

December 23, 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.

**BURDEN OF PROOF
(Section 6 of the UUPA)**

The ABA recommends that Section 6 of the revised UUPA be modified to follow the U.S. Supreme Court's ruling in *Delaware v. New York*, which holds that a state's power to escheat unclaimed intangible property is defined by the debtor-creditor relationship that exists under the law that created the property at issue.¹ Since the state's power to escheat is derived from that of the creditor, the state's burden of proof must match that of the creditor; otherwise, the process of escheat would result in a change to the nature of the debtor-creditor relationship, which the Supreme Court held cannot be done.

The burden of proof is extremely important in any legal proceeding, including unclaimed property audits. As explained by the U.S. Supreme Court in *Director v. Greenwich*

¹ 507 U.S. 490, 501 (1993) ("In framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights...."); *id.* at 499 ("First, we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. . . . In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law. [The] law that creates property necessarily defines the legal relationships under which certain parties ('debtors') must discharge obligations to others ('creditors').") (internal quotes and citations omitted)).

Collieries,² the “burden of proof” refers to the obligation to convince the trier of fact of the truth of a disputed fact. This concept is often conflated with the “burden of production of evidence,” which refers to a party’s obligation to come forward with evidence that supports a claim.³ The ABA proposes to expand the existing language of UUPA 1995 Section 6 to clarify this distinction and the significance of each term with respect to unclaimed property audits in particular.

The proposed revised section would also expressly refute an important point that is often wrongly used against holders (*i.e.*, debtors) in unclaimed property audits: that the mere recordation on the holder’s books of an accrual for an estimated or contingent liability (which is often required by generally accepted accounting principles although the amount of such potential or contingent liability is not liquidated, fixed and certain) or the mere recordation of a credit on the holder’s books, is not sufficient, in and of itself, to satisfy the state’s obligation to establish a *prima facie* case that a fixed and certain obligation exists or to shift to the holder the burden of establishing that such entries do not represent abandoned property. Finally, the proposed revised section would also affirm that, if the administrator seeks to use estimation to establish a holder’s liability, the administrator has the affirmative burden to establish both (a) that the records of the holder are insufficient to permit the preparation of a report and (b) that the proposed method of estimation is reasonably crafted to result in an appropriate estimation of the amount actually owed by the holder to the state.

More specifically, the ABA recommends that Section 6 of the UUPA be modified to read as follows:

(a) Controlling Law. In the absence of any controlling federal law, the law that determines the precise debtor-creditor relationship for an obligation potentially subject to escheat under this Act is the substantive law of the State or foreign jurisdiction that creates the property at issue.

(b) Burden of Production. The administrator, as the party claiming property, has the initial burden of producing evidence to establish a *prima facie* case that a particular property right exists and that such property is an outstanding fixed and certain obligation of the purported holder. A *prima facie* case is the production of sufficient evidence to allow an inference that a particular property right exists and

² 512 U.S. 267 (1994).

³ As *Director v. Greenwich Collieries*, 512 U.S. 267, 272-75 (1994), explains, “The burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts . . . of the truth of a proposition which he has affirmatively asserted. . . . The proper meaning . . . is ‘the duty of the person alleging the case to prove it,’ rather than ‘the duty of the one party or the other to introduce evidence.’” In *Greenwich Collieries*, the U.S. Supreme Court provided a detailed history of the use of the term and explains that “burden of proof” is used to describe “burden of persuasion”—the notion that where the evidence is evenly balanced, the party that bears the burden of persuasion must lose, unless an unusual “standard of proof” is imposed. “Burden of proof” is a distinct concept from the “burden of production”—a party’s obligation to come forward with evidence to support its claim—and a “standard of proof, such as preponderance of the evidence,” that “can apply only to a burden of persuasion, not to a burden of production.” *Id.* at 233.

that such property is an outstanding fixed and certain obligation of the purported holder.

(c) Burden of Proof. At all times, the administrator bears the burden of proof under the controlling state law to establish that a particular property right exists, that such property is an outstanding fixed and certain obligation of the purported holder, and passage of the requisite period of abandonment. The burden of proof refers to the burden of persuading the trier of fact.

