

Who Stole My Bitcoin?! A Look into the Problems Associated with State Custodial Taking of Unclaimed Cryptocurrencies

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ABSTRACT: With states realizing the potential bounty associated with unclaimed cryptocurrency, they are increasingly amending their unclaimed property statutes to allow state administrators to take control of these assets as an untapped source of revenue. However, both states and the Uniform Law Commission have failed to adequately plan for the complicated nature of cryptocurrency, making the implementation of these laws extremely complicated, if not impossible. In this Note, I argue the Revised Uniform Unclaimed Property Act and all relevant state statutes need to be amended to add clarity for state administrators as well as unclaimed property holders and owners. Additionally, states need to improve their technological capabilities to hold these assets and properly dispose of them.

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I. INTRODUCTION

In 2011, the National Association of Unclaimed Property Administrators estimated “more than \$40 billion in unclaimed property” was held collectively by the states.¹ This figure is nearly twice the \$22.8 billion reported in 2003.² States are increasingly taking control of any unclaimed property they can get their hands on—from gift cards, to stocks, to paychecks. Traditionally, an owner who forgot he stored his family jewels in a safe deposit box would soon find them sold and the cash from the sale sitting in the coffers of the state; today, it’s more common to find a shareholder who forgets to claim his dividends for a few years in the same situation.³ Understanding where this system of seemingly unfair laws sprang from and how states have shaped their

1. REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 5 (UNIF. L. COMM’N 2016).

2. *Id.*

3. *See id.* §§ 205, 208.

statutes to allow for such an action is pivotal to how the legal system has become what it is today: states trying to snatch their citizens' Bitcoins.

Unclaimed property laws are the vehicle by which the state takes control of untouched tangible and intangible property as its custodian until the true owner reemerges.⁴ Each state has its own version of these laws, shaped by the various incarnations of the model code written by the Uniform Law Commission. The 2016 Revised Uniform Unclaimed Property Act ("RUUPA") added a new class of assets that states may take control of: "virtual currency."⁵ This includes any "digital representation of value used as a medium of exchange . . . which does not have legal tender status recognized by the United States."⁶ Most importantly for this Note, that definition includes cryptocurrency.⁷

Cryptocurrency was born in 2008 with the invention of Bitcoin, "an open-source, peer-to-peer digital currency."⁸ Using assets like Bitcoin, owners of cryptocurrency can use their coins or tokens to conduct transactions without the need for a third-party intermediary.⁹ Cryptocurrencies present a tempting target for state unclaimed property administrators, despite their volatility. As of December 2020, a single Bitcoin is worth more than \$23,000.¹⁰ The state and model code language directing how states can gain control of this unclaimed cryptocurrency is ambiguous regarding who is required to notify the state of unclaimed property, how the state is expected to deal with the assets once remitted, and even how some cryptocurrency owners are expected to regain their property.

This Note argues that RUUPA is inadequate in its language surrounding virtual currencies and will result in unclear administration by implementing states, which will inevitably lead to complex and contentious litigation. Part II reviews the background and common-law roots of American unclaimed property law as well as the characteristics that make Bitcoin and other cryptocurrencies unique. Part III details the problems that will stem from the ambiguous language of RUUPA's virtual currency provision. Part IV discusses a solution to this problem, including clearer language that relates explicitly

4. *Id.* prefatory note at 1–2.

5. *Id.* § 102(32).

6. *Id.*

7. See Yessi Bello Perez, *The Differences Between Cryptocurrencies, Virtual, and Digital Currencies*, NEXT WEB (Feb. 19, 2019, 9:14 AM), <https://thenextweb.com/hardfork/2019/02/19/the-differences-between-cryptocurrencies-virtual-and-digital-currencies> [<https://perma.cc/GSN3-FQAS>].

8. JERRY BRITO & ANDREA CASTILLO, MERCATUS CTR., BITCOIN: A PRIMER FOR POLICYMAKERS 3 (2013), https://www.mercatus.org/system/files/Brito_BitcoinPrimer_v1.3.pdf [<https://perma.cc/A5AH-XAFL>]; *All Cryptocurrencies*, COINMARKETCAP, <https://www.coinmarketcap.com/all/views/all> [<https://perma.cc/7BRN-C45X>].

9. BRITO & CASTILLO, *supra* note 8, at 3–4.

10. *Bitcoin*, COINDESK, <https://www.coindesk.com/price/bitcoin> [<https://perma.cc/D7Q7-VZQF>].

to cryptocurrency and increased technological capabilities in states who want to include these assets in their unclaimed property law.

II. FROM FEUDAL LAW TO BITCOIN

In the past decade, states have begun to amend their unclaimed property laws to allow the state to take control of unclaimed cryptocurrency.¹¹ These new laws present a high degree of difficulty and uncertainty for practitioners in its application. To understand how this issue came to be, Section II.A will detail the background of America's views toward unclaimed property from its common-law roots to the modern Uniform Unclaimed Property Acts; Section II.B will lay out what cryptocurrency is, where it started, and how it is used today.

A. THE EVOLUTION OF AMERICAN UNCLAIMED PROPERTY LAW

The disposition of unclaimed property has its roots in English common law.¹² However, the modern American approach to unclaimed property has departed from its English feudal law traditions. Today, each state governs how and when such property, real or intangible, is to be taken and used.¹³ To lay a clear picture of the evolution of American unclaimed property law, Section II.A.1 will outline the common-law history of the doctrines of escheat and *bona vacantia*, Section II.A.2 will discuss the American adoption and adaptation of these doctrines, and Section II.A.3 will detail how the Uniform Unclaimed Property Act came to define the American approach to unclaimed property.

1. English Common Law and Early History

The early days of English common law gave birth to two of the original doctrines that made up English unclaimed property law: escheat and *bona vacantia*.¹⁴ Under the doctrine of escheat, the feudal lord—or in his absence, the Crown—would take title to abandoned or otherwise unclaimed *real* property, “based on [his] status as the ultimate owner of all real property.”¹⁵ Similarly, under the doctrine of *bona vacantia*, *personal* property would also transfer to the feudal lord or Crown, but unlike under escheat, the Crown did not take title as the true owner.¹⁶ The title bestowed to the Crown by this

11. See Josh Garcia & Jenny Leung, *Unclaimed Property Laws and Virtual Currency Custodians: Part Two*, KETSAL (July 28, 2020), <https://ketsal.com/blog/unclaimed-property-laws-and-virtual-currency-custodians-part-two> [<https://perma.cc/P3LG-85ZA>].

12. Susan T. Kelly, Note, *Unclaimed Billions: Federal Encroachment on States' Rights in Abandoned Property*, 33 B.C. L. REV. 1037, 1038 (1992).

13. *Id.*

14. Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 KY. L.J. 302, 302–03 (1947).

15. Sean M. Diamond, Comment, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 978 (2011).

16. *Id.*

doctrine was less absolute, as the Crown saw itself as the rightful owner of personalty against all *but* the rightful owner.¹⁷

These doctrines persisted, even being adopted by the newly formed United States of America after the Revolutionary War.¹⁸ States were believed to have inherent power to enact escheat legislation as the sovereign successors to the Crown.¹⁹ The states also took on the powers of *bona vacantia* as part of their police powers.²⁰

2. A Peculiarly American Twist

Early American states rejected the English feudal system of landholding, making the distinctions between escheat and *bona vacantia* wholly unnecessary and thus quickly dissolved.²¹ Accordingly, U.S. law expanded escheat to encompass all unclaimed property, regardless of whether it was real or personal.²² Three Supreme Court decisions illustrate the development of modern escheat laws: *Hamilton v. Brown* (synonymizing escheatment with quieting title),²³ *Cunnius v. Reading School District* (justifying state authority to enact legislation to regulate the property of absentee owners),²⁴ and *Provident Institution for Savings v. Malone* (justifying state escheatment of intangible personal property).²⁵

First, in *Hamilton v. Brown*, the Supreme Court made it clear that states have the right to regulate the succession of property as a function of their sovereignty.²⁶ The case began when a claimed descendant and heir of a deceased landowner sued administrators for the state of Texas, arguing the state did not have the power to escheat and sell the decedent's property.²⁷ The state argued that it had properly published notice of the coming escheatment and adequately handled all claims to the land before escheatment.²⁸ The Court sided with Texas, reasoning that because the state's escheat legislation required sufficient notification to all interested parties, it met the requirements of due process.²⁹ The opinion's arguably most notable

17. See *id.*; Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 WASH. & LEE L. REV. 1429, 1431 (1983).

18. Diamond, *supra* note 15, at 978.

19. 1 DAVID J. EPSTEIN, UNCLAIMED PROPERTY LAW AND REPORTING FORMS § 1.04 (rev. ed. 2020).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Hamilton v. Brown*, 161 U.S. 256, 263 (1896).

24. *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 467 (1905).

25. *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 664 (1911).

26. *Hamilton*, 161 U.S. at 262–63.

27. *Id.* at 257–61.

28. *Id.* at 261–62.

29. *Id.* at 275 (“When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may

contribution to modern property law, however, was its framing of escheatment as simply a way in which to distribute a decedent's estate if he or she dies with no heirs or successors.³⁰ Before *Hamilton*, escheatment was simply the way property reverted back to the state when unclaimed.³¹ Following this decision, escheatment was more synonymous with "quieting title" and deciding ownership—giving the doctrine of escheat "a peculiarly American twist."³²

Second, *Cunnius v. Reading School District* expanded states' rights to enact legislation regarding the disbursement of property of not only deceased owners, but also absentee owners.³³ At issue was a Pennsylvania statute which allowed the administrator of an individual's estate to distribute any property within it if the person had been missing for more than seven years.³⁴ After the plaintiff in the case went missing for nine years, the administrator of her estate, believing her to have died, invoked the Pennsylvania statute to collect debts owed to the plaintiff by the Reading School District in order to close and distribute the assets within estate.³⁵ When *Cunnius* reappeared and found her property had been distributed, she sued the school district to recover the original debt from the school district.³⁶ She claimed the taking was an unconstitutional violation of her due process because "[the law] did not provide for adequate notice" and that Pennsylvania did not have the power to enact legislation that would allow the administration of her property without her knowledge or consent.³⁷

The Supreme Court disagreed, finding that states had "the right to regulate concerning the estate or property of absentees . . . to the end that they may be able to perform the purposes for which government exists."³⁸ And exercising such power was not a violation of due process because the statute was specifically written for the administration of the property of *absentee* owners, thereby giving constructive notice to all citizens of what will happen

provide for promptly ascertaining . . . who has succeeded to his estate. If such proceedings are had, after actual notice . . . and constructive notice by publication . . . the final determination of the right of succession . . . is due process of law . . .").

30. *Id.* at 268 ("[T]he whole object in proceedings for escheat . . . is to ascertain who are entitled to the estate of a deceased person . . .").

31. See EPSTEIN, *supra* note 19, § 1.04.

32. See *id.*

33. *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 477 (1905).

34. *Id.* at 458–59. While *Cunnius* does not itself involve escheat (the administrator of the estate was the one who took title to the absentee's property, not the state), this case has been used in numerous escheat cases as authority on the power of states to dispose of absentee property through proper legislation. EPSTEIN, *supra* note 19, § 1.04.

35. *Cunnius*, 198 U.S. at 461.

36. *Id.*

37. *Id.* at 462.

38. *Id.* at 469.

to their estate should they decide to disappear for seven years or more.³⁹ Furthermore, the seven-year statutory waiting period offered the owner enough time to come forward before their property was distributed.⁴⁰ This opinion would later be used by courts to justify the states' power to take control of absentee owners' property.⁴¹

Lastly, *Provident Institution for Savings v. Malone* has been used by courts to justify escheatment of intangible personal property.⁴² In *Malone*, Massachusetts took claim to deposits in a savings account, untouched for 30 years, invoking a state statute which authorized the treasurer or receiver general to take control of such property if the owner is unknown or unreachable.⁴³ The bank sued, claiming the statute violated due process and "impaired the obligation of contracts."⁴⁴

The Court sided with Massachusetts, finding the statute did not authorize total escheatment, but only empowered the state to become the custodian of the property until the true owner came forward to claim it, effectively granting title to the state against all but the true owner.⁴⁵ This case solidified states' rights to control abandoned personal property as custodians without violating due process.

