



## MEMORANDUM

**TO: Drafting Committee to Revise the Uniform Unclaimed Property Act, Uniform Law Commission**

**FROM: Uniform Unclaimed Property Act Revision Committee, National Association of Unclaimed Property Administrators**

**RE: “Business-to-Business” Transactions; Addressing Arguments for Exemption from a Revised Uniform Unclaimed Property Act**

**DATE: May 8, 2014**

**Summary of NAUPA Position:** Substantial sums of unclaimed property arising from transactions between businesses are reported to the states, and the states in turn pay out a substantial percentage of this property in the form of claims of business entities. Exempting “business-to-business” transactions from the coverage of the Uniform Unclaimed Property Act would be inconsistent with the sound public policies underlying the statute, and would deny equal protection of the law to individuals that formed a business entity, who, but for the business purpose, would be entitled to the salutary benefits of the Act.

**Background:** Business-to-business transactions, which are commonly referred to as B2B transactions, were not considered for exemption when the 1995 Uniform Unclaimed Property Act was adopted. Paula Smith,<sup>1</sup> a recognized expert in unclaimed property, notes that the Committee on State Taxation (COST),<sup>2</sup> who ultimately became the driving force in calling for the exemption of B2B transactions from state statutes, did not begin taking an active interest in unclaimed property and the B2B issue until approximately 1998. Smith observed, “[i]n part, this focus was influenced by the drafting of the Uniform Unclaimed Property Act (1995), and by the increase in the states targeting for audit national companies that had never given serious attention to reporting vendor checks, credit balances, or other general ledger liabilities.”<sup>3</sup> The first B2B

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<sup>1</sup> Paula Smith is an attorney who was a consultant for ACS Unclaimed Property Clearinghouse and its predecessor for many years. She has served as the director of the Division of Unclaimed Property in Texas, President of NAUPA, CEO of the Clearinghouse Reporting Service, and as an Observer for the 1995 Uniform Unclaimed Property Act. She was also very active with Unclaimed Property Holders Liaison Council (now UPPO).

<sup>2</sup> On its website, [www.cost.org](http://www.cost.org), COST identifies itself as “the premier state tax organization representing taxpayers. COST is a nonprofit trade association consisting of more than 600 multistate corporations engaged in interstate and international business. COST’s objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.”

<sup>3</sup> Paula Smith, “B2B or Not B2B,” Solutions in Practice, ACS Unclaimed Property Clearinghouse, 2002 Annual, at 2.

exemption was passed in 1998 in Maryland.<sup>4</sup> Wisconsin became the second state to pass a B2B exemption in 1999.<sup>5</sup> Six more states enacted B2B exemptions to their unclaimed property laws in 2000. In 2001, four more states adopted B2B exemptions; however, for the next decade no additional state instituted the exemption. The thirteenth and most recent state to adopt a B2B exemption was Michigan, in 2012.<sup>6</sup> Thus, while for a period of time the enactment of B2B transactions could be viewed as a trend among the states, this has not been the case in more recent years.

What is the impact of the B2B exemption? The exemption allows holders to keep outstanding checks and other obligations that were issued to other businesses during the ordinary course of its business. In other words, when the reported owner is a business, the obligation is exempt from reporting and delivery to the States. Why is this approach advocated? Business trade associations assert that their members look after their own interests and do not need the States looking out for them. In essence, the argument is that consumer protection is for the individual, *not* for a business.

Those lobbying for the B2B exemption argue that businesses employ people to balance their books and to go after money due them. They believe that when a holder's records reflect that they owe other businesses money, it is more likely than not an accounting error.<sup>7</sup> According to COST, it is simple. The B2B exemption for businesses comes down to a cost-benefit analysis, and the bottom line is that it costs them more to reconcile and maintain their records than they stand to recover from the States in unclaimed property. COST writes in its 2013 "Scorecard on State Unclaimed Property Statutes" that "[t]he cost to a business that enters into millions of transactions yearly to trace such items and prove that the items are not abandoned property far exceeds any public benefit from the **remote chance of reclaiming the relatively few business accounts that actually are legitimately owed and unclaimed.**"<sup>8</sup>

However, unless COST and other powerful B2B advocates including the Unclaimed Property Professionals Organization (UPPO) are speaking only on behalf Fortune 1000 businesses, state unclaimed property statistics belie what they are saying. Most businesses can only dream "of millions of transactions yearly" and an accounting and bookkeeping staff to match it. The majority of business entities are small; many are individually-owned and lack sophisticated

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<sup>4</sup> Md. Code Ann., Com. Law § 17-101(m) (LEXIS through 2013 Reg. Sess.).

<sup>5</sup> Wis. Stat. § 177.01(10)(b) (LEXIS through 2013 Act 45).

<sup>6</sup> Mich. Comp. Laws Serv. § 567.257a (emphasis added) (LEXIS through 2013 P.A. 248).

<sup>7</sup> Sometimes, "accounting errors" which appear to arise from transactions between business entities in fact relate to credit balances owed to consumers. An example would be a consumer's payment to a medical provider for services, where the consumer's health insurer also pays the medical provider for the same services. If the medical provider fails to recognize that the duplicate payment is due the consumer, the medical provider would likely instead view the credit balance as an overpayment, or unreconciled payment by the health insurer. Exempting this course of events as a "business-to-business transaction" would likely result in the consumer being unable to recover the erroneous payment.

<sup>8</sup> Douglas L. Lindholm and Ferdinand S. Hogroian, "The Best and Worst of State Unclaimed Property Laws: Scorecard on State Unclaimed Property Statutes," Council on State Taxation, October 2013, at 3 (emphasis added).

account reconciliation capacities. In reality, States return money to businesses of *all* sizes year after year. Albeit some amounts may be small, but not all. As you will see later, State unclaimed property program statistics show that B2B property adds unclaimed property to large amounts coming in and, more importantly, going out in claims paid.

COST's interest in the B2B issue is surprising, given that unclaimed property is not a tax. However, in recent years, holders—or, perhaps more accurately, holder advocates representing holders in compliance matters—have chosen to portray unclaimed property laws as overly burdensome and akin to a tax. Keane Unclaimed Property Consulting and Advisory Services called unclaimed property a “close cousin to taxes” because of its annual reporting requirement and penalties for non-compliance.<sup>9</sup> Unclaimed Property Recovery & Reporting, LLC (UPRR) reiterated this theme in a June 2012 post to a blog on the company's website:

Over the last few years, there have been dozens of stories on how states have seized unclaimed property as a source of non-tax revenue in order to fill the gaps created by declining state revenues. Everyone is familiar that in order to increase unclaimed property revenues, states have expanded the definition of unclaimed property, shortened dormancy periods, used long “reach back” periods in audits, and assessed stiff penalties. Further, states have contracted with third-party auditors who are paid a fee that is contingent upon the amount of unclaimed property they uncover and the penalties assessed. Unclaimed property has become a moving target, and the burden for businesses has increased as unclaimed property is seemingly changing from a consumer protection focus to a business tax.<sup>10</sup>

Not surprisingly, the States have a problem with this characterization because unclaimed property does not belong to holders. It belongs to the lost owners. Unclaimed property laws are consumer protection laws, not revenue-generating laws. This is true even in the States that transfer their unclaimed property receipts to their general fund. Unfortunately, when a state unclaimed property program “aggressively” pursues and demands an esoteric type of property that most other states would exclude, it bolsters the B2B exemption proponents' battle cry that the States are focused on generating revenue rather than protecting the lost owner. This dynamic is addressed further below.

**The Interest of the States in the B2B Issue.** Why do the States want to protect businesses if purportedly businesses do not want their protection? The answer is that businesses, regardless of their size or annual sales, deserve consumer protection just like individuals. It is a matter of equal protection under the law. The majority of businesses that are encouraging a B2B exemption have robust operation with a large number of employees, some of whom are employed to balance the books and to collect money owed to them. What about the companies that have gone out of business and thus there are no employees to keep track of receivables?

