

REVISED UNIFORM UNCLAIMED PROPERTY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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REVISED UNIFORM UNCLAIMED PROPERTY ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

REX BLACKBURN, P.O. Box 70 (83707), 1221 W. Idaho St., Boise, ID 83702, *Co-Chair*

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, *Co-Chair*

DAVID D. BIKLEN, 799 Prospect Ave., B2, West Hartford, CT 06105

LYLE W. HILLYARD, 595 S. Riverwoods Pkwy., Suite 100, Logan, UT 84321

GENE N. LEBRUN, P.O. Box 8250, 909 St. Joseph St., Suite 900, Rapid City, SD 57709

CLAIRE LEVY, 1395 Kalmia Ave., Boulder, CO 80304

FLOYD M. LEWIS, Bill Drafting Division, North Carolina General Assembly, 300 N. Salisbury St., Suite 401, Raleigh, NC 27603

RAYMOND P. PEPE, 17 N. 2nd St., 18th Floor, Harrisburg, PA 17101-1507

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020

MICHAEL P. SULLIVAN, 80 S. 8th St., 500 IDS Center, Minneapolis, MN 55402-3796

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606

ROBERT J. TENNESSEN, 2522 Thomas Ave. S., Minneapolis, MN 55405

CHARLES A. TROST, Nashville City Center, 511 Union St., Suite 2700, Nashville, TN 37219-1760, *Reporter*

EX OFFICIO

RICHARD T. CASSIDY, 100 Main St., P. O. Box 1124, Burlington, VT 05402, *President*

NORA WINKELMAN, Office of Chief Counsel, House Democratic Caucus, Pennsylvania House of Representatives, Main Capitol Bldg., Room 620, Harrisburg, PA 17120, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

ETHAN D. MILLAR, 333 S. Hope St., 16th Floor, Los Angeles, CA 90071, *ABA Advisor*

ALEXANDRA DARRABY, 11620 Wilshire Blvd., Suite 900, Los Angeles, CA 90025, *ABA Section Advisor*

SCOTT HEYMAN, 1 S. Dearborn St., Chicago, IL 60603, *ABA Section Advisor*

CHAROLETTE NOEL, 2727 N. Harwood St., Dallas, TX 75201-1515, *ABA Section Advisor*

NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS

CAROLYN C. ATKINSON, 322 70th St. SE, P.O. Box 3328, Charleston, WV 25333, *Advisor*

BETH PEARCE, Office of the State Treasurer, 109 State St., Montpelier, 4th Floor, VT 05609-6200, *Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org

REVISED UNIFORM UNCLAIMED PROPERTY ACT

TABLE OF CONTENTS

PREFATORY NOTE.....	1
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[ARTICLE] 1 GENERAL PROVISIONS

SECTION 101. SHORT TITLE.	12
SECTION 102. DEFINITIONS.....	12
SECTION 103. INAPPLICABILITY TO FOREIGN TRANSACTION.....	25
SECTION 104. RULEMAKING.....	25

[ARTICLE] 2 PRESUMPTION OF ABANDONMENT

SECTION 201. WHEN PROPERTY PRESUMED ABANDONED.	25
SECTION 202. WHEN TAX-DEFERRED RETIREMENT ACCOUNT PRESUMED ABANDONED.	29
SECTION 203. WHEN OTHER TAX-DEFERRED ACCOUNT PRESUMED ABANDONED.	32
SECTION 204. WHEN CUSTODIAL ACCOUNT FOR MINOR PRESUMED ABANDONED.	32
SECTION 205. WHEN CONTENTS OF SAFE-DEPOSIT BOX PRESUMED ABANDONED.	34
SECTION 206. WHEN STORED-VALUE CARD PRESUMED ABANDONED.	35
[SECTION 207. WHEN GIFT CARD PRESUMED ABANDONED.]	36
SECTION 208. WHEN SECURITY PRESUMED ABANDONED.	36
SECTION 209. WHEN RELATED PROPERTY PRESUMED ABANDONED.	37
SECTION 210. INDICATION OF APPARENT OWNER INTEREST IN PROPERTY.	37
SECTION 211. KNOWLEDGE OF DEATH OF INSURED OR ANNUITANT.....	39
SECTION 212. DEPOSIT ACCOUNT FOR PROCEEDS OF INSURANCE POLICY OR ANNUITY CONTRACT.....	42

[ARTICLE] 3 RULES FOR TAKING CUSTODY OF PROPERTY PRESUMED ABANDONED

SECTION 301. ADDRESS OF APPARENT OWNER TO ESTABLISH PRIORITY	43
SECTION 302. ADDRESS OF APPARENT OWNER IN THIS STATE.	44
SECTION 303. IF RECORDS SHOW MULTIPLE ADDRESSES OF APPARENT OWNER.....	45
SECTION 304. HOLDER DOMICILED IN THIS STATE.	45
SECTION 305. CUSTODY IF TRANSACTION TOOK PLACE IN THIS STATE.....	47
SECTION 306. TRAVELER’S CHECK, MONEY ORDER, OR SIMILAR INSTRUMENT...48	

SECTION 307. BURDEN OF PROOF TO ESTABLISH ADMINISTRATOR’S RIGHT TO CUSTODY.....	48
---	----

[ARTICLE] 4
REPORT BY HOLDER

SECTION 401. REPORT REQUIRED BY HOLDER.	49
SECTION 402. CONTENT OF REPORT.	50
SECTION 403. WHEN REPORT TO BE FILED.....	52
SECTION 404. RETENTION OF RECORDS BY HOLDER.....	52
SECTION 405. PROPERTY REPORTABLE AND PAYABLE OR DELIVERABLE ABSENT OWNER DEMAND.....	53

[ARTICLE] 5
NOTICE TO APPARENT OWNER OF PROPERTY PRESUMED ABANDONED

SECTION 501. NOTICE TO APPARENT OWNER BY HOLDER.....	54
SECTION 502. CONTENTS OF NOTICE BY HOLDER.....	55
SECTION 503. NOTICE BY ADMINISTRATOR.	56
SECTION 504. COOPERATION AMONG STATE OFFICERS AND AGENCIES TO LOCATE APPARENT OWNER.	58

[ARTICLE] 6
TAKING CUSTODY OF PROPERTY BY ADMINISTRATOR

SECTION 601. DEFINITION OF GOOD FAITH.....	58
SECTION 602. DORMANCY CHARGE.....	59
SECTION 603. PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.....	59
SECTION 604. EFFECT OF PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.	61
SECTION 605. RECOVERY OF PROPERTY BY HOLDER FROM ADMINISTRATOR.	62
SECTION 606. PROPERTY REMOVED FROM SAFE-DEPOSIT BOX.	64
SECTION 607. CREDITING INCOME OR GAIN TO OWNER’S ACCOUNT.....	65
SECTION 608. ADMINISTRATOR’S OPTIONS AS TO CUSTODY.....	65
SECTION 609. DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL VALUE; IMMUNITY FROM LIABILITY.....	66
SECTION 610. PERIODS OF LIMITATION AND REPOSE.....	67

[ARTICLE] 7
SALE OF PROPERTY BY ADMINISTRATOR

SECTION 701. PUBLIC SALE OF PROPERTY.....	68
SECTION 702. DISPOSAL OF SECURITIES.....	69
SECTION 703. RECOVERY OF SECURITIES OR VALUE BY OWNER.....	70
SECTION 704. PURCHASER OWNS PROPERTY AFTER SALE.	71
SECTION 705. MILITARY MEDAL OR DECORATION.	71

[ARTICLE] 8
ADMINISTRATION OF PROPERTY

SECTION 801. DEPOSIT OF FUNDS BY ADMINISTRATOR.	72
SECTION 802. ADMINISTRATOR TO RETAIN RECORDS OF PROPERTY.	73
SECTION 803. EXPENSES AND SERVICE CHARGES OF ADMINISTRATOR.....	73
SECTION 804. ADMINISTRATOR HOLDS PROPERTY AS CUSTODIAN FOR OWNER. 74	

[ARTICLE] 9
CLAIM TO RECOVER PROPERTY FROM ADMINISTRATOR

SECTION 901. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.....	74
SECTION 902. WHEN PROPERTY SUBJECT TO RECOVERY BY ANOTHER STATE. ...	75
SECTION 903. CLAIM FOR PROPERTY BY PERSON CLAIMING TO BE OWNER.....	77
SECTION 904. WHEN ADMINISTRATOR MUST HONOR CLAIM FOR PROPERTY.	78
SECTION 905. ALLOWANCE OF CLAIM FOR PROPERTY.	78
SECTION 906. ACTION BY PERSON WHOSE CLAIM IS DENIED.	80

[ARTICLE] 10
VERIFIED REPORT OF PROPERTY; EXAMINATION OF RECORDS

SECTION 1001. VERIFIED REPORT OF PROPERTY.....	81
SECTION 1002. EXAMINATION OF RECORDS TO DETERMINE COMPLIANCE.	81
SECTION 1003. RULES FOR CONDUCTING EXAMINATION.	82
SECTION 1004. RECORDS OBTAINED IN EXAMINATION.	83
SECTION 1005. EVIDENCE OF UNPAID DEBT OR UNDISCHARGED OBLIGATION. ...	84
SECTION 1006. FAILURE OF PERSON EXAMINED TO RETAIN RECORDS.	86
SECTION 1007. REPORT TO PERSON WHOSE RECORDS WERE EXAMINED.	87
SECTION 1008. COMPLAINT TO ADMINISTRATOR ABOUT CONDUCT OF PERSON CONDUCTING EXAMINATION.....	87
SECTION 1009. ADMINISTRATOR’S CONTRACT WITH ANOTHER TO CONDUCT EXAMINATION.	88
SECTION 1010. LIMIT ON FUTURE EMPLOYMENT.	90
SECTION 1011. REPORT BY ADMINISTRATOR TO STATE OFFICIAL.....	90
SECTION 1012. DETERMINATION OF LIABILITY FOR UNREPORTED REPORTABLE PROPERTY.	92

[ARTICLE] 11
DETERMINATION OF LIABILITY; PUTATIVE Holder REMEDIES

SECTION 1101. INFORMAL CONFERENCE.....	92
SECTION 1102. REVIEW OF ADMINISTRATOR’S DETERMINATION.	94
SECTION 1103. ADMINISTRATIVE REVIEW.....	94
SECTION 1104. JUDICIAL REMEDY.....	95

[ARTICLE] 12
ENFORCEMENT BY ADMINISTRATOR

SECTION 1201. JUDICIAL ACTION TO ENFORCE LIABILITY.	97
SECTION 1202. INTERSTATE AND INTERNATIONAL AGREEMENT; COOPERATION	97
SECTION 1203. ACTION INVOLVING ANOTHER STATE OR FOREIGN COUNTRY.	98
SECTION 1204. INTEREST AND PENALTY FOR FAILURE TO ACT IN TIMELY MANNER	99
SECTION 1205. OTHER CIVIL PENALTIES.	100
SECTION 1206. WAIVER OF INTEREST AND PENALTY.....	101

[ARTICLE] 13
**AGREEMENT TO LOCATE PROPERTY OF APPARENT OWNER HELD BY
ADMINISTRATOR**

SECTION 1301. WHEN AGREEMENT TO LOCATE PROPERTY ENFORCEABLE.....	101
SECTION 1302. WHEN AGREEMENT TO LOCATE PROPERTY VOID.	102
SECTION 1303. RIGHT OF AGENT OF APPARENT OWNER TO RECOVER PROPERTY HELD BY ADMINISTRATOR.....	103

[ARTICLE] 14
CONFIDENTIALITY AND SECURITY OF INFORMATION

SECTION 1401. DEFINITIONS; APPLICABILITY.....	104
SECTION 1402. CONFIDENTIAL INFORMATION.	105
SECTION 1403. WHEN CONFIDENTIAL INFORMATION MAY BE DISCLOSED.....	106
SECTION 1404. CONFIDENTIALITY AGREEMENT.....	107
SECTION 1405. NO CONFIDENTIAL INFORMATION IN NOTICE.....	108
SECTION 1406. SECURITY OF INFORMATION.....	108
SECTION 1407. SECURITY BREACH.....	109
SECTION 1408. INDEMNIFICATION FOR BREACH.....	111

[ARTICLE] 15
MISCELLANEOUS PROVISIONS

SECTION 1501. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	112
SECTION 1502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.....	112
SECTION 1503. TRANSITIONAL PROVISION.....	112
[SECTION 1504. SEVERABILITY.]	113
SECTION 1505. REPEALS; CONFORMING AMENDMENTS.....	113
SECTION 1506. EFFECTIVE DATE.....	113

REVISED UNIFORM UNCLAIMED PROPERTY ACT

PREFATORY NOTE

This revised Act is a complete revision of its immediate predecessor, the Uniform Unclaimed Property Act (1995) (the 1995 Act), which itself was a rewrite of its predecessor, the Uniform Unclaimed Property Act (1981) (the 1981 Act), which was a revision of the Uniform Disposition of Unclaimed Property Act (1966) (the 1966 Act), and of the Uniform Law Commission's first effort in this field which was the Uniform Disposition of Unclaimed Property Act (1954) (the 1954 Act).

All 53 jurisdictions that make up the Uniform Law Commission have some form of unclaimed property law on their books, some which predate the 1954 Act. The various Uniform Acts have received substantial but not complete acceptance. In one form or another (with modifications) either the 1981 Act or the 1995 Act has been adopted in 39 of the 53 jurisdictions. Of these, the most accepted version is the 1981 Act which has been adopted (with revisions) in 23¹ jurisdictions. Nine² states have adopted the 1995 Act without revisions and six³ more have a hybrid version. There are fourteen jurisdictions—most notably California, New York, Texas, and Delaware, that have non-uniform unclaimed property acts.

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

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

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

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

³ HI, MI, NV, VI, VT, and WV.

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

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

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

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

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

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

2-104). If there are no known living heirs of the intestate decedent within the requisite degree of kinship, the decedent's property escheats to the state, even if there are known kin of a more remote degree.⁷

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

The process by which "unclaimed" property⁸ comes into the custody of a state administrator of unclaimed property is as follows: (1) businesses which have possession or control of property that does not belong to them, hold it for the benefit of the owners of the property, thus they are called "holders." If the status of the property is in question as to whether or not it is "unclaimed" property being held for owners, they are referred to as "putative holders" until there has been a determination of the status of the property, i.e., they are persons who are said to be but have not yet been determined to be holders as a result of an examination.

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

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

“Owners” are the people who own property which is in the possession of another. During a specified holding period (the “Holding Period”), which under the various acts varies from one to 15 years for different categories of property, the holder is required to attempt to notify the owner to claim his or her property. After unsuccessful attempts at notification, at the end of the holding period, the unclaimed property is deemed to have been abandoned and the holder is required to file a report with the unclaimed property administrator in the appropriate state and remit or deliver the property into the custody of the administrator.

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

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

As the body of unclaimed property law has matured since 1954, six significant groups, each with various economic or policy interests, have evolved, each with its own, sometimes conflicting, concerns. In the process of preparing this revised Act significant effort was made to include and involve in the drafting process parties with a significant stake in the outcome of the policy decisions required for the revision. There are many, and they have become very involved.¹⁰

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

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

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

It has been estimated that in 2011 states collectively held more than \$40 billion in unclaimed property, a figure nearly double the figure of \$22.8 billion reported by NAUPA¹¹ in 2003. This property seldom lies fallow in the hands of the administrators. Some states use that portion of the funds that are estimated and will likely never be returned to the owners for purposes ranging from supplementing educational funds to helping fund Medicaid obligations. It can involve a lot of money. Delaware, by far the largest custodian of unclaimed property, brought in over \$600 million in 2014.¹² A large portion of unclaimed property turned over to Delaware is second priority funds for which there is no ability to identify the owner because there is no name or no viable address, and thus it will never be returned to an owner and is effectively escheated to the state.

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

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

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

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

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

The second group with a significant stake in the outcome of this revision is a business that has grown up alongside the growth of receipts from unclaimed property laws. This group is composed of private firms organized to examine the records of holders looking for unreported unclaimed property. Decisions made by the Uniform Law Commission with respect to this revised Act can impact these firms by affecting the significant fees paid to them by administrators for services in connection with examinations of records of holders looking for unremitted unclaimed and abandoned property on their books. These examinations are usually¹⁶ performed on a contingency fee basis where the firms performing the examinations receive an agreed percentage of between 10% and 15% of the monies recovered in the process of examining the books and records of the companies under examination.¹⁷

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

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

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

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

Auditing holders for unremitted unclaimed property can be a significant source of revenue for certain firms. Recently, in the course of a review of its practices by officials in Delaware, it was revealed that one private company had been awarded substantially all of the private examinations performed on behalf of the Delaware Escheator, and had been paid over \$200 million in contingent fees over a period of 10 years.

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

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

The third group with significant interests at stake is the cadre of professionals who have developed the expertise needed to service the needs of businesses who as putative holders of unclaimed property are subject to unclaimed property examinations. This organization whose members have been most affected and who have been most involved in the drafting process are the Unclaimed Property Professionals Organization (UPPO) which has participated in drafting sessions and advanced substantial arguments and documentation in support of their constituents’ interests.

The fourth group with various policy interests and concerns are representatives of the American Bar Association (ABA) which reflect a number of constituencies and views. These include holders, in certain context owners, as well as practitioners with various academic and policy positions depending on the issue. The ABA views its role as primarily intended to offer guidance and expertise.

The fifth group is composed of various industries and industry groups¹⁸ whose members as holders and putative holders will be substantially impacted, for good or ill, by the revised Act. This group, as a Holders’ Coalition, has participated in the drafting process through their representatives. Their insight into the problems the current acts cause or contribute to, and their suggestions of how the act can be improved, have been very helpful to the Uniform Law Commission.

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

¹⁸ See list in footnote 10.

There are three broad categories of disputes that most often arise between the holders and the examiners. The first category has to do with how far back in time the examiner may go in looking for unclaimed property, what records the holders are required to maintain, and for how long.¹⁹ The 1981 Act provides an absolute 10 year statute of repose. The 1995 Act does not, and takes the position that no statute of limitations on examinations begins to run until a report is filed. The revised Act reverts to the 1981 Act and provides a 10 year time bar on how far back of the end of the holding period an examiner can go, as well as specifies a 10 year record retention rule.

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

The third category concerns the doctrine of “derivative rights” and how it applies in the context of unclaimed property. In essence the “derivative rights” doctrine is the position taken by holders that vis-à-vis the holder of property, the state steps into the shoes of the owner as custodian, and the state’s right to unclaimed property, being derived from the owner, can be no greater than the rights the owner had with respect to the property. States do not agree that the “derivative rights” doctrine should apply to limit their right to take custody of unclaimed property. They assert instead that their right to unclaimed property cannot be limited to the rights of the owner because some limitations placed on owners are beyond the state’s ability to perform, and as the sovereign with the ultimate right to the benefit of property which has been permanently lost or abandoned by its lawful owner, its rights are superior to the rights of the holder.²⁰

Two situations illustrate the problem. If a person whose life has been insured by an insurance company dies, the insurer's contractual obligation to pay the death benefit does not mature until a claim has been filed by the beneficiary with proof of the decedent’s death under circumstances that do not preclude payment of the claim, such as a death by suicide. When death benefits otherwise payable by reason of the death of an insured are not claimed during the requisite holding period, states have successfully maintained their right to take custody of the funds without having to submit a claim on behalf of the owner, even though the owner would have been required to file a claim.²¹ Another example arises when the owner of a claim does not

¹⁹ Some states, Delaware for example, assert the right to go back as far as 1986 in an examination in its search for unreported and unremitted unclaimed property. This practice has been under review in that state and a Delaware Federal District Court found that, as applied in the context of that audit, the extensive look back period was one of several factors that violated the holder’s due process. *Temple-Inland, Inc. v. Cook*, 2016 WL 3536710, at *1 (D. Del. June 28, 2016).