These three cases shaped modern escheatment law by establishing five key propositions:

- (1) The states were the successors to the English doctrines of escheat and *bona vacantia*;
- (2) Escheat is a valid exercise of the state's power to dictate the disposition of unclaimed or abandoned property;
- (3) States can legislate the escheatment of realty or personalty, whether tangible or intangible;
- (4) Such regulation is not a violation of due process when it dictates a sufficient waiting period and/or provides possible claimants notice of pending escheatment; and
- (5) The states can legislate the regulation of property for someone who died intestate and without heirs *as well as* in situations where an owner either cannot be located or is known and unreachable.⁴⁶

In light of these cases, modern escheatment law is no longer premised upon taking title to abandoned or unclaimed property but is instead more

39. See *id.* at 475–76.

40. *Id.* at 476.

41. See EPSTEIN, *supra* note 19, § 1.04.

42. *Id.*

43. *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 661–62 (1911).

44. *Id.* at 663. The assertion that the Massachusetts statute "impaired the obligation of contracts" was grounded in the bank's contract with the depositor in which it was agreed that no person could access the funds without production of the passbook. *Id.* at 662.

45. *Id.* at 664.

46. McThenia & Epstein, *supra* note 17, at 1431–33.

custodial in nature—holding on to and caring for the property until the true owner comes forward.⁴⁷ Many legal commentators believe modern custodial escheat laws have several advantages over their English ancestors, such as reflecting societal interests in preventing the deterioration of real property and allowing the state to utilize the land until the owner comes forward to retake control and resumes responsibility for using it to society's benefit.⁴⁸ Such laws demonstrate the primary purpose of American unclaimed property laws: to provide a way to keep an absentee owner's property safe until he returns and frees private custodians from further legal obligations associated with its protection and upkeep.⁴⁹ As for personalty, commentators have reduced the rationale for escheatment to the desire to avoid a "windfall[]" by or unjust enrichment of the private custodian whose retention of unclaimed funds or property will allow him to "get 'something for nothing.'"⁵⁰

The state may also take control of property whose owner is unknown, becoming the true owner of the property rather than a mere custodian.⁵¹ Scholars view this process as a function of the secondary purpose of unclaimed property law: "to take, hold, and use for the common good," all property that has been either lost or abandoned by an unknown owner.⁵² Similar to the first purpose, lawmakers believe this policy ensures the state and its citizens receive the benefits of the property rather than the subsequent custodian or finder of the property.⁵³

3. Uniform Unclaimed Property Acts

As states began implementing unclaimed property laws, they naturally began to diverge in their statutory language. This divergence prompted the creation of model unclaimed property legislation to make state law more uniform across the country and bring predictability to this area of law.⁵⁴ Those model codes were the Uniform Disposition of Unclaimed Property Act of 1954, the 1966 revision, the Uniform Unclaimed Property Act of 1995, and the 2016 revision.

By 1954, only ten states had enacted comprehensive escheat legislation.⁵⁵ In order to unify and advance such legislation across the country, the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission ("ULC"), created the Uniform Disposition of Unclaimed Property Act (hereinafter referred to as "the Act") in 1954,

47. Kelly, *supra* note 12, at 1043.

48. Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1331 (1961).

49. *Id.* at 1326–28.

50. David C. Auten, Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95, 101 (1963).

51. See Kelly, *supra* note 12, at 1040.

52. REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 3 (UNIF. L. COMM'N 2016).

53. See *id.*

54. See Diamond, *supra* note 15, at 980; Kelly, *supra* note 12, at 1053–54.

55. 16 POWELL ON REAL PROPERTY § 89.05 (Michael Allan Wolf ed., 2020).

approved by the American Bar Association the same year.⁵⁶ The original version of the Act is still the basis of many state unclaimed property statutes.⁵⁷ The Act describes the circumstances under which various types of property are to be presumed abandoned and establishes a seven-year dormancy period before the state can take custodial ownership of any intangible property.⁵⁸ In 1966, the Commissioners met again to update the Act to address issues that had arisen around the use of travelers' checks and money orders.⁵⁹ Today, ten states still follow this revised version of the Act, known as the Revised Uniform Disposition of Unclaimed Property Act (hereinafter referred to as "the Revised Act").⁶⁰

However, the Revised Act did not address persisting uncertainties with jurisdictional complications for intangible property.⁶¹ In 1965, a year before the Revised Act was released, a dispute arose in the case of *Texas v. New Jersey*, when Texas sought a declaratory judgment from the Supreme Court concerning its right to escheat title of abandoned debts owed by Sun Oil Co., over the claims New Jersey and Pennsylvania, which were also seeking title.⁶² Texas based its argument on the fact that the debts at issue were on the books of two Texas offices or owed to people whose last known addresses were in Texas but who had since been unreachable.⁶³ New Jersey claimed its right to the property was based on the fact that Sun Oil was incorporated in the state.⁶⁴ Pennsylvania based its claim on the fact that the company's main headquarters were located in Pennsylvania.⁶⁵

Later in the litigation, Florida joined the dispute, asserting it had a right to a portion of the property because some of the known creditors had last known addresses in Florida.⁶⁶ The parties proposed four options for how the

56. *Id.*

57. *Id.*; see, e.g., MD. CODE ANN., COM. LAW §§ 17-101 to 17-326 (West 2020) (partially based on 1981 version of the Act).

58. See UNIF. UNCLAIMED PROP. ACT § 2 cmt. (UNIF. L. COMM'N 1981) ("The general dormancy period of the 1966 Uniform Act was 7 years.").

59. POWELL ON REAL PROPERTY, *supra* note 55, § 89.05.

60. See ALA. CODE §§ 35-12-70 to 35-12-96 (2020); 765 ILL. COMP. STAT. ANN. 1026/15-101 to 15-104 (West 2018); IOWA CODE ANN. §§ 556.1-556.30 (West 2014); MINN. STAT. ANN. §§ 345.31-345.60 (West 2020); MISS. CODE ANN. §§ 89-12-1 to 89-12-59 (West 2020); MO. ANN. STAT. §§ 447.500-447.595 (West 2020); NEB. REV. STAT. ANN. §§ 69-1301 to 69-1329 (West 2020); NEV. REV. STAT. ANN. §§ 120A.010-120A.750 (West 2007); OR. REV. STAT. ANN. §§ 98.302-98.436 (West 2020); TENN. CODE ANN. §§ 66-29-101 to 66-29-184 (West 2017). The statutes in Oregon, Nevada, Iowa, Minnesota, and Tennessee are also partially based on the 1981 version of the Act.

61. See EPSTEIN, *supra* note 19, § 2.03.

62. *Texas v. New Jersey*, 379 U.S. 674, 675 (1965).

63. *Id.* The unclaimed property at issue consisted of \$26,461.65 owed to creditors who had never claimed/cashed their checks from Sun Oil. *Id.*

64. *Id.* at 676.

65. *Id.*

66. *Id.* at 677.

governing law could be interpreted: The property would go to: (1) the state in which the corporate custodian had the most contacts; (2) the state where the company was incorporated; (3) the state of the last known address of the owner; or (4) the state of the custodian's principal place of business.⁶⁷

The Supreme Court first reasoned that option number one would result in a highly subjective contacts-based test, requiring heavy case-by-case analysis, and therefore not a suitable option.⁶⁸ Next, it rejected the second option, stating such a rule would give too much weight to such a minor factor as where the company decided to incorporate.⁶⁹ It also rejected the fourth option, finding that it would be "strange" to allow the state to claim the debt simply because the company had its principal place of business there, as the debt is more of a liability than an asset, only becoming an asset once escheated.⁷⁰ Thus, the Court held that the third option was the most feasible, and established the rule that the state of the owners' last known address had jurisdiction over the intangible property.⁷¹ The 1966 Revised Act, however, did not incorporate the *Texas* jurisdictional rule, requiring the Commissioners to revisit the Act only 15 years later.⁷²

In 1981, the Act was largely expanded when the Commissioners drafted the Uniform Unclaimed Property Act ("UUPA").⁷³ Many scholars believe UUPA was rewritten solely to incorporate the Court's ruling in *Texas* and resolve the lingering questions of jurisdiction over unclaimed intangible property.⁷⁴ The prefatory note explicitly states that the Commission recognizes the importance of *Texas* and incorporates its jurisdictional rule.⁷⁵ Other major changes included lowering the requisite inactivity period for most intangible property from seven to five years,⁷⁶ allowing custodial escheatment for shares of stock if the owner has not claimed its dividends,⁷⁷ and instituting more regulation of service charges against unclaimed property so that the charges cannot continue in perpetuity, eventually eliminating the

67. *Id.* at 678–81.

68. *Id.* at 678–79.

69. *Id.* at 679–80.

70. *Id.* at 680.

71. *Id.* at 680–82.

72. *See generally* UNIF. UNCLAIMED PROP. ACT (UNIF. L. COMM'N 1981) (amended 1995) (discussing the importance of clarifying the law and adopting the rule set out in *Texas*). It is unknown why the Revised Act did not incorporate the *Texas* decision into its recommendations.

73. *See generally id.* (incorporating recent developments in the law of unclaimed property into a uniform act in order to encourage uniformity among the states in this area of law).

74. *See, e.g.,* Kelly, *supra* note 12, at 1058 ("Commentators have suggested that the 1981 Act is essentially a revision of the 1954 Act designed to comply with the Supreme Court decision in *Texas v. New Jersey.*"); EPSTEIN, *supra* note 19, § 12.00 (noting the major substantive change in the 1981 Act was to change the jurisdictional test to incorporate *Texas*).

75. UNIF. UNCLAIMED PROP. ACT, prefatory note.

76. *Id.* § 2.

77. *Id.* § 21.

unclaimed property.⁷⁸ UUPA also encouraged states to work together to process and take control of unclaimed property “by authorizing uniform reporting forms and joint agreements between states.”⁷⁹ The Act was amended again in 1995; however, the majority of it remained the same.⁸⁰ The major change in the amendment regarded investment securities in which the owner could not be identified.⁸¹ In cases where an owner’s domicile could not be ascertained, the property would fall under the jurisdiction of the intermediary’s state, not the issuing corporation’s.⁸²

The most recent revision to the Act occurred in 2016 (RUUPA) with expansions of the types of property of which states can take control.⁸³ In its prefatory note, the Commission acknowledged states’ interest in pursuing more intangible unclaimed property as a way to raise state revenue in the face of increased citizen resistance to efforts to increase taxes.⁸⁴ RUUPA clarifies that virtual currency—which includes cryptocurrencies along with other intangible property such as health savings accounts and stored value cards—is subject to custodial taking.⁸⁵

Together, the 1954 Uniform Disposition of Unclaimed Property Act along with its 1966 revision and the 1981 Uniform Unclaimed Property Act with its 2016 revision represent the United States’ view of unclaimed property and how states are to properly dispose of such property, real or intangible.⁸⁶ Today, “[f]orty-four states, the District of Columbia, and the Virgin Islands have enacted” some form of the 1954, 1966, 1981, or 2016 versions of the Act.⁸⁷

4. Administration of the Revised Uniform Unclaimed Property Act

Some of the most critical parts of state unclaimed property legislation are the procedures that dictate how states can go about taking control of

78. *Id.* § 23.

79. Kelly, *supra* note 12, at 1059; UNIF. UNCLAIMED PROP. ACT § 33 cmt.

80. *See generally* UNIF. UNCLAIMED PROP. ACT (UNIF. L. COMM’N 1995) (stating in the prefatory note that “[t]his Act retains the custodial features of the 1954 Act and the 1981 Act”).

81. *Id.* § 2.

82. *Id.* § 4.

83. *See generally* REVISED UNIF. UNCLAIMED PROP. ACT (UNIF. L. COMM’N 2016) (revising the 1995 Act and addressing or “resolv[ing] in one fashion or another most of the preliminary issues identified” with the previous version).

84. *See id.* prefatory note at 5.

85. *See id.* § 102(24)(B)(i).

