

SUMMARY OF THE PROVISIONS OF THE REVISED UNIFORM UNCLAIMED PROPERTY ACT (2016)

INTRODUCTION

The Revised Uniform Unclaimed Property Act is the fifth in a series of uniform unclaimed property acts going back to the original 1954 Act. It began as a revision of the 1995 Act. All jurisdictions have some form of unclaimed property laws. Thirty-nine (39) jurisdictions have adopted one of the uniform unclaimed property acts. However, fourteen (14) – most notably New York, California, Texas, and Delaware – have not adopted any version of the uniform acts.

The concept of the state taking custody of unclaimed property arose out of the common law of escheat by which the sovereign takes title to property of a decedent who dies intestate without surviving legal heirs. All states have some form of escheat laws which allow a judicial determination declaring that property of an intestate decedent who dies without heirs is legally vested in the state. Similar laws apply to articles and money that have been lost or abandoned and found by a stranger – so called “treasure trove” laws. The key to both is that there is no owner, or the identity of the owner is unknown.

This Act does not deal with escheat. It only deals with a state’s right to take custody of unclaimed property held by a holder that is presumed to have been abandoned by the owner through the passage of time – from 1 to 15 years, depending on the nature of the property. It allows the state to take custody of property and hold it indefinitely for the benefit of its owner, to be returned to the owner upon proper proof of ownership being presented.

In a number of instances – for example in the case of a gift card – the identity of the owner is not known and as a practical matter property being held by the state for an owner whose identity is not known is effectively operates the same as property that has escheated to the state in that with no known owner, only the state can claim the right to use the funds for its own

purposes, and this is in fact what every state does, holding back an amount estimated to be sufficient to honor claims of owners as they are presented. Therefore, states that receive property as a first priority state – the state of known owner’s last known address – usually take custody of a greater percentage of unclaimed property that is returned to owners than is the case with second priority states. Second priority states are states such as Delaware where most multi-state corporations are incorporated for purposes of the Act, domiciled and mostly receive property where there is no known owner or the owner’s address is not known so it cannot be claimed by a first priority state.

Unclaimed property involves a lot of money – states were estimated to hold over \$40 billion in 2010. As a consequence, this revision has attracted a lot of attention and has brought together a significant number of interested parties who have attended the public drafting sessions and cumulatively have provided the committee with over 2,500 pages of comments and suggestions which have been posted on the ULC website.

In addition to the members of the drafting committee the panel includes four ABA Advisors and two representatives of the National Association of Unclaimed Property Administrators.

The draft will be up for second and final reading at the Annual Conference to be held in Stowe, Vermont, July 7-14, 2016. Six hours have been reserved for the draft to be read. The version before you is very different from the version that was presented for first reading at the 2015 Conference. While the content is largely the same, the format is very different. It has been broken into shorter sections and rearranged to be more readable. There are now 96 Sections divided among 15 Articles.

Section 101. This Act is referred to as the Revised Act.

Section 102. The Act begins with definitions. Many are carried over from 1995, but several are new. Note (5) which reflects that a provision for securing and maintaining confidential information has been added as Article 14.

(6) is a change in the definition of “domicile” with the result that LLC’s and LP’s will now have their domicile in the state of their filing or formation as has always been the case with corporations.

(7) “Electronic” and (8) “Electronic mail” reflect the development of electronic technology since the 1995 Act.

(10) Defines “game-related digital content” as digital game value that cannot be monetized and therefore excluded from the definition of property required to be turned over to the Administrator.

(11) “Gift card” is defined in brackets to reflect that there are other definitions that states may prefer to use.

(14) “Loyalty cards” which also cannot be monetized are also excluded from the definition of property and are not required to be turned over to the Administrator.

(19) “Net card value” is the unused portion of a “stored value card” as defined in (29).

(20) “Non-freely transferable security” is defined and is later given special treatment in the Act.

(22) “Payroll card” is defined to differentiate the funds it represents from unpaid wages with the results that the holding period is three years rather than one year.

(24) Note that “Property” includes “virtual currency” which is later defined at (31) and included as property required to be delivered to the Administrator.

