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Defending Liberty
Pursuing Justice

February 23, 2016

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 (the "UUPA") – Exclusion of Foreign-Owned Property from the UUPA

Dear Ms. Robinson:

I am writing on behalf of the American Bar Association ("ABA") to provide additional legal authorities to the Uniform Law Commission's Drafting Committee to Revise the Uniform Unclaimed Property Act (the "UUPA") in support of our recommendation to exclude foreign-owned property from the UUPA. As explained below, foreign-owned property should not be subject to the UUPA for numerous constitutional and public policy reasons.

I. State Statutes that Require Escheat of Foreign-Owned Property Conflicts with Federal Common Law and the Supremacy Clause

First, any state law requiring the escheat of foreign-owned property conflicts with the federal common law rules promulgated by the U.S. Supreme Court for determining when a state has the right and jurisdiction to escheat unclaimed property. Federal courts have routinely rejected state laws that attempt to expand the federal common law rules defining states' right to escheat property. In accordance with the Supremacy Clause of the U.S. Constitution, inconsistent state laws must yield to the federal common law in this area.

In articulating these rules, the Court has never permitted the holder's state of domicile to escheat property belonging to an owner residing in a foreign country. To the contrary, the Court expressly stated in *Texas v. New Jersey*, 379 U.S. 674 (1965), that the state of domicile of the holder has the right to escheat only where either (1) the last known address of the owner of the property is unknown or (2) the owner's "last known address is in a State which does not provide for escheat of the property."[1] Nowhere has the Court suggested that the state of domicile of the holder has the right to escheat property if the owner's address is in a

[1] *Texas*, 379 U.S. at 682.

foreign country. The Court has indicated that it intended the rules to be the *exclusive* bases under which states have the right and jurisdiction to escheat unclaimed property and has rejected attempts by states to modify or "extend" the two rules articulated by the Court in *Texas v. New Jersey*. For example, in *Pennsylvania v. New York*,[2] the Court declined to modify the rules to permit Pennsylvania to escheat unclaimed money orders using a transaction-based custody rule. And over twenty years later, in *Delaware v. New York,* the Court again declined to modify the rules and stated that "[i]n Texas v. New Jersey . . . we adopted *two rules* intended to 'settle the question of which State will be allowed to escheat [abandoned] intangible property.'"[3]

Lower courts have also held that states may not escheat property other than as expressly permitted under the Court's federal common law rules. For example, in *N.J. Retail Merchants Association et al. v. Sidamon-Eristoff*,[4] the U.S. Court of Appeals for the Third Circuit held that the plaintiffs had satisfied their burden of showing that the third priority rule was "likely preempted under *Texas*, *Pennsylvania*, and *Delaware*" because the third-priority rule went beyond the established federal common law rules and contradicted the Court's intent to settle the escheat disputes "once and for all by a clear rule" and "with administrative ease and equity."[5] The Third Circuit's decision affirmed the opinion of the U.S. District Court for the District of New Jersey, which similarly concluded that, under the federal priority rules, "there is no room for a third priority position."[6] In addition, in *American Petrofina Co. v. Nance*,[7] the U.S. Court of Appeals for the Tenth Circuit held that the *Texas* priority rules preempted an Oklahoma law that would have permitted the state to take custody of unclaimed property on a basis other than as set forth by the Supreme Court in *Texas v. New Jersey*. *See also, e.g., TXO Production Corp. v. Oklahoma Corp. Commission*, 829 P.2d 964 (Okla. 1992) (in which the Oklahoma Supreme Court held that Oklahoma could take custody of unclaimed property only if it was either the state of domicile of the holder of such property or the state of last known address of the owner of such property); *State v. Amsted Industries*, 226 A.2d 715 (N.J. 1967) (in which the New Jersey Supreme Court held that New Jersey could not escheat property in a manner inconsistent with the federal common law rules).

II. State Escheatment of Foreign-Owned Property Raises Significant Concerns of Due Process

The escheat foreign-owned property raises multiple concerns of deprivation of property without due process of law, in conflict with the Due Process Clause of the U.S. Constitution. For example, the state of incorporation of the holder of foreign-owned property may lack minimum contacts with both the foreign owner and his property. Moreover, deprivation of property rights is of particular concern when the state is authorized to liquidate such property without a make-whole requirement, as the current draft of the UUPA contemplates.

