Where Art Thou, Uniformity? Examining Deviations From RUUPA

by Michael Giovannini

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In this installment of UP Ahead, Giovannini explores the Revised Uniform Unclaimed Property Act and some of the more eyebrow-raising state deviations regarding key provisions of importance to holders.

In July 2016 the Uniform Law Commission (ULC) approved the Revised Uniform Unclaimed Property Act (RUUPA), a comprehensive rewrite of its predecessor, the 1995 Uniform Unclaimed Property Act.[1] The goals of RUUPA were to (1) update the 1995 act to address more modern unclaimed property types and concepts, and (2) achieve "substantial uniformity" among the states.[2] Indeed, the latter is consistent with the ULC's overarching mission statement.[3]

RUUPA — or a version thereof — has been enacted by Colorado, Illinois, Kentucky, Maine, Tennessee, Utah, and Vermont.[4] Indiana, North Dakota, and South Carolina have pending RUUPA legislation, while several others have considered RUUPA bills. Among this small group of state adoptions, however, there has been a substantial lack of uniformity in several key respects, and nearly half of these states later amended their versions of RUUPA or adopted administrative rules that effectively deviate from the uniform act. Thus, what began as an effort to minimize holder compliance burdens and streamline compliance efforts has evolved into a tangled web of differing standards and competing state considerations.

This article explores some of the more eyebrow-raising state deviations regarding key provisions of importance to holders, which could cause compliance headaches and require holders to customize their escheat processes to take into account the highly nonuniform requirements stemming from the RUUPA states. At bottom, this article serves as a cautionary tale to holders and their advisers to carefully monitor all state unclaimed property legislation, even when it purports to be an adoption of RUUPA, as there may be traps for the unwary hidden throughout. This article also highlights the importance of holder involvement in the legislative process.

[1] For the sake of brevity, this article steers away from much of the substantive analysis or debate regarding the merits of RUUPA. While the act upgrades various aspects of previous uniform acts, there are still numerous deficiencies, including some that have constitutional implications. For further exploration of these issues, see Ethan D. Millar et al., "Building a Better Unclaimed Property Act," 73 *The Business Lawyer* 711 (Summer 2018).

[2] *See* Prefatory Note to RUUPA.

[3] *See* ULC Constitution, section 1.2 ("It is the purpose of the Conference to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable").

[4] Notably, the ULC does not consider Illinois or Maine to have enacted RUUPA per the website for the RUUPA project. *See* ULC, Unclaimed Property Act, Revised. This is presumably because of the numerous deviations from the act's standard provisions that these states incorporated into their bills.

Retirement Account Variations Add Unnecessary Complexity

Under RUUPA, a retirement account — for example, a traditional IRA — is presumed abandoned if unclaimed for three years after the later of (a) the second consecutive instance of returned mail (RPO) is received by the holder,[5] or (b) the earlier of the date the owner reaches age 70-1/2 or two years after the holder receives confirmation of the owner's death. Using an RPO-based standard reflects a general upgrade from the 1995 act (and its predecessor, the 1981 Uniform Unclaimed Property Act), at least from the perspective of conserving owner assets and preventing them from escheating, which has tax consequences to the owner.[6] Also, an RPO standard reflects the notion that an owner is required to take distribution from only one of his IRAs if he has multiple accounts. So by requiring one or more instances of RPO in addition to the owner's reaching age 70-1/2 or dying, holders will likely escheat fewer IRAs to states under the RUUPA standard as compared with others.

Early adopters of RUUPA have not hesitated to make changes to this standard, however. On the positive side of the ledger is Vermont's IRA provision, which replaces the age 70-1/2 standard with an age 72 standard. Indeed, this is sensible in light of the fact that the ULC intended the age portion of the IRA provision to reflect the "date an owner reaches the age of mandatory distribution."[7] That age historically was 70-1/2 (more specifically, an owner was required to begin taking distributions on or before April 1 of the year following the year when she reached age 70-1/2). However, in late 2019 Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which changed the required minimum distribution date to April 1 after the year when the owner turned 72.[8] Fortunately, Vermont enacted its RUUPA bill after the SECURE Act was signed and thus used the updated age of 72.[9] A RUUPA state with a statute in place before the SECURE Act's passage, however, has yet to take action to similarly update the age 70-1/2 provision, which leaves their acts in conflict with the federal law they purport to track vis-à-vis beginning/required distribution dates.

Unfortunately, Vermont's law also has one of the more problematic deviations from RUUPA as it relates to IRAs. In particular, despite having an IRA provision that largely mirrors RUUPA's standard language (except for using the age 72 rule, as noted), Vermont included a separate provision applicable to deceased-owner IRAs. In particular, the provision states that not only does a two-year dormancy period apply to deceased-owner IRAs (more on this later), but also that this period begins to run "from the earliest of the date of distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty."[10] This provision directly conflicts with the existing standard RUUPA provision regarding deceased-owner IRAs, which are otherwise presumed abandoned based on confirmation of death, provided that there is also RPO on the account. Squaring Vermont's two provisions is apparently impossible, so holders are left with determining which of the two conflicting standards to apply.

