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Defending Liberty
Pursuing Justice

April 22, 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 comments to the Uniform Law Commission's Drafting Committee to Revise the Uniform Unclaimed Property Act (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. DERIVATIVE RIGHTS DOCTRINE (Impacts Multiple Sections of the UUPA)

The ABA recommends that the revised UUPA recognize and incorporate the fundamental principle of unclaimed property law that has become known as the "derivative rights doctrine." This doctrine provides that the state's right to claim unclaimed property is derivative of the owner's right to the property. The U.S. Supreme Court has recognized the derivative rights doctrine in *Delaware v. New York*.[1] In that case, the Court held that "[i]n framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights…." The Court stated that, in determining whether a state has the right to escheat unclaimed property, the first step is to "determine the precise debtor-creditor relationship as defined by the law that creates the property at issue."[2] The Court specifically acknowledged that "the holder's legal obligations… define[] the escheatable property at issue."[3] Accordingly, the Court found that the "holder" of unclaimed property is the "debtor" or the "obligor"; conversely, if a person is not a legal debtor, then it is not a "holder" and has no obligation to report or

[1] 507 U.S. 490, 503 (1993).
[2] *Id.* at 499.
[3] *Id.* at 501.

remit property to the state.[4] Lower courts have also widely recognized the derivative rights doctrine.[5]

[4] The UUPA was revised in 1995 to attempt to codify this federal common law rule. The UUPA thus currently defines a "holder" to mean "a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act]." *See* 1995 UUPA, section 1(6). The Comment to the 1995 UUPA further clarifies that "As held by the Supreme Court in *Delaware v. New York*, the holder is the person indebted under the applicable state law….The holder thus is 'a person obligated,' i.e., a person who could be sued successfully by the owner for refusing to make payment." However, other provisions of the 1995 UUPA are inconsistent with the derivative rights doctrine and should be amended.

[5] For example, see: *Insurance Co. of N. Am. v. Knight*, 291 N.E.2d 40, 44 (Ill. App. 1972), *appeal dismissed,* 414 U.S. 804 (1973) (noting that "the rights of the State are derivative from the rights of the owner, and…the State has no greater right than that of the payee owner"); *Cole v. National Life Ins. Co.* 549 So. 2d 1301, 1303-04 (Miss. 1989) ("The State Treasurer agrees and the Companies concur that the Treasurer acquires his rights by and through the owners of the abandoned property. This conclusion is based on the custodial nature of the Uniform Act under which the courts have consistently held that the rights of the State are indeed derivative from the rights of the owners of abandoned property…."); *In the Matter of November 8, 1996 Determination of the State of New Jersey Department of the Treasury, Unclaimed Property Office*, 706 A.2d 1177, 1180 (N.J. Super. Ct., App. Div. 1998), *aff'd* 722 A.2d 536 (N.J. 1999) ("The implication of [the] cases [applying the derivative rights doctrine] is that the [Unclaimed Property] Act cannot, and therefore presumably was not intended to, impose an obligation different from the obligation undertaken to the original owner of the intangible property which it covers."); *State v. United States Steel Corp*., 126 A.2d 168, 173 (N.J. 1956) ("Limitations operate not against the State *per se*, but against the basic claim of the unknown owner. If, by virtue of limitations, the owner can obtain nothing, the State is under like disability. This is the derivative consequence, long recognized in the law of escheat. The right of action to escheat or to obtain custody of unclaimed property is not derivative; but what may be obtained by exercise of the right is dependent upon the integrity of the underlying obligation."); *State v. Elizabethtown Water Co.,* 191 A.2d 457, 458 (N.J. 1963) (affirming that the state had no right to escheat funds resulting from unrefunded deposits for water utility main construction based on the contractual rights between the holder, the water utility, and the putative owners, the developers, which allowed the utility to keep any unrefunded deposits and placed the burden of the speculative risks on the developers, noting that "the State's claims are nonetheless derivative and certainly no broader than the developers' claims"); *State v. Sperry & Hutchinson Co.,* 153 A.2d 691, 699-700 (N.J. Super. App. Div. 1959), *aff'd per curiam,* 157 A.2d 505 (N.J. 1960) (holding that the state had no right to escheat the value of unredeemed trading stamps when the contractual terms required a minimum quantity for redemption, noting that the "State's rights are no greater than that of each stamp holder" and "entirely derivative") *Bank of America Nat'l Trust & Sav. Ass'n v. Cranston*, 252 Cal. App. 2d 208, 211 (1967) ("The Controller's rights under the act are derivative. He succeeds, subject to the act's provisions, to whatever rights the owners of the abandoned property may have."); *Blue Cross of Northern California v. Cory*, 120 Cal. App. 3d 723 (1981) (holding that "the Controller's rights under the UPL are 'derivative,' and that he accordingly succeeds to whatever rights the owner of un-claimed property may have and no more"); *State v. Standard Oil Co.*, 74 A.2d 565, 573 (1950), *aff'd*, 341 U.S. 428 (1951) ("The State's right is purely derivative: it takes only the interest of the unknown or absentee owner."); *Bank of Am. v. Cory*, 164 Cal. App. 3d 66, 74-75 (1985) ("With those objectives in mind, we find the derivative rights theory … helpful in determining if a statute of limitations is applicable to an action to enforce compliance with the UPL…. 'The Controller's rights under the act are derivative. He succeeds, subject to the act's provisions, to whatever rights the owners of the abandoned property may have.'") (internal citations omitted); *Barker v. Leggett*, 102 F. Supp. 642, 644-45 (W.D. Mo. 1951), *appeal dismissed,* 342 U.S. 900 (1952), *reh'g denied,* 342 U.S. 931 (1952) ("'The state as the ultimate owner is in effect the ultimate heir.' The United States Supreme Court has distinctly held that the right of escheat is a right of succession, rather tha[n] an independent claim to the property escheated. The result of that is this: 'The State's right is purely derivative; it takes only the interest of the unknown or absentee owner.'") (internal citations omitted); *State ex rel. Marsh v. Nebraska State Bd. of Agric.*, 350 N.W.2d 535, 539 (Neb. 1984) ("Both parties agree that the State's rights under the UDUPA are strictly derivative, and therefore the uniform act is distinct from escheat laws and the State acquires no greater

Incorporation of the derivative rights doctrine will impact the UUPA in a number of ways, including the following:

