Building a Better Unclaimed Property Act

*By Ethan D. Millar, Scott Heyman, and Charolette Noel**

This article examines the legal and policy concerns raised by the Uniform Unclaimed Property Acts developed by the Uniform Law Commission, focusing on the most recent Uniform Act that was completed in 2016. The authors highlight significant constitutional problems with the Uniform Acts, including provisions that attempt to rewrite debtor-creditor laws and broaden the scope of unclaimed property laws inconsistent with U.S. Supreme Court precedent. The authors also explain that the Uniform Acts do not provide adequate constitutional protection for owners of securities that could result in substantial losses to owners. The article then compares the Uniform Acts with the American Bar Association's Draft Model Unclaimed Property Act, which was completed in early 2018 by the Business Law Section to address these constitutional concerns and other legal and policy issues. The authors conclude that the ABA Model Act is a significant improvement over the Uniform Acts, both in terms of satisfying the applicable constitutional requirements and restoring state unclaimed property laws to their original purpose of returning unclaimed property to the rightful owner.

In summer 2016, the Uniform Law Commission (the "ULC") adopted a revised Uniform Unclaimed Property Act (the "Uniform Act"). This concluded a seven-plus-year effort initiated by the American Bar Association (the "ABA") in 2009, which was intended to reform state unclaimed property laws and fix the numerous problems created by the much-criticized 1981 and 1995 versions of the Uniform Act. The ULC has touted the finished product as a substantial improvement over the prior Acts, which had greatly expanded states' rights to seize (and liquidate) supposedly "unclaimed" property, often at the expense of both holders and owners of such property. Others have dismissed the effort as a waste of time and effort, arguing that the 2016 version does little to fix these problems.

This article discusses the history and development of the Uniform Acts, and focuses on the legal and policy concerns created by the 1981 and 1995 Acts,

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which led to the present effort to reform these laws. We then examine the changes made in the 2016 Act and—just as important—what has not changed. We conclude that the 2016 Act is, in a number of respects, a better product than both the 1981 and 1995 Acts. Unfortunately, at the same time, the 2016 Act also left intact a number of highly controversial—and very likely unconstitutional—provisions of the prior Acts. In particular, the 2016 Act attempts to alter, rather than defer to, the debtor-creditor relationship between the parties, in violation of U.S. Supreme Court precedent. It also requires the escheat of foreign-owned property contrary to the U.S. Constitution, as well as foreign laws and treaties. The 2016 Act also does not provide adequate constitutional protection for owners of securities, whose property can still be escheated and liquidated without proper notice after a relatively short period of time.

Finally, this article discusses the Model Unclaimed Property Act (the "Model Act"), which was drafted in 2018 by the Unclaimed Property Subcommittee of the Taxation Committee of the Business Law Section of the ABA (the "Unclaimed Property Subcommittee"), with input from a number of key stakeholders including the ABA's Section of Taxation. The Model Act is intended to resolve each of these issues in a manner that satisfies constitutional requirements and that will also restore state unclaimed property laws to their original purpose, which is to return unclaimed property to the rightful owner.

A Brief History of State Unclaimed Property Laws

It is often noted that modern unclaimed property laws are derived from the English common law concepts of escheat and *bona vacantia*, under which property (typically, real property or tangible personal property) reverted to the King as the sovereign lord if the owner died without heirs. And in fact, many states embraced these common law doctrines in the early history of the United States. The U.S. Supreme Court upheld the constitutionality of such laws in early cases, such as *Hamilton v. Brown*,[1] as long as there were no heirs and proper notice had been given, reasoning as follows:

> [W]hen (as is admitted in the present case) the former owner was dead; and in the proceedings for escheat (as shown by the record on which the defendants rely) the petition describes the land, gives the name of the former owner, and alleges that he died intestate and without heirs, that no letters of administration upon his estate had been granted, that there is no tenant or person in actual or constructive possession of the land, nor any person, known to the petitioner, claiming an estate therein, and that the land has escheated to the state of Texas, and an order of notice to all persons interested in the estate has been published, as required by the statute; and, after a hearing of all who appear and plead, judgment is entered, describing the land and declaring that it has escheated to the state; the judgment is conclusive evidence of the state's title in the land, not only against any tenants or claimants having had actual notice by *scire facias*, or having appeared and pleaded, but also against all other persons interested in the estate and having had constructive notice by publication.

1. 161 U.S. 256, 268 (1896).

A decade later, in *Cunnius v. Reading School District*,[2] the Court upheld a state statute providing for escheat of real property, but warned that, "if a state law, in providing for the administration of the estate of an absentee, contained no adequate safeguards concerning property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others, that such a law would be repugnant to the Fourteenth Amendment."

It was not until the mid-twentieth century that states began to expand these laws to include certain types of intangible property, including in particular unclaimed bank deposits. Such laws complicated the legal landscape considerably, as will be discussed below.

The Original Uniform Unclaimed Property Act

The ULC (also known as the National Conference of Commissioners on Uniform State Laws) adopted the first version of the Uniform Act in 1954. Unlike the old escheat laws of the past, the Uniform Act was designed as a "custodial" escheat law, and was applicable primarily to "unclaimed" intangible property. The prefatory note to the 1954 Act explained:

> The Uniform Act is custodial in nature—that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, *the owner retains his right of presenting his claim at any time no matter how remote*. State records will have to be kept on a permanent basis. In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and the title to the property passes to the state. Not only does the custodial type of statute more adequately preserve the owner's interests, but, in addition, it makes possible a substantial simplification of procedure.[3]

The principal purpose of the Uniform Act was to protect unknown owners of intangible property by locating them and reuniting them with their property.[4] Thus, although modern unclaimed property laws are no longer "escheat" laws in a technical sense, the term "escheat" is still widely used to refer to a state's custodial taking of unclaimed property.[5] As a shorthand, we will sometimes refer to the "escheat" of property, which should be construed to mean the custodial taking of property by a state.

2. 198 U.S. 458, 477 (1905).

3. Unif. Disposition of Unclaimed Prop. Act pref. note (Unif. Law Comm'n 1954) (emphasis added).

4. *See, e.g.*, Commonwealth Edison Co. v. Vega, 174 F.3d 870, 872 (7th Cir. 1999) (The Uniform Acts "are not escheat statutes. The state does not acquire title to the property. It is merely a custodian. The owner can reclaim his property at any time."); Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff, 755 F. Supp. 2d 556, 565 (D.N.J. 2010) ("[T]he purpose of enacting [unclaimed property] laws is to provide for the safekeeping of abandoned property and then reunite the abandoned property with its owner."), *aff'd*, *sub nom.* N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374 (3d Cir. 2012).

5. Delaware v. New York, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.").

The Uniform Act, as its name implies, also applies to "unclaimed" property rather than "abandoned" property. There is an important distinction between the two. As Judge Posner recognized in *Cerajeski v. Zoeller*,[6] "abandonment" refers to the "voluntary relinquishment or renunciation of a property right, or an ownership vacuum resulting from the owner's death without heirs or a valid will. It means that the owner gives up all claims to the property, thus pitching it back into the public domain, where it is available for reappropriation." By contrast, where the property is merely "unclaimed," the owner has not voluntarily relinquished any rights. It may be that the owner has forgotten about the property (for example, an uncashed check left sitting in a desk drawer), or it may be that the owner simply has not affirmatively taken action with respect to the property for a period of time (for example, an investment account left to appreciate over time). As Judge Posner explained, states have significantly greater rights to seize abandoned property than unclaimed property, precisely because the owner's rights in abandoned property have been relinquished. Unfortunately, the Uniform Act confuses the two concepts, by saying that property is "presumed abandoned"[7] after it has been unused for a period of time. What the Act really means is that it is presumed "unclaimed."

The Uniform Act, as originally designed, applied to obligations to pay money—including unclaimed bank deposits, life insurance proceeds, utility deposits and refunds, and dividends—and securities. The escheat of securities raises additional concerns because, after the escheat, the state is authorized by the Act to liquidate them. In 1966, the ULC revised the Uniform Act, and made minor revisions, primarily to address issues concerning money orders and travelers' checks. By 1980, over thirty states and the District of Columbia had adopted either the original version or the 1966 version of the Uniform Act.

Adoption of Federal Common Law Custodial Escheat Rules

States soon realized that unclaimed intangible property, after it was remitted to the states, was often never claimed by the owner and thus could represent a significant source of revenue. Accordingly, states began asserting competing claims to the property. For tangible property, "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat."[8] Intangible property, however, of course has no physical situs and thus it is unclear which state had the right to escheat or take custody of such property. At the same time, the U.S. Supreme Court made clear, in *Western Union Telegraph Co. v. Pennsylvania*,[9] that a holder of unclaimed intangible property could not, under the Due Process Clause of the U.S. Constitution, be subject

6. 735 F.3d 577, 581 (7th Cir. 2013) (citations omitted).
7. *See, e.g.*, Unif. Unclaimed Prop. Act art. 2 (Unif. Law Comm'n 2016) ("Presumption of Abandonment").
8. Texas v. New Jersey, 379 U.S. 674, 677 (1965).
9. 368 U.S. 71, 75 (1961).

to the possible conflicting liabilities caused by two or more states seeking to escheat the same intangible property.

In *Texas v. New Jersey*,[10] which involved claims by multiple states to take custody of property owed by Sun Oil Company, the Court established two rules intended to settle "once and for all" whether a state has jurisdiction to escheat unclaimed intangible property. The Court recognized that unclaimed intangible property is an unsatisfied "debt" that is owed by the debtor to the creditor.[11] Reasoning that a debt is the property of the creditor, the Court established a "primary rule" that "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records."[12] The Court then established a "secondary rule," which permits the state of domicile of the debtor to escheat the property if (1) the last known address of the owner of the property is unknown; or (2) the owner's "last known address is in a State which does not provide for escheat of the property."[13] The Court reaffirmed these rules in *Pennsylvania v. New York*, and applied them strictly to require escheat of unclaimed money orders to Western Union's state of domicile (or state of last known address, if Western Union had such records), rather than the state in which the money orders were sold.[14]

In *Delaware v. New York*,[15] the Court clarified that these rules "cannot be severed from the law that creates the underlying creditor-debtor relationships." Thus, "[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."[16] More simply, "the holder's legal obligations not only defined the escheatable property at issue, but also carefully identified the relevant 'debtors' and 'creditors.'"[17] Accordingly, a state's right to escheat is defined by the legal obligation that is owed by the debtor to the unknown or absent creditor, and the debtor—and not any other person—has the legal obligation to comply with any applicable unclaimed property laws. Thus, *Delaware* stands for the common-sense principle that the state can only escheat property that is actually owed to the creditor, or owner. Indeed, if this were not true, then the state would be escheating property from someone who does not owe it, for the purpose of giving it to someone to whom it does not belong. The principle that the state's rights are derived from those of the absentee creditor and thus limited to property actually owed to that creditor has become known as the principle

10. *Texas*, 379 U.S. at 678.
11. *Id.* at 680.
12. *Id.* at 680–81.
13. *Id.* at 682.
14. 407 U.S. 206 (1972). Congress later adopted a federal statute which provides that money orders and traveler's checks are escheatable to (1) the state in which such instruments were sold, if the holder has a record of such information; (2) the state of the principal place of business of the holder, if it lacks such a record; or (3) the state of the principal place of business of the holder, if the holder's records show that the state in which the instruments were sold do not provide for the escheat of the sums payable on such instruments. 12 U.S.C. § 2503 (2012). This is the *only* exception that has been adopted to the jurisdictional rules established by the Court in *Texas*.
15. 507 U.S. 490, 503 (1993).
16. *Id.* at 501.
17. *Id.* at 503.

of derivative rights, or alternatively as the "derivative rights doctrine."[18] Numerous courts have embraced this doctrine.[19]

18. Some courts have carved out a narrow exception to this principle where the creditor's claim against the debtor is barred by the statute of limitations. *See, e.g.*, Travelers Express Co. v. State, 732 P.2d 121, 124 (Utah 1987) (citation omitted) ("[T]he 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."). On the other hand, other courts have reached the opposite result. *See, e.g.*, Pac. Nw. Bell Tel. Co. v. Dep't of Revenue, 481 P.2d 556, 558 (Wash. 1971) (en banc) ("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.").

19. *See, e.g.*, *In re* New York, 138 F. Supp. 661, 666 (S.D.N.Y. 1956) (footnotes and citations omitted) ("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."); Barker v. Leggett, 102 F. Supp. 642, 644–45 (W.D. Mo. 1951) (citations omitted) ("'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.'"), *appeal dismissed*, 342 U.S. 900 (1952); Bank of Am. N.A. v. Cory, 210 Cal. Rptr. 351, 355–56 (Ct. App. 1985) (citations omitted) ("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.'"); Blue Cross of N. Cal. v. Cory, 174 Cal. Rptr. 901, 909 (Ct. App. 1981) (holding that "the Controller's rights under the UPL are 'derivative,' and that he accordingly succeeds to whatever rights the owner of unclaimed property may have and no more"); Bank of Am. N.A. v. Cranston, 60 Cal. Rptr. 336, 338 (Ct. App. 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."); Ins. Co. of N. Am. v. Knight, 291 N.E.2d 40, 44 (Ill. App. Ct. 1972) (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"), *appeal dismissed*, 414 U.S. 804 (1973); Cole v. Nat'l Life Ins. Co., 549 So. 2d 1301, 1304 (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 . . . ."); State *ex rel.* Marsh v. Neb. 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 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. 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. U.S. Steel Corp., 126 A.2d 168, 173 (N.J. 1956) (citations omitted) ("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. Standard Oil Co., 74 A.2d

The Court in *Delaware* thus clarified 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."[20] Accordingly, the Court found that the "holder" of unclaimed property with the potential obligation to report and remit such property to the state is the "debtor" or the "obligor." As the Court stated, "[f]unds held by a debtor become subject to escheat *because the debtor has no interest in the funds.*"[21] Conversely, if a person *does* have an interest in the property the state seeks to escheat, then the person is not the legal debtor, and thus cannot be the "holder" and has no obligation to escheat the property.

The Court's analysis and conclusion are consistent with the age-old axiom that escheat is a right of succession, pursuant to which the state takes custody of property owed to another person who has failed to claim that property. Indeed, citing the Supreme Court's earlier decision in *Christianson v. King County*,[22] one federal district court more explicitly summarized the derivative rights principle as follows:

565, 573 (N.J. 1950) ("The State's right is purely derivative; it takes only the interest of the unknown or absentee owner."), *aff'd*, 341 U.S. 428 (1951); *In re* Nov. 8, 1996, Determination of State, Dep't of Treas., Unclaimed Prop. Office, 706 A.2d 1177, 1180 (N.J. Super. Ct. App. Div. 1998) ("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."), *aff'd per curiam*, 722 A.2d 536 (N.J. 1999); State v. Sperry & Hutchinson Co., 153 A.2d 691, 699–700 (N.J. Super. Ct. App. Div. 1959) (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"), *aff'd per curiam*, 157 A.2d 505 (N.J. 1960); State v. Am.-Hawaiian S.S. Co., 101 A.2d 598, 609 (N.J. Super. Ct. Ch. Div. 1953) ("[T]he State's right is wholly 'derivative' of the right of the owner . . . ."); *In re* 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."); S.C. Tax Comm'n v. Metro. Life Ins. Co., 221 S.E.2d 522, 523 (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. City of 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. State, 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."); State v. Tex. Elec. Serv. Co., 488 S.W.2d 878, 881 (Tex. 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. Tex. Osage Royalty Pool, Inc., 394 S.W.2d 241, 244 (Tex. 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"); S. Pac. Transp. Co. v. State, 380 S.W.2d 123, 126 (Tex. 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 v. Puget Sound Power & Light Co., 694 P.2d 7, 11 (Wash. 1985) (en banc) ("[T]he state's right [is] purely derivative and therefore no greater than the owner's.").

20. Delaware v. New York, 507 U.S. 490, 499 (1993).

21. *Id.* at 502 (emphasis added).

22. 239 U.S. 356, 370 (1915).

> 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."[23]

The rules governing when states may take custody of unclaimed property, as set forth in *Texas*, *Pennsylvania*, and *Delaware*, constitute federal common law, which cannot be superseded by any state.[24] Furthermore, these rules have been held to apply not just in the context of interstate disputes, as in those three cases, but in controversies between states and potential holders of unclaimed property. For example, in *American Petrofina Co. of Texas v. Nance*,[25] the court declared an Oklahoma escheat statute invalid "because it [was] inconsistent with the federal common law set forth in *Texas v. New Jersey*."[26] The court held that "[t]he Supreme Court's decision in *Texas v. New Jersey* may be relied upon to prevent state officials from enforcing a state law in conflict with the *Texas v. New Jersey* scheme for escheat or custodial taking of unclaimed property."[27] The Tenth Circuit affirmed, stating that "the district court's reasoning is in accord with our views."[28] The Third Circuit reached the same result in *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*.[29]

The Third Circuit revisited this issue in *Marathon Petroleum Corp. v. Secretary of Finance for Delaware*,[30] expressly holding that "we disagree with [the district court's] conclusion that private parties cannot invoke federal common law to challenge a state's authority to escheat property."[31] The court analyzed the issue in detail, explaining that "the reasoning of the *Texas* cases is directly applicable to disputes between a private individual and a state" because the federal common law rules "were created not merely to reduce conflicts between states, but also to protect individuals."[32] The court stated that, "without a private cause of action, the *Texas* trilogy's protections of property against escheatment would, in many instances, become a dead letter."[33] The court explained that "[d]enying

23. Barker v. Leggett, 102 F. Supp. 642, 644–45 (W.D. Mo. 1951) (citation omitted) (quoting Standard Oil Co. v. New Jersey, 74 A.2d 565, 573 (N.J. 1950), *aff'd*, 341 U.S. 428 (1951)); *see also* Hamilton v. Brown, 161 U.S. 256, 268 (1896) (noting that escheat involves the regulation of succession to property).