Utah's RUUPA enactment is also less than ideal in terms of its articulation of the dormancy standard applicable to IRAs. Although the Utah provision contains all the same words as the standard RUUPA provision, they are in a slightly different order, which the state has seized upon in proposing a set of regulations to drastically differentiate the statute from standard RUUPA. For instance, Utah's law provides that an IRA is presumed abandoned if unclaimed three years after (a) "the later of" the date of RPO or second RPO, if the communication is re-sent within 30

[5] Unless the second communication was sent later than 30 days after the date of the first RPO, in which case the date of the first RPO is the relevant date.

[6] In particular, the IRS has concluded that escheatment of an IRA to a state as unclaimed property constitutes a distribution, which is taxable to the owner and subject to withholding. *See* IRS Rev. Rul. 2018-17, 2018-25 IRB 753.

[7] Comment to RUUPA.

[8] Further Consolidated Appropriations Act, 2020, P.L. 116-94.

[9] *See* Vt. Stat. Ann. title 27, section 1462.

[10] *Id.* section 1473(2).

days after the first RPO; or (b) the earlier of the owner reaching 70-1/2 years old or two years after the holder has confirmed the owner's date of death. Again, the words are the same, but the difference is that the phrase "the later of" relates only to the RPO prong of the standard rather than to the standard as a whole.

While this may appear to be a drafting error, and there is no indication that the Utah Legislature intended a departure from RUUPA here, the Utah state treasurer's position is that an IRA is escheatable if *either* there has been RPO on the account, or the owner has reached age 70-1/2 or is deceased — and not necessarily both. Indeed, regulations proposed by the treasurer's office provide the following:

> (6) An IRA is considered dormant three years after failed delivery of communications. If an IRA falls within this provision but the owner is under age 59.5, Utah Treasury asks that a due diligence mailing be made but that the property not be reported and remitted unless the owner's IRA remains in the same dormant status when he or she reaches age 59.5. This is to address the issue of a potential penalty associated with early IRA distributions.
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> (7) Under subsection 1(b) of the IRA provision, an IRA is considered dormant and subject to due diligence on the earlier of (i) attained age of 70.5 or (ii) two years after death. If either of triggers (i) or (ii) are met, the property is subject to due diligence. There is no additional returned mail requirement under these circumstances and returned mail on the customer IRA, or the lack thereof is not a factor in the dormancy analysis under section 1(b). Because of the "or" operator between subsection 1(a) and 1(b), if either of the dormancy triggers in 1(a) or 1(b) are met, due diligence is required, and if no response is received, the property must be reported and remitted.[11]

[11]Utah Admin. Code R966-1-4.

This is a significant departure from the standard RUUPA provision, which again is premised on both RPO and either 70-1/2 or confirmed death. One of these factors alone does not lead to dormancy, but under Utah's interpretation, only one is required. What's more, the proposed Utah regulation concocts an age 59-1/2 standard[12] out of whole cloth — a rule for which there would not appear to be any statutory authority.

Statutes of Limitations That Provide No Real Limitations

Under RUUPA, a state is prohibited from commencing an action or proceeding to enforce the act "more than five years after the holder filed a nonfraudulent report" with the state.[13] Otherwise, the state "may not commence an action, proceeding, or examination . . . more than 10 years after the duty arose."[14] Per the ULC's comment to this provision, the idea was to provide a "clear cut-off date" on which a holder can rely.[15] This clear statute of limitations was in contrast to the 1995 act, which essentially requires holders to specifically identify property in a report for a limitation period to apply.[16] Under such a provision, the state is effectively never barred from attempting to escheat property years after it became potentially escheatable to the extent the holder never identified the property to the administrator. Per the ULC drafting committee, however, "this [1995 act] rule is not the rule recognized by this Act."[17]

Despite this clear limitation and the surrounding commentary, some states adopting RUUPA have disregarded the provision and enacted laws that essentially continue the 1995 act standard. Illinois's statute of limitations provision, for example, echoes the 1995 act and

[12]That said, there is at least some logic to the rule, as age 59-1/2 is relevant for tax purposes. In particular, under the IRC, an IRA owner may begin taking distributions from her IRA upon reaching age 59-1/2 without penalty. *See* 26 U.S.C. section 72(t)(2)(A)(i). However, using age 59-1/2 as a dormancy requirement is entirely novel.

[13]RUUPA, section 610(a).

[14]*Id.* section 610(b).

[15]RUUPA, Official Comment to section 610.

[16]1995 act, section 19.

[17]RUUPA, Official Comment to section 610.

provides that property is only off-limits from an assessment after 10 years if the holder "specifically identified the property in a report . . . or gave express notice to the administrator of a dispute regarding the property."[18] In the absence of such a report, "the period of limitation is tolled."[19]

Of course, this type of provision provides little to no closure to unclaimed property holders. The state maintains an open-ended ability to audit or assess holders for property long after records related to the property may no longer be available; it is impractical to suggest that a holder that has a legitimate reason for not reporting property needs to identify that property to the state to avoid the state's unlimited time to review the property.