Note paragraph (C) which excludes “game-related digital content” from the definition of

property. It is left to each state to choose whether to exempt “gift cards” (as have 33 states) or include them, and whether to exempt “in-store credits for returned merchandise” as have some states, or include them as most states have

(25) “Putative Holder” defines a person who is said to be, but has not yet been determined to be the holder of unclaimed property.

(26) “Record” is a term used consistently in ULC Acts to mean a preserved record of information.

(27) “Security” is defined by reference to Art. 8 of the Uniform Commercial Code.

(29) “Stored value card,” of which there are many forms, is defined to include gift cards and “payroll cards,” but does not include “loyalty cards” and “game related digital content.”

(31) “Virtual currency” is a new development since the 1995 Act and is defined here to be consistent with a parallel uniform act under consideration by the ULC regulating virtual currency. Since “virtual money” is “included property” the definition excludes “loyalty cards” and “game related digital content,” as well as their software/protocols on the basis that, unlike “virtual currency,” neither of them is capable of being monetized.

(32) With a new definition of “security,” “worthless securities” are excluded and need to be defined.

Section 103. This Section keeps intact the provision in the 1995 Act that includes foreign owned property as property within the Act unless it is property located in a foreign country which arose from a foreign transaction.

ARTICLE 2 - Section 201. This sets out dormancy periods for travelers checks of 15 years based on federal law, and for money orders seven years, also based on federal law. The other dormancy periods are either three years or one year, with a five year exception for gift cards which is also based on federal law.

Note the bracketed provisions on lines 20-21 that optional exclusion of “in-store credits for returned merchandise,” and the bracketed reference to Section 207 on line 22 which allows each state the option to include or exclude gift cards. This is also covered by bracketing Section 207 on p. 12. See Leg. Note at top of p. 13.

Section 202. This Section provides special dormancy periods for tax deferred retirement and health savings accounts. It is tied to required minimum distributions at age 70.5, and utilizes a second mailing standard.

Section 203. Note that since funds in 529 ABLE accounts are held by the states, they are not included property. All other tax advantaged funds not covered by the special rules of Section 202 are under a three year dormancy beginning at the earlier of the first date of required minimum distributions or 30 years after being opened.

Section 204. UTMA and UGMA accounts are tied to the age of majority with a second mailing standard.

Section 207. Puts “gift cards” in brackets. If a state chooses to include them, the dormancy period will be five years.

Section 208. Provides for a three year dormancy period for securities which is also tied to a second mailing standard.

Section 209. The dormancy period of related property interests is tied to the underlying property.

Section 210. Deals with indications of interest in property by the owner which will stop the running of the dormancy period and is very specific with regard to different situations involving various accounts with special rules for insurance and annuity contracts.

Section 211. Deals with when an insurance company or annuity company has knowledge of the death of an insured or annuitant. These rules were drafted after negotiations with both

insurance industry and state representatives and represent what the Committee believes is a fair and reasonable compromise. It says what happens when a Death Master File match occurs, but does not mandate that the holder use a DMF. It incorporates by reference the provisions of the NCOIL Model Act of 2014.

Administrators and auditors are allowed to conduct a DMF comparison search. The Committee does not take a position with regard to which side is correct in the ongoing disputes between insurance companies and Administrators. (See paragraph (c).)

Section 212. Incorporates retained asset accounts into the policy or contract.

ARTICLE 3. Sets out the priority rules for which state is allowed to take custody of specific property.

Sections 301 and 302. These Sections provide that when the state of the owner's last known address is known or determinable, that state has first priority even if the address is not sufficient for the delivery of U.S. Mail. It provides for the situation where the state, as determined from the zip code, puts the owner in a state different from the owner's physical address. Lookout Mountain, TN/GA, is an example where the post office is in Tennessee, but some residents living in the zip code area are physically located in Georgia.

Section 303. This Section covers multiple addresses.

Section 304. Establishes the state with second priority which is the state of domicile of the holder if the first priority state cannot be determined under either **Sections 302 or 303.**

Section 305. Allows for the state where the underlying transaction took place to have third priority if neither the first or second priority state provides for custodial taking of the property, unless either or both of the first and second priority states specifically exempts or excludes the property from the Act. A Third Circuit case holds that third priority states must give full faith and credit to laws of a higher priority state that chooses to exclude the property.

