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Defending Liberty
Pursuing Justice

October 6, 2014

Ms. Katie Robinson
Staff Liaison
Uniform Law Commission
11 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

Re: Project to Revise the Uniform Unclaimed Property Act

Dear Ms. Robinson:

I am writing on behalf of the American Bar Association (ABA) to provide the following additional recommendations to the Uniform Law Commission's Drafting Committee to Revise the Uniform Unclaimed Property Act (the "UUPA"). We very much appreciate the opportunity to work with the Drafting Committee on this important project and to share our recommendations regarding the revision of the UUPA.

I. DEFINITION OF "LAST KNOWN ADDRESS" (Section 1 of the UUPA)

The ABA recommends that Section 1 of the UUPA be revised to include a definition of "last known address" that is generally consistent with the definition set forth in the 1981 version of the UUPA (the "1981 Act"). The 1981 Act defined "last known address" to mean "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail."[1] The Comment to this provision stated that this definition is "consistent with most state laws which have defined an address." The 1995 version of the UUPA (the "1995 Act") did not define a "last known address," and this lack of guidance has resulted in confusion among states and holders regarding where property should be reported where the holder has some information regarding the address of the owner, such as a zip code or state of location, but lacks a full mailing address. States have split on the issue, with some states arguing that a zip code or other information short of a full mailing address is sufficient, while other states argue that a full mailing address must be available. The U.S. Supreme Court did not define the term "last known address" in *Texas v. New Jersey*, suggesting that it intended the common or ordinary meaning of such term to apply, which was the approach taken by the 1981 Act. The Court further

[1] 1981 Uniform Act, § 1(11).

stated that it intended to create a standard that raised no legal issues and was not factually complex. The Court stated:

> [B]y using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. It may well be that some addresses left by vanished creditors will be in States other than those in which they lived at the time the obligation arose or at the time of the escheat. But such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out.[2]

We would recommend that the Drafting Committee avoid including provisions in the UUPA that are likely to be challenged on the basis that they conflict with federal law and thus are preempted. We believe that defining "last known address" based on a complete mailing address is consistent both with the common meaning of the term "address" as well as with the federal common law rules adopted by the U.S. Supreme Court that base the state's jurisdiction to escheat on whether the holder has a record of the owner's "address." As a result, we believe that such a definition is less likely to be challenged on the basis that it conflicts with these federal common law rules. Notably, such a definition is also consistent with the general purpose of state unclaimed property laws to return missing property to the rightful owner, as a complete mailing address is certainly helpful, if not necessary, to accomplish this purpose.

II. SECURITIES PROPERTY (Multiple Sections of the UUPA)

The ABA recommends that the treatment of securities under the UUPA be substantially revised to more properly protect the interests of owners. In particular, we would recommend as follows:[3]

- First, we would recommend that Section 2(a)(3) of the UUPA be revised to provide the general rule that securities shall not become presumed abandoned until ten (10) years have passed from the later of (1) the date a second mailing to the owner was returned as undeliverable (unless a subsequent mailing to the owner was not returned as undeliverable);[4] and (2) the date of last contact by the owner with respect to the securities. This proposed rule is similar to the 1995 Act rule, insofar as both rules generally apply a "returned mail" test for triggering the dormancy period. A returned mail test is also consistent with the standard applied under federal securities laws for searching for lost shareholders. However, this proposed rule differs from the 1995 Act rule in

[2] *Texas v. New Jersey*, 379 U.S. 674, 681 (1965).

[3] In addition to these recommendations, we anticipate that the ABA will, in the future, be providing recommendations regarding the definition of "holder," which will address additional securities-specific issues, such as how the term "holder" should applied to securities held in IRAs, by broker-dealers, etc.