24. *See, e.g.*, *Delaware*, 507 U.S. at 500 (holding that "no State may supersede" these rules of federal common law); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (discussing federal preemption of state law); Illinois v. City of Milwaukee, 406 U.S. 91, 105–06 (1972) (citing *Texas* as federal common law); Wilburn Boat Co. v. Fireman's Fund 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 generally* City of Milwaukee v. Illinois, 451 U.S. 304, 307 (1981) (characterizing *Illinois v. City of Milwaukee* as an example of federal common law).

25. 697 F. Supp. 1183 (W.D. Okla. 1986), *aff'd*, 859 F.2d 840 (10th Cir. 1988).

26. *Id.* at 1190.

27. *Id.* at 1187.

28. *Am. Petrofina Co.*, 859 F.2d at 842.

29. 669 F.3d 374, 391–98 (3d Cir. 2012).

30. 876 F.3d 481 (3d Cir. 2017).

31. *Id.* at 484.

32. *Id.* at 494.

33. *Id.*

a private right of action would leave property holders largely at the mercy of state governments for the vindication of their rights" and "would make it easier for states outside of the line of priority to escheat property and would require the Supreme Court to exercise or delegate its original jurisdiction in a greater number of cases, undermining one of the chief benefits of the rules of priority."[34] The court also noted that "[m]aking private rights contingent on state action would likewise undermine the Supreme Court's goal of national uniformity, because whether an individual is protected would depend on whether a state brings suit to contest escheatment of the property."[35] The court concluded that "the Supreme Court's desire for a uniform and consistent approach to escheatment disputes indicates that a private right of action is fully appropriate."[36] Finally, the court noted that "allowing private parties to sue also provides secondary benefits that serve the public interest. In protecting their own interests, private parties may also be aiding states in the maintenance of their sovereignty."[37] Several lower court cases have reached the same conclusion.[38]

The 1981 and 1995 Versions of the Uniform Act

In 1981, the ULC adopted a new version of the Uniform Act. The prefatory note to the 1981 Act recognized the importance of the U.S. Supreme Court's decision in *Texas v. New Jersey*, and incorporated the primary and the secondary rules into the Act. At the same time, the 1981 Act, and later the 1995 Act, deviated from the *Texas* rules in substantial ways. The Acts also were deficient in numerous other ways, including the treatment of securities and the lack of an effective statute of limitations on state claims against putative holders.

The "Tertiary" Rule

In addition to the primary and secondary rules created by the Supreme Court in *Texas*, and upheld in *Pennsylvania* and *Delaware*, the 1981 and 1995 Acts also included a "tertiary rule," which granted the right to escheat to the state in which the transaction giving rise to the property occurred, if the property was not es-

34. *Id.* at 494–95 & n.15.
35. *Id.* at 495.
36. *Id.*
37. *Id.*
38. *See, e.g.*, Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527 (D. Del. 2016); Nellius v. Tampax, Inc., 394 A.2d 233 (Del. Ch. 1978); State *ex rel.* French v. Card Compliant, LLC, No. N13C-06-289 FSS [CCLD], 2015 Del. Super. LEXIS 1069 (Nov. 23, 2015); State *ex rel.* Higgins v. SourceGas, LLC, No. N11C-07-193 MMJ CCLD, 2012 WL 1721783 (Del. Super. Ct. May 15, 2012). A few recent federal district court cases in Delaware have reached the opposite result, but those cases were superseded by the Third Circuit's opinion in *Marathon Petroleum Corp. v. Secretary of Finance for Delaware*. *See* Office Depot, Inc. v. Cook, 238 F. Supp. 3d 616 (D. Del. 2017), *vacated*, 710 F. App'x 59 (3d Cir. 2018); Marathon Petroleum Corp. v. Cook, 208 F. Supp. 3d 576 (D. Del. 2016), *vacated*, 876 F.3d 481 (3d Cir. 2017).

cheated under the primary or secondary rules.[39] However, the tertiary rule was problematic for several reasons:

- First, in *Texas v. New Jersey*,[40] the Court was primarily concerned with crafting priority rules that would "unambiguously and definitively resolve disputes among states regarding the right to escheat abandoned property."[41] In other words, the Court intended the primary and secondary rules to be the sole bases under which states may take custody of unclaimed property. Indeed, in *Marathon Petroleum Corp.*, the Third Circuit unequivocally held that "the two states allowed to escheat under the priority rules of the *Texas* cases are the *only* states that can do so."[42] If a state was permitted to adopt a tertiary rule, then different states could easily adopt conflicting tertiary rules.[43] This would ultimately result in an interstate 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 these rules.

- Second, in crafting the primary and secondary 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."[44] On this basis, the *Texas* Court then *specifically rejected* a transaction-based custody rule, like that in the 1981 and 1995 Acts, that would allow a state to take custody of unclaimed property based on where the transaction giving rise to the property occurred.[45] Subsequently, in *Pennsylvania*,[46] the Court again rejected a transaction-based custody rule proposed by Pennsylvania with respect to unclaimed money orders.

- Third, in *Delaware*,[47] the Court recognized that a state's power to escheat is derived from the principle of sovereignty. However, if the tertiary rule were enforceable, it would allow the transaction state to infringe on the

39. Unif. Unclaimed Prop. Act § 3(6) (Unif. Law Comm'n 1981); Unif. Unclaimed Prop. Act § 4(6) (Unif. Law Comm'n 1995).

40. 379 U.S. 674 (1965).

41. N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 394 (3d 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.

42. *Marathon Petroleum Corp.*, 876 F.3d at 481.

43. The risk of competing claims is amplified when considering the location of an intangible transaction where each of the debtor, creditor, and controlling law may implicate a different jurisdiction.

44. *Texas*, 379 U.S. at 679.

45. 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." *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.

46. Pennsylvania v. New York, 407 U.S. 206 (1972).

47. Delaware v. New York, 507 U.S. 490, 503 (1993).

> sovereign authority of other states.[48] Specifically, the tertiary 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 tertiary state, which "would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat."[49] 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."[50]

The constitutionality of the tertiary rule was specifically addressed by the U.S. Court of Appeals for the Third Circuit in *New Jersey Retail Merchants Association*.[51] In that case, the court concluded that the tertiary 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 tertiary rule was "likely preempted under *Texas*, *Pennsylvania*, and *Delaware*."[52] The Third Circuit's decision affirmed the district court's opinion, which similarly concluded that, under the federal priority rules, "there is no room for a third priority position."[53] "If the secondary-rule state does not escheat," the court held, "the buck stops there."[54]

Foreign-Owned Property

The 1981 and 1995 Acts also permitted the state of domicile of the holder to escheat property if the last known address of the owner was located in a foreign country.[55] Like with the tertiary rule, though, the Supreme Court has not permitted the holder's state of domicile to escheat property belonging to an owner residing in a foreign country. To the contrary, the Court expressly stated in *Texas v. New Jersey* that the state of domicile of the holder has the right to escheat *only* where the last known address of the owner of the property is unknown or "is in *a State* which does not provide for escheat of the property."[56] Accordingly, just as with the tertiary rule, a new rule providing for escheat of foreign property likewise goes beyond *Texas* and therefore is preempted. Indeed, the Third Circuit reached the same conclusion in a different context in *Marathon Petroleum Corp.*, expressly holding that,

> Constructed as federal common law, that order of priority gives first place to the state where the property owner was last known to reside. If that residence cannot

48. N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 395 (3d Cir. 2012).
49. *Id.*
50. *Id.*
51. *Id.* at 396.
52. *Id.*
53. Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff, 755 F. Supp. 2d 556, 606 (D.N.J. 2010), *aff'd*, 669 F.3d 374 (3d Cir. 2012).
54. *Id.*
55. Unif. Unclaimed Prop. Act §§ 3, 36 (Unif. Law Comm'n 1981); Unif. Unclaimed Prop. Act §§ 4, 26 (Unif. Law Comm'n 1995).
56. 379 U.S. 674, 682 (1965) (emphasis added); *see also* Delaware v. New York, 507 U.S. 490, 498 (1993) (quoting *Texas*, 379 U.S. at 682).

> be identified or if that state has disclaimed its interest in escheating the property, second in line for the opportunity to escheat is the state where the holder of the abandoned property is incorporated. *Any other state is preempted by federal common law from escheating the property*.[57]

The escheat of foreign-owned property also raises serious constitutional concerns under the foreign affairs doctrine[58] and the Commerce Clause.[59] For example, in *Zschernig v. Miller*,[60] the U.S. Supreme Court invalidated an Oregon statute because it had more than "some incidental or indirect effect in foreign countries" and posed a "great potential for disruption or embarrassment" of the nation's foreign relations.[61] The statute in question barred a nonresident alien from acquiring property of an Oregon decedent by testamentary disposition, and required that the property be escheated to Oregon unless the nonresident could show that his country of origin would grant reciprocal rights to a U.S. citizen and that his government would not confiscate the inherited property.[62] States now collect as unclaimed property (and, in the case of securities, liquidate) billions of dollars of foreign-owned property, thus creating as significant an effect on foreign countries and as great a "potential for disruption or embarrassment" of the nation's foreign relations as the Oregon law.[63]

Similarly, in *Japan Line, Ltd. v. County of Los Angeles*,[64] the Supreme Court held that Los Angeles County was prohibited by the Commerce Clause from imposing a fairly apportioned property tax on shipping containers owned by foreign companies which were physically located within the county. The Court recognized that special considerations beyond those that govern the regulation of property owned by U.S. citizens come into play when states seek to regulate property owned by foreign citizens, even when that property is physically used in the United States—because "[f]oreign commerce is preeminently a matter of national concern."[65] The Court emphasized the "overriding concern" that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[66] The Court wanted to avoid international disputes and potential retaliation

57. Marathon Petroleum Corp. v. Sec'y of Fin., 876 F.3d 481, 484 (3d Cir. 2017) (emphasis added).

58. The U.S. Constitution vests foreign affairs powers exclusively in the federal government rather than the states. *See* United States v. Pink, 315 U.S. 203, 233 (1942); Ping v. United States, 130 U.S. 581, 606 (1889); Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 482 (1888); *see also* U.S. Const. art. I, § 8, cl. 3; *id.* art. I, § 10, cl. 1–3; *id.* art. II, § 2, cl. 2.

59. U.S. Const. art. I, § 8, cl. 3 (Congress, rather than the states, shall have the sole and exclusive power to "regulate Commerce with foreign Nations . . . ."); Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) (Congress's power over foreign commerce is "exclusive and absolute.").

60. 389 U.S. 429 (1968).

61. *Id.* at 434–35 (quoting, in the first instance, Clark v. Allen, 331 U.S. 503, 517 (1947)).

62. *Id.* at 430.

63. Indeed, foreigners own over $6 trillion in U.S. corporate stock. *U.S. Long-Term Securities Held by Foreign Residents*, U.S. Dep't Treas. (Dec. 19, 2017), http://ticdata.treasury.gov/Publish/slt2d.txt.

64. 441 U.S. 434, 454 (1979).

65. *Id.* at 448.

66. *Id.* at 449 (quoting, in the second instance, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

by foreign countries.[67] These same concerns apply in the escheat context, particularly where the property is not just escheated but liquidated (as in the case of securities). Indeed, if merely *taxing* foreign-owned property is unconstitutional, then it follows that entirely depriving an owner of such property should similarly be unconstitutional. The escheat by states of foreign-owned property also prevents the federal government from "speak[ing] with one voice when regulating commercial relations with foreign governments."[68] Notwithstanding the ULC's goals, state unclaimed property laws are anything but uniform, as the states have variously adopted different versions of the Uniform Act, deviated from the Uniform Acts in significant ways, or adopted unique unclaimed property laws.[69] This is hardly part of the "uniform system or plan" required by law.[70]

The escheat of foreign-owned property also may conflict with U.S. treaties with foreign countries, foreign laws, due process, and other international legal standards. Indeed, the foreign country in which the owner is located has a greater interest in regulating the unclaimed property belonging to its citizens than the U.S. state where the holder of the property is domiciled. This is in accordance with the escheat rules developed in *Texas*, which reflect the traditional view of escheat as an exercise of sovereignty over person and property owned by persons and the common-law concept of *mobilia sequuntur personam*, which recognizes that the state of address of the owner has a superior interest than the state of domicile of the holder.

Other Derivatives from *Texas v. New Jersey*

The 1981 and 1995 Acts also deviated from the *Texas* rules in other ways. For example, these Acts permit the state to escheat property if the holder of the property does not have a record of the owner's address or identity, but the administrator has determined by other means that the last-known address of the owner is in the state.[71] In *Texas*, however, the Court held that, under the primary rule, "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*."[72] Accordingly, the Court's decision in *Texas* does not appear to support the use by a state of extrinsic evidence of the owner's address to establish an obligation of the holder under the primary rule. To the contrary, as noted above, one of the key objectives of the Court in creating the federal common law rules was to establish rules that are simple and easy to administer.[73] In particular, the Court chose the primary rule be-

67. *Id.* at 450–51.
68. *Id.* at 449 (quoting *Michelin Tire Corp.*, 423 U.S. at 285).
69. All states have adopted some form of unclaimed property law, so the possibility that no state law governs has virtually disappeared, with the possible exception of a few remote non-state territories or possessions of the United States.
70. *Japan Line, Ltd.*, 441 U.S. at 457.
71. Unif. Unclaimed Prop. Act § 3(3) (Unif. Law Comm'n 1981); Unif. Unclaimed Prop. Act § 4(3) (Unif. Law Comm'n 1995).
72. Texas v. New Jersey, 379 U.S. 674, 681–82 (1965) (emphasis added).
73. *Id.* at 683.

cause it "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided."[74] The Court further explained that, "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified."[75] The Court's goals of simplicity and ease of administration would be served by applying the primary rule based solely on the holder's records. The Court's decision in *Texas* seems to be reasonably clear on this point, as the Court stated 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*."[76]

The 1981 and 1995 Acts also include language that arguably permits a holder's state of domicile to assert unclaimed property jurisdiction over property that is not subject to escheat by the state of last-known address of the owner, an issue not expressly addressed by the Court in *Texas* but which is inconsistent with the sovereign authority of the primary state to determine not to exercise its right to escheat the property. To the extent that the *Texas* decision was unclear on this point, the Court's later decisions in *Pennsylvania* and *Delaware* appeared to clarify that the secondary rule can apply only if there is no record of the owner's address or the primary state "does not provide for escheat of intangibles"[77] or "does not provide for escheat"[78] at all. These subsequent articulations of the federal common law rules 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 the Court was intending to allow the holder's state of domicile to escheat property exempted by the primary state. Indeed, the Third Circuit later 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."[79] The Full Faith and Credit Clause of the U.S. Constitution would also apparently require the second-priority state to give full recognition to the first-priority state's sovereign right not to escheat the ex-

74. *Id.* at 681.

75. *Id.* In *Texas*, the Court also rejected other jurisdictional escheat rules proposed by states on the basis that such rules would require a case-by-case analysis that would inevitably be subject to dispute. The Court wanted to avoid "[t]he uncertainty of any test which would require [it] 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." *Id.* at 679; *see also* Nellius v. Tampax, Inc., 394 A.2d 233, 235–37 (Del. Ch. 1978) (interpreting *Texas* and *Pennsylvania* as requiring that, even if the records of the holder were proven to be inaccurate, those records would still be determinative for purposes of applying the primary rule).

76. *Texas*, 379 U.S. at 681 n.11 (emphases added).

77. Pennsylvania v. New York, 407 U.S. 206, 210 (1972).

78. Delaware v. New York, 507 U.S. 490, 507 (1993); *id.* at 500, 504 (emphases added) (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*"); *see also* Pennsylvania v. New York, 407 U.S. 206, 212 (1972) (emphasis added) (stating that the second-priority rule applies if the address "was located *in a State not providing for escheat*").

79. N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 395 (3d Cir. 2012).

empted property.[80] The Full Faith and Credit Clause expresses "[a] unifying principle . . . looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states,"[81] 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."[82]

Derivative Rights

The 1981 and 1995 Acts also deviated from the federal common law principle of derivative rights—i.e., that the holder's unclaimed property obligation must be based on "the precise debtor-creditor relationship as defined by the law that creates the property at issue."[83] For example, the 1981 Act defined the "holder" of unclaimed property to be not only the person "indebted to another on an obligation," but also the person "in possession of property belonging to another" or a "trustee."[84] After *Delaware* was decided, the 1995 Act attempted to correct this error by redefining 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]."[85] The commentary to the 1995 Act further clarified that, "[a]s 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."[86] While the commentary got it right, the actual language of the statute is still somewhat ambiguous and thus could potentially result in a person being designated as the "holder" even though the person does not have the requisite legal obligation to the owner. Neither Act makes clear that there cannot be multiple holders of unclaimed property.