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[2] 407 U.S. 206 (1972).
[3] *Delaware v. New York*, 507 U.S. at 499 (emphasis added).
[4] 669 F.3d 374 (3rd Cir. 2012).
[5] *Id.* at 393, 396 (citing *Texas*, 379 U.S. at 678, 683) (emphasis added).
[6] *American Exp. Travel Related Servs. Co. et al. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 606 (D.N.J. 2010).
[7] 859 F.2d 840 (10th Cir. 1988).

The issue of whether a state has the jurisdiction under the Due Process Clause to escheat foreign-owned property is closely related to the issue of whether the state's courts have jurisdiction over an action involving such property (*i.e.*, *in rem* jurisdiction).[8] Thus, if a state's courts do not have jurisdiction over intangible property subject to escheat, then it is likely that the state itself also lacks jurisdiction to escheat such property. Historically, the extent of a state court's jurisdiction over a controversy hinged on the situs of persons or property within the forum state.[9] However, in *International Shoe v. Washington,*[10] the U.S. Supreme Court adopted the "minimum-contacts" test and held that that a defendant's litigation-related "minimum-contacts" may take the place of physical presence as the basis for *in personam* jurisdiction, so long as it does not offend "traditional notions of fair play and substantive justice."[11] Under the minimum-contacts test, a court may exercise jurisdiction over a defendant not served within the forum state only if the defendant has "purposefully availed itself of the privilege of conducting activities within the forum State," such that the defendant "should reasonably anticipate being haled into court there."[12]

The U.S. Supreme Court has since applied the minimum-contacts test to *in rem* jurisdiction. For example, *Shaffer v. Heitner*[13] involved a shareholder derivative suit against a corporation's directors alleging that the directors had violated their fiduciary duties to the corporation. The plaintiff shareholders followed a Delaware statute that authorized a quasi *in rem* jurisdiction upon sequestration of an out-of-state defendant's property within the state. Because Delaware law adopted the conclusion that the situs of a Delaware corporation's stock was Delaware (regardless of the situs of the stock certificate or its holder), the plaintiffs attempted to use the constructive sequestration of the stock as a mechanism to compel the absent defendants to appear in a suit to determine their personal rights and obligations. However, the Court rejected this claim, holding that the law of state court jurisdiction no longer stands on the situs of the property within the forum state, but on the test of "fair play and substantial justice" that governs *in personam* jurisdiction.[14] The Court explained that the premise of its application is that:

> [T]he phrase, "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing. *This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing."* The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

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8 *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, dissenting) (holding that "the two [issues] are often closely related and to a substantial degree depend on similar considerations").
9 *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).
10 326 U.S. 310 (1945).
11 *Id.* at 316.
12 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
13 433 U.S. 186 (1977).
14 *Id.* at 206.

> … The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of property supports an ancient form without substantial modern justification.[15]

The Supreme Court has held that ownership of shares in a Delaware corporation did not justify Delaware court jurisdiction.[16] The Court explained "*it strains reason … to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's … jurisdiction on any cause of action*."[17] Accordingly, the Court reaffirmed *International Shoe* and held that "The Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.'"[18]

Following the Court's reasoning in *Shaffer,* the state of domicile of the holder will ordinarily not have Due Process jurisdiction over property of a foreign owner (even absent the federal common law escheat rules). This is because the foreign owner will normally not have any contacts with the holder's state of domicile other than the fact that the holder is incorporated in that state, which the Supreme Court held was by itself insufficient to constitute the requisite minimum contacts even if the foreign owner owned stock in the holder.[19] The Due Process concern is particularly troubling where the state may liquidate the property, as in the case of securities or tangible personal property. As the U.S. Supreme Court in *Hanson v. Denckla* explained, "[s]ince a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction."[20]

Further, the application of state unclaimed property laws to foreign-owned property may also violate the Due Process Clause by subjecting holders to potential multiple conflicting claims for the same property. The U.S. Supreme Court long ago held that the Due Process Clause protects a holder against multiple escheat claims for the same property. Indeed, in *Western Union Tel. & Tel. Co. v. Pennsylvania*,[21] the Court rejected Pennsylvania's claim to property as violating the due process rights of the holder under circumstances where the state asserting the claim to escheat was unable to provide protection to the holder against conflicting claims by other states. In the past several decades, a number of foreign countries have implemented unclaimed property laws, many others are currently considering doing so, and it is likely that this trend will continue for the foreseeable future. Since no court could protect a holder against a subsequent claim that might be asserted for the property by the country of residence or the country of citizenship of the owner, or some other foreign jurisdiction that might have a