[4] This "returned mail" standard should be drafted in such a way as to address situations where correspondence is sent electronically as well as through regular mail.

two primary ways: (1) first, it includes a longer dormancy period, which reflects the fact that securities are often long-term investments (and therefore it may not be proper to "presume" the securities to be abandoned only after three or five years[5]); and (2) second, it eliminates the provision in the 1995 Act that would allow the dormancy trigger for securities to start running based on the failure of the owner to cash a dividend check or other distribution. In the experience of our members, many owners of securities are well aware of their investments, but still may not cash dividend checks (or other distributions) because the amounts are immaterial, the check is lost or for other reasons. Accordingly, in such circumstance, we believe that it is more appropriate for the dormancy period on the uncashed dividend (or other distribution) to start running, but not to escheat the underlying securities, as such escheat could well be adverse to the interests of the owner.

- Second, we would recommend that Section 2(a)(14) of the UUPA be revised to provide that securities in a traditional IRA similarly become presumed abandoned ten (10) years from the later of (1) the date a mailing to the owner was returned by the U.S. Post Office as undeliverable (unless a subsequent mailing to the owner was not returned as undeliverable); (2) the date of last contact by the owner with respect to the securities; and (3) the date, if determinable by the holder, that the owner of the account reaches age 70½.[6] This proposed rule is intended to be consistent with both the general practice by holders and what we understand to be the states' positions on this issue, which are both generally tied to the required minimum distribution date for traditional IRAs. At the same time, this proposed rule clarifies significant ambiguities with the 1995 Act rule for IRAs, insofar as that rule (1) generally bases the dormancy period on the date, if determinable by the holder, "by which distribution of the property must begin in order to avoid a tax penalty" (in the experience of our members, the holder will never know this date, as the owner may have multiple accounts, and therefore may not be required to take a distribution from any particular account); (2) arguably requires the dormancy period with respect to the account to start running based on "the date of distribution or attempted distribution of the property" (for the reasons discussed above, the distribution or attempted distribution of property from an account should not result in the escheat of the underlying account; moreover, in the case of an IRA, it may be more reasonable to presume that, if a distribution was requested but not cashed, the owner may have intended the amount of the distribution to remain in the account); and (3) does not technically reference the "returned mail" test for securities, leading to confusion by some states and holders as to how to apply the dormancy rules

[5] In addition, and as discussed further below, the escheat of securities—unlike the escheat of many other types of property—can negatively impact the owner of the securities if, as is common, the state subsequently liquidates the securities. Thus, we believe it is important to have an extended dormancy period to further reduce the likelihood that the owner will be adversely affected by the escheat process.

[6] If the holder does not know the age of the account owner, one possible approach would be to presume the owner to be 18 years of age at the time that the owner first opened the account. Such a rule should, in most cases, prevent the securities from being escheated until the owner reaches age 70½.

when the property that is held in the IRA is securities (in such case, it would seem reasonable to apply both the rule for securities and the rule for IRAs,[7] but the 1995 Act is not explicit on that point). A similar rule could be applied to Roth IRAs, 529s, HSAs and other tax-advantaged accounts, though there is less justification for using the date that the owner reaches age 70½ as a potential trigger date because none of these other types of accounts requires a minimum distribution upon attaining age 70½ (or, technically, April 1 of the year following the year in which the owner attained such age). Accordingly, for securities in these other types of accounts, we would recommend that the securities become presumed abandoned ten (10) years from the later of (1) the date a mailing to the owner was returned by the U.S. Post Office as undeliverable (unless a subsequent mailing to the owner was not returned as undeliverable); (2) the date of last contact by the owner with respect to the securities; and (3) the date, if determinable by the holder, that the owner of the account reaches age 85. We believe that such a rule will preserve the rights of owners by reducing the number of instances in which owners may be adversely affected by the escheat process, either through tax penalties or otherwise.

