American Bar Association
321 North Clark Street
Chicago, IL 60654

Defending Liberty
Pursuing Justice

April 30, 2015

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 additional recommendations to the Uniform Law Commission's Drafting Committee to Revise the Uniform Unclaimed Property Act (the "UUPA") in light of the initial draft version of the UUPA that was circulated in February 2015 and the Drafting Committee meeting that was held on February 27-28, 2015. These recommendations are made to assist the Drafting Committee in preparing a revised version of the UUPA for first reading at the ULC's Annual Conference in July 2015, and are in addition to the comments made by the ABA at the February 2015 meeting.

In the interests of time, we have kept these recommendations brief and to the point; however, we would be pleased to provide additional information or support regarding any of these recommendations if it would be helpful for the Drafting Committee. 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.

1. **Contractual Anti-Limitation Provision (Section 19(a) of the draft UUPA).** We would recommend that, in Section 19(a) of the draft UUPA, the word "contract" be bracketed for further discussion, as we believe that inclusion of this language raises serious concerns—both from a policy perspective and from a legal perspective—and very limited discussion was held on this issue at the February meeting. In brief, inclusion of the word "contract" in Section 19(a) would mean that any provision in a contract that limits the time during which a person can make a claim for property would be overridden by the UUPA. Notably, earlier versions of the UUPA did not include the word "contract" in this section, but this word was added in the 1981 version of the UUPA in response to three cases that involved attempts by holders to unilaterally adopt contractual

limitations provisions with the express purpose of circumventing state unclaimed property laws. However, Section 19(a) is much broader than the holdings of these cases, as it would apparently apply to any contractual limitation provision, regardless of the purpose of the limitation, whether it was unilaterally imposed by the purported holder, and whether it is enforceable under applicable laws governing the contract.[1] We do not believe it is appropriate for the UUPA to invalidate all contractual limitations provisions, regardless of the circumstances, as such a rule would alter debtor-creditor relationships and the parties' settled expectations, would interfere with freedom of contract and would conflict with state contract laws (which generally provide for the enforceability of contract restrictions), consumer protection laws (which already address whether certain types of expiration dates and similar limitations provisions are enforceable or not) and other laws applicable to the contracting parties. NAUPA's concern that omitting this "contract" language from Section 19(a) would somehow "emasculate" the UUPA is contradicted by the fact that 14 states—including major states such as California, New York, Illinois, Massachusetts, Pennsylvania and Tennessee—have not included such a provision in their unclaimed property laws and yet their unclaimed property programs remain some of the most active in the country.[2]

2. **Penalties (Section 24 of the draft UUPA).** Since the Drafting Committee did not have an opportunity to discuss this Section at the February meeting, we would reiterate the comments that we made to the Drafting Committee in our April 2014 letter.[3] We would also recommend that the new language added to Section 24(c), which imposes a penalty on "a holder who enters into a contract or other arrangement for the purposes of evading its obligations under this [Act]," be stricken, as such language is unnecessary given that Section 24(c) already imposes a penalty on a holder that willfully fails to report property under the UUPA. The new language also is ambiguous and could potentially subject holders to risk of penalties for perfectly valid contracts or arrangements, if one purpose of the contract or arrangement was to reduce the holder's escheat

[1] It is also worth noting that other cases that have involved nearly identical facts to those at issue in the three cases relied on by the 1981 version of the UUPA have reached contrary conclusions, and have upheld these provisions. *See, e.g., State ex rel. Baker v. Intermountain Farmers Ass'n*, 668 P.2d 503 (Utah 1983) (holding that Utah could not escheat unclaimed patronage credits owed to members of a nonprofit agricultural cooperative because the cooperative's bylaws provided that any patronage credits unclaimed after six years would revert to the cooperative's education and research fund and could not be claimed by members); *Murdock v. John B. Stetson Co.*, 32 Pa.D.&C.2d 300 (C.C.P. Phila. 1963) (holding that gift certificates with expiration dates were not escheatable).

[2] The other states that have not adopted such language in their unclaimed property laws include Iowa, Kentucky, Maryland, Mississippi, Missouri, Nebraska, Oregon and Virginia.

[3] For example, we would recommend that Section 24(b) 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.

obligations.[4] As in the tax and other contexts, there is nothing wrong with a holder structuring its affairs to reduce its unclaimed property obligations, as long as it does so in a manner consistent with applicable law.