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<sup>9</sup> Laura Lane, “Unclaimed Property Compliance: A Tax Department Responsibility?” *The Tax Executive*, August 26, 2011.

<sup>10</sup> “UPRR Congratulates Delaware, Michigan and North Carolina as Each Considers Pro-Business Proposals” Posted by Karen Anderson on UPRR's blog at [www.uprr-inc.com](http://www.uprr-inc.com).

What about companies who declare bankruptcy? What about the small businesses like sole proprietors, family-owned operations, and community-based nonprofits? These entities may not have enough staff to keep track of all of their accounts receivable. Their “accounting errors” may not be errors and they may in fact (and often do) lose track of money. Unfortunately, trade groups advocating B2B exemptions have not recognized the realities of small business.<sup>11</sup>

Furthermore, while a state legislature may elect to exempt B2B transactions from the unclaimed property law, the underlying liability may still be reportable to the holder’s state of incorporation under the secondary rule of unclaimed property adopted by the U.S. Supreme Court in Texas v. New Jersey.<sup>12</sup> Accordingly, if the property is subject to claim by *some* State, it should optimally be reported to the state which has the best chance of returning it to the reported owner. That state is the State of the owner’s last known address, as opposed to the State where the holder, which may transact business in every state, elected to be incorporated.

States want to protect **all** constituencies and prevent forfeitures. Robert Krenkowitz, an attorney who has represented State unclaimed property interests for more than 30 years, reminded the Nevada legislative committee that was considering Senate Bill 355 last year of the guiding principles of unclaimed property law. Speaking before the Senate Committee on Judiciary regarding the bill’s proposed B2B exemption, Krenkowitz emphasized the following key point:

The alternative to an unclaimed property law is to allow the holder to confiscate the money, to forfeit the money, and one great principle of equity in the law is that the law abhors forfeiture. Keep in mind that this money does not belong to the corporation holding it; does not belong to the bank in which it is deposited; does not belong to the department store that issued the gift certificate; and does not belong to American Express because they issued a traveler’s check. That money belongs to a citizen, whether that citizen is a private individual, an incorporated individual or some other kind of business entity.<sup>13</sup>

In his Written Testimony in Opposition to Senate Bill 355, Krenkowitz stressed:

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<sup>11</sup> COST’s position is also at odds with the practices of many of its own members, who employ locator services to identify and collect on behalf of these companies unclaimed property held by the States. Each year, States pay claims filed by COST members totaling hundreds of thousands of dollars. The companies sign claim forms attesting to their entitlement to these funds. As such, these unclaimed funds were most certainly overlooked, notwithstanding the comprehensive tracking protocols of the corporate owners.

<sup>12</sup> 379 U.S. 674, 683 (1965). The Supreme Court in Texas v. New Jersey held that the secondary rule applies in situations where the holder does not have a record of the owner’s address or where the State of last known address of the owner “does not provide for escheat of the property”, and it gives the State of corporate domicile the jurisdiction to escheat the property and retain it “until some other State comes forward with proof that it has a superior right to escheat.” Id. Some commentators have suggested that a distinction can be drawn between property where there is no last known address, and property that is not subject to the laws of the state of last known address, referring to the latter as the “third priority rule.” While federal courts have addressed the scope of the “third priority rule,” no court has specifically examined the issue of whether the holder’s state of incorporation may claim business-to-business property that is exempt from reporting under the laws of the state of last known address of the owner.

<sup>13</sup> Hearing on S.B. 355 before the Senate Comm. on Judiciary, 2013 Leg., 77<sup>th</sup> Sess. 52 (Nev. 2013).

Unclaimed property laws prevent forfeiture of the property to its fortuitous holder. The law abhors a forfeiture. As the US Supreme Court concluded in 1951, by means of State unclaimed property law, unclaimed “property thus escapes seizure by would-be possessors and is used for the general good rather than the chance enrichment of particular individuals or organizations.”<sup>14</sup>

Krenkowitz also pointed out that “[a]n unclaimed property law is ‘consumer protection and public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the State the benefit of its use until the owner claims it.’”<sup>15</sup>

Even in those situations where a B2B transaction is exempt from reporting as unclaimed property, it cannot simply be written off and taken into income. This is true whether the business believes the credit balance to be real or the result of an error. The business must continue to reflect the credit balance on its books as a liability under the Generally Acceptable Accounting Procedures (“GAAP”) until such time as the business has sufficient documentation to write the balance off. In order to write-off the credit balance in the future, the business will have to have adequate documentation, which means the business is going to have to reconcile its books to find the source of the error. Accordingly, as Paula Smith noted, “[a] real business advantage of escheat is to transfer the recordkeeping responsibility for old claims to the state. This advantage is lost if an exemption from reporting is used.”<sup>16</sup>

**The Disparate Patchwork of Existing B2B Exemptions.** As noted above, thirteen states have a statutory B2B exemption. Maryland has the distinction of being the first state to exempt B2B property and the year was 1998. The exemption varies from state to state and the year of adoption is noted in parentheses. Four states have a full exemption, meaning they exempt all business-to-business transactions. These states are Illinois (2000),<sup>17</sup> Kansas (2000),<sup>18</sup> Ohio (2000),<sup>19</sup> and Virginia (2000).<sup>20</sup> The other nine states have limited exemptions. Significantly,

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<sup>14</sup> *Id.* at Ex. L, p.1 (Written Testimony of Robert Krenkowitz in Opposition to S.B. 355) (citing and quoting *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36 (1951)).

<sup>15</sup> *Id.* (quoting *Clymer v. Summit Bancorp.*, 726 A.2d 983, 993 (N.J. Super. Ct. Ch. Div. 1998), *rev'd on other ground*, 758 A.2d 652 (N.J. Super. Ct. App. Div. 2000), *rev'd*, 792 A.2d 396 (N.J. 2002)).

<sup>16</sup> Smith, *supra* note 3, at 6.

<sup>17</sup> 765 Ill. Comp. Stat. Ann. 1025/2a(b) (LEXIS through P.A. 98-597 of 2013 Leg. Sess.). It reads in pertinent part: “Notwithstanding the provisions of subsection (a), 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 shall be exempt from the provisions of this Act.”

<sup>18</sup> Kan. Stat. Ann. § 58-3935(g) (2012). It reads: “Any outstanding check, draft, credit balance, customer's overpayment or unidentified remittance issued to a sole proprietorship or business association as part of a commercial transaction in the ordinary course of a holder's business shall not be presumed abandoned.”

<sup>19</sup> Ohio Rev. Code Ann. § 169.01(B)(2)(b) (Anderson 2013). It reads in pertinent part:

(2) ‘Unclaimed funds’ does not include any of the following: ... (b) Any payment or credit due to a business association from a business association representing sums payable to suppliers, or payment for services rendered, in the course of business, including, but not limited to, checks or memoranda, overpayments, unidentified remittances, nonrefunded overcharges, discounts, refunds, and rebates[ ]”.

Ohio’s enabling legislation was the only legislation that provided for complete retroactivity of the exemption. Retroactivity is addressed below.