- Section 2(a)(7) of the 1995 version of the UUPA (the "1995 UUPA") currently requires the escheat of 60% of the value of a "gift certificate" that is redeemable in merchandise only. However, the owner of a gift certificate that is redeemable in merchandise only is not entitled to cash equal to 60% of the certificate's face value. Thus, this provision is inconsistent with the derivative rights doctrine insofar as it provides the state with a right that is different than the rights of the owner. We would therefore recommend that the UUPA be amended to provide that only gift certificates that are redeemable in cash are escheatable.[6] We would also recommend that the term "gift certificate" be replaced with a broader term, such as "prepaid obligation" to take into account the many different kinds of prepaid instruments that have been developed since the 1995 UUPA was drafted.[7] For the same reasons as noted above, we would also recommend that the definition of "property" in Section 1(13) of the UUPA be amended to clarify that it does not include any prepaid obligation that is not redeemable for cash. These

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property right than the owner. The State may assert the rights of the owners, but it has only a custodial interest in property delivered to it under the act."); *State v. American-Hawaiian S.S. Co.*, 101 A.2d 598, 609 (N.J. Super. Ch. Div. 1953) ("[T]he State's right is wholly 'derivative' of the right of the owner."); *In re Steins Old Harlem Casino Co.*, 138 F. Supp. 661, 666 (S.D.N.Y. 1956) ("The state's right of escheat is the right of an ultimate heir; it does not assert a separate claim to the fund but stands in the shoes of those so-called unknown creditors who are deemed to have abandoned their claims. Such creditors, by diligence, can cut off the rights of other claimants, and the state, standing in their shoes, has the same right."); *Petition of Abrams*, 512 N.Y.S.2d 962, 968 (Sup. Ct. 1986) ("The State, in asserting the right of escheat, stands in the shoes of the rightful claimants, and is entitled to reclaim the funds as abandoned property."); *South Carolina Tax Comm'n v. Metropolitan Life Ins. Co.,* 221 S.E.2d 522, 524 (S.C. 1975) ("The Commission's rights under the act are derivative. It succeeds, subject to the act, to the rights of the abandoned property's owners. It takes only the interest of the absent or unknown owner."); *Presley v. Memphis,* 769 S.W.2d 221, 224 (Tenn. Ct. App. 1988) ("The state acts under the statute to protect the rights of the property owners. Any rights and obligations of the state in the property are derivative of the rights of the owners of the property."); *Melton v. Texas,* 993 S.W.2d 95, 102 (Tex. 1999) ("Once property is presumed abandoned, the comptroller assumes responsibility for it and essentially steps into the shoes of the absent owner.") (internal citations omitted); *State v. Texas Elec. Serv. Co.*, 488 S.W.2d 878, 881 (Tex. Civ. App. 1972) ("[T]he State of Texas has no greater right to enforce payment of claims through an escheat proceeding under Article 3272a than was possessed by the owner of the claim."); *State v. Texas Osage Royalty Pool, Inc.,* 394 S.W.2d 241 (Tex. Civ. App. 1965) (adopting "the elementary rule that the State cannot acquire by escheat property or rights which were not possessed at the time of the escheat by the unknown or absent owners of such property or rights"); *Southern Pac. Transp. Co. v. State,* 380 S.W.2d 123, 126 (Tex. Civ. App. 1964) ("[T]he State in escheating such claims did not acquire any better or greater right to enforce the claims than was possessed by the former owners. The State cannot acquire by escheat property or rights which were not possessed at the time of escheat by the unknown or absentee owners of such property or rights."); *State Dep't of Revenue v. Puget Sound Power & Light Co.,* 694 P.2d 7, 11 (Wash. 1985) ("[T]he State's right is purely derivative and therefore no greater than the owner's").

[6] Such a change also serves the interest of owners, as many owners would prefer to retain a gift certificate in a certain specified amount rather than receiving cash equal to 60% of the amount of the gift certificate.

[7] We would suggest that a "prepaid obligation" be defined to mean "an obligation, made in exchange for consideration, to provide merchandise and/or services to the owner of the obligation, and includes, but is not limited to, obligations evidenced by gift certificates, gift cards, merchandise credits, tickets, memberships, telecommunications cards, general purpose reloadable cards, promotional cards, loyalty cards, incentive cards, rebate cards, and other stored value or prepaid cards, codes or accounts."

changes are consistent with the majority of states which generally exempt gift certificates and similar items from escheat.[8]

- Section 5 of the 1995 UUPA provides that a holder may deduct a dormancy fee from property presumed abandoned only if certain requirements are met, including that the amount of the fee is not unconscionable and that the fee is not regularly reversed or otherwise canceled. This provision is inconsistent with the derivative rights doctrine because a fee may still be legally enforceable as against the owner of property even if it is regularly reversed or waived. This provision is also unnecessary, as the enforceability of such fees is already subject to regulation under a state's consumer protection laws, including laws prohibiting deceptive or unfair trade practices.[9] The purpose of the UUPA is simply to return unclaimed property to the rightful owner and not to be used as a "back door" to impose additional substantive regulations that may impact the debtor's obligations to a creditor. Accordingly, we would recommend that this provision be deleted and that the language from the 1981 version of the UUPA (the "1981 UUPA"), which simply permits a deduction for "any lawful charges", be reinstated, as that prior language more appropriately defers to the underlying applicable substantive law.

- Section 19(a) of the 1995 UUPA provides that a limitation imposed on an owner's right to claim property from the holder, whether imposed by contract, statute or court order, is not enforceable as against the state for unclaimed property purposes even if it is enforceable as against the owner of the property. The language permitting the state to disregard limitations imposed by contract or court order clearly and directly conflicts with the derivative rights doctrine and therefore should be deleted. Otherwise, an owner could potentially use the unclaimed property laws to circumvent a legally enforceable contractual limitation or a court order. Rather, to the extent that the contractual limitation (or court) is enforceable under applicable laws, then the holder should be entitled to enforce it as against the state as well as the owner.[10] In theory, the same result should apply in the case of an owner's claim that is barred by the statute of limitations. However, we recognize that some courts have carved out a narrow exception to the derivative rights doctrine in such instance, and held that the state

[8] The following states generally do not require the escheat of gift certificates or similar items (though some of these states exempt gift certificates only if they do not have fees or expiration dates): Alabama, Arizona, Arkansas, California, Colorado (exempting gift certificates but only some gift cards), Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming.