3. **Burden of Proof (Section 7 of the draft UUPA).** We do not believe that there were any objections made to the ABA's suggested revised language for Section 7, which we submitted in December 2014, addressing the burden of proof under the UUPA. Accordingly, we are not sure why that language was not included in the draft UUPA, as the current language—which is taken mostly from the 1995 version of the UUPA—does not address many of the concerns identified in our proposed language. We assume that our prior version was considered too complex; if that is the case, we would propose a similar, but significantly shortened, version below (though we prefer the prior version, as we think the added detail is warranted in this case):

"(a) The administrator bears the burden of proving the existence and amount of property that the state seeks to claim under the [Act], that the property is an outstanding fixed and certain obligation of the purported holder, and that the property is required to be reported to the state under the [Act].

(b) Where the holder is also the issuer of a check, draft, or similar instrument, a record of the issuance of the instrument, on a particular date, in a stated amount, to a third party, under circumstances that normally indicate delivery, constitutes prima facie evidence of the existence of an outstanding fixed and certain obligation. A record of a liability in a holder's books or records is some evidence of an obligation but is not by itself sufficient prima facie evidence of an outstanding fixed and certain obligation.

(c) The putative holder may present opposing evidence that tends to negate one or more elements of the administrator's claim and may raise any affirmative defense, including but not limited to accord and satisfaction, discharge, or failure of consideration. The putative holder bears the burden of proof on its affirmative defenses, which may be established by evidence of custom and practice, prior dealings between the putative holder and the owner, or by other relevant evidence.

(d) In order for an administrator to impose estimation under Section 20(f), the administrator has the evidentiary burden to show that the records required to be maintained by the holder were insufficient to permit the preparation of a report and that unclaimed 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

[4] For example, we have concerns that this language could be used to impose penalties on a holder that simply changed its state of incorporation or merged into another entity if one of the purposes of doing so was to avoid unclaimed property requirements imposed by its prior state of incorporation.

apply the method that is more likely to approximate the actual amount of unclaimed property owed to the state by the holder."

We recommend that the proposed Reporter's Comment be retained as follows:

"Reporter's Comment

It sometimes happens that checks are lost or not cashed and payment is accomplished by issuance of a replacement, but through oversight the prior check is not voided on the record. When this happens, the putative holder should not be held to an impossible standard of proof that the obligation is no longer owed and should be given a reasonable opportunity to produce collateral evidence sufficient to overcome the presumption."

4. **Business-to-Business Exemption (Section 3(c) of the draft UUPA).** We would recommend that the "business-to-business" exemption included as an optional provision in Section 3(c) of the draft UUPA be revised to eliminate the "ongoing business relationship" requirement. We have found that such a requirement is impractical, as it would require businesses to track outstanding credits and checks for extended periods of time so that the business can report them if and when the business relationship with the creditor ever terminates.[5] Such a requirement is also inconsistent with the vast majority of states that have adopted a business-to-business exemption, which do not include such a requirement. We proposed specific language for a business-to-business exemption to the Drafting Committee in our April 2014 letter to the committee, and would reiterate our recommendation to include that language for this optional provision.

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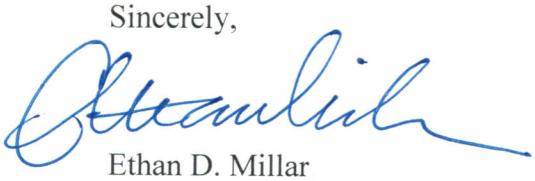
If the Drafting Committee has any questions or needs any additional information or clarification regarding any of the ABA's recommendations as set forth in this letter, please contact me at (213) 293-7258 or ethan.millar@alston.com. In addition, we are working on additional recommendations for the Drafting Committee and hope to submit them in advance of the July 2015 meeting. In particular, as we indicated at the February meeting, we intend to submit a much more comprehensive white paper that will hopefully address any questions or concerns that the Drafting Committee may have regarding the concept of derivative rights, which the ABA has strongly recommended—and continues to recommend—be included as an integral part of the revised UUPA. We are also planning to submit additional recommendations regarding unclaimed life insurance proceeds and related issues.

[5] This burden may not be alleviated by a statute of limitations, as the statute of limitations generally will not start running until the date that the property would otherwise be required to be reported to the state, which will not occur with an "ongoing business relationship" requirement until the relationship is terminated. Thus, a business may need to track credits and its customer relationships for decades.

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

Sincerely,



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

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