Notwithstanding the 1995 Act's attempted correction to the definition of "holder," neither the 1981 Act nor 1995 Act reflects the other central holding in *Delaware*, which is that the state can only escheat the obligation that is actually owed. In particular, both Acts include so-called "anti-limitations provisions," which provide that:

> The expiration, before or after the effective date of this Act, of any period of time specified by contract, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required by this Act.[87]

80. U.S. Const. art. IV, § 1.
81. Hughes v. Fetter, 341 U.S. 609, 612 (1951).
82. Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941).
83. *Delaware*, 507 U.S. at 499.
84. Unif. Unclaimed Prop. Act § 1(8) (Unif. Law Comm'n 1981).
85. Unif. Unclaimed Prop. Act § 1(6) (Unif. Law Comm'n 1995).
86. *Id.* § 1 cmt.
87. Unif. Unclaimed Prop. Act § 29(a) (Unif. Law Comm'n 1981); *see also* Unif. Unclaimed Prop. Act § 19(a) (Unif. Law Comm'n 1995).

These anti-limitations provisions expand from those in the 1954 and 1966 Acts to include "contractual" limitations. Thus, these revised provisions purport to override contractual restrictions on an owner's right to claim property—*even if those restrictions are valid and enforceable under applicable laws governing the debtor-creditor relationship*. These provisions thus purport to change the underlying debtor-creditor relationship, rather than defer to it, in direct contravention of *Delaware*.

States have argued that the U.S. Supreme Court's 1948 decision in *Connecticut Mutual Life Insurance Co. v. Moore*[88] somehow overrides *Delaware* (decided forty-five years later) and permits states to ignore contractual conditions that may prevent the property from being owed. However, *Connecticut Mutual* involved the narrow issue of whether New York's escheat statute applicable to life insurance proceeds violated the Contract Clause of the U.S. Constitution. It did not address the derivative rights principle, other than to suggest that a state *cannot* constitutionally alter substantive contract conditions existing between the parties.

The law at issue in *Connecticut Mutual* permitted escheat of unpaid life insurance proceeds owed under preexisting policies even without satisfying the insurance policy conditions requiring proof of death and surrender of the policy. The insurance companies argued that these contract conditions served a substantive purpose—they were intended to provide information from which the companies could establish defenses to their obligation to pay. Consequently, the companies argued that New York's attempt to require them to pay the policy proceeds to the state without satisfaction of these conditions materially changed the terms of its contracts with policyholders and therefore substantially impaired the contracts, in violation of the Contract Clause. In rejecting this argument, the Court stated that the "enforced variations from the policy provisions" were not unconstitutional because otherwise "the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay."[89] In explaining its holding, the Court stated, "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be proper as between the contracting parties. The state is acting as a conservator, not as a party to a contract."[90]

Nevertheless, the Court did *not* hold that a state may simply ignore *all* contract conditions that exist between a debtor and creditor, and thereby claim as property an amount that is not owed. To the contrary, the Court pointed out that the New York Court of Appeals had construed the escheat law to leave "open to the insurance companies all defenses except the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency, and failure to surrender a policy on making a claim."[91]

Strikingly, none of the potential defenses cited by the Court or the insurers was that the insured had not actually died. Thus, all of the parties and the

88. 333 U.S. 541 (1948).
89. *Id.* at 546.
90. *Id.* at 547.
91. *Id.* at 545.

Court assumed that the insurers would have had actual knowledge of death before escheating—the standard later adopted in the 1981 Act. Given that the Court did not place on the insurers any obligation to affirmatively determine whether insureds had died, such an assumption would have been quite reasonable. Therefore, the "proof of death" in question was the merely formalistic substantiation required by the policies. Indeed, given the highly restricted ability at that time to affirmatively determine deaths, insurers would have had no ability to escheat without having actual knowledge of death, which in most cases could arise only by having been provided with some reliable notice of the death, even if not in the exact form required by the policy and the insurance laws of the state.

In other words, the Court addressed only *formalistic* contract conditions on property *that was already classified as "abandoned"* by the unclaimed property statute and "which normally [the insurance companies] would have been required to pay."[92] The Court specifically recognized that non-formalistic conditions may be raised as defenses to escheat, if those conditions have not been satisfied.[93] *Connecticut Mutual* would therefore not support a state escheat law that provides that the state need not satisfy a substantive condition of ownership. Indeed, one court, in distinguishing the *Connecticut Mutual* decision, stated that the Supreme Court excused compliance with contract conditions "which only go to formalism of interest, such as proof of death . . . but it is nevertheless held to compliance with matters that deal with substantive determination of ownership."[94] Furthermore, a number of courts have subsequently denied state claims to property where the purported owner of the property had not satisfied certain conditions to claim the property.[95]

More importantly, even if a state could adopt escheat laws that would override other, more substantive, conditions without violating the Contract Clause, that

92. *Id.* at 546.

93. *See id.* 542–47. *Connecticut Mutual* thus did not hold that states can disregard the contractual "due proof of death" requirement in all circumstances. It held only that requiring the reporting of life insurance benefits at the limiting age, or when the insurer has received some notice of death (presumably from, for example, a beneficiary or funeral home), does not impair the contracts in a constitutionally problematic way. *See id.* In contrast, legislation that eliminates any requirement of notice and requires insurers to affirmatively seek out deaths substantially impairs preexisting contracts—it shifts the burden of establishing death entirely from the beneficiary to the insurer, and thus fundamentally alters the parties' bargain, a result the Court in *Connecticut Mutual* never contemplated.

94. Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?*, 70 U. Pitt. L. Rev. 511, 524 & n.36 (2009) (quoting Kane v. Ins. Co. of N. Am., slip. op. at 21 (Pa. Ct. Common Pleas Jan. 20, 1976)).

95. *See, e.g.*, State v. Elizabethtown Water Co., 191 A.2d 457, 458 (N.J. 1963) (holding that New Jersey had no right to escheat funds resulting from unrefunded deposits for water utility main construction based on the contract terms among the parties, and noting that "the State's claims are nonetheless derivative and certainly no broader than the [owners'] claims"); State v. Sperry & Hutchinson Co., 153 A.2d 691, 698–700 (N.J. Super. Ct. App. Div. 1959) (holding that the state had no right to escheat the value of unredeemed trading stamps when the contractual terms required a person to obtain a minimum quantity of stamps before they could be redeemed for cash and the state could not show such minimum quantity was held by any particular owner), *aff'd per curiam*, 157 A.2d 505 (N.J. 1960); State v. Multnomah Kennel Club, 411 P.2d 63, 67–68 (Or. 1966) (holding that an unpresented pari-mutuel ticket that was payable on demand was not "payable or distributable," Or. Rev. Stat. § 98.362, because the ticket did not become "due" until it was presented).

does not mean that such laws would not violate the federal common law rules set forth in *Delaware*, the Takings Clause, substantive due process, or other laws. These issues were never considered by the *Connecticut Mutual* Court and thus that decision cannot stand for the proposition that such escheat laws are valid. Indeed, the Court in *Delaware*, citing *Connecticut Mutual*, stated:

> Unless we define the terms "creditor" and "debtor" according to positive law, we might "permit intangible property rights to be cut off or adversely affected by state action . . . in a forum having no continuing relationship to any of the parties to the proceedings." *Pennsylvania*, *supra*, at 213 (internal quotation marks omitted). Cf. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 549–550 (1948) (upholding New York's escheat of unclaimed insurance benefits only "as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at . . . maturity"). *Texas* and *Pennsylvania* avoided this conundrum by resolving escheat disputes according to the law that creates debtor creditor relationships; only a State with a clear connection to the creditor or the debtor may escheat.[96]

Given the Court's emphatic requirement in *Delaware* that a debtor-creditor relationship exist under the positive law of the state, it simply could not have cited *Connecticut Mutual* if that case stood for the broad proposition that states are not bound by contractual contingencies. *Delaware* does not allow the state to create a debtor-creditor relationship where none exists, and neither does *Connecticut Mutual*.[97]

The 1981 and 1995 Acts also attempted to justify the contractual anti-limitations provisions by citing three so-called "private escheat" cases. However, each of these cases involved very unusual factual situations in which the courts found that the

96. Delaware v. New York, 507 U.S. 490, 504 (1993).

97. Permitting the state to use its escheat laws to override substantive contract conditions also creates significant problems under the Full Faith and Credit Clause. For example, consider a contract that is entered into between two parties, and which is expressly agreed to be governed by the laws of a particular state. The governing-law state may not be the state that claims the right to escheat any unclaimed property arising out of that contract. Thus, if the laws of the state governing the contract permit the parties to impose certain conditions between themselves, then any escheat laws of another state that do not respect such conditions will not be giving full faith and credit to the laws of the governing-law state. This effectively allows states to use their escheat laws to "trump" the debtor-creditor laws of other states, which is not permitted by the Full Faith and Credit Clause because the state whose laws govern the debtor-creditor relationship has a substantially greater connection than the state whose unclaimed property laws apply to the property at issue. Allstate Ins. Co. v. Hague, 449 U.S. 302, 307–12 (1981) (plurality opinion) (holding that, where there is a conflict between the laws of different states, the Full Faith and Credit Clause requires deference to the state with the most significant contacts to the controversy); Nevada v. Hall, 440 U.S. 410, 421–24 (1979) (same); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 181–83 (1936) (same); Home Ins. Co. v. Dick, 281 U.S. 397, 407–11 (1930) (same). Furthermore, if the state that governs the contract is the same as the escheat state, another constitutional problem is created, as the state's escheat laws then may effectively "amend" the state's debtor-creditor laws in violation of the single-subject provision of the state's own constitution. *See, e.g.*, Planned Parenthood Affiliates of Cal. v. Swoap, 219 Cal. Rptr. 664, 673 (Ct. App. 1985) (invalidating a budget bill that would have "impose[d] substantive conditions that nowhere appear" in the Family Planning Act); Cal. Labor Fed'n v. Occupational Safety & Health Standards Bd., 7 Cal. Rptr. 2d 399, 405 (Ct. App. 1992) (quoting Planned Parenthood Affiliates of Cal. v. Swoap, 219 Cal. Rptr. 664, 673 (Ct. App. 1985)) (invalidating a budget bill that would have effectively amended the attorney fee provisions under CAL. CIV. PROC. CODE § 1021.5, creating "substantive conditions that nowhere appear in existing law").

holders of unclaimed property had unilaterally taken actions designed specifically to circumvent state unclaimed property laws by cutting off the rights of owners after a specified period of time.[98] This is in stark contrast to most time-based contractual limitations provisions entered into between sophisticated business entities, which are entered into for valid business reasons, such as to provide certainty to the parties. Furthermore, all of the private escheat cases predate *Delaware* and thus none of them considered the restraints imposed by federal common law on the state's jurisdiction to escheat.

The 1981 and 1995 Acts also violated the derivative rights doctrine in other ways. Most notably, these Acts for the first time expanded the categories of property subject to escheat to include "gift certificates" as well as "tickets" or "airline tickets."[99] These new categories are problematic under the derivative rights doctrine because a "gift certificate" is not normally redeemable for cash, nor are many types of tickets (e.g., movie tickets, concert tickets, etc.). Under *Delaware*, if money is not owed, the state should be barred from escheating money from the putative holder. Such escheat would change the underlying debtor-creditor relationship, by converting an obligation to provide goods or services into an obligation to pay money. This is the exact opposite of what the U.S. Supreme Court commanded. The New Jersey Supreme Court addressed this issue (albeit not in the context of applying federal common law) in *In re Nov. 8, 1996, Determination of State, Department of Treasury, Unclaimed Property Office*.[100] The court stated: "We have denied the State the right to exact cash by escheating obligations which do not bind the obligor to pay money."[101] It is possible, of course, that the 1981 Act was intended to require escheat of gift certificates and airline tickets only to the extent that such items were redeemable for cash. But the 1995 Act eliminated any such possibility, at least for gift certificates, by expressly providing that the escheat

98. For example, in *State v. Jefferson Lake Sulphur Co.*, 178 A.2d 329 (N.J. 1962), the holder amended its certificate of incorporation to provide that any dividends that remained unclaimed for a period of three years would revert back to it, after New Jersey had enacted an unclaimed property law permitting New Jersey to escheat unclaimed dividends after five years. The New Jersey Supreme Court stated that "[e]scheat of unclaimed dividends serves the important public need of providing revenue to be utilized for the common good." *Id.* at 336. The court also concluded that a company such as Jefferson Lake that incorporates in New Jersey becomes subject to this public policy, and thus the "[a]lteration of a charter for the avowed purpose of defeating a relevant aspect of the sovereign's declared public policy cannot achieve judicial approval." *Id.* In reaching this conclusion, the court relied on a number of cases holding that any provision of a corporation's charter or bylaws that conflicts with the state's public policy is void. *Id.* at 335 (collecting cases). Thus, because the holder's charter was amended for the express purpose of avoiding the escheat laws, the court held that the amendment was invalid. *See also* Screen Actors Guild, Inc. v. Cory, 154 Cal. Rptr. 77, 80 (Ct. App. 1979) (invalidating holders' amended bylaw that provided that unclaimed residuals revert back to the holder after six years); People *ex rel.* Callahan v. Marshall Field & Co., 404 N.E.2d 368, 373–74 (Ill. App. Ct. 1980) (invalidating holder's unilateral amendment to the terms of its gift certificates to cause their expiration prior to the dormancy period under Illinois' unclaimed property laws).

99. Unif. Unclaimed Prop. Act § 1(10) (Unif. Law Comm'n 1981) (defining "intangible property"); Unif. Unclaimed Prop. Act § 1(13) (Unif. Law Comm'n 1995) (defining "property").

100. 706 A.2d 1177 (N.J. Super. Ct. App. Div. 1998), *aff'd per curiam*, 722 A.2d 536 (N.J. 1999).

101. *Id.* at 1179.

of money was required even if the gift certificates were redeemable only for merchandise.[102]

SECURITIES

The 1981 and 1995 Acts also included controversial and constitutionally inadequate provisions regarding the escheatment and liquidation of securities. Under the 1981 Act, dividend-paying securities generally were escheatable if the owner did not have contact with the issuer of the securities for seven years.[103] After escheatment, securities generally were required to be held by the state for at least one year before liquidation unless "the administrator consider[ed] it to be in the best interest of the state to do otherwise."[104] By contrast, the 1995 Act generally provided that securities were escheatable five years after the earlier of (1) the most recent distribution unclaimed by the owner; or (2) the date the second mailing sent to the owner was returned as undeliverable by the U.S. Post Office (this is generally referred to as a "Returned by Post Office" or "RPO" standard).[105] Thus, for a non-dividend-paying security or a security in a dividend reinvestment account, the 1995 Act essentially substituted the RPO standard for the 1981 Act's exemption. The 1995 Act further provided that, after the escheat, the securities could be sold at any time, but that if the securities are sold within three years after escheat *and* the owner made a claim within that three-year period, then the owner would receive the greater of (1) the proceeds from the sale of the securities or (2) the market value of the securities at the time the claim was made.[106] However, the 1995 Act, like the 1981 Act before it, provided only for notice to the owner in the form of a single advertisement in a newspaper of general circulation.[107]

The escheat and liquidation of securities raise a number of constitutional problems. Most obviously, the mere newspaper notice provided in the Acts is likely unconstitutional, particularly as an address should be available. In 1950—over thirty years prior to the 1981 Act—the U.S. Supreme Court held in *Mullane v. Central*

102. UNIF. UNCLAIMED PROP. ACT § 2(a)(7) (UNIF. LAW COMM'N 1995). In an effort to avoid a Takings challenge, the 1995 Act required escheat of 60 percent of the unredeemed balance of the gift certificate, thereby permitting the putative holder to retain 40 percent, which the 1995 Act characterized as an estimate of the holder's expected profit margin on the sale of a gift certificate. *See* Serv. Merch. Co. v. Adams, No. 97-2782-III, 2001 WL 34384462, at *6–7 (Tenn. Ch. Ct. June 29, 2001) (holding that, because a gift certificate could be redeemed only for merchandise and not cash, requiring the gift certificate issuer "to pay to the State, in cash, the full face amount of the gift certificates . . . violate[s] the Takings Clause" by depriving the issuer of its anticipated gross profit on the sale of the gift certificate).

103. UNIF. UNCLAIMED PROP. ACT § 10 (UNIF. LAW COMM'N 1981). Non-dividend-paying securities were apparently exempt from escheatment, as were securities enrolled in an automatic reinvestment account (unless the owner also had another account with the same issuer that did not provide for automatic reinvestment of dividends). *Id.* These "exemptions," however, appear to be more the product of poor drafting than anything else.

104. UNIF. UNCLAIMED PROP. ACT § 22(c) (UNIF. LAW COMM'N 1981).

105. UNIF. UNCLAIMED PROP. ACT § 2(a)(3) (UNIF. LAW COMM'N 1995).

106. *Id.* § 12(b).