This rule is carried out in **Section 305**.

Section 307. Establishes that the Administrator has the burden of proof to prove:

1. the existence and amount of the property
2. that it is abandoned, and
3. is the property subject to the custody of the Administrator.

This burden is similar to the burden on the tax administrator to determine a tax deficiency. It can be carried from examination of the records of a holder. A record of an unpaid debt or undischarged obligation is *prima facie* evidence of the debt or obligation. (See **Section 1005**, *supra*)

ARTICLE 4 - Report of Holders.

Section 401. Provides that the holder of property presumed to be abandoned is required to report it to the Administrator. The holder may file the report electronically and cannot be required to provide a paper report. The holder may contract with a third party to complete and file the report, but remains responsible for its timely and accurate filing.

Section 402. Sets out what is required to be contained in the report. Note, if it is filed electronically, it must be in a secure format, and it must protect confidential information of the owner.

Note the floor of \$50 for individual owners and aggregate filing of small amounts.

Section 403. Provides for a filing due date of November 1 for the preceding 12 months. However, for insurance companies the date is May 1 for preceding years. The time for filing may be extended by the Administrator.

Section 404. Provides a 10 year record retention requirement after the date the report is filed. The Administrator has discretion to establish a shorter period.

Section 405. This Section says that property is reportable and payable even if no demand

for payment or presentment has been made.

ARTICLE V - Notices to Owners

Section 501. Sets out the requirement that holders must notify owners.

Section 502. Spells out what must be contained in the notice to owners.

Section 503. Sets out the duties of the Administrator to notify owners of property held in custody and includes U.S. Mail and electronic mail, as well as publication in a newspaper.

Section 503. This Section also requires the Administrator to maintain a website electronic database of property held for owners.

Section 504. Mandates that other state agencies cooperate with the Administrator in determining the address of owners of unclaimed property being held.

ARTICLE 6. This Article deals with what happens when a holder turns over property to the Administrator. It provides in **Section 601** a definition of “good faith” and in **Section 602** allows a reasonable dormancy charge to be deducted.

Section 603. This Section spells out when and the ways by which various types of property are to be turned over to the Administrator and has special provisions regarding turning over securities.

Paragraph (h) says that holders are not required to turn over “non-freely-transferable securities” (defined in Section 102), but must identify it and say why it is not included. The Administrator can decide whether or not to take it into custody.

Section 604. This Section says what the effect is of turning property over to the Administrator and relieves the holder of further liability to the owner regarding the property. Paragraph (b) provides that the state will indemnify the holder from liability to an owner for property of the owner turned over to the Administrator by the holder in good faith and in substantial compliance with **Section 501** and **Section 502.**

Section 605. This Section says when a holder may recover property from the Administrator which has been delivered in error, or when the holder has subsequently paid money to an owner entitled to the money. Under paragraph (c) the holder will also be entitled to any increments received by the Administrator with respect to the money. Paragraph (d) allows the holder to file a claim under **Section 903.**

Section 607. Entitles the holder also to recover any increments to the property that accrued while the Administrator held the property.

Section 608. Allows the Administrator to decline to take custody of property if its estimated value is less than estimated expenses of sale.

Section 608. This Section also allows a holder to deliver property to the Administrator's custody before the dormancy period has run, but only with the Administrator's consent after notice has been given to the owner.

Section 609. Allows the Administrator to return or destroy property with no substantial value and provides immunity other than for malfeasance or intentional misconduct.

Section 610:

- establishes that the running of a period of limitation on an owner's right to recover abandoned property does not relieve the holder of liability to turn it over to the Administrator.
- provides a five year statute of limitations on audits of holders who have filed a non-fraudulent report, and
- provides a ten year statute of repose which is a bar to further audits. Note that this changes the 1995 Act and returns to the 1981 Act.

ARTICLE 7. This Article sets out rules for sale of property by the Administrator.

Section 701. Allows a public sale or internet sale of property after it has been held for

[3] years.]

Section 702. This Section provides that if the property is a security the owner must be notified prior to its sale, and

Section 703. This Section says that if the Administrator sells a security earlier than six years after it was received, an owner who claims the security is entitled to its replacement or its market value, plus increments received by the Administrator on the security.

