Illinois Revised Uniform Unclaimed Property Act

Highlights from S.B. 9
November, 2017
Illinois’ Old UP Act was an Antiquated Mess

- IL adopted a version of the 1954 Act in 1961
  - Did not adopt 1966, 1981, or 1995 revisions to uniform act
- Instead, the IL Act has been subjected to a series of non-uniform amendments.
  - “Gift certificate” exemption with no defined terms for “gift certificate” or “gift card” or “merchandise credit”
  - IRA provision that doesn’t address deceased owners
  - Inconsistent statute of repose / limitation language
  - ETC, ETC, ETC
- Sometimes the IL Act was unclear or used archaic language
2016 ULC Uniform Act (RUUPA)

- Opportunity to have a modern Unclaimed Property Act in Illinois
- Treasurer Frerichs has been a national leader in calling for an updated Unclaimed Property Act
- Easier to tackle problems in current law as part of a larger rewrite using the RUUPA and ULC process
HB 2603

- IL-RUUPA introduced as HB 2603 by Representative Mike Zalewski
- HB 2603 was a “domesticated” version of ULC RUUPA that incorporated or cross-referenced existing Illinois law
- HB 2603 did not advance, but was the subject of numerous in-person and telephone meetings with representatives from business groups
- Both technical concerns and policy disagreements raised
Senate Bill 9

• Rep. Zalewski is Chairman of the House Revenue Committee and helped draft the final budget package that included IL-RUUPA in SB 9

• IL-RUUPA in SB 9 is different from HB2603: it made changes in response to the meetings with business groups throughout the legislative session
Public Act 100-0022

• SB 9 was enacted over the Governor’s veto in July as part of the overall budget package
• SB 9 became Public Act 100-0022
• Article 15 of SB 9 is the IL-RUUPA
• IL-RUUPA has an effective date of January 1, 2018 (don’t get confused by “Articles” within SB 9 with “Articles” within IL-RUUPA)
• The new Act is codified at 765 ILCS 1026 (right next to the old Act at 765 ILCS 1025)
• Use the General Assembly’s website to see the new Act in context:
Topics

- Definitions
- Presumptions of Abandonment
- Owner Interest & Priority Rules
- Report by Holder
- Notice to Owner by Holders and by Treasurer
- Custody and Sale of Property by Treasurer
- Claims
- Examinations & VDAs
- Holder and Treasurer Remedies
- Finders
- Transition and Lookback
- Trailer Bill
- Administrative Rules
Definitions

• Affiliated group of merchants
  o Term from Federal Reserve’s “Reg E” to help distinguish “stored value cards” from “gift cards”
  o Trailer bill removes from RUUPA

• Domicile
  o As old Act was based on 1954 uniform act, it did not have definitions that account for LLCs, LLPs, and other modern business organizations

• Electronic mail
  o Define email in order to allow / require some types of owner contact

• Gift card / Stored value card
  o Old Act did not have definitions; use “Reg E” for SVC definition and a hybrid for “gift card” definition; trailer bill further amends

• Payroll card
  o Tied to payroll card account as defined in Federal Reserve’s “Reg E”

• Security
  o Tie definition to the Illinois UCC (instead of stand alone definition)
More Definitions

• Game-related digital content
  ○ Allows exclusion of certain types of in-game credits than cannot be monetized

• Loyalty card (excluded)
  ○ Allows exclusion of loyalty card programs than cannot be monetized by the owner/user

• Non-freely transferable security
  ○ Defined to allow holder to report without remitting

• Virtual currency
  ○ Defines virtual currency (e.g. Bitcoin, etc.) to ensure coverage as transactions in VC increase

• Worthless security
  ○ Defined to allow holder to report without remitting
Presumptions of Abandonment

• Generally shortened from 5 years to 3 years
• New tests for special types of property intended to better match needs / marketplace
  o Tax deferred accounts
  o UTMA/UGMA accounts
  o Stored value cards, gift cards, and merchandise credits (also payroll cards)
  o New “hybrid” standard for securities
  o Life insurance rules to match other IL law
  o Prepaid funeral trust funds
  o Deceased owner rule
Tax-deferred retirement accounts

- Old Act said:
  - “Property of any kind held in an individual retirement account (IRA) is not presumed abandoned earlier than 5 years after the owner attains the age at which distributions from the account become mandatory under law.”
  - No mention of death. No mention of other non-IRA retirement accounts.