86. *See generally* UNIF. DISPOSITION OF UNCLAIMED PROP. ACT (UNIF. L. COMM’N 1954); UNIF. DISPOSITION OF UNCLAIMED PROP. ACT (UNIF. L. COMM’N 1966); UNIF. UNCLAIMED PROP. ACT (UNIF. L. COMM’N 1981); REVISED UNIF. UNCLAIMED PROP. ACT (UNIF. L. COMM’N 2016) (representing the United States’ entire scheme for dealing with unclaimed property, real or intangible).

87. *See* EPSTEIN, *supra* note 19, § 1.06. The remaining states, except one, have enacted separate, comprehensive unclaimed property legislation that “requir[es] [the] holders [to] report and deliver . . . [certain] types of [unclaimed] property” to the state. *Id.*

unclaimed property and what to do with it once they have it. RUUPA has carefully outlined these procedures based on what kind of property is at issue.⁸⁸ Each state can make their own determinations of how it may escheat this property, but for simplicity's sake, this Note will only discuss how RUUPA has suggested states go about the process, as most states merely adopt a version of this process with only slight variations.

First, the "holder" of property must establish what kind of property she is in possession of and what kind of dormancy period is associated with the property.⁸⁹ A holder is "a person obligated to hold for the account of, or to deliver to pay to, the owner, property subject to th[e] [act]."⁹⁰ A person becomes a holder when she comes into possession or control of another person's property, which imbues certain responsibilities if the owner does not claim the property within a certain time.⁹¹ The holder of the property must determine how to classify the property according to the statute, which will dictate how long the property must lay unclaimed before it may be escheated.⁹² A typical example of a holder is a bank because they act as a custodian of their customers' money in bank accounts and property in safe deposit boxes. When a person comes to a bank and deposits money into an account, the bank is now responsible as a "holder" under state law and must inform the state if the property is later "unclaimed" after a defined time period has passed.⁹³

After the appropriate dormancy period has elapsed, the holder is required to attempt to contact the owner regarding her property using guidelines set forth in the statute.⁹⁴ The notice requirements dictate that a holder must send two communications to the owner's last known address no less than 60 days before filing a report with the state's unclaimed property administrator.⁹⁵ Section 502 describes that this notice must contain information about the property and the pending report to administrators so the owner has sufficient opportunity to come forward and claim her property before it is turned over to the state.⁹⁶

Once the holder meets the notice requirements, she must then file a report with state administrators.⁹⁷ The report must include information about

88. See generally REVISED UNIF. UNCLAIMED PROP. ACT (creating separate provisions for unclaimed gift cards, contents of safe-deposit boxes, and custodial accounts).

89. See *id.* art. 2.

90. *Id.* § 102(12) (second alteration in original).

91. See *id.* prefatory note at 3-4.

92. See *id.* art. 2.

93. See *id.* § 102 cmt. 1 at 23 ("[W]here a party contractually assumes direct liability to the owner for an obligation and is in possession of the funds associated with such obligation, the assuming party becomes the applicable holder . . .").

94. *Id.* art. 5.

95. *Id.* § 501.

96. *Id.* § 502.

97. *Id.* art. 4.

the property, the period of abandonment, the apparent owner, a certification that the notice requirements were met, and any other information the administrator requires.⁹⁸

After the report is filed, the state may finally take control of the property.⁹⁹ But the state is not yet free and clear—they then have to comply with statutory post-escheatment procedures. RUUPA specifically outlines how each type of property is to be sold or disposed of for use or custody by the state.¹⁰⁰ The owner may then contact the state to regain control and ownership over their property according to the processes set forth in Article 9 of RUUPA.¹⁰¹

5. State Implementation of the Revised Uniform Unclaimed Property Act

As of late 2020, only six states have codified the language in RUUPA, with two more proposals working their way through the legislative process. This Section briefly discusses its implementation in Delaware, Illinois, Colorado, Kentucky, Tennessee, Utah, and its proposal in New York and South Carolina.

First out of the gate was Delaware. It incorporated portions of RUUPA into its unclaimed property statutes in February 2017.¹⁰² Much of Delaware's updated statutes were written to accommodate the state case of *Temple-Inland, Inc. v. Cook*, which found the state's audit practices related to unclaimed property were unconstitutional.¹⁰³ This decision led Delaware to deviate from RUUPA and enact much more specific estimation methodology and audit rules.¹⁰⁴

A close second, Utah enacted its own version of RUUPA in May of 2017.¹⁰⁵ Utah's version of the act is very similar to the original language, but it does not incorporate the change in dormancy period¹⁰⁶ that is included in RUUPA and keeps its original treatment of gift cards as exempt from escheatment.¹⁰⁷ Tennessee followed suit in July of 2017,¹⁰⁸ also retaining its

98. *Id.* § 402.

99. *Id.* art. 6.

100. *Id.* art. 7, 8. Though, as we will see later, the procedures regarding the disposition of virtual currencies is anything but clear. *See infra* Section III.D.

101. REVISED UNIF. UNCLAIMED PROP. ACT art. 9.

102. DEL. CODE ANN. tit. 12, §§ 1101–1190 (West 2020).

103. *See generally* *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527 (D. Del. 2016) (finding Delaware's practice of estimating unclaimed property owed to the state allowed it to escheat vastly more property than it should have, which was a violation of substantive due process).

104. DEL. CODE ANN. tit. 12, §§ 1172, 1176.

105. UTAH CODE ANN. §§ 67-4a-101 to 67-4a-1504 (West 2020).

106. *Id.* § 67-4a-201.

107. *Id.* § 67-4a-102(2g)(c)(vi) (exempting gift cards from the definition of "property" which is escheatable).

108. TENN. CODE ANN. §§ 66-29-101 to 66-29-184 (West 2017).

clear exemption for gift cards and property obtained in a business-to-business relationship.¹⁰⁹

Mostly following suit, but giving the language its own spin, Illinois enacted its version of RUUPA in January 2018.¹¹⁰ In response to Illinois practitioners' negative views of the new Act, lawmakers have introduced a bill to repeal the new RUUPA-like version and reinstate the old version of the state's unclaimed property legislation.¹¹¹

Later that year, Kentucky updated its unclaimed property statutes to reflect the changes in RUUPA in July of 2018.¹¹² Most of the Kentucky act mirrors RUUPA, although Kentucky affirmatively excludes gift cards as long as the cards do not expire or have any post-sale fees.¹¹³ And finally, Colorado passed its version of RUUPA in April 2019, after trying and failing to pass a previous version of RUUPA in 2018.¹¹⁴ Colorado's major departure from the RUUPA language is in its treatment of gift cards and gift certificates.¹¹⁵ While under RUUPA, a holder may be required to report any unclaimed gift cards or gift certificates, if a Colorado holder makes over \$200,000 in annual gross receipts from the sale of the cards, she is required to report and remit any unclaimed gift cards or gift certificates.¹¹⁶

States are continuing to propose amendments to their unclaimed property statutes to incorporate some, if not most, of the provisions in RUUPA.¹¹⁷ This number will likely grow rapidly over the next few years as states begin to unify their unclaimed property legislation and see the above states' revenues increase as they begin to take control of unclaimed virtual currencies. A memorandum in support of New York's amendment to its current unclaimed property statutes—which would include cryptocurrency as escheatable property—explicitly noted that the inclusion of virtual currency

109. *Id.* § 66-29-102(24)(c)(iv) (exempting gift cards from the definition of “property” which is escheatable); *see also* Wilson G. Barmeyer, Mary Jane Wilson-Bilik, Emily A. Bork & John Allen Zumpetta, *Unclaimed Property—What's New for Gift, Payroll, Loyalty and Stored-Value Cards?*, EVERSHEDES SUTHERLAND (Aug. 22, 2019), <https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/223800/Legal-Alert-Unclaimed-property-Whats-new-for-gift-payroll-loyalty-and-stored-value-cards> [https://perma.cc/MSJ9-5VP6].

110. 765 ILL. COMP. STAT. ANN. 1026/15-101 (West 2018).

111. H.B. 321, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). It should be noted that this proposal has not yet passed.

112. KY. REV. STAT. ANN. § 393A (West 2018).

113. *Id.* § 393A.010(11), (24)(d); Barmeyer et al., *supra* note 109.

114. COLO. REV. STAT. ANN. § 38-13-101 (West 2020); S.B. 18-240, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

115. *See* COLO. REV. STAT. ANN. § 38-13-102(11) (West 2020); *id.* cmt.

116. *Id.* § 38-13-219.

117. *See, e.g.*, A.B. 8314, 2019 Assemb., Reg. Sess. (N.Y. 2019); S.B. 524, 123d Gen. Assemb., Reg. Sess. (S.C. 2019).

in their definition of property would likely increase state revenues by \$2 million to \$5 million each year.¹¹⁸

B. A BEGINNER'S GUIDE TO CRYPTOCURRENCY AND BLOCKCHAIN

The rise of cryptocurrencies (also known as virtual currencies) has caused growing pains for the legal community since its emergence in 2009.¹¹⁹ To better understand the legal implications cryptocurrencies pose for unclaimed property law, a basic understanding of what a cryptocurrency is and how it arose is necessary. Section II.B.1 will introduce and define cryptocurrency, Section II.B.2 will detail blockchain and the basics of virtual currencies, Section II.B.3 will explain the cryptocurrency environment, and Section II.B.4 will briefly discuss pending legal battles over cryptocurrency and its regulation.

1. What is Cryptocurrency?

Cryptocurrency is a “digital asset[] recorded on decentralized, public ledgers.”¹²⁰ The currencies are open-sourced and decentralized, meaning there is no overarching body controlling the currency’s value or management and users don’t have to rely on a trusted third party to transact.¹²¹ Cryptocurrencies are tamper-proof and unalterable because of their decentralized and highly secured structure, giving them a level of trustworthiness and anonymity that attract many investors.¹²² The Bitcoin economy itself is substantial,¹²³ with a market capitalization of over \$433 billion as of December 2020.¹²⁴ And as for the general cryptocurrency market, its market capitalization, as of December 2020, is a staggering \$631 billion.¹²⁵

118. Memorandum in Support of Legislation Submitted in Accordance with Assembly Rule II, Sec 1(f) to the N.Y. State Assemb. (2019), https://nyassembly.gov/leg/?bn=A08314&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y&leg_video=1 [<https://perma.cc/77BQ-5NHC>].

119. See generally LAW LIBR. OF CONG., REGULATION OF CRYPTOCURRENCY AROUND THE WORLD (2018), <https://permanet.fdlp.gov/gp094288/cryptocurrency-world-survey.pdf> [<https://perma.cc/E5RZ-YTC4>] (discussing various types of cryptocurrencies and how regulatory bodies around the world have addressed the issues arising from their widespread adoption); see also Bernard Marr, *A Short History of Bitcoin and Crypto Currency Everyone Should Read*, FORBES (Dec. 6, 2017, 12:28 AM), <https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read> [<https://perma.cc/P8RA-GGKF>] (“Bitcoin has existed since 2009 . . .”).

120. Dennis Chu, Note, *Broker-Dealers for Virtual Currency: Regulating Cryptocurrency Wallets and Exchanges*, 118 COLUM. L. REV. 2323, 2326 (2018).

121. Rebecca M. Bratspies, *Cryptocurrency and the Myth of the Trustless Transaction*, 25 MICH. TECH. L. REV. 1, 2 (2018).