²⁰ See *American Travel Related Services*, *supra*, at note 14. Compare *Sennett v. Ins. Co. of N. Am.*, 247 A.2d 774, 778 (Pa. 1968) (although the Commonwealth’s right to the property at issue was “derivative,” statute of limitations effective against owners’ claim “nevertheless do[es] not prevent the Commonwealth from enforcing its separate and distinct right to bring escheat proceedings”) with *State by Furman v. Elizabethtown Water Co.*, 191 A.2d 457, 458 (N.J. 1963) (holding that a contract allowing developer to claim a refund for a deposit within a specified period precluded escheat liability for unreturned deposits, stating “[t]his course would undoubtedly be followed if the [owners] themselves were claiming the unrefunded balances and ... the State’s claims are nonetheless derivative and certainly no broader than the [owner’s] claims”).

²¹ See *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948).

file suit to recover on the claim before the applicable statute of limitations has run and the owner's claim has become time-barred. States have asserted that their right to take custody of the funds survives the running of the statute of limitations, because it is the state, not the holder, that should have the benefit of the windfall, if there is one. The problem is that the claim may be disputed or the holder may have offsetting claims, so the question becomes should the holder be entitled to litigate those issues in defense of a state's custody claim? Conversely, should the owner be allowed to circumvent the bar of the statute of limitations by waiting until the funds have been turned over to the state and then asserting his claim against the administrator? Representatives of the ABA and the Holders' Coalition have argued vigorously that the derivative rights doctrine has been recognized by the Supreme Court²² as the basis for custodial taking of property, and therefore, it should apply as well as a limitation on the obligations of holders to turn over property to the administrator.

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

The first arises in the context of the "gift card" issue. Traditionally a retail merchant or seller of goods and services offers a "gift card"—originally a paper card or gift certificate, but more recently an electronically loaded plastic card—which a customer may buy to use, or to present to another as a gift. By its express terms, the card is only redeemable for merchandise or services from the retail seller up to the limit of the amount of the value printed or loaded into the card. When the value within the "gift card" has not been fully utilized within the holding period, the remaining unused amount is deemed to be abandoned and subject to a claim by some states²³ that cash in the amount of the unused portion²⁴ is due to be turned over to the custody of the state. On the other hand retailers²⁵ point out that the terms of the gift card contracts with their customers do not provide for cash refunds, but rather only allow redemption in the form of merchandise or services priced at their retail value. In making their argument the retailers point out that they incur incremental costs in selling the card, not the least of which may be the credit card transaction fee if the purchaser pays with a credit card, and that when forced to pay off the full amount in cash rather than in goods or services, they lose the gross profit²⁶ earned at the time of the initial purchase of the gift card which properly would have been included in the seller's income and subjected to taxation.²⁷

²² *Delaware v. New York*, 507 U.S. 490, 503 (1991).

²³ Thirty-six states have enacted one version or another of an unclaimed property exemption for "gift cards" and other forms of stored value cards.

²⁴ Some states have claimed a right to receive the original face amount of the card.

²⁵ Through the representatives of their associations such as the Retail Industry Leaders Association.

²⁶ The margin between the amount paid for the gift card and the retailer's average cost of goods or services delivered to the bearer of the gift card.

²⁷ One state trial court has held that a state's requirement that the value remaining in unclaimed gift cards be turned over to the state in cash violates both the "takings" provision of the Due Process Clause and the impairment of contract provision of the Constitution. *Service Merchandise Co., Inc. v. Adams, Treasurer*, Chancery Court of Davidson County, Tennessee, # 97-2782-III, 2001. To avoid "taking" the gross profits some states that claim gift cards only require that the retailer remit 60% of the unclaimed value in the card.

It is an issue that is at the heart of the arguments made to the Uniform Law Commission on behalf of the retailers. They point out that 36 states have enacted some version of a “gift card” exemption. But the fourteen states, plus the District of Columbia, that do not exempt gift cards say the loss of the ability to recover unclaimed gift card proceeds will result in a loss of funds that probably will never be claimed by owners and will be fully usable by the state because by their nature gift cards are usually issued in a form which allows them to be redeemed by the bearer of the card and only rarely is the owner’s name and address associated with or attached to the card. States say that in that case, they, not the holder, should receive the benefit of any windfall.

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

On the other side, administrators say that in their experience it is not that clear that businesses, even large businesses with sophisticated accounting systems, are always careful to keep track of credit balances and other obligations owed to them by businesses they regularly do business with. This is especially true where there is a significant disparity in the size, sophistication, and bargaining power of the two businesses. States say that they see many instances in which businesses, particularly small businesses, lose track of the claims they have against other businesses. Many never realize they have a claim against the other party until their property is turned over to the state, and are pleasantly surprised to learn that they are the owners of unclaimed property being held by the state for their benefit. Achieving the proper balance between these competing interests have been difficult. B2B provisions have not been

incorporated into this act. However, states that have a B2B exemption will be able to keep it if they want to, and those who do not have or want a B2B exemption, will be free to leave it out without offending the goal of achieving substantial uniformity.

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

This revised Act is the result of the Uniform Law Commission having worked through and resolved in one fashion or another most of the preliminary issues identified by stakeholders at the outset of the drafting process. It has been read and discussed on the floor of the Uniform Law Conference at its first reading and at its second reading on the floor at the annual conference held in July 2016, and has been approved by vote of the states for adoption as a Uniform Act. The Uniform Law Conference believes that the Uniform Law Commission has produced a fair, balanced, and enactable Revised Uniform Unclaimed Property Act, and recommend it to the states for enactment.

Charles A. Trost
Reporter

REVISED UNIFORM UNCLAIMED PROPERTY ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Revised Uniform Unclaimed Property Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Administrator” means [insert name of the state official with responsibility to administer this [act]].

(2) “Administrator’s agent” means a person with which the administrator contracts to conduct an examination under [Article] 10 on behalf of the administrator. The term includes an independent contractor of the person and each individual participating in the examination on behalf of the person or contractor.

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

(4) “Business association” means a corporation, joint stock company, investment company other than an investment company registered under the Investment Company Act of 1940[, as amended], 15 U.S.C. Sections 80a-1 through 80a-64, partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, land bank, safe deposit company, safekeeping depository, financial organization, insurance company, federally chartered entity, utility, sole proprietorship, or other business entity, whether or not for profit.

(5) “Confidential information” means records, reports, and information that are confidential under Section 1402.

(6) “Domicile” means:

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

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

(C) for a federally chartered entity or an investment company registered under the Investment Company Act of 1940[, as amended], 15 U.S.C. Sections 80a-1 through 80a-64, the state of its home office; and

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

(7) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

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

(9) “Financial organization” means a savings and loan association, building and loan association, savings bank, industrial bank, bank, banking organization, or credit union.

(10) “Game-related digital content” means digital content that exists only in an electronic game or electronic-game platform. The term:

(A) includes:

(i) game-play currency such as a virtual wallet, even if denominated in United States currency; and

(ii) the following if for use or redemption only within the game or platform or another electronic game or electronic-game platform:

(I) points sometimes referred to as gems, tokens, gold, and similar names; and

(II) digital codes; and

(B) does not include an item that the issuer:

(i) permits to be redeemed for use outside a game or platform for:

(I) money; or

(II) goods or services that have more than minimal value; or

(ii) otherwise monetizes for use outside a game or platform.

(11) “Gift card” means:

(A) a stored-value card:

(i) the value of which does not expire;

(ii) that may be decreased in value only by redemption for merchandise, goods, or services; and

(iii) that, unless required by law, may not be redeemed for or converted into money or otherwise monetized by the issuer; and

(B) includes a prepaid commercial mobile radio service, as defined in 47 C.F.R. 20.3[, as amended].

(12) “Holder” means a person obligated to hold for the account of, or to deliver or pay to, the owner, property subject to this [act].

(13) “Insurance company” means an association, corporation, or fraternal or mutual-benefit organization, whether or not for profit, engaged in the business of providing life endowments, annuities, or insurance, including accident, burial, casualty, credit-life, contract-performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage-protection, and worker-compensation insurance.

(14) “Loyalty card” means a record given without direct monetary consideration under an

award, reward, benefit, loyalty, incentive, rebate, or promotional program which may be used or redeemed only to obtain goods or services or a discount on goods or services. The term does not include a record that may be redeemed for money or otherwise monetized by the issuer.

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

(16) “Mineral proceeds” means an amount payable for extraction, production, or sale of minerals, or, on the abandonment of the amount, an amount that becomes payable after abandonment. The term includes an amount payable:

(A) for the acquisition and retention of a mineral lease, including a bonus, royalty, compensatory royalty, shut-in royalty, minimum royalty, and delay rental;

(B) for the extraction, production, or sale of minerals, including a net revenue interest, royalty, overriding royalty, extraction payment, and production payment; and

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

(17) “Money order” means a payment order for a specified amount of money. The term includes an express money order and a personal money order on which the remitter is the purchaser.

(18) “Municipal bond” means a bond or evidence of indebtedness issued by a municipality or other political subdivision of a state.

(19) “Net card value” means the original purchase price or original issued value of a

stored-value card, plus amounts added to the original price or value, minus amounts used and any service charge, fee, or dormancy charge permitted by law.

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

(21) “Owner” means a person that has a legal, beneficial, or equitable interest in property subject to this [act] or the person’s legal representative when acting on behalf of the owner. The term includes:

(A) a depositor, for a deposit;

(B) a beneficiary, for a trust other than a deposit in trust;

(C) a creditor, claimant, or payee, for other property; and

(D) the lawful bearer of a record that may be used to obtain money, a reward, or a thing of value.

(22) “Payroll card” means a record that evidences a payroll-card account as defined in Regulation E, 12 C.F.R. Part 1005[, as amended].

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

(24) “Property” means tangible property described in Section 205 or a fixed and certain interest in intangible property held, issued, or owed in the course of a holder’s business or by a government, governmental subdivision, agency, or instrumentality. The term:

(A) includes all income from or increments to the property;

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

(i) money, virtual currency, interest, or a dividend, check, draft, deposit, or payroll card;

(ii) a credit balance, customer's overpayment, stored-value card, security deposit, refund, credit memorandum, unpaid wage, unused ticket for which the issuer has an obligation to provide a refund, mineral proceeds, or unidentified remittance;

(iii) a security except for:

(I) a worthless security; or

(II) a security that is subject to a lien, legal hold, or restriction evidenced on the records of the holder or imposed by operation of law, if the lien, legal hold, or restriction restricts the holder's or owner's ability to receive, transfer, sell, or otherwise negotiate the security;

(iv) a bond, debenture, note, or other evidence of indebtedness;

(v) money deposited to redeem a security, make a distribution, or pay a dividend;

(vi) an amount due and payable under an annuity contract or insurance policy; and

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

(C) does not include:

(i) property held in a plan described in Section 529A of the Internal Revenue Code[, as amended], 26 U.S.C. Section 529A;

(ii) game-related digital content; [or]

(iii) a loyalty card[;] [or]

[(iv) an in-store credit for returned merchandise][;] [or]

[(v) a gift card].

(25) “Putative holder” means a person believed by the administrator to be a holder, until the person pays or delivers to the administrator property subject to this [act] or the administrator or a court makes a final determination that the person is or is not a holder.

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

(27) “Security” means:

(A) a security as defined in [insert citation to appropriate section of Article 8 of the Uniform Commercial Code];

(B) a security entitlement as defined in [insert citation to appropriate section of Article 8 of the Uniform Commercial Code], including a customer security account held by a registered broker-dealer, to the extent the financial assets held in the security account are not:

(i) registered on the books of the issuer in the name of the person for which the broker-dealer holds the assets;

(ii) payable to the order of the person; or

(iii) specifically indorsed to the person; or

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

(28) “Sign” means, with present intent to authenticate or adopt a record:

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

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

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

(30) “Stored-value card” means a record evidencing a promise made for consideration by the seller or issuer of the record that goods, services, or money will be provided to the owner of the record to the value or amount shown in the record. The term:

(A) includes:

(i) a record that contains or consists of a microprocessor chip, magnetic strip, or other means for the storage of information, which is prefunded and whose value or amount is decreased on each use and increased by payment of additional consideration; and

(ii) a [gift card and] payroll card; and

(B) does not include a loyalty card[, gift card,] or game-related digital content.

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

(A) transmission of communications or information;

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

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

(32) “Virtual currency” means a digital representation of value used as a medium of exchange, unit of account, or store of value, which does not have legal tender status recognized

by the United States. The term does not include:

(A) the software or protocols governing the transfer of the digital representation of value;

(B) game-related digital content; or

(C) a loyalty card[or gift card].

(33) “Worthless security” means a security whose cost of liquidation and delivery to the administrator would exceed the value of the security on the date a report is due under this [act].

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (4), (6)(C), (11)(B), and (22).*

In a state that does not refer to federal statutes or regulations, the reference in paragraph (22) to the Code of Federal Regulations should be replaced with “...means a record that evidences an account that is directly or indirectly established through an employer and to which electronic fund transfers of an employee’s wages, salary, and other compensation are made on a recurring basis.”

(24) “Property.” - Gift cards: *A state that wants to exempt gift cards may remove the brackets so as to include the words “a gift card” where they appear in paragraph (24)(C)(v) as part of the phrase beginning “but does not include.” A state that does not want to exempt gift cards should do the reverse: delete the words “a gift card” in paragraph (24)(C)(v). In paragraph (30)(A)(ii) delete “a gift card”, and in paragraph (30)(B) delete the brackets around the words “gift card.” States that wish to exempt gift cards without regard to whether they expire may delete paragraph 11(A)(i).*

In-store credits: *A state that wants to exclude in-store credits for returned merchandise from unclaimed property should remove the brackets to paragraph (24)(C)(iv) and retain the language. A state that wants to include these credits should delete subparagraph (C)(iv).*

Business-to-business: *Fifteen states have some form of statutory exemption from “property” a right arising from transactions taking place in the course of a business-to-business relationship. A state that wants to continue to exempt this type of property will need to include in this section its definition of a business-to-business relationship and specifically state in the definition of “property” in paragraph 102(24)(C) that it does not include property arising from a business-to-business relationship.*

(30) “Stored-value card.” *The definition of a stored-value card includes a payroll card and a gift card. A state that exempts gift cards may continue to do so by deleting “a gift card” in paragraph (30)(A)(ii). A state that does not exempt gift cards will need to remove the brackets*

around the words “a gift card” in paragraph (30)(A)(ii) and retain the words, and delete the words “gift card” in brackets in paragraph (30)(B).

Comment

“Apparent owner” is defined in Section 102(3) in terms of reference to the person who appears in the holder’s records to be the person entitled to the property. The right of a state to claim abandoned property depends on the information in the holder’s records concerning the apparent owner’s identification. It is of no consequence that without notice to the holder, the owner may have transferred title to or ownership of the property to another person. In *Nellius v. Tampax, Inc.*, 394 A.2d 333 (Del. Ch. Ct. 1978), the court held that the address of the apparent, not the actual, owner controlled. The holder is not required to ascertain the name of the current owner or resolve a dispute between the owner of record and a successor contesting ownership. However, nothing in this Act prohibits the actual owner from recovering the property from the holder or the administrator by providing proof of ownership.

“Business association” - As used in Section 102(4) the word “partnership” is intended to include all forms of partnerships, not just general partnerships. Further, certain investment companies are expressly excluded from the definition of business association.

“Domicile” - Section 102(6)(A) is based on the holding of the U.S. Supreme Court in *Texas v New Jersey*, 379 U.S. 674 (1964). Subsection (B) is consistent with the rationale of that Court providing that in cases of business associations other than corporations, such as LLC’s and limited partnerships, that only come into existence upon the filing of their organizational documents with a state, domicile is the state of formation by filing. At the time the Court announced its rule with respect to corporations, LLCs did not exist in the United States. The first state to authorize the formation of LLCs was Wyoming in 1977. There is no reason to assume the Court would not have applied the same rationale to LLCs. See, e.g., *State ex rel. French v. Card Compliant LLC*, 2015 WL 11051006, at *8 (Del. Super. Ct. Nov. 23, 2015) (holding that “[i]n accordance with the *Texas* cases...the Court finds that Delaware escheat laws apply to LLCs organized in Delaware”) (emphasis added). Limited partnerships were in existence, but at the time they were of limited use and were seldom formed in a state other than the one in which they were organized and operated and therefore are treated the same as LLCs in this Act.

“Game-related digital content” - This definition in Section 102(10) is provided because it is expressly excluded from the definition of property in Section 102(24)(c)(2). Game-related digital content has become an increasingly popular part of digital gaming. As defined in Section 102(10), they are exclusively elements of the games to which they apply, are not transferrable and hold no value outside of the game. When a player purchases digital codes for virtual items, the purchaser has obtained the end product, e.g. a limited license of use to an element of game play, which does not convey any monetizable ownership interest but only rights to use within the game.

“Gift card” - There is now a definition in Section 102(11) of gift card to take into account the various ways in which a gift card can be issued and used. It is to be distinguished from a stored value card of which it is a subset, in that unlike other stored value cards, a gift card may

only be redeemed for merchandise, goods, or services provided or sold by the issuer, and is not redeemable for money and may not otherwise be monetized.

The 1981 Act provided that the entire amount of unredeemed gift certificate balances were required to be reported as unclaimed property. The 1995 Act continued to treat unredeemed gift certificate balances as reportable property, but provided that the amount reportable was 60 percent of the unredeemed value. This was intended to address arguments that requiring the reporting of the entire unredeemed balance on gift certificates and gift cards was unfair to the issuer and perhaps unconstitutional. See, e.g., *Service Merchandise Co., Inc. v. Adams*, 2001 WL 34384462, at 6-7 (Tenn. Ch. Ct. 2001)(state statute requiring a gift certificate issuer to “deliver to the state cash in the full amount of the face value of the gift certificates violates the Takings Clause.”)

Currently, thirty six states exempt gift cards from the application of their unclaimed property statutes in some manner. Some limit the exemption to gift cards with no expiration dates (e.g., CA, HI, ID, IL, IA, NE, NV, NC, PA, RI, SD, TN, TX, WA). Others have adopted outright exemptions for “gift certificates” or “gift cards”, without regard to whether they contain expiration dates (e.g., AL, AZ, AR, CT, FL, IN, MD, MA, MI, MN, NH, OH, UT, VT, VA). Some states require reporting of unused gift card balances based on the unredeemed value of the gift card. For example, New Hampshire exempts gift cards with values under \$100. Idaho exempts all property, including gift cards, having a value of \$50 or less. Michigan exempts all property, including gift cards, having a value of \$25 or less. Four states (KS, OR, ND and SC) don’t expressly exempt gift cards, but have amended their laws to remove gift certificates from the definition of property subject to the unclaimed property act and do not apply their statutes to unredeemed gift certificate and gift card balances. This Act does not take a position with respect to whether unredeemed balances on gift certificates or gift cards should be covered by the Act.

The definition in Section 102(11) limits the term “gift card” to cards the value of which do not expire, which is consistent with the exemptions for gift cards currently provided in some states (e.g., CA, HI, ID, IL, IA, NE, NV, NC, PA, RI, SD, TN, TX, WA). However, other states currently exempt gift cards without regard to whether they expire (e.g., AL, AZ, AR, CT, FL, IN, KS, MD, MA, MI, MN, NH, ND, OH, OR, UT, VT, VA). States that wish to exempt gift cards without regard to whether they expire would need to delete paragraph 11(A)(i).