- Sec. 15-202 of IL-RUUPA specifically addresses tax-deferred retirement accounts
  - Based on new ULC language, but with minor tweaks
  - Notice the “after the later of” language – so, the new standard is the later of RPO or IRS mandatory distribution
  - Generally prevents abandonment until after account needs to make distribution under IRS rules and then subsequent RPO
  - IL-RUUPA differs from ULC draft:
    - One RPO (instead of second consecutive mailing)
    - One year after death (to match IRS rules)
    - Mailing “on at least an annual basis” in the email provision
Other tax-deferred accounts

• No mention of non-IRA tax-deferred accounts under the old Act.

• Sec. 15-203 of IL-RUUPA specifically addresses other tax-deferred accounts
  - Based on new ULC language, but with minor tweaks
  - Generally, earlier of 3 years after distribution required to avoid tax penalty or 30 years from opening of account
  - Adds provision to ULC language to deal with deceased owners to shorten period to 2 years
  - Provides coverage for 529 College Savings accounts, Coverdell accounts, Health Savings Accounts, etc.
  - 529A ABLE accounts are included
UTMA/UGMA accounts

• No mention of UTMA/UGMA accounts in old Act
• Sec. 15-204 of IL-RUUPA specifically addresses UTMA/UGMA accounts
  o Based on new ULC language, but with minor tweaks
  o Worked with representatives of Illinois financial organizations to craft language that fit other Illinois laws
  o Generally, UTMA/UGMA accounts are reportable 3 years after they must be transferred to minor / minor’s estate (although there is also an RPO standard)
  o Provision for accounts with email contact
  o Section 15-204 no longer applies after money is transferred to minor or minor’s estate

• Provision to treat accounts opened under Illinois Probate Act for minors in a similar fashion to UTMA/UGMA (carried over from old Act)
SVCs, gift cards, etc.

• Old Act had somewhat confusing exemption for gift certificates without a definition in the UP Act (§10.6)
• IL-RUUPA has definitions for stored value card and gift cards – using a combination of Reg E definitions and language negotiated with business groups
• Gift cards remain exempt under IL-RUUPA
  o Exempted as they are not “property” under IL-RUUPA
  o Must meet all the elements of gift card definition to qualify for exemption
• Stored Value Cards are covered under IL-RUUPA
  o 5 year period of abandonment to match the Reg E provisions
  o Requirement to honor SVCs presented after reporting
    • Holder reimbursement
    • Required to comply with CFPB opinion (CFPB-2012-0036) preemption determination concerning Maine and Tennessee
Payroll Cards

• Old Act required one-year period for “unclaimed wages, payroll, or salary”
  o Regardless of medium (i.e. check, payroll card, etc.)
  o Provision added in 2011 with unanimous support from General Assembly (Public Act 97-0270)

• IL-RUUPA maintains this one-year standard for wages regardless of medium

• Discussion about whether to treat payroll cards as wages (one-year) or bank account (three years) was one of the most contentious issues at the ULC meeting where RUUPA was adopted

• 41 states have a one-year period for wages

• Expect more “discussions” in the Spring session
Merchandise Credits

• Old Act did not discuss merchandise credits (although the consumer fraud act does)
• IL-RUUPA exempts retail merchandise credits
• “money or a credit owed to a customer as a result of a retail business transaction, other than in-store credit for returned merchandise…”
• The ULC version allows states to choose whether to exempt either gift cards or merchandise credits, exempt neither, or exempt both
Securities

- Old Act used pure 5-year owner interest standard
- Sec. 15-208 of IL-RUUPA uses a hybrid returned post office (RPO) and owner interest standard
- Earlier of 3 years after returned mail or 5 years of owner inactivity
- Special rules:
  - 3 years of owner activity if the account does not receive US mail at least once per year (i.e. an email only account)
  - 2 years after death of account owner (with language to mesh with the standard used for retirement accounts)
Life Insurance

- IL-RUUPA uses a combination of the ULC provisions and standards from Illinois’ Unclaimed Life Insurance Benefits Act (ULIBA)
- Death of insured is the trigger for 3 year period of abandonment (or 2 years after limiting age)
- Old trigger has been litigated in other states
  - West Virginia Supreme Court interpreted similar language in WV Act as having death as actual trigger (State ex rel. Perdue v. Nationwide Life Insurance Co., 777 S.E.2d 11 (W. Va. 2015))
  - Florida Appellate Court held otherwise (Thrvient Financial for Lutherans v. Department of Financial Services, 145 So. 3d 178 (Dist. Ct. App. 2014)) Instead of appealing the CFO had the legislature amend Florida’s Unclaimed Property Act
Pre-Need Funeral Trusts

• Old Act did not specify a rule for amounts held in a pre-need funeral trust
• Section 4 of Illinois Funeral or Burial Funds Act provides rules for when funds should be withdrawn – refunds and when services not provided (225 ILCS 45/4)
• IL-RUUPA meshes with IL Funeral or Burial Funds Act to provide that funeral trust funds only become unclaimed property upon the earliest of:
  o Two years after death;
  o Three years after owner would be 105; or
  o [40] years after execution of contract
Deceased Owner Rule

• End of Section 15-201 provides that a deceased owner cannot show interest in their property and that (except for life insurance) the period of abandonment is generally shortened to 2 years.