122. See *id.*

123. See BRITO & CASTILLO, *supra* note 8, at 1.

124. All Cryptocurrencies, *supra* note 8.

125. *Id.*

2. Blockchain and the Birth of Virtual Currencies

To understand cryptocurrency, one must understand blockchain, a notoriously complicated idea¹²⁶ and the basic foundation for cryptocurrencies.¹²⁷ Blockchain is “a digital database containing information (such as records of financial transactions) that can be simultaneously used and shared within a large[,] decentralized, publicly accessible network.”¹²⁸ The “blocks” are digital information that are then stored on the “chain,” or public database, which connects each block to the next.¹²⁹ Each block is made up of three pieces of information: (1) information about the transaction like date, price, and time; (2) who is part of the transaction, typically the buyer’s username and the seller’s name; and (3) a unique code that distinguishes each transaction so no block on the chain is identical.¹³⁰ Depending on the size of the transaction, each block can potentially store thousands of pieces of information in one place.¹³¹

In order for new blocks to be added to the chain, a few things need to happen. First, a transaction must take place, and the transaction must be verified by a network of computers that confirms the transaction details.¹³² The information is then stored in a block, and the block is given a unique code.¹³³ Once these four elements are met, the block is added to the larger chain and becomes publicly available for viewing.¹³⁴ Nearly all cryptocurrencies follow the same basic pattern when extracted from the blockchain, so Bitcoin is used here to illustrate the process.¹³⁵ Bitcoin is decentralized, meaning there is no intermediary computer network verifying the information in Bitcoin transactions; it relies on the efforts of users to decode and log Bitcoin

126. See Akshay KS, *How Blockchain Technology Seems Complicated but Does Not Have to Be*, AMBCRYPTO (July 17, 2020), <https://eng.ambcrypto.com/how-blockchain-technology-seems-complicated-but-does-not-have-to-be> [<https://perma.cc/R6YW-NXUE>]; Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARV. BUS. REV. (2017), <https://hbr.org/2017/01/the-truth-about-blockchain> [<https://perma.cc/3WF4-HZ9C>].

127. See Iansiti & Lakhani, *supra* note 126.

128. *Blockchain*, MERRIAM-WEBSTER (2020), <https://www.merriam-webster.com/dictionary/blockchain> [<https://perma.cc/8RYP-AUDC>].

129. Luke Conway, *Blockchain Explained*, INVESTOPEDIA (Nov. 17, 2020), <https://www.investopedia.com/terms/b/blockchain.asp> [<https://perma.cc/ZHU8-YKYA>].

130. *Id.*

131. *Id.*

132. *Id.*; see also Edith M., *How Exactly Does Blockchain Work?*, FOREX ACAD. (Dec. 11, 2019), <https://www.forex.academy/how-exactly-does-blockchain-work> [<https://perma.cc/9Y4S-VV95>] (“Verifying means checking if the transaction is as you said it was, in regard[] to the details of the purchase, time, amount, and participants.”).

133. Conway, *supra* note 129.

134. *Id.*

135. Nathan Reiff, *The 10 Most Important Cryptocurrencies Other than Bitcoin*, INVESTOPEDIA (Jan. 8, 2020), <https://www.investopedia.com/tech/most-important-cryptocurrencies-other-than-bitcoin> [<https://perma.cc/R9FB-T3W2>].

transactions.¹³⁶ These efforts are called “mining.”¹³⁷ To gain Bitcoins, miners use highly specialized computers to solve complex math problems that will verify Bitcoin transactions.¹³⁸ Miners look for (or “mine”) a block within the entire chain “that produces a particular pattern when the Bitcoin ‘hash’ algorithm is applied to the data.”¹³⁹ Bitcoin miners are rewarded with new Bitcoins each time they produce this pattern in a block to compensate them for their work, but because there is a finite number of Bitcoins available (21 million), the calculations become increasingly difficult.¹⁴⁰ But mining is only one way to gain Bitcoins.

Another way to get Bitcoins is by purchasing coins on an exchange or by accepting coins as payment for goods or services.¹⁴¹ Bitcoin exchanges—similar to regular securities exchange platforms—match potential Bitcoin buyers with interested sellers.¹⁴² Once an individual has obtained the Bitcoin, she then has to securely store it.

Because Bitcoin is purely digital (and somewhat theoretical), it is stored much differently than traditional currency or even securities.¹⁴³ It is typically stored in “wallets” that keep track of the private “keys” that are used to access your public Bitcoin address.¹⁴⁴ These keys are much like physical keys; without them you cannot access your Bitcoins.¹⁴⁵ However, instead of a physical object, these keys are 256-bit long alphanumeric numbers used to authorize transactions using your Bitcoins.¹⁴⁶ The wallet stores this number securely until the owner is ready to use it.¹⁴⁷

3. Today’s Cryptocurrency Landscape

With that basic understanding of how cryptocurrencies work, we can discuss today’s ever-changing cryptocurrency environment. As of December 2020, there are over 8,100 different cryptocurrencies in existence with a total

136. BRITO & CASTILLO, *supra* note 8, at 5.

137. *Id.*

138. *Id.* at 5–6.

139. *Id.* at 6. Hashing is a highly complicated process that is unnecessary to understand for this Note. For a detailed explanation, see *Block Hashing Algorithm*, BITCOIN WIKI (May 13, 2019, 4:36 PM), https://en.bitcoin.it/wiki/Block_hashing_algorithm [<https://perma.cc/4VT5-R2YB>].

140. Anthony Volastro, *CNBC Explains: How to Mine Bitcoins on Your Own*, CNBC (Jan. 24, 2014, 8:57 AM), <https://www.cnbc.com/2014/01/23/cnbc-explains-how-to-mine-bitcoins-on-your-own.html> [<https://perma.cc/ZG52-4XQX>].

141. *Id.*

142. Jake Frankenfield, *Bitcoin Exchange*, INVESTOPEDIA (July 13, 2020), <https://www.investopedia.com/terms/b/bitcoin-exchange.asp> [<https://perma.cc/9H2P-97QA>].

143. See *Bitcoin Wallets for Beginners: Everything You Need to Know*, COINTELEGRAPH, <https://cointelegraph.com/bitcoin-for-beginners/what-is-bitcoin-wallets> [<https://perma.cc/CP6C-E26A>].

144. *Id.*

145. *Id.*

146. Harsh Agrawal, *Bitcoin Private Keys: Everything You Need to Know*, COINSUTRA (Aug. 12, 2020), <https://coinsutra.com/bitcoin-private-key> [<https://perma.cc/QZ2T-NPNU>].

147. *Id.*

market cap of over \$687.94 billion.¹⁴⁸ Not all of those virtual currencies are significant (or even legitimate), with nearly 90 percent of the market consisting of only the top 20 cryptocurrencies.¹⁴⁹ As of December 2020, the top three cryptocurrencies—Bitcoin, Ethereum, and Tether—are worth a combined market cap of more than \$571.85 billion.¹⁵⁰ The number of Bitcoin owners is highly concentrated, with only a fraction coming within the definition “of long-term, frequent users.”¹⁵¹ The majority of transactions take place on exchanges where investors can buy and sell Bitcoins and other cryptocurrencies as a means of investment, rather than use as a legitimate currency.¹⁵²

4. Current Legal Battlegrounds

Because of cryptocurrencies’ incredible value and complicated nature, they have caused legal professionals a variety of difficulties in the past few years, causing states to enact legislation regulating their use.¹⁵³ Cryptocurrencies “[have] been used to evade taxes, launder money and trade illicit goods” as well as fund a variety of illegal activities on the Dark Web.¹⁵⁴ These questionable uses have caused various agencies, such as the Treasury Department, Commodity Futures Trading Commission, Securities Exchange Commission, and the Internal Revenue Service to implement new regulations to crack down on such use.¹⁵⁵ In 2013, the Treasury’s Financial Crimes Enforcement Network announced their plan to use anti-fraud provisions in the Bank Secrecy Act to investigate and prosecute cryptocurrency exchanges engaged in illegal activity.¹⁵⁶ In January 2017, the operators of a cryptocurrency

148. *All Cryptocurrencies*, *supra* note 8.

149. Matthew Frankel, *How Many Cryptocurrencies Are There?*, MOTLEY FOOL (Mar. 16, 2018, 6:21 AM), <https://www.fool.com/investing/2018/03/16/how-many-cryptocurrencies-are-there.aspx> [<https://perma.cc/3W2Q-NJXV>].

150. *All Cryptocurrencies*, *supra* note 8.

151. See Susan Athey, Ivo Parashkevov, Vishnu Sarukkai & Jing Xia, *Bitcoin Pricing, Adoption, and Usage: Theory and Evidence* 3 (Stanford Univ. Graduate Sch. of Bus., Research Paper No. 16-42, 2016), https://papers.ssrn.com/sol3/papers.cfmabstract_id=2826674 [<https://perma.cc/GVA6-HRVN>].

152. *Id.* at 3–4.

153. See Bratspies, *supra* note 121, at 49–54.

154. *Id.* at 50.

155. Francine McKenna, *Here’s How the U.S. and the World Regulate Bitcoin and Other Cryptocurrencies*, MARKETWATCH (Dec. 28, 2017, 11:19 AM), <https://www.marketwatch.com/story/heres-how-the-us-and-the-world-are-regulating-bitcoin-and-cryptocurrency-2017-12-18> [<https://perma.cc/4SED-6D73>].

156. Bank Secrecy Act, 31 U.S.C. §§ 5311–5332 (2018) (describing how to properly record and report monetary instrument transactions); U.S. DEP’T TREASURY FIN. CRIMES ENFT NETWORK, APPLICATION OF FINCEN’S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013), <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf> [<https://perma.cc/A7MR-WAKE>]; see, e.g., Thomas Carlucci, Megan Curran, Patrick Daugherty, Lisa Noller & Lewis Ziogiannis, *FinCEN Takes Action Against Bitcoin Mixer for*

exchange platform, Coin.mx, pled guilty to charges of money laundering and fraud after illegally processing more than \$10 million in Bitcoin transactions.¹⁵⁷

Comparatively, the IRS and SEC have begun treating cryptocurrencies like securities in their attempts to prevent fraud and abuse.¹⁵⁸ The IRS has specifically issued guidance that it does not recognize Bitcoin as legitimate currency,¹⁵⁹ but it does require investors to claim any gains or losses associated with trading them.¹⁶⁰ In 2017, the IRS won a suit against cryptocurrency exchange platform, Coinbase, requiring the platform to give the IRS the account information of some 14,000 users suspected of tax violations.¹⁶¹

Recently, the SEC has tried to regulate crypto-based exchange-traded funds (“ETFs”) by refusing to approve proposals that raise concerns over valuation and verification.¹⁶² The Commission has also taken action to classify certain virtual currencies as securities¹⁶³ and stop initial coin offerings it sees as illegitimate.¹⁶⁴ However, the SEC has taken few regulatory actions, and it is still unclear how government agencies will continue regulating the cryptocurrency markets.¹⁶⁵

In September 2017, the Commodities Futures Trading Commission (“CFTC”) allowed for futures trading on Bitcoin, with two platforms officially launching Bitcoin futures later that year.¹⁶⁶ The CFTC routinely brings charges against platforms that unlawfully solicit or offer unregistered Bitcoin futures to punish unlawful commodity exchanges that occur off-exchange and those who fail to register properly.¹⁶⁷

Violating the Bank Secrecy Act, JDSUPRA (Oct. 27, 2020), <https://www.jdsupra.com/legalnews/fincen-takes-action-against-bitcoin-38704> [<https://perma.cc/2MJQ-VR39>].

157. See Press Release, U.S. Att’y’s Off., S. Dist. N.Y., Operator of Unlawful Bitcoin Exchange Pleads Guilty in Multimillion-Dollar Money Laundering and Fraud Scheme (Jan. 9, 2017), <https://www.justice.gov/usao-sdny/pr/operator-unlawful-bitcoin-exchange-pleads-guilty-multimillion-dollar-money-laundering> [<https://perma.cc/Q9DZ-2BAZ>].

158. See Bratspies, *supra* note 121, at 52–53.

159. See I.R.S. Notice 2014-21, 2014-1 C.B. 938.

160. See *id.*

161. See *United States v. Coinbase, Inc.*, No. 17-CV-01431-JSC, 2017 WL 5890052, at *8–9 (N.D. Cal. Nov. 28, 2017).

162. See Reuters Staff, *SEC Rejects Nine Proposals for Bitcoin ETFs*, REUTERS (Aug. 22, 2018, 8:26 PM), <https://www.reuters.com/article/us-bitcoin-funds-etfs/sec-rejects-nine-proposals-for-bitcoin-etfs-idUSKCN1L8o2V> [<https://perma.cc/8QU9-gDSE>].

163. See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81,207, at 11 (July 25, 2017).

164. Paul Vigna, *SEC Targets Initial Coin Offering ‘Scam,’* WALL ST. J. (Dec. 4, 2017, 11:51 AM), <https://www.wsj.com/articles/secs-cyber-unit-charges-canadian-firm-with-coin-offering-fraud-1512400168> [<https://perma.cc/UJ7S-PMKX>]. For an in-depth look at Initial Coin Offerings and the legal issues associated, see *Spotlight on Initial Coin Offerings (ICOs)*, U.S. SEC. & EXCH. COMM’N (Jan. 7, 2020), <https://www.sec.gov/ICO> [<https://perma.cc/J3YH-54BE>].