Holder” - This Act carries forward the definition of “holder” from the 1995 Act. There will be circumstances in which a literal application of the definition of holder could result in more than one person or entity falling within the definition of holder with respect to a particular obligation. In most instances, there should be only one holder of obligations for unclaimed property purposes—the exception being where there are multiple obligors directly liable on a specific obligation, such as co-borrowers on a loan. In circumstances where more than one party potentially meets the definition of holder, the party which is primarily obligated to the owner should be treated as the holder for purposes of application of unclaimed property laws. See, e.g., *Clymer v. Summit Bancorp*, 792 A.2d 396 (NJ 2002)(issuer of bonds, not trustee in possession of funds to be used to pay bondholders and having contractual obligation to issue such payments, is the holder for purposes of determining applicable dormancy period). Where one party has a direct legal obligation to the owner of the property, and another party has possession of funds associated with the property and an obligation to hold it for the account of, or to pay or deliver it

to, the owner solely by virtue of a contractual relationship with the party who is directly obligated to the owner, but who has not assumed direct liability to the owner, it is the party who is directly obligated to the owner who is the holder for purposes of the act. For example, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would, in such circumstances, be the holder of the obligation and any unclaimed dividends on the stock or interest on the bonds. On the other hand, where a party contractually assumes direct liability to the owner for an obligation and is in possession of the funds associated with such obligation, the assuming party becomes the applicable holder for purposes of application of unclaimed property obligations. Where a corporation sells assets to another corporation and the acquiring corporation affirmatively assumes liability for obligations of the selling corporation for certain liabilities associated with the acquired assets, the acquiring corporation becomes the applicable “holder” of the assumed obligations and the selling corporation should no longer be the “holder” with respect to the assumed obligations. Section 402(d) recognizes such successor holders and requires that they include in any report of unclaimed property the name of the previous holder, if known and the address of each previous holder of the property

“Loyalty cards” - Loyalty cards are defined in Section 102(14) because they are expressly excluded from the definition of “property” which must be delivered to the administrator. (See § 102(24)(c)(ii). Loyalty cards are limited to cards given to consumers without payment of direct monetary consideration by the consumer. Some loyalty programs permit consumers to purchase additional rewards for direct monetary consideration. The burden would be on the issuer of cards under such programs to establish that unredeemed card balances for which exemption is claimed do not include balances for which the cardholder paid any direct monetary consideration.

“Money order” - The changes in Section 102(17) to the definition of “money order” from the 1995 Act are intended to prevent sophisticated issuers from creating debt instruments that technically fit within the 1995 Act definition of a “money order” to achieve the longer seven year dormancy period. It is not intended to include conventional bank issued personal or business checks.

“Municipal bonds” - A definition in Section 102(18) of municipal bond is included to differentiate municipal bonds from United States issued bonds, and relates to abandonment of unclaimed bonds other than United States issued bonds.

“Net card value” - This definition in Section 102(19) is included to make it clear that the amount of value in a stored value card subject to becoming “unclaimed property” is the original issued value of the card, less any amounts used or withdrawn from the card and any service charge, fee, or dormancy charge permitted by law, , and includes additional amounts subsequently loaded into the card which have not been withdrawn.

“Non-freely transferable security” - Under this definition in Section 102(20) there can be a variety of reasons why a custodian of securities might not be able to effect a transfer. The security might be subject to a lien or other type of restriction evidenced on the records of the holder or imposed by operation of law.

“Owner” - Legal and beneficial ownership interest are recognized in this definition in Section 102(21). When the person with legal ownership of the property is known, that person takes precedence as the “owner” for purposes of this act. For example, the legal owner of trust assets is the trustee. In situations where there is no trustee to act, the beneficiary or equitable owner is the “owner” for purposes of this act. The trustee, as legal owner, has precedence over the beneficial owner unless the beneficiary establishes that the trust has terminated or there is no trustee to take and hold the property. Similarly, for bank accounts, brokerage accounts, IRAs, and other similar property, the legal owner of the account would take precedence over a named beneficiary who does not yet have legal ownership of the account.

“Payroll cards” - Payroll cards as defined in Section 102(22) are a subset of “stored-value cards” and are intended to mean the bank account into which wages and other compensation can be paid and accessed electronically by the employee. Accordingly, payroll cards have the same three year holding period as bank accounts, rather than the one year holding period for unpaid compensation being held by the employer. Stored value cards are property subject to being turned over to the state if they are unclaimed and abandoned after the relevant three year period under Section 201(13), unless the state elects a different holding period.

“Property” - The term “bond” as used in Section 102(24)(B)(iv) includes U.S. Savings Bonds and they are intended to be included in the definition of property under this act. The decision of the Third Circuit in *Treasurer of New Jersey v U.S. Dept. of Treasury*, 684 F.3d 382 (2012) makes it clear that the right of the U.S. Treasury to hold the proceeds of U.S. Savings Bonds in its custody for the owners of the bonds preempts state claims to take custody and hold the bonds for the owners. The Court indicated that the outcome would be different where a state had become the owner of the bonds by operation of its escheat law or otherwise. In 2000 Kansas amended its unclaimed property act to establish a procedure by which the Kansas administrator can bring an action for a judgment of the state court affirming that the administrator had become by escheat the owner of U.S. Savings Bonds that had not been claimed. This matter is in litigation in the U.S. Court of Federal Claims in a suit brought by the Treasurer of Kansas in *Estes v United States*, 13-1011 (Fed. Cl. 2015). By Opinion and Order entered August 20, 2015, the trial judge denied the defendant’s Motion to Dismiss the plaintiff’s contract, equitable estoppel and declaratory judgment claims and Takings Clause claim, and dismissed the plaintiff’s third party beneficiary claim. The matter is still pending. Logically, if an administrator is judicially declared to be the owner of U.S. Savings Bonds found in the lock box of a deceased owner by operation of the state’s escheat laws, the administrator’s claim to the proceeds as the “owner” should prevail. The more difficult issue before the Court is the “absent owner” bonds with respect to which there is no evidence of the continued interest or ownership of the original registered owner of the bonds. Ultimately, it will be up to the court to determine whether the Kansas procedure for obtaining such a ruling from a court is sufficient to vest legal title to the bonds in the state by escheat and is consistent with the customary means by which a state may acquire title to property under the state’s escheat laws.

“Record” - The term “record” defined in Section 102(26) is meant to replace the terms “writing” or “written,” and is a standard Uniform Law Commission definition.

“Security” - While prior iterations of the Act address treatment of securities, the term has not been defined. The definition in Section 102(27) intends to capture certain existing

definitions found in the Uniform Commercial Code as well as equity interests in business associations not otherwise covered.

“Virtual currency” - The definition in Section 102(32) of virtual currency is adapted from the current draft of the Uniform Regulation of Virtual Currency Act (URVCA). The drafting committee of that Act has not yet settled on a definition of “virtual currency.” It is thought that the two definitions should be harmonized. Under this Act, “virtual currency” is property included in the URVCA definition and the definition in this Act specifically excludes game related digital content and loyalty cards because they are excluded from this act, in order that they not be swept back in through an over broad interpretation of “virtual currency.” The same will hold true for versions of this Act that are enacted by states that elect to exclude “gift cards”. See Section 102(11).

SECTION 103. INAPPLICABILITY TO FOREIGN TRANSACTION. This [act] does not apply to property held, due, and owing in a foreign country if the transaction out of which the property arose was a foreign transaction.

Comment

This exclusion for foreign held property is taken directly from Section 26 of the 1995 Act.

SECTION 104. RULEMAKING. The administrator may adopt under [insert citation to the state administrative procedure act] rules to implement and administer this [act].

[ARTICLE] 2

PRESUMPTION OF ABANDONMENT

SECTION 201. WHEN PROPERTY PRESUMED ABANDONED. Subject to Section 210, the following property is presumed abandoned if it is unclaimed by the apparent owner during the period specified below:

- (1) a traveler’s check, 15 years after issuance;
- (2) a money order, seven years after issuance;
- (3) a state or municipal bond, bearer bond, or original-issue-discount bond, three years after the earliest of the date the bond matures or is called or the obligation to pay the principal of the bond arises;

(4) a debt of a business association, three years after the obligation to pay arises;

(5) a payroll card or demand, savings, or time deposit, including a deposit that is automatically renewable, three years after the maturity of the deposit, except a deposit that is automatically renewable is deemed matured on its initial date of maturity unless the apparent owner consented in a record on file with the holder to renewal at or about the time of the renewal;

(6) money or a credit owed to a customer as a result of a retail business transaction,[other than in-store credit for returned merchandise,] three years after the obligation arose;

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

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

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

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

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

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

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

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

(11) wages, commissions, bonuses, or reimbursements to which an employee is entitled, or other compensation for personal services, other than amounts held in a payroll card, one year after the amount becomes payable;

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

(13) property not specified in this section or Section 202 through [207][208], the earlier of three years after the owner first has a right to demand the property or the obligation to pay or distribute the property arises.

Legislative Note: *A state that wants to exclude in-store credits for returned merchandise from unclaimed property should delete the brackets around the language in paragraph (6). A state that wants to include these credits should delete the bracketed language.*

A state that wants to exclude gift cards from unclaimed property should delete the bracketed reference to Section 207 in paragraph (13) and delete Section 207. Renumber the sections of Article 2 following Section 206, and delete the reference to Section 208 in paragraph (13).

Comment

Use of the phrase “subject to Section 210” here and elsewhere in Article 2 (Sections 201-208) should not be construed as creating additional required standards of owner generated activities resulting in abandonment in addition to those activities address by those sections (e.g. returned post office mail). Use of the phrase with all these sections is meant to indicate that certain types of owner generated activities rebuts the presumption otherwise triggered by the standard set forth in each section.

Fifteen states currently exclude some form of property arising from a “business-to-business” (“B2B”) transaction by statute. However, most states do not. A “B2B” exemption is not in this Act because it has been adopted in a clear minority of states. However, those states that want to exempt property arising from a B2B transaction may do so by including the language from their own or another state’s B2B exemption and excluding it from the definitions

of “property” in this Act. Also see Legislative Note to Section 102(24)(C).

Section 201 implements the general proposition that unless specifically excluded, all intangible property is within the coverage of this Act. The other sections of this Article 2 specify the rules applicable to particular categories or types of property. However, the bases for presuming abandonment of the property established in the 1981 Act and the 1995 Act remain unchanged.

Section 201 puts state and municipal bonds on the same footing as corporate bonds, and includes bonds issued by non-profits such as churches and schools. The principal obligation of the obligor on the bond is not accelerated by an interest payment not being claimed. An uncashed check issued in payment of an interest installment is treated like any other uncashed check.

The 1981 Act shortened the general dormancy period from seven years to five years and the 1995 Act then shortened the general dormancy period from five years to three years. Certain exceptions continue to be appropriate. For instance, experience indicates that a period of fifteen years continues to be appropriate in the case of traveler’s checks, and seven years in the case of personal money orders and money orders issued by express companies. In certain instances shorter periods are appropriate. For instance, a deposit or refund owed to a utility subscriber continues to be one year.

This section also covers consumer credits owed on consumer transactions such as returns of merchandise, cancellation of layaways, and various kinds of deposits. The existence and amounts of such credits will of course be dependent on the terms of the contract between the holder and the consumer. However, in-store credits for returned merchandise are included, unless expressly excluded in the Act.

A one year dormancy period for property distributable by a business association in the course of a dissolution under subsection (8) recognizes that constraints on distribution, such as escrow or set aside to accommodate contractual indemnification obligations, must be considered in determining when the one year period commences.

Intangible property held by a utility other than subscribers' deposits and refunds are subject to the three year rule of subsection (13).

Since the holder is indemnified against any loss resulting from the delivery of the property to the administrator, no harm can result in requiring that a holder turn over the property to the administrator, even though no proof of death has been presented, nor any insurance policy, savings account passbook, gift certificate, winning racing ticket, or other memorandum of ownership has been surrendered.

What constitutes an indication of interest is addressed in Section 210.

**SECTION 202. WHEN TAX-DEFERRED RETIREMENT ACCOUNT
PRESUMED ABANDONED.**

(a) Subject to Section 210, property held in a pension account or retirement account that qualifies for tax deferral under the income-tax laws of the United States is presumed abandoned if it is unclaimed by the apparent owner three years after the later of:

(1) the following dates:

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

(B) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered by the United States Postal Service; or

(2) the earlier of the following dates:

(A) the date the apparent owner becomes 70.5 years of age, if determinable by the holder; or

(B) if the Internal Revenue Code[, as amended], 26 U.S.C. Section 1 et seq., requires distribution to avoid a tax penalty, two years after the date the holder:

(i) receives confirmation of the death of the apparent owner in the ordinary course of its business; or

(ii) confirms the death of the apparent owner under subsection (b).

(b) If a holder in the ordinary course of its business receives notice or an indication of the death of an apparent owner and subsection (a)(2) applies, the holder shall attempt not later than 90 days after receipt of the notice or indication to confirm whether the apparent owner is

deceased.

(c) If the holder does not send communications to the apparent owner of an account described in subsection (a) by first-class United States mail, the holder shall attempt to confirm the apparent owner's interest in the property by sending the apparent owner an electronic-mail communication not later than two years after the apparent owner's last indication of interest in the property. However, the holder promptly shall attempt to contact the apparent owner by first-class United States mail if:

(1) the holder does not have information needed to send the apparent owner an electronic mail communication or the holder believes that the apparent owner's electronic mail address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the apparent owner does not respond to the electronic-mail communication not later than 30 days after the communication was sent.

(d) If first-class United States mail sent under subsection (c) is returned to the holder undelivered by the United States Postal Service, the property is presumed abandoned three years after the later of:

(1) except as in paragraph (2), the date a second consecutive communication to contact the apparent owner sent by first-class United States mail is returned to the holder undelivered;

(2) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

(3) the date established by subsection (a)(2).

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(2)(B).*

Comment

The 1995 Act provided a three year dormancy period for unpaid distributions from retirement accounts. Section 202 retains the dormancy period of three years, but clarifies when the dormancy period is triggered for such accounts based on return of first class United States mailings, date an owner reaches the age of mandatory distribution or confirmation of apparent owner death.

There is substantial disagreement between various authorities concerning whether ERISA preempts state unclaimed property laws. For example, while several courts have held that because the unclaimed property laws are matters of traditional state powers, are laws of general application, and have only a tenuous, remote and peripheral impact on ERISA plans, they are not pre-empted by federal law, *see, e.g., Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2nd Cir. 1989); *Attorney General v. Blue Cross and Blue Shield of Michigan*, 424 N.W.2d 54 (Ct. App. 1988), the Department of Labor has taken the position that unclaimed property laws "relate to" ERISA, and are thus pre-empted, in a letter opinion issued March 3, 1995. *See* 22 BNA Pension & Benefits Reporter 743 (1995); *see also Dep't of Labor Advisory Opinion 94-41A* (Dec. 7, 1994); *Dep't of Labor Advisory Opinion 79-30A* (May 14, 1979); *Dep't of Labor Advisory Opinion 78-32A* (Dec. 22, 1978), a position not adopted by those courts.

Despite these generalized positions on preemption, authorities have also weighed in on specific portions of ERISA. For example, ERISA appears to preempt the application of state unclaimed property laws to funded “pension plans,” a term that includes all tax-qualified retirement plans, tax-sheltered annuity plans described in Internal Revenue Code (I.R.C.) § 403(b), and various other retirement arrangements that are subject to ERISA. *See Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999) (Illinois’ claiming of the uncashed benefit checks improperly involved the state in a plan administration function, thereby impairing the uniform administration of claims of plan participants and is therefore preempted.); *Manufacturers Life Insurance Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (N.D. Cal. 1999) (adopting the “plan asset” analysis of the Commonwealth Edison decision, the federal district court held that California was attempting to confiscate “plan assets,” which interfered with the uniform administration of the ERISA retirement plan and deprived the plan of assets (i.e., the premium refund) that could be utilized to pay benefits to other plan participants and is therefore preempted). Thus there may be a valid distinction between assets held in a defined contribution plan where each participant’s portion is held separately and those held in a defined benefit plan where the assets are held in a pool or fund out of which funds are withdrawn as needed, and excess funds may be returned to the plan sponsor. The holdings in these cases were consistent with the position taken by the U.S. Department of Labor, which had filed an amicus curiae brief in support of preemption in *Commonwealth Edison* and had previously issued several pertinent advisory opinions.

SECTION 203. WHEN OTHER TAX-DEFERRED ACCOUNT PRESUMED

ABANDONED. Subject to Section 210 and except for property described in Section 202 and property held in a plan described in Section 529A of the Internal Revenue Code [as amended], 26 U.S.C. Section 529A, property held in an account or plan, including a health savings account, that qualifies for tax deferral under the income-tax laws of the United States is presumed abandoned if it is unclaimed by the apparent owner three years after the earlier of:

(1) the date, if determinable by the holder, specified in the income-tax laws and regulations of the United States by which distribution of the property must begin to avoid a tax penalty, with no distribution having been made; or

(2) 30 years after the date the account was opened.

***Legislative Note:** In a state in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted.*

Comment

It was determined that tax deferred accounts, like health savings or college tuition savings, may well be used by beneficiaries over a longer period of time and that, as a consequence, a policy allowing for up to thirty years before those accounts would be surrendered to the states was prudent and favored consumers. With respect to the exception for property “held in a plan described in Section 529A of the Internal Revenue Code” this provision was intended to exclude such property from being presumed abandoned under the Act due to the nature and purpose of such property.

SECTION 204. WHEN CUSTODIAL ACCOUNT FOR MINOR PRESUMED

ABANDONED.

(a) Subject to Section 210, property held in an account established under a state’s Uniform Gifts to Minors Act or Uniform Transfers to Minors Act is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened three years after the later of:

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

(2) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

(3) the date on which the custodian is required to transfer the property to the minor or the minor's estate in accordance with the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of the state in which the account was opened.

(b) If the holder does not send communications to the custodian of the minor on whose behalf an account described in subsection (a) was opened by first-class United States mail, the holder shall attempt to confirm the custodian's interest in the property by sending the custodian an electronic-mail communication not later than two years after the custodian's last indication of interest in the property. However, the holder promptly shall attempt to contact the custodian by first-class United States mail if:

(1) the holder does not have information needed to send the custodian an electronic mail communication or the holder believes that the custodian's electronic-mail address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the custodian does not respond to the electronic-mail communication not later than 30 days after the communication was sent.

(c) If first-class United States mail sent under subsection (b) is returned undelivered to

the holder by the United States Postal Service, the property is presumed abandoned three years after the later of:

(1) the date a second consecutive communication to contact the custodian by first-class United States mail is returned to the holder undelivered by the United States Postal Service; or

(2) the date established by subsection (a)(3).

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

Comment

The Uniform Gift to Minors Act (UGMA) is a mechanism whereby a minor can directly own securities in his/her name without a guardian or trustee. However, a fiduciary, either the donor or another person, must be the custodian of the minor's account. The minor is not allowed access to the account until he/she reaches the age of majority (18 or 21 depending on the state). The Uniform Transfers to Minors Act (UTMA) is similar to the UGMA and allows minors to receive transfers such as patents, royalties, real estate, etc. Minors are not allowed access to the UTMA until the age of majority.

Since UGMAs and UTMAs were not specifically addressed in the 1995 Act, leaving holders to determine how to apply the "catch-all" language of the act, the treatment of UGMAs and UTMAs is expressly addressed in this act. This section provides that the three year dormancy period does not begin to run until the later of the second returned mail or the minor reaches the age of majority.

SECTION 205. WHEN CONTENTS OF SAFE-DEPOSIT BOX PRESUMED

ABANDONED. Tangible property held in a safe-deposit box and proceeds from a sale of the property by the holder permitted by law of this state other than this [act] are presumed abandoned if the property remains unclaimed by the apparent owner five years after the earlier of the:

(1) expiration of the lease or rental period for the box; or

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

Comment

Section 205 parallels Section 3 of the 1995 Act and Section 16 of the 1981 Act. However, in this Act this section also extends the triggering of the dormancy period to the date when the lessor may remove or dispose of the contents of the safe deposit box. This section is not intended to cover property left in places other than traditional safe deposit boxes, for example, bus station and airport lockers or field warehouses and storage units. Its coverage is limited to tangible property held in safe deposit boxes maintained in banks and similar financial institutions. Intangible property such as stock certificates or certificates of deposit, for example, evidence of which is found in a safe deposit box, is covered by Section 201.

SECTION 206. WHEN STORED-VALUE CARD PRESUMED ABANDONED.

(a) Subject to Section 210, the net card value of a stored-value card, other than a payroll card [or a gift card], is presumed abandoned on the latest of three years after:

- (1) December 31 of the year in which the card is issued or additional funds are deposited into it;
- (2) the most recent indication of interest in the card by the apparent owner; or
- (3) a verification or review of the balance by or on behalf of the apparent owner.