Five of the nine states with limited exemptions only exempt credit balances, but the exact scope of this exemption differs. The states are Indiana (2002),<sup>21</sup> Massachusetts (2000),<sup>22</sup> Michigan (2012),<sup>23</sup> North Carolina (2000),<sup>24</sup> and Wisconsin (1999).<sup>25</sup> For example, Indiana’s B2B statutory provision is narrow and appears in the section that enumerates excepted property. It only applies to “a business to business credit memorandum or a credit balance resulting from a business to business credit memorandum.”<sup>26</sup> It helps that the Indiana Act defines “property” in another section by enumerating a list of specific types of property. The list includes the following properties grouped in kind together: “a credit balance, a customer overpayment, a security deposit, a refund, a credit memorandum other than a business to business credit memorandum, an unpaid wage, an unused airline ticket, mineral proceeds, or an unidentified remittance”.<sup>27</sup>

Massachusetts, on the other hand, added a B2B exemption to its Act in 2000 by inserting the following paragraph that carved out “outstanding credit balances” from the “catch-all” provision for all intangible personal property not covered elsewhere in the Act:

**Notwithstanding the provisions of the preceding paragraph, any outstanding credit balances to a vendor or commercial customer from a vendor resulting from a transaction occurring in the normal and ordinary course of business shall be exempt from the provisions of this chapter.** This exemption shall not apply to unallocated distributions from securities held by financial intermediaries including, but not limited to, brokers, mutual funds, custodians, trust companies and depositories and owing to unknown beneficiaries but held in the intermediary’s nominee names.<sup>28</sup>

Since “outstanding credit balance” was not defined in the legislation or elsewhere in the Commonwealth’s unclaimed property law, the Treasury Department promulgated regulations that addressed the exemption. In 2000, when the B2B exemption became law, the State Treasurer was Shannon O’Brien. Treasurer Shannon O’Brien applied the term liberally to cover

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<sup>20</sup> Va. Code Ann. § 55-210.8:1(B) (2012). It provides:

B. The following property is exempt from the provisions of this chapter and shall not be assessed by the administrator as unclaimed property: (i) credit balances payable to a business association, (ii) outstanding checks resulting from or attributable to the sale of goods or services to a business association, (iii) promotional incentives, and (iv) credits, gift certificates, coupons, layaways, and similar items, provided such credits, gift certificates, coupons, layaways, and similar items are redeemable in merchandise, in services, or through future purchases.

<sup>21</sup> Ind. Code Ann. § 32-34-1-1(e) (2013).

<sup>22</sup> Mass. Gen. Laws. ch. 200A, § 5 (2013).

<sup>23</sup> Mich. Comp. Laws Serv. § 567.257a (LEXIS through 2013 P.A. 248).

<sup>24</sup> N.C. Gen. Stat. § 116B-54(e) (LEXIS through 2013 Reg. Sess.).

<sup>25</sup> Wis. Stat. § 177.01(10)(b) (LEXIS through 2013 Act 45).

<sup>26</sup> Section 32-34-1-1(e).

<sup>27</sup> *Id.* § 32-34-1-17(b)(2).

<sup>28</sup> Mass. Gen. Laws. ch. 200A, § 5 (2013) (emphasis added).

different property types, including outstanding accounts payable checks. She also applied the exemption retroactively to cover all Report Years. The administrative regulations adopted by the Massachusetts Treasury Department the following year in 2001 were consistent with the broad application. “Commercial customer” was defined in the regulations as “[a]ny person who purchases goods or services in connection with the conduct of that person’s business within Massachusetts or through a vendor conducting business in Massachusetts. No individual purchasing goods or services in his/her capacity as a consumer at retail shall be considered a commercial customer.”<sup>29</sup> “Credit Balances” was defined as including:

...any outstanding credits; overpayments; refunds; vouchers; accumulated value in the form of points, discounts, or other incentive type programs; or any other value potentially due and owing to a vendor or commercial customer; whether currently remaining as a credit, previously resolved, revised, expired, or issued to the vendor or to a commercial customer as a credit memo or repayment. Credit balances shall pertain to credits either current or past that are or were owing to a vendor or commercial customer, whether or not those vendors or commercial customers are currently determinable. Credit balances as used in 960 CMR 4.00 shall not include consumer retail credits.<sup>30</sup>

The underlined language in the above definition was the basis for Treasurer O’Brien’s policy of exempting outstanding accounts payable checks. The regulation below entitled “Reporting Abandoned Property” provided for the retroactive application of the exemption in (a) and a broad application of the term “credit balance” in (b). It read in relevant part:

(a) [A]n exemption shall exist for any outstanding credit balances between vendors or commercial customers resulting from a transaction occurring in the normal and ordinary course of business. This exemption shall apply to all prior and current reporting years.

(b) Credit balances, as defined in 960 CMR 4.02, shall not be considered abandoned property, in accordance with M.G.L. c. 200A, § 5. Credit balances, when they arise in the normal and ordinary course of business, may originate from activity such as overpayments, payment mis-postings, volume discounting, customer relations programs, and payments to satisfy other obligations between two commercial customers, and may take the form of credits, credit memos, refunds, vouchers, discount points or programs, and other transactions between the parties.<sup>31</sup>

These regulations reflected a much broader interpretation of B2B exemptions than is the case in many other States and indeed, Timothy Cahill, Shannon O’Brien’s successor as Treasurer, narrowed the scope of the exemption. Treasurer Cahill administration believed that the 2001 regulations were unenforceable because they exceeded the limits of the statutory exemption language. In particular, he did not believe that the statute creating the exemption could be read to include uncashed accounts payable checks because the definition of “Property” in the

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<sup>29</sup> 960 Code Mass. Regs. § 4.02 (2001).

<sup>30</sup> Id. (emphasis added).

<sup>31</sup> Id. § 4.03(13) (2001) (emphasis added).

unclaimed property law included “checks” in (i) but not in (ii) that dealt with credit balances.<sup>32</sup> In fact, Treasurer Cahill believed that the promulgation of emergency regulations was needed to correct the existing regulations.

In 2003, prior to amending the regulations, the Treasury Department authorized one of its contract examiners to audit Biogen IDEC MA, Inc. (“Biogen”). The amended regulations set forth below went into effect while the Biogen audit was ongoing. In the audit of Biogen, the Massachusetts Treasury applied an interpretation of the B2B exemption that was ultimately reflected by the 2004 revised regulations. Biogen objected to the findings and litigation ensued over which regulations applied. The decision by the Supreme Court of Massachusetts is discussed below.

The Treasury Department’s amended unclaimed property regulations took effect in 2004. Among other changes, the 2004 regulations carved out outstanding accounts payable checks from the B2B exemption for “outstanding credit balances” and they added the word “current” to several of the key definitions. The key definitions now read:

Commercial Customer: Any person who maintains a current, multiple transaction, commercial relationship with a vendor in the conduct of the person's business within Massachusetts or through a vendor conducting business in Massachusetts. No individual purchasing goods or services in his/her capacity as a consumer at retail shall be considered a commercial customer.

Credit Balances: Outstanding balances that are recorded as current accounts receivable or accounts payable of a holder. The balance must have been generated in the normal and ordinary course of business between the holder and a then current commercial customer.<sup>33</sup>

Massachusetts also revised the “reporting” regulation on the credit balance exemption. Subsection (a) was revised by adding “merchandise credit” and by deleting the retroactivity provision. Subsection (b) was revised to reduce the long list of examples of activity that result in credit balances. Subsection (c) was not amended. It now reads:

(a) Pursuant to the reporting requirements detailed in M.G.L. c. 200A, §§ 5 and 7, an exemption shall exist for any outstanding credit balance or merchandise credit between vendors or commercial customers resulting from a transaction occurring in the normal and ordinary course of business.

(b) Credit balances, as defined in 960 CMR 4.02, shall not be considered abandoned property, in accordance with M.G.L. c. 200A, § 5. Credit balances may originate from activities such as customer overpayments and shall include balance sheet credits, such as the payment to vendors for the purchase of goods and services.

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<sup>32</sup> See Biogen Idec MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 188 n.24 (2009).

<sup>33</sup> Section 4.02 (2004) (emphasis added).