(d) Property Evidenced by Record of Check or Draft. A record of the issuance on a particular date of a check, draft, or similar instrument, in a stated amount, to a third party under circumstances that normally indicate delivery creates a prima facie case of the existence of an outstanding fixed and certain obligation of the issuer. In claiming property from a holder who is also the issuer, if an administrator presents evidence sufficient to create a prima facie case, then the burden of production shifts to the purported holder to produce evidence that tends to disprove issuance on a particular date, delivery or amount of the obligation evidenced by the record of the check, draft, or similar instrument, or otherwise show that it never was or no longer remains the fixed and certain obligation of the purported holder. Evidence that tends to disprove a prima facie case includes, but is not limited to, evidence that:

- 1) the check, draft, or similar instrument was issued as an offer in settlement of an unliquidated amount;
- 2) the check, draft, or similar instrument was issued to a governmental entity, a charitable organization, or an affiliated entity of the issuer;
- 3) the check, draft, or similar instrument was voided within 90 days of issuance;
- 4) the check, draft, or similar instrument was never delivered to a third party; and
- 5) the obligation evidenced by the check, draft, or similar instrument was paid, satisfied, or discharged, or there was a want of consideration therefor or a failure of consideration therefor.

When a purported holder has produced evidence that tends to disprove a prima facie case, the purported holder has satisfied any shifted burden of production, and the burden of proof remains with the administrator. If the administrator has created a prima facie case with respect to a check, draft or similar instrument and the purported holder has not satisfied its shifted burden of production, the administrator has met its burden of proof with respect to such check, draft or similar instrument upon showing the passage of the requisite period of abandonment.

(e) Property Evidenced by Record in a Holder's Books or Records. The record of a liability in a holder's books or records is some evidence of an obligation but is not by itself sufficient to create a prima facie case of a fixed and certain

obligation. Examples of such evidence by itself insufficient to create a prima facie case include, but are not limited to, the record of:

- 1) an accrual of an estimated liability;
- 2) an accrual of a contingent liability; and
- 3) a credit on a holder's books recorded for accounting purposes.

(f) Negative and Affirmative Defenses. The purported holder may raise any defenses, whether negative or affirmative, to an administrator's claim to property. A negative defense negates the elements of the administrator's prima facie case. Asserting a negative defense does not shift the burden of proof to the purported holder; rather, the burden of proof remains with the administrator. An affirmative defense precludes liability even if all of the elements of the administrator's claim are proven. The purported holder bears both the burden of proof and the burden of production with respect to any affirmative defense it raises.

(g) Estimation. In order for an administrator to impose estimation under Section 20(f), the administrator has the evidentiary burden to show that the records of the holder were insufficient to permit the preparation of a report and that unclaimed and dormant property was held by the holder. If such burden is met, the administrator shall use a method of estimation that is reasonably crafted to determine the amount of unclaimed property that would have been owed to the state, but was not paid to that state. If the holder disputes the method of estimation and offers an alternative method of estimation, the trier of fact shall apply the method that is more likely to approximate the actual amount of unclaimed and dormant property owed to the state by the holder.

The ABA further recommends that comments be added to explain that the usual burdens of production and persuasion apply to establishing the existence of unclaimed property. In particular we recommend the following:

Comment

This section has been modified to follow the U.S. Supreme Court's ruling in *Delaware v. New York*, which holds that a state's power to escheat unclaimed intangible property is defined by the debtor-creditor relationship that exists under the law that created the property at issue. *Delaware v. New York*, 507 U.S. 490, 499 (1993) ("First, we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. . . . In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law. [The] law that creates property necessarily defines the legal relationships under which certain parties ('debtors') must discharge obligations to others ('creditors')." (internal quotes and citations omitted)).