[9] State consumer protection laws vary significantly from state to state. For example, some states may prohibit the use of dormancy fees entirely on gift cards, while other states may permit them after a certain period of inactivity or if certain disclosures are made.

[10] This does not prevent an owner, or the state on the owner's behalf, from seeking to claim property on the basis that the contractual limitation is unenforceable under other applicable laws, such as unfair or deceptive trade practice laws. But such a claim should be premised on the state's substantive laws rather than on the state's unclaimed property laws.

may escheat the property even if the statute has run against the owner.[11] This exception is premised on the theory that unclaimed property laws may be rendered much more limited in scope if states are required to claim the property before the owner's statute of limitation expires. On the other hand, unclaimed property laws have historically had a very limited scope (and still do, in most countries), whereas statutes of limitation have been in place for hundreds of years and serve a number of important purposes, including to provide certainty to defendants, to encourage diligent prosecution of claims, and to prevent fraudulent and stale claims which may arise where evidence has been lost or facts have become obscure due to the passage of time. The same compelling reasons that justify enforcing a statute of limitations against a purported owner of property also justify enforcing that same statute of limitations against the state for unclaimed property purposes.[12] Otherwise, the unclaimed property laws have the effect of overriding the very purposes of owner statutes of limitation in the first place. Nonetheless, if the Drafting Committee elects to retain the provisions of Section 19(a) of the 1995 UUPA, as applied to owner statutes of limitation, we would highly recommend that, at a minimum, in order to mitigate the extraordinary impact that such provisions would have on a holder's rights: (a) the state must have a relatively short period of time in which it must assert a claim against the holder with respect to the property (our recommendations regarding such a state statute of limitations are set forth below in Section V of this letter) and (b) the state must only be permitted to escheat property that was, prior to the expiration of the statute of limitations, admitted in writing by the holder to be due or otherwise adjudicated to be due.[13] The UUPA should also be clarified that the state is still obligated to return such property to the owner, and cannot keep such property for itself.

A number of other provisions of the 1995 UUPA implicate the derivative rights doctrine, including the provisions applicable to estimation, life insurance proceeds and the burden of proof provisions. We will address those issues separately in a subsequent letter or letters to the Drafting Committee.

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[11] *See, e.g., Travelers Express Co. v. Utah*, 732 P.2d 121, 124 (Utah 1987) (explaining that "the rights of the State are derivative from the rights of the owners of the abandoned property. That statement is true as to the substance of the State's claim. However, procedural requirements, such as the statute of limitations, should not bar the State.").

[12] *See, e.g., Pacific N.W. Bell Tel. Co. v. Department of Revenue*, 481 P.2d 556, 558 (Wash. 1971) ("The state's rights under the act are derivative and it succeeds, subject to the act's provisions, to whatever rights the owner of the abandoned property may have. If the owner may proceed against the holder of the abandoned property and legally obtain that property, then the state may also effectively enforce that same claim against the holder. If, however, the holder of the property possesses the valid defense of the bar of the statute of limitations, then that holder may successfully assert that bar against either the owner or the state, which stands in the position of the owner. The rights of the state are not independent of the rights of the owner and are therefore no greater than those of the person to whose rights it succeeds.").

[13] This is to clarify that a state may not, for instance, seek to litigate the existence or amount of a liability after the owner's statute of limitations has run.

II. THIRD-PRIORITY RULE (Section 4(6) of the UUPA)

The ABA recommends that the "third-priority rule," which is codified in Section 4(6) of the 1995 UUPA, be deleted. The third-priority rule essentially permits a state to take custody of unclaimed property if the transaction occurred in the state, the holder is domiciled in a state that does not provide for escheat of the property, and the last known address of the owner is either unknown or located in a state that does not provide for escheat of the property. The U.S. Supreme Court has held that, under the Supremacy Clause (Article VI, Section 2) of the United States Constitution, federal law preempts state law if the state law "stands as an obstacle" to the accomplishment and execution of the full objectives of the federal law.[14] We believe that the third-priority rule "stands as an obstacle" to the objectives of the Supreme Court when it created the priority rules in *Texas v. New Jersey*, and thus is preempted, for the following reasons:

- First, in *Texas v. New Jersey*,[15] the Court was primarily concerned with crafting priority rules that would "unambiguously and definitely resolve disputes among states regarding the right to escheat abandoned property."[16] In other words, the Court intended the first- and second-priority rules that it created in that decision to be the sole bases under which states may take custody of unclaimed property. If a state were permitted to adopt a third priority rule, then different states could easily adopt conflicting third priority rules. This would ultimately result in an inter-state dispute of the sort the Court expressly sought to avoid. The possibility of such additional rules would also undermine the Supreme Court's focus on ease of administration which, as discussed below, was another important objective of the Court in creating the priority rules.

- Second, in crafting the priority rules, the Court stated that it wanted to avoid "[t]he uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."[17] On this basis, the *Texas* Court then specifically rejected a transaction-based custody rule, like that in the 1995 UUPA, that would allow a state to take custody of unclaimed property based on where the transaction giving rise to the property occurred.[18]

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[14] *See, e.g., English v. Gen. Elec. Co*., 496 U.S. 72, 79 (1990); *Wilburn Boat Co. v. Fireman's Find Ins. Co.*, 348 U.S. 310, 314 (1955) ("States can no more override . . . [federal] judicial rules validly fashioned than they can override Acts of Congress."). *See also Illinois v. City of Milwaukee*, 406 U.S. 91, 105-6 (1972), *later opinion*, 451 U.S. 304 (1981) (characterizing the decision in *Texas v. New Jersey* as an example of federal common law).

[15] 379 U.S. 674 (1965).

[16] *N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff*, 669 F.3d 374, 394 (3rd Cir. 2012). The Supreme Court stated that it wanted to "settle the question" of which state will be entitled to escheat unclaimed property in any given circumstance. *Texas*, 379 U.S. at 677.

[17] *Texas*, 379 U.S. at 679.

[18] The Court held that "uncertainties" would result "if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat. Any rule leaving so much for decision on a case-by-case basis should not be adopted unless none is available which is more certain and yet still fair."

Subsequently, in *Pennsylvania v. New York*,[19] the Court again rejected a transaction-based custody rule proposed by Pennsylvania with respect to unclaimed money orders.