(b) The amount presumed abandoned in a stored-value card is the net card value at the time it is presumed abandoned.

Legislative Note: *A state that wants to exclude gift cards from unclaimed property should delete the bracketed reference to gift cards in subsection (a). A state that wants to include gift card balances as unclaimed property should delete the brackets and retain the reference to gift cards in subsection (a) to exclude them from the three year dormancy provided in this section for stored value cards generally. Gift cards would then be reportable based on the five year dormancy period provided in Section 207.*

Comment

In addition to the clarification of when stored value cards are presumed abandoned, Section 206 provides that the value of the card that is presumed abandoned is the net card value - a term defined in Section 102(19) - not the face value.

[SECTION 207. WHEN GIFT CARD PRESUMED ABANDONED.] Subject to Section 210, a gift card is presumed abandoned if it is unclaimed by the apparent owner five years after the later of the date of purchase or its most recent use.]

Legislative Note: *A state that wants to exclude gift cards from unclaimed property should delete this section and renumber the succeeding sections in Article 2. If gift cards are to be included, the brackets should be removed and the language retained.*

Comment

Certain federal legislation applies to gift cards. See Credit Card Accountability Responsibility and Disclosure Act of 2009 and amendments to Regulation E previously issued by the Federal Reserve Board. Accordingly, the dormancy period in Section 207 is the mandated five years, instead of the three years applicable to other types of stored value cards.

SECTION 208. WHEN SECURITY PRESUMED ABANDONED.

(a) Subject to Section 210, a security is presumed abandoned three years after:

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

(2) if the second communication is made later than 30 days after the first communication is returned, the date the first communication is returned undelivered to the holder by the United States Postal Service.

(b) If the holder does not send communications to the apparent owner of a security by first-class United States mail, the holder shall attempt to confirm the apparent owner's interest in the security by sending the apparent owner an electronic-mail communication not later than two years after the apparent owner's last indication of interest in the security. However the holder promptly shall attempt to contact the apparent owner by first-class United States mail if:

(1) the holder does not have information needed to send the apparent owner an electronic-mail communication or the holder believes that the apparent owner's electronic-mail

address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the apparent owner does not respond to the electronic-mail communication not later than 30 days after the communication was sent.

(c) If first-class United States mail sent under subsection (b) is returned to the holder undelivered by the United States Postal Service, the security is presumed abandoned three years after the date the mail is returned.

Comment

The 1995 Act was not clear on when the running of the dormancy period for securities was triggered. Section 208 clarifies the trigger event and will help to reduce compliance challenges faced by holders.

SECTION 209. WHEN RELATED PROPERTY PRESUMED ABANDONED. At and after the time property is presumed abandoned under this [act], any other property right or interest accrued or accruing from the property and not previously presumed abandoned is also presumed abandoned.

Comment

Section 209 is not intended to mean that a security is presumed abandoned as a result of a dividend payment being presumed abandoned, nor does it mean that the underlying bond will be presumed abandoned merely because an interest payment with respect to the bond is presumed abandoned. Instead, it is intended to mean that, in the event the security or bond is presumed abandoned as provided in the Act, any future dividend, interest or other property right accruing on such security or bond shall also be presumed abandoned. The section also encompasses cash distributions or accruals on, for example, securities positions, mineral rights, etc. when the underlying property is presumed abandoned.

SECTION 210. INDICATION OF APPARENT OWNER INTEREST IN PROPERTY.

(a) The period after which property is presumed abandoned is measured from the later of:

(1) the date the property is presumed abandoned under this [article]; or

(2) the latest indication of interest by the apparent owner in the property.

(b) Under this [act], an indication of an apparent owner's interest in property includes:

(1) a record communicated by the apparent owner to the holder or agent of the holder concerning the property or the account in which the property is held;

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

(3) presentment of a check or other instrument of payment of a dividend, interest payment, or other distribution, or evidence of receipt of a distribution made by electronic or similar means, with respect to an account, underlying security, or interest in a business association.

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

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

(6) subject to subsection (e), payment of a premium on an insurance policy; and

(7) any other action by the apparent owner which reasonably demonstrates to the holder that the apparent owner knows that the property exists.

(c) An action by an agent or other representative of an apparent owner, other than the holder acting as the apparent owner's agent, is presumed to be an action on behalf of the apparent owner.

(d) A communication with an apparent owner by a person other than the holder or the holder's representative is not an indication of interest in the property by the apparent owner unless a record of the communication evidences the apparent owner's knowledge of a right to the property.

(e) If the insured dies or the insured or beneficiary of an insurance policy otherwise becomes entitled to the proceeds before depletion of the cash surrender value of the policy by operation of an automatic-premium-loan provision or other nonforfeiture provision contained in the policy, the operation does not prevent the policy from maturing or terminating.

Comment

It has been argued that the owner's interest in property should not be deemed abandoned if there have been any reasonable indications that the owner is aware of the existence of his or her claim and therefore it is not in fact abandoned property. The revisions in Section 210 are intended to expand and liberalize the ways in which continuing interest may be indicated, and to make clear that an owner may indicate interest by acting through an agent or representative. Section 210 requires that indications of owner interest be verifiable in order to evidence that the owner is aware of their property.

SECTION 211. KNOWLEDGE OF DEATH OF INSURED OR ANNUITANT.

(a) In this section, "death master file" means the United States Social Security Administration Death Master File or other database or service that is at least as comprehensive as the United States Social Security Administration Death Master File for determining that an individual reportedly has died.

(b) With respect to a life or endowment insurance policy or annuity contract for which an amount is owed on proof of death, but which has not matured by proof of death of the insured or annuitant, the company has knowledge of the death of an insured or annuitant when:

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

(2) due diligence, performed as required under [insert citation to applicable state law or regulations relating to the business of insurance] to maintain contact with the insured or annuitant or determine whether the insured or annuitant has died, validates the death of the insured or annuitant;

(3) the company conducts a comparison for any purpose between a death master file and the names of some or all of the company's insureds or annuitants, finds a match that provides notice that the insured or annuitant has died, and validates the death;

(4) the administrator or the administrator's agent conducts a comparison for the purpose of finding matches during an examination conducted under [Article] 10 between a death master file and the names of some or all of the company's insureds or annuitants, finds a match that provides notice that the insured or annuitant has died, and the company validates the death;
or

(5) the company:

(A) receives notice of the death of the insured or annuitant from an administrator, beneficiary, policy owner, relative of the insured, or trustee or from a [insert the term or terms for personal representative in the state], [executor], or other legal representative of the insured's or annuitant's estate; and

(B) validates the death of the insured or annuitant.

(c) The following rules apply under this section:

(1) A death-master-file match under subsection (b)(3) or (4) occurs if the criteria for an exact or partial match are satisfied as provided by:

(A) law of this state other than this [act];

(B) a rule or policy adopted by [insert name of the state insurance official or department authorized to adopt rules]; or

(C) absent a law, rule, or policy under subparagraph (A) or (B) standards in the [National Conference of Insurance Legislators’ “Model Unclaimed Life Insurance Benefits Act” as published in 2014].

(2) The death-master-file match does not constitute proof of death for the purpose of submission to an insurance company of a claim by a beneficiary, annuitant, or owner of the policy or contract for an amount due under an insurance policy or annuity contract.

(3) The death-master-file match or validation of the insured’s or annuitant’s death does not alter the requirements for a beneficiary, annuitant, or owner of the policy or contract to make a claim to receive proceeds under the terms of the policy or contract.

(4) If no provision in [insert citation to state insurance statutes or rules] which establishes a time for validation of a death of an insured or annuitant, the insurance company shall make a good faith effort using other available records and information to validate the death and document the effort taken not later than 90 days after the insurance company has notice of the death.

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

Comment

The National Association of Insurance Commissioners (NAIC) is in the process of developing a new Model Act that may contain standards different from those contained in the current National Conference of Insurance Legislators Model Act. If these new standards are adopted, a state may elect to substitute a reference to the standards yet to be developed by NAIC.

Section 211 provides bright line rules an insurance company may rely upon to determine whether it has notice of the death of an insured or annuitant. The procedures established by these paragraphs are consistent with the Model Act adopted by the National Conference of Insurance Legislators that has been generally endorsed both by unclaimed property administrators and many insurance industry representatives. These procedures are also consistent with settlement agreements entered into between a substantial number of states and many large life insurance companies.

The Act does not require an insurance company to perform a death master file match. An insurance company may elect to so in accordance with requirements established or to be established by state insurance regulators, or as may be otherwise required by law, or receive notice of death from an administrator, beneficiary or other legal representative of the insured or annuitant and also validate the death.

Section 211 specifically avoids having any effect on the extent to which insurance companies had knowledge of death or was required to conduct a DMF comparison prior to the effective date of the Act.

SECTION 212. DEPOSIT ACCOUNT FOR PROCEEDS OF INSURANCE

POLICY OR ANNUITY CONTRACT. If proceeds payable under a life or endowment insurance policy or annuity contract are deposited into an account with check or draft-writing privileges for the beneficiary of the policy or contract and, under a supplementary contract not involving annuity benefits other than death benefits, the proceeds are retained by the insurance company or the financial organization where the account is held, the policy or contract includes the assets in the account.

Comment

Section 212 clarifies that asset accounts related to or arising from an insurance policy of annuity contract will be subject to the same presumption of abandonment that is applied to the underlying policy or contract.

[ARTICLE] 3

RULES FOR TAKING CUSTODY OF PROPERTY PRESUMED ABANDONED

SECTION 301. ADDRESS OF APPARENT OWNER TO ESTABLISH

PRIORITY. In this [article], the following rules apply:

(1) The last-known address of an apparent owner is any description, code, or other indication of the location of the apparent owner which identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner.

(2) If the United States postal zip code associated with the apparent owner is for a post office located in this state, this state is deemed to be the state of the last-known address of the apparent owner unless other records associated with the apparent owner specifically identify the physical address of the apparent owner to be in another state.

(3) If the address under paragraph (2) is in another state, the other state is deemed to be the state of the last-known address of the apparent owner.

(4) The address of the apparent owner of a life or endowment insurance policy or annuity contract or its proceeds is presumed to be the address of the insured or annuitant if a person other than the insured or annuitant is entitled to the amount owed under the policy or contract and the address of the other person is not known by the insurance company and cannot be determined under Section 302.

Comment

Article 3 describes the circumstances under which a state may claim abandoned intangible property. This Article closely follows the language of *Texas v. New Jersey*, in which the court reasoned that unclaimed property is an asset of the creditor and should generally be paid to the creditor state, *i.e.*, the state of residence of the apparent owner. Consistent with that reasoning it held that unclaimed intangible property is subject to custody as unclaimed property first by the state of the owner's last known address. See Section 302. Consistent with the Court's

concern for a simple rule which would avoid the complexities of proving domicile and residence the Court established the priority on the basis of information contained in the holder's records. Where the holder's records do not show that the owner had an address within the state, the second priority claimant, the state of domicile of the holder, is entitled to claim the property. See Section 304.

Section 301 is meant to provide clarity and direction for determining the “last known address” of the apparent owner, a significant concept in the priority scheme. The 1981 Act defined “last known address” as “a description of the location of the apparent owner for the purpose of delivery of mail.” *See* Section 1(11). Although the U.S. postal zip code associated with the apparent owner is given great weight, this Act does not limit “last known address” determinations to records of the U.S. postal service. Section 301(1) provides that any “description, code or other indication of location” is sufficient for “last known address” determinations. Indication of location could include by use of example, a state abbreviation or an internally maintained holder code which translates into a state name or abbreviation. There is some disagreement among commentators over whether the U.S. Supreme Court intended a broader definition than appears in the 1981 Act, such as the one included in this section. However, the policy underlying the rules establishing priority among contending states is that unclaimed property should be held by the administrator of the state where the owner is most likely to look for it, which is the state in which the owner resided, i.e. had his or her “last known address”, if that state can be determined. It follows that limiting the first priority only to states determined by having an address suitable for mailing frustrates that policy when the owner’s state of last known address can be determined another way. Lastly, Section 301(4) provides guidance in situations involving life or endowment policy proceeds, specifying that the address of the insured or annuitant is the “last known address” of the apparent owner, where someone else is entitled to the proceeds, but no address for this individual is known or can be found.

SECTION 302. ADDRESS OF APPARENT OWNER IN THIS STATE. The administrator may take custody of property that is presumed abandoned, whether located in this state, another state, or a foreign country if:

(1) the last-known address of the apparent owner in the records of the holder is in this state; or

(2) the records of the holder do not reflect the identity or last-known address of the apparent owner, but the administrator has determined that the last-known address of the apparent owner is in this state.

Comment

Section 302(1) restates the factual situation in *Texas v. New Jersey, supra*. As the court there said ". . . the address on the records of a debtor, which in most cases will be the only one available, should be the only relevant last known address." Section 302(2) covers the situation in which, on the basis of the holder's records, the identity of the person entitled to the property is unknown. Unlike the 1995 Act version of this provision (Section 4(2)), this Act specifies that the determination as to the "last-known address" may be made by the administrator based on extrinsic evidence and if determined to be in that state, custody of property may be taken.

SECTION 303. IF RECORDS SHOW MULTIPLE ADDRESSES OF APPARENT OWNER.

(a) Except as in subsection (b), if records of a holder reflect multiple addresses for an apparent owner and this state is the state of the most recently recorded address, this state may take custody of property presumed abandoned, whether located in this state or another state.

(b) If it appears from records of the holder that the most recently recorded address of the apparent owner under subsection (a) is a temporary address and this state is the state of the next most recently recorded address that is not a temporary address, this state may take custody of the property presumed abandoned.

Comment

Section 303 does not have an analogue in either the 1981 Act or the 1995 Act. The purpose of this Section is to provide uniform guidance as to which state may take custody of property, when the records reflect multiple addresses for an apparent owner.

SECTION 304. HOLDER DOMICILED IN THIS STATE.

(a) Except as in subsection (b) or Section 302 or 303, the administrator may take custody of property presumed abandoned, whether located in this state, another state, or a foreign country, if the holder is domiciled in this state or is this state or a governmental subdivision, agency, or instrumentality of this state, and

(1) another state or foreign country is not entitled to the property because there is

no last-known address of the apparent owner or other person entitled to the property in the records of the holder; or

(2) the state or foreign country of the last-known address of the apparent owner or other person entitled to the property does not provide for custodial taking of the property.

(b) Property is not subject to custody of the administrator under subsection (a) if the property is specifically exempt from custodial taking under the law of this state or the state or foreign country of the last-known address of the apparent owner.

(c) If a holder's state of domicile has changed since the time property was presumed abandoned, the holder's state of domicile in this section is deemed to be the state where the holder was domiciled at the time the property was presumed abandoned.

Comment

Section 304 reflects the secondary priority rule of *Texas v. New Jersey*. There the Supreme Court ruled that when property is owed to a person for whom there is no known address, the property will be subject to being taken into custody by the state of the holder's domicile, provided that another state may later claim upon a showing of proof that the last known address of the person entitled to the property was within its borders. Section 304(a)(1) and (a)(2) provide that if the law of the state of the owner's last known address does not provide for taking custody of the unclaimed property or if that state's unclaimed property law is not applicable to the property in question, the property is subject to claim by the state in which the holder is domiciled. If another state does claim the property, it may of course proceed to claim the property under Section 901. Similar to the 1981 Act (Section 3(5)) and the 1995 Act (Section 4(5)), this section provides, in Section 304(3)(b) that the state of domicile may claim abandoned property where the last known address of the owner is in a foreign country. The issue was not dealt with by the Supreme Court in *Texas v. New Jersey*, but is a rational extension of that ruling. Some argue that the escheat of foreign owned property is not a natural extension of the priority rules, pointing to case law outside of the unclaimed property context and employing a rationale that is not controlling in the context of unclaimed property, wherein a statute implicating foreign property was likened to an unlawful taking. *See e.g., Zscherer v. Miller*, 389 U.S. 426 (1968), but the rationale used by the Court in that case is neither controlling nor compelling in the context of unclaimed property. Section 304(3)(b) adds a new provision that, if property is specifically exempt under the laws of either a state or foreign country in which the last known address of the owner is located, the state of holder's domicile cannot take custody. *See N.J. Retail Merchants Assn. v. Eristof, Treasurer*, 669 F.3d 374 (3d Cir. 2012).

SECTION 305. CUSTODY IF TRANSACTION TOOK PLACE IN THIS STATE.

Except as in Section 302, 303, or 304, the administrator may take custody of property presumed abandoned whether located in this state or another state if:

- (1) the transaction out of which the property arose took place in this state;
- (2) the holder is domiciled in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the holder's domicile, the property is not subject to the custody of the administrator; and
- (3) the last-known address of the apparent owner or other person entitled to the property is unknown or in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the last-known address, the property is not subject to the custody of the administrator.

Comment

Section 305 provides for the situation in which neither of the claims to priority established by *Texas v. New Jersey* can be made, but the state has a genuine and important contact with the property. An example of the type of claim which might be made under Section 305 arose in *O'Connor v. Sperry & Hutchinson Co.*, 412 A.2d 539 (Pa.1980). There Pennsylvania sought to claim unredeemed trading stamps sold by a corporation domiciled in New Jersey to retailers located in Pennsylvania. Pennsylvania took the position that *Texas v. New Jersey* did not create a jurisdictional bar to a claim by another state when the states which were granted priority were unable to take. There was no first priority claim since there were no last known addresses of the trading stamp purchasers. The second priority claimant, the state of corporate domicile (New Jersey), was not permitted under its law to take custody of trading stamps (*see New Jersey v. Sperry & Hutchinson Co.*, 56 N.J.Super. 589, 153 A.2d 691 (1959), affirmed per curiam, 31 N.J. 385, 157 A.2d 505 (1960)). Hence, Pennsylvania urged that in order to prohibit a corporate windfall it should be allowed to claim this property. The Pennsylvania Supreme Court affirmed a lower court decision which overruled *Sperry & Hutchinson's* motion to dismiss but did not reach the *Texas v. New Jersey* issue. Section 305 provides the newly added provision recognizing that, if property is specifically exempt as unclaimed property under the laws of the state of the last known address of the owner, or that of the holder's domicile, then the state in which the transaction giving rise to the property occurred must recognize the higher priority state's affirmative exemption of the property and cannot take custody of the property because to do so would not give Full Faith and Credit to the laws of a

state with a higher constitutional priority to claim the property. *N.J. Retail Merchants Assn. v. Eristof, Treasurer*, 669 F.3d 374 (3d Cir. 2012). Some commentators contend that *N.J. Retail Merchants* stands as a bar to all “place of transaction” priority rules, however, the Court’s ruling envisioned a conflict between so-called “third priority rules” which were non-uniform, something not applicable to this Act. *See also State v. Chubb Corp.*, 570 A.2d 1313 (N.J. Super. Ct. 1989) (permitting custodial escheat of property based on “locale of the transaction”).

SECTION 306. TRAVELER’S CHECK, MONEY ORDER, OR SIMILAR

INSTRUMENT. The administrator may take custody of sums payable on a traveler’s check, money order, or similar instrument presumed abandoned to the extent permissible under [12 U.S.C. Sections 2501 through 2503[, as amended]] [federal law].

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted.*

Comment

Travelers checks, money orders and similar instruments are covered under Section 306 which states the rule enacted by Congress in 12 U.S.C. Sections 2501 et seq. The Congressional action was in response to the Supreme Court decision in *Pennsylvania v. New York*, 407 U.S. 206 (1972), which held that the state of corporate domicile was entitled to claim money orders when there was no last known address of the purchaser although the property had been purchased in other states. Pursuant to the Congressional mandate, Section 306 substitutes as the test for asserting a claim to travelers checks, money orders and similar instruments the place of purchase rather than the state of incorporation of the issuer.

SECTION 307. BURDEN OF PROOF TO ESTABLISH ADMINISTRATOR’S

RIGHT TO CUSTODY. If the administrator asserts a right to custody of unclaimed property, the administrator has the burden to prove:

- (1) the existence and amount of the property;
- (2) the property is presumed abandoned; and
- (3) the property is subject to the custody of the administrator.