This section also clarifies the distinction between the “burden of proof” and the “burden of production” as explained by the U.S. Supreme Court in *Director v. Greenwich Collieries*, 512 U.S. 267, 272-75 (1994). In *Greenwich Collieries*, the U.S. Supreme Court held that the ordinary and natural meaning of the term “burden of proof” was the “burden of persuasion” – the notion that where the evidence is evenly balanced, the party that bears the burden of persuasion must lose, unless an unusual “standard of proof” is imposed. *Id.* at 272. Noting that courts have often confused the terminology, the court clarified that the “burden of proof” is a distinct concept from the “burden of production” – “a party’s obligation to come forward with evidence to support its claim” – and a “standard of proof, such as preponderance of the evidence,” that “can apply only to a burden of persuasion, not to a burden of production.” *Id.* at 272, 278. As the Court explained, “[t]he burden of proof is the obligation which rests on one of the parties to an action to persuade the trier of the facts . . . of the truth of a proposition which he has affirmatively asserted. . . . The proper meaning . . . is ‘the duty of the person alleging the case to prove it,’ rather than ‘the duty of the one party or the other to introduce evidence.’” *Id.* at 276 (citations omitted).

This section is consistent with those cases that have held that the ordinary default rule is that the plaintiff, as the party seeking relief, bears the initial burden of production to create a prima facie case and also bears the burden of proof. Further, such cases hold that upon the creation of a prima facie case, the defendant is not required to, but may, rebut the prima facie case by raising any defense. The assertion of a negative defense, which tends to disprove one or all of the elements of the prima facie case, does not shift the burden of proof to the defendant. If, however, the defendant raises an affirmative defense, which accepts the state’s claim that an obligation exists, but nonetheless defeats liability, the defendant bears its own burden of proof with respect to its affirmative defense. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Thus, when applied to the unclaimed property context, the administrator, as the party claiming property, bears the initial burden of producing sufficient evidence to create a prima facie case and the ultimate burden of proof, that is, the burden of persuading the trier of fact. A prima facie case is a “party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” BLACK’S LAW DICTIONARY 1382 (10th ed. 2014).

This section also is consistent with those cases holding that when claiming abandoned property, the state steps into the shoes of the owner. *See* Epstein, McThenia and Froslund, “Unclaimed Property and Reporting Forms,” sec. 3.02 (Matt. Bend. 1984). As the state can claim no more than the interest of the unknown or absentee owner of property, a necessary element that it must prove before property may escheat, is the existence of a liquidated and certain obligation. *See, e.g., California ex rel. v. Bank of America*, 120 Cal. Rptr. 3d 204, 216 (Cal. Ct. App. 2011); *Employers Ins.*

of *Wausau v. Smith*, 453 N.W.2d 856, 861-63 (Wis. 1990); *Revenue Cabinet v. Blue Cross & Blue Shield* (Ky. 1986) 702 S.W.2d 433, 434-35. Because the mere issuance of a check, draft or similar instrument alone does not create liability, see *Kane v. Insurance Co. of N.A.*, 392 A.2d 325, 329 n.5 (Pa. 1978), this provision clarifies that some evidence of delivery of a check or obligation must be shown. Similarly, a mere accounting entry, without more, does not create a fixed and certain obligation.

* * * * *

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

cc: Michael Houghton, Co-Chair, ULC Drafting Committee to Revise UUPA
Rex Blackburn, Co-Chair, ULC Drafting Committee to Revise UUPA
Charles Trost, Reporter, ULC Drafting Committee to Revise UUPA
Harriet Lansing, President, ULC
Robin K. Roy, ABA-ULC Liaison
Scott Heyman, ABA Business Law Section Advisor
Charolette Noel, ABA Business Law Section Advisor
Alexandra Darraby, ABA Forum on Entertainment and Sports Industries Advisor
Michelle Andre, ABA Business Law Section, Unclaimed Property Subcommittee
Dean Bunton, ABA Business Law Section, Unclaimed Property Subcommittee
Mike Rato, ABA Business Law Section, Unclaimed Property Subcommittee
Jamie Ryan, ABA Business Law Section, Unclaimed Property Subcommittee
Tami Salmon, ABA Business Law Section, Unclaimed Property Subcommittee
Sam Schaunaman, ABA Business Law Section, Unclaimed Property
Subcommittee

Mary Jane Wilson-Bilik, ABA Business Law Section, Unclaimed Property
Subcommittee

Michael Kliegman, Chair, ABA Business Law Section, Taxation Committee

John Biek, ABA Taxation Section, Unclaimed Property Subcommittee Co-Chair

Matthew Hedstrom, ABA Taxation Section, Unclaimed Property Subcommittee
Co-Chair