- Third, in *Delaware v. New York*, the Court recognized that a state's power to escheat is derived from the principle of sovereignty. However, if the third-priority rule were enforceable, it would allow the third-priority state to infringe on the sovereign authority of other states.[20] Specifically, the third-priority rule would force a holder that is incorporated in a state that does not escheat the property at issue to turn over such property to the third-priority state, which "would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."[21] The "ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty."[22]

The U.S. Court of Appeals for the Third Circuit specifically concluded that the third-priority rule "would stand as an obstacle to executing the purposes of the federal law" and thus, that the plaintiffs had satisfied their burden of showing that the third priority rule was "likely preempted under *Texas*, *Pennsylvania*, and *Delaware*."[23] The Third Circuit's decision affirmed the lower district court's opinion, which similarly concluded that, under the federal priority rules, "there is no room for a third priority position."[24] "If the secondary-rule state does not escheat," the court held, "the buck stops there."[25] Although these are the only two courts that have expressly considered the preemption of the third-priority rule, other court decisions also support this same conclusion. Most significantly, in *American Petrofina Co. v. Nance*,[26] 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*.[27]

Id. at 680. Determining the state in which the transaction occurred is particularly problematic for e-commerce or telephone transactions, which often involve parties in multiple states.

[19] 407 U.S. 206 (1972).

[20] *N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff*, 669 F.3d 374 (3rd Cir. 2012).

[21] *Id.* at 395.

[22] *Id.*

[23] *Id.* at 396.

[24] *N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556 (D.N.J. 2010).

[25] *Id.*

[26] 859 F.2d 840 (10th Cir. 1988).

[27] By contrast, only one case has expressly suggested that a transaction-based rule is constitutional. *See State v. The Chubb Corporation*, 570 A.2d 1313 (N.J. Super. Ct. Ch. Div. 1989) ("Nothing in Texas v. New Jersey . . . prohibits a state from claiming custodial escheat of property based on the locale of the transaction or the place of business of the holder being in that state."). However, this case is inconsistent with a higher court decision in New Jersey, and thus is of limited (if any) precedential value. *See State v. Amsted Industries*, 226 A.2d 715 (N.J. 1967) (holding that New Jersey could not escheat property owed by a New Jersey corporation where the last known addresses of the creditors were outside New Jersey, stating "[u]nder *Texas* the creditor's state now has the paramount interest and other states should do what they can to honor it."). Finally, although a few other decisions suggested or held that the priority rules established by the U.S. Supreme Court may not apply to disputes between a state and a single holder of unclaimed

III. ESCHEAT BY HOLDER'S STATE OF DOMICILE OF PROPERTY EXEMPTED BY FIRST-PRIORITY STATE (Section 4(4) of the UUPA)

The ABA recommends that Section 4 of the UUPA be clarified to provide that the state of domicile of the holder of unclaimed property is not entitled to escheat property exempted from escheat by the state in which the last known address of the owner of the property is located.

Section 4(4) of the UUPA requires a holder to escheat property to its domiciliary state if the last known address of the owner of such property is in a state that "does not provide for the escheat or custodial taking of the property." This language is intended to embody the second-priority rule articulated by the Supreme Court in *Texas v. New Jersey*, which requires a holder to escheat to its state of domicile "where the State of the last known address does not, at the time in question, provide for escheat of the property."[28]

Although the language in Section 4(4) is somewhat vague, this provision apparently permits a holder's state of domicile to assert unclaimed property jurisdiction over property for which the state of the owner's last known address has not adopted comprehensive unclaimed property legislation or legislation covering the specific type of property in question. In addition, Section 4(4) could potentially be construed to also permit a holder's state of domicile to claim property when the first-priority state had considered the property type and made an explicit determination in its statutes to exempt such property type from escheat. Under such a construction, a state that affirmatively exempts certain transactions, such as business-to-business transactions, from escheat would be treated as "not providing" for the escheat of this type of property, thus allowing the holder's state of domicile (that had not enacted the same exemption) to claim the property. Such a reading undermines the sovereign authority of the first-priority state to determine not to exercise its right to escheat the property, an authority long recognized by the Supreme Court, and leads to disputes among the states regarding the proper exercise of the power to escheat. This construction is also inconsistent with later U.S. Supreme Court precedent, which held that the second-priority rule applies if the first-priority state "does not provide for escheat of intangibles"[29] or "does not provide for escheat"[30] at all. These subsequent articulations of the second-priority rule suggest that the Court's intent was to allow the holder's state of domicile to escheat the property if the first-priority state has not adopted an escheat law applicable to intangible property in general, and not that

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property, such positions are contrary to the language and intent of the Court's decisions themselves, as well as to more recent authority considering the issue. For example, in the above-mentioned *American Petrofina* decision, the Tenth Circuit Court of Appeals applied the federal priority rules to a dispute between only one state (Oklahoma) and multiple holders, and found that the state was in violation of the federal priority rules.

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

[29] *Pennsylvania v. New York*, 407 U.S. 206, 210-211 (1972).

[30] *Delaware v. New York*, 507 U.S. 490, 500, 504, 507 (1993) (stating that the second-priority rule applies if "the creditor's last known address is *in a State whose laws do not provide for escheat*" or "*the laws of the creditor's State do not provide for escheat*" or the "*creditor's State does not provide for escheat*"). See also *Pennsylvania v. New York*, 407 U.S. 206, 212 (1972) (stating that the second-priority rule applies if the address "was located *in a State not providing for escheat*").

the Court was intending to allow the holder's state of domicile to escheat property exempted by the first-priority state.