- Third, we would recommend that Section 12 of the UUPA be revised to provide that a state shall have the right to elect whether to hold the securities on behalf of the owner or sell the securities for their current fair market value; provided, however, that no state should be permitted to sell securities once a claim has been made, unless and until such time that the claim is determined to be without merit, and all opportunities for appeal by the claimant have expired. However, if the state elects to sell the securities within ten (10) years after the shares are escheated, then the owner should have the right to recover the securities that were sold and the state should be obligated to repurchase the securities at their then market value or, if no public market exists for the securities, the state shall reimburse the owner for the approximate value of the securities (as of the date the owner's claim was made). Thus, regardless of whether the securities have appreciated or depreciated in value since they were sold, the owner is returned to the same approximate position he would have been in if the securities had not been sold. This change is intended to further the primary purpose of state unclaimed property laws, which is to preserve the property of the owner, by providing a lengthier period of time during which the owner's interests must be preserved (or the owner must be made whole). The 1995 Act contains a similar provision, but allows the owner to benefit at the expense of the state (by putting the burden of any depreciation on the state) if the securities are sold by the state within three years, and allows the state to benefit at the expense of the owner (by depriving

[7] Otherwise, the policy interest that is served by generally applying a "returned mail" standard for securities will not be served in the case of securities held in an IRA, where it is arguably even less likely that the owner will engage in regular contact with respect to the account, particularly if the owner owns multiple IRAs.

the owner of any appreciation with respect to the securities) if the securities are sold after that date.

- Fourth, we would recommend that Section 17 of the UUPA be revised to provide that the state can decline to accept securities property from any holder by providing notice to the holder of such election. We believe that such a provision is reasonable in light of the fact that securities can change significantly in value, and the carrying cost of holding the securities may be significant.

- Fifth, we would recommend that early reporting of securities be prohibited, except where the holder can demonstrate a compelling need to escheat early (such as where the holder is liquidating its business). This change would further preserve the rights of owners.

- Sixth, we would recommend that a provision be added to the UUPA that expressly grants an owner of securities the right to elect, via contract with the holder, that his or her securities will never be escheated to any state, regardless of the period of inactivity or whether mailings were returned as undeliverable. We believe this change is reasonable due to the nature of securities as an interest in a business rather than as an obligation to pay money, and the fact that (unlike with traditional types of unclaimed property) the state is generally not in a better position than the holder to preserve the property for the owner. In the event that states are concerned that holders may use such a provision to take advantage of owners, language could be added to the UUPA to make clear that owners would need to specifically "opt in" to such a provision, after full disclosure by the holder.

- Seventh, we would recommend that Section 2 of the UUPA be revised to expressly exempt privately-held and restricted (*i.e.*, not freely transferable) securities from the UUPA. Given that there is no liquid market for these securities, we do not believe that it makes practical sense to escheat them.

III. PROPERTY HELD BY OR OWING TO THE FEDERAL GOVERNMENT

The ABA recommends that a new section (f) be added to Section 2 of the UUPA to provide that the UUPA does not apply to property held by or owing to the United States government.

The U.S. Court of Appeals for the Third Circuit has held that state unclaimed property laws are invalid under the Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2, to the extent such laws would result in state regulation of the federal government,[8] rejecting the states' position that the Tenth Amendment barred the federal government's

[8] *Treasurer of New Jersey v. U.S. Dept. of Treasury*, 684 F.3d 382, 406 (3d Cir. 2012).

involvement with unclaimed property.[9] Rather, the Third Circuit reasoned that application of the state unclaimed property laws to unclaimed U.S. savings bonds owed by the federal government would require the federal government to account to the states for the unredeemed bonds and violate the constitutional doctrines of Intergovernmental Immunity and preemption.