(c) Nothing in 960 CMR 4.03 should be construed so as to suggest that any commercial customer incorporated or registered to do business in Massachusetts is exempt from abandoned property reporting obligations relative to credit balances, as defined in 960 CMR 4.02, in other domestic reporting jurisdictions outside of Massachusetts.<sup>34</sup>

When Massachusetts concluded its Biogen audit in 2005 with findings of \$781,251.34 in uncashed accounts payable checks for the period 1984-2004, Biogen objected to the findings being based on the retroactive application of the amended regulations. Biogen argued to the Massachusetts Treasury that the amended regulations could not be applied retroactively because they reflected a change in Treasury's policy on the application of the exemption to uncashed accounts payable checks. Treasury disagreed, arguing instead that the 2001 regulations were unenforceable because they exceeded the enabling legislation. The Supreme Court agreed with Biogen and entered judgment in favor of the Commonwealth for \$56,094, which represented the outstanding accounts payable checks that were not paid to businesses. The Treasury Department appealed the matter, and the Supreme Judicial Court affirmed the lower court's judgment. Because the Supreme Judicial Court found that Treasurer Cahill's narrow interpretation of the credit balance exemption was not the only reasonable interpretation of the statutory language, it instead upheld the equally plausible interpretation and application of the 2001 regulations that exempted uncashed accounts payable checks.<sup>35</sup>

Michigan adopted a B2B exemption in 2012 by adding a new section, 567.257a, to its Unclaimed Property Act that reads as follows:

(1) Except with respect to property described in sections 7 and 17, this act does not apply to any credit balances, overpayments, deposits, refunds, discounts, rebates, credit memos, or unidentified remittances created on or after April 1, 2009 and issued, held, due, or owing in any transactions between 2 or more associations. This exemption does not apply to outstanding checks, drafts, or other similar instruments.

(2) As used in this section, "association" means a business association, a public corporation, or any other commercial entity, including a sole proprietorship.<sup>36</sup>

The legislation enacted by Michigan was more specific than B2B exemptions enacted by other States with respect to the types of property covered. Although the exemption does not appear to cover outstanding checks and other similar instruments, the sentence underlined above in the statute clarifies that exemption is so limited.

North Carolina adopted a limited B2B exemption in 2000 when it added the following to the exclusions section in its Unclaimed Property Act:

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<sup>34</sup> Id. § 4.03(13).

<sup>35</sup> Biogen, 454 Mass. at 188-191.

<sup>36</sup> Mich. Comp. Laws Serv. § 567.257a (LEXIS through 2013 P.A. 248) (emphasis added). Note that "business association" is defined in § 567.222(e) of the Act.

(e) Credit balances as shown on the records of a business association to or for the benefit of another business association, shall not constitute abandoned property. For purposes of this section, the term "credit balances" means items such as overpayments or underpayments on the sale of goods or services.<sup>37</sup>

As with Indiana, the North Carolina exemption should be read in conjunction with the State's definition of "property" within its Act. The definition of "property" includes, in relevant part, a "[c]redit balance, customer's overpayment, gift certificate, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds, or unidentified remittance".<sup>38</sup>

Wisconsin excludes a "credit balance issued to a commercial customer account by a business association in the ordinary course of business" unless it is held by a banking or financial organization.<sup>39</sup> Wisconsin's exemption appears in the definitions section of its Unclaimed Property Act, but credit balance is not defined. Because "credit balances" was one of the many property types included in the definition of "intangible property" set forth in § 177.01(10)(a),<sup>40</sup> the Wisconsin legislature created the B2B exemption for credit balances by adding (b) to the definition: "[i]ntangible property" does not include a credit balance issued to a commercial customer account by a business association in the ordinary course of business, unless the credit balance is property described in s.177.06(1) or (2) held by a banking organization or financial organization."<sup>41</sup>

The remaining four states with B2B exemptions are Arizona (2001),<sup>42</sup> Iowa (2001),<sup>43</sup> Maryland (1998),<sup>44</sup> and Tennessee (2001).<sup>45</sup> Like Wisconsin, Iowa and Maryland carve out banking and financial institutions from their B2B exemptions. Unlike Wisconsin, their B2B exemptions are not limited to credit balances. Iowa's definition of "property" includes, in relevant part, the following grouped properties: "b. Credit balance, customer overpayment, gift certificate, security deposit, refund, credit memorandum, unpaid wage, unused airline ticket, unused ticket, mineral proceeds, and unidentified remittance and electronic fund transfer."<sup>46</sup> Iowa's B2B exemption is created by carving out the following properties at the end of the definition: "'[p]roperty' does not include credits, advance payments, overpayments, refunds, or credit memoranda shown on the books and records of a business association with respect to another business association unless the balance is property described in section 556.2 held by a banking organization or financial organization."<sup>47</sup> In 2011, Iowa's Treasury Department proposed amendments to its

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<sup>37</sup> N.C. Gen. Stat. § 116B-54(e) (LEXIS through 2013 Reg. Sess.).

<sup>38</sup> *Id.* § 116B-52 (11)b.

<sup>39</sup> Wis. Stat. § 177.01(10)(b) (LEXIS through 2013 Act 45).

<sup>40</sup> *Id.* § 177.01(10)(a). Subsection (2) reads: "Credit balances, customer overpayments, security deposits, refunds, credit memos, unpaid wages, unused airline tickets and unidentified remittances." *Id.* § 177.01(10)(a)(2).

<sup>41</sup> *Id.* § 177.01(10)(b).

<sup>42</sup> Ariz. Rev. Stat. § 44-301(15) (LEXIS through 2013 legislation).

<sup>43</sup> Iowa Code § 556.1(12) (LEXIS through 2012 legislation).

<sup>44</sup> Md. Code Ann., Com. Law § 17-101(m) (LEXIS through 2013 Reg. Sess.).

<sup>45</sup> Tenn. Code Ann. § 66-29-104(3)(C) (LEXIS through 2013 Reg. Sess.).

<sup>46</sup> Section 556.1(12)(b).

<sup>47</sup> *Id.* § 556.1(12) (emphasis added).

unclaimed property rules, which included adding a definition for the exclusions in the statute. Effective February 1, 2012, the following definition was added to Rule 781-9.3(556):

*‘Credits, advance payments, overpayments, refunds, or credit memoranda,’* for purposes of Iowa Code section 556.1(12), mean current accounts receivable of a business association that have not been reduced to a check or other form of payment. “Credits, advance payments, overpayments, refunds, or credit memoranda,” for purposes of Iowa Code section 556.1(12), shall not include uncashed checks or other unclaimed payments due and owing to a business association for its provision of goods or services, with respect to any other type of obligation.<sup>48</sup>

Like Iowa, Maryland, which was the first state to adopt a B2B exemption, did so by including the exempted property in its definition of what is **not** personal property. Maryland’s provision expressly exempts outstanding checks. It reads:

‘Personal property’ does not include:

- (1) A gift certificate;
- (2) Credits in connection with the sale of consumer goods to a wholesaler or retailer in the ordinary course of business;**
- (3) Outstanding checks or credits issued to vendors or commercial customers in the ordinary course of business, other than property described in § 17-301(a) of this title held by a banking organization or financial organization;**
- (4) Credit balances in vendor or commercial customer accounts that occur in the ordinary course of business, other than property described in § 17-301(a) of this title held by a banking organization or financial organization; or**
- (5) Purchase price rebates issued to customers in the ordinary course of business.<sup>49</sup>

Maryland’s statute is silent about retroactivity, but, as noted below, there is retroactivity in its application.