107. UNIF. UNCLAIMED PROP. ACT § 18 (UNIF. LAW COMM'N 1981); UNIF. UNCLAIMED PROP. ACT § 9 (UNIF. LAW COMM'N 1995).

Hanover Bank & Trust Co.,[108] that, before a person may be deprived of his or her property, due process requires the state to provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The Court then specifically held that notice by newspaper was insufficient for due process purposes, explaining as follows:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity, of any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected . . . . It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and, if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed.[109]

There are also constitutional constraints on the states' ability to divest owners of their property through escheatment and liquidation. In particular, a state's escheat and liquidation of securities is a physical appropriation of property giving rise to a *per se* "taking" because the owner loses the entire "bundle" of rights in the securities.[110] When a government "physically takes possession of an interest in property," it has a "categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes [the entire property] or merely a part thereof."[111] The government "is required to pay for that share no matter how small."[112] Thus, the issue is how much compensation must be paid by the state. There is scant case law involving takings of securities. However, in *United States v. Miller*,[113] the U.S. Supreme Court held that "*[t]he owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken.*" In addition, in *Seaboard Air Line Railway Co. v. United States*,[114] the Court specifically held that, where the state seized land belonging to an owner but the owner was not compensated until after the taking, the amount of just com-

108. 339 U.S. 306, 314 (1950).

109. *Id.* at 315; *see also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (holding that more than publication notice is required and "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable").

110. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)) (holding that the physical appropriation of personal property is perhaps the "most serious form of invasion of an owner's property interest," depriving the owner of "the rights to possess, use and dispose" of the property).

111. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

112. *Id.*

113. 317 U.S. 369, 373 (1943) (emphasis added).

114. 261 U.S. 299, 303–06 (1923).

pensation to be paid to the owner was not limited to the value of the land at the time of the taking. Thus, any failure of the state to make an owner whole contravenes *Seaboard*, regardless of when the owner comes forward.[115] Indeed, New York—which has a significant state interest in escheating securities—has adopted a permanent "make whole" provision for this reason.[116]

States have argued that the escheat and liquidation of securities (or any property) does not constitute a taking based on *Texaco, Inc. v. Short*,[117] in which the Court held there was no taking where the former owner had abandoned his property and therefore "retain[ed] no interest for which he may claim compensation."[118] But this argument again confuses unclaimed property with abandoned property. Modern custodial escheat laws do not involve abandoned property at all, as in *Texaco*. They involve property that is merely "unclaimed" by the owner. That was why the Uniform Acts provide for much shorter dormancy periods than older laws involving property that was actually abandoned. Indeed, one cannot reasonably contend that a person has relinquished his property rights in his securities if he has not accessed his account for five or even seven years. Indeed, in *Texaco*, the state law at issue assumed mineral interests were abandoned after they were left unused by the owner for *twenty-two years*. Furthermore, the Court made clear that "[w]e need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of 'use' or 'nonuse' have little meaning."[119] In *Cerajeski*,[120] the Seventh Circuit specifically expressed that a three-year dormancy period for interest "present[s] a serious question whether it is consistent with the requirement in the Fourteenth Amendment that property not be taken without due process of law."

A presumption that securities are actually "abandoned" (resulting in a relinquishment of the owner's rights) after a similarly short period of time makes even less sense, given that securities are passive assets such that "concepts of 'use' or 'non-use' have little meaning" and where no regular activity is expected. The 1981 and 1995 Acts confuse the distinction between property that is merely "unclaimed" and not "abandoned," as the short dormancy periods in those Acts are consistent with the concept of unclaimed property, but the state's ability to liquidate securities without recourse is more consistent with the concept of abandoned property. The state cannot have it both ways. If it wants to be able to liq-

115. *See* Cerajeski v. Zoeller, 735 F.3d 577, 583 (7th Cir. 2013) (ruling Indiana's failure to pay interest on income-earning bank account was an unconstitutional taking because title of the property did not vest in the state). *But cf.* Turnacliff v. Westly, 546 F.3d 1113, 1119 (9th Cir. 2008) (assuming, *arguendo*, the owner has a right to interest earned by escheated property, the court ruled that "no further compensation is due . . . because when the Estate abandoned its property, it forfeited any right to interest earned on that property" as "the Estate did not challenge the escheat, per se, of its property to the State").

116. *See* N.Y. Aban. Prop. Law § 1403 (McKinney, Westlaw through L.2018, chs. 1 to 3).

117. 454 U.S. 516 (1982).

118. *Id.* at 530.

119. *Id.* at 536 n.28.

120. *Cerajeski*, 735 F.3d at 582.

uidate securities and not make the owner whole, it must adopt a sufficiently long dormancy period after which it is reasonable to presume that the securities are in fact abandoned and the owner has relinquished his rights.

Other Problems with the 1981 and 1995 Acts

The 1981 and 1995 Acts contained a number of other problems. For example, the Acts also did not include any type of administrative appeals provision, which made it even more difficult to try to resolve some of the thorny issues created by these new laws. This problem was compounded when, as discussed below, states began conducting massive multi-state audits of businesses. The Acts also provided for the use of estimation by states when a putative holder does not retain records for the statutorily mandated period. Further, the Acts failed to provide sufficient clarity as to how such estimation should be applied, particularly in the context of *Delaware v. New York*, leaving states open to adopting different methods that could whipsaw businesses.

A Slow Path to Reform

The deficiencies with the 1981 and 1995 Acts went largely unnoticed by the business community until the late 1990s and early 2000s, when states began to dramatically increase enforcement efforts. This surge in audit activity was in large part due to the proliferation of the use of private contract audit firms that are compensated by the states on a contingent-fee basis—typically, 10-to-15 percent of the amount of any unclaimed property that is identified in the audit. Such a fee structure provides a profit incentive to such firms to take aggressive positions in these audits. Furthermore, these contingent-fee audit firms were often staffed by former accountants and consultants with far greater expertise in unclaimed property matters than their client states, which led many states to defer almost entirely to the positions taken by these firms in audits. Moreover, some states—most notoriously Delaware—saw the interests of these audit firms as perfectly aligned with their own interests, in using unclaimed property laws primarily, if not solely, as a source of revenue.[121]

Until relatively recently, most businesses were unfamiliar with state unclaimed property laws. Such laws are highly esoteric and were thought to have little if any application outside the banking and insurance industries. As a result, few businesses or trade groups participated in the ULC drafting committee meetings that spawned the 1981 and 1995 Acts. The drafting committees were instead dominated by state interests, including the National Association of Unclaimed Property Administrators ("NAUPA"), an organization comprised, as its name suggests, exclusively of state unclaimed property administrators. Indeed, NAUPA was part

121. *See, e.g.*, Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527, 548 (D. Del. 2016) (finding that Delaware "offered no credible reason for using estimation as it did in plaintiffs' [unclaimed property] audit other than to raise revenue" and noting that "[s]tates violate substantive due process if the sole purpose of enacting an unclaimed property law is to raise revenue").

of the Review Committee of the 1981 Act and was a key advisor to the 1995 Act. More importantly, the "reporter" for the 1981 Act—which is the person who drafts the Act—was David Epstein, who founded Unclaimed Property Clearinghouse, one of the largest contingent-fee unclaimed property audit firms in the country. Mr. Epstein also acted as a "special advisor" for the 1995 Act. His biography touts that he has audited over 500 companies.[122] Mr. Epstein and his colleagues had every incentive to structure the 1981 and 1995 Acts in a manner that greatly enhanced auditors' rights, at the expense of both holders and owners of unclaimed property. The ULC, for its part, was predominantly interested in passing uniform legislation and had little if any expertise in the unclaimed property field and thus had little incentive to resist the states' overreaching.

The business community began to push back around the turn of the century, and lobbied state legislatures to adopt exemptions for gift certificates and similar items, on the basis that the escheat of such items violated the principle of derivative rights and deprived retailers of their anticipated profits from the sales of such products. This effort was largely successful, and by the time the 2016 version of the Uniform Act was adopted, about two-thirds of the states had adopted such exemptions.[123] Businesses also lobbied for the adoption of business-to-

122. Unclaimed Property Clearinghouse, https://www.acsupch.com/Epstein.htm (last visited Mar. 20, 2018).

123. Ala. Code § 35-12-73(b)(1) (West, Westlaw through Act 2018-124, and Act 2018-126 through Act 2018-131); Ariz. Rev. Stat. Ann. § 44-301(15) (West, Westlaw through legislation effective Mar. 20, 2018 of the 2d Reg. Sess. of the 53d Leg.); Ark. Code Ann. § 18-28-201(13) (West, Westlaw through the 2017 Reg. Sess. & the 2017 1st Extraordinary Sess.); Cal. Civ. Proc. Code § 1520.5 (West, Westlaw through ch. 8 of 2018 Reg. Sess.); Colo. Rev. Stat. Ann. § 38-13-108.4(3) (West, Westlaw through ch. 25 of the 2d Reg. Sess. of the 71st Gen. Assembly); Conn. Gen. Stat. Ann. § 3-73a(e) (West, Westlaw through 2018 Supp. to the Gen. Stats. of Conn.); Fla. Stat. Ann. § 717.1045 (West, Westlaw through chs. from the 2018 2d Reg. Sess. of the 25th Leg. in effect through Mar. 9, 2018); Haw. Rev. Stat. Ann. § 523A-3.5 (West, Westlaw through 2017 Reg. & Spec. Sess.); Idaho Code Ann. § 14-502(2)(b) (West, Westlaw through 2d Reg. Sess. of the 64th Leg.); 765 Ill. Comp. Stat. Ann. 1026/15-102(24)(C) (West, Westlaw through P.A 100-579 of the 2018 Reg. Sess.); Ind. Code Ann. § 32-34-1-1(f) (West, Westlaw through 2018 2d Reg. Sess. of the 120th Gen. Assembly effective through Mar. 8, 2018); Iowa Code Ann. § 556.9 (West, Westlaw through legislation effective Mar. 8, 2018 from the 2018 Reg. Sess.); Md. Code Ann., Com. Law § 17-101(m)(1) (West, Westlaw through chs. 1 to 5 from the 2018 Reg. Sess.); Mass. Gen. Laws Ann. ch. 200A, § 5D (West, Westlaw through ch. 36 of the 2018 2d Sess.); Mich. Comp. Laws Ann. § 567.235(4) (West, Westlaw through P.A.2018, No. 56 of the 2018 Reg. Sess.); Minn. Stat. Ann. § 345.39(1) (West, Westlaw through 2017 Reg. & 1st Spec. Sess.); Neb. Rev. Stat. Ann. § 69-1305.02 (West, Westlaw through 1st Reg. Sess. of the 105th Leg.); Nev. Rev. Stat. Ann. § 120A.520(1) (West, Westlaw through 79th Reg. Sess.); N.H. Rev. Stat. Ann. § 471-C:16 (West, Westlaw through ch. 4 of the 2018 Reg. Sess.); N.C. Gen. Stat. Ann. § 116B-54(b) (West, Westlaw through the 2017 Reg. Sess.); Ohio Rev. Code Ann. § 169.01(B)(2)(d) (West, Westlaw through File 51 of the 132d Gen. Assembly); 72 Pa. Stat. & Con. Stat. Ann. § 1301.6 (West, Westlaw through 2018 Reg. Sess. Act 10); 33 R.I. Gen. Laws Ann. § 33-21.1-14 (West, Westlaw through ch. 480 of the Jan. 2017 Sess.); S.D. Codified Laws §§ 43-41B-42, -43 (West, Westlaw through 2018 Reg. Sess. effective Mar. 9, 2018); Tenn. Code Ann. § 66-29-102(9) (West, Westlaw through 2018 2d Reg. Sess. of the 110th Gen. Assembly, eff. through Mar. 7, 2018); Tex. Prop. Code Ann. § 72.1016 (West, Westlaw through 2017 Reg. & 1st Sess. of the 85th Leg.); Tex. Bus. & Com. Code Ann. § 604.002(5) (West, Westlaw through 2017 Reg. & 1st Sess. of the 85th Leg.); Utah Code Ann. § 67-4a-102(28)(c) (West, Westlaw through 2017 1st Spec. Sess.); Va. Code Ann. § 55-210.8:1(B) (West, Westlaw through 2018 Reg. Sess. cc. 1, 2, 10, 14, 15 & 45); Vt. Stat. Ann. tit. 27, § 1241(13) (West, Westlaw through 1st Sess. of the 2017–2018 Gen. Assembly); Wash. Rev. Code Ann. § 63.29.140 (West, Westlaw through ch. 3 of the 2018 Reg. Sess.); Wyo. Stat. Ann.

business ("B2B") exemptions, which were designed to exempt from the unclaimed property laws obligations owed by one business to another. Such exemptions were based on the understanding that state unclaimed property laws were primarily designed to protect the rights of individuals who lost track of their property, and were not intended to safeguard the property of businesses, which generally have the resources to track any potential unclaimed property due to them. In addition, and perhaps more importantly, such exemptions recognize the practical reality that entries in a business' accounting records that appear to indicate the existence of an obligation to another business are often erroneous or have otherwise been resolved between the businesses and, therefore should not be treated as unclaimed property. Indeed, many states led by contingent-fee audit firms took advantage of such uncertainties in business' records to claim hundreds of millions of dollars in supposed, but unidentified, unclaimed property. Many businesses viewed such audits as highly aggressive and lacking in legal support. Ultimately, these lobbying efforts proved moderately successful, as fifteen or so states have now adopted comprehensive B2B exemptions in their unclaimed property laws.[124]

Business organizations had little incentive to push back on certain other provisions of the Uniform Acts that primarily hurt owners, such as the rules requiring the escheatment of foreign-owned property and the inadequate notice and liquidation provisions for securities. Many businesses still lack the sophistication to understand the potential ramifications of the anti-limitations provisions that threatened freedom of contract, or were insufficiently well-organized to successfully lobby for changes to the statute-of-limitations or other provisions.

The ABA began to take an interest in solving these problems in 2009. A year earlier, the Business Law Section's Taxation Committee formed the Unclaimed

§ 34-24-114 (West, Westlaw through chs. 1 to 4, 9, 10, 18 to 21, 23, 27, and 29 of the 2018 Budget Sess.). Other states (including Kansas, North Dakota, South Carolina, and Wisconsin) have not adopted formal exemptions, but have repealed provisions of their unclaimed property laws that previously required the escheat of gift cards or gift certificates. *See, e.g.*, KAN. STAT. ANN. § 58-3934(o) (West, Westlaw through 2018 Reg. Sess. effective Mar. 8, 2018) (defining "property" subject to escheat without any mention of gift cards or gift certificates).

124. ARIZ. REV. STAT. ANN. § 44-301(3), (15) (West, Westlaw through legislation effective Mar. 20, 2018 of the 2d Reg. Sess. of the 53d Leg.); 765 ILL. COMP. STAT. ANN. 1025/2a(b) (repealed 2018 in connection with adoption of new Uniform Act provisions); IND. CODE ANN. § 32-34-1-1(e) (West, Westlaw through 2018 2d Reg. Sess. of the 120th Gen. Assembly effective through Mar. 8, 2018); IOWA CODE ANN. § 556.1(12)(b) (West, Westlaw through legislation effective Mar. 8, 2018 from the 2018 Reg. Sess.); KAN. STAT. ANN. § 58-3935(g) (West, Westlaw through 2018 Reg. Sess. effective Mar. 8, 2018); MD. CODE ANN., COM. LAW § 17-101(m) (West, Westlaw through chs. 1 to 5 from the 2018 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 200A, § 5 (West, Westlaw through ch. 36 of the 2018 2d Sess.); MICH. COMP. LAWS ANN. § 567.257a(1) (West, Westlaw through P.A.2018, No. 56 of the 2018 Reg. Sess.); MO. ANN. STAT. §§ 447.535(2), 447.547(6) (West, Westlaw through 2017 1st Reg. Sess. & 1st & 2d Extraordinary Sess. of the 99th Gen. Assembly); NEV. REV. STAT. ANN. § 120A.505(1) (West, Westlaw through 79th Reg. Sess.); N.C. GEN. STAT. ANN. § 116B-54(e) (West, Westlaw through the 2017 Reg. Sess.); OHIO REV. CODE ANN. § 169.01(B)(2)(b)–(c) (West, Westlaw through File 51 of the 132d Gen. Assembly); TENN. CODE ANN. § 66-29-105(c) (West, Westlaw through 2018 2d Reg. Sess. of the 110th Gen. Assembly, eff. through Mar. 7, 2018); VA. CODE ANN. § 55-210.8:1(B) (West, Westlaw through 2018 Reg. Sess. cc. 1, 2, 10, 14, 15 & 45); WIS. STAT. ANN. § 177.01(10)(b) (West, Westlaw through 2017 Act 139).

Property Subcommittee comprised of ABA members with significant expertise in the unclaimed property field. These members were eager to try to reform state laws which had morphed from their core purpose of reuniting property with true owners into general revenue raising provisions that operated inequitably against both owners and holders.[125] Accordingly, in mid-2009, the Unclaimed Property Subcommittee submitted a proposal to the ULC to revise the Uniform Act to address the problems identified above, including the many constitutional infirmities as well as the policy concerns related to a lack of a realistic statute-of-limitations provision, administrative appeal provision, and B2B exemption. The ABA's proposal was supported by a number of key stakeholders, including the Unclaimed Property Professionals Organization ("UPPO") and the Council on State Taxation ("COST"). The ULC initially deferred action on the proposal, on the basis that NAUPA had not yet provided its recommendation. On June 16, 2010, NAUPA adopted a resolution opposing the ABA's proposal and recommending that the ULC not proceed with a revised Uniform Act. At the ULC's next meeting in January 2011, the ULC formally declined to move forward with the revised Act.