165. Bratspies, *supra* note 121, at 54.

166. *Id.* at 53.

167. *Id.*

III. A LIMITED UNDERSTANDING LEADS TO AMBIGUITY

Unclaimed property has long been a source of substantial revenue for states, and it continues to grow year to year.¹⁶⁸ Some legal commentators consider it the fastest growing source of state revenue.¹⁶⁹

The ULC, in its prefatory note to RUUPA, wrote that “states . . . held more than [an estimated] \$40 billion in unclaimed property, a figure nearly double the figure of \$22.8 billion . . . in 2003.”¹⁷⁰ Now, states are eyeing unclaimed cryptocurrencies as the next potentially lucrative source of revenue, given its growing value and the sheer number of unclaimed cryptocurrencies in the market.¹⁷¹ Section III.A discusses possible interpretations of the 2016 RUUPA as it relates to the “virtual currency” provision and how states that have enacted RUUPA language have approached it. Sections III.B–E examine issues states will undoubtedly face as they begin to implement the new version of the Act, such as cryptocurrency classification problems, difficulty identifying “holders” of the property for reporting purposes, and logistical issues surrounding the use of the currency, such as how the state is supposed to control the property and how an owner is expected to make claim to get her property back. Section III.F analyzes the few cases that are centered on this issue and how the courts have grappled with these concerns.

A. REVISED UNIFORM UNCLAIMED PROPERTY ACT INTERPRETATION

First up for discussion is the statutory language of RUUPA. The definition of virtual currencies in section 102(32) is ambiguous and may lead to conflicting interpretations over what states are allowed to take and what they may do with the property once they have control over it. Unlike its predecessors, RUUPA includes “virtual currencies” as a type of property states may escheat.¹⁷² In section 102(32), virtual currency is defined as “a digital representation of value used as a medium of exchange, unit of account, or store of value, which does not have legal tender status recognized by the United States.”¹⁷³ The Act gives states the ability to exclude gift cards, game-

168. REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 5–6 (UNIF. L. COMM’N 2016) (“For some states unclaimed property has become money available to make up revenue shortfalls. . . . [and] some state courts have agreed with states that they have the right to enforce unclaimed property claims as a means of augmenting state revenues.”).

169. See, e.g., TRACEY L. REID, UNCLAIMED PROPERTY: A REPORTING PROCESS AND AUDIT SURVIVAL GUIDE 4 (2008) (stating state revenue from unclaimed property is increasing 20 percent per year).

170. REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 5.

171. See Wilson Barmeyer, Tony Ficarrotta, Alexander F.L. Sand & Mary Jane Wilson-Bilik, *Block and Tackle—Unclaimed Property and Cryptocurrency*, JDSUPRA (May 16, 2018), <https://www.jdsupra.com/legalnews/block-and-tackle-unclaimed-property-and-71460> [<https://perma.cc/KCS7-23FH>].

172. REVISED UNIF. UNCLAIMED PROP. ACT § 102(32).

173. *Id.*

related digital content, and any software governing the transfer of digital currency from this definition.¹⁷⁴ But unfortunately, it doesn't explicitly include or exclude cryptocurrencies.¹⁷⁵

While the definition of virtual currency may seem clear enough, its simplicity could lead to troublesome interpretations because it does not account for the unique complexity of cryptocurrencies, should a state decide they fit under the "virtual currency" umbrella. For example, does cryptocurrency fit under the definition of virtual currency, or is it excludable as a gift card (for those states that choose to exclude them)? According to the Code of Federal Regulations, a "gift certificate" can be any device through which the owner can redeem digital value for goods or services but that is not redeemable for cash.¹⁷⁶

Since many private cryptocurrencies are accessed by a code and only redeemable for goods or services rather than cash,¹⁷⁷ this may lead to potential litigation over whether cryptocurrency stored this way is merely a "gift card" and is therefore not escheatable, or if it is considered virtual currency generally because the value being exchanged is cryptocurrency, and is therefore escheatable.¹⁷⁸ It is clear that the ULC was still unsure on the correct definition of a virtual currency during the drafting of RUUPA, explaining "[t]he definition . . . of virtual currency is adapted from the current draft of the Uniform Regulation of Virtual Currency Act (URVCA). The drafting committee of that Act has not yet settled on a definition of 'virtual currency.'"¹⁷⁹ It is unclear why the RUUPA drafting committee would rely on a definition that another drafting committee had not yet settled on.¹⁸⁰ The URVCA was published in 2017, after RUUPA, and contains a more comprehensive definition of what fits under the "virtual currency" umbrella.¹⁸¹ States could implement the clear delineations in their versions of

174. *See id.*

175. *See* Kendall L. Houghton, John L. Coalson, Jr. & Kathleen S. Cornett, *INSIGHT: Cryptocurrencies and Unclaimed Property—Into the 'Virtual' Unknown*, BLOOMBERG TAX (Feb. 8, 2019, 6:00 AM), <https://news.bloombergtax.com/daily-tax-report-state/insight-cryptocurrencies-and-unclaimed-property-into-the-virtual-unknown> [<https://perma.cc/X6DT-N6gB>].

176. *See* 12 C.F.R. § 1005.20(a)(1) (2020).

177. RYAN LEOPOLD & PASCAL VOLLMANN, PWC, *IN DEPTH: A LOOK AT CURRENT FINANCIAL REPORTING ISSUES 7* (2019) ("Crypto tokens are issued not as a general-purpose medium of exchange, but to provide holders with other rights, including rights to goods or services or certain underlying physical assets.").

178. *See* Houghton et al., *supra* note 175.

179. REVISED UNIF. UNCLAIMED PROP. ACT § 102 cmt.; *see* UNIF. REGUL. OF VIRTUAL-CURRENCY BUS. ACT § 102(23) (UNIF. L. COMM'N 2017).

180. *See* REVISED UNIF. UNCLAIMED PROP. ACT § 102 cmt. (stating only "that the two definitions should be harmonized").

181. UNIF. REGUL. OF VIRTUAL-CURRENCY BUS. ACT § 102(23) ("Virtual currency": (A) means a digital representation of value that: (i) is used as a medium of exchange, unit of account, or store of value; and (ii) is not legal tender . . . and (B) does not include: (i) a transaction in which a merchant grants, as part of an affinity or rewards program, value that cannot be taken from or

the Act to resolve the ambiguities in the RUUPA definition, but no states have done this, instead relying exclusively on the vague RUUPA language.¹⁸²

If a state does end up gaining control of a card loaded with cryptocurrency, RUUPA is equally unclear on what exactly they do with it. Practitioners believe the issue will lead to litigation over whether a state who escheats a “gift card” loaded with cryptocurrency has the right to demand the retailer or service provider to cash out the cryptocurrency and remit the cash value, or whether states only have the same rights as the property owner.¹⁸³

If the latter, states will not be able to gain the cash value of the card because the owner typically only has the right to redeem the value for goods or services at that retailer.¹⁸⁴ The state would then be left holding a card loaded with non-legal tender.

These ambiguities and competing interpretations seem to reflect an incomplete understanding of cryptocurrencies. If the drafting committee had carefully included language that specifically stated where cryptocurrencies fit into RUUPA and what the procedures for remitted cryptocurrencies are, as they do with almost every other type of property, they could have avoided these difficulties.

B. CRYPTOCURRENCY CLASSIFICATION PROBLEMS

If a state has determined that cryptocurrencies do in fact fall under the “virtual currency” umbrella, it must then decide where such property fits within the Article 2 “Presumption of Abandonment” procedures, which include specific dormancy periods for each type of property. Determining the correct dormancy period for cryptocurrencies is likely going to be an issue for states because they won’t know what kind of property to classify the asset as. Under the vague definition of RUUPA, cryptocurrencies can be classified as a security, commodity, or gift card, based on what aspects of the asset the state focuses on.

The holder¹⁸⁵ of unclaimed property is required to wait a certain amount of time before remitting the property to the state, depending on what type of asset the property is.¹⁸⁶ For example, an insurance company that owes a

exchanged with the merchant for legal tender . . . or (ii) a digital representation of value issued by or on behalf of a publisher and used solely within an online game . . .”). The URVCA also specifically mentions cryptocurrencies in a section of its prefatory note entitled “What is Virtual Currency and How is it Used?,” explaining “[v]irtual currencies are a subset of cryptocurrencies. As media of exchange, they offer a communications technology that facilitates peer-to-peer . . . transactions that is the equivalent of paying cash . . .” *Id.* prefatory note at 4.

182. See *supra* notes 102–17 and accompanying text.

183. See Barmeyer et al., *supra* note 109. The idea that the state only has the same rights to property as those of the original owner is known as the derivative rights doctrine. See Diamond, *supra* note 15, at 985–86.

184. See Diamond, *supra* note 15, at 985–86.

185. See *infra* Section III.C for a discussion of who qualifies as a “holder.”

186. See REVISED UNIF. UNCLAIMED PROP. ACT § 201 (UNIF. L. COMM’N 2016).

certain amount of money on a life insurance policy must only wait three years before reporting it as unclaimed, whereas the holder of an unclaimed traveler's check must wait 15 years after its issuance before reporting.¹⁸⁷ This period is determined by classifying the property according to RUUPA section 201.¹⁸⁸

Unfortunately for cryptocurrency holders, the Act fails to define what type of property virtual currency is.¹⁸⁹ State unclaimed property administrators will need to decide whether to treat the property as a security, commodity, currency, or gift card, as each type comes with its own rules and dormancy periods for the holders.¹⁹⁰ The penalty for a holder failing to report unclaimed property within the statutory time limit is severe, becoming subject to an examination by the state of all the holder's records and possibly incurring personal liability for the mistake.¹⁹¹ Because this dormancy period determination is so important, holders need to understand what kind of property they are in control of.

The first possibility for cryptocurrency classification is as a security. Administrators or holders may find that because a cryptocurrency was bought for cash on a widely used exchange platform with the expectation of a return on investment, it is most like a security.¹⁹² Similarly, cryptocurrencies that were created by organizations hoping to raise capital (in what is known as an initial coin offering) can easily fall under the SEC's definition of an investment contract and therefore may be considered a security.¹⁹³ The dormancy period for unclaimed securities is only three years after notification.¹⁹⁴

However, the SEC has recently cautioned against the blanket interpretation of typical cryptocurrencies as a type of security.¹⁹⁵ In a congressional hearing in February 2018, the SEC Chairman stated that cryptocurrencies, like Bitcoin, that are pure mediums of exchange will not be considered securities,

187. *Id.* § 201(1), (7).

188. *Id.* § 201.

189. *See id.* § 102(32).

190. *See id.*

191. *Id.* § 1012.

192. *See* Allen Kogan, Comment, *Not All Virtual Currencies Are Created Equal: Regulatory Guidance in the Aftermath of CFTC v. McDonnell*, 8 AM. U. BUS. L. REV. 199, 233 (2019).

193. *See* Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, U.S. SEC. & EXCH. COMM'N (Dec. 11, 2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> [<https://perma.cc/64P4-DRK9>] ("By and large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities and directly implicate the securities registration requirements and other investor protection provisions of our federal securities laws."); *Spotlight on Initial Coin Offerings (ICOs)*, *supra* note 164. *See also generally* SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (defining the elements of an investment contract).

194. REVISED UNIF. UNCLAIMED PROP. ACT § 208.

195. *See Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 4-5 (2018) (statement of Jay Clayton, Chairman, United States Securities and Exchange Commission).

but coins sold by organizations to finance projects (initial coin offerings) will likely be considered securities.¹⁹⁶ This makes classifying cryptocurrencies as securities complicated, as the holder will have to determine whether the asset she is dealing with is a pure medium of exchange or obtained through an initial coin offering or something similar.