Arizona has two limited B2B exemptions that are found in its definition of “property” or more specifically in the exclusions from the definition of property. The first is for “de minimis property” and the second is for “property of a person who is maintaining a current business relationship with the holder.”<sup>50</sup> Because Arizona’s unclaimed property law separately defines “de minimis property” as “any account balances of business associations of fifty dollars or less payable to another business association,”<sup>51</sup> it is an exemption limited to B2B transactions only. However, because “person” is used in the second exclusion rather than “business association” and “person” is defined as “an individual, business association, financial organization, estate, trust, government, governmental subdivision, agency or instrumentality or any other legal or commercial entity,” Arizona’s second B2B exemption is a *business-to-consumer* exemption as well.<sup>52</sup> This is far-reaching. At least for this exemption to apply, there is a “current business

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<sup>48</sup> Iowa Admin. Code r. 781-9.3(556) (LEXIS current through Jan. 22, 2014 Supp.) (emphasis added).

<sup>49</sup> Section 17-101(m) (emphasis added).

<sup>50</sup> Ariz. Rev. Stat. § 44-301(15) (LEXIS through 2013 legislation) (emphasis added).

<sup>51</sup> Id. § 44-301(3).

<sup>52</sup> Id. § 44-301(14).

relationship” requirement. While “current business relationship” is not defined in Arizona’s Unclaimed Property Act nor in any rules, regulations, or guidance documents, Arizona’s Unclaimed Property Division has consistently advised holders and others that it interprets “current” to mean that business has been transacted with the other business within the past year. Arizona also takes the position that if the business relationship ends, a reporting obligation would then arise.<sup>53</sup>

Tennessee is the only state that by statute requires an “ongoing business relationship” for the B2B exemption to apply. More importantly, Tennessee identifies the exempt property specifically and defines “ongoing business relationship” in the statute. The exemption is found in the section entitled “property held by banking or financial organizations or by business associations” and provides in relevant part:

Notwithstanding any provision of this part to the contrary, **any outstanding check, draft, credit balance, customer's overpayment or unidentified remittance** issued to a business entity or association as part of a commercial transaction in the ordinary course of a holder's business shall not be presumed abandoned if the holder and such business entity or association have an ongoing business relationship. **An ongoing business relationship shall be deemed to exist if the holder has engaged in a commercial, business or professional transaction involving the sale, lease, license, or purchase of goods or services with the business entity or association or a predecessor-in-interest of the business entity or association within the dormancy period immediately following the date of the check, draft, credit balance, customer’s overpayment, or unidentified remittance giving rise to the unclaimed property interest.** As used herein “dormancy period” means the period during which the holder may hold the property interest before it is presumed to be abandoned.<sup>54</sup>

Why are B2B exemptions so variable amongst the States that have adopted them? Although there are some exceptions, most State legislatures have been reluctant to enact wholesale exemption of unclaimed property owing to businesses. In an effort to accommodate both the interests of big business and the legitimate arguments and concerns of unclaimed property programs, legislatures have developed compromise language providing for limited exemption of B2B transactions. As explained in the next section, B2B legislation has been defeated in some states. And, it bears worth noting that two-thirds of the State unclaimed property statutes do not include a B2B exemption.

**Unsuccessful Efforts to Enact B2B Exemptions.** Proponents have attempted to enact tried B2B exemptions twice in Nevada and three times in Missouri. Their first attempt in Nevada was in 2009.<sup>55</sup> The first attempt in Missouri was in 2010.<sup>56</sup> Proponents tried

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<sup>53</sup> This has been reported in numerous articles and was confirmed by the author in a recent conversation with Joshua Joyce, the Administrator of the Unclaimed Property Section in the Arizona Department of Revenue.

<sup>54</sup> Tenn. Code Ann. § 66-29-104(3)(C) (LEXIS through 2013 Reg. Sess.) (emphasis added).

<sup>55</sup> S.B. 167, 2009 Leg., 75th Sess. (Nev.).

<sup>56</sup> H.B. 1993, 2010 Leg., 95<sup>th</sup> Sess. (Mo.).

again in Missouri the next year.<sup>57</sup> Their second attempt in Nevada was in 2013.<sup>58</sup> Recently, a B2B exemption was re-introduced in Missouri.

The introduced version of Nevada Senate Bill 167 in the 2009 legislative session was a housekeeping bill requested by the State Treasurer and introduced by Senator (and Uniform Law Commissioner) Terry Care. It, however, was amended to include a B2B exemption among other holder reforms at the urging of the International Game Technology (IGT). It was referred to the Senate Committee on the Judiciary, which was chaired by Senator Care. Because of Senator Care has been involved in drafting the 1995 Uniform Act, he requested that the legislative staff of the Uniform Law Commission (ULC) study the bill and comment on the proposed amendments. Unlike some of the other proposed amendments in SB 167, the merits of the proposed B2B are not addressed in ULC Legislative Staffer Nicole Julal's March 17, 2009 memo to Senator Care. The ULC's objection to the proposed B2B exemption found in NRS 120A.113 (Definitions) was that its passage would create a "substantive change" to the Uniform Unclaimed Property Act that would result in a "non-uniform adoption of the Act" and would "set a bad precedent for other jurisdictions that seek to adopt the Unclaimed Property Act in the future."<sup>59</sup> For these reasons, Julal stated that "[t]he Uniform Law on Commission discourages the adoption of the amendments as proposed in this section."<sup>60</sup>

In 2013, advocates of the B2B legislation were promising legislators that Nevada could become the "new" old Delaware in attracting businesses to incorporate there. At a Judiciary Committee hearing in Nevada in April 2013, Senator Michael Roberson, the bill sponsor, introduced the bill as follows: "Senate Bill 355 seeks to reform Nevada's unclaimed property law by excluding business-to-business transactions, providing a reasonable limitation period for unclaimed property to escheat, and barring contingent fee audits. These reforms will help to make Nevada an ideal location for businesses to incorporate and as such, will help us to grow our way to prosperity."<sup>61</sup> After referencing the "F" grade that Delaware received from COST, citing a recent Wall Street Journal "expose" on Delaware's unclaimed property law, and reading the bill summary from the Legislative Counsel's Digest, Senator Roberson concluded: "Senate Bill 355 will improve Nevada's unclaimed property laws and administration. The COST supports S.B. 355 and states that these changes are important toward reforming Nevada's unclaimed property laws."<sup>62</sup> Later in the hearing, Senator Roberson noted: "My point of bringing this bill is not simply to address a problem in this State, but to give our State a competitive advantage over a

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<sup>57</sup> H.B. 401, 2011 Leg., 96<sup>th</sup> Sess. (Mo.).

<sup>58</sup> S.B. 355, 2013 Leg., 77<sup>th</sup> Sess. (Nev.).

<sup>59</sup> Minutes of 3/26/09 Hearing on S.B. 167 Before the Sen. Comm. on Judiciary, 2009 Leg., 75<sup>th</sup> Sess. Ex. E (Nev. 2009) (ULC Legislative Staffer Nicole Julal's March 17, 2009 memo to Senator Care).

<sup>60</sup> *Id.*

<sup>61</sup> Minutes of Hearing on S.B. 355 Before the Sen. Comm. on Judiciary, 2013 Leg., 77<sup>th</sup> Sess. 32 (Nev. 2013) (Statement of Sen. Michael Roberson, Bill Sponsor).

<sup>62</sup> *Id.* at 34.

state like Delaware. ... The COST grades Delaware and F and Nevada a C. With this bill, we become an A. That is another tool to incentivize companies to look to Nevada.”<sup>63</sup>

Attorney Robert Krenkowitz, along with officers of the Nevada State Treasury, addressed the following points at the hearing: the significant economic impact of the B2B exemption; the consumer protection aspects of the Unclaimed Property Act that would be affected by the exemption and would disadvantage small companies; the *Texas v. New Jersey* priority rules that would allow another state to claim the business property of businesses located in Nevada; and the equitable principle behind unclaimed property that forfeiture is abhorred, and, therefore, until the property is reunited with its true owner, the Sovereign should possess the property rather than the chance holder.