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[15] *Id.* at 207-212 (emphasis added).
[16] *Id.*
[17] *Id.* (emphasis added).
[18] *Id.*
[19] If the foreign owner does have other contacts with the state sufficient to enable the state's courts to exercise jurisdiction over that person, and thus his or her property, then there may be Due Process jurisdiction to escheat the owner's property, but the state will still lack jurisdiction under the Supreme Court's federal common law rules for determining when states have the right to escheat.
[20] *Hanson*, 357 U.S. 235, 250 (1958); *see also San Jose v. Superior Court (Davecic)*, 195 Cal.App.3d 743, 746 (1987).
[21] 368 U.S. 71 (1961).

basis to assert such a claim, the Due Process Clause precludes *any* U.S. state, including the holder's state of domicile, from claiming such property.

III. Escheat of Foreign-Owned Property Violates International Norms

States may also lack jurisdiction to regulate foreign-owned property under international legal standards. As detailed in the Restatement (Third) of the Foreign Relations, which is derived from customary international agreements to which the United States is a party and which courts in the United States have treated as illustrating an outline of central principles of international law,[22] a state generally has jurisdiction to prescribe law only with respect to "conduct that, wholly or in substantial part, takes place within its territory" or "the status of persons, or interests in things, present within its territory"[23] and only if the exercise of such jurisdiction is "reasonable."[24] Whether exercise of jurisdiction is unreasonable is determined by evaluating all relevant factors, including:

> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) *the connections*, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or *between that state and those whom the regulation is designed to protect*;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
> (d) *the existence of justified expectations that might be protected or hurt by the regulation*;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) *the extent to which the regulation is consistent with the traditions of the international system*;
> (g) *the extent to which another state may have an interest in regulating the activity*; and
> (h) the likelihood of conflict with regulation by another state.[25]

These factors suggest that it would be unreasonable to apply U.S. state escheat laws to foreign-owned property. First, as discussed above, the connection between the state of domicile of the holder and the foreign owner of the property escheated will, except in unusual circumstances, be minimal. Second, owners located in foreign countries do not expect their property to be escheated and liquidated by the state of domicile of the holder of the property,

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[22] *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 799 (1993) (citing Restatement); *Hartford Fire,* 509 U.S. at 818 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles ... and in the decisions of other federal courts...."); *In re Maxwell Communication Corp.,* 93 F.3d 1036, 1047–48 (2d Cir.1996).
[23] *Id.* § 402.
[24] *Id.* § 403(1)(emphasis added); *see also Hartford Fire,* 509 U.S. at 818-19 (Scalia, J., dissenting).
[25] Restatement, § 403(2) (emphasis added).

particularly given that they may not even be aware of the state of domicile of the holder (given that it is the state of incorporation of the corporation rather than the state in which the corporation is based). If an owner expected his or her property to be escheated at all, the owner would expect it to be escheated by the jurisdiction in which the owner is located. Third, a state escheat law that permits the escheat of foreign-owned property by the holder's state of domicile, as in the draft UUPA, is completely inconsistent with the laws of other countries; indeed, we are aware of no other country that escheats foreign-owned property based on the mere fact that the holder was incorporated in that country. Finally, the foreign country in which the owner is located has a greater interest in regulating the unclaimed property belonging to its citizens than the U.S. state where the holder of the property is domiciled. This is in accordance with the escheat rules developed in *Texas v. New Jersey*[26] and *Pennsylvania v. New York,*[27] which reflect the traditional view of escheat as an exercise of sovereignty over person and property owned by persons and the common-law concept of *mobilia sequuntur personam*, and which recognize that the state of address of the owner has a superior interest of the state of domicile of the holder.

IV. State Escheatment of Foreign-Owned Property Is Inconsistent with Foreign Commerce Clause Jurisprudence

The escheat of foreign-owned property also conflicts with the Commerce Clause of the U.S. Constitution. The Commerce Clause provides that Congress shall have the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes." In *Japan Line, Ltd. v. County of Los Angeles*,[28] the U.S. Supreme Court held that Los Angeles County was prohibited by the Commerce Clause from imposing a fairly apportioned property tax on shipping containers owned by foreign companies which were physically located within the county. The Court recognized that special considerations beyond those that govern the regulation of property owned by U.S. citizens come into play when states seek to regulate property owned by foreign citizens, even when that property is physically used in the United States. The analysis by which the Court reached that conclusion is equally applicable to a state's attempt to take custody of foreign-owned property under its unclaimed property laws.

