Unclaimed Property ADVISORY ▪

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Illinois General Assembly Stealthily Enacts Version of Revised Uniform Unclaimed Property Act

In an unexpected development, Illinois has adopted a modified version of the 2016 Revised Uniform Unclaimed Property Act (RUUPA) as part of the General Assembly's effort to enact a state budget. The Illinois Act was added to an omnibus budget bill (SB 9) by amendment on July 2. Both houses of the General Assembly overrode Governor Bruce Rauner's veto of SB 9 on July 7, upon which the bill became enacted into law. A RUUPA bill (HB 2603) had previously been introduced and considered in the legislature but had been stagnant since March. It appeared that Illinois would not adopt a version of RUUPA, at least this session, but that has quickly changed.

Illinois is the third state (joining Tennessee and Utah) to adopt some version of RUUPA, which was finalized by the Uniform Law Commission in July 2016. Delaware's new Escheats Law incorporated some elements from RUUPA as well. Although some aspects of RUUPA as adopted by Illinois are favorable and represent an improvement over the state's current unclaimed property law (which is not based on either the 1981 or 1995 Uniform Unclaimed Property Act), in many respects Illinois' law will become more unfavorable for holders when the provisions take effect on January 1, 2018.

Elimination of the Business-to-Business Exemption

Perhaps most significantly, the new law eliminates the business-to-business (B2B) exemption that currently exists in the Illinois statutes, which will have a substantial, negative impact on holders. Under current law, the B2B exemption applies broadly to "any property due or owed by a business association to or for the benefit of another business association resulting from a transaction occurring in the normal and ordinary course of business." The new law contains no such exemption.

This is an unfortunate development for holders, and it highlights one of the most significant flaws of RUUPA, which is the lack of optional B2B exemption language (though the official comments suggest a way for a state to incorporate B2B language to the extent it "wants to continue to exempt this type of property"). From a practical perspective, holders will now need to closely monitor all credit balances and other amounts owed to vendors, even vendors with which the holder is in an active relationship, and consider these amounts to be potentially escheatable.

From a policy perspective, this represents a significant step backward for Illinois. State unclaimed property laws were not intended to safeguard the property of businesses; rather, such laws were intended to be consumer protection laws and so should not regulate affairs between businesses. These laws are also neither needed nor helpful in the business context because businesses are typically much better able than consumers (as well as states, for that matter) to track and claim any outstanding amounts owed to them. If a business does not claim an amount that appears to be owed to it based on the records of another business, it is often because the apparent "debt" is not actually owed. So by reversing course and now choosing to claim these amounts as unclaimed property, Illinois is increasing burdens on business activity and commerce while likely doing little to protect the rights of the owners of the property.

Finally, even more concerning is that SB 9 purports to apply the new law retroactively to existing property. In particular, the bill states that any report 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 5-year period preceding the effective date of this Act as if this Act had been in effect during that period." This language would appear to require the escheat of B2B property that arose prior to January 1, 2018, even though such property is currently exempt. The retroactive effect raises significant constitutional concerns, including due process, Contract Clause, and Takings Clause issues.

Elimination of the Statute of Limitations

The new law also eliminates the existing statute of limitations that barred the state from making assessments against a holder more than five years after filing a report (or nine years following the applicable dormancy period). In its place, the new law creates an artificial statute of limitations that applies only to property specifically identified by the holder in the report. If property was specifically identified in a report, there is generally no need for a statute of limitations. Thus, this new provision essentially provides no protection to a holder and gives the state unlimited authority to audit and assess property that has not been reported, even many years after the year in question. It also deviates from the standard RUUPA provision, which includes a five-year statute of limitations after the holder filed a non-fraudulent report or otherwise a 10-year statute of limitations after the duty arose. As explained in the official comment to RUUPA, "[t]his 10 year limitations period provides a holder with a clear cut-off date on which it can rely." However, there will be no such reliance available to holders in Illinois.

Addition of a Contractual Anti-Limitations Provision

The new law also adds a new anti-limitations provision that provides that the expiration of a period of limitation on an owner's right to claim property does not apply to the state, even if the expiration provision is valid against the owner. This substantially enlarges the rights of the state of Illinois compared with the rights of owners of property.

Practically speaking, what this provision means is that, even if a holder and owner agree in a contract that the owner is precluded from recovering amounts owed by the holder after a certain period of time, the state is nonetheless able to claim these amounts as unclaimed property. The anti-limitations provision makes no distinction between contractual terms that are dictated by legitimate business concerns versus those that are designed to circumvent unclaimed property laws. Although the latter types of terms are likely what anti-limitations provisions were originally intended to override, states have interpreted them broadly to apply to all contractual terms.

Tax-Deferred Retirement Accounts and Securities

Under current law, Illinois applies an inactivity dormancy standard to securities, requiring escheat five years after the last indication of interest. Securities are considered escheatable even if no mail has been returned to the owner as undeliverable (RPO). The new law will adopt a hybrid standard incorporating both an RPO and an inactivity standard. In particular, a security is presumed abandoned *at the earliest of* three years after the first RPO or five years after the owner's last indication of interest in the security (i.e., inactivity). The new law is actually less favorable to securities owners than existing law, because if there is an RPO, that will actually accelerate the reporting of the securities. The new law is also much less favorable than RUUPA, which—consistent with federal securities laws—does not permit securities to be escheated unless there has been an RPO. The Illinois Act also adds a provision requiring a holder that receives notification that the owner of a security has died to attempt to confirm whether the owner is in fact deceased. If death is confirmed, the security is presumed abandoned two years after the date of the owner's death.