The U.S. Court of Appeals for the Third Circuit, citing Supreme Court precedent, specifically recognized that a state, in exercising its sovereign power, has the right to decide not to escheat, noting that "[v]arious considerations might motivate states not to exercise custodial escheat[,]" including incentivizing companies that "might find the absence of state custodial escheat attractive."[31] The Third Circuit has recognized that, "[w]hen fashioning the priority rules, the Supreme Court did not intend [to]… give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."[32]

In addition, the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV Sec. 1, would also apparently require the second-priority state to give full recognition to the first-priority state's sovereign right not to escheat the exempted property. The Full Faith and Credit Clause expresses "a unifying principle … looking toward maximum enforcement in each state of the obligations and rights created or recognized by the statutes of sister states,"[33] and "preserve[s] rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others."[34]

Accordingly, the ABA recommends that Section 4(4) of the UUPA be modified as follows:

"(4) the holder of the property is domiciled in this State and the last known address of the apparent owner of the property, as set forth on the records of the holder, is located in a State or other jurisdiction that has no unclaimed property law applicable to the property. For the purpose of this subsection (4), a State or other jurisdiction shall be considered as having an unclaimed property law that is applicable to the property if the State or other jurisdiction has a rule that applies to the property, regardless of whether the rule permits the State or other jurisdiction to take custody of the property, affirmatively exempts the property from escheat or provides for some other treatment of the property. If the State or other jurisdiction of the apparent owner's last known address subsequently adopts an unclaimed property law applicable to the property, then the State that previously claimed the property shall be required to remit it to the State or other jurisdiction adopting such law, if the law requires the escheat of such property, or to the holder, if the State or other jurisdiction exempts such property from escheat."

[31] *N.J. Retail Merchs. Ass'n*, 669 F.3d at 395.
[32] *Id.*
[33] *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).
[34] *Pink v. A. A. A. Highway Express, Inc.*, 314 U.S. 201, 246 (1941).

IV. BUSINESS-TO-BUSINESS EXEMPTION (Section 2 of the UUPA)

The ABA recommends that a new section be added to Section 2 of the UUPA to provide that the UUPA does not apply to property arising out of transactions between two or more business associations.

State unclaimed property laws were primarily designed to protect the rights of individuals, particularly consumers, who have lost track of their property or that never received payments owed to them. These laws were not intended to safeguard the property of businesses. Unlike in the consumer context, unclaimed property laws are not generally needed in the business-to-business context, as businesses are typically much better able than consumers to track and claim any outstanding amounts owed to them (which may include, for example, credits, overpayments, uncashed checks and rebates), as they have the experience, resources and electronic capability to be able to identify and reconcile amounts arising out of business-to-business transactions. Hence, if a business does not claim an amount that appears to be owed to it based on the records of another business, it is often because the apparent "debt" is not actually owed. Often, the so-called "debt" may instead be a bookkeeping entry or systems error that is either automatically reconciled by electronic systems when future transactions are entered, offset intentionally in the next transaction pursuant to industry practice, settled at some future date, or by some other means, or has otherwise been resolved between the businesses.[35] Even if an amount is in fact owed to a business, the business may have made an affirmative decision not to pursue the debt on the basis that it is immaterial or for other reasons. States that claim such amounts as unclaimed property are therefore not so much protecting the rights of the owners of the property, as they are increasing burdens on business activity and commerce.[36]

Notwithstanding the above, we recognize that businesses do sometimes benefit from the application of state unclaimed property laws, as the total amount of escheated property claimed from states by businesses is significant. However, we understand that, on a national scale, the amount claimed back by businesses is typically a small fraction of the amount reported. Also, many of the amounts claimed are by small businesses which are not generally compliant with state unclaimed property laws.[37] Thus, we believe that any benefit of unclaimed property laws to these small businesses is overstated, as it does not take into account the amounts that such small businesses should be, but are not, reporting to the states. Thus, a business-to-business exemption would also benefit small businesses

[35] In the context of unclaimed property audits, these amounts are nonetheless generally deemed "owing" from one business to another because the business recording the error cannot prove otherwise (often because the transaction is stale and records are not retained indefinitely for practical reasons) despite the fact that the amount does not represent an actual payment obligation. This raises a similar issue to the burden of proof issue (that we will discuss in a later letter to the Drafting Committee), and could in theory be addressed either through a business-to-business exemption or a stricter burden of proof on the states.

[36] *See also* the Council of State Taxation report titled "The Best and Worst of State Unclaimed Property Laws – COST Scorecard on State Unclaimed Property Statutes" dated October 2013.

[37] This lack of compliance is often due to a lack of understanding by small businesses that these laws exist or are applicable to them, and may also be a function of the fact that small businesses are rarely audited by states for compliance with these laws.

by eliminating their reporting obligations with respect to amounts owed to other business associations, including large, institutional clients, thereby simplifying the small businesses' compliance burdens. Furthermore, at this point, we have seen no empirical data suggesting that small businesses lack the sophistication to track and offset unreconciled invoices for goods and services administered to larger businesses.

For all of these reasons, thirteen states have adopted business-to-business exemptions in their unclaimed property laws, including Arizona, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, North Carolina, Ohio, Tennessee, Virginia and Wisconsin.[38] Furthermore, New York and Texas have recognized limited business-to-business exemptions as a matter of administrative practice, although New York has recently discontinued this practice,[39] and the Texas statutes, while not explicit, appear to support such exemption.[40] Florida has also adopted a limited business-to-business exemption for amounts owed by a health care provider to a managed care payor.[41]

Accordingly, the ABA recommends that Section 2 of the UUPA be amended by adding the following provision:[42]

"Notwithstanding any other provision of this [Act], any property due or owing from a business association to another business association, including, but not limited to, checks, drafts or similar instruments, credit memoranda, overpayments, credit balances, deposits, unidentified remittances, nonrefunded overcharges, discounts, refunds and rebates, shall not constitute unclaimed property under this [Act]. This section also applies to all amounts due or owing from a business association to another business association that, on the effective date of this section, are in the possession, custody, or control of a business association."

V. STATUTE OF LIMITATIONS (Section 19(b) of the UUPA)

The ABA recommends that the statute of limitations provision in Section 19(b) of the 1995 UUPA be revised to provide greater certainty and protection to holders of unclaimed property.[43] As discussed above, statute of limitations provisions serve a number of important purposes, including providing certainty, encouraging diligent

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[38] Ariz. Stat. § 44-301(15), (3); 765 Ill. Comp. Stat. § 1025/2a(b); Ind. Code § 32-34-1-1(e); Iowa Code § 556.1(12); Kan. Stat. § 58-3935(g); Md. Code Ann. Com. Law § 17-101(m)(2)-(4); Mass. G.L. Ch. 200A, § 5; Mich. Comp. Laws Ann. § 567.237a; N.C. Gen. Stat. § 116B-54(e); Ohio Code § 169.01(B)(2)(b), (c); Tenn. Code § 66-29-104(3)(C); Va. Code § 55-210.8:1(b); Wis. Stat. § 177.01(10)(b).