Second, some commentators have likened cryptocurrency to a type of commodity.¹⁹⁷ Some cryptocurrencies, such as Bitcoin, are obtained by “mining,” and the number of items in existence is finite.¹⁹⁸ As a result, these cryptocurrencies begin to look strikingly similar to commodities, which are assigned a value by the market and can be bought and sold as simply items of value.¹⁹⁹ If treated as commodities, unclaimed cryptocurrencies would likely have a dormancy period of three years.²⁰⁰

Lastly, the currency may be classified as a gift card or stored value card, which many states have excluded under RUUPA’s definition of “virtual currency.”²⁰¹ A gift card is typically a card, physical or digital, “that has been pre-loaded [with] a certain dollar amount.”²⁰² Gift cards are usually “closed-loop,” meaning “that [they] can only be redeemed by a specific retailer.”²⁰³ These cards cannot be redeemed for cash, only goods or services.²⁰⁴ Stored value cards are “open-loop” cards, meaning they can be used at any retailer who accepts them, once they have been loaded with a dollar amount.²⁰⁵ The

196. *Id.* at 5.

197. *See generally* JAN A. BERGSTRA & PETER WEIJLAND, INFORMATICS INST., UNIV. OF AMSTERDAM, BITCOIN: A MONEY-LIKE INFORMATIONAL COMMODITY (2014), <https://arxiv.org/pdf/1402.4778.pdf> [<https://perma.cc/J5NU-4E2P>] (classifying bitcoin as a “money-like informational commodity”); George Selgin, *Synthetic Commodity Money*, 17 J. FIN. STABILITY 92 (2015) (proposing a third type of “synthetic commodity” money which bears some resemblance to traditional commodity and fiat monies by having no monetary value yet is “absolutely scarce”); *Commodity Futures Trading Comm’n v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (finding the Commodities Futures Trading Commission can regulate cryptocurrency because such assets are “commodities” under the common definition and the Commodities Enforcement Act).

198. *See* Jason Evangelho, *Mining 101: An Introduction to Cryptocurrency Mining*, FORBES (Mar. 13, 2018, 4:24 PM), <https://www.forbes.com/sites/jasonevangelho/2018/03/13/mining-101-what-exactly-is-cryptocurrency-mining> [<https://perma.cc/BA3A-QTPZ>].

199. *See* Selgin, *supra* note 197, at 19–23.

200. REVISED UNIF. UNCLAIMED PROP. ACT § 201(13) (UNIF. L. COMM’N 2016).

201. *See id.* § 102(32); Edward Bernert et al., Am. Bar Ass’n Section of Tax’n, State & Loc. Taxes Comm., *An Examination of Unclaimed Property Laws After the Adoption of RUUPA: Suggestions for Continued Advancement*, 71 TAX LAW. 941, 951–52 (2018).

202. *See* Bernert et al., *supra* note 201, at 951.

203. *Id.*

204. *Id.*

205. FDIC, CREDIT CARDS, CHARGE CARDS, DEBIT CARDS, AND STORED VALUE CARDS—ACCESSIBLE VERSION 2, https://moneysmartcbi.fdic.gov/Lessons/08/courses/08/pdfs/credit_and_other_cards.pdf [<https://perma.cc/55XV-5GRP>].

typical example is a pre-loaded Visa or American Express card.²⁰⁶ A number of companies now allow Bitcoin and other cryptocurrency owners to purchase stored value or gift cards loaded with their cryptocurrencies for easy use,²⁰⁷ meaning these cryptocurrencies could actually fall under the “gift card” or “stored value” card provisions of sections 206 and 207 of RUUPA.²⁰⁸ Some commentators believe a *majority* of cryptocurrencies on the market actually fall under one of these two umbrellas.²⁰⁹ If the holder determines a cryptocurrency should be classified as one of these two types, she will have to wait either five years for gift cards or three years for a stored value card before remitting.²¹⁰ But it can be even more complicated if the holder is dealing with a state that excludes these cards altogether.²¹¹ A further problem for unclaimed property administrators is the fact that some states exempt gift cards altogether from their lists of escheatable property.²¹² State statutes are not clear as to when a cryptocurrency is or is not a stored value or gift card, which does not give state administrators or holders clarity on whether the property is exempt from escheatment or not.²¹³ If states exempt these types of property from escheatment, and do not expressly exempt cards with cryptocurrency from the gift card exemption, a large percentage of cryptocurrency will be beyond the state’s reach.

Determining the statutorily required dormancy period for unclaimed property is key for holders because there are serious and very real consequences for failing to report unclaimed property within the correct time period.²¹⁴ The state has the right to conduct an audit of any holder with unclaimed property obligations, but it typically will only audit holders it has reason to believe have not reported unclaimed property.²¹⁵ If the state finds unremitted property in the holder’s possession, the holder will be required to turn over the property

206. *Cf. id.* (this Note analogizing Visa or American Express cards to the propositions stated in the FDIC report).

207. *See, e.g.*, CRYPTO VOUCHER, <https://cryptovoucher.io> [<https://perma.cc/3XV9-SY3V>]; MYBITCARDS.COM, <https://www.mybitcards.com> [<https://perma.cc/S7BB-SHNN>]; COINCOLA, <https://www.coincola.com/buy-bitcoin/gift-cards> [<https://perma.cc/LKQ8-6PKC>].

208. REVISED UNIF. UNCLAIMED PROP. ACT §§ 206–207 (UNIF. L. COMM’N 2016); *see* Houghton et al., *supra* note 175 (questioning how state administrators should treat unclaimed cards that are pre-loaded with cryptocurrencies).

209. *See* Houghton et al., *supra* note 175 (“There is the real possibility that many—perhaps most—cryptocurrencies could fall under a broad definition of gift certificates or gift cards.”).

210. REVISED UNIF. UNCLAIMED PROP. ACT §§ 206–207.

211. *Id.* § 102 cmt.

212. *See, e.g.*, UTAH CODE ANN. § 67-4a-102(16)(a) (West 2019); KY. REV. STAT. ANN. § 393A.010(11), (24) (d) (West 2018); TENN. CODE ANN. § 66-29-102(9) (West 2019).

213. *See supra* notes 176–83.

214. *See* T. Conrad Bower, Note, *Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court’s Interstate Escheat Framework*, 74 OHIO ST. L.J. 515, 533–34 (2013) (discussing the effect of dormancy periods).

215. REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 4.

to the state and will likely incur penalties and interest.²¹⁶ The 2016 revision of the Act now explicitly allows states to contract with outside firms to conduct audits of the records of holders on a contingency-fee basis to ensure compliance with reporting requirements, giving firms an incentive of receiving ten to 15 percent of all unreported unclaimed property.²¹⁷ The use of these firms is highly controversial, as it incentivizes the auditing firms to resolve reporting disputes in favor of the state and increases the number of audits the state can conduct.²¹⁸

A holder who is found to have violated the reporting requirements may be found personally liable and pay penalties of up to \$25,000 (however, states could decide to impose higher penalties) “plus [25] percent of the . . . value of [the] property.”²¹⁹ Such high penalties show why calculating the correct dormancy period for unclaimed property is crucial. Without the clarity of what *kind* of property cryptocurrency is, holders and state administrators are going to have increasing difficulty with RUUPA. Plus, with the increased likelihood of an audit with a negative outcome, holders have a lot on the line.

C. WHO IS THE “HOLDER” OF CRYPTOCURRENCY?

The next piece of ambiguity surrounds just who qualifies as a holder, responsible for calculating the dormancy periods described above. Under RUUPA, a holder is someone who is currently in possession of unclaimed property and therefore required to report it to the state.²²⁰ However, identifying the holder or entity with custody over a purely virtual item like cryptocurrency is not a simple task. A “holder” of a cryptocurrency could be the exchange platform through which the virtual currency can be accessed, or the digital wallet that holds the access key, or perhaps there is no holder at all in the case of cryptocurrencies that have been mined directly from the blockchain.²²¹ Identifying the correct holder is crucial to the state’s ability to identify who is required to notify it of the unclaimed property.

216. *Id.*

217. *Id.* prefatory note at 6.

218. *See id.* prefatory note at 7. This practice of allowing private firms to receive considerable monetary gain from such a practice has raised some due process concerns since the firm has such a high stake in the outcome. It has led to “egregious estimation” and projection methods used to determine if property has not been properly reported, which at times has led to property being improperly escheated. Bernert et al., *supra* note 201, at 968–70; *see* Plains All Am. Pipeline L.P. v. Cook, 866 F.3d 534, 545 (3d Cir. 2017) (finding the appointment of a contingent-fee auditor to assess possible unreported unclaimed property presented a valid due process issue); Bower, *supra* note 214, at 534–37 (“The rise of contingent-fee auditing represents perhaps the most significant threat to holders of unclaimed property obligations and has been the conduit through which states have brought these [holders] into compliance with the law.”).

219. REVISED UNIF. UNCLAIMED PROP. ACT §§ 1104(a)(2), 1201(a), 1204, 1205.

220. *See id.* § 102(12).

221. *See* Brooke E. Condran, Marc J. Musyl & Steven M. Felsenstein, *Cryptocurrencies and Unclaimed Property: Potential Implications of State Escheat Laws for the Blockchain Technology Industry*, GREENBERG TRAURIG (June 24, 2019), <https://www.gtllaw.com/en/insights/2019/6/crypto>

To be sure, some determinations will be easier than others. For example, it is relatively simple to identify the holder of cryptocurrencies which are stored on an exchange platform such as Binance or Coinbase Pro.²²² A cryptocurrency exchange is an online platform that allows users to “exchange one kind of digital asset for another based on the market value of the given assets.”²²³ Like online securities brokers, cryptocurrencies are stored on the platform’s database and accessed from there, so the holder will naturally be the platform’s owner.

Things become more complicated the moment the owner of the cryptocurrency takes it off the exchange platform and stores it in a digital wallet. A wallet in this sense is an online service that allows cryptocurrency owners to store the public and private keys that they use to access their digital currency.²²⁴ In the case of digital wallets, cryptocurrency itself is not stored on its platform, the only thing stored there is the access code or key used to gain access to the cryptocurrency, which can then be used or traded.²²⁵

There are two types of wallets—non-custodial and custodial.²²⁶ In the case of a custodial wallet, the owner does not control her private key directly.²²⁷ The company does that for her, which means the holder will likely be the wallet company because it has control over and access to the asset.²²⁸ But in the case of non-custodial wallets, the owner of the cryptocurrency is in full control of the private key, and the company operating the wallet does not have access to that information.²²⁹ As a result, there is no “holder” in a non-custodial wallet relationship, because according to the language of RUUPA,

currencies-and-unclaimed-property-potential-implications-of-state-escheat-laws [https://perma.cc/STX9-WM7F] (“One factor that may become increasingly complicated is whether there is even a ‘holder’ of some cryptocurrencies.”).

222. See *What Are Cryptocurrency Exchanges?*, ETHOS, <https://www.ethos.io/what-are-cryptocurrency-exchanges> [https://perma.cc/49ST-A9MD]. See generally BINANCE, <https://www.binance.com/en> [https://perma.cc/EA68-JRWA] (offering a virtual platform to trade cryptocurrency); COINBASE PRO, <https://pro.coinbase.com> [https://perma.cc/Q88F-QE4J] (advertising on the home page as a platform for cryptocurrency trading).

223. *What Are Cryptocurrency Exchanges?*, *supra* note 222; see TTM Agency, *Crypto Exchanges—The Good, the Bad, and the Ugly*, MEDIUM (Sept. 26, 2018), <https://medium.com/ttm-group/crypto-exchanges-the-good-the-bad-and-the-ugly-f1f997e61502> [https://perma.cc/X8RJ-3AU5].

224. For a discussion of wallets, see *supra* notes 143–47 and accompanying text; Ameer Rosic, *Cryptocurrency Wallet Guide: A Step-By-Step Tutorial*, BLOCKGEEKS, <https://blockgeeks.com/guides/cryptocurrency-wallet-guide> [https://perma.cc/A6VS-NYRD].

225. See Rosic, *supra* note 224.

226. See *What is a Cryptocurrency Wallet?*, CRYPTOCURRENCY FACTS, <https://cryptocurrencyfacts.com/what-is-a-cryptocurrency-wallet> [https://perma.cc/YWX2-N4TK].

