

Unclaimed Property

Illinois Unclaimed Property Law Ripe for Future Fight

Illinois's new law modernizing its unclaimed property statute deviates from principles recommended by a national uniformity commission, raising speculation that the new regime is headed for a legal challenge.

But Illinois Treasurer Michael Frerichs characterized the new law as a much-needed update that will help businesses and individuals better understand their unclaimed property rights and duties in the face of technical innovation and changing business practices. Frerichs said his office would commence writing administrative rules under the statute shortly.

"There is still a lot of work to be done. We are not taking any victory laps right now. Our main objective is to modernize and streamline this process," Frerichs told Bloomberg BNA July 13. "It's not sexy, and it's not a money grab like some in the business groups are saying."

Tax and securities practitioners told Bloomberg BNA they are just now coming to grips with a surprise decision by Illinois lawmakers to revise the state's unclaimed property statute for the first time in decades. The law describes the duties of persons and businesses that hold property owned by other persons or businesses, and circumstances where unclaimed property can be transferred to the state—a legal doctrine known as escheat.

The new language is found in S.B. 9 (Public Act 100-22), an omnibus revenue bill passed by the General Assembly July 6.

Revised Uniform Act Freda Pepper, an attorney with Reed Smith LLP in Philadelphia, said the Illinois law reflects many features of the Revised Uniform Unclaimed Property Act (RUUPA), crafted by the Uniform Law Commission (ULC) in 2016 after three years of deliberation.

RUUPA represents an update to a previous model law, capturing new forms of property and new technologies. Specifically, RUUPA clarifies certain types of intangible property are covered by the act, including stored-value cards, payroll cards, virtual currency, and health savings accounts. The RUUPA also establishes dormancy periods, expands remedies for holders of unclaimed property, and creates clear rules for the protection of confidential information.

Illinois is the fourth state to enact a law modeled after RUUPA this year. The ULC said Delaware, Tennes-

see, and Utah have all passed laws based on RUUPA. Maine, Minnesota and Nebraska are also considering RUUPA-style bills.

Pepper, whose practice focuses on unclaimed property audit defense, said Illinois had "taken a positive step" modernizing its unclaimed property law. But she said S.B. 9 also deviates from RUUPA and will frustrate many in the holder community.

She said the new law eliminates the business-to-business exemption, leaving previously exempted commercial transactions subject to escheat and escheat reporting. In this regard, credits, overpayments, uncashed checks, rebates, and other property due to any business are deemed reportable after becoming payable.

"The business to business exemption is premised on the notion that businesses, unlike individuals, do not need the protections afforded by the unclaimed property laws as businesses are better suited to ensure their property interests," Pepper said. "The exemption allows businesses to settle their contractual rights between each other. The state has now abandoned this philosophy in favor of raising revenue, evidenced by the inclusion of the new law in the state's budget bill."

Retroactive Reporting In addition, Pepper said the law creates a new "transitional reporting system," in which property that wasn't escheatable prior to the effective date of the law becomes escheatable.

"This provision would make the requirements of the law retroactive and would further require holders, in the 2018 reporting year, to report property that had previously been deemed exempt from escheat," she said. "Essentially, Illinois businesses will be required to report unclaimed property from the last 10 years which was previously deemed exempt from escheat. Records dating back to that period of time will most likely not exist, particularly because there has been no record retention requirement contained in Illinois' unclaimed property law."

Pepper said the new reporting duty imposes a "significant financial burden" on businesses that relied on previous Illinois law.

Legal Challenges? Jennifer Borden, founder of the Boston-based unclaimed property law firm Borden Consulting Group LLC, said this retroactive reporting duty could cause problems for Illinois.

"That's a retroactive application of the statute. That's clearly unconstitutional, and that will have a really, really negative impact on Illinois businesses," said Borden, a member of the government relations committee of the Unclaimed Property Professionals Organization (UPPO). "So businesses incorporated the law exactly

the way it was into their operations for a number of years, and now, all of a sudden, they will be penalized with payments to Illinois. It doesn't make any sense."

Borden predicted a legal challenge in a scenario where Illinois makes an audit demand on a business, asking for property to be reported that was previously exempt. Alternatively, she said a group of holders may petition an Illinois court for a declaratory judgment asserting retroactive application is impermissible under the constitution.

"I don't know of any group planning on doing this, but it could be either reactionary or proactive. But I do feel it will be challenged," she said.

Borden objected to the manner by which Illinois lawmakers enacted the law. The language was added to S.B. 9 very late in the legislative process, and the reform language received no hearing and very little debate.

A coalition of a dozen business groups, calling itself the Unclaimed Property Holders Coalition, wrote a letter of opposition to key legislative leaders on May 31. Members of the coalition—including the UPPO, the Securities Transfer Association, the Council On State Taxation, and the Consumer Credit Industry Association—called on lawmakers to slow the process and consult with the business community.

Last-Minute Process Michael Houghton, co-chair of the ULC committee that drafted RUUPA, declined comment on Illinois' law, but expressed frustration with the state's last-minute legislative process.

"We had some passing awareness that this was happening on an expedited basis," Houghton said. "But like everyone else, this seemed like an expedited political resolution of a lot of fiscal and budgetary issues, and the uniform unclaimed property revision was part of that."

Treasurer Frerichs dismissed complaints from the business community, particularly concerns that his office would use the new statute to shake out additional revenue for the state.

"That was not the purpose of it," Frerichs said. "The money never belongs to the state. We are fiduciaries of this money. So if businesses are complaining 'the state is seeking our money'—no. The money we are taking possession of belongs to other businesses."

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