Comment

Section 307 is an expansion of the concept of the administrator's burden of proof. Where the 1995 Act provided this burden of proof on the administrator when the property at issue was evidenced by a check or draft, this Act acknowledges that the burden of proof as to all items of property is on the administrator.

[ARTICLE] 4

REPORT BY HOLDER

SECTION 401. REPORT REQUIRED BY HOLDER.

(a) A holder of property presumed abandoned and subject to the custody of the administrator shall report in a record to the administrator concerning the property. The administrator may not require a holder to file a paper report.

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

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

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

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

Comment

Section 401(a) provides that the administrator may not require a holder to file a paper report. This reflects technological advancements in unclaimed property reporting, as well as the superior efficiency of submitting reports electronically. For those states still requiring paper submissions, this provision serves as an incentive to modernize their unclaimed property reporting process.

Sections 401(b)-(c) provide that holders may contract with third parties for the preparation and filing of unclaimed property reports. Third party contracting has become a common practice within the unclaimed property area since the 1995 Act. However, Section 401(c)(1)-(2) clarifies that despite the use of a third party contractor, the holder remains ultimately responsible for the timeliness and accuracy of the report, as well as for the payment or delivery of property described in the report.

SECTION 402. CONTENT OF REPORT.

(a) The report required under Section 401 must:

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

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

(3) 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 ascertainable, of the apparent owner of property with a value of \$[50] or more;

(5) for an amount held or owing under a life or endowment insurance policy or annuity contract, contain the name and last-known address of the insured, annuitant or other apparent owner of the policy or contract and of the beneficiary;

(6) for property held in or removed from a safe-deposit box, indicate the location of the property, where it may be inspected by the administrator, and any amounts owed to the holder under Section 606;

(7) contain the commencement date for determining abandonment under [Article] 2;

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

(9) identify property that is a non-freely transferable security and explain why it is a non-freely transferable security; and

(10) contain other information the administrator prescribes by rules.

(b) A report under Section 401 may include in the aggregate items valued under \$[50] each. If the report includes items in the aggregate valued under \$[50] each, the administrator may not require the holder to provide the name and address of an apparent owner of an item unless the information is necessary to verify or process a claim in progress by the apparent owner.

(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.

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

Comment

Sections 402(a)(2) and (c) require the protection of confidential information contained in electronically submitted reports. Article 14 of this Act is devoted to confidential information. Its inclusion is in response to the growing threat of cybersecurity breaches in recent years. Section 402(c) also recognizes the fact that reports convey sensitive, personal information and are to be protected.

Section 402(b) is a departure from the 1995 Act in that holders reporting in the aggregate items valued under \$50 may not be required by the administrator to provide the name and address of an apparent owner of an item, if the information is not necessary to verify or process a claim in progress by the apparent owner. The 1995 Act requires the name and address of an apparent owner for items valued over \$50 each.

Section 402(a)(9) reflects a new approach toward non-freely transferable securities, which are exempt under Section 603(h). However, such securities must still be reported, and the holder must explain why the security is non-freely transferable

SECTION 403. WHEN REPORT TO BE FILED.

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

(b) Subject to subsection (c), the report under Section 401 to be filed by an insurance company must be filed before May 1 of each year for the immediately preceding calendar year.

(c) Before the date for filing the report under Section 401, the holder of property presumed abandoned may request the administrator to extend the time for filing. The administrator may grant an extension. If the extension is granted, the holder may pay or make a partial payment of the amount the holder estimates ultimately will be due. The payment or partial payment terminates accrual of interest on the amount paid.

Comment

Section 403(c) retains the flexibility provided to the holder and to the administrator by the 1995 Act in cases where the holder's timely compliance is not feasible. In the past, some administrators have felt themselves to be without authority to extend the filing deadlines, or to accept less than a final report. This Section makes clear that an extension can be had for good cause, and the holder can limit its exposure to interest by making a partial payment.

SECTION 404. RETENTION OF RECORDS BY HOLDER. A holder required to file a report under Section 401 shall retain records for 10 years after the later of the date the report was filed or the last date a timely report was due to be filed, unless a shorter period is provided by rule of the administrator. The holder may satisfy the requirement to retain records under this section through an agent. The records must contain:

- (1) the information required to be included in the report;
- (2) the date, place, and nature of the circumstances that gave rise to the property right;
- (3) the amount or value of the property;

(4) the last address of the apparent owner, if known to the holder; and

(5) if the holder sells, issues, or provides to others for sale or issue in this state traveler's checks, money orders, or similar instruments, other than third-party bank checks, on which the holder is directly liable, a record of the instruments while they remain outstanding indicating the state and date of issue.

Comment

Section 404 does not require the holder to obtain the address of the owner. For example, a record of the address of the purchaser or donee of a gift certificate often is not obtained. However, if the address is obtained it should be retained by the holder.

Initially, the period for which records of address must be retained is established at 10 years from the date the property was first reportable as abandoned property. However, Section 404 permits a state to shorten this period by rule. Because the reporting practices of holders vary, an administrator will want to consider such factors as the burden imposed on the holder in maintaining such records, the opportunity of returning the property, and the type of business of the holder. For example, in the case of property that would be reportable in the aggregate without the name and apparent owner under Section 402(b), a state may adopt a rule providing for a relatively short record retention period on condition that the holder maintain a record sufficient to satisfy the requirements of *Texas v. New Jersey* that there be a last known address or that the state can prove that the last known address of the creditor was within its borders.

Subsections (1)-(4) of Section 404 specify the types of information that holders must retain in their records. This is intended to ensure that a state has a complete and accurate record from which to determine and assess unclaimed property liability, while, simultaneously, reducing the reliance and need for estimation.

Subsection (5) of Section 404 is designed to ensure that the information required for asserting a claim to travelers checks, money orders, and similar instruments is retained by issuers of travelers checks, money orders and similar instruments.

SECTION 405. PROPERTY REPORTABLE AND PAYABLE OR

DELIVERABLE ABSENT OWNER DEMAND. Property is reportable and payable or deliverable under this [act] even if the owner fails to make demand or present an instrument or document otherwise required to obtain payment.

Comment

Section 405 is intended to make clear that property is reportable notwithstanding that the owner, who has lost or may otherwise have forgotten his or her entitlement to property, fails to present the holder evidence of ownership or to make a demand for payment. See *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), in which the Court stated “When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties.” See also *Provident Institution for Savings v. Malone*, 221 U.S. 660 (1911), involving savings account; *Insurance Co. of N. Am. v. Marshall Field & Co.*, 83 Ill. App. 3d 811 (1980), involving gift certificates; *State of West Virginia ex rel. Perdue v. Nationwide Life Ins. Co.*, 777 S.E.2d 11 (W.Va. 2015), involving life insurance proceeds.

[ARTICLE] 5

NOTICE TO APPARENT OWNER OF PROPERTY PRESUMED ABANDONED

SECTION 501. NOTICE TO APPARENT OWNER BY HOLDER.

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

(1) the holder has in its records an address for the apparent owner which the holder’s records do not disclose to be invalid and is sufficient to direct the delivery of first-class United States mail to the apparent owner; and

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

(b) If an apparent owner has consented to receive electronic-mail delivery from the holder, the holder shall send the notice described in subsection (a) both by first-class United States mail to the apparent owner’s last-known mailing address and by electronic mail, unless the holder believes that the apparent owner’s electronic-mail address is invalid.

Comment

A version of Section 501 appears in the 1981 and 1995 Acts under sections covering holder reports of unclaimed property. This Act has extended the outermost time limit for a holder to send notice from 120 days before the report is filed to 180 days before the report is filed. And, if the property has a value of \$50 or more, and the holder's records to not disclose the address to be inaccurate, the notice must also be sent by U.S. First Class Mail, even where the apparent owner has consented to notice by electronic mail. The delivery specification is intended to create uniformity and remove uncertainty as to the proper form of notice. Other efforts to locate the owner are no longer required.

SECTION 502. CONTENTS OF NOTICE BY HOLDER.

(a) Notice under Section 501 must contain a heading that reads substantially as follows:

“Notice. The [State] of [insert name of state] requires us to notify you that your property may be transferred to the custody of the [state's unclaimed property administrator] if you do not contact us before (insert date that is 30 days after the date of this notice).”.

(b) The notice under Section 501 must:

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

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

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

(4) state that property that is not legal tender of the United States may be sold by the administrator; and

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

Comment

Section 502 sets out a detailed list of items that must be contained in the notice sent to apparent owners by holders. This specificity is aimed at creating uniformity, as well as protecting the rights of apparent owners to their property, by ensuring to the extent possible, that

owners are made fully aware of the unclaimed property process.

SECTION 503. NOTICE BY ADMINISTRATOR.

(a) The administrator shall give notice to an apparent owner that property presumed abandoned and appears to be owned by the apparent owner is held by the administrator under this [act].

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

(1) except as otherwise provided in paragraph (2), send written notice by first-class United States mail to each apparent owner of property valued at \$[50] or more held by the administrator, unless the administrator determines that a mailing by first-class United States mail would not be received by the apparent owner, and, in the case of a security held in an account for which the apparent owner had consented to receiving electronic mail from the holder, send notice by electronic mail if the electronic-mail address of the apparent owner is known to the administrator instead of by first-class United States mail; or

(2) send the notice to the apparent owner's electronic-mail address if the administrator does not have a valid United States mail address for an apparent owner, but has an electronic-mail address that the administrator does not know to be invalid.

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

(1) publish every [six] months in at least one newspaper of general circulation in each [county] in this state notice of property held by the administrator which must include:

(A) the total value of property received by the administrator during the preceding [six]-month period, taken from the reports under Section 401;

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

(C) the Internet web address of the unclaimed property website maintained

by the administrator;

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

(E) a statement that a person may access the Internet by a computer to search for unclaimed property and a computer may be available as a service to the public at a local public library; and

(2) 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 by the administrator.

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

(e) In addition to giving notice under subsection (b), publishing the information under subsection (c)(1) and maintaining the website or database under subsection (c)(2), the administrator may use other printed publication, telecommunication, the Internet, or other media to inform the public of the existence of unclaimed property held by the administrator.

Legislative Note: *A state that does not have counties should substitute the name of its local governmental entity in subsection (c)(1).*

Comment

The administrator's notice requirement has been updated from prior acts to reflect the growing and varied forms of communicating and transmitting information used by apparent owners in contemporary times. As reflected in Section 503(b), stakeholders in the securities industry were particularly interested in allowing notice by electronic mail. Where prior acts required mere publication of lists by administrators, this Act puts a greater emphasis on facilitating administrator outreach through publication and websites or similar databases to apparent owners to increase awareness of their property and how to claim it.

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

Comment

This section is new and is designed to facilitate administrators under this Act accessing information in the possession of other state officials which may help identify and locate owners of unclaimed property.

[ARTICLE] 6

TAKING CUSTODY OF PROPERTY BY ADMINISTRATOR

SECTION 601. DEFINITION OF GOOD FAITH. In this [article], payment or delivery of property is made in good faith if a holder:

(1) had a reasonable basis for believing, based on the facts then known, that the property was required or permitted to be paid or delivered to the administrator under this [act]; or

(2) made payment or delivery:

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

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

Comment

The definition of "good faith" under this Act has been modified from the definition in the 1981 Act (Section 20) and the 1995 Act (Section 10). Section 601(1) was incorporated from the 1981 and 1995 Act definitions. However, Sections 601(2)(A)-(B) are entirely new based on holders' response to actions of or guidance from administrators.

SECTION 602. DORMANCY CHARGE.

(a) A holder may deduct a dormancy charge from property required to be paid or delivered to the administrator if:

(1) a valid contract between the holder and the apparent owner authorizes imposition of the charge for the apparent owner's failure to claim the property within a specified time; and

(2) the holder regularly imposes the charge and regularly does not reverse or otherwise cancel the charge.

(b) The amount of the deduction under subsection (a) is limited to an amount that is not unconscionable considering all relevant factors, including the marginal transactional costs incurred by the holder in maintaining the apparent owner's property and any services received by the apparent owner.

Comment

The 1995 Act provides that dormancy charges are permissible to the extent these charges are not "unconscionable." (Section 5). This limitation was drawn from Section 302 of the Uniform Commercial Code but the 1995 Act does not provide a definition of "unconscionable." This Act offers some context as to when amounts might be deemed unconscionable, such as consideration of the marginal transactional costs incurred by the holder, as well as any services received by the apparent owner, compared to the amount of charge assessed.

SECTION 603. PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) Except as otherwise provided in this section, on filing a report under Section 401, the holder shall pay or deliver to the administrator the property described in the report.

(b) If property in a report under Section 401 is an automatically renewable deposit and a penalty or forfeiture in the payment of interest would result from paying the deposit to the administrator at the time of the report, the date for payment of the property to the administrator is

extended until a penalty or forfeiture no longer would result from payment, if the holder informs the administrator of the extended date.

(c) Tangible property in a safe-deposit box may not be delivered to the administrator until [120] days after filing the report under Section 401.

(d) If property reported to the administrator under Section 401 is a security, the administrator may:

(1) make an endorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer, its transfer agent, or the securities intermediary to transfer the security; or

(2) dispose of the security under Section 702.

(e) If the holder of property reported to the administrator under Section 401 is the issuer of a certificated security, the administrator may obtain a replacement certificate in physical or book-entry form under [insert citation to Section 8-405 of the Uniform Commercial Code]. An indemnity bond is not required.

(f) The administrator shall establish procedures for the registration, issuance, method of delivery, transfer, and maintenance of securities delivered to the administrator by a holder.

(g) An issuer, holder, and transfer agent or other person acting under this section under instructions of and on behalf of the issuer or holder is not liable to the apparent owner for, and must be indemnified by the state against, a claim arising with respect to property after the property has been delivered to the administrator.

(h) A holder is not required to deliver to the administrator a security identified by the holder as a non-freely transferable security. If the administrator or holder determines that a security is no longer a non-freely transferable security, the holder shall deliver the security on the

next regular date prescribed for delivery of securities under this [act]. The holder shall make a determination annually whether a security identified in a report filed under Section 401 as a non-freely transferable security is no longer a non-freely transferable security.

Comment

Section 603 largely tracks Section 8 of the 1995 Act, with a few modifications.

Section 603(b) which permits a delay in payment to the administrator of an automatically renewable deposit that is subject to penalty or forfeiture, now allows the holder to inform the administrator of the date when the property will be payable to the administrator and obtain an extension without incurring a penalty or causing forfeiture.

Sections 603(d) and (e) particularize the general duty stated in Section 603(a) with respect to investment securities, including securities positions held directly and securities positions held indirectly through accounts with brokers or other intermediaries (referred to as a “security entitlement” under revised Article 8 of the Uniform Commercial Code). The administrator has the same rights under UCC Article 8 as other persons who succeed by operation of law to securities or security entitlements, such as the executor or administrator of a decedent. Section 603(e) deals with situations where the holder reporting abandoned property is itself the issuer of a certificated security, and hence does not have the original certificate to turn over to the administrator. And, Section 603(e) provides that the administrator can invoke the provisions of UCC Article 8 governing replacement certificates, without being required to post an indemnity bond.

Section 603(f) requires the administrator to establish procedures for the registration, issuance, method of delivery, transfer and maintenance of securities delivered to the administrator. This is intended to create clarity and to reduce conflict between holders and administrators regarding the proper form.

Section 603(g) indemnifies a person causing a replacement certificate to be issued to the administrator from any claims that the person acted wrongfully in so doing. The indemnification is desirable in that it eliminates any duty of the transferring authority to make an independent investigation into whether the listed owner of the security is in fact missing, or into other factors which might affect the administrator’s right to obtain custody of the property.

Section 603(h) reflects the new exemption in this Act for non-freely transferable securities, and provides that such securities are not required to be paid or delivered to the administrator.

SECTION 604. EFFECT OF PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) On payment or delivery of property to the administrator under this [act], the

administrator as agent for the state assumes custody and responsibility for safekeeping the property. A holder that pays or delivers property to the administrator in good faith and substantially complies with Sections 501 and 502 is relieved of liability arising thereafter with respect to payment or delivery of the property to the administrator.

(b) This state shall defend and indemnify a holder against liability on a claim against the holder resulting from the payment or delivery of property to the administrator made in good faith and after the holder substantially complied with Sections 501 and 502.

Comment

When property is delivered to the administrator, the holder is relieved of all liability for any delivery made in good faith. Section 601 sets forth the definition of good faith which *inter alia* allows the holder to rely on determinations as to reportability made by the administrator.

If after property has been delivered to the administrator, a person or another state makes a claim against the holder for the property, the state, upon request, is required to defend the holder and to provide indemnification against any liability asserted against the holder with respect to the property turned over to the administrator in good faith.

SECTION 605. RECOVERY OF PROPERTY BY HOLDER FROM ADMINISTRATOR.

(a) A holder that under this [act] pays money to the administrator may file a claim for reimbursement from the administrator of the amount paid if the holder:

(1) paid the money in error; or

(2) after paying the money to the administrator, paid money to a person the holder reasonably believed entitled to the money.

(b) If a claim for reimbursement under subsection (a) is made for a payment made on a negotiable instrument, including a traveler's check, money order, or similar instrument, the holder must submit proof that the instrument was presented and payment was made to a person the holder reasonably believed entitled to payment. The holder may claim reimbursement even

if the payment was made to a person whose claim was made after expiration of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute, or court order.

(c) If a holder is reimbursed by the administrator under subsection (a)(2), the holder may also recover from the administrator income or gain under Section 607 that would have been paid to the owner if the money had been claimed from the administrator by the owner to the extent the income or gain was paid by the holder to the owner.

(d) A holder that under this [act] delivers property other than money to the administrator may file a claim for return of the property from the administrator if:

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

(2) the apparent owner has claimed the property from the holder.

(e) If a claim for return of property under subsection (d) is made, the holder shall include with the claim evidence sufficient to establish that the apparent owner has claimed the property from the holder or that the property was delivered by the holder to the administrator in error.

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

(g) A holder is not required to pay a fee or other charge for reimbursement or return of property under this section.

(h) Not later than 90 days after a claim is filed under subsection (a) or (d), the administrator shall allow or deny the claim and give the claimant notice of the decision in a record. If the administrator does not take action on a claim during the 90 day period, the claim is deemed denied.

(i) The claimant may initiate a proceeding under [the state administrative procedures act] for review of the administrator's decision or the deemed denial under subsection (h) not later than:

(1) Thirty days following receipt of the notice of the administrator's decision; or

(2) One hundred twenty days following the filing of a claim under subsection (a) or (d) in the case of a deemed denial under subsection (h).

(j) A final decision in an administrative proceeding initiated under subsection (i) is subject to judicial review by the [court][as a matter of right in a de novo proceeding on the record in which either party is entitled to introduce evidence as a supplement to the record].

Legislative Note: *A state that has or allows judicial review of the decision of an administrative proceeding should delete the brackets at the end of subsection (j) and retain the language creating a right to de novo review on the record with either party being free to submit additional evidence to supplement this record. If de novo review is not possible in the state, the state should delete the bracketed language.*

Comment

Section 605 modifies provisions found in the 1981 (Section 20) and 1995 Acts (Section 10). Section 605(a) and Section 605(d) reflect the added entitlement provided by this Act of holder reimbursement where money is paid or other property delivered to the administrator in error. Section 605(c) now explicitly provides in the text of the Act concepts reflected in comments to Section 20 of the 1981 Act and Section 10 of the 1995 Act, namely, that when the holder is entitled to reimbursement, any income or gain on property held by the administrator and otherwise payable to the owner under Section 607, shall also be paid to the holder.

SECTION 606. PROPERTY REMOVED FROM SAFE-DEPOSIT BOX. Property removed from a safe-deposit box and delivered under this [act] to the administrator under this [act] is subject to the holder's right to reimbursement for the cost of opening the box and a lien or contract providing reimbursement to the holder for unpaid rent charges for the box. The administrator shall reimburse the holder from the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

Comment

Section 608 authorizes the administrator to take custody of property prior to the time for presuming abandonment. Administrators have expressed a need for this authority to enable them to take possession of property, such as the contents of a safe deposit box repository, when the holder is terminating business but the property is not yet reportable. Additionally, other holders which have conducted business in the state and are ceasing operations might use the provisions of that section.