• BUT, Section 15-1204(c) of IL-RUUPA prohibits the Treasurer from charging interest or penalties if the failure to report was due to a lack of knowledge of the death that established the period of abandonment.
  
  o this applies to both life insurance and other property types where death is a potential trigger.
  
  o this prevents penalties, but if holder knows of death, then property is abandoned more quickly so that Treasurer can work on tracking down heirs / owners if they do not respond to holder.
Owner Interest

- Rules are more clear about what counts as owner interest that stops presumption of abandonment
- Clearly includes logging in to owner’s account
- Purely automatic transfers still do NOT count as owner interest (e.g. DRIPs and recurring ACH)
- IL-RUUPA specific rule for related accounts at a financial organization where the accounts all have the same mailing address for the apparent owner
No B2B Loophole

• Old Act’s business to business loophole did NOT apply to all businesses
  o Only applied to businesses that reported under Section 2a
  o Did NOT apply to financial organizations, life insurance, utilities, etc.

• Illinois was one of only 4 states with a broad B2B

• ULC rejected B2B proposals for RUUPA

• A B2B loophole never allowed a holder to “convert” unclaimed property belonging to another business

• IL-RUUPA allows evidence of “course of dealing”

• If there is an ongoing business relationship, then keep record of “owner interest” in property
Priority Rules

• Incorporates federal common law that established which state has priority to claim unclaimed property
  o Primary rule – address of owner in records of holder
  o Secondary rule – state of incorporation (domicile)

• Third-priority rule (state of transaction)
  o Excluded if either the primary rule or secondary rule states exclude property from being reported

• Clear rule for multiple addresses in holder records

• Treasurer has initial burden of proof in a dispute over the right to custody of unclaimed property
Report by Holder

- Online reporting required (unless given permission for paper filing) using NAUPA standard format
- Clear authority for holders to contract for reporting
- Maintains current $5 threshold for reporting address
- Maintains reporting schedule (May 1 or November 1 based on type of business)
- 10 year retention of records by holder after filing report (or date report was due)
Notice to Owner by Holder

• Raises threshold for due diligence letters to $50 (from the current $10)
• Due diligence by email is required in addition to first class mail if owner consented to email
• Securities valued at more than $1,000 require due diligence mailing by certified mail
Notice to Owner by Treasurer

• First class mail for property valued at $100 or more
• Email for some securities and when there is no valid postal address
• Newspaper publication every 6 months advertising unclaimed property program
More Notice to Owner by Treasurer

• Searchable unclaimed property website
• IDOR data matching and payment of properties valued at less than $2,000
• Specific authorization for intergovernmental cooperation to update addresses and provide additional notices
Custody of Property

• Special rules for safe deposit boxes that require remittance after a mutually agreed upon date
• Allows safe deposit box holders to be reimbursed for unpaid rent charges and fees after property is sold
• Statutory authority for holder reimbursement (i.e. when holder pays apparent owner directly)
Sale of Property

• Treasurer must hold tangible property for at least 3 years before sale (current practice of 5 years)
• Treasurer must generally hold securities for at least 3 years before sale (up from current 1 year)
• Clarifies what an owner receives when claiming securities (or proceeds of sale)
Claims

• Updated claims language
• Statutory authorization to fast track up to $500 with the ability to change the maximum value by administrative rule
• Statutory deadline for acting on claim that matches the current administrative rule – 90 days “after a claim is complete”
• Authorizes sale of property at request of owner
• Denied claims may be challenged via formal administrative review process
FY 2017 Claims

- Paid over 58,000 claims to individuals, businesses, governments, and non-profits.
- Returned over $1.7 million worth of securities
- Returned a record over $159 million in cash and securities (up from $155 million in FY 2016)
Fast Track

• Online claiming
• Must meet criteria (see 765 ILCS 1026/15-903)
  o Sole owner claims (i.e. not joint property, an heir claim, or other complex claims)
  o The claimant is the owner
  o <$500 per property