With respect to Missouri, there have been two failed attempts to pass a B2B exemption, and a bill is pending in the current legislative session. As noted, the first attempt by the business community to pass a B2B exemption in Missouri was in 2010.<sup>64</sup> House Bill 1993 sponsored by Representative John Diehl proposed adding the following B2B exemption: “Any intangible 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 shall be exempt from the provisions of sections 447.500 to 447.595.”<sup>65</sup> If the bill had passed, this exemption would have been added to the catch-all provision for intangible property in § 447.535. Although the bill was referred by the House to the Special Standing Committee on General Laws and was passed by vote back to the House, no further action was taken. Had it passed, this exemption would have covered substantial unclaimed obligations, because it exempted any intangible property, not merely credit balances or other defined property types.

The effort in Missouri to exempt B2B transactions was reinitiated in 2011 with the introduction of House Bill 401 by the same sponsor, Representative Diehl.<sup>66</sup> As introduced, House Bill 401 was identical to House Bill 1993. While House Bill 401 progressed farther with amendments, it died in the House much like House Bill 1993 did the previous year. The amended bill, however, was not as broad in scope; it added some other conditions and included definitions. It added an ongoing business relationship requirement and defined it. It also narrowed the scope of the exemption by replacing “any intangible property” with “any outstanding check, draft, credit balance, customer’s overpayment, or unidentified remittance.” House Bill 401, as amended, added the following new paragraph to the catch-all intangible property section:

2. Notwithstanding any provision to the contrary, any outstanding check, draft, credit balance, customer's overpayment, or unidentified remittance issued to a business entity or association as part of a commercial transaction in the ordinary course of a holder's business shall not be presumed abandoned if the holder and such business entity or

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<sup>63</sup> *Id.* at 36.

<sup>64</sup> H.B. 1993, 2010 Leg., 95<sup>th</sup> Sess. (Mo.).

<sup>65</sup> *Id.*

<sup>66</sup> H.B. 401, 2011 Leg., 96<sup>th</sup> Sess. (Mo.).

association have an ongoing business relationship. An ongoing business relationship shall be deemed to exist if the holder has engaged in a commercial, business, or professional transaction involving the sale, lease, license, or purchase of goods or services with the business entity or association or a predecessor-in-interest of the business entity or association within the dormancy period immediately following the date of the check, draft, credit balance, customer's overpayment, or unidentified remittance giving rise to the unclaimed property interest. As used in this subsection, "dormancy period" means the period during which the holder may hold the property interest before it is presumed to be abandoned. A "predecessor-in-interest" is a person or entity whose interest in a business entity or association was acquired by its successor-in-interest, whether by purchase of the business ownership interest, purchase of business assets, statutory merger or consolidation, and includes successive acquisitions by whatever means accomplished.<sup>67</sup>

House Bill 401 also included an exemption for a "business credit"<sup>68</sup> that was defined in the Definitions section and placed in another section in the Unclaimed Property Act.

A third attempt to exempt B2B transactions from coverage by Missouri's unclaimed property law was launched when Missouri House Bill 1075 was prefiled on December 2, 2013, by Representative Rocky Miller.<sup>69</sup> The prefiled bill, which is co-sponsored by Representative Diehl, appears to be identical to the amended version of House Bill 401.

In response to Delaware Division of Revenue's pursuit of uninvoiced payables, legislation was passed in that State in 2010 to exempt them from being reported as unclaimed property. However, the statutory exemption was limited to uninvoiced payables and expressly did not create any kind of business-to-business exemption:

§ 1211. Limited exception, uninvoiced payables not reportable.

(a) Property as defined in § 1198 of this title shall be deemed to exclude uninvoiced payables as more particularly defined in this section.

(b) "Uninvoiced payables" are amounts due between merchants as defined in the Delaware Uniform Commercial Code, §§ 1-101 et seq. of Title 6, from a holder who is a buyer to a creditor who is the seller of goods ordered by a holder in the ordinary course of business when the goods were received and accepted by the holder, but which for any reason were never invoiced by the seller.

(c) Uninvoiced payables include the value of goods received by a holder from a seller from out of balance transactions where the holder's purchase order for goods and the amount of goods received by the holder do not match.

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<sup>67</sup> *Id.*

<sup>68</sup> Business credit was defined as "any credit offered by one business entity to another business entity to be applied in exchange for goods or services but does not have a redeemable cash value."

<sup>69</sup> H.B. 1075, 2014 Leg., 97<sup>th</sup> Sess. (Mo.).

(d) Uninvoiced payables include unsolicited goods received by a holder from a seller that fall within § 2505 of Title 6.

(e) Uninvoiced payables specifically do not include accounts payable, accounts receivable, or any other type of credit or amount due to the creditor, including uncashed checks of any kind whatsoever whether relating to inventory, goods, or services, and all of these types of property are still reportable as abandoned or unclaimed property.

**(f) Nothing in this section shall be construed to create a business-to-business exemption of any kind regardless of whether a current business relationship exists between the holder and the creditor.<sup>70</sup>**

## **Factors that Affect the Scope and Application of the B2B Exemption**

### **1) Definitions of “business association” and “intangible property”**

The scope or reach of the B2B exemption depends in part on how broadly or narrowly defined “business association” is in the State’s unclaimed property law. For example, Michigan’s B2B exemption applies to transactions between “two or more associations” and “association” is defined very broadly to be a “business association, public corporation, or any other commercial entity, including a sole proprietorship.”<sup>71</sup> While similar to Michigan’s definition, Tennessee’s definition specifically excludes a public corporation from its definition of business association. It reads: “‘Business association’ means any corporation, other than a public corporation, joint stock company, business trust, partnership cooperative, or any association for business purposes of two (2) or more individuals.”<sup>72</sup> Contrast this to the definition in Arizona’s Unclaimed Property Act:

Business association" means any corporation, joint stock company, investment company, partnership, limited partnership, registered limited liability partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, land bank, safe deposit company, safekeeping depository, financial organization, insurance company, mutual fund, utility or other business entity, whether for profit or not for profit, that consists of one or more persons.<sup>73</sup>

The same is true for the definition of intangible property or its equivalent. As noted earlier, some states exempt certain types of property from their unclaimed property law by not including the property type in the definition of “intangible property” or “property.” An example of a property type omitted from the definition and thus exempt from the state’s unclaimed property law would be credit balances. Other states include the type(s) in their definitions, but then specifically exempt the type(s) when it comes to B2B transactions later in the definition(s) or

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<sup>70</sup> Del. Code Ann. tit. 12, § 1211(f) (LEXIS through 79 Del. Laws, Ch.185) (emphasis added).

<sup>71</sup> Mich. Comp. Laws Serv. § 567.257a (LEXIS through 2013 P.A. 248).

<sup>72</sup> Tenn. Code Ann. § 66-29-102(2) (LEXIS through 2013 Reg. Sess.).

<sup>73</sup> Ariz. Rev. Stat. § 44-301(2) (LEXIS through 2013 legislation).



elsewhere in the unclaimed property law. The specific property types exempted are discussed more below.

## **2) Specific property types exempted**

A significant challenge in dealing with B2B exemptions is that the property types are not terms of art that are universally accepted. In other words, property types mean different things to different people, i.e. attorneys and accountants and record keepers. They mean different things to different industries. More importantly, as shown in the Statutory B2B Exemptions section, they mean different things in different states. Paula Smith cleverly summed unclaimed property the situation in 2002 and it still applies: “Alas, business-to-business transactions are not akin to Justice Potter Stewart’s description of hard-core pornography – ‘I know it when I see it.’”<sup>74</sup>

As noted above, five of the thirteen states that have B2B exemptions only exempt credit balances or credit balances and memoranda. This should mean that these states do not exempt outstanding checks, but, as shown in the Statutory B2B of the exemptions, it does not. Therefore, the definitions are key components along with precise drafting of the exemptions.