Under the Intergovernmental Immunity doctrine, the states may not directly regulate the federal government's operations or property.[10] Courts have held that the Intergovernmental Immunity doctrine generally bars a state from escheating unclaimed property held by the federal government because the federal government has a continuing interest in the property until the owner claims it. Courts have also held that federal laws preempt state unclaimed property statutes when Congress has regulated the area so pervasively that it has not left room for state unclaimed property laws or where state law stands as an obstacle to the full objectives of Congress.[11] The same reasoning arguably applies to unclaimed property held by or owing to the federal government. When a holder owes property to the federal government, or where the federal government holds property owed to another person, the federal government's interest in the property is compelling. A state's attempt to escheat unclaimed property held by or owing to the federal governments would violate the constitutional principles of Intergovernmental Immunity and preemption.[12]

At the initial ULC Drafting Committee meeting in February, NAUPA referenced *In re: Matured, Unredeemed, and Unclaimed United States Savings Bonds*, Case No 13C 000005, in support of NAUPA's position that states should be permitted to escheat property held by or owed to the federal government. This case is a 2013 declaratory judgment action pending in the District Court of Shawnee County, Kansas, in which the court transferred title of unclaimed U.S. savings bonds to Kansas pursuant to K.S.A. § 58-3956. Kansas in turn attempted to escheat the proceeds on the savings bonds from the

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[9] *Id*. at 413.

[10] *See Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991) (citing *Hancock v. Train*, 426 U.S. 167, 170-180 (1976) (holding that a state's attempt to take custody of unclaimed funds held by the U.S. Treasury constitutes an attempted regulation of a federal property interest); *Resolution Trust Corporation v. State of California*, 851 F.Supp. 1453 (C.D. Cal. 1994) (holding that California's attempt to take custody of unclaimed federal deposit insurance funds was barred by the Supremacy Clause because regulation of federal property was involved).

[11] *See, e.g., Treas. of New Jersey,* 684 F.3d at 409-412 (holding that unredeemed proceeds on U.S. savings bonds were not escheatable on intergovernmental immunity and preemption grounds); *Bowsher*, 935 F.2d at 334, 336 (holding that unclaimed funds that federal agencies owed to persons whose address was unknown and that were held in custody by the U.S. Treasury pursuant to federal statute were not escheatable to the states on intergovernmental immunity and preemption grounds). *But see In re Moneys Deposited*, 243 F.2d 443 (3d Cir. 1957) (permitting escheatment of unclaimed funds arising from a bankruptcy proceeding that were held for administrative purposes by the U.S. Treasury).

[12] Some cases have also held that Article IV, Section 3, Clause 2 of the Constitution precludes a finding of implied abandonment of federal property; rather, such property may only be abandoned by an express, unambiguous, and affirmative act. *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000); *United States v. Steinmetz*, 973 F.2d 212, 222 (3rd Cir. 1992) ("The United States cannot abandon its own property except by explicit acts."); *United States v. California*, 332 U.S. 19, 39-40 (1947) (the federal government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts).

U.S. Treasury. The U.S. Treasury agreed to pay proceeds on savings bonds that Kansas had in its possession, but refused Kansas's Freedom of Information Act request and other requests for information on additional savings bonds proceeds that may be due to Kansas residents. Kansas then sued the United States for payment of the remaining unclaimed savings bonds in the United States Court of Federal Claims. *See Estes v. United States*, Case 1:13-cv-01011-EDK (Fed. Cl. 2013). The case is currently pending. In our view, there is nothing in the court's opinion in this case which contradicts the general authorities discussed above that prohibit states from escheating property held by or owed to the federal government.

Accordingly, the ABA recommends that Section 2 of the UUPA be amended by adding the following provision:

> (f) This [Act] shall not apply to property held by or owing to the United States Government.

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If the Drafting Committee has any questions or needs any additional information or clarification regarding any of the ABA's recommendations as set forth in this letter, please contact me at (213) 293-7258 or ethan.millar@alston.com. We anticipate that we will also be providing additional recommendations regarding the UPPA in the near future, and also reserve the right to modify or supplement these or any prior recommendations. In the interim, if the Drafting Committee would like the ABA to submit written recommendations or positions on any particular issues, please do not hesitate to let me know.

Again, we greatly appreciate the Drafting Committee's consideration of these recommendations.

Sincerely,

Ethan D. Millar
ABA Advisor to ULC Drafting Committee
to Revise UUPA

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