SECTION 607. CREDITING INCOME OR GAIN TO OWNER'S ACCOUNT.

(a) If property other than money is delivered to the administrator, the owner is entitled to receive from the administrator income or gain realized or accrued on the property before the property is sold. If the property was an interest-bearing demand, savings, or time deposit, the administrator shall pay interest at the lesser of the rate of [insert legal rate] or the rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the administrator and ends on the earlier of the expiration of 10 years after its delivery or the date on which payment is made to the owner.

(b) Interest on interest-bearing property is not payable under this section for any period before the effective date of this [act], unless authorized by [law superseded by this [act]].

Legislative Note: *A state should insert which laws are superseded by this Act in subsection (b).*

Comment

Under this section the owner of interest earning bonds or bank deposits, or dividend paying stock, will generally receive interest or income which the property earned while in the administrator's custody.

SECTION 608. ADMINISTRATOR'S OPTIONS AS TO CUSTODY.

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

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

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

(b) A holder may pay or deliver property to the administrator before the property is presumed abandoned under this [act] if the holder:

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

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

(3) first obtains the administrator's consent in a record to accept payment or delivery.

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

(d) On payment or delivery of property under subsection (b), the property is presumed abandoned.

Comment

Section 608 is a departure from its analogue in the 1981 Act (Section 27) and in the 1995 Act (Section 17). Section 608(b) now provides that, in addition to obtaining the consent of the administrator, the holder must meet several other requirements, including providing notice to the apparent owner (as set forth in Section 501), before the holder may deliver property to the administrator before it is presumed abandoned. Where the 1981 and 1995 Acts provide that the prematurely delivered property would not be presumed abandoned until the relevant period has run, this Act provides that the property is presumed abandoned upon delivery and meeting the requirements of this section.

SECTION 609. DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL VALUE; IMMUNITY FROM LIABILITY.

[(a)] If the administrator takes custody of property delivered under this [act] and later

determines that the property has no substantial commercial value or that the cost of disposing of the property will exceed the value of the property, the administrator may return the property to the holder or destroy or otherwise dispose of the property.

[(b) An action or proceeding may not be commenced against the state, an agency of the state, the administrator, another officer, employee, or agent of the state, or a holder for or because of an act of the administrator under this section, except for intentional misconduct or malfeasance.]

Legislative Note: *A state should determine whether subsection (b) is covered by its sovereign immunity tort claims act and decide how to proceed with subsection (b). If it chooses not to include subsection (b), the state should remove it and the brackets from around [a].*

Comment

This section provides for the disposition of property which has no commercial value. As an example, the contents of safety deposit boxes often include such items as rent receipts, personal correspondence and lapsed insurance policies. In such cases, these contents might have some personal significance to the owner, which the administrator would take into consideration in determining for what period of time the administrator will hold the property awaiting a claim by the owner. However, in the usual situation there will be no interest to be preserved by maintaining this property under state custody.

Under this section the administrator would be free to retain property having no commercial value. Further, the administrator could transfer it to other agencies or institutions which might have an interest in the property because of its historical value or other independent significance.

SECTION 610. PERIODS OF LIMITATION AND REPOSE.

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

(b) The administrator may not commence an action or proceeding to enforce this [act] with respect to the reporting, payment, or delivery of property more than five years after the

holder filed a non-fraudulent report under Section 401 with the administrator. The parties may agree in a record to extend the limitation in this subsection.

(c) The administrator may not commence an action, proceeding, or examination with respect to a duty of a holder under this [act] more than 10 years after the duty arose.

Comment

Section 610(a) is consistent with Section 29 of the 1981 Act and Section 19 of the 1995 Act, the so-called “anti-limitations provisions,” such as these. Some contend that anti-limitations provisions are inconsistent with the U.S. Supreme Court’s recognition that priority rules are established based upon the debtor-creditor relationship, as created by state law, *see e.g., Delaware v. New York*, 507 U.S. 490, 503 (the holder’s legal obligations...defin[e] the escheatable property at issue”), however, this contention is not as persuasive as the rationale which underlies the holdings of the various courts that have upheld the policy underlying anti-limitations provisions of preventing “private escheat.” *See, e.g., Blue Cross of N. California v. Cory*, 120 Cal. App. 3d 723,740 (1981).

Section 610(b) is a departure from the 1981 (Section 29) and 1995 Acts (Section 19). Under this section, an administrator is precluded from bringing an action to enforce this Act five years after the holder has filed a non-fraudulent report in compliance with Article 4. Variations of this provision currently exist in several states’ unclaimed property acts. *See, e.g., Idaho Code Ann. § 14-529; 765 Ill. Comp. Stat. Ann. 1025/23.5; Mo. Ann. Stat. § 447.548; Neb. Rev. Stat. § 69-1315; Okla. Stat. Ann. tit. 60, § 666(C); Va. Code Ann. § 55-210.17.B.-C.*

Section 610(c) is a return to the limitations provision provided for in the 1981 Act, which provides for a 10 year statute of limitations, without any contingencies (Section 29 of the 1981 Act). By contrast, the 1995 Act, at Section 19, provides that the 10 year limitations period is only effective as to specifically identified property included in a report as filed. This is not the rule recognized by this Act. This 10 year limitations period provides a holder with a clear cut-off date on which it can rely.

[ARTICLE] 7

SALE OF PROPERTY BY ADMINISTRATOR

SECTION 701. PUBLIC SALE OF PROPERTY.

(a) Subject to Section 702, not earlier than [three] years after receipt of property presumed abandoned, the administrator may sell the property.

(b) Before selling property under subsection (a), the administrator shall give notice to the

public of:

- (1) the date of the sale; and
- (2) a reasonable description of the property.

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

- (1) at public sale at a location in this state which the administrator determines to be the most favorable market for the property;
- (2) on the Internet; or
- (3) on another forum the administrator determines is likely to yield the highest net proceeds of sale.

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

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

Comment

Section 701 corresponds to Section 22(a) of the 1981 Uniform Act and Section 12(a) of the 1995 Uniform Act. However, this section makes the sale of property by the administrator permissible rather than obligatory. Date of the proposed sale and a reasonable description is now required to be part of the notice given the public and the time frame for published notice of sale other than on the Internet or any other forum now can be no longer than the week before sale. Further, it gives the administrator the right to conduct a sale on the Internet if the administrator determines it is likely to yield the highest net proceeds.

SECTION 702. DISPOSAL OF SECURITIES.

(a) The administrator may not sell or otherwise liquidate a security until three years after the administrator receives the security and gives the apparent owner notice under Section 503 that the administrator holds the security.

(b) The administrator may not sell a security listed on an established stock exchange for less than the price prevailing on the exchange at the time of sale. The administrator may sell a security not listed on an established exchange by any commercially-reasonable method.

Comment

In order to give additional protection to the missing owner of a security which has been presumed abandoned, subsection (a) directs the administrator to hold that security for at least three years and requires that the apparent owner be given notice that the administrator holds the security. Subsection (b) is similar to Section 22(b) of the 1981 Uniform Act and Section 12(b) of the 1995 Uniform Act, except that it provides the administrator with greater latitude in selling a security which is not listed on an established exchange.

SECTION 703. RECOVERY OF SECURITIES OR VALUE BY OWNER.

(a) If the administrator sells a security before the expiration of six years after delivery of the security to the administrator, an apparent owner that files a valid claim under this [act] of ownership of the security before the six-year period expires is entitled, at the option of the administrator, to receive:

- (1) replacement of the security; or
- (2) the market value of the security at the time the claim is filed, plus dividends, interest, and other increments on the security up to the time the claim is paid.

(b) Replacement of the security or calculation of market value under subsection (a) must take into account a stock split, reverse stock split, stock dividend, or similar corporate action.

(c) A person that makes a valid claim under this [act] of ownership of a security after expiration of six years after delivery of the security to the administrator is entitled to receive:

- (1) the security the holder delivered to the administrator, if it is in the custody of the administrator, plus dividends, interest, and other increments on the security up to the time the administrator delivers the security to the person; or
- (2) the net proceeds of the sale of the security, plus dividends, interest, and other

increments on the security up to the time the security was sold.

Comment

As provided in Section 703, the administrator is permitted to sell the security after three years following delivery of the security to the administrator. If the administrator sells the security after the three-year period prescribed in Section 703, a missing owner may still make a claim for the security within six years following delivery to the administrator. If a missing owner makes a claim within this six-year period, the administrator must decide to either replace the security or give the owner the market value of the security on the date it is claimed. Thus there is a genuine incentive for an administrator to hold this property for longer than the permitted three-year period. If a claim is not made until after the six-year period, the owner is only entitled to the security, and accumulated proceeds therefrom, if it is still in the administrator's possession, or the net proceeds of the sale made in accordance with this Article.

It is intended that claims made under this section will be payable out of unclaimed property funds held by the administrator.

SECTION 704. PURCHASER OWNS PROPERTY AFTER SALE. A purchaser of property at a sale conducted by the administrator under this [act] takes the property free of all claims of the owner, a previous holder, or a person claiming through the owner or holder. The administrator shall execute documents necessary to complete the transfer of ownership to the purchaser.

SECTION 705. MILITARY MEDAL OR DECORATION.

(a) The administrator may not sell a medal or decoration awarded for military service in the armed forces of the United States.

(b) The administrator, with the consent of the respective organization under paragraph (1), agency under paragraph (2), or entity under paragraph (3), may deliver a medal or decoration described in subsection (a) to be held in custody for the owner, to:

(1) a military veterans organization qualified under the Internal Revenue Code[, as amended], 26 U.S.C. Section 501(c)(19);

(2) the agency that awarded the medal or decoration; or

(3) a governmental entity.

(c) On delivery under subsection (b), the administrator is not responsible for safekeeping the medal or decoration.

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b)(1).*

Comment

Military medals and decorations are not considered to be abandoned property appropriate for custodial taking. An alternate means of handling them is made available.

[ARTICLE] 8

ADMINISTRATION OF PROPERTY

SECTION 801. DEPOSIT OF FUNDS BY ADMINISTRATOR.

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

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

Legislative Note: *A state that allows for continuing appropriations and wants to make the payment of claims out of the general fund of the state a self-executing provision should include the following sentence, or something similar, at the end of subsection (b): “Such funds are hereby appropriated on a continuing basis to the administrator for the purposes of this subsection.”*

Comment

States are given the choice in Section 801(a) of where they want to deposit funds received by the administrator after depositing an amount into an account under subsection (b) to pay claims. It is intended, however, that valid claims to be paid that exceed the amount in the account will be paid out of the state's general fund as required by subsection (b).

Section 801(a) is a departure from the 1981 and 1995 Acts in that it does not propose a specific amount of funds to be held by the administrator in order to pay claims. The 1981 Act suggested at least \$25,000 be held in the account, while the 1995 Act suggested at least \$100,000. This Act leaves to the administrator's discretion what a sufficient amount of funds will be. It is contemplated that the amount of the account fund which is ultimately established will reflect a state's experience with paying owners' claims. A further addition to this Act is the requirement that, where the funds held in the account are insufficient to meet the claims of apparent owners, the state must pay the excess amounts from its general fund. This added obligation is intended to ensure that states are properly acting as custodians of these funds.

SECTION 802. ADMINISTRATOR TO RETAIN RECORDS OF PROPERTY.

The administrator shall:

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

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

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

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

SECTION 803. EXPENSES AND SERVICE CHARGES OF ADMINISTRATOR.

Before making a deposit of funds received under this [act] to the [general fund of the state], the administrator may deduct:

(1) expenses of disposition of property delivered to the administrator under this [act];

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

(3) reasonable service charges; and

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

SECTION 804. ADMINISTRATOR HOLDS PROPERTY AS CUSTODIAN FOR OWNER. Property received by the administrator under this [act] is held in custody for the benefit of the owner and is not owned by the state.

Comment

Section 804 does not have an analogue in the 1981 Act or 1995 Act. Although the concept of the state as “custodian” is found throughout earlier versions of the Acts, an express statement such as the one in this Act does not exist. Its inclusion is intended to emphasize that states are not entitled to use these funds, without ensuring that the funds will be available to apparent owners if and when they come to claim them.

[ARTICLE] 9

CLAIM TO RECOVER PROPERTY FROM ADMINISTRATOR

SECTION 901. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.

(a) If the administrator knows that property held by the administrator under this [act] is subject to a superior claim of another state, the administrator shall:

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

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

(b) The administrator is not required to enter into an agreement to transfer property to the other state under subsection (a).

Comment

Section 901 spells out the requirement that administrators report, pay or deliver property to another state whose claim to the property is superior. Neither the 1981 Act nor the 1995 Act have a comparable provision, although this is implicit in those Acts.

Section 901(a) permits either delivery directly from one state to another, or the return of property to the holder to then pay or deliver the property to the other state. Section 901(b) provides that a formal agreement or record of transfer of property from one state to another is not necessary. This is intended to clarify that such agreements and transfers of property are beyond the scope of Section 1202, which deals with interstate agreements and cooperation.

SECTION 902. WHEN PROPERTY SUBJECT TO RECOVERY BY ANOTHER STATE.

(a) Property held under this [act] by the administrator is subject to the right of another state to take custody of the property if:

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

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

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

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

(3) the property was subject to the custody of the administrator of this state under Section 305 and, under the law of the state of domicile of the holder, the property has become subject to a claim by the state of domicile of the holder of abandonment; or

(4) the property:

(A) is a sum payable on a traveler's check, money order, or similar instrument that was purchased in the other state and delivered to the administrator under Section 306; and

(B) under the law of the other state, has become subject to a claim by the other state of abandonment.

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

(c) The administrator shall decide a claim under this section not later than [90] days after it is presented. If the administrator determines that the other state is entitled under subsection (a) to custody of the property, the administrator shall allow the claim and pay or deliver the property to the other state.

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

Comment

Section 902(a)(1) provides that if property was paid to the state of the holder's domicile because the last known address of the owner was not known and it is later established by another state that the last known address of the person entitled to the property was in the other state, the state of domicile should pay the property to the other state.

Section 902(a)(2) addresses the problem of *Nellius v. Tampax, Inc.*, 394 A.2d 333 (Del. Ch. Ct. 1978) in which the holder's records did not reflect the fact that the record owner had sold the property to another. The court concluded, under *Texas v. New Jersey*, that the holder's records were controlling and that it could properly report and deliver the property to the state in which its records showed the owner to be resident. However, as provided in *Texas v. New Jersey* and in paragraph 4, the state of the owner's actual residence could then claim the property from the state to which it was initially reported.

Section 902(a)(3) provides that property initially claimed under a "contacts" test because there was no last known address and the state of domicile had no applicable unclaimed property law may be reclaimed by the state of corporate domicile if it enacts an applicable unclaimed

property law.

Section 902(d) provides that the state that initially receives property later claimed by another state may require an indemnification agreement from the claiming state.

SECTION 903. CLAIM FOR PROPERTY BY PERSON CLAIMING TO BE OWNER.

(a) A person claiming to be the owner of property held under this [act] by the administrator may file a claim for the property on a form prescribed by the administrator. The claimant must verify the claim as to its completeness and accuracy.

(b) The administrator may waive the requirement in subsection (a) and may pay or deliver property directly to a person if:

(1) the person receiving the property or payment is shown to be the apparent owner included on a report filed under Section 401;

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

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

Comment

This Act, at Section 903(b), for the first time provides the administrator with the option to waive the formality of a claim being filed where the property's value is below a certain monetary amount, and where the apparent owner's identity is clear.

The claim may be filed or refiled prior to commencing an action under Section 906. The administrator's decision on a claim is not intended to operate as collateral estoppel or res judicata. A person who has commenced an action under Section 906 may also reassert a claim before the administrator if the action has been dismissed without prejudice. However, a claim which has become the subject of a final judgment may not thereafter be refiled with the administrator.

In a departure from the 1981 and 1995 Acts, this Section, at 904(a), provides a standard of proof by which administrators are to evaluate evidence supporting an apparent owner's claim to property. It is a reasonableness standard that it is ultimately deferential to the administrator.

SECTION 904. WHEN ADMINISTRATOR MUST HONOR CLAIM FOR PROPERTY.

(a) The administrator shall pay or deliver property to a claimant under Section 903(a) if the administrator receives evidence sufficient to establish to the satisfaction of the administrator that the claimant is the owner of the property.

(b) Not later than [90] days after a claim is filed under Section 903(a), the administrator shall allow or deny the claim and give the claimant notice in a record of the decision.

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

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

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

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

(d) If the administrator does not take action on a claim during the [90] day period following the filing of a claim under Section 903(a), the claim is deemed denied.

Comment

In a departure from the 1981 and 1995 Acts, this Section, at 904(a), provides a standard of proof by which administrators are to evaluate evidence supporting an apparent owner's claim to property. It is a reasonableness standard that is ultimately deferential to the administrator.

SECTION 905. ALLOWANCE OF CLAIM FOR PROPERTY.

(a) Not later than [30] days after a claim is allowed under Section 904(b), the administrator shall pay or deliver to the owner the property or pay to the owner the net proceeds of a sale of the property, together with income or gain to which the owner is entitled under

Section 607. On request of the owner, the administrator may sell or liquidate a security and pay the net proceeds to the owner, even if the security had been held by the administrator for less than three years or the administrator has not complied with the notice requirements under Section 702.

(b) Property held under this [act] by the administrator is subject to a claim for the payment of an enforceable debt the owner owes in this state for:

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

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

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

(c) Before delivery or payment to an owner under subsection (a) of property or payment to the owner of net proceeds of a sale of the property, the administrator first shall apply the property or net proceeds to a debt under subsection (b) the administrator determines is owed by the owner. The administrator shall pay the amount to the appropriate state [or local] agency and notify the owner of the payment.

(d) The administrator may make periodic inquiries of state [and local] agencies in the absence of a claim filed under Section 903 to determine whether an apparent owner included in the unclaimed-property records of this state have enforceable debts described in subsection (b). The administrator first shall apply the property or net proceeds of a sale of property held by the administrator to a debt under subsection (b) of an apparent owner which appears in the records of

the administrator and deliver the amount to the appropriate state [or local] agency. The administrator shall notify the apparent owner of the payment.

Legislative Note: *A state that wants to include payment for local taxes in subsection (b)(3) should delete the brackets around “local” and “local taxing authority” wherever they appear in the section. However, a state with many different local taxing authorities might not want to include local taxes. If so, the state should delete the bracketed language.*

The words “and local” are bracketed in subsection (d) to allow a state to choose whether to include local agencies as those of which inquiry may be made concerning debts owed by the owner.

Comment

Section 905(b)-(d) is new to this Act. The subsections provide for a priority scheme for the payment of property owed to an apparent owner, taking into account the apparent owner’s outstanding obligations and debts. Under Section 905(c), the administrator is to ascertain that property is not subject to claims of certain of the apparent owner’s debtors before making payment or delivering property to the owner.

If there are multiple debts of a claimant to be paid under Section 905(b), and there are not sufficient funds to pay them all, the debts should be paid, to the extent possible, in the order in which they are listed in subsection (b).

SECTION 906. ACTION BY PERSON WHOSE CLAIM IS DENIED. Not later than one year after filing a claim under Section 903(a), the claimant may commence an action against the administrator in the [appropriate court] to establish a claim that has been denied or deemed denied under Section 903(d). [On final determination of the action, the court may, on application, award to the [plaintiff] [prevailing party] its reasonable attorney’s fees, costs, and expenses of litigation.]

Legislative Note: *The bracketed language at the end of this section may be included or deleted according to the public policy of the state concerning statutory awards of attorney’s fees. If the state elects to include attorney’s fees, the state must decide whether to restrict the award of attorney’s fees to the plaintiff regardless which side prevails or only to the prevailing party.*

Comment

Section 906 largely tracks its analogue in the 1981 Act (Section 26) and the 1995 Act (Section 16). The sole change is that a one year limitation period is imposed on the time during

which a claimant may commence an action against an administrator. The previous Acts did not include such a limitations period.