• Treasurer uses LexID from Lexis to provide statistical assurance that this is the proper owner (name, address, Social Security Number)
“E-Claiming”

• New online portal, fully automated
• Allows electronic submission of documents except those which require a “wet” signature
  o Address proof
  o Name change
  o Authority to act
  o Subsidiary information
  o Certified copy of a will (without and embossed seal)
• Uploaded documents attach directly to the claim
• Reduces document submission time
Complex Claims

- **Heir claims**
  - Usually requires providing copies of the will, trust documents, final order from a probate case, or similar testamentary documents
  - Otherwise, the Illinois Probate Code will be followed for intestate succession for an Illinois decedent
  - Frequent use of Illinois Small Estate Affidavit

- **Mergers & Acquisitions**
  - Someone claiming property reported as belonging to a different business (whether or not dissolved) must show the chain of ownership of the property
  - Sometimes requires copies of purchase agreements, bankruptcy orders, or even affidavits from the former owner

- **Assets of dissolved pension plans**
  - Need records showing final distribution or percentage owned by the claimant
Anti-Limitations Provision

• The anti-limitations language adds “contract” to the anti-limitations provision in Section 15-610(a)
• This is a continuation of existing Illinois law
• Under the common law in Illinois contracts could not serve as a limitation on the ability of the state to take custody of unclaimed property
Statute of Limitations / Repose

• Eliminates the dual (and potentially confusing) limitations in existing Act and uses the language from the 1995 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. In the absence of such a report or other express notice, the period of limitation is tolled. The period of limitation is also tolled by the filing of a report that is fraudulent.”

• Of the states that have a statute of limitations, the 1995 Act’s language is the most common
Initiating Examinations

• Uses language from the 1995 Uniform Act:

The Treasurer, “at reasonable times and on reasonable notice, may:
(1) examine the records of any person to determine whether the person has
complied with this Act even if the person believes it is not in possession of any
property that must be reported, paid, or delivered under this Act; (2) issue an
administrative subpoena requiring the person or agent of the person to
make records available for examination; and (3) bring an action seeking
judicial enforcement of the subpoena.”

• Eliminates the 1956 Act’s “reason to believe”
standard (eliminated in the 1981 Uniform Act)

• Treasurer has administrative subpoena power and
may seek judicial enforcement

Comment
This section is designed to facilitate compliance with the Act. Subsection (a) provides for
the filing of a negative report if the administrator requires such a report and will minimize
disruption which would otherwise be caused to the holder if an examination of records instead
were conducted by the administrator. Subsection (b) is based on Section 30 of the 1981 Act.
Aside from the requirement that the administrator conduct the examination at reasonable
times and upon reasonable notice, the principal limitations on the administrator’s right to
examine are constitutional limitations. Even though the Fourth Amendment does not extend as broadly to

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times and upon reasonable notice, the principal limitations on the administrator’s right to
examine are constitutional limitations. See generally Tannenbaum v. Cook, 2016 WI
Examinations

• Requires Treasurer to promulgate rules concerning unclaimed property examinations
• Treasurer statutorily authorized to hire auditors using contingent fee contracts with a 15% maximum
• Special provisions for state (IDFPR) regulated financial institutions
  o Generally financial organizations that are chartered and audited regularly by IDFPR will have unclaimed property compliance included in their IDFPR audits
  o The Treasurer will not conduct unclaimed property exams of these entities unless IDFPR waives the provision or has not examined the entity within the last 5 years.
Statutory Burden Shifting

• A record of a putative holder showing an unpaid debt or undischarged obligation is *prima facie* evidence of the debt or obligation

• The putative holder may overcome by the *prima facie* evidence by a preponderance of the evidence

• Statutory examples are listed in IL-RUUPA
  o Including: “voided not later than 90 days after issuance for a valid business reason set forth in a contemporaneous record
  o n.b. that a policy of automatically voiding checks is a private escheat under [Marshall Field](https://example.com) and not a “valid business reason”
  o Course of dealing evidence may also be used
Estimation

- Authorizes estimation as a penalty for failure to maintain records as required by the Act
  - See the official comments to the 1995 Act and the 2016 RUUPA
  - Penalty because holder cannot remit the same property twice
- Old Act used estimation when a holder failed to maintain records *(765 ILCS 1025/11.5)*
- Estimation must be done in conformity with the rules for examinations promulgated by the Treasurer
- HOWEVER, if a holder maintains records then:
  - Estimation may NOT be used unless consented to in writing by the person being examined
  - The examination must include a review of the person’s records
Confidentiality