[39] *See* New York Office of Unclaimed Funds 2014 Policy Statement on Business to Business Transactions.

[40] *See* Tex. Prop. Code § 72.101(a).

[41] Fla. Stat. § 717.117(7)(c).

[42] This provision is largely based on the business-to-business exemptions adopted by Illinois, Ohio and Maryland.

[43] Section 19(b) of the 1995 UUPA provides that "An action or proceeding may not be maintained by the administrator to enforce this [Act] in regard to the reporting, delivery, or payment of property more than 10 years after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property. In the absence of such a report or other express notice, the period of limitation is tolled. The period of limitation is also tolled by the filing of a report that is fraudulent."

prosecution of claims, and preventing fraudulent and stale claims. These purposes apply equally whether the claimant is an owner or the state acting on the owner's behalf. However, the 1995 UUPA statute of limitations provision is inadequate because it applies only after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property address, neither of which is likely to occur. Accordingly, the ABA recommends that Section 19(b) of the 1995 UUPA be replaced with the following language, which is based on the statute of limitations provision in the 1981 UUPA, the statute of limitations in the Virginia unclaimed property act and on certain statute of limitation provisions in the state tax area:[44]

(i) Except as otherwise provided in subsection (ii) or (iii) of this section, in the event that a holder files an unclaimed property report with the administrator for a particular period, including a zero or negative report, no action or proceeding shall be initiated or maintained against the holder to enforce this [Act] with respect to any unclaimed property that became presumed abandoned during or prior to such period more than three years after the later of (A) the date the report was filed and (B) the date the report was due (including any extensions).

(ii) No action or proceeding shall be initiated or maintained against the holder to enforce this chapter with respect to any property more than seven years following the date on which such property first became reportable if the holder (A) filed a fraudulent report with the intent to evade delivery of property otherwise subject to this chapter or (B) failed to file a report with the administrator. The state shall have the burden of proving fraudulent activity of the holder by clear and convincing evidence, and if the state cannot meet such burden, then the limitations period set forth in subsection (i) shall apply to any demand, claim or assessment by the state. The holder shall have the right to appeal any determination of fraud by the state, under the same procedures as set forth in Section [ ] of the [Act].

(iii) If, before the expiration of time prescribed in subsections (i) or (ii), the holder and the administrator have so consented in writing, an action or proceeding may be initiated or maintained at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

[44] Subsection (i) has been substantially revised from the Virginia provision to simplify that provision and clarify that the filing of a report will start the running of a statute of limitations for all unclaimed property that was presumed abandoned during or prior to the year covered by the report. Subsection (i) also proposes a 3-year limitations period rather than the 5-year period in the Virginia Act to be more consistent with statute of limitations provisions in other areas, such as tax, and also in recognition that the state's claim may already be made after the owner's statute of limitations has expired. The 7-year limitations provision in subsection (ii) where no return is filed or a fraudulent return is filed is also intended to be more consistent with statute of limitations provisions in other areas, such as tax. This subsection also includes a higher standard of proof that must be satisfied by the state in order to prove fraud. Subsection (iii) is based on similar provisions in the state tax area granting statutory authority to waive the statute of limitations, and is designed to give both holders and states some flexibility to contract around the general rules.

VI. OTHER ISSUES

- Prefatory Note or Act – The ABA recommends that the UUPA include, either in the Prefatory Note or (preferably) in the UUPA itself, a statement of purpose that generally sets forth how the UUPA should be applied and construed. We would recommend that this statement of purpose include the following sub-parts:
  (1) The purpose of this [Act] is to facilitate the return of unclaimed property to its rightful owner.
  (2) Under the circumstances described in this [Act], the State may take custody of unclaimed property from the holder on behalf of the owner.
  (3) The State's right to take custody of property under the [Act] is derived from that of the owner and, except as expressly set forth in the [Act], the State shall have no greater right to the property than the owner.
  (4) The State shall hold all unclaimed property on behalf of the owners thereof in perpetuity until the owner reclaims such property.
  (5) This [Act] shall be preempted to the extent that it conflicts with any federal law.

- Sections 1(13) – The ABA recommends that the UUPA be amended to clarify that the "unclaimed property" at issue is the underlying obligation itself and not an "uncashed check" or other payment instrument or evidence of the obligation. This is consistent with U.S. Supreme Court precedent as well as the vast majority of courts that have considered the issue.[45]

- Section 2(a) (General) – The ABA recommends that this entire Section be reconsidered, both to see if it can be simplified (*i.e.*, by including most categories of property in the "catch-all" provision) and also whether the dormancy periods for any or all types of property should be adjusted. In general, the ABA believes that the dormancy period should bear some reasonable relationship to the average time during which it would be expected that the property would be actually abandoned by the owner. The ABA also suggests that the Drafting Committee consider a much longer dormancy period for high-value property (*e.g.*, property with a value of $10,000 or greater). We will subsequently provide specific recommendations regarding the dormancy period for securities property.

- Section 2(d) – The ABA recommends that this Section be revised to take into account electronic and other forms of communication not originally contemplated by the UUPA. Specifically, the ABA recommends that this Section be revised to state as follows:

  "An indication of an owner's interest in property includes:

[45] *See Delaware v. New York*, 507 U.S. 490, 501 (1993) ("[O]ur examination of the holder's legal obligations not only defined the escheatable property at issue, but also carefully identified the relevant 'debtors' and 'creditors.'").

(i) any written communication, including any electronic communication, by the owner to the holder concerning the property or the account in which the property is held;

(ii) any oral communication by the owner to the holder concerning the property or the account in which the property is held, if the holder makes a contemporaneous record of the owner's communication;

(iii) the presentment of a check or other instrument of payment of a dividend, interest payment or other distribution made with respect to an account or underlying stock, debt or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;

(iv) any owner-directed activity in the account in which the property is held, including accessing the account or a direction by the owner to increase, decrease, or change the amount or type of property held in the account;

(v) the making of a deposit to or withdrawal from an account in which the property is held, including automatic deposits or withdrawals previously authorized by the owner;

(vi) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions; and

(vii) any other action by the owner that demonstrates that the owner is aware that the property exists."

