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STATE OF MICHIGAN
IN THE SUPREME COURT

DINE BRANDS GLOBAL, INC,

Plaintiff–Appellee,

v

RACHAEL EUBANKS, in her capacity as THE TREASURER FOR THE STATE OF MICHIGAN,

Defendant–Appellant.
_____/

Supreme Court No. [#]

Court of Appeals No. 360293

Oakland Circuit Court No. 2021–189420–CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

APPLICATION FOR LEAVE TO APPEAL OF RACHAEL EUBANKS, STATE TREASURER

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Dated: March 2, 2023

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STATEMENT OF JURISDICTION

The Appellee, Dine Brands Global, Inc, (Dine Brands), filed a complaint in Oakland County Circuit Court challenging an examination determination issued by the Appellant, the State Treasurer. On January 24, 2022, The Circuit Court issued an order enjoining the State from enforcing an administrative decision. (Order.) The Treasurer appealed. On January 19, 2023, the Court of Appeals issued a decision. Accordingly, an appeal as a matter by leave is proper. MCR 7.305(C)(2)

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STATEMENT OF QUESTIONS PRESENTED

1. The Treasurer has the administrative right to examine books and records and determine compliance with Michigan's unclaimed property laws. The statute of limitations to enforce those obligations does not continue to run while the examination is underway. Did the Court of Appeals err in ruling that the statute of limitations continued to run through an audit?[1]

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

[1] This case presents the same question to be adjudicated as a nearly identical case pending before this Court. *Walt Disney Co, v Racheal Eubanks*, COA No 360291.

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STATUTES INVOLVED

MCL 567.250

(1) The expiration, before or after the effective date of this act, of any period of time specified by contract, statute, or court order, during which a claim for money or property can be made or during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property, does not prevent the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the administrator as required by this act. This subsection does not apply to gift cards or gift certificates.

(2) Except as otherwise provided in subsection (3), an action or proceeding shall not be commenced by the administrator with respect to any duty of a holder under this act more than 10 years, or, for the holder of records of transactions between 2 or more associations as defined under section 37(a)(2), more than 5 years, after the duty arose.

(3) For eligible holders electing to participate in the streamlined audit process described in section 31b, an action or proceeding shall not be commenced by the administrator with respect to any duty of a holder under this act more than 4 years after the duty arose.

MCL 567.251

(1) The administrator may require a person who has not filed a report under this act or a person who the administrator believes has filed an inactive, incomplete, or false report, to file a verified report in a form specified by the administrator. The report shall state whether the person is holding any unclaimed property reportable or deliverable under this act, describe unclaimed property not previously reported or as to which the administrator has made inquiry, and specifically identify and state the amounts of property that may be in issue.

(2) The administrator, at reasonable times and upon reasonable notice, may examine the records of a person to determine whether the person has complied with this act. The administrator may conduct the examination even if the person believes he or she is not in possession of any property reportable or deliverable under this act. The administrator may contract with any other person to conduct the examination on behalf of the administrator.

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(3) If a person is treated under section 13 as the holder of the property only insofar as the interest of the business association in the property is concerned, the administrator, pursuant to subsection (2), may examine the records of the person if the administrator has given the notice required by subsection (2) to both the person and the business association at least 90 days before the examination.

(4) Any examination performed by the administrator or his or her duly authorized agents must be performed in accordance with the generally accepted auditing standards to the extent applicable to unclaimed property examinations. A person who has been audited by the administrator or his or her duly authorized agents or a person whose books, records, and papers have been examined by the administrator or his or her duly authorized agents shall be provided a complete copy in printed or electronic format of the audit report, which shall identify in detail the work performed, the property types reviewed, any estimation techniques employed, calculations showing the potential amount of property due, and a statement of findings as well as all other correspondence and documentation which formed a basis for the findings. Not later than 6 months after the effective date of the amendatory act that added this subsection, the administrator shall electronically file a request for rule–making with the office of regulatory reinvention pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to initiate rules on auditing standards.

(5) When the person being examined does not have substantially complete records, the administrator or his or her duly authorized agents may determine the amount of any abandoned or unclaimed property due and owing based upon a reasonable method of estimation consistent with the standards described in subsection (4). If the person being examined has filed all the required reports and has maintained substantially complete records, then all of the following apply to the examination:

(a) The examination shall include a review of the person's books and records.

(b) The examination shall not be based on an estimate.

(c) The administrator or his or her duly authorized agents shall consider all evidence presented by the holder to remediate the findings.