## **3) Requirement of “ongoing relationship” between businesses**

As noted above, only two states (Arizona and Tennessee) limited their statutory B2B exemption to instances in which the holder and the reported business owner maintain either an “ongoing business relationship” or a “current business relationship.” Arizona’s statute does not define “current business relationship,” but, as noted earlier, they interpret it to mean that business must have been transacted with the other business within the last year. While not quite the same, Massachusetts amended its unclaimed property regulations in 2004 to require that a “current” relationship exist between the businesses for the exemption to apply.<sup>75</sup> At least in the states that require more than just a single business transaction between the businesses, there is a greater chance that the two businesses will be able to reconcile their books by communicating and refunding the credit balance or overpayment or by discovering and correcting an accounting error. House Bill 1075, which is currently pending in Missouri, requires **and** defines an ongoing relationship.

It would be unwise to assume that the ongoing relationship requirement is an organic element of the B2B exemption regardless of whether it is set forth in the law. It must be set forth in the law. It is not implicit.

## **4) Application of exemption: Prospective v. retroactive v. silent**

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<sup>74</sup> Smith, *supra* note 3, at 3-4.

<sup>75</sup> 960 Code Mass. Regs. § 4.02 (2004).

In general, legislation is applied prospectively. For legislation to be applied retroactively, specific language must be included for that to happen. A common rule of statutory construction is that amendments to statutes are applied prospectively if the legislation is silent as to its application. In other words, in order for a B2B exemption to be applied retroactively, it would have to be specifically provided for in the legislation.

As previously noted, Ohio is the only state that had specific language providing for complete retroactivity included in its B2B legislation (indeed, until 2012, Ohio was the only state with B2B legislation that provided for any form of retroactive application of the exemption).

The Ohio B2B exemption became law on September 14, 2000, and wiped out an entire category of reporting when it did. House Bill 640 contained the following provision:

### **Uncodified Retroactivity**

**Section 53(C).** Sections 169.01 and 169.02 of the Revised Code, as amended by this act, apply to payments and credits that, on the effective date of this section, are in the possession, custody, or control of a business association.<sup>76</sup>

Ohio's Division of Unclaimed Funds said it best when it summed unclaimed property the effect of the bill in a special Notice of Change in Reporting Procedures: Business to Business Exemption as follows:

This Business to Business Exemption effectively eliminates wholesale trade from the jurisdiction of the Ohio Unclaimed Funds Law. In addition, the changes not only eliminate unclaimed funds resulting from business to business transactions that are due by November 1, 2000, but also retroactively exempts any unclaimed funds from such transactions that were reportable in prior years but are still in the possession of the business association.<sup>77</sup>

In 2012, Michigan became the only other state with legislation that addressed the application of the exemption. Michigan's statute addresses the application of the new exemption in subsection (1). It provides:

Except with respect to property described in sections 7 and 17, this act does not apply to any credit balances, overpayments, deposits, refunds, discounts, rebates, credit memos, or unidentified remittances created on or after April 1, 2009 and issued, held, due, or owing in any transactions between 2 or more associations. This exemption does not apply to outstanding checks, drafts, or other similar instruments.<sup>78</sup>

As you can see, the underlined language provides for partial retroactivity by applying the exemption to property issued on or after April 1, 2009, instead of to property issued or created on or after May 24, 2012, when the law took effect. The crucial date, April 1, 2009, is the day

<sup>76</sup> H.B. 640, 123<sup>rd</sup> Gen. Assem. (OH 2000)(emphasis added).

<sup>77</sup> Notice is posted on Ohio's Division of Unclaimed Funds at <http://www.com.state.oh.us/unfd/>.

<sup>78</sup> Mich. Comp. Laws Serv. § 567.257a (LEXIS through 2013 P.A. 248) (emphasis added).

after the cutoff date of March 31, 2009, for property due on the 2012 Report. This means that B2B property, which has a three year dormancy period, is still due on the 2012 Report even though the B2B exemption became law before the 2012 Report was due on July 1, 2012.

As previously noted, Maryland was the first state to adopt a B2B exemption. Maryland's statute went into effect on June 1, 1998. Even though Maryland's B2B legislation was silent on the application of the exemption, Maryland's Comptroller applied the exemption retroactively. The Comptroller applied the exemption so that it was in effect for any reports due on or after June 1, 1998.<sup>79</sup> Since the 1998 Report for Maryland was not due until October 31, 1998, B2B property was not due on the 1998 Report. Therefore, the last report that B2B property was due on was the 1997 Report, which covered property that became abandoned between July 1, 1996, and June 30, 1997. Because the B2B property had a three year dormancy period, the Comptroller's application reached back and exempted any B2B property issued or created on or after July 1, 1994.

If the legislation is silent and the amendment is to be prospectively applied, States should apply the law in effect on the date the abandonment period ends for each property. For example, if the B2B exemption became the law of a state with a five year dormancy period on July 1, 2013, and the outstanding check was issued by the holder on April 1, 2008, the check would still be due on the November 2013 Report. Even though the B2B exemption went into effect before the 2013 Report was due in November, it was not in effect when the property became abandoned on April 1, 2013, which met the June 30<sup>th</sup> cutoff date for the November 1, 2013 Annual Report.

Practically speaking, any retroactive application of an exemption is the equivalent of a pardon. It rewards the holders who have not properly reported their unclaimed property and are in violation of States' unclaimed property laws.

**States Statistics on B2B Reporting and Claims.** NAUPA recently conducted a poll of the States regarding how much property they received from businesses and paid out to businesses in the last three years. Thirteen states responded with varying degrees of information.<sup>80</sup> Of these states, two, Arizona and Virginia, have enacted B2B exemptions. Interestingly enough, this fact is not readily apparent in their figures.<sup>81</sup> The respondent States all had significant amounts of

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<sup>79</sup> See [http://comptroller.marylandtaxes.com/Public\\_Services/Unclaimed\\_Property/General\\_Information/](http://comptroller.marylandtaxes.com/Public_Services/Unclaimed_Property/General_Information/) (Reporting Requirements, Unclaimed Property Tax Tip # 19).

<sup>80</sup> Some states were unable to capture the information requested. Although the Maryland Comptroller's Office did not respond to the survey, their website has the following link to Unclaimed Property Business Tax Tip # 19: [http://comptroller.marylandtaxes.com/Public\\_Services/Unclaimed\\_Property/General\\_Information/](http://comptroller.marylandtaxes.com/Public_Services/Unclaimed_Property/General_Information/). The tip reads in pertinent part that "[a] substantial proportion of the unclaimed funds belong to businesses. The Comptroller's Office has records on approximately 758,000 accounts, dating back into the 1960s. These accounts are worth more than \$708 million." Maryland exempted B2B property in 1998.

<sup>81</sup> One possibility for this phenomenon is that some holders are unaware of the exemption. A more plausible explanation is that for many holders, it is more expedient to report the property, and eliminate the liability. In the case of Arizona, it may be a matter of holders finding the exemption to be too difficult to understand and apply.

property reported in the name of businesses (either in dollar value or in comparison to the size of program) and all paid significant amounts of business claims. The chart below incorporates the states' responses and summarizes business as a percentage of total reported property and claims. On average, business property constituted 22 percent of all property reported, and 19 percent of the total value of claims paid. The total amount of business property reported for FY 2011 for the respondent states was \$942,511,424, and ***a total of \$432,194,160, or an amount equal to 46 percent of the property reported as owing to businesses in this one year,<sup>82</sup> was returned to businesses named as owners by these same states.*** Averaging the percentage across all states, it is reasonable to conclude that nationwide, unclaimed property reported in the name of a business for FY 2011 was approximately \$1.26 billion, and approximately \$370 million was paid to businesses by States in the form of approved claims.