The *Japan Line* Court noted the "enhanced risk of multiple taxation" when foreign commerce is involved.[29] The Court explained that because foreign-owned instrumentalities of commerce may clearly be subject to taxation in their home countries, if a U.S. state were permitted to tax such property, no court, including the U.S. Supreme Court, could protect that foreign-owned property against a risk of multiple taxation that the Commerce Clause prohibits and "[e]ven a slight overlapping tax – a problem that might be deemed de minimis in a domestic context – assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."[30] Likewise, as discussed above, there is a risk of multiple escheat with respect to the property owed to citizens of foreign countries that have adopted unclaimed properties laws. This risk is present even for citizens of foreign countries that have not yet adopted

[26] 379 U.S. 674 (1965).
[27] 407 U.S. 206 (1972).
[28] 441 U.S. 444 (1979).
[29] *Id.* at 446.
[30] *Id.* at 447, 456.

unclaimed property laws because of the possibility that these countries may adopt applicable escheat laws in the future.

The *Japan Line* Court also noted that the imposition by a U.S. state of any tax on a foreign-owned instrumentality of commerce would "impair federal uniformity in an area where federal uniformity is essential."[31] Indeed, in *Michelin Tire Corp. v. Wages*,[32] the Court noted the "overriding concern" of the framers of the Constitution that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The *Japan Line* Court was concerned that California's tax statute at issue would provoke retaliation in the form of taxation of U.S. goods including, specifically, shipping containers in foreign jurisdictions. Furthermore, such retaliation may be imposed on all U.S. shipping containers and not simply those containers registered to the offending state. Likewise, because foreign nations have the power and authority to claim unclaimed property owned by their citizens or residents, allowing any U.S. state to escheat and liquidate foreign-owned property held by a U.S. holder would risk retaliatory claims by foreign countries to escheat and liquidate property owned by their citizens to U.S. owners, thereby preventing the U.S. from speaking with one voice in commercial dealings with such foreign countries.

Although the Court has since clarified *Japan Line* in a number of cases distinguishing *Japan Line*'s application to *income* tax,[33] the analysis of the *Japan Line* factors as applied to *property* tax remains the same.[34] Accordingly, if a U.S. state is prohibited from *taxing* property owned by foreign companies even where such property is physically located within the state, then it stands to reason that the state should have no greater authority to seize and liquidate the property owned by a foreign person who has no physical location in the state.

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For the above-stated reasons, the ABA recommends the Drafting Committee affirmatively exclude foreign-owned property from the UUPA or, at a minimum, remain silent on that

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[31] *Id.* at 448.
[32] 423 U.S. 470 (1976).
[33] For example, in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), which involved application of an income tax on a domestic multinational firm, the Court acknowledged that there was actual multiple taxation and that *Japan Line* had hinted that even a slight overlapping of tax would be unconstitutional, but concluded that "absolute consistency" in the allocation of income jurisdiction "may be just too much to ask." In its reasoning, the Court acknowledged that *Container Corp.* and *Japan Line* shared similarities, but emphasized their differences, specifically, the difference between tax on income and tax on property. *Id. See also Itel Containers Intern. Corp. v. Huddleton*, 507 U.S. 60 (1993).
[34] For example, in *Harris Country Appraisal Dist. v. Transamerica Container*, 920 S.W.2d 678 (1995), the Court of Appeals of Texas held a property tax on a domestic shipping container used in foreign commerce violated the Commerce Clause, as outlined in *Japan Line*. The Court of Appeals specifically distinguished the tax at issue from that in *Itel*. *Id.* at 684. Utilizing the *Japan Line* factors, the Court of Appeals found that there was no evidence that the containers were in fact subject to multiple taxation, however, there was substantial risk of multiple taxation, including the stipulated facts that other countries could tax the containers. *Id.* at 684-85. Accordingly, the Court of Appeals held that that that tax violated the Commerce Clause and, thus, was invalid. *Id.* Similarly, in *Vinmar, Inc. v. Harris County Appraisal District*, 947 S.W.2d 554 (1997), involving a property tax on plastic resin purchased by a domestic taxpayer for clients in foreign countries, the Supreme Court of Texas held the tax in this case interfered with the federal government's ability to speak with one voice in its regulation of commercial relations with foreign governments and, thus, violated the Commerce Clause. *Id.* at 555.

issue. Should the Drafting Committee have any questions or need any additional information or clarification regarding our recommendation, please contact me at (213) 293-7258 or ethan.millar@alston.com. We very much appreciate the Drafting Committee's consideration of our comments and recommendations.

Sincerely,

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

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