This was not a surprise, as the ULC had earlier made clear that it would require NAUPA's support to move forward with any revisions to the Uniform Act. Thus, in late 2010, the Unclaimed Property Subcommittee had already begun to lay the groundwork for the adoption of the Model Act that would address the legal and policy concerns with the Uniform Acts. When the ULC formally declined to revise the Uniform Act, the Unclaimed Property Subcommittee immediately began to press forward with drafting the Model Act and formed a Task Force of interested members to work on the project. The Unclaimed Property Subcommittee reached out to numerous stakeholders for assistance with the Model Act, including UPPO, COST, NAUPA, and various industry groups. After significant review of the relevant issues, the ABA began circulating draft provisions of the Model Act for comments in 2012. In late 2012, apparently in response to the Model Act drafting effort, NAUPA reconsidered its position and recommended to the ULC that it move forward with revisions to the Uniform Act.

Almost immediately, in January 2013, the ULC authorized the appointment of a Study Committee to consider revising the Uniform Act. In the meantime, the Unclaimed Property Subcommittee pressed forward with the Model Act drafting process. In April 2013, the ULC Study Committee met with numerous stake-

125. For example, a fiscal note to a recent Pennsylvania bill shortening the dormancy period for certain property types indicated that the bill would generate $150 million in revenue for the state:

> Fiscal Impact—It is estimated that the reduction in the holding period for the newly identified classes of unclaimed property will generate $150,000,000 in revenue for the General Fund in 2014–15. The Treasury Department anticipates that the majority of the new unclaimed property will be received by the State Treasury in April 2015. The State Treasurer will incur costs to notify holders of the shortened dormancy period. Treasury will incur costs for advertising in 2015–16. The General Appropriation Act included $3,500,000 in the State Treasury general government operations appropriation to cover the costs that will be incurred from the shortening of the holding period.

Pa. H.R. Comm. on Appropriations, Fiscal Note on H.R. 280 (July 2, 2014), http://www.legis.state.pa.us/WU01/LI/BI/FN/2013/0/HB0278P3930.pdf.

holders, including the ABA and both state representatives and business organizations. The overwhelming majority in attendance were in favor of moving forward with revisions to the Uniform Act. In July 2013, the ULC formally voted to form a Drafting Committee to revise the Uniform Act. Almost immediately, the ULC reached out to the ABA Business Law Section to request that it cease work on the Model Act on the basis that the Model Act would conflict with the Uniform Act and, thereby, reduce the likelihood that either Act would be successful in advancing the goal of unclaimed property reform. By this time, however, the ABA had made substantial progress on the Model Act and so was reluctant to stop work on the Model Act project because its members had already expended significant time and effort on the project. There was also some concern with the product that the ULC would ultimately produce, particularly given the ULC's deference to NAUPA both on the prior Uniform Acts and in rendering the decision to move forward with a revision of the Uniform Act in 2013.

The ULC and ABA leadership, including the Unclaimed Property Subcommittee, had a number of discussions in August through October 2013 to try to resolve the matter in a manner that would be acceptable to all parties. Ultimately, the ABA agreed to put the Model Act project on hold and instead devote its efforts to collaborating with the ULC on the Uniform Act revision project, and in return the ULC gave assurances that it would give significant weight to the ABA's views on the various issues to be considered. The Unclaimed Property Subcommittee hoped that a joint effort between the ULC and the ABA would be more likely to result in meaningful reform in the unclaimed property area. However, the ABA specifically reserved the right, if it was ultimately not satisfied with the Uniform Act revision process or the ultimate end product, to resume work on the Model Act project at any time.

Thus, in early 2014, the ULC Drafting Committee kicked off the project to revise the Uniform Act. Two and a half years later, the 2016 version of the Uniform Act was born.

The 2016 Uniform Act—The Good, the Bad . . . and the Ugly

The 2016 version of the Uniform Act is, overall, an improvement over the 1981 and 1995 Acts, but the improvements are overshadowed by the fact that the 2016 Act leaves intact a number of the provisions from the prior Acts that are either constitutionally suspect or simply bad policy.

Statute of Limitations. Perhaps the most substantial improvement in the 2016 Act is the statute of limitations provision. The 2016 Act restores the ten-year statute of limitations from the 1981 Act, and also provides for a five-year statute of limitations if the holder has filed a non-fraudulent report with the administrator.[126] During the drafting process, the ABA had recommended this bifurcated approach, except with three-year and seven-year periods instead of five years and ten years. There are several benefits to this approach. First, it encourages

126. Unif. Unclaimed Prop. Act § 610(b)–(c) (Unif. Law Comm'n 2016).

businesses to file non-fraudulent returns, so that they can trigger the earlier statute of limitations. By contrast, under the 1981 Act's rule, the statute of limitations is the same (ten years), regardless of whether a return is filed. This creates a disincentive to file a return. Another benefit of this bifurcated approach is that it encourages states to review returns and issue assessments against delinquent holders more promptly. This will serve the primary goal of these laws in returning property to the rightful owner.

Administrative Appeals. The 2016 Act includes an optional administrative appeals procedure for the first time. The procedure, however, merely provides that a putative holder may initiate a proceeding under the state's administrative procedures act for review of the administrator's audit determination.[127]

Securities. The 2016 Act also provides that the dormancy period for securities is not triggered until mail sent to the owner has been returned as undeliverable.[128] Unlike the 1995 Act, this new RPO rule applies to all securities, not just non-dividend-paying securities or securities enrolled in a dividend reinvestment account. This new rule is consistent with federal securities regulations promulgated in 1997 by the U.S. Securities and Exchange Commission.[129] These federal regulations were enacted specifically to protect securityholders from having their shares escheated, by requiring transfer agents, brokers, and dealers to exercise reasonable care to attempt to locate "lost securityholders."[130] For this purpose, the regulation defines a "lost securityholder" to mean a securityholder to whom mail has been sent at the address of record and returned as undeliverable and for whom the transfer agent, broker, or dealer has not received information regarding the securityholder's new address. The RPO rule is consistent with this regulation because, under this rule, the securities will not be escheated until mail has been returned as undeliverable and the issuer of the securities (or other party) has conducted the requisite due diligence under federal law to try to locate the missing owner.

The 2016 Act includes new notice provisions to owners of escheated securities. Specifically, the revised Act provides that the state must send written notice by first-class mail to the apparent owner and must maintain an electronically searchable website or database accessible by the public which contains the names reported to the administrator of all apparent owners for whom property is being held by the administrator.[131] While such notice may generally satisfy constitutional requirements for certain types of escheated property, it is likely still constitutionally inadequate for securities. First, the 2016 Act is conspicuously silent as to when such notice must be sent. Even the 1981 Act required the notice to be published within the year following the year of escheat. Second,

127. *Id.* § 1103.
128. *Id.* § 208.
129. 17 C.F.R. § 240.17Ad-17 (2017).
130. *Id.*; *see* Lost Securityholders, 62 Fed. Reg. 52229, 52229–31 (Oct. 7, 1997) (to be codified at 17 C.F.R. pts. 240 & 249) (expressing concern regarding the risk of securities being deemed abandoned under state escheat laws).
131. Unif. Unclaimed Prop. Act § 503 (Unif. Law Comm'n 2016).

the 2016 Act does not require the notice to inform the owner that the state will liquidate the securities, and thus fails to apprise the owner of the potential harm that could result from the escheatment of the securities. Third, the 2016 Act requires the notice to be sent to an address that is *already presumed to be invalid* because the securities are reported as unclaimed after the holder's mail to the last known address is returned undeliverable. As discussed above, the Supreme Court has held that, to satisfy due process, "[t]he means employed [for the notice] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[132] Thus, "notice required will vary with circumstances and conditions."[133] A notice process which is a "mere gesture is not due process."[134]

To satisfy due process, the state will need to undertake further analysis of the type of reasonable action appropriate to attempt to locate the owner of unclaimed securities to provide notice of the impending sale of the owner's property. Indeed, in *Jones*, the Court expressly held that, "*when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.*"[135] The Court explained that it did not think that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed," and "failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman."[136] The Court's other rulings further support the conclusion that additional steps are required if the regular mailing is known to be ineffective or if it would be unreasonable not to do so based on the other facts and circumstances involved.[137] Indeed, in a recent concurring opinion issued by Justice Alito (joined by Justice Thomas) in the U.S. Supreme Court's denial of *certiorari* in *Taylor v. Yee*,[138] Justice Alito made clear that the constitutional issue of adequate notice before seizing private property is an "important" one.[139] Justice Alito stated that, "When a State is required to give notice, it must do so through processes 'reasonably calculated' to reach the interested party—here, the property owner."[140] Furthermore, Justice Alito specifically suggested that states should take advantage of changes in technology that make it easier to locate owners and return their property to them.[141] Accordingly, we believe that the states should be re-

132. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950).

133. Jones v. Flowers, 547 U.S. 220, 227 (2006) (quoting Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956)).

134. *Mullane*, 339 U.S. at 315.

135. *Jones*, 547 U.S. 220, 225 (2006) (emphasis added).

136. *Id.* at 229.

137. *See, e.g.*, Robinson v. Hanrahan, 409 U.S. 38, 39–40 (1972) (per curiam) (applying *Mullane*); Covey v. Town of Somers, 351 U.S. 141, 145–47 (1956) (same).

138. 136 S. Ct. 929 (2016) (Alito, J., concurring in denial of certiorari).

139. *Id.* at 929.

140. *Id.* (quoting *Mullane*, 339 U.S. at 318).

141. *Id.* at 930.

quired to utilize other records available to them, such as tax and real estate records, motor vehicle registration databases, the State Vital Statistics database, the U.S. Postal Service's National Change of Address database, and other publicly available databases such as Accurint or Google, to try to locate the missing owner and reunite him or her with the escheated securities.[142] Such actions should be taken well before the securities are liquidated.

Finally, the escheat and liquidation provisions in the 2016 Act still likely do not satisfy the substantive due process and takings concerns discussed above. The 2016 Act prohibits the state from selling the owner's securities within the first three years following the remittance of dormant securities, and also requires the owner be "made whole" if the state liquidates the securities during the three years following this "no liquidation" period—thus effectively providing six years of protection.[143] At the same time, as noted above, the 2016 Act *shortens* the dormancy period in the 1995 Act from five years to three years. Thus, whereas the 1995 Act provided a total of eight years of protection, the 2016 Act provides a total of nine years of protection. To be sure, every year counts, and so the 2016 Act is at least moving in the right direction. Again, however, this nine-year period does not compare favorably to the twenty-two-year period at issue in *Texaco* that the Court found to be constitutionally sufficient to treat unused mineral interests as abandoned. As the Court cautioned in that case, "We need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of 'use' or 'nonuse' have little meaning."[144] Unlike mineral interests, the concepts of "use" or "nonuse" generally have "little meaning" in the context of securities. Thus, it is unclear that the Court would sanction even a twenty-two-year period for the escheat and liquidation of securities, particularly given the proliferation of target-date mutual funds, buy-and-hold strategies, and other investments or practices that encourage the investor not to touch the securities for decades.

Derivative Rights. Unfortunately, a major problem with the 2016 Act is that, like the 1981 and 1995 Acts, it still fails to recognize the fundamental principle of derivative rights. As discussed above, this common-sense principle holds that, because the purpose of state unclaimed property laws is to return property to the missing owner, the state should have no greater right to the property than the owner. The U.S. Supreme Court confirmed this principle as central to the federal common law in *Delaware v. New York*, in which the Court explained that the federal common law rules set forth in *Texas* for determining when a state has the "right and jurisdiction" to escheat "cannot be severed from the law that creates the underlying creditor-debtor relationships."[145] The Court thus held that "the holder's legal obligations . . . define[] the escheatable property at issue" and

142. Interestingly, the states have recently become more aggressive in asserting in audits that holders be required to utilize such databases, but have been reluctant to self-impose that requirement.
143. Unif. Unclaimed Prop. Act §§ 208, 702, 703 (Unif. Law Comm'n 2016).
144. Texaco, Inc. v. Short, 454 U.S. 516, 535 n.28 (1982).
145. Delaware v. New York, 507 U.S. 490, 503 (1993).

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."[146] In other words, the state cannot escheat what is not owed. If the state requires such an escheat, it would "sever" the escheat claims from "the underlying debtor-creditor relationships." This is exactly what the Supreme Court ruled states could not do. The 2016 Act continues to disregard this principle by retaining the contractual anti-limitations provisions from the 1981 and 1995 Acts, which override contractual restrictions on an owner's right to claim property even if those restrictions are valid and enforceable under applicable laws governing the debtor-creditor relationship. These unclaimed property provisions purport to change the underlying debtor-creditor relationship, rather than defer to it.

In limited recognition of the derivative rights principle, the 2016 Act includes narrow, optional exemptions for gift cards, store credits, and other similar obligations to provide merchandise or services rather than cash.[147] Yet, even these narrow—and optional—exemptions appear to be merely a nod to political reality and do not adequately take into account the fundamental constitutional issue that the state's rights are based on the underlying debtor-creditor relationship and therefore, if cash is not owed to the creditor, the state should be constitutionally barred from escheating cash from the holder.[148]

The 2016 Act does contain a helpful clarification regarding the definition of "holder." The Official Comments to the Act provide that:

> In most instances, there should be only one holder of obligations for unclaimed property purposes—the exception being where there are multiple obligors directly liable on a specific obligation, such as co-borrowers on a loan. In circumstances where more than one party potentially meets the definition of holder, the party which is primarily obligated to the owner should be treated as the holder for purposes of application of unclaimed property laws. *See, e.g.*, *Clymer v. Summit Bancorp.*, 792 A.2d 396 (N.J. 2002) (issuer of bonds, not trustee in possession of funds to be

146. *Id.* at 501, 503.

147. Unif. Unclaimed Prop. Act § 102(24)(C) (Unif. Law Comm'n 2016) (including exemptions for "game-related digital content" and "loyalty cards" and optional exemptions for "in-store credit" and "gift cards").

148. For example, the optional gift card exemption does not apply to gift cards that expire, which may be a legitimate policy decision to encourage retailers not to use expiration dates, but cannot be justified under escheat principles. *Id.* § 102(11). In addition, the 2016 Act created additional constitutional concerns by providing that, if a state does elect to escheat gift cards, the amount escheatable is cash equal to the unredeemed gift card balance, *see id.* §§ 206, 207, rather than cash equal to 60 percent of the unredeemed card balance, which was the rule adopted in the 1995 Act to recognize that merchandise and services are sold by retailers at a profit, and that escheatment of the full amount of the card balance would deprive the retailer of its anticipated profits, arguably a violation of the Takings Clause of the U.S. Constitution. The 2016 Act also included a new penalty that is imposed on "a holder [that] enters into a contract or other arrangement for the purpose of evading an obligation under this [act]." *Id.* § 1205. This was apparently targeted at retailers that set up special-purpose entities (or contract with third parties) to issue gift cards, where the special-purpose entity (or third party) is located in a state that exempts gift cards from escheat (as many large retailers have set up such arrangements). However, companies should be free to structure their affairs in a manner that minimizes escheat liabilities, just as they can structure themselves to reduce tax or other regulatory burdens. This sort of provision appears to allow one state (that decides not to exempt gift cards) to punish a retailer that legitimately relies on an exemption adopted by another state.

> used to pay bondholders and having contractual obligation to issue such payments, is the holder for purposes of determining applicable dormancy period). Where one party has a direct legal obligation to the owner of the property, and another party has possession of funds associated with the property and an obligation to hold it for the account of, or to pay or deliver it to, the owner solely by virtue of a contractual relationship with the party who is directly obligated to the owner, but who has not assumed direct liability to the owner, it is the party who is directly obligated to the owner who is the holder for purposes of the act. For example, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would, in such circumstances, be the holder of the obligation and any unclaimed dividends on the stock or interest on the bonds. On the other hand, where a party contractually assumes direct liability to the owner for an obligation and is in possession of the funds associated with such obligation, the assuming party becomes the applicable holder for purposes of application of unclaimed property obligations.[149]

This language still leaves some ambiguity where a party contractually assumes direct liability to the owner, but is not in possession of the funds. Presumably, in that situation, the "holder" is still the obligor, consistent with *Delaware*, rather than the person in possession of property, but it would have been preferable if the 2016 Act had made that clear.

Foreign-Owned Property. Another major problem with the 2016 Act is that it still requires the escheat of foreign-owned property, contrary to federal common law, the foreign affairs doctrine, the Commerce Clause, and other authorities. The 2016 Act makes some effort to soften this provision, providing that escheat is only permitted by the holder's state of domicile if the foreign country "does not provide for custodial taking of the property" (whatever that means) or the property is "specifically exempt from custodial taking" under the laws of the foreign country.[150] The Official Commentary to the 2016 Act admits, though, that *Texas* did not permit such escheat, which, under the rationale of the federal appellate courts to have addressed the issue, means that such escheat is impermissible.