Section 704. Establishes that the purchaser of property sold by the Administrator receives clear title and has a right to be indemnified from any loss from a third party claim.

ARTICLE 8, Section 801. Provides for the deposit of funds received by the Administrator into the Treasury, retaining funds estimated to be sufficient to pay owner's claims. However, if the retained fund is not sufficient to pay all claims, excess claims are to be paid from the state's general fund as priority claims.

Section 802. Establishes a record retention duty on the part of the Administrator.

Section 803. Allows the Administrator to recover sale expenses before depositing proceeds of sales, and

Section 804. Establishes that funds received by the Administrator are held in custody for the owner. Custodial funds are not owned by the state, and therefore suits for their recovery are not barred by sovereign immunity.

ARTICLE 9. This Article deals with claims to recover property held by the Administrator.

Section 901 and Section 902. These Sections deal with property held that should have been delivered to another state, and paragraph (d) allows the Administrator to require indemnification before turning over property to another state.

Section 903. Sets out rules for claims made by an owner.

Section 904. Establishes when the Administrator must honor a claim, and what is to be done if the claim is denied.

Section 905. Covers requirements for return of property, and provides that before being turned over to the owner, any property held by the Administrator is subject to debts owed by the owner for

- child support;
- civil or criminal fines, costs, and penalties, and
- state [and local] taxes, plus penalties and interest.

The Administrator may inquire about such debts, and may pay such debts as are established with notification to the owner of the payment. States have the option to delete the reference to local taxes.

Section 906. Authorizes an owner whose claim has been denied or not acted on within 90 days to file suit for recovery in the appropriate court. There is bracketed provision giving a right to recovery of litigation costs.

ARTICLE 10, Section 1001. Deals with the holder's requirement to file an annual report with the Administrator.

Section 1002. Allows the Administrator to conduct an examination of the holder's records, issue an administrative subpoena, and seek judicial enforcement of the subpoena.

Section 1003. Establishes that the Administrator is to adopt rules for the conduct of examinations, including rules for the use of estimation, extrapolation, and statistical sampling. Examinations are to be conducted in accordance with generally accepted examination practices.

Paragraph (3) limits examination of holders who have filed all required reports and retained all required records, by precluding the use of estimates unless consented to by the holder.

Section 1004. Establishes that records received in an examination are subject to the confidentiality and security rules set out in Article 14 and says when, how, and with whom they can be shared. It expressly provides that they are not “public records” subject to disclosure or FOI.

Section 1005. Sets out that a record of an unpaid debt or obligation is *prima facie* evidence of the debt which satisfies the Administrator’s burden of proof under **Section 307**. However, paragraph (b) allows the holder to overcome the presumption by a preponderance of evidence, and paragraph (c) lists the specific circumstances that may be presented by the holder to negate the inference that an uncashed check in the holder’s records is unclaimed property.

Paragraph (d) allows the holder in asserting a defense to present evidence of a course of dealing between the owner and the holder, and of custom and practice.

Section 1006. Establishes that unlike **Section 1003** where records have been retained, in an examination of a holder who has not maintained the required records, the Administrator may establish liability through the use of estimation, extrapolation, and statistical sampling.

Section 1007. Sets out what must be contained in the Administrator’s report to the holder being examined.

Section 1008. Allows a holder being examined to complain to the Administrator about the conduct of the examiner, to have a conference with the Administrator, and to request specific relief from an onerous or overreaching examination.

Section 1009. Allows the Administrator to contract with a person to conduct an examination under this Act, subject to certain limitations on personal relationships between that person and the Administrator.

Paragraph (e) allows the contract with an examiner to provide for compensation of the examiner based on a fixed fee, hourly fee, or contingent fee, with a contingent fee being limited

to not more than [10]% of amounts or value recovered.

Paragraph (f) requires that the contract be awarded under the state's general competitive procurement of services rules, and

Paragraph (g) specifies that all such contracts are subject to public disclosure without redaction under the state's FOI rules.

Section 1010. Limits future employment by auditing firms of Administrators who have been involved in awarding contracts for examinations.

Section 1011. Requires an annual report to be prepared and submitted by the Administrator to an appropriate state government official concerning the total amounts received, the costs of examination, the amounts paid out to claimants, and amounts of claims denied.