While Utah's statutory standard essentially reflects the RUUPA provision, the proposed administrative regulation drastically departs from it by purporting to adopt a provision based on the Illinois statute. In particular, the Utah regulation provides that:

> Pursuant to Section 67-4a-610(4) of the Act an action or proceeding may not be maintained by the administrator to enforce this Act in regard to the reporting, delivery, or payment of property more than 10 years after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property.[20]

However, the referenced section of Utah's version of RUUPA does not contain such a standard. Rather, the statute provides that the state "may not commence an action, proceeding, or examination . . . on a day that is more than 10 years after the day on which the duty arises." Again, this is essentially the RUUPA standard provision. The proposed regulations' drastic departure from the standard conflicts with the statute and would appear to be invalid as a matter of law.

South Carolina[21] and the District of Columbia[22] are among the jurisdictions that have proposed (but not enacted) RUUPA bills, but have flirted with similar limitation provisions that provide no closure for a holder.

'Death Acceleration' Concepts Create Dueling Dormancy Standards

Other than in the context of life insurance proceeds, the death of an owner has historically not played a role in unclaimed property dormancy determinations. RUUPA essentially continued this theme with the exception of IRAs, as noted (that is, an IRA can be escheatable if there is RPO on the account and the holder has confirmed the death of the owner). This concept is somewhat sensible (if imperfect), as the death of an IRA owner can trigger a distribution requirement for IRA beneficiaries under federal tax law. Similar arguments cannot be made for property types such as checking/savings accounts and securities/brokerage accounts, however.

Despite RUUPA's sensible approach, once again Illinois created issues and muddied the waters by pioneering the non-RUUPA concept of providing for different, shorter dormancy periods for property to the extent the owner is dead. This plays out in three separate areas in the Illinois law, as follows:

- Regarding property covered by Illinois's "general" dormancy statute, which applies to bank accounts, retail credits, miscellaneous property, as well as other items, the statute provides that "a deceased owner cannot indicate interest in his or her property."[23] Thus, "if the owner is deceased and the abandonment period for the owner's property specified in this Section 15-201 is greater than 2 years, then the property . . . shall instead be presumed abandoned 2 years from the date of the owner's last indication of interest in the property."

[18] 765 Ill. Comp. Stat. section 610(b).

[19] *Id.* A fraudulent report also results in a tolling of the limitations period.

[20] Utah Admin. Code section R966-1-51(2).

[21] *See* S.C. H.B. 3849 (124th Sess., 2021-2022).

[22] D.C. Bill 22-0654.

[23] 765 Ill. Comp. Stat. section 1026/15-201.

- Regarding the "other tax-deferred" account provision,[24] Illinois provides for an alternative two-year dormancy period triggered by the "earliest of: (1) the date of the distribution or attempted distribution of the property; (2) the date of the required distribution as stated in the plan or trust agreement governing the plan; or (3) the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty."[25] Note that Maine has adopted a similar two-year alternative dormancy standard.[26]
- Regarding securities, including brokerage accounts, Illinois has introduced an unwieldly provision that includes three separate dormancy standards, each with its own dormancy period. A security is escheatable if any of the following occurs: (1) RPO, after three years; (2) customer inactivity, after five years; or (3) owner death, after two years.[27]

The latest entry into the death-acceleration derby comes from Vermont, which made its RUUPA law effective on January 1, 2021. Section 1473 of that law, titled "When Abandonment Period is Accelerated," provides that a "deceased owner cannot indicate interest in his or her property," similar to Illinois's provision. Thus, "if the holder has reason to believe that the owner's deceased, and the abandonment period for the owner's property in sections 1461 through 1469 of this title is greater than two years, the property shall instead be presumed abandoned two years from the date of the owner's last indication of interest in the property."

This is substantially broader than the Illinois provision, however, as it includes not only the general property types, but also property types such as minor accounts, tax-deferred accounts, stored-value cards, and safe deposit box property. Vermont's death acceleration provision also enacts the aforementioned standard for deceased-owner IRAs, which conflicts with the standard RUUPA IRA provision in section 1462 of Vermont's law. Yet, the ULC considers Vermont as having adopted a version of RUUPA, unlike Illinois.

In sum, as evidenced by this relatively small sample of state deviations from RUUPA, holders and advocates must carefully monitor legislation that is advertised as "uniform" to ensure that all unique settings are taken into account. This article only scratches the surface, as state RUUPA enactments (and pending bills) feature numerous other examples of deviations. Holders should also consider involving themselves in the legislative process and perhaps lobby or advocate for different results when problematic nonuniform changes are introduced. ■

[24] *Id.* section 1026/15-203(a) (providing for a three-year dormancy period triggered after the earlier of the date distribution must begin to avoid a tax penalty or 30 years after the account-open date).

[25] *Id.* section 1026/15-203(b).

[26] Me. Rev. Stat. title 33, section 2063(2).

[27] 765 Ill. Comp. Stat. section 15-208.