The Commentary further tries to justify this provision by offering the conclusory assertion that "the rationale used by the Court in [*Zschernig v. Miller*] is neither controlling nor compelling in the context of unclaimed property."[151] But the Court's reasoning in *Zschernig* does apply here. In that case, the U.S. Supreme Court invalidated an Oregon statute because it had more than "some incidental or indirect effect in foreign countries" and posed a "great potential for disruption or embarrassment" of the nation's foreign relations.[152] The Oregon statute required the state to evaluate foreign laws to determine if the foreign citizen's country of origin would grant reciprocal rights and that the foreign country would not confiscate the inherited property.[153] The 2016 Act similarly requires

149. *Id.* § 102 cmt.
150. *Id.* § 304.
151. *Id.* § 304 cmt. (citing Zschernig v. Miller, 389 U.S. 429 (1968)).
152. *Zschernig*, 389 U.S. at 429 (quoting, in the first instance, Clark v. Allen, 331 U.S. 503, 517 (1947)).
153. *Id.* at 430–31.

an evaluation of a foreign country's laws to determine if such laws "provide for custodial taking" or "specifically exempt" the property at issue from escheat.[154] A state's confiscation of supposedly unclaimed property creates a significant "potential for disruption and embarrassment" of the nation's foreign relations, particularly where the state is not merely acting in a custodial capacity but is liquidating the property and causing the owner to lose property rights as a result. After all, as noted above, foreigners own over $6 trillion in U.S. corporate stock,[155] and states escheat hundreds of millions (if not billions) of dollars of such stock per year. It strains credibility to suggest that the appropriation of foreign property on such a massive scale does not have the potential to significantly impact foreign investors and relations.

The Official Commentary also does not address the fact that the escheat of foreign-owned securities conflicts with the Commerce Clause, by regulating commercial relations with foreign countries. As the Court held in *Japan Line*, special considerations come into play when states seek to regulate property owned by foreign citizens, even when that property is physically used in the United States—because "[f]oreign commerce is preeminently a matter of national concern."[156] The Court wanted to avoid international disputes and potential retaliation by foreign countries.[157] Countries retaliate when the interests of their citizens are threatened.[158] For the same reason that the escheat and liquidation of foreign-owned securities creates the "potential for disruption or embarrassment" of the nation's foreign relations, such actions also create a risk of retaliation. That risk is higher where the "presumption" for treating property appears arbitrary and unfair, as in the case of securities. Given that states hardly have uniform standards for escheatment of liquidation of unclaimed property in general, and securities in particular, the escheat and liquidation of foreign-owned property also conflicts with the "overriding concern" that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[159]

Jurisdictional Escheat Rules. The 2016 Act continues to deviate in other ways from the federal common law jurisdictional escheat rules set forth in *Texas*, though there are some improvements that reduce the practical impact of such deviations. In particular, the 2016 Act retains the tertiary rule that the Third Circuit enjoined in *N.J. Retail Merchants Ass'n*.[160] However, the Act does not apply such rule if the holder's state of domicile "specifically exempts" the property in question. Thus, if the holder is domiciled in a state that exempts gift cards from escheat, the holder need not be concerned with a state attempting to escheat gift cards on the basis

154. Unif. Unclaimed Prop. Act § 304 (Unif. Law Comm'n 2016).
155. *U.S. Long-Term Securities Held by Foreign Residents*, U.S. Dep't Treas. (Dec. 19, 2017), http://ticdata.treasury.gov/Publish/slt2d.txt.
156. Japan Line, Ltd. v. Cty. of L.A., 441 U.S. 434, 448 (1979).
157. *Id.* at 450, 453.
158. *Id.* at 450.
159. *Id.* at 449 (quoting, in the second instance, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).
160. Unif. Unclaimed Prop. Act § 305 (Unif. Law Comm'n 2016); *see* N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374 (3d Cir. 2012).

that the cards were sold in the state. The primary problem with this exception is that states often do not "specifically exempt" property from escheat, but nonetheless still do not actually escheat such property. For example, a number of states *repealed* provisions requiring the escheat of gift cards, in recognition that such escheat violates the derivative rights principle, but did not expressly *exempt* gift cards from escheat by statute. There is no constitutional or policy rationale for permitting the transaction state to escheat the property in this instance, but not where the state has "specifically exempted" the property from escheat.

The 2016 Act contains a similar rule for claims by the state of domicile for property that is "specifically exempted" from escheat by the state in which the owner is located.[161] Again, while this clarification is helpful where the property is specifically exempted (as it reduces the likelihood of litigation in that instance), it would have been better if the 2016 Act had simply stated that any property that is not escheated by the state of the owner's address may not be claimed by the holder's state of domicile because the domiciliary state has a lesser claim to that property and thus should respect the policy decision of the primary state, regardless of whether that policy is set forth in a "specific exemption."

The 2016 Act also retains the rule from the 1981 and 1995 Acts that allows a state to make a claim under the primary rule for property even if the holder lacks the address of the owner, if the state can establish from other sources that the address of the owner is in its state.[162] As noted above, such rules contravene *Texas*, which expressly held that, for ease of administration and simplicity, "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."[163] The 2016 Act may eventually lead to interstate jurisdictional disputes, as different states may identify different addresses of the same owner to support a claim, or if the state in which the newfound address is located attempts to force the state of domicile to give it the property. It will also inevitably lead to litigation between states and holders, where the holder has no records of the owner's address and is domiciled in a state that does not require escheat of the property at issue.

The 2016 Act also includes a new provision defining the last-known address of the owner to mean "any description, code, or other indication of the location of the apparent owner which identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner."[164] The 2016 Act further provides that, "[i]f the United States postal zip code associated with the apparent owner is for a post office located in this state, this state is deemed to be the state of the last-known address of the apparent owner unless other records associated with the apparent owner specifically identify the physical address of the apparent owner to be in an-

161. UNIF. UNCLAIMED PROP. ACT § 305 (UNIF. LAW COMM'N 2016).
162. *Id.* § 302.
163. Texas v. New Jersey, 379 U.S. 674, 682 n.11 (1965).
164. UNIF. UNCLAIMED PROP. ACT § 301(1) (UNIF. LAW COMM'N 2016).

other state."[165] As noted above, the 1981 Act defined "last known address" to mean "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail."[166] The 1995 Act was silent on the issue. The Official Commentary to the 2016 Act justifies the change as follows:

> [T]he policy underlying the rules establishing priority among contending states is that unclaimed property should be held by the administrator of the state where the owner is most likely to look for it, which is the state in which the owner resided, i.e. had his or her "last known address," if that state can be determined. It follows that limiting the first priority only to states determined by having an address suitable for mailing frustrates that policy when the owner's state of last known address can be determined another way.[167]

This explanation makes a certain amount of sense. However, in *Texas*, the Court did not define the term "address" and thus it would seem that the Court intended the ordinary meaning of the term to apply.[168] The ordinary meaning of the term "address" is a mailing address.[169] Thus, it would appear that the 2016 Act's definition of "address," while perhaps justifiable from a policy perspective, is preempted by the federal common law jurisdictional escheat rules. Indeed, as the Supreme Court cautioned in *Pennsylvania*, "*to vary the application of the Texas rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, '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.'*"[170] Including a provision that is likely superseded by federal law will invite both interstate disputes and disputes between holders and states. As things currently stand, seventeen states still define "last known address" to be a description of the owner's

165. *Id.* § 301(2).

166. UNIF. UNCLAIMED PROP. ACT § 1(11) (UNIF. LAW COMM'N 1981).

167. UNIF. UNCLAIMED PROP. ACT § 301 cmt. (UNIF. LAW COMM'N 2016).

168. *See, e.g.*, Perrin v. United States, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); Burns v. Alcala, 420 U.S. 575, 580 (1975) ("[W]ords used in a statute are to be given their ordinary meaning . . . .").

169. *See, e.g.*, *In re* Application of Cty. Collector, 826 N.E.2d 951, 956–57 (Ill. App. Ct. 2005) ("The common and ordinary meaning of the term address . . . clearly contemplates a number and street address. No reasonable argument can be made that the conventional meaning of 'address' does not encompass a number and street name. This clearly is the plain and ordinary meaning of the term 'address.'"); Bank of Am., N.A. v. Bridgewater Condos, L.L.C., No. 299441, 2011 WL 5866932, at *7 (Mich. Ct. App. Nov. 22, 2011) (quoting BLACK'S LAW DICTIONARY 44 (9th ed. 2009)) (defining "address" as "[t]he place where mail or other communication is sent," and holding that such "definition is consistent with the plain and ordinary meaning of the term"); State v. Knudson, 174 P.3d 469, 472 (Mont. 2007) (quoting BLACK'S LAW DICTIONARY 38 (6th ed. 1990)) (defining "address" as the "[p]lace where mail or other communications will reach [a] person[, g]enerally a place of business or residence; though it need not be"); Hoot v. Brewer, 640 S.W.2d 758, 765 (Tex. App. 1982) (Doyle, J., dissenting) ("I cannot conceive of an address as employed in the ordinary course of usage, as being complete and meaningful, that gives only a *house number* or *post office box number*, and omitting all reference to a city.").

170. Pennsylvania v. New York, 407 U.S. 206, 215 (1972) (emphasis added) (quoting Texas v. New Jersey, 379 U.S. 674, 679 (1965)).

location sufficient for the purpose of delivery of mail.[171] Only eight states have adopted the definition from the 2016 Act, or a similar definition.[172]

B2B Exemptions. The 2016 Act does not include a B2B exemption, optional or otherwise. This is notable, given that the 2016 Act provided only optional exemptions for gift cards and in-store credits for returned merchandise even though such exemptions are mandated by federal law and have been adopted by two-thirds of the states. The Official Commentary to the 2016 Act provides

171. *See* Colo. Rev. Stat. Ann. § 38-13-102(8) (West, Westlaw through ch. 25 of the 2d Reg. Sess. of the 71st Gen. Assembly); Conn. Gen. Stat. Ann. § 3-56a(8) (West, Westlaw through the 2018 Supp. to the Gen. Stats. of Conn.); D.C. Code Ann. § 41-102(12) (West, Westlaw through Mar. 20, 2018); Ga. Code Ann. § 44-12-192(11) (West, Westlaw through Act 284 of the 2018 Sess.); Idaho Code Ann. § 14-501(11) (West, Westlaw through 2d Reg. Sess. of the 64th Leg.); Kan. Stat. Ann. § 58-3934(i) (West, Westlaw through 2018 Reg. Sess. effective Mar. 8, 2018); Mich. Comp. Laws Ann. § 567.222(l) (West, Westlaw through P.A.2018, No. 56 of the 2018 Reg. Sess.); N.H. Rev. Stat. Ann. § 471-C:1(XII) (West, Westlaw through ch. 4 of the 2018 Reg. Sess.); Okla. Stat. Ann. tit. 60, § 651(10) (West, Westlaw through ch. 7 of the 2d Extraordinary Sess. of the 56th Leg.); Or. Rev. Stat. Ann. § 98.302(9) (West, Westlaw through 2017 Reg. Sess. legislation effective Jan. 1, 2018); 33 R.I. Gen. Laws Ann. § 33-21.1-1(11) (West, Westlaw through ch. 480 of the Jan. 2017 Sess.); S.C. Code Ann. § 27-18-20(11) (West, Westlaw through 2018 Act No. 133); S.D. Codified Laws § 43-41B-1(11) (West, Westlaw through 2018 Reg. Sess. effective Mar. 9, 2018); Utah Code Ann. § 67-4a-102(19) (West, Westlaw through 2017 1st Spec. Sess.); Wash. Rev. Code Ann. § 63.29.010(13) (West, Westlaw through ch. 3 of the 2018 Reg. Sess.); Wis. Stat. Ann. § 177.01 (11) (West, Westlaw through 2017 Act 139); Wyo. Stat. Ann. § 34-24-102(a)(xi) (West, Westlaw through chs. 1 to 4, 9, 10, 18 to 21, 23, 27, and 29 of the 2018 Budget Sess.).

172. Del. Code Ann. tit. 12, § 1139(a) (West, Westlaw through 81 Laws 2018) ("The last known address of an owner is a description, code, or other indication of the location of the owner on the holder's books and records which identifies the state of the last-known address of the owner."); Fla. Stat. Ann. § 717.101(15) (West, Westlaw through 2018 2d Reg. Sess. of the 25th Leg. in effect through Mar. 9, 2018) ("For the purposes of identifying, reporting, and remitting property to the department which is presumed to be unclaimed, 'last known address' includes any partial description of the location of the apparent owner sufficient to establish the apparent owner was a resident of this state at the time of last contact with the apparent owner or at the time the property became due and payable."); 765 Ill. Comp. Stat. Ann. 1026/15-301 (West, Westlaw through P.A. 100-579 of the 2018 Reg. Sess.) ("The last-known address of an apparent owner is any description, code, or other indication of the location of the apparent owner which identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner."); Ind. Code Ann. § 32-34-1-10(b) (West, Westlaw through 2018 2d Reg. Sess. of the 120th Gen. Assembly effective through Mar. 8, 2018) (defining "last known address" as "a description indicating that the apparent owner was located within Indiana, regardless of whether the description is sufficient to direct the delivery of mail"); N.J. Admin. Code § 17:18-1.2 (West, Westlaw through N.J. Reg., Vol. 50, Issue 3, Feb. 5, 2018) (defining "last known address" as "a description of the location of the apparent owner sufficient for the purpose of determining which state has the right to escheat the abandoned property and the zip code of the apparent owner's (creditor's) last known address is sufficient"); Tenn. Code Ann. § 66-29-116(1) (West, Westlaw through 2018 2d Reg. Sess. of the 110th Gen. Assembly, eff. through Mar. 7, 2018) ("The last known address of an apparent owner is any description, code, or other indication of the location of the apparent owner that identifies the state of residence, regardless of whether the description, code, or indication of location is sufficient to direct the delivery of first-class United States mail to the apparent owner."); Utah Code Ann. § 67-4a-301 (West, Westlaw through 2017 1st Spec. Sess.) ("[T]he last known address of an apparent owner is any description, code, or other indication of the location of the apparent owner that identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner."); Va. Code Ann. § 55-210.2 (West, Westlaw through 2018 Reg. Sess. cc. 1, 2, 10, 14, 15 & 45) (defining "last known address" as "a description of the location of the apparent owner sufficient to identify the state of residence of the apparent owner for the purpose of the delivery of mail").

that "[a] 'B2B' exemption is not in this Act because it has been adopted in a clear minority of states."[173] While true, this statement reflects the ULC's bias in favor of state interests, as the Official Commentary explains for gift cards: "This Act does not take a position with respect to whether unredeemed balances on gift certificates or gift cards should be covered by the Act."[174] It is inconsistent to, on the one hand, take an affirmative position not to exempt certain property because such exemption has been adopted by a minority of states, but take no position on whether to exempt another type of property even though such exemption has been adopted by a majority of states. Unlike the gift card exemption, a B2B exemption is not required by law, but there are valid policy reasons to include such an exemption in an unclaimed property law that is primarily designed to protect individual consumers.

Contingent fee auditors. The 2016 Act expressly permits states to use a third party audit firm that is compensated on a contingent fee basis.[175] During the drafting process, NAUPA made clear that it would not support the 2016 Act without such a provision. As a result, there was little debate during the drafting committee meetings on the question of whether contingent-fee auditors should be permitted, despite the reservations of certain ULC commissioners at the annual conference. The Official Commentary dismisses the issue on the basis that, "while use of contingent fee auditors can be viewed as controversial, state administrators contend these auditors are necessary for audits to be undertaken."[176] Instead, the focus was on adding minor limitations on the use of such auditors. The Official Commentary summarized these provisions as follows:

> [T]his section limits any actual conflict of interest, or the appearance of conflict of interest, between the administrator and the contractor conducting the examination by precluding the administrator from contracting with related persons, and requiring that such third party auditing contracts be awarded on a competitive bid basis.

173. Unif. Unclaimed Prop. Act § 201 cmt. (Unif. Law Comm'n 2016).

174. *Id.* § 102 cmt.

175. *Id.* § 1009.

176. *Id.* § 1009 cmt. It is certainly questionable whether contingent-fee auditors are necessary. A number of states, including California and New York, regularly conduct their own audits. Delaware generally uses contingent-fee auditors, but its voluntary disclosure program—which is essentially a managed audit—is conducted by the state and a private law firm that is compensated on an hourly basis. Most states similarly have voluntary disclosure programs that are run in-house. In any single audit, a contingent-fee auditor may make sense, as it limits the state's risk that the cost of an audit may outweigh its benefits. But the states audit dozens, if not hundreds, of companies each year, and collectively, the states almost certainly pay out more in fees to contingent-fee auditors than they would to employees to conduct these audits directly. *See* Jonathan Starkey, *Del. Senate Passes Unclaimed Property Bill*, News J. (Jan. 22, 2015, 5:20 PM), http://www.delawareonline.com/story/firststatepolitics/2015/01/22/senate-abandoned-property/22176233/ (reporting that contingent-fee audit firm was paid over $200 million by a single state over the course of a decade). In theory, contingent-fee auditors should also be more efficient, but that has not been borne out in practice, as unclaimed property audits regularly take three to eight years to complete. In the authors' experience, the audits or voluntary disclosure agreements (VDAs) conducted by the states themselves have generally been much more efficient.