227. *Id.*

228. See *id.*

229. See *id.*

if the wallet is not in control of the cryptocurrency itself, the wallet is not required to report any unclaimed cryptocurrency to the state.²³⁰

In the case of cryptocurrency obtained by miners, there is also no holder. Since the cryptocurrency is held on a decentralized blockchain, no overarching entity or person has access to or control over it.²³¹ This necessarily means there is no party who has possession of the unclaimed property and no one is therefore responsible for reporting the unclaimed property to the state, frustrating the ability of state administrators to gain control of the cryptocurrency.

Without clear guidelines on who serves as the holder of unclaimed cryptocurrencies, it will be nearly impossible for the state to gain control of these assets. Without any holder to be made responsible to report the unclaimed property, the state will have no way of knowing when cryptocurrencies are unclaimed, whether the dormancy period has been met, or who the original cryptocurrency owner is and whether they have been notified.

D. STATE INABILITY TO HOLD OR DISPOSE OF CRYPTOCURRENCY

The next wrinkle is possibly the most striking and ill-considered—states are unprepared and likely wholly incapable of holding or controlling remitted cryptocurrencies because they currently do not have the technological capacity to hold such assets or even accept their transfer.²³² The only viable option that does not require a complete (and likely expensive) technological overhaul for states is for each state to require holders to liquidate the unclaimed cryptocurrency and merely transfer the dollar value to the administrator.²³³

However, this solution does not assuage the concerns of the holder, who may be held liable to the owner for liquidating their virtual asset. Additionally, if the state refuses to indemnify the holder, it may lead to holders who want to follow the law, but do not report the unclaimed property for fear of possibly more severe personal liability to the owner.²³⁴

230. See REVISED UNIF. UNCLAIMED PROP. ACT § 102(12) (UNIF. L. COMM'N 2016).

231. See Houghton et al., *supra* note 175 (“[P]resumably[,] bitcoins recently mined by an individual have no holder. The record of the miner’s bitcoins is stored in the decentralized block chain; no bank, exchange, or online platform has access to the bitcoins or is storing the bitcoins on the miner’s behalf.”).

232. See Barmeyer et al., *supra* note 171 (stating because states are not equipped to accept cryptocurrency transfers, they have two options—require the holder to liquidate the asset or create a state-run cryptocurrency exchange or wallet); Condran et al., *supra* note 221 (“[S]tate unclaimed property administrators may not be technologically equipped to accept and hold cryptocurrencies on behalf of owners, which could make an in-kind transfer impossible.”); Houghton et al., *supra* note 175 (“[M]ost states’ unclaimed property departments do not have the ability to receive cryptocurrencies.”).

233. See Barmeyer et al., *supra* note 171 (stating administrators might try to justify requiring holders to liquidate the cryptocurrency based on the current practice of liquidating unclaimed securities immediately upon receipt).

234. *Id.*

Holders will likely try to fight an order from the state using section 702 of RUUPA, which specifies that only the state administrator is allowed to dispose of a security on the open market, making it improper for the holder to do so.²³⁵ Effectively, under RUUPA, there seems to be no statutory requirement for a holder to dispose of the property *for* the administrator at all.²³⁶ Attempting to order the holder to liquidate cryptocurrencies may cut against the state's own statute and be impossible in application.

Further, if a state itself were to liquidate cryptocurrency, it would likely invite fervent litigation from owners with claims of negligent escheatment or unlawful taking.²³⁷ If the owner of a liquidated cryptocurrency comes to the state to reclaim her escheated assets only to receive its cash value at the time of liquidation, the owner could potentially have lost out on thousands of dollars' worth of appreciated value.²³⁸ This result would work directly against the purported purpose of unclaimed property laws—to prevent property from falling into decay and acting as a responsible guardian until the owner comes forward.²³⁹ The state will have to fight claims by owners who assert that the state's arguably negligent cashing out of their cryptocurrency directly caused their property to lose significant value.

Another reason liquidating “unclaimed” cryptocurrency will invite litigation is because as an investment strategy, investors often purposely accumulate cryptocurrency and leave it untouched for a lengthy period of time, a strategy which is wholly usurped by escheatment.²⁴⁰ These cryptocurrency owners ascribe to the “HODL” model of crypto-ownership—that owners will purchase Bitcoin or other cryptocurrencies and then leave them alone, expecting their value to surge.²⁴¹ Even more intense cryptocurrency investors believe their cryptocurrencies will eventually replace all government-issued currency.²⁴² Based on this belief, these investors often buy cryptocurrencies with the intent to let them sit, believing that when the inevitable day comes,

235. REVISED UNIF. UNCLAIMED PROP. ACT § 702.

236. *See id.* §§ 603, 702.

237. *See* Condran et al., *supra* note 221 (“Liquidation may also invite litigation against holders for negligent escheat, or against the states for unlawful takings.”).

238. *See id.*

239. *See* REVISED UNIF. UNCLAIMED PROP. ACT, prefatory note at 3.

240. *See* Bruno Aziza, *Should You Invest in Crypto Now?!*, FORBES (Sept. 9, 2019, 12:30 AM), <https://www.forbes.com/sites/ciocentral/2019/09/09/should-you-invest-in-crypto-now> [<https://perma.cc/RZQ9-3JHQ>] (“Investing in crypto requires a different belief system [;] . . . ‘crypto isn’t an investment, it’s a belief system.” (citing DAN CONWAY, CONFESSIONS OF A CRYPTO MILLIONAIRE: MY UNLIKELY ESCAPE FROM CORPORATE AMERICA 211 (2019))).

241. *See* Jake Frankenfield, *HODL*, INVESTOPEdia (June 30, 2020), <https://www.investopedia.com/terms/h/hodl.asp> [<https://perma.cc/28QY-RKBM>].

242. *See* Lucy Ingham, *Cryptocurrency May Replace Cash Within a Decade, Says Deutsche Bank*, VERDICT (Dec. 9, 2019, 9:56 AM), <https://www.verdict.co.uk/cryptocurrency-replace-cash> [<https://perma.cc/3TP4-Z9PA>].

their cryptocurrency's value will skyrocket.²⁴³ If a state liquidates the assets of these owners, it will likely face intense backlash, as it will be seen to have dismantled the owners' ensuing fortune.

States who have adopted the RUUPA virtual currency provision have not fully prepared for the complexity of cryptocurrency. They do not have the technological capacity to hold the assets, whether that be through a wallet system or online platform, and they will have considerable difficulty if they attempt to require holders to liquidate cryptocurrencies and remit the cash value, or even if the states do it themselves.²⁴⁴ The latter action, in particular, will likely open the state to litigation from angry owners who may have lost considerable appreciated value.

E. HOW DOES AN ANONYMOUS OWNER RETRIEVE ESCHEATED PROPERTY?

If a state successfully escheats unclaimed cryptocurrency, according to RUUPA, owners have the ability to make a claim to regain their property.²⁴⁵ However, many cryptocurrency owners purposefully keep their identities anonymous, which will be a frustrating factor for owners who try to retrieve their escheated cryptocurrency. Modern unclaimed property law sees the state as a custodian, giving owners the ability to reclaim their property.²⁴⁶ But if an owner is anonymous, under RUUPA, he cannot regain his escheated property.²⁴⁷ Meaning, in many cases, the effects of owner anonymity and a state-mandated asset liquidation may combine to produce a uniquely likely risk of an unconstitutional taking.

A bedrock of unclaimed property law is that the state acts as a responsible custodian for unclaimed property only *until* the true owner comes to reclaim their property.²⁴⁸ Before any property can be escheated by the state, the owner must be notified of the pending taking.²⁴⁹ After the state takes control of the property, owners can file a claim for the return of their property, and "if the administrator receives evidence sufficient to establish . . . that the claimant is the owner of the property," then the administrator will honor the claim.²⁵⁰ However, most cryptocurrencies are not connected to an owner's personal

243. *See id.*

244. *See* Condran et al., *supra* note 221.

245. REVISED UNIF. UNCLAIMED PROP. ACT § 903 (UNIF. L. COMM'N 2016).

246. *See supra* notes 47–53 and accompanying text.

247. *See* REVISED UNIF. UNCLAIMED PROP. ACT § 903(a).

248. *See id.* prefatory note at 3.

249. *Id.* § 501. Failing to notify an owner can run afoul of due process. *See* Taylor v. Westly, 488 F.3d 1197, 1201 (9th Cir. 2007) (finding California's practice of immediately liquidating assets upon receipt likely violated substantive due process). *But see* Teagan J. Gregory, Note, *Unclaimed Property and Due Process: Justifying "Revenue-Raising" Modern Escheat*, 110 MICH. L. REV. 319, 321 (2011) (arguing that modern policies of raising funds via escheating larger swaths of property are not violations of due process).

250. REVISED UNIF. UNCLAIMED PROP. ACT § 904.

identity, which creates an entirely new problem that is not present with almost any other type of property.

Bitcoin's pseudonymous structure is the most common form of cryptocurrency owner identification, so it will be used to examine the problems associated with identifying cryptocurrency owners. Bitcoin is found on the blockchain, which means the information about the owner of the asset is also located there.²⁵¹ The blockchain records information about the asset, like IP address and transaction information.²⁵² However, unless the transaction or IP address is linked to the owner's personal identity in some way, administrators and holders will only be able to locate the owner's IP address.²⁵³ Further complicating matters, if an owner uses a browser such as the commonly used Tor, which routes traffic through different servers and adds layers of encryption to browsing history, the IP address located on the blockchain will be useless for locating the owner.²⁵⁴ If, as discussed in Section III.D, the state requires a holder to liquidate the asset before remitting, the state would also be completely unable to track ownership.²⁵⁵ Ownership can only be validated by the network, and liquidated cryptocurrencies are no longer a part of the network where that can happen, making their owner's identity untraceable.²⁵⁶ Without this knowledge of who actually owns the asset, there will be no way for the owner to be notified or any way for the owner to later prove to the administrator that she has a valid claim to the escheated property.

As a result, if an owner was never notified of the pending escheatment is unable to retrieve their cryptocurrency, a court may find that the state has run afoul of the Takings Clause.²⁵⁷ A true owner of the digital asset would have a unique case against the state for unconstitutionally taking their property without just compensation because there would be no way under the current law for the owner to retrieve their cryptocurrency, though it has not yet been challenged in court. Previous cases deciding the constitutionality of escheatment in the event of an unknown owner have taken for granted that in each case, the owner's name or something identifiable is known that the owner may use to prove their identity and reclaim their property.²⁵⁸ But no case has analyzed

251. See BRITO & CASTILLO, *supra* note 8, at 2–4.

252. *Id.* at 8.

253. *Id.*

254. *History*, TOR PROJECT, <https://www.torproject.org/about/history> [<https://perma.cc/7657-Q8MG>]; see Shirley U. Emehelu, *A Shot in the Dark: Using Asset Forfeiture Tools to Identify and Restrain Criminals' Cryptocurrency*, 66 U.S. ATT'YS BULL., no. 5, Oct. 2018, at 81, 88–89 (describing the various uses of the Tor browser and how it can shield the identity of the user).

255. See Condran et al., *supra* note 221.

256. See BRITO & CASTILLO, *supra* note 8, at 7–8.

257. See U.S. CONST. amend. V.

258. See, e.g., *Temple-Inland, Inc. v. Cook*, 82 F. Supp. 3d 539, 549 (D. Del. 2015) (considering owners “unknown” if the holder knows their identity, but cannot locate them); *Suever v. Connell*, 439 F.3d 1142, 1144 (9th Cir. 2006) (“‘Escheat[.]’ . . . means the vesting in the state of title to property the whereabouts of whose owner is unknown or whose owner is

what happens if an owner's ability to prove her status as the true owner is *impossible*.