• Statutory protection for the confidentiality of records related to examinations
• Exempt from FOIA (under both IL-RUUPA and FOIA)
• Subject to IL Personal Information Protection Act
• Limits the use of confidential information by the Treasurer and Auditors
• A person being examined may require a confidentiality agreement (i.e. NDA) with the Treasurer and the Auditor “in a form that is reasonably satisfactory to the” Treasurer:
  o Statutory right to an NDA
  o But, cannot use NDA to halt an examination
Yet More on Examinations

• Allows holder to request informal conference with the Treasurer’s staff during examination
  o if the holder believes the Auditor has made an unreasonable or unauthorized request
  o or is not proceeding expeditiously to complete the examination

• Requires a detailed written report at end of examination to holder

• Treasurer (not Auditor) issues determination of liability to holder at conclusion of examination
Resolution / Settlement of Exam

• The Treasurer has the inherent authority to resolve examinations by settlement

• Audit Resolution Agreements (aka Global Resolution Agreements) can provide either a:
  o written roadmap for handling an examination; or,
  o settlement in lieu of litigation to resolve disputed points of law

• Excess claims provision
  o If a settlement agreement provides that the IL Treasurer accept a lesser amount than what the examination has identified as unclaimed property, then expect that a backstop / excess claims provision will be included
  o Treasurer returns property at 100% rate; if all cash is used up in claims, then the holder reimburses Treasurer for “excess claims”
VDAs

• Voluntary Disclosure Agreements (VDAs) are not mentioned in either the old Act or in IL-RUUPA
• Possible under IL-RUUPA because of the Treasurer’s authority to waive interest and penalties
• Expect that current practice will continue:
  o VDA not allowed after notice of examination
  o Completed VDA does not prevent future examinations of covered time period
Holder Remedies

• Holder may request informal conference with Treasurer’s staff after the conclusion of the examination

• Holder may contest determination of liability via formal administrative hearing
  o the old Act was exempted from the IL Administrative Procedure Act
  o preponderance of the evidence standard

• The outcome of the administrative hearing may be appealed to the courts
Treasurer Remedies

• Treasurer may seek judicial enforcement
• Holders required to pay statutory interest on unreported property (1% per month)
• May impose civil penalties ($200/day to $5,000 max)
• Other penalties for fraudulent reporting
• Treasurer authorized to waive interest and penalties
• Interest / penalties waived if failure to report was due to lack of knowledge of the death that established the period of abandonment

Section 15-1204. Interest and penalty for failure to act in timely manner.
(a) A holder that fails to report, pay, or deliver property within the time prescribed by this Act shall pay to the administrator interest at a rate of 1% per month on the property or value of the property from the date the property should have been reported, paid, or delivered to the administrator until the date reported, paid, or delivered.
(b) Except as otherwise provided in Section 15-1 or 15-1206, the administrator may require a holder that fails to report, pay, or deliver property within the time prescribed by this Act to pay to the administrator, in addition to interest included under subsection (a), a civil penalty of $200 for each day the duty is not performed, up to a cumulative maximum amount of $5,000.
Finders

• Prevents contracts with finders from the time property is presumed abandoned until 24 months after delivery of property to the Treasurer

• Caps fees at 10% of amount collected (and prohibits unconscionable fees)

• Maintains requirement that contingent fee finders be licensed as private detectives in Illinois

• Exemption for attorneys under agreement to pursue claim for specifically identified property or to contest a denial of a claim
Transition and Lookback

- Five year look back period
- Interpretation is that this requires reporting anything that would have been reportable in the last five years (even if exempt under the old Act)
- So, you look back five years plus the period of abandonment – typically $5 + 3 = 8$ years
Trailer Bill in Veto Session

• House Floor Amendment #2 to SB 868 sponsored by Rep. Zalewski and Sen. Hutchinson
• Revised definitions for “gift card” and “stored-value card” from negotiations with IRMA, IBA, ICUL, CBA, credit cards, etc.
• Provision for Treasurer to pay interest on claims for interest-bearing property per Kolton litigation
• Clarified reporting remains on current schedule
• Removes prohibition on escheat fees
• Other technical items
• Passed unanimously
• Awaits Governor’s action
Rulemaking

• Required to draft administrative rules for IL-RUUPA
• Can currently receive informal suggestions, comments, and concerns from interested parties
• After First Notice comments are subject to ex parte communication reporting
• Expect that Treasurer’s office will hold a public hearing to formally receive feedback on the draft administrative rules during First Notice period