While some holders may be willing to forego the ability to recover from the States unclaimed property that is owed them in exchange for being relieved of the duty to report property arising from B2B transactions, presumably for such holders there is a net financial benefit from this equation. However, for the multitude of small businesses,<sup>83</sup> which are far more likely to be owed unclaimed property than they are to generate it, retention of B2B property in a revised Uniform Unclaimed Property Act would be beneficial. If it were possible to poll the ***hundreds of thousands*** of businesses who recovered unclaimed property from the States in 2011, it is likely that there would be tremendous appreciation for the State's collection and return of this property (and support for the status quo).

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<sup>82</sup> Because claims to property are not always made or paid in the same year in which the property is reported, some of the claims paid to businesses in 2011 were for property reported in prior years. Regardless of the exact ratio of property reported as owing to business and claims paid by States to businesses, States return a significant percentage of such property, notwithstanding the efforts of holders to attempt to locate the businesses prior to the transfer of property to the States. If the successful reunification efforts of holders through their own "due diligence" was factored in, an even greater percentage of unclaimed property (and tens of millions of dollars in additional assets) could be shown as having been returned to businesses.

<sup>83</sup> As noted *supra*, small businesses are frequently owned by individuals or families. Should these individuals be denied the salutary benefits of the unclaimed property law simply because funds owed them arise in a business-to-business context? While the view of COST on this issue has been made clear, the position of small business is unknown. Ensuring the rights of small business—or, in reality, small business *owners*—to recover the property owed them is consistent with the public interest.

State Statistics on Collected, Returned Business Property							
STATE	B2B exempt?	FY 2010 Business	FY 2011 business	FY 2012 business	FY 2013 business	Total for FY11	% of total FY11 attr to B2B
<b>AZ BUSINESS</b>		Y	FY 2011 business	FY 2012 business	FY 2013 business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)			\$18,248,968	\$20,427,974	\$18,567,775	\$129,171,350	14.13%
Property Received (#)							
Claims Paid (\$)			\$9,701,713	\$4,507,179	\$8,380,504	\$34,667,594	27.98%
Property Paid (#)			6,342	2,502	5,523	14,784	42.90%
<b>CT BUSINESS</b>		N	FY 2010 Business	FY 2011 Business	FY 2012 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$22,456,991	\$15,278,467	\$19,842,832		\$68,000,000	22.47%
Property Received (#)							
Claims Paid (\$)		\$5,074,939	\$11,081,656	\$7,011,581		\$51,900,000	21.35%
Property Paid (#)		5,287	5,717	6,124		17,933	31.88%
<b>FL BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$84,850,000	\$95,940,000	\$59,260,000		\$346,303,034	24.50%
Property Received (#)							
Claims Paid (\$)		\$28,280,000	\$41,230,000	\$49,380,000		\$189,320,000	14.94%
Property Paid (#)		41,409	41,321	67,029		293,627	14.10%
<b>KY BUSINESS</b>		N	FY 2010 Business	FY 2011 Business	FY 2012 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$8,532,758	\$7,016,274	\$8,432,210		\$38,091,504	18.42%
Property Received (#)		25292	23753	23516			
Claims Paid (\$)		\$2,067,806	\$2,137,758	\$3,116,345		\$15,343,528	13.93%
Property Paid (#)		2792	3727	8383		11,332	32.89%
<b>ID BUSINESS</b>		N	FY 2010 Business	FY 2011 Business	FY 2012 Business	FY11 Total	% of total FY11 attr to B2B
Property Reported (\$)		\$3,296,361	\$2,592,573	\$1,855,593		\$9,684,517	26.77%
Property Received (#)		6604	13287	4858			
Claims Paid (\$)		\$504,373	\$162,913	\$558,763		\$3,062,417	5.32%
Property Paid (#)		757	629	915		11,282	5.58%
<b>LA BUSINESS</b>		N	FY 2010 Business	FY 2011 Business	FY 2012 Business	FY11 Total	% of total FY11 attr to B2B
Property Reported (\$)		\$9,865,277	\$14,349,868	\$14,937,495		\$61,214,405	23.44%
Property Received (#)							
Claims Paid (\$)		\$8,428,169	\$10,028,290	\$13,578,714		\$22,631,665	44.31%
Property Paid (#)		13,584	18,666	23,348		19,352	96.46%
<b>ME BUSINESS</b>		N	FY 2010 Business	FY 2011 Business	FY 2012 Business	FY11 Total	% of total FY11 attr to B2B
Property Reported (\$)		\$3,355,906	\$2,779,808	\$2,402,593		\$16,347,526	17.00%
Property Received (#)							
Claims Paid (\$)		\$3,588,852	\$3,214,719	\$3,749,162		\$12,500,000	25.72%
Property Paid (#)		9153	7666	54681		19,352	39.61%
<b>NE BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 Total	% of total FY11 attr to B2B
Property Reported (\$)		\$3,112,654	\$3,634,792	\$3,551,205		\$16,587,309	18.77%
Property Received (#)		7,875	8,272	9,132		103,213	
Claims Paid (\$)		\$1,172,131	\$921,928	\$559,913		\$7,350,963	15.95%
Property Paid (#)		1,480	2,421	3,272		33,051	4.48%
<b>NV BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$31,202,079	\$36,847,388	\$10,212,496		\$114,450,904	27.26%
Property Received (#)							
Claims Paid (\$)		\$6,196,291	\$4,654,399	\$5,267,649		\$32,763,849	18.91%
Property Paid (#)		14,757	11,237	11,673		19,753	74.71%
<b>SD BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$2,907,990	\$5,119,465	\$10,845,829		\$15,624,135	18.61%
Property Received (#)		3102	7100	10577			
Claims Paid (\$)		\$29,851	\$108,807	\$572,054		\$3,666,631	0.81%
Property Paid (#)		123	206	433		2,992	4.11%
<b>VA BUSINESS</b>		Y	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$21,714,865	\$22,738,546	\$19,953,454		\$102,319,923	21.22%
Property Received (#)		48,598	49,400	45,186			
Claims Paid (\$)		\$6,436,696	\$10,722,720	\$8,187,674		\$42,255,750	15.23%
Property Paid (#)		7,395	15,809	13,211		57,402	12.88%
<b>WV BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$5,199,739	\$5,141,000	\$4,287,724		\$19,063,000	27.28%
Property Received (#)							
Claims Paid (\$)		\$3,763,395	\$1,920,217	\$2,887,805		\$14,909,415	25.24%
Property Paid (#)		534	544	586		6,826	7.82%
<b>WY BUSINESS</b>		N	FY 2011 Business	FY 2012 Business	FY 2013 Business	FY11 total	% of total FY11 attr to B2B
Property Reported (\$)		\$688,907	\$559,896	\$822,239		\$5,653,817	12.18%
Property Received (#)							
Claims Paid (\$)		\$110,048	\$158,838	\$159,156		\$1,822,348	6.04%
Property Paid (#)		327	434	330		1,961	16.68%
<b>Totals for all rptg states:</b>		FY2010	FY 2011	FY 2012	FY 2013	FY11 total	% of total FY11 attr to B2B
Property Reported FY11		\$47,507,293	\$209,942,192	\$237,879,784	\$127,500,722	\$942,511,424	22.27%
Property Received (#)		\$31,896	\$96,615	\$93,146	\$64,895		
Claims Paid		\$19,664,139	\$82,315,461	\$92,238,653	\$75,394,755	\$432,194,160	19.05%
Properties Paid		\$31,573	108772	167925	102057	509,647	21.34%