F. CURRENT CASELAW ON THE ISSUE

There has not yet been much litigation surrounding escheatment of cryptocurrencies, as each state's version of RUUPA is in its infancy. However, there have been two cases that may become influential as this area of the law develops: *Faasse v. Coinbase* and *Commodity Futures Trading Commission v. McDonnell*.²⁵⁹

First, in *Faasse v. Coinbase*, the class-action plaintiffs claimed Coinbase improperly kept cryptocurrencies sent to the plaintiffs through Coinbase's platform.²⁶⁰ According to the plaintiffs, Coinbase users had sent them cryptocurrency using Coinbase's platform by sending a link in an email where they could click and claim their cryptocurrencies.²⁶¹ However, because many of the plaintiffs were unaware of what cryptocurrencies were, the emails went unopened.²⁶² After some time, Coinbase took control of the gifted cryptocurrencies, failing to notify the plaintiffs that they had unclaimed assets on the platform or to turn them over to the state as required by "California's unclaimed property" statutes.²⁶³ Several plaintiffs even alleged that the link they were sent by Coinbase was broken, so they were not able to access the cryptocurrencies at all.²⁶⁴

The plaintiffs brought suit in March 2018 against Coinbase, seeking to recover their cryptocurrencies for those whose identities were known and for Coinbase to turn over any cryptocurrencies for which the owner was unknown to the state of California.²⁶⁵ The case was settled out of court,²⁶⁶ but it highlights the issues associated with the new frontier of unclaimed cryptocurrency. For example, some of those questions that remain include whether Coinbase was truly the "holder" of the cryptocurrency sent by email, what California will do with the property that was sent to email addresses with no known identity tied to it, and what link maintenance—ensuring each sent link is active and functional—Coinbase is required to perform to make sure users can access

unknown, . . . *subject to the right of claimants to appear and claim the escheated property . . .*" (alteration and omissions in original) (quoting CAL. CIV. PROC. CODE § 1300(c) (West 2020)); *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (discussing the right to escheat property of "unknown" owners who can be identified, but "whose [whereabouts or] present address is unknown").

259. *Faasse v. Coinbase, Inc.*, No. 3:18-cv-01382, 2018 BL (N.D. Cal. Mar. 7, 2018); *Commodity Futures Trading Comm'n v. McDonnell*, 287 F. Supp. 3d 213, 213 (E.D.N.Y. 2018).

260. Complaint at 1–2, *Faasse*, No. 3:18-cv-01382 (N.D. Cal. Mar. 2, 2018).

261. *Id.* at 2.

262. *Id.*

263. *Id.*

264. *Id.* at 2–3.

265. *Id.* at 1–2.

266. Joint Stipulation of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), at 2, *Faasse*, No. 3:18-cv-01382 (N.D. Cal. May 30, 2019).

gifted cryptocurrencies within the statutory period in order to avoid escheatment.

The second relevant case is *Commodity Futures Trading Commission v. McDonnell*.²⁶⁷ In March 2018, the CFTC alleged a virtual currency trader was “defraud[ing] investors by [purposely] misappropriating their funds under the guise of a legitimate advisor for the trading and purchasing of cryptocurrencies.”²⁶⁸ In its judgment, the district court recognized the CFTC’s jurisdiction to regulate cryptocurrencies and virtual currencies, finding that such items were commodities and therefore “subject to the agency’s” control.²⁶⁹ The court stated:

Virtual currencies can be regulated by [the] CFTC as a *commodity*. Virtual currencies are “goods” exchanged in a market for a uniform quality and value. They fall well-within the common definition of “commodity” as well as the [Commodities Exchange Act]’s definition of “commodities” as “all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.”²⁷⁰

States may use this finding in the future to settle how they should classify unclaimed cryptocurrency for the purpose of dormancy periods,²⁷¹ however there has been no litigation on this point since 2018.

These cases highlight the complexity that comes with regulating cryptocurrencies. As states begin to grapple with the inherent ambiguity of RUUPA’s virtual currency treatment, they will likely face litigation that will hopefully lead legislatures and the ULC to more thoughtfully draft how to manage these assets.

IV. RESOLVING AMBIGUITY AND CATCHING UP TO THE 21ST CENTURY

RUUPA’s current treatment of unclaimed cryptocurrency is likely to lead to several problems, not only for state administrators who need to figure out what to do with these assets and how to properly escheat them, but also for owners who may want to reclaim their escheated cryptocurrency and have no way of proving they are in fact the true owners. In response, Section IV.A identifies provisions in RUUPA where more specific drafting language could resolve ambiguities, and Section IV.B proposes ways states can update their technological capacity to hold cryptocurrencies and gain the revenue associated with the unclaimed assets.

²⁶⁷. *Commodity Futures Trading Comm’n v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018).

²⁶⁸. Kogan, *supra* note 192, at 214, 216, 230.

²⁶⁹. *Id.* at 214.

²⁷⁰. *McDonnell*, 287 F. Supp. 3d at 228 (omission in original) (emphasis added) (citation omitted) (quoting 7 U.S.C. § 1(a)(9) (2018)).

²⁷¹. *See supra* Section III.B (discussing problems with cryptocurrency classification).

A. RESOLVE AMBIGUITY IN RUUPA RELATED TO THE
“VIRTUAL CURRENCY” PROVISION

First, the ULC is the body most equipped to offer some clarity to this area of the law because the vast majority of states have used RUUPA and its predecessors to shape and draft their own unclaimed property legislation. By starting the change there, states who have decided to include RUUPA’s virtual currency provision will be able to look to the revised model code and understand ways they can improve their own unclaimed property statutes. If states want to ensure they can actually gain and control this large class of unclaimed property, they will need a few clarifications, specifically as it relates to clarifying the “virtual currency” definition, determining who is considered a holder, explaining the process of gaining control of cryptocurrency, and defining what states should do in the case of an unknown owner.

Initially, the definition for “virtual currency,” as stated in section 102(32), is too ambiguous.²⁷² As it is written, the term virtual currency encompasses all types of “digital representation[s] of value . . . which do[] not have legal tender status recognized by the United States.”²⁷³ RUUPA, or its next incarnation, should have a separate definition for cryptocurrency, either within section 102(32) or as its own provision under section 102, because of its unique properties and complex origins that complicate its classification.²⁷⁴ This definition needs to explicitly say what types of cryptocurrency holders are required to report to the state, such as tokens, access codes and keys, and shares of cryptocurrencies held on an exchange platform or digital wallet. Careful drafting will ensure holders know what their responsibilities are under the statute and administrators know whether a holder is in violation of the Act. If the Commission believes different types of cryptocurrencies should be treated as different types of property, then definitions in section 102 should reflect that distinction, with each type of cryptocurrency included in the definition of the corresponding type of property. For example, a revised section 102 could include shares in a cryptocurrency under “security” or physical coins under “money.” This proposed language will clear up which relevant dormancy period is required for a certain type of cryptocurrency and will minimize administrative difficulty for both holders and administrators.

The second way the ULC can resolve the ambiguity within RUUPA is by specifically and carefully defining who is a holder with respect to cryptocurrency. Holders need to understand when they are responsible for reporting unclaimed property to the state, but under the current language of RUUPA that responsibility is unclear. Section 102(12) only defines a holder as “a person obligated to hold for the account of, or to deliver or pay to, the

272. See REVISED UNIF. UNCLAIMED PROP. ACT § 102(32) (UNIF. L. COMM’N 2016) (defining “virtual currency”).

273. *Id.*

274. See *supra* Section III.B (discussing problems with cryptocurrency classification).

owner, property subject to this [act].”²⁷⁵ As discussed above,²⁷⁶ this definition causes difficulty as it relates to the unique nature of cryptocurrency. The ULC should instead draft a definition of the term “holder” which is specific to such assets or include the information within the commentary below section 102. The commission should make clear that only those who have access to and control over the cryptocurrency are required to report and remit the asset—i.e., know the cryptocurrency’s private access key. When a holder does not have the required passcode or key, she should not be required to report and remit the cryptocurrency. Under section 102(12)’s definition, the holder cannot “deliver . . . to” the owner because she cannot control it enough to deliver it to anyone.²⁷⁷ By resolving this ambiguity within RUUPA, cryptocurrency wallets and exchange platforms will know when they are not required to report and remit that an asset is unclaimed and when they may face legal action for failure to do so.

Next, the ULC should, at the very least, suggest to states within the comments what they should do with cryptocurrency once it has been remitted so owners know exactly what to expect if the state has taken control over their assets. RUUPA is silent on a state’s obligation to liquidate or hold a virtual currency for an owner. Providing some guidance to states could help clarify for holders, owners, and administrators what they should do with this asset class.²⁷⁸ As it stands, most states will not have the technological sophistication to hold cryptocurrencies for an extended period of time.²⁷⁹ Therefore, adding a provision that states can liquidate cryptocurrencies as they do securities will bring clarity to the process and possibly lessen future litigation by providing owners some notice of this possibility. The downside of this option is that the state may face litigation from owners who are angry that the state cashed out their cryptocurrency, resulting in a loss of appreciated value.²⁸⁰ But until states have the capacity to hold the cryptocurrency in its original form, liquidation is one of the only ways states can gain the desired revenue from unclaimed cryptocurrency.

Finally, RUUPA must outline what the state and holder must do in the case of an unknown owner. If neither the state nor holder can identify the cryptocurrency’s owner, the state should not take control of the property. The cost of litigation from owners who have had their cryptocurrency taken by the state claiming violations of the Due Process and Takings Clauses will outweigh any increases in revenue gained by liquidating these assets and taking title to the funds if states do not know who the owner is. RUUPA should be redrafted

275. REVISED UNIF. UNCLAIMED PROP. ACT § 102(12).

276. See *supra* Section III.C.

277. See REVISED UNIF. UNCLAIMED PROP. ACT § 102(12).

278. See *id.* § 102 cmt. at 21–24.

279. See Condran et al., *supra* note 221.

280. See *supra* Section III.D.

to include language that states every holder is required to conduct a reasonable investigation to uncover the owner's identity and that, only after all reasonable attempts have failed, the holder is then exempt from remitting the currency to the state.

A careful redrafting of RUUPA to account for the complexity of cryptocurrency will save both the state and holders from the headaches of engaging in questionable classification, determining whether a person or entity is a holder, and deciding what to do if a cryptocurrency owner's identity is unknown. Without this clarification, the state will likely face litigation from owners and holders alike, unsure of their duties and rights.

B. STATES HAVE TO UPDATE THEIR TECHNOLOGICAL CAPABILITIES IF THEY WANT TO SUCCESSFULLY OBTAIN UNCLAIMED CRYPTOCURRENCIES

The second necessary change is for states, if they are going to accept remitted cryptocurrencies, to bring their technological capacities into the modern age. At the moment, states do not have the infrastructure in place for holders to transfer unclaimed cryptocurrency into the states' control.²⁸¹ If states want to fully reap the benefits of this class of unclaimed assets, they need to update their technological capacity.

First, states should hire an outside technological firm with experience building exchange platforms to create a state-run secure exchange platform that is completely private, which holders can use to remit the virtual currencies. Because states expect to make so much revenue from these cryptocurrencies,²⁸² it will be a highly beneficial investment to create a secure way to receive and hold the assets for the owner. This approach will eliminate the need for holders to liquidate the cryptocurrencies themselves and remove that liability from them, while ensuring the state has a way to properly manage the assets.

If creating its own exchange platform is not feasible for a particular state, working with existing exchanges, such as Coinbase, to use their platforms during the liquidation process may be an alternative option. Partnering with an existing exchange platform will give states the necessary ability to receive cryptocurrencies without paying the high price of specialists to build one from scratch. Either way, it is clear states need to update their technological capacity if they expect to receive the benefits of this unique unclaimed property.

281. See Condran et al., *supra* note 221 (“Another complicating factor is the states’ ability or inability to accept and hold escheated cryptocurrencies.”); Houghton et al., *supra* note 175 (“However, most states’ unclaimed property departments do not have the ability to receive cryptocurrencies.”).

282. See *supra* notes 168–70 and accompanying text.

V. CONCLUSION

Unclaimed virtual currencies like Bitcoin and Ethereum have the potential to become a digital gold mine for states who adopt RUUPA. But what the ULC and states failed to realize during their drafting process is just how complicated the issues surrounding cryptocurrencies are. The few lines of text adopted to govern the administration of unclaimed cryptocurrencies have introduced more questions than answers.

The ULC should thoughtfully draft amendments to the virtual currency provision of RUUPA that resolve these ambiguities so administrators, as well as owners and holders, are put on notice of what is expected of them. Accordingly, states should also update their technological capabilities so they may adequately hold and administer these assets and fully reap the potential revenues from unclaimed cryptocurrencies.