Paragraph (e) says the report is a public record subject to disclosure under the state's FOI rules without redaction.

Section 1012. Provides that if the Administrator finds from examination that a holder has not turned over reportable property under the Act, the Administrator shall issue a determination letter to the holder of its liability.

ARTICLE 11. Establishes three optional remedies that are available to a putative holder who does not agree with the Administrator's determination in whole or in part. These remedies are not mutually exclusive.

Section 1101. Provides that within 90 days of receipt of a determination notice, the holder may request an informal conference with the Administrator or his designee to present the holder's reasons and support for disagreement with the determination. The conference is not an administrative remedy, nor is it a contested case.

Section 1102. Provides that the putative holder does not request an informal conference or is not satisfied with the outcome of a conference, he may seek administrative review under

Section 1103 or judicial review under **Section 1104**.

Section 1103. Provides for administrative review under the state's Administrative Procedures Act. The decision of the administrative hearing officer may be appealed to court for judicial review as a matter of right in a *de novo* proceeding on the record with both parties being entitled to introduce evidence to supplement the record.

Section 1104. Allows the holder to bypass informal conference or administrative review and file suit for declaratory judgment, or pay the liability and file suit for refund.

Paragraph (c) allows the court to award attorney's fees and expenses to the [plaintiff] [prevailing party], and

Paragraph (d) entitles a successful holder who recovers monies to an award of interest at the same rate of interest a delinquent holder has to pay under **Section 1204(a)**.

Section 1201. Allows the Administrator to seek judicial enforcement of a final determination of holder liability under **Section 1012** with a [one] year limitation period.

Section 1202. Allows the Administrator to exchange information with another state or foreign country regarding unclaimed property, but only if the other state or country has confidentiality and security requirements substantially equivalent to Article 14, or agrees in a record to be bound by this state's confidentiality and security requirements.

Section 1203. Authorizes the Administrator to join with other states and foreign countries to seek enforcement of this Act, including filing suit in another state court, federal court, or a court in a foreign country.

Section 1204. Provides for assessment of interest and penalties against a holder who fails to timely report and pay or deliver unclaimed property and allows the state to select from three options for calculating interest. Civil penalties of [\$200] per day up to [\$5,000] may also be imposed.

Section 1205. Provides for additional civil penalties for fraud, evasion or willful failure to perform the duties imposed under this Act [\$1,000] per day up to [\$25,000] plus 25% of the amount underreported.

Section 1206. Allows the Administrator to waive interest and penalty.

ARTICLE 13. This Article deals with when agreements made with an owner to find unclaimed property are enforceable (**Section 1301**) and when they are unenforceable (**Section 1302**).

Section 1303. This Section gives an apparent owner's agent the right to recover property held by the Administrator, to receive information concerning the property, and, if authorized by the owner, to bring an action on behalf of the owner for recovery of the claimed property.

ARTICLE 14. Provides for the first time an obligation to maintain confidentiality and security of sensitive information of the owner.

Section 1401. This Section says who, besides the Administrator, is covered by the confidentiality rules.

Section 1402. Defines "sensitive personal information" of the owner.

Paragraph (b) provides that with certain exceptions the records of the Administrator and Administrator's agents, reports and records of the holder, and any information obtained from examination of the holder's records are confidential and exempt from public inspection and disclosure.

Section 1403. This Section says when and to whom confidential information may be disclosed.

Section 1404. Allows a holder undergoing examination to require the examiner to execute confidentiality agreements in a form reasonably satisfactory to the Administrator before turning over its records.

Section 1405. This Section says that other than as required under **Section 501** and **Section 502**, confidential information is not required to be included in the notice the holder is required to give an owner.

Section 1406. Sets out rules by which the security of confidential information is to be protected.

Section 1407. This Section says what the obligations of the various parties are in the event of a security breach and inadvertent unauthorized disclosure of confidential information.

Section 1408. Provides for indemnification by the state for breach by the Administrator, and indemnification by an agent for a breach by the agent. It directs the Administrator to require that its agents maintain insurance adequate to provide indemnification in case of loss from a security breach.

ARTICLE 15. This Article contains miscellaneous provisions common to all uniform acts.

Charles A. Trost
Reporter