[ARTICLE] 10

VERIFIED REPORT OF PROPERTY; EXAMINATION OF RECORDS

SECTION 1001. VERIFIED REPORT OF PROPERTY. If a person does not file a report required by Section 401 or the administrator believes that a person may have filed an inaccurate, incomplete, or false report, the administrator may require the person to file a verified report in a form prescribed by the administrator. The verified report must:

- (1) state whether the person is holding property reportable under this [act];
- (2) describe property not previously reported or about which the administrator has inquired;
- (3) specifically identify property described under paragraph (2) about which there is a dispute whether it is reportable under this [act]; and
- (4) state the amount or value of the property.

Comment

Section 1001 is designed to facilitate compliance with the Act and provides for the filing of a negative report by the holder if the administrator requires such a report. It allows a holder to minimize disruption which would otherwise be caused to the holder if an examination of records instead were conducted by the administrator.

SECTION 1002. EXAMINATION OF RECORDS TO DETERMINE

COMPLIANCE. The administrator, at reasonable times and on reasonable notice, may:

- (1) examine the records of a person, including examination of appropriate records in the possession of an agent of the person under examination, if the records are reasonably necessary to determine whether the person has complied with this [act];
- (2) issue an administrative subpoena requiring the person or agent of the person to make

records available for examination; and

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

Comment

Aside from the requirement that the administrator conduct the examination at reasonable times and upon reasonable notice, the principal limitations on the administrator's right to examine are constitutional limitations. *See generally Temple-Inland, Inc. v. Cook*, 2016 WL 3536710, at *9 (D. Del. June 28, 2016) (finding that, when taken together, several aspects of the State of Delaware's audit of a holder violated substantive due process, including, (1) waiting 22 years to conduct an audit, (2) failing to give holders notice they would need to retain unclaimed property records, and (3) applying a prolonged retroactive period to scope of the audit). Even though the Fourth Amendment to the federal Constitution does not extend as broadly to corporations as to individuals, [*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946)], inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of a governmental interest. [*Donovan v. Dewey*, 452 U.S. 594 (1980)]. This Act is believed to meet that standard. Also, since one of the dual purposes of this act is the collection of revenue, reference may be made to the cases holding that it is not an unreasonable search to require taxpayers to produce their books and records. [See Annot., "Constitutionality of statutory provisions for examination of records, books, or documents for taxation purpose," 104 ALR 522]

The Act intends that even a person that does not believe it has property in its possession subject to the Act, is nevertheless subject to an examination by the administrator or its agent. It would make no sense for a putative holder to be able to refuse to be subject to an audit on the basis that the holder doesn't have any reportable unclaimed property. That is what the audit is intended to determine or verify.

SECTION 1003. RULES FOR CONDUCTING EXAMINATION.

(a) The administrator shall adopt rules governing procedures and standards for an examination under Section 1002, including rules for use of an estimation, extrapolation, and statistical sampling in conducting an examination.

(b) An examination under Section 1002 must be performed under rules adopted under subsection (a) and with generally accepted examination practices and standards applicable to an unclaimed-property examination.

(c) If a person subject to examination under Section 1002 has filed the reports required under Section 401 and Section 1001 and has retained the records required by Section 404, the

following rules apply:

- (1) The examination must include a review of the person's records.
- (2) The examination may not be based on an estimate unless the person expressly consents in a record to the use of an estimate.
- (3) The person conducting the examination shall consider the evidence presented in good faith by the person in preparing the findings of the examination under Section 1007.

Comment

In adopting rules under Subsection (a), administrators are encouraged to do so in a way that promotes the use of relevant national standards and uniformity of practice among the states. There are generally accepted auditing standards applicable to the conduct of unclaimed property audits based on generally accepted government auditing standards. For example, California has adopted regulations concerning these standards applicable specifically to the policies and procedures governing the activities of third-party auditors who are engaged to conduct audits of holders of unclaimed property. *See, e.g.*, Cal. Civ. Proc. Code § 1571(c). A source used by the Pennsylvania unclaimed property administrator is the generally accepted auditing standards issued by the Comptroller General of the United States. *See* 61 Pa Code § 951.31(b).

SECTION 1004. RECORDS OBTAINED IN EXAMINATION. Records obtained and records, including work papers, compiled by the administrator in the course of conducting an examination under Section 1002:

- (1) are subject to the confidentiality and security provisions of [Article] 14 and are not public records;
- (2) may be used by the administrator in an action to collect property or otherwise enforce this [act];
- (3) may be used in a joint examination conducted with another state, the United States, a foreign country or subordinate unit of a foreign country, or any other governmental entity if the governmental entity conducting the examination is legally bound to maintain the confidentiality and security of information obtained from a person subject to examination in a manner

substantially equivalent to [Article] 14;

(4) must be disclosed, on request, to the person that administers the unclaimed property law of another state for that state's use in circumstances equivalent to circumstances described in this [article], if the other state is required to maintain the confidentiality and security of information obtained in a manner substantially equivalent to [Article] 14;

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

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

Comment

Third parties reportedly have sought to subpoena documents obtained by an administrator or its third-party auditors in the course of an unclaimed property audit in litigation unrelated to the audit of a holder under this Act. The provisions of Section 1004(5) are not intended to apply in such situations.

SECTION 1005. EVIDENCE OF UNPAID DEBT OR UNDISCHARGED OBLIGATION.

(a) A record of a putative holder showing an unpaid debt or undischarged obligation is prima facie evidence of the debt or obligation.

(b) A putative holder may establish by a preponderance of the evidence that there is no unpaid debt or undischarged obligation for a debt or obligation described in subsection (a) or that the debt or obligation was not, or no longer is, a fixed and certain obligation of the putative holder.

(c) A putative holder may overcome prima facie evidence under subsection (a) by establishing by a preponderance of the evidence that a check, draft, or similar instrument was:

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

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

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

(4) paid, satisfied, or discharged;

(5) issued in error;

(6) issued without consideration;

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

(8) voided [not later than 90 days] [within a reasonable time] after issuance for a valid business reason set forth in a contemporaneous record; or

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

(d) In asserting a defense under this section, a putative holder may present evidence of a course of dealing between the putative holder and the apparent owner or of custom and practice.

Comment

In establishing the rules for determining the first and second priority states, the rationale used by the Court in *Delaware v. New York*, 507 U.S. 490, 501 (1993) was to analyze the relationship between the debtor who owed an unpaid obligation and was therefore the “holder” of the property, and the creditor—the person to whom the debt was owed was the “owner.” In its analysis the Court said: “In framing a state’s power of escheat, we must first look to the law that creates property and binds persons to honor property rights. . . First we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. . . ‘[P]roperty and interest in property are creatures of state law. [The] law that creates property necessarily defines the legal relationships under which certain parties (‘debtors’) must discharge obligations to others [creditors].’” *Id.*

Section 1005 is intended to give greater clarity to the kinds of evidence which the holder can use to rebut the presumption if such evidence is available. It is consistent with cases which have ruled on the matter. See *Insurance Co. of North America v. Knight*, 291 N.E.2d 40 (1972), *Aetna Cas. & Sur. v. State ex rel. Eagerton*, 414 So.2d 455 (Ala. 1982); *Blue Cross of Northern Cal. v. Cory*, 120 Cal. App.3d 723 (1981), *State ex rel. McCann v. Bank of Am., N.A.*, 120 Cal. Rptr. 3d 204, 216 (Ct. App. 2011), *State ex rel. Bowen v. Bank of Am. Corp.*, 23 Cal. Rptr. 3d 746, 760 (Ct. App. 2005) and *Revenue Cabinet v. Blue Cross & Blue Shield*, 702 S.W.2d 433, 435 (Ky. 1986). See also *Riggs Nat’l Bank v. District of Columbia*, 581 A.2d 1229 (D.C. App.

1990). It is also consistent with Article 3-308 of the Uniform Commercial Code. Under U.C.C. Section 3-308(2), "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." The reason for requiring a plaintiff to produce the instrument is "to show that the plaintiff is in fact the holder, and in order to protect the defendant from double liability." 6 Anderson, Uniform Commercial Code, sec. 3-307:4, p. 158 (3rd ed., 1993). The administrator, by establishing issuance of the instrument, succeeds to all rights of the payee. Because the issuer is relieved of all liability on the instrument by paying the obligation to the state as unclaimed property, and is indemnified by the state, there is no chance that the issuer would be held liable twice, and therefore the administrator is not required to produce the instrument in order to possess the same rights as a holder in due course. This provision, however, combined with the statute of repose and record retention provisions, are meant to provide greater fairness in addressing the presumption of property being deemed unclaimed when significant time has lapsed between the original alleged obligation and the determination that such obligation has become unclaimed property.

SECTION 1006. FAILURE OF PERSON EXAMINED TO RETAIN RECORDS.

If a person subject to examination under Section 1002 does not retain the records required by Section 404, the administrator may determine the value of property due using a reasonable method of estimation based on all information available to the administrator, including extrapolation and use of statistical sampling when appropriate and necessary, consistent with examination procedures and standards adopted under Section 1003(a) and in accord with Section 1003(b).

Comment

If a holder has not maintained records as required by this Act, the administrator may use other existing records or reasonable estimation techniques consistent with the established standards adopted pursuant to this Act. The holding in *Texas v. New Jersey* is intended to prevent multiple liability of holders. However, adverse consequences, which might be characterized as "penalties," resulting from failure to maintain records as required by Section 404 could result and, depending on the result obtained and the methodology of estimation employed, could be consistent with that decision. The prospect of double liability should be diminished when statistical sampling is not used to establish an amount of owner addressed liability by a first priority rule state but is instead used, as noted in *Delaware v. New York*, by second priority rule states. 507 U.S. 490, 509 (1993) (rejecting the use of "a statistical surrogate instead of the debtor's records to locate the last known addresses of creditors," as such use of estimation would "vary the application of the primary rule...").

A federal district court in Delaware has recently recognized the outer limits of the use of estimation techniques in an audit. *Temple-Inland, Inc. v. Cook*, 2016 WL 3536710, at *9 (D. Del. June 28, 2016) (finding that, when taken together, several aspects of the State of Delaware's

audit of a holder violated substantive due process, including, (1) waiting 22 years to conduct an audit, (2) failing to give holders notice they would need to retain unclaimed property records, and (3) applying a prolonged retroactive period to scope of the audit).

SECTION 1007. REPORT TO PERSON WHOSE RECORDS WERE

EXAMINED. At the conclusion of an examination under Section 1002, the administrator shall provide to the person whose records were examined a complete and unredacted examination report that specifies:

- (1) the work performed;
- (2) the property types reviewed;
- (3) the methodology of any estimation technique, extrapolation, or statistical sampling used in conducting the examination;
- (4) each calculation showing the value of property determined to be due; and
- (5) the findings of the person conducting the examination.

Comment

Section 1007 was based on MICH. COMP. LAWS ANN. § 567.251 and is intended to promote transparency in the examination of a holder. Importantly, this record will form the basis on which a holder may contest the reasonability of administrator conduct and correctness of the findings and calculations made during the course of an examination.

SECTION 1008. COMPLAINT TO ADMINISTRATOR ABOUT CONDUCT OF PERSON CONDUCTING EXAMINATION.

(a) If a person subject to examination under Section 1002 believes the person conducting the examination has made an unreasonable or unauthorized request or is not proceeding expeditiously to complete the examination, the person in a record may ask the administrator to intervene and take appropriate remedial action, including countermanding the request of the person conducting the examination, imposing a time limit for completion of the examination, or reassigning the examination to another person.

(b) If a person in a record requests a conference with the administrator to present matters that are the basis of a request under subsection (a), the administrator shall hold the conference not later than [30] days after receiving the request. The administrator may hold the conference in person, by telephone, or by electronic means.

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

Comment

Section 1008 has been added to provide a method by which a person being examined may seek timely intervention and redress from the administrator if the putative holder believes it is being treated unreasonably or unfairly by the examiner.

SECTION 1009. ADMINISTRATOR’S CONTRACT WITH ANOTHER TO CONDUCT EXAMINATION.

(a) In this section, “related to the administrator” refers to an individual who is:

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

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

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

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

(b) The administrator may contract with a person to conduct an examination under this [article]. The contract may be awarded only under [insert citation to the state competitive procurement of services of private contractors statute].

(c) If the person with which the administrator contracts under subsection (b) is:

(1) an individual, the individual may not be related to the administrator; or

(2) a business entity, the entity may not be owned in whole or in part by the administrator or an individual related to the administrator.

(d) At least 60 days before assigning a person under contract with the administrator under subsection (b) to conduct an examination, the administrator shall demand in a record that the person to be examined submit a report and deliver property that is previously unreported.

(e) If the administrator contracts with a person under subsection (b):

(1) the contract may provide for compensation of the person based on a fixed fee, hourly fee, or contingent fee;

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

(3) on request by a person subject to examination by a contractor, the administrator shall deliver to the person a complete and unredacted copy of the contract and any contract between the contractor and a person employed or engaged by the contractor to conduct the examination.

(f) A contract under subsection (b) is subject to public disclosure without redaction under [the state's freedom of information act].

Legislative Note: *If a state does not allow use of contingent fee examiners, subsection (e)(1) should be revised to delete the words "contingent fee" and subsection (e)(2) should be deleted.*

Comment

This section expressly permits the use of contract auditors working on a contingent fee basis. However, this section limits any actual conflict of interest, or the appearance of conflict of interest, between the administrator and the contractor conducting the examination by precluding the administrator from contracting with related persons, and requiring that such third party auditing contracts be awarded on a competitive bid basis. This provision mandates that a person who is to undergo an examination or be audited by a third party contractor be given unredacted

copies of the contract. *See* also Section 1011.

While use of contingent fee auditors can be viewed as controversial, state administrators contend these auditors are necessary for audits to be undertaken and many state laws permit use of contract auditors. One state, North Carolina, has enacted legislation banning, as a general matter, the use of contingent fee auditors. N.C. Gen. Stat. § 116B-8. Illinois and Virginia have banned the use of contingent fee examiners for in-state businesses. 765 Ill. Comp. Stat. 1025/24.5; Va. Code Ann. § 55-210.24(D).

SECTION 1010. LIMIT ON FUTURE EMPLOYMENT. The administrator or an individual employed by the administrator who participates in, recommends, or approves the award of a contract under Section 1009(b) on or after the effective date of this [act] may not be employed by, contracted with, or compensated in any capacity by the contractor or an affiliate of the contractor for [two] years after the latest of participation in, recommendation of, or approval of the award or conclusion of the contract.

Comment

Developments in Delaware caused that state to enact laws imposing post-employment constraints on administrators who have awarded contingent fee contracts to third party examiners from being able to leave state employment and go to work for the firms to whom they have awarded contingent fee examination contracts. *See* 12 *Del.C.* Section 1155(b). Section 1010 reflects what is viewed as a reasonable limit on a contract auditor's employment by state personnel involved in hiring the contract auditor, once such individuals leave state employment.

SECTION 1011. REPORT BY ADMINISTRATOR TO STATE OFFICIAL.

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

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

(A) the part voluntarily paid or delivered; and

(B) the part paid or delivered as a result of an examination under Section

1002, separated into the part recovered as a result of an examination conducted by:

(i) a state employee; and

(ii) a contractor under Section 1009;

(2) the name of and amount paid to each contractor under Section 1009 and the percentage the total compensation paid to all contractors under Section 1009 bears to the total amount paid or delivered to the administrator as a result of all examinations performed under Section 1009;

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

(4) the total amount of claims made by persons claiming to be owners which:

(A) were denied;

(B) were allowed; and

(C) are pending.

(b) The report under subsection (a) is a public record subject to public disclosure without redaction under [insert citation to the state freedom of information act].

Legislative Note: *A state should list in subsection (a) the government officials who are to receive the report.*

Comment

Section 1011 is intended to require greater transparency as to terms and use of contract auditors to other state authorities and to the public. This section establishes detailed reporting requirements intended to better inform the public and other responsible officials of the state with how much net revenue from unclaimed property is being collected through the use of contract examiners and at what cost. The current act does not require such disclosures. Contracts are awarded and amounts paid to contractors which may pass outside public notice. This section allows assessment of how effective the administrator has been in collecting unclaimed property

and returning unclaimed property to owners.

SECTION 1012. DETERMINATION OF LIABILITY FOR UNREPORTED REPORTABLE PROPERTY. If the administrator determines from an examination conducted under Section 1002 that a putative holder failed or refused to pay or deliver to the administrator property which is reportable under this [act], the administrator shall issue a determination of the putative holder's liability to pay or deliver and give notice in a record to the putative holder of the determination.

Comment

Issuance by the administrator of a determination of liability under Section 1012 starts the running of the period that gives the administrator legal remedy under Section 1201 for the failure of a putative holder to report unclaimed property, as well as the running of the period in which a holder may contest a determination it does not agree with under Section 1101.

[ARTICLE] 11

DETERMINATION OF LIABILITY; PUTATIVE HOLDER REMEDIES

SECTION 1101. INFORMAL CONFERENCE.

(a) Not later than 30 days after receipt of a notice under Section 1012, the putative holder may request an informal conference with the administrator to review the determination. Except as otherwise provided in this section, the administrator may designate an employee to act on behalf of the administrator.

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

(1) not later than [20] days after the date of the request, the administrator shall set the time and place of the conference;

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

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

(4) the request tolls the 90-day period under Sections 1103 and 1104 until notice of a decision under paragraph (7) has been given to the putative holder or the putative holder withdraws the request for the conference;

(5) the conference may be postponed, adjourned, and reconvened as the administrator determines appropriate;

(6) the administrator or administrator's designee with the approval of the administrator may modify a determination made under Section 1012 or withdraw it; and

(7) the administrator shall issue a decision in a record and provide a copy of the record to the putative holder and examiner not later than [20] days after the conference ends.

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

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

(1) discuss the determination made under Section 1012; and

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

(e) If the administrator fails to act within the period prescribed in subsection (b)(1) or (7), the failure does not affect a right of the administrator, except that interest does not accrue on the amount for which the putative holder was determined to be liable under Section 1012 during the period in which the administrator failed to act until the earlier of:

(1) the date under Section 1103 the putative holder initiates administrative review or files an action under Section 1104; or

(2) 90 days after the putative holder received notice of the administrator's determination under Section 1012 if no review was initiated under Section 1103 and no action was filed under Section 1104.

(f) The administrator may hold an informal conference with a putative holder about a determination under Section 1012 without a request at any time before the putative holder initiates administrative review under Section 1103 or files an action under Section 1104.

(g) Interest and penalties under Section 1204 continue to accrue on property not reported, paid, or delivered as required by this [act] after the initiation, and during the pendency, of an informal conference under this section.

Comment

A holder who has received a notice of determination of liability under Section 1012 it believes is incorrect or illegal has a series of optional remedies to use to challenge the determination. One of these, addressed in Section 1101, allows the holder to ask for an informal conference designed to be flexible and to allow less expensive non-litigious resolution of the matter. Requesting this conference tolls the time frame for passing administration review under Section 1103 or judicial review under Section 1104 until notice of a decision in a record by the administrator or withdrawal of the request for a conference.

SECTION 1102. REVIEW OF ADMINISTRATOR'S DETERMINATION. A putative holder may seek relief from a determination under Section 1012 by:

(1) administrative review under Section 1103; or

(2) judicial review under Section 1104.

SECTION 1103. ADMINISTRATIVE REVIEW.

(a) Not later than 90 days after receiving notice of the administrator's determination under Section 1012, a putative holder may initiate a proceeding under [insert citation to the state

administrative procedure act] for review of the administrator's determination.

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

Legislative Note: *A state that has or allows judicial review of the decision of an administrative proceeding should delete the brackets at the end of subsection (b) and retain the language creating a right to de novo review on the record with either party being free to submit additional evidence to supplement this record. If de novo review is not possible in the state, the state should delete the bracketed language.*

Comment

If a putative holder decides not to request an informal conference or is not satisfied with the results of a conference, the holder is faced with a second choice: the holder may seek an administrative review under the state's administrative procedures act or may file suit for judicial review of the determination. This second choice must be made within 90 days of receipt by the putative holder of the notice of determination of liability. If the putative holder decides to seek administrative review and is not satisfied with the decision of the administrative judge, it may, within the time prescribed in the state's rules, file an action in the appropriate court to appeal the decision of the administering judge. If a state has *de novo* judicial review of administrative decisions, either party has the right to supplement the record or present additional evidence at the subsequent court hearing.