Current Illinois law provides that IRAs are not presumed abandoned earlier than five years after the owner attains the age at which distributions from the account become mandatory under law (i.e., April 1 following the year the owner turns 70 ½). The new law follows RUUPA's treatment of tax-deferred retirement accounts with minor variations. Retirement accounts are presumed abandoned three years *after the later of* the date of an RPO (in contrast with a second RPO under RUUPA) or the date of mandatory distribution, which is either the date the owner reaches 70 ½ or one year after the owner's death, if death causes mandatory distributions.

For both securities and tax-deferred retirement accounts, holders are required to monitor accounts for inactivity to the extent the owner is signed up for e-delivery or otherwise does not receive any communications by first-class mail, consistent with RUUPA. After three years of inactivity, the holder is required to send the owner an email to confirm his/her interest in the property. If the owner does not respond or the email bounces back, the holder then must send a first-class mailing.

Gift Cards, Merchandise Credits, and Stored Value Cards

Current Illinois unclaimed property law exempts gift certificates and gift cards without expiration dates and post-sale fees or charges but has no specific provision for merchandise credits or general stored-value cards. The treatment of gift certificates and gift cards under the new law will generally be the same as the current law; under the new law, "stored-value cards" that satisfy the definition of "gift card" are exempt. For this purpose, a gift card is a "stored-value card: (i) issued on a prepaid basis in a specified amount; (ii) the value of which does not expire; (iii) that is not subject to a dormancy, inactivity, or service fee; (iv) that may be decreased in value only by redemption for merchandise, goods, or service upon presentation at a single merchant or an affiliated group of merchants; (v) that, unless required by law, may not be redeemed for or converted into money or otherwise monetized by the issuer." This definition would appear to include any closed-loop stored-value or prepaid card product that does not expire or impose fees rather than just traditional gift cards or gift certificates.

However, a stored-value card that does not satisfy this definition of gift card is expressly escheatable. Presumably, this will include any open-loop stored-value card even if it does not expire or impose fees. This represents a change in the law for such open-loop instruments, as they were likely covered by the prior exemption for gift certificates and gift cards to the extent they did not expire/impose fees. This change also raises significant constitutional concerns given the retroactivity language. The Third Circuit has expressly held that a since-repealed provision in New Jersey's unclaimed property law that requires the escheat of stored-value cards issued prior to the effective date of the legislation was likely unconstitutional under the Contract Clause. *See N.J. Retail Merchants Association v. Sidamon-Eristoff*, 669 F.3d 374 (3rd Cir. 2012). Moreover, the new law requires holders to honor stored-value cards indefinitely upon escheatment and to seek reimbursement from the state following redemption.

The new law also specifies that an in-store credit for returned merchandise is not escheatable as "money or a credit owed to a customer as a result of a retail business transaction." Although there is a carve out for a stored-value card, presumably an in-store credit for returned merchandise that is loaded to a stored-value card *and* that satisfies the definition of gift card would be exempt. This is also similar to the treatment of in-store merchandise credits under current law.

Other Variations from Current Illinois Law

Under the new law, the dormancy period for most property is reduced from five to three years, which is consistent with RUUPA. The new law also makes holder appeals from an unclaimed property assessment subject to Illinois' Administrative Procedure Act.

Other Variations from RUUPA

The new law departs from RUUPA in a few other notable aspects (most of which, again, are unfavorable to holders), including:

- Specifying that recurring automated clearinghouse (ACH) debits or credits are not indications of owner interest.
- Providing a list of conditions under which an owner can show interest in one account with a holder and have that interest attributed to all accounts with that holder (e.g., the mailing address on the accounts must be the same).
- Escheating U.S. savings bonds.
- Preventing holders from aggregating items over $5 on a holder report.
- Denying owners interest that accrued while the state possessed the property.
- Not expressly exempting property in a 529 plan from escheat.

Given that this new law was enacted quickly and quietly, without any meaningful opportunity for public input, the unclaimed property community is likely still processing all of the changes and nuances of the law. It is clear that, although Illinois has achieved relative uniformity (at least going forward under the assumption that additional states will adopt RUUPA), certain favorable aspects of the current law have been sacrificed.

In addition, a thorough analysis of the single-subject clause of Illinois' constitution—"Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject. Appropriation bills shall be limited to the subject of appropriations."—surely must be considered in determining the legality of Illinois' new law, which was enacted as part of a 500-plus page budget bill. Assuming the law is constitutional, holders will need to give serious consideration to whether and the extent to which property that was previously exempt (e.g., B2B property) must now be reported and remitted.

Finally, it is worth noting that at least one repeal bill has already been introduced in the Illinois General Assembly (HB 4078, which would repeal the RUUPA sections upon SB 9's becoming law). It appears that Illinois' unclaimed property law may be in flux for at least the foreseeable future.

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