> This provision mandates that a person who is to undergo an examination or be audited by a third party contractor be given unredacted copies of the contract.[177]

These provisions avoid the core issue, however, which is whether the use of contingent-fee auditors violates due process or public policy.

Since *Tumey v. Ohio*,[178] a decision from the early twentieth century, the U.S. Supreme Court has held that there is a violation of due process by a system that permits a person to be fined by someone who has direct pecuniary interest in the fine that is imposed. Although the Supreme Court has never considered the validity of using private contingent-fee audit firms, other courts have found that the use of such firms violates due process or public policy. For example, in *Sears, Roebuck & Co. v. Parsons*,[179] the Georgia Supreme Court held that a contract to use a contingent-fee tax audit firm was void, reasoning that:

> The power to tax rests exclusively with the government. In the exercise of that power, the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected, and we hold that such an agreement offends public policy. The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

The Wyoming Supreme Court reached a similar conclusion in *MacDougall v. Board of Land Commissioners*.[180] The court reasoned as follows:

> No rule of law can be sound which encourages officials to neglect their duty. If state officials, charged with the collection of money due to the state under contract, were permitted to act merely perfunctorily, fail to ascertain the amount due, and in a month or a year or other time, were allowed to hire experts at large expense to do what they themselves should have done, they might deprive the state of large amounts of money, which could, by their own proper efforts made at the time, have been easily saved. Not alone would this encourage neglect of duty on their part, which is against public policy, but it might easily open wide the door to fraud, which cannot be countenanced.[181]

In *Yankee Gas Co. v. City of Meriden*,[182] the Connecticut Superior Court, relying on *Tumey*, held that a city's agreement with a contract audit firm violated due process where the firm was compensated based on a percentage of the additional tax collected as a result of the audits. The court held that "the risk of a due process violation is inherent" when the person determining the tax liability has "a direct financial interest in the amount of tax assessed."[183]

177. Unif. Unclaimed Prop. Act § 1009 cmt. (Unif. Law Comm'n 2016).
178. 273 U.S. 510 (1927).
179. 401 S.E.2d 4, 5 (Ga. 1991) (citation omitted).
180. 49 P.2d 663 (Wyo. 1935).
181. *Id.* at 669.
182. No. X07-CV-960072560S, 2001 WL 477424 (Conn. Super. Ct. Apr. 20, 2001).
183. *Id.* at *9.

To be sure, there are also a number of cases that have reached the opposite result, upholding the use of contingent-fee tax audit arrangements. For example, in *In re Appeal of Philip Morris U.S.A.*,[184] the North Carolina Supreme Court held that a contingent-fee tax auditor's contract with a local county did not violate public policy. Similarly, the Kansas Supreme Court upheld a contingent-fee "tax ferret" arrangement (in which the firm is hired to identify taxpayers that have a high probability of underreporting taxes) in *Dillon Stores v. Lovelady*.[185]

These cases cannot easily be reconciled, and the due process and public policy concerns are magnified in the case of unclaimed property audits, which are almost always conducted on a multistate basis (often involving over thirty states at once). Thus, to withstand scrutiny, it appears that the administrator must, at a minimum, exercise oversight and control over the contractor and must make all material decisions regarding the potential liability of the putative holder. As a practical matter, this may prove difficult, as many state administrators currently lack the necessary expertise in unclaimed property matters, and thus give substantial deference to the contract audit firm. While it is understandable for the states to operate in this manner, it is this type of deference that is precisely the problem.

A recent case, *Temple-Inland, Inc. v. Cook*,[186] would appear to present a textbook example of what can go wrong where the audit is conducted by a private firm on a contingent-fee basis. That case involved the issue of whether Delaware's audit practices, including its methods for estimating unclaimed property liability, were unconstitutional. The court concluded that, during the course of Temple-Inland's audit, Delaware and its contract audit firm "engaged in a game of 'gotcha' that shocks the conscience" sufficient to violate Temple-Inland's substantive due process rights, because Delaware:

> (i) waited 22 years to audit [Temple-Inland]; (ii) exploited loopholes in the statute of limitations; (iii) never properly notified holders regarding the need to maintain unclaimed property records longer than is standard; (iv) failed to articulate any legitimate state interest in retroactively applying Section 1155 except to raise revenue; (v) employed a method of estimation where characteristics that favored liability were replicated across the whole, but characteristics that reduced liability were ignored; and (viii) [sic] subjected [Temple-Inland] to multiple liability.[187]

The *Temple-Inland* decision rejected Delaware's audit practice of estimating unclaimed property owed *to Delaware* in years for which the holder lacked complete records based on unclaimed property owed by Temple-Inland to persons *in all states* in the base years. The court held that such a methodology "is contrary to the fundamental principle of estimation,"[188] which requires *both* the existence *and the characteristics* of property from the base years to be extrapolated into

184. 436 S.E.2d 828 (N.C. 1993).
185. 855 P.2d 487, 491 (Kan. 1993).
186. 192 F. Supp. 3d 527 (D. Del. 2016).
187. *Id.* at 550.
188. *Id.* at 549.

the reach-back years. The court then made abundantly clear that, "[i]f the property in base years shows an address in another state, then the characteristic of that property *has to be* extrapolated into the reach back years."[189] Delaware's methodology was therefore invalid because it "created significantly misleading results" by not replicating the "characteristics and qualities of the property within the sample . . . across the whole."[190] Put more simply: Delaware was improperly trying to escheat significantly more property through the use of estimation than it would have received had the holder reported the property in the first place. The court also held Delaware's "purported reasons for applying [the estimation statute] retroactively [i.e., to raise revenue] d[id] not withstand scrutiny."[191] The court explained that "unclaimed property laws were never intended to be a tax mechanism whereby states can raise revenue as needed for the general welfare."[192] Thus, "[s]tates violate substantive due process if the sole purpose of enacting an unclaimed property law is to raise revenue."[193]

To be sure, some of this bad behavior may have been the fault of the state itself rather than its auditor, as Delaware is notorious for assessing huge sums against companies that conduct little or no business in the state.[194] On the other hand, the two are perhaps inextricably linked, as the auditor has earned over $200 million from its contingent-fee arrangement with Delaware over the course of a decade, and has provided lucrative retirement deals for several former high-level unclaimed property officials, including the Delaware State Escheator himself and a Deputy Attorney General.[195]

Finally, in *Plains All American Pipeline, L.P. v. Cook*,[196] the Third Circuit recently held that the use of a contingent-fee auditor in an unclaimed property audit raises significant due process concerns due to the financial stake that the auditor has in the outcome of the audit, and remanded the case to the district court to address that issue on the merits. However, the case was later dismissed when the plaintiff converted the audit into Delaware's voluntary disclosure program, which is administered by a law firm that is not compensated on a contingent fee basis. Accordingly, it may be some time before a court weighs in regarding the validity of a contingent-fee multistate unclaimed property audit arrangement.

189. *Id.* (emphasis added).

190. *Id.* A byproduct of Delaware's estimation methodology is the potential for a holder to face multiple liability arising from another state's use of the same property in the base years to estimate a liability in the reach-back years. The court found that such circumstances could compel a holder "to escheat the same estimated property to two states, in violation of the principles articulated in the *Texas* cases" that prohibit states from subjecting a holder to multiple liability. *Id.* at 449–50.

191. *Id.* at 547.

192. *Id.* at 548.

193. *Id.*

194. *Id.* at 532 (quoting exhibit) (noting that unclaimed property has now become "Delaware's third largest revenue source, making it a 'vital element' in the State's operating budget"). Indeed, from 2000–2017, Delaware has escheated over $7.3 billion, but has returned less than 10 percent of that amount to owners. *See generally Comprehensive Annual Financial Reports*, State of Del., https://accounting.delaware.gov/cafrdefault.shtml (last visited Mar. 22, 2018) (collecting comprehensive annual financial reports from 2002 to 2017).

195. *See* Starkey, *supra* note 176.

196. 866 F.3d 534 (3d Cir. 2017).

The ABA Model Unclaimed Property Act

The authors, who served as the ABA advisors to the ULC drafting committee to revise the Uniform Act, communicated all of these constitutional and policy concerns to the ULC during the drafting process. The ULC ultimately chose not to follow the ABA's guidance. Members of the ULC drafting committee even suggested there would be no harm in including unconstitutional provisions because the courts would eventually strike them down. However, the legislature has a duty not to pass laws that violate, or likely violate, the Constitution. Moreover, the fact that relatively few unclaimed property cases have been litigated in the last few years indicates that owners and putative holders of unclaimed property often do not have sufficient amounts at stake to justify litigation, or they may not have sufficient expertise to understand that the law as written is unconstitutional. Uniform or model acts should strive to avoid perpetuating illegal practices.

In early 2017, shortly before the ABA House of Delegates was scheduled to vote on the 2016 Act, the Business Law Section of the ABA reiterated these concerns to the ULC, and indicated that the ABA may not support the 2016 Act if the concerns were not addressed. In response, the ULC withdrew the 2016 Act from consideration by the House of Delegates. Shortly thereafter, the Unclaimed Property Subcommittee resumed its work on the Model Act.

The Unclaimed Property Subcommittee posted an initial draft of the Model Act on its website in early March 2017. The Subcommittee sought, and received, comments from a number of key stakeholders with substantial expertise in the unclaimed property field, including UPPO, COST, various securities organizations, and the U.S. Chamber Institute for Legal Reform. The Subcommittee published a number of revised drafts over the next few months, and finalized the Model Act in January 2018. The final version of the Model Act addresses each of the above issues head-on and resolves them in a manner which we believe both satisfies constitutional requirements and serves the fundamental goals of state unclaimed property laws.

Derivative Rights. The Prefatory Note to the Model Act explicitly adopts the principle of derivative rights, providing as follows: "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."[197] The other key provisions of the Act are consistent with this statement. For example:

- The definition of "property" subject to the Act includes "a fixed and certain obligation to pay money by a holder to an owner under the laws governing the precise debtor-creditor relationship between the holder and the owner" and expressly *excludes* "any obligation to provide only goods or services to the owner, such as an obligation represented by a gift card, store credit, or ticket, unless such obligation may also be re-

197. Model Unclaimed Prop. Act pref. note 3 (Am. Bar Ass'n 2018).

deemed for cash."[198] The reference to the "precise debtor-creditor relationship" is, of course, taken directly from the U.S. Supreme Court's decision in *Delaware v. New York*.[199]

- The Model Act also revises the definition of "holder" of intangible property to mean "the person primarily obligated to pay the property to the owner" except that (1) if the obligation is assigned to another person, the assignee is considered the holder if the obligation was validly assigned under applicable debtor-creditor laws; and (2) if more than one person is considered primarily obligated to the owner, then each such person is considered the holder with respect to an equal portion of the property at issue.[200] Thus, the definition is not only consistent with *Delaware*, but also more clearly addresses and resolves the concern of multiple holders than the language in the 2016 Act and its Official Commentary.

- The Model Act does not include the controversial contractual anti-limitations provision from the 1981, 1995, and 2016 Uniform Acts, nor does it include the similar rule overriding limitations imposed by "court order." The statutory anti-limitations provision is modified to read as follows: "The expiration of a statute of limitations on an owner's right to recover property from the holder does not prevent the administrator from commencing an action or proceeding to enforce this Act, if the statute of limitations expired after the date the property became unclaimed under this Act."[201] The idea is that, if the statute of limitations on the owner's claim expires before the state's escheat claim arises, then the state's claim is likewise barred, consistent with the concept of derivative rights. However, if the state's claim vests before the owner's claim is barred, then the state is effectively deemed to have asserted its rights over the property by virtue of adopting the Model Act, thereby permitting the state to take custody of the property, even if the statute of limitations on the owner's claim subsequently expires—as long as the state does so within its own statute of limitations period.

- The burden of proof and burden of production that the state must satisfy are based on the same burdens that the owner would have had to satisfy, if the owner were attempting to claim the property from the putative holder directly.[202]

Jurisdictional Escheat Rules. The Model Act strictly adheres to the jurisdictional escheat rules set forth in *Texas v. New Jersey*, rather than expand those rules as in the Uniform Acts. In particular, the Model Act provides that "the administrator may take custody of intangible property subject to this Act only if: (1) the last-

198. *Id.* § 102(21).
199. *See* 507 U.S. 490, 499 (1993).
200. Model Unclaimed Prop. Act § 102(12)(C) (Am. Bar Ass'n 2017).
201. *Id.* § 1201(f).
202. *Id.* §§ 1003, 1004.

known address of the apparent owner(s), as set forth on the books and records of the holder, is in this state; or (2) the holder is domiciled in this state or is this state or a governmental subdivision, agency, or instrumentality of this state and . . . the holder has no record of the address of the apparent owner of the property."[203] Notably, the Model Act does not incorporate the *Texas* rule that the state of domicile can also claim the property if the state of last known address does not "provide for escheat." Because all states have now adopted custodial escheat rules applicable to intangible property, that rule has become mere surplusage.[204] The Model Act does not include any of the 2016 Uniform Act provisions identified as constitutionally invalid by the ABA advisors. In particular:

- The Model Act does not require the escheat of foreign-owned property.[205] As noted above, such escheat is not only contrary to *Texas*, but also is likely unconstitutional under the foreign affairs doctrine and the Commerce Clause, and may also conflict with U.S. treaties and foreign laws.
- The Model Act does not include any type of "tertiary" rule that applies if the holder's state of domicile does not require the escheat of the property at issue.
- The Model Act does not permit a state to use extrinsic evidence to establish a claim under the primary rule. Rather, the state is bound by the last known address, as set forth in the books and records of the holder, as *Texas* instructed.[206]
- The Model Act uses the ordinary definition of the term "address" for purposes of applying the primary rule—which is much more likely to be consistent with *Texas* than the expansive definition in the 2016 Act.[207]

Securities. The Model Act, like the 2016 Act, provides that the dormancy period for securities is triggered by mail returned as undeliverable (RPO).[208] However, the Model Act changes the dormancy period from three years to seven years, in recognition of the fact that securities are often held for extended periods of time without affirmative contact or activity by the owner (consistent with prevalent investment strategies).[209] The Model Act also includes a much more comprehensive notice provision than the Uniform Acts, which is intended to sat-

203. *Id.* § 303.
204. Moreover, as discussed above, the Third Circuit held in *Marathon Petroleum Corp.* and *N.J. Retail Merchants Ass'n* that permitting a state with a lesser claim to property (such as the holder's state of domicile) to escheat property that is exempted by a state with a greater claim to the property (i.e., the state of address of the owner) would allow such lower-priority state to "trump" the policy decision of the higher-priority state to exempt that property from escheat. *See* Marathon Petroleum Corp. v. Sec'y of Fin., 876 F.3d 481, 491 (3d Cir. 2017); N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 395–96 (3d Cir. 2012).
205. Model Unclaimed Prop. Act § 103 (Am. Bar Ass'n 2017).
206. *See id.* § 303.
207. *See id.* § 102(14).
208. *Id.* § 207.
209. *Id.*

isfy due process. In particular, the Model Act provides not only the minimal notice by letter to the last known address of the owner (which is known to be invalid, based on the RPO dormancy trigger), and the constructive notice by newspaper and website, but also requires the administrator to contact other state and local agencies to attempt to identify additional addresses of the owner, including but not limited to agencies with access to tax and real estate records, motor vehicle registration databases, the State Vital Statistics database, and the U.S. Postal Service's National Change of Address database.[210] The administrator is then required to send notice to every address identified by the administrator (including electronic addresses), at least once per year, except where prior notices to that address have been returned as undeliverable, and the notice must specifically inform the owner of the risk that the securities may be liquidated.[211] The Model Act then provides that the administrator must not liquidate the securities for at least ten years, and that, if the administrator sells the securities after ten years, the owner is entitled to the value of the securities at the time the claim is made (or, if the state does not diligently process the claim, the greater of the value at the time the claim is made or the time the claim is finally approved).[212] Thus, like in New York, the owner of the securities should be made whole by the state if it chooses to liquidate the owner's property.[213]

Tangible Property. The Model Act provides substantial additional protections for owners of tangible property. This issue was largely overlooked by the ULC, but the escheat and liquidation of tangible property raise similar constitutional issues as for securities. Indeed, tangible property can include both items with immense monetary value, such as rare jewelry, paintings or other items, as well as items with considerable personal value, such as letters, pictures, and awards. The Model Act limits the escheat of tangible property to property held in a safe-deposit box with a financial institution.[214] The dormancy period is generally five years after the expiration of the lease or rental period for the box, including any automatic renewals of that period. The administrator is prohibited from selling any escheated tangible property for a period of at least five years, and must provide annual notices similar to those described above for securities, as well as provide public notices of the sale, before the property can be sold.[215]

Contingent Fee Auditors. The Model Act prohibits the use of contingent-fee audit arrangements in unclaimed property examinations.[216] As discussed above, while contingent fee arrangements may survive constitutional scrutiny under certain cir-

210. *Id.* § 503(b)–(c).

211. *Id.* § 503(a)–(d).

212. *Id.* §§ 702, 905.

213. *Id.* § 905; *see* N.Y. Aban. Prop. Law 1403 (McKinney, Westlaw through L.2018, chs. 1 to 3). The Model Act also exempts from the scope of the Act all non-publicly-traded securities. Model Unclaimed Prop. Act § 102(21), (23) (Am. Bar Ass'n 2017). The escheat of such securities is impractical given that the escheat and liquidation of such securities raises additional complex issues, including valuation, shareholder rights, and contact issues, among other things.