SECTION 1104. JUDICIAL REMEDY.

(a) Not later than 90 days after receiving notice of the administrator's determination under Section 1012, the putative holder may:

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

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

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

[(c) On the final determination of an action filed under subsection (a), the [court] may, on application, award to the [plaintiff] [prevailing party] its reasonable attorney's fees, costs, and expenses, of litigation.]

[(d)]A putative holder that is the prevailing party in an action under subsection (a)(2) for refund of money paid to the administrator is entitled to interest on the amount refunded, at the same rate a holder is required to pay to the administrator under Section 1204(a), from the date paid to the administrator until the date of the refund.

Legislative Note: *The bracketed language of subsection (c) may be included or deleted according to the public policy of the state concerning statutory awards of attorney's fees. If the state elects to include attorney's fees, the state must decide whether to restrict the award of attorney's fees to the plaintiff regardless of which side prevails or only to the prevailing party.*

Comment

If the putative holder decides not to seek administrative review, it may nevertheless, within 90 days following receipt of the notice of determination (unless extended by requesting an informal conference) file an action in the appropriate court seeking either a declaration of whether it is required to pay the determined liability or a refund of any sums paid to the administrator together with interest at the same rate of interest required to be paid to the administrator.

Article 11 adds for the first time remedies to a holder who does not agree with the administrator's determination of liability. Neither the 1981, the 1995 nor any prior Acts provided a procedure by which holders could dispute or appeal determinations of unclaimed property liability by administrators. Although various states have enacted some sort of review and/or appeals process, *see e.g.*, 12 *Del. C.* § 1156; Tenn. Code Ann. § 66-29-125, this Act provides a far more comprehensive process, uniquely permitting the holder to choose among various forms of remedy.

[ARTICLE] 12

ENFORCEMENT BY ADMINISTRATOR

SECTION 1201. JUDICIAL ACTION TO ENFORCE LIABILITY.

(a) If a determination under Section 1012 becomes final and is not subject to administrative or judicial review, the administrator may commence an action in the [court] or in an appropriate court of another state to enforce the determination and secure payment or delivery of past due, unpaid, or undelivered property. The action must be brought not later than [one] year after the determination becomes final.

(b) In an action under subsection (a), if no court in this state has jurisdiction over the defendant, the administrator may commence an action in any court having jurisdiction over the defendant.

***Legislative Note:** A state that requires approval of its Attorney General of the action to be taken by an administrator under this section should include language that requires approval to be obtained before proceeding with the desired action.*

Comment

The administrator may enforce a determination of liability that has become final by bringing an enforcement action in court against the holder within one year after the determination becomes final. After that, it is time barred.

SECTION 1202. INTERSTATE AND INTERNATIONAL AGREEMENT; COOPERATION.

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

(1) exchange information with another state or foreign country relating to property presumed abandoned or relating to the possible existence of property presumed abandoned; and

(2) authorize in a record another state or foreign country or a person acting on behalf of the other state or country to examine its records of a putative holder as provided in

[Article] 10.

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

Comment

Section 1202 continues the policy of the 1981 Act and 1995 Act to increase the efficiency of state unclaimed property program administration by promoting interstate cooperation, in both the realms of reporting compliance and enforcement. Newly added is the expansion of the cooperation to include foreign countries.

Reciprocal agreements envisioned by Section 1202 do not require the consent of Congress under the Compact Clause of the Constitution, Art. I, § 10, cl. 3. The Supreme Court has held that the restriction of the Compact Clause is limited to combinations or agreements that tend to increase the political power of the states to such an extent that it interferes with the supremacy of the United States. *United States Steel v. Multi-State Tax Commission*, 434 U.S. 452 (1978).

SECTION 1203. ACTION INVOLVING ANOTHER STATE OR FOREIGN COUNTRY.

(a) The administrator may join another state or foreign country to examine and seek enforcement of this [act] against a putative holder.

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

(c) The administrator may request the official authorized to enforce the unclaimed property law of another state or foreign country to commence an action to recover property in the other state or country on behalf of the administrator. This state shall pay the costs, including

reasonable attorney's fees and expenses, incurred by the other state or foreign country in an action under this subsection.

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

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

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

Legislative Note: *A state that requires approval of its Attorney General of the actions to be taken by an administrator under this section should include language that requires approval to be obtained before proceeding with the desired action.*

Comment

Similar to Section 1202, Section 1203 continues the policy of the 1981 Act and 1995 Act to increase the efficiency of state unclaimed property program administration by promoting interstate cooperation, in both the realms of reporting compliance and enforcement. Newly added is the expansion of the cooperation to include foreign countries.

SECTION 1204. INTEREST AND PENALTY FOR FAILURE TO ACT IN TIMELY MANNER.

(a) A holder that fails to report, pay, or deliver property within the time prescribed by this [act] shall pay to the administrator interest at an annual rate of [[] percent] [the rate of interest payable to the department of revenue of this state on delinquent taxes] on the property or value

of the property from the date the property should have been reported, paid, or delivered to the administrator until the date reported, paid, or delivered.

(b) Except as otherwise provided in Section 1205 or 1206, the administrator may require a holder that fails to report, pay, or deliver property within the time prescribed by this [act] to pay to the administrator, in addition to interest included under subsection (a), a civil penalty of \$[200] for each day the duty is not performed, up to a cumulative maximum amount of \$[5,000].

Legislative Note: *In subsection (a), a state needs to decide a rate of interest to impose on a holder that has not performed in a timely manner. If a variable rate is chosen, the rate should be tied to a rate that is calculable on its face, such as the prime rate or London Interbank Official Rate (LIBOR).*

Comment

In order to facilitate compliance with unclaimed property reporting and remitting obligations, this Act includes moderate penalties and interest where failure to comply is non-willful and non-fraudulent.

SECTION 1205. OTHER CIVIL PENALTIES.

(a) If a holder enters into a contract or other arrangement for the purpose of evading an obligation under this [act] or otherwise willfully fails to perform a duty imposed on the holder under this [act], the administrator may require the holder to pay the administrator, in addition to interest as provided in Section 1204(a), a civil penalty of \$[1,000] for each day the obligation is evaded or the duty is not performed, up to a cumulative maximum amount of \$[25,000], plus [25] percent of the amount or value of property that should have been but was not reported, paid, or delivered as a result of the evasion or failure to perform.

(b) If a holder makes a fraudulent report under this [act], the administrator may require the holder to pay to the administrator, in addition to interest under Section 1204(a), a civil penalty of \$[1,000] for each day from the date the report was made until corrected, up to a cumulative maximum of \$[25,000], plus [25] percent of the amount or value of any property that

should have been reported but was not included in the report or was underreported.

Comment

As opposed to the compliance incentivizing penalties and interest in Section 1204, the penalties and interest in this section are more severe, reflecting the fact that non-compliance under this, Section 1205, is a result of willful or fraudulent conduct on the part of the holder. It would seem appropriate that in instances where a holder has acted in good faith penalties should not apply.

SECTION 1206. WAIVER OF INTEREST AND PENALTY. The administrator:

(1) may waive, in whole or in part, [interest under Section 1204(a) and] penalties under Section 1204(b) or 1205; and

(2) shall waive a penalty under Section 1204(b) if the administrator determines that the holder acted in good faith and without negligence.

***Legislative Note:** In a state in which interest on unpaid taxes is not permitted to be waived, the bracketed language in paragraph (1) should be deleted. Otherwise, the state should make a policy decision whether the administrator should have the authority to waive payment of interest.*

Comment

Recognizing that not all instances of non-compliance with unclaimed property reporting and remitting obligations are the result of neglect or bad faith, Section 1206 provides administrators the discretion to waive penalties and interest where the holder acted in good faith and without negligence.

[ARTICLE] 13

AGREEMENT TO LOCATE PROPERTY OF APPARENT OWNER HELD BY ADMINISTRATOR

SECTION 1301. WHEN AGREEMENT TO LOCATE PROPERTY

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

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

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

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

Comment

Section 1301 reflects the common practice of an apparent owner entering into a contract with a third party, whereby the third party locates property of the apparent owner held in custody by administrators for a fee. Such agreements are consistent with the overall policy of this Act of reuniting owners with their property. However, in order to provide protection for apparent owners, such agreements are subject to certain restrictions, as reflected in Section 1302.

SECTION 1302. WHEN AGREEMENT TO LOCATE PROPERTY VOID.

(a) Subject to subsection (b), an agreement under Section 1301 is void if it is entered into during the period beginning on the date the property was paid or delivered by a holder to the administrator and ending 24 months after the payment or delivery.

(b) If a provision in an agreement described in subsection (a) applies to mineral proceeds for which compensation is to be paid to the other person based in whole or in part on a part of the underlying minerals or mineral proceeds not then presumed abandoned, the provision is void regardless of when the agreement was entered into.

(c) An agreement under subsection (a) which provides for compensation in an amount that is unconscionable is unenforceable except by the apparent owner. An apparent owner that believes the compensation the apparent owner has agreed to pay is unconscionable or the administrator, acting on behalf of an apparent owner, or both, may file an action in [the appropriate court] to reduce the compensation to the maximum amount that is not unconscionable. [On the final determination of an action filed under this subsection, the [court] may, on application, award the [plaintiff] [prevailing party] its reasonable attorney's fees, costs,

and expenses of litigation.]

(d) An apparent owner or the administrator may assert that an agreement described in this section is void on a ground other than it provides for payment of unconscionable compensation.

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

Legislative Note: *The bracketed language at the end of subsection (c) may be included or deleted according to the public policy of the state concerning statutory awards of attorney's fees. If the state elects to include attorney's fees, the state must decide whether to restrict the award of attorney's fees to the plaintiff regardless of which side prevails or only to the prevailing party.*

Comment

Section 1302 provides protection for apparent owners entering into fee agreements for the location of property held by state administrators. This ensures that such agreements promote rather than hinder the policy of reuniting owners with their property.

SECTION 1303. RIGHT OF AGENT OF APPARENT OWNER TO RECOVER PROPERTY HELD BY ADMINISTRATOR.

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

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

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

Comment

Section 1303 is meant to facilitate the operation of agreements between an apparent owner and a third party agent, who has contracted to recover property on behalf of the apparent owners. Providing a uniform procedure by which such agents are permitted to act on behalf of apparent owners facilitates property ending up with the rightful owners.

[ARTICLE] 14

CONFIDENTIALITY AND SECURITY OF INFORMATION

SECTION 1401. DEFINITIONS; APPLICABILITY.

(a) In this [article], “personal information” means:

(1) information that identifies or reasonably can be used to identify an individual, such as first and last name in combination with the individual’s:

(A) social security number or other government-issued number or identifier;

(B) date of birth;

(C) home or physical address;

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

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

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

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

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

(3) any combination of data that, if accessed, disclosed, modified, or destroyed without authorization of the owner of the data or if lost or misused, would require notice or

reporting under [insert citation to state statute regarding privacy and security] and federal privacy and data security law, whether or not the administrator or the administrator's agent is subject to the law.

(b) A provision of this [article] that applies to the administrator or the administrator's records applies to an administrator's agent.

Comment

Certain holders are obligated by law to maintain the confidentiality of non-public personal information in their possession. *See* the Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801 et seq., the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., the Telecommunications Act of 1996, 47 U.S.C. § 222 and the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952. However, during the course of an examination a holder may be required under this Act to provide to the administrator certain confidential or non-public personal information. Article 14 is 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. Some state unclaimed property laws already have confidentiality provisions. *See*, e.g., Del. Code tit. 12, § 1141; Nev. Rev. Stat. § 120A.500; Wash. Rev. Code § 63.29.380.

SECTION 1402. CONFIDENTIAL INFORMATION.

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

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

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

(3) personal information and other information derived or otherwise obtained by or communicated to the administrator or the administrator's agent from an examination under this [act] of the records of a person.

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

Comment

Section 1402 identifies the categories of information that are deemed to be sensitive and must be kept confidential in accordance with this Act and other laws. It is intended that such information in the possession of the administrator be protected from improper disclosure, including any disclosure required under freedom of information laws.

SECTION 1403. WHEN CONFIDENTIAL INFORMATION MAY BE DISCLOSED.

(a) When reasonably necessary to enforce or implement this [act], the administrator may disclose confidential information concerning property held by the administrator or the administrator's agent only to:

(1) an apparent owner or the apparent owner's [insert the term or terms for personal representative in the state], attorney, other legal representative, relative, or agent designated under Section 1303 to have the information;

(2) the [insert the term or terms for personal representative in the state] [executor], other legal representative, relative of a deceased apparent owner, agent designated under Section 1303 by the deceased apparent owner, or a person entitled to inherit from the deceased apparent owner;

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

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

(5) a person subject to an examination as required by Section 1004(6).

(b) Except as otherwise provided in Section 1402(a), the administrator shall include on the website or in the database required by Section 503(c)(2) the name of each apparent owner of property held by the administrator. The administrator may include in published notices, printed publications, telecommunications, the Internet, or other media and on the website or in the database additional information concerning the apparent owner's property if the administrator believes the information will assist in identifying and returning property to the owner and does not disclose personal information except the home or physical address of an apparent owner.

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

Comment

In the process of determining any potential unclaimed property held by a holder or reuniting an apparent owner with property, effective administration of this Act requires that certain disclosures of confidential information be made. This is not unlike Federal and State laws regarding the disclosure of confidential tax information in the possession of the government. See, e.g., 26 U.S.C. § 6103; Tenn. Code § 67-1-1704. Section 1403 is intended to codify such permitted disclosures without expanding such disclosures beyond what is necessary to administer the Act and within the confines of applicable confidentiality laws. This includes permitting the administrator to publish information on a website accessible to apparent owners in order to facilitate the return of property to the owner and permitting the administrator to provide holders with confidential information that is obtained in connection with the examination of such holder.

SECTION 1404. CONFIDENTIALITY AGREEMENT. A person to be examined under Section 1002 may require, as a condition of disclosure of the records of the person to be examined, that each person having access to the records disclosed in the examination execute and deliver to the person to be examined a confidentiality agreement that:

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

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

[article] applicable to the person.

Comment

Section 1404 codifies the existing practice in many jurisdictions of permitting confidentiality and non-disclosure agreements between holders and the administrator (and its representatives) in order to protect any non-public personal information or other confidential information provided by holders over the course of the examination.

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

Comment

Section 1405 is meant to provide holders and owners with additional safeguards by limiting the disclosure of confidential or non-public information to persons that are not under a duty to maintain the confidentiality of such information, as may be required by Federal or State law.

SECTION 1406. SECURITY OF INFORMATION.

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

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

(1) implement administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information required by [insert citation to state statute regarding privacy and security] and federal privacy and data security law whether or not the administrator or the administrator's agent is subject to the law;

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

(3) protect against unauthorized access to or use of the information which could result in substantial harm or inconvenience to a holder or the holder's customers, including insureds, annuitants, and policy or contract owners and their beneficiaries.

(c) The administrator:

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

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

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

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

Comment

Section 1406 provides that if a holder is required to include confidential information in a report to the administrator that is otherwise subject to Federal or State confidentiality laws, additional safeguards must be employed. For example "secure means" can be such things as a password-protected website or another form of encrypted mechanism for delivering information, securely.

SECTION 1407. SECURITY BREACH.

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

(1) a suspected loss, misuse or unauthorized access, disclosure, modification, or destruction of confidential information obtained from the holder in the possession of the administrator or an administrator's agent; and

(2) any interference with operations in any system hosting or housing confidential information which:

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

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

(b) Except as necessary to inform an insurer, attorney, investigator, or others as required by law, the administrator and an administrator's agent may not disclose, without the express consent in a record of the holder, an event described in subsection (a) to a person whose confidential information was supplied by the holder.

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

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

(2) cooperate with the holder with respect to:

(A) any notification required by law concerning a data or other security breach; and

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

Comment

Section 1407 requires that notice be provided to holders and their customers of any improper or inadvertent disclosure of confidential or non-public personal information, including such disclosures that could lead to holder liability unrelated to the unclaimed property examination. This notice requirement is similar to data breach notifications mandated under Federal law, see, e.g., the Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801 et seq., the Office of Management and Budget's "Breach Notification Policy," the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, and state law, see, e.g., Ariz. Rev. Stat. § 44-7501; Ark. Code § 4-110-101 et seq.; Cal. Civ. Code §§ 1798.29, 1798.80 et seq.; Colo. Rev. Stat. § 6-1-716; Del. Code tit. 6, § 12B-101 et seq.; Fla. Stat. §§ 501.171, 282.0041, 282.318(2)(i); Haw. Rev. Stat. § 487N-1 et seq.; Ind. Code §§ 41-11 et seq.,

24-4.9 et seq.; Iowa Code §§ 715C.1, 715C.2; Kan. Stat. § 50-7a01 et seq.; KRS § 365.732, KRS §§ 61.931 to 61.934; Me. Rev. Stat. tit. 10 § 1347 et seq.; Md. Code Com. Law §§ 14-3501 et seq., Md. State Govt. Code §§ 10-1301 to -1308; Mass. Gen. Laws § 93H-1 et seq.; Mich. Comp. Laws §§ 445.63, 445.72; Minn. Stat. §§ 325E.61, 325E.64; Mo. Rev. Stat. § 407.1500; Neb. Rev. Stat. §§ 87-801 to -807; Nev. Rev. Stat. §§ 603A.010 et seq.; N.H. Rev. Stat. §§ 359-C:19 et seq.; N.J. Stat. § 56:8-161, -163; N.D. Cent. Code §§ 51-30-01 et seq., 51-59-34(4)(d); 73 Pa. Stat. § 2301 et seq.; Tenn. Code § 47-18-2107; § 8-4-119 (2015 S.B. 416, Chap. 42); Vt. Stat. tit. 9 § 2430, 2435; Va. Code § 18.2-186.6, § 32.1-127.1:05, § 22.1-20.2; W.V. Code §§ 46A-2A-101 et seq.

SECTION 1408. INDEMNIFICATION FOR BREACH.

[(a) If a claim is made or action commenced arising out of an event described in Section 1407(a) relating to confidential information possessed by the administrator, this state shall indemnify, defend, and hold harmless a holder and the holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action; and

(2) a liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, established by the claim or action.]

[(b)] If a claim is made or action commenced arising out of an event described in Section 1407(a) relating to confidential information possessed by an administrator's agent, the administrator's agent shall indemnify, defend, and hold harmless a holder and the holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action and

(2) a liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, established by the claim or action.

[(c)] The administrator shall require an administrator's agent that will receive

confidential information required under this [act] to maintain adequate insurance for indemnification obligations of the administrator's agent under subsection (b). The agent required to maintain the insurance shall provide evidence of the insurance to:

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

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

Legislative Note: Section 1408(a) is bracketed to indicate that states which may not provide for blanket indemnification may delete this section.

Comment

The indemnification provided in Section 1408 is meant to encourage administrators to employ proper safeguards to prevent the disclosure of confidential or non-public personal information and to protect holders from liability resulting from such disclosures.

[ARTICLE] 15

MISCELLANEOUS PROVISIONS

SECTION 1501. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform [act] consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 1503. TRANSITIONAL PROVISION.

(a) An initial report filed under this [act] for property that was not required to be reported

before the effective date of this [act], but that is required to be reported under this [act], must include all items of property that would have been presumed abandoned during the 10-year period preceding the effective date of this [act] as if this [act] had been in effect during that period.

(b) This [act] does not relieve a holder of a duty that arose before the effective date of this [act] to report, pay, or deliver property. Subject to Section 610(b) and (c), a holder that did not comply with the law governing unclaimed property before the effective date of this [act] is subject to applicable provisions for enforcement and penalties in effect before the effective date of this [act].

[SECTION 1504. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

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

SECTION 1505. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

SECTION 1506. EFFECTIVE DATE. This [act] takes effect