- Section 2(e) – The ABA recommends that this provision be deleted. This provision has resulted in significant confusion between states and holders, and may be inconsistent with the derivative rights doctrine if applied broadly. In addition, the primary situation in which this provision is applied is based on a misunderstanding of unclaimed property law. Specifically, this provision is generally relied upon to support the proposition that an unpresented check may constitute unclaimed property even though the condition of presentment has not been satisfied. As discussed above, the "unclaimed property" is not the uncashed check but rather the underlying obligation with respect to which the check was written. The underlying obligation continues to be owed, and thus may constitute unclaimed property, even if the check is not presented for payment. This provision is therefore unnecessary from that perspective.

- Section 2 (ERISA) – The ABA recommends that the UUPA be amended to clarify that employee benefit plans covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., are not subject to state unclaimed property laws. Section 1(13) of the 1995 UUPA currently defines "property" subject to the UUPA to include "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 similar benefits" and Section 2(a)(14) of the 1995 UUPA generally provides a three-year dormancy period for property in a "defined benefit plan, or other account or plan that is qualified for tax deferral…." Furthermore, a comment to Section 2 of the 1995 UUPA states in pertinent part "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, it has been held that they are not pre-empted by federal law." However, since the 1995 UUPA was adopted, the U.S. Court of Appeals for the Seventh Circuit has held that ERISA does generally preempt state unclaimed property laws, and other courts and authorities, including the U.S. Department of Labor (which is responsible for administering ERISA), have reached the same conclusion.[46] Accordingly, we would recommend that a new Subsection be added at the end of Section 2 (Presumptions of Abandonment) of the UUPA to state as follows: "Notwithstanding any provision of the [Act] to the contrary, any unclaimed property held or owed by an employee benefit plan subject to or covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., shall be exempt from the provisions of this [Act]. As used herein, the term 'employee benefit plan' shall include both 'employee welfare benefit plans' and 'employee pension benefit plans', as such terms are defined in ERISA, Sections 3(1) and 3(2), respectively. This exemption shall also apply to any unclaimed property held by a third party administrator, claim administrator or other third party acting on behalf of an employee benefit plan, but shall not apply to an insurance company that has contracted with an employee benefit plan to be the 'holder' of the unclaimed property, if the insurance company is entitled under its arrangement with the plan to retain any unclaimed property associated with the plan."

- Section 2 (De Minimis) – The ABA recommends that the UUPA adopt an exemption for de minimis property, such as that adopted by Idaho and a few other states. Such exemption would take into account the practical reality that

[46] *See Commonwealth Edison Company v. Vega*, 174 F. 3d 870 (7th Cir. 1999); *Manufacturers Life Insurance Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (N.D. Cal. 1999); Department of Labor ("DOL") ERISA Adv. Op. 94-41A (Dec. 7, 1994), quoting from 120 Cong. Rec. S15751 (daily ed., 8/22/74). The only authorities holding that ERISA does not preempt state unclaimed property laws involve situations in which an insurance company, rather than the ERISA plan itself, was attempting to claim preemption and the insurance company, rather than an ERISA plan, would receive the benefit of an unclaimed amounts associated with the plan. *See, e.g., Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989).

the expenses incurred both by holders and states in escheating and trying to return de minimis property to the rightful owner may outweigh the value of the property itself. The ABA recommends that the amount of the de minimis exemption be initially established at between $25 to $50, with perhaps an automatic adjustment for future inflation. Accordingly, we would recommend that a new Subsection be added at the end of Section 2 (Presumptions of Abandonment) of the UUPA to state as follows: "Notwithstanding any provision of the Act to the contrary, any unclaimed property that has a value of [$25 to $50] or less shall not be required to be reported and remitted to the state."

- Section 3 – The ABA recommends that this Section be amended to clarify that it applies only to property held by banks or financial institutions, as set forth in the comment to the UUPA. This Section also recommends that the term "safekeeping depository" be deleted or specifically defined.

- Sections 4(2) and (3) - The ABA recommends that Section 4(2) and 4(3)(i) of the 1995 UUPA be deleted. Those provisions permit the state to escheat property if the records of the holder do not reflect the identity or last known address of the owner, but it is "established" that the last known address of the owner is in the state. However, the U.S. Supreme Court held in *Texas v. New Jersey* that "each item of property…is subject to escheat only by the State of the last known address of the creditor, *as shown by the debtor's books and records*."[47] The Court further elaborated that "since our inquiry here is not concerned with the technical domicile of the creditor, and since ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address."[48] Based on these statements, it appears clear that the Court intended the first-priority rule to apply only if the holder has a record of the owner's address. For the reasons discussed above, any jurisdictional priority rule that allows a state to take custody of property on a basis other than that expressly permitted by the U.S. Supreme Court is contrary to federal common law and should be preempted.

- Section 7(b) – The ABA recommends that the aggregation provision be modified such that the holder is required to report owner information for all property (subject to the de minimis exemption discussed above), unless the holder can demonstrate that reporting such information would result in a hardship to the holder. Modifying the aggregation provision in this manner will generally serve the purpose of returning property to the rightful owner, and given developments in electronic recordkeeping, should normally not be a burden to holders.

[47] *Texas*, 379 U.S. at 681-682.
[48] *Id*. at 681, fn. 11.

- Section 7(e) – The ABA recommends that holders be permitted to conduct due diligence prior to the periods currently set forth in this Section, and that such early voluntary due diligence will eliminate the holder's obligation to perform further due diligence at a subsequent date.

- Section 8(a) – The ABA recommends that the provision extending the time to pay or deliver property where a penalty or forfeiture may result be modified to apply to all property types, rather than only automatically renewable deposits, and to all types of forfeitures, rather than only interest. Accordingly, we would recommend that the first sentence of this Section be restated as follows: "Except for property held in a safe deposit box [or other safekeeping depository[49]], upon filing the report required by Section 7, the holder of property presumed abandoned shall pay, deliver, or cause to be paid or delivered to the administrator the property described in the report as unclaimed; provided, however, that if the holder reasonably believes a penalty or forfeiture may result to the owner as a result of payment or delivery of the property to the state, the time for compliance is extended until a penalty or forfeiture may no longer result." This change will benefit owners by reducing the likelihood that owners will be subject to penalties or forfeiture of their property in connection with the escheat process.

- Section 9(e) – The ABA recommends that this Section be expanded to require that the states also publish a notice of the unclaimed property electronically in a database that is searchable by the names of the owners.