214. Model Unclaimed Prop. Act § 206 (Am. Bar Ass'n 2017).

215. *Id.* § 701.

216. *Id.* § 1007.

cumstances, those circumstances have historically not existed in the unclaimed property context. Unclaimed property audits are replete with examples of the contract audit firms essentially dictating policy to states, which lack the knowledge or expertise to know when these audit firms are overreaching. This is also unlikely to change without a complete prohibition on the use of such firms, which some state legislatures are already starting to embrace.[217] The use of contingent fee audits, which of course creates financial incentives for larger assessments, is also inconsistent with the primary purpose of unclaimed property laws, which is to return property that is indisputably owed to another person. Thus, unclaimed property audits are not the proper venues to make aggressive arguments about whether property is due or not. These laws are designed to be procedural, rather than substantive, in nature, and elimination of the contingent-fee audit model will be a major step towards returning to that original design. There are also substantial policy concerns about excess compensation to contingent fee auditors. Finally, states certainly have the ability to lower audit costs, for example, by subcontracting with their revenue departments to audit unclaimed property at the same time as conducting corporate income tax or sales/use tax audits or by banding together with other states (through NAUPA or otherwise) to create a shared cost audit function (similar to what is done by the Multistate Tax Commission in the state tax context).

The Model Act also includes a number of other improvements compared to the 2016 Uniform Act. Some of these are tied to constitutional requirements, whereas other improvements are more policy-based. The most significant changes are as follows:

Unclaimed vs. Abandoned Property. The Model Act eliminates the misleading and legally incorrect terminology of "abandoned" property, and substitutes it with consistent use of the terminology of "unclaimed" property.[218] As discussed above, this is a substantive distinction, as "abandoned" property refers to property where the owner has relinquished his rights in the property. Merely "unclaimed" property refers to property that has perhaps been forgotten or is at least unused but not abandoned, and the owner retains rights in that property. It is important to emphasize this distinction, to avoid confusion regarding the applicable constitutional standards at issue.

Dormancy Periods. The Model Act takes a different approach from the 2016 Act, which mostly either maintained or shortened the dormancy periods from the 1995 Act. Instead, the Model Act approaches the issue of dormancy periods from the perspective of the owner, and adopts a common-sense, practical approach as to when an owner's property is reasonably likely to be "unclaimed." For example, for uncashed checks, the Model Act shortens the dormancy period to one year, on the theory that if a person has not cashed a check within a year, it is likely that the person has lost the check or forgotten about it, and therefore a quick escheatment of the amount of the check will be in the owner's best inter-

217. N.C. Gen. Stat. Ann. § 116B-8 (West, Westlaw through the 2017 Reg. Sess.).
218. *See* Model Unclaimed Prop. Act pref. note (Am. Bar Ass'n 2017).

ests.[219] The Model Act also shortens the dormancy period for unclaimed life insurance proceeds to two years.[220] Conversely, the Model Act returns the dormancy period for bank accounts to five years (as in the 1995 Act), and also adds a returned mail (RPO) standard to trigger dormancy.[221] These changes are intended to reflect the fact that a typical person does not "forget" about his or her bank account after a mere three years, as the 2016 Act provides. Rather, such accounts are often left untouched for extended periods of time (e.g., "rainy-day" accounts). The fact that a bank account also may contain a substantial amount of assets also suggests that one should be more careful before deeming it "unclaimed" and escheatable to the state, as the ramifications of such escheat on the owner could potentially be more severe.

The "catch-all" dormancy period in the Model Act is five years, rather than three years in the 2016 Act.[222] This is consistent with both the 1981 and 1995 Acts, and we believe is a more reasonable default period for property not specifically addressed in the Act. As Judge Posner cautioned in *Cerajeski*, a three-year dormancy period for certain types of property raises significant due process concerns.[223] Thus, utilizing such a short period as a default would appear to be inappropriate. Indeed, the 1954 and 1966 Acts included a seven-year default dormancy period. The overall shortening of the dormancy periods over the last thirty years appears to be driven more by state revenue concerns than by any correlation with the actual time that owners are likely to have forgotten about their property.

B2B Exemption. The Model Act also includes a B2B exemption that applies to property due or owing from a business association to another business association.[224] This exemption is modeled after the B2B exemption that Illinois adopted before it converted to the 2016 Act. As discussed above, a B2B exemption is desirable from a policy perspective both because the unclaimed property laws are generally intended to protect consumers rather than businesses, and also because much of the supposed "unclaimed property" owed between businesses is actually accounting errors or disputed balances rather than property due and owing.

De Minimis Exemption. The Model Act includes a de minimis exemption for "any property with an aggregated value by owner of less than $10."[225] This exemption reflects the practical reality that it will cost more to escheat the property and return it to the owner than the property is worth (and that a typical owner is unlikely to make an escheat claim where the amount at issue is so small).

Voluntary Disclosure Program. The Model Act also includes a voluntary disclosure program to encourage businesses to voluntarily come forward and identify past unreported unclaimed property liabilities to the state, in exchange for a

219. *Id.* § 202(8).
220. *Id.* § 202(6).
221. *Id.* § 202(4).
222. *Id.* § 202(13).
223. Cerajeski v. Zoeller, 735 F.3d 577, 582 (7th Cir. 2013).
224. Model Unclaimed Prop. Act § 102(21) (Am. Bar Ass'n 2017).
225. *Id.*

waiver of penalties and interest.[226] Such voluntary disclosure programs are a common practice by states, but thus far have only been codified in one state (Delaware).[227] As a result, the rules of each program are often in doubt (including such basic issues such as whether a business will receive a release of liability for periods covered by the program) and are far from uniform among the states. The Model Act provides (for the first time) clear, fair rules to encourage companies to come into compliance with each state's unclaimed property laws.

Validations of Owner's Death. The 2016 Act permits the states to compare life insurers' in-force and terminated policies against the Social Security Death Master File ("DMF"), and then, if there is at least a partial match, require insurers to make a good faith effort to validate the death and provide claim forms in respect of validated matches.[228] Similarly, the 2016 Act provides that, if an IRA custodian "receives notice or an indication of the death of an apparent owner" of the account, then the IRA custodian must attempt to confirm whether the owner is deceased.[229] The Model Act does not include these provisions, as they violate a fundamental tenet of the Supreme Court's unclaimed property jurisprudence that requires *states*, rather than holders, to incur the expense of reviewing records and determining reportable property.[230] Moreover, these types of provisions would violate the derivative rights doctrine by injecting unclaimed property administrators into the regulation of insurance companies and IRA custodians and imposing obligations on these companies that have fundamentally been the province of other state or federal laws and regulations and thus creating new statutory and regulatory obligations under the unclaimed property laws, rather than the substantive laws that regulate these industries. The unclaimed property laws are intended to be narrowly tailored procedural laws designed to facilitate the return of property to the rightful owner, and are not intended to impose new or different substantive obligations on the parties.[231]

Statute of Limitations. Consistent with the ABA's recommendations to the ULC during the drafting process for the 2016 Act, the Model Act provides two separate limitation periods: (1) a four-year limitations period where the holder filed a

226. *Id.* § 1010.

227. *See* Del. Code Ann. tit. 12, § 1173 (West, Westlaw through 81 Laws 2018).

228. Unif. Unclaimed Prop. Act § 211(c)(4) (Unif. Law Comm'n 2016).

229. *Id.* § 202(b).

230. Pennsylvania v. New York, 407 U.S. 206, 215 (1972) ("We think that as a matter of fairness the claimant States, and not Western Union, should bear the cost of finding and recording the available addresses [for purposes of determining any escheat liability],"); *see* Delaware v. New York, 507 U.S. 490, 509 (1993) (rejecting New York's objection to the "cost and difficulty of culling creditors' last known addresses from brokers' records").

231. *See* Model Unclaimed Prop. Act pref. notes 1, 7 (Am. Bar Ass'n 2017) ("The purpose of this Act is to facilitate the return of unclaimed property to its rightful owner. . . . This Act is not intended to supersede any state contract or debtor-creditor law."). The 2016 Act provisions would also impose a substantial impairment on insurers' life insurance contracts to the extent the Act applies to presently in-force or terminated contracts by requiring insurers to verify results of a DMF match before due proof of death is received. It shifts the burden of establishing death entirely from the beneficiary to the insurer, and thus fundamentally alters the parties' bargain. Enforcing such a requirement retroactively against life insurance policies issued before the effective date of the legislation requiring DMF searches thus also violates the Contract Clause.

non-fraudulent report; and (2) a seven-year limitation where the holder did not file a report or filed a fraudulent report.[232] We believe the shorter limitations provisions are ultimately fairer to holders than the five-year and ten-year periods in the 2016 Act, particularly when it is considered that these limitations periods do not start running until after the dormancy period has expired and the property has become reportable. Thus, if the dormancy period is three years, a holder may still be obligated to retain records for at least seven years, which is consistent with IRS requirements.

ERISA. The Model Act recognizes that, since the 1995 Uniform Act was adopted, the Seventh Circuit has held that ERISA generally preempts 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.[233] The 2016 Act refuses to recognize that preemption applies, and the Official Commentary states that "[t]here is substantial disagreement between various authorities concerning whether ERISA preempts state unclaimed property laws," citing two cases for the proposition that ERISA does not preempt state unclaimed property laws.[234] However, these cases—which are the only authorities finding that preemption did not apply—involve situations in which *an insurance company*, rather than *the ERISA plan itself*, was attempting to claim preemption and the insurance company would receive the benefit of any unclaimed amounts. Thus, the primary incidence of the unclaimed property law fell on the insurer, and any effect on the ERISA plan was simply too tangential or peripheral to justify preemption. These cases are therefore consistent with the cases upholding preemption: the issue is whether the state is attempting to escheat assets held by an ERISA plan or which the plan is entitled to receive, or where the state is otherwise acting in a manner inconsistent with the fiduciary obligations imposed by ERISA. No case has denied that preemption applies in these situations.

Reporting. The Model Act updates the reporting requirements for holders to make reporting unclaimed property easier and more practical, as well as to facilitate claims by owners. For example, unlike the 2016 Act, the Model Act permits a group of affiliated companies to file a single report on behalf of multiple holders within the affiliated group.[235] The Model Act also requires reporting of the date the property is unclaimed, rather than the last contact date by the owner.[236] The last contact date is often irrelevant for certain types of properties,

232. *Id.* § 1201(c), (d).

233. *See* Commonwealth Edison Co. v. Vega, 174 F.3d 870 (7th Cir. 1999); Mfrs. Life Ins. Co. v. E. Bay Rest. & Tavern Ret. Plan, 57 F. Supp. 2d 921 (N.D. Cal. 1999); Advisory Opinion Letter from Robert J. Doyle, Dir. of Regs. & Interpretations, Dep't of Labor, to Thomas R. Giltner, Cox & Smith, Inc. (Dec. 7, 1994) (quoting 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974)), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-41a (Adv. Op. 94-41A).

234. Unif. Unclaimed Prop. Act § 202 cmt. (Unif. Law Comm'n 2016) (citing Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989); Att'y Gen. v. Blue Cross & Blue Shield of Mich., 424 N.W.2d 54 (Mich. Ct. App. 1988)).

235. Model Unclaimed Prop. Act § 401(d) (Am. Bar Ass'n 2017).

236. *Id.* § 402(a).

where an RPO standard or other dormancy standard applies, and the reporting of that information has caused states to automatically and improperly assess interest on holders. The Model Act also includes record retention requirements (for seven years after the date the property was due), which clearly specify the information to be retained, as opposed to the ambiguous rules of the 2016 Act.[237] The Model Act also eliminates the ability of holders to report low-dollar amounts (i.e., under $50) in the aggregate without providing owner name and address information.[238] If property is reported on such an aggregated basis, it will be impossible for states to reunite the property with the rightful owner.

Administrative Appeals. As with the 2016 Act, the Model Act permits the holder to appeal an adverse determination in an audit either directly to court or pursuant to the state's administrative procedures act.[239] In addition, the Model Act includes another optional avenue for appeal, which is that the putative holder and state administrator can jointly select a third party hearing examiner to issue a determination of the appeal.[240] The hearing examiner must be a former member of the judiciary or a licensed attorney who is qualified by experience or training to serve and cannot be any current employee of the administrator or an agent of the administrator. The hearing examiner may award reasonable attorney's fees and the costs of the appeal to the prevailing party, except that the administrator may be awarded fees or costs only where it is the prevailing party and the putative holder acted with fraud or willful misconduct. This type of alternative appeal process can be both cost-effective and fair from the perspective of both states and putative holders.

Penalties. The 2016 Act included a new penalty against a holder that "enters into a contract or other arrangement for the purpose of evading an obligation under this [act]" of up to $25,000 plus 25 percent of the amount of property at issue.[241] The 2016 Act included the same penalty for willful or fraudulent violations of the Act.[242] For non-willful violations, the 2016 Act imposed a penalty of up to $5,000.[243] The 2016 Act also imposes interest for late-reported property.[244] Finally, the 2016 Act provides that the administrator "may" waive interest or penalties in his discretion, but "shall" waive penalties "if the administrator determines that the holder acted in good faith and without negligence."[245] The problem with the fixed-dollar penalties is twofold. First, depending on the amount of property at issue, the penalties could be either too small so as to have no deterrent effect or too large so as to be unfair. Second, the risk that the penalties could be grossly excessive (and perhaps even violate the Eighth Amendment of the Constitution, which prohibits excessive fines) is increased

237. *Id.* § 404.
238. *See id.* §§ 402, 501, 502.
239. *See id.* § 1103.
240. *Id.* § 1105.
241. Unif. Unclaimed Prop. Act § 1205(a) (Unif. Law Comm'n 2016).
242. *Id.* § 1205(b).
243. *Id.* § 1204.
244. *Id.*
245. *Id.* § 1206.

by the fact that the 2016 Act does not specify whether the penalties are imposed on a per-item basis, per-annum basis, or some other basis, despite the fact that the ABA advisors pointed out this ambiguity repeatedly during the drafting process. If penalties are applied on a per-item basis, then the negligent failure to report a single check worth $10 could result in a mandatory $5,000 penalty that the administrator could, in his discretion, decline to waive. The Model Act fixes these concerns by imposing penalties that are directly tied to the amount of property that was not reported.[246] The amount of the penalty is much lower for negligent omissions (5 percent) as compared to fraudulent omissions (50 percent). The Model Act also provides that any penalty must be waived if the holder had reasonable cause for not reporting the property, rather than leaving that decision within the discretion of the administrator.[247]

Transition Provisions. The 2016 Act included controversial "transition" provisions, which stated that:

> (a) An initial report filed under this [act] for property that was not required to be reported before the effective date of this [act], but that is required to be reported under this [act], must include all items of property that would have been presumed abandoned during the 10-year period preceding the effective date of this [act] as if this [act] had been in effect during that period.
>
> (b) This [act] does not relieve a holder of a duty that arose before the effective date of this [act] to report, pay, or deliver property. Subject to Section 610(b) and (c), a holder that did not comply with the law governing unclaimed property before the effective date of this [act] is subject to applicable provisions for enforcement and penalties in effect before the effective date of this [act].[248]

The first transitional provision requires retroactive escheat of property that was not previously subject to escheat under the prior version of each state's unclaimed property laws. This raises serious concerns under both the Contract Clause and Takings Clause of the U.S. Constitution.[249] The second transitional provision creates some uncertainty whether the new statute of limitations provisions apply to property that became reportable under the prior version of the Act.

The Model Act includes other provisions from the 2016 Act that generally improve state unclaimed property laws, including in particular new confidentiality and security provisions that apply to information provided by putative holders to

246. Model Unclaimed Prop. Act § 1204 (Am. Bar Ass'n 2017).

247. *Id.*

248. Unif. Unclaimed Prop. Act § 1503 (Unif. Law Comm'n 2016). *Compare* Model Unclaimed Prop. Act § 1502 (Am. Bar. Ass'n 2017) ("Any property that was required to be reported before the effective date of this Act, but that is not required to be reported under this Act, shall not be required to be reported after the effective date. Any property that was in existence prior to the effective date of this Act, and was not required to be reported before the effective date of this Act, shall not be required to be reported under this Act.").

249. *See, e.g.*, N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 388–89 & n.6 (3d Cir. 2012) (concluding that 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).

states during audits. Finally, the Model Act substantially simplifies the 2016 Act, and clarifies or eliminates many ambiguities in the 2016 Act to create a law that is easier to apply in practice.

Conclusion

State unclaimed property laws have been trending in the wrong direction for over thirty years, as such laws have been greatly expanded in unconstitutional ways for the purpose of generating revenue for states, at the expense of both owners and putative holders of unclaimed property. The 2016 Uniform Act—while containing some notable improvements from the 1981 and 1995 Acts—does little to reverse this alarming trend. The ABA Model Act, by contrast, is specifically drafted to satisfy constitutional requirements and to restore the unclaimed property laws to their original purpose: to reunite owners with their missing property. In addition, the Model Act also includes many additional improvements as compared to the Uniform Acts, both in terms of simplifying and clarifying these laws, which have become needlessly complex, and applying a practical approach that is consistent with the policies underlying these laws.