- Section 10(a) – The ABA recommends that this Section be modified to provide that a payment or delivery shall be deemed to have been made in "good faith" if the holder remits the property in response to a demand by a state or agent of the state, or if a state representative has otherwise informed the holder or published guidance that the property is required to be reported. This change will give holders more comfort that they can rely on directives or informal guidance from states regarding the escheatability of property. The ABA also recommends that clauses (2) and (3) of Section 10(a) be deleted, as a holder should be entitled to indemnification from the state if it paid or delivered property in a reasonable attempt to comply with the UUPA. The additional requirements of clause (2) and (3) potentially put holders in a situation where they may remit property to the state in good faith compliance, but still not be entitled to indemnification.

- Section 10(c) – The ABA recommends that this Section be modified to also allow a holder to deduct from an amount required to be reported to the state on a subsequent unclaimed property report any amount required to be returned to the holder pursuant to this Section. This change should facilitate return of such property to the holder, and reduce administrative expense.

[49] *See* comment above regarding Section 3 of the UUPA.

- Section 10(f) – The ABA recommends that this Section be modified to make clear that indemnification also applies where a foreign government makes a subsequent claim to the property from the holder.

- Section 11 – The ABA recommends that this Section be modified to require the State to match the rate of interest that would have been required to be paid by the holder to the owner. This change will further protect owners, and thereby serve the purpose of the escheat laws, by making it clear that an owner will not lose or forfeit interest earnings as a result of the escheat process. Conversely, the state should have the right to decline to receive any interest-bearing property, on the basis that it does not wish to assume the holder's obligations to the owner, and instead permit the holder to retain such property without penalty.

- Section 14 – The ABA recommends that this Section be modified consistent with the changes above to Section 4 (Rules for Taking Custody).

- Section 15 – The ABA recommends that this Section be modified to clarify that it permits holders or purported holders to recover property that was remitted to the state due to mistake of law or fact. As will be discussed in more detail in a subsequent letter to the Drafting Committee, the ABA also recommends that this Section or a new Section provide for a clear mechanism by which holders or purported holders may appeal (either administratively or to court, at the holder's election) state unclaimed property assessments.

- Section 16 – The ABA recommends including the bracketed language regarding attorney's fees in the UUPA, rather than making it optional, since (a) the language is not mandatory and still gives the court discretion whether to award fees and (b) a similar provision in Section 22 is not bracketed/optional. We would also recommend allowing the claimant to seek reimbursement of costs. We would further recommend that the provision allowing the court to award attorney's fees and costs apply to fees and costs incurred by the holder in connection with any administrative appeals process, so as to provide added incentive by the state to provide a fair and impartial review process.

- Section 17 – The ABA recommends, consistent with the comment to Section 11, that the state have the right to decline to receive interest-bearing property.

- Section 20(a) – The ABA recommends that this Section be modified to apply only to holders that are subject to the state's jurisdiction under the U.S. Supreme Court's priority rules. If a holder is not subject to the state's jurisdiction, the state has no power to require the holder to file such a report.

- Section 20(e) – The ABA recommends that this provision be deleted. States already have significantly greater leverage than holders in the examination process, as a general matter, and this type of provision – which would provide additional leverage to the state, even where a holder took a reasonable reporting position in good faith – therefore offends traditional notions of equity and fair play.

- Section 21(a) – The ABA recommends that this provision be modified to be consistent with the statute of limitations provision recommended in Section V of this letter.

- Section 22 – The ABA recommends that this Section be modified to provide that the state may seek attorney's fees only if it is the prevailing party and the holder acted with fraud or willful misconduct. This change is intended to recognize the practical reality that the state typically has significantly greater leverage than the holder in these actions, and therefore the statute should be modified to attempt to balance the equities and put both parties on a more equal playing field.

- Section 24(a) – The ABA recommends that the interest rate be tied to the Treasury bill rate rather than using a fixed rate. This change should reduce or eliminate the likelihood of excessive interest fines. We would also recommend that states be similarly obligated to pay interest to holders if the holder is successful in reclaiming property that was improperly escheated to the state. This change is consistent with provisions in the tax area where taxpayers are entitled to interest with respect to overpayments of tax.

- Section 24(b) – The ABA recommends that this provision be modified to clarify that the penalties are imposed on a holder on an annual basis rather than on a property-by-property or owner-by-owner basis. Otherwise, for example, a $5,000 penalty could be imposed with respect to each instance of property not reported to the state. For low value properties, the penalty amount would greatly exceed the amount of the property due, and may therefore violate the Excessive Fines Clause of the U.S. Constitution. We would also recommend that the state be required to apply either a fixed penalty or a penalty based on estimation, but not both.

- Section 24(e) – The ABA recommends that this provision be modified to provide that the state "shall" (rather than "may") waive any penalties and interest if the holder acted in good faith. We further recommend that this provision be modified to provide that a holder shall be deemed to have acted in good faith if either (a) the holder had a reasonable legal and/or factual basis for its position that the property is not subject to escheat or (b) the holder relied upon an opinion of legal counsel that the property is not subject to escheat. This change is consistent with similar provisions found in the tax context.

- Section 27(a) – The ABA recommends that Section 27(a) of the 1995 UUPA be deleted. That provision requires escheatment of property that was not required to be reported before the effective date of the Act, if the property would have been presumed abandoned during the 10-year period prior to the Act's effective date "as if this [Act] had been in effect during that period." The retroactive escheat of property that was not previously subject to escheat under the Act violates the Contract Clause and Takings Clause of the U.S. Constitution.[50]

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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 will also be providing a supplemental letter that includes additional recommendations regarding the UPPA in the near future, including recommendations regarding the treatment of securities and life insurance proceeds, burden of proof issues, an administrative appeals process, the definitions of "holder" and "last known address," foreign-owned property, property owed to the federal government, and the use of estimation. In addition, if the Drafting Committee would like the ABA to submit written recommendations or positions on any other 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
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to Revise UUPA

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[50] *See, e.g., N.J. Retail Merchs. Ass'n et al. v. Sidamon-Eristoff*, 669 F.3d 374 (3rd Cir. 2012) (plaintiffs established a reasonable likelihood of success on their claim that New Jersey's attempted retroactive escheat of stored value cards issued prior to the effective date of a provision requiring the escheat of such property violated the Contract Clause; and suggesting a similar result would apply under the Takings Clause).

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