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(6) If an examination of the records of a person results in the disclosure of property reportable and deliverable under this act, the administrator may assess the cost of the examination against the holder at the rate of $50.00 a day for each examiner; however, the charges shall not exceed the value of the property actually found to be reportable and deliverable. The cost of examination made pursuant to subsection (3) shall be imposed only against the business association.

(7) If a holder fails after the effective date of this act to maintain the records required by section 32 and the records of the holder available for the periods subject to this act are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay an amount as may reasonably be estimated from any available records.

(8) For an eligible holder that has elected to follow the streamlined process described in section 31b, examinations shall not include checks voided within 180 days from the date of issuance of the check.

(9) As used in this section, "substantially complete records" means at least 90% of the records necessary for unclaimed property examination purposes as defined under the principles of internal controls. The determination of substantially complete records shall not be made solely as a percentage of the total overall individual records to be examined, but also on a materiality level of value of the records. The lack of greater than 10% of records in 1 particular property class to be examined does not result in the extrapolation of error in those areas in which a person has filed all the required reports and has maintained at least 90% of the overall records for that particular property class. Substantially complete records are not meant to be an absolute measurement of all available records.

MCL 567.251a

If the administrator determines that a holder has failed to report or deliver to the administrator unclaimed property as required by this act, the administrator shall mail to the holder by certified or registered mail a notice of examination determination, which shall include the property deliverable. The notice of examination determination shall constitute a decision of the administrator. Within 90 days after the decision of the administrator is mailed, a holder that is aggrieved of the decision may bring an action in the circuit court, or within the same period, the holder may elect to contest the decision by filing a request for reconsideration with the administrator prior to bringing an action in circuit court.

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MCL 567.252

(1) A holder required to file a report under section 18, as to any property for which it has obtained the last known address of the owner, shall maintain a record of the name and last known address of the owner for 10 years, or, for the holder of records of transactions between 2 or more associations as defined under section 37(a)(2), for 5 years, after the property becomes reportable, except to the extent that a shorter time is provided in subsection (2) or by rule of the administrator.

(2) A business association that sells in this state its travelers checks, money orders, or other similar written instruments, other than third–party bank checks on which the business association is directly liable, or that provides those instruments to others for sale in this state, shall maintain a record of those instruments while they remain outstanding, indicating the state and date of issue for 3 years after the date the property is reportable.

MCL 567.253

The administrator may bring an action in a court of competent jurisdiction to enforce this act.

MCL 567.261

This act shall be applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

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INTRODUCTION

This Court has never interpreted a provision of Michigan's Uniform Unclaimed Property Act (UUPA). MCL 567.221, *et seq*. And the last time this Court issued an opinion concerning Michigan's escheat and abandoned property laws was over 60 years ago concerning the prior Act, the Code of Escheats. *Schoener v Continental Motors Corp*, 362 Mich 303 (1961). This is an issue of first impression, addressing a law that applies statewide, but is also part of a nationwide set of state laws derived from a model code for treatment of unclaimed property.

In a published decision, the Court of Appeals erroneously ruled that the State is barred from filing a lawsuit to enforce an administrative decision to compel Dine Brands to turn over abandoned property due to Michigan citizens. The ruling is the exact opposite of what the Legislature intended. Despite Dine Brands appealing the administrative decision, the Court of Appeals held that the statute of limitations is still running against Dine Brands underlying statutory duty. Under this ruling, the longer Dine Brands—and every other holder of unclaimed property that belongs to another—stalls and frustrates Treasury's review, the more time periods, and thus unclaimed property, falls outside the statute. Upon information and belief, the Court of Appeals' decision is the first appellate decision nationwide reaching such a result.

Modern escheat laws are like a melting pot of American ideals: a mix of sovereignty, escheat and *bona vacantia*, and consumer protection. In 1996, Michigan closed the book on the Code of Escheats and adopted a version of the uniform Act, which forms the basis of every State and U.S. territories escheat laws.

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For nearly 30 years, the UUPA has governed the State's sovereign rights of escheat and *bona vacantia*.

Unclaimed property laws have always been about defending citizens from corporate greed, utilizing the State as a shield, and defending those who cannot defend themselves. By adopting the UUPA in 1996, Michigan transitioned from the cumbersome administration by the Attorney General, public administrator, and the Board of Escheats to administration solely through the State Treasurer.

The UUPA eliminated the process of court decrees in favor of a streamlined system centered on administrative decisions. It jettisoned the Code of Escheats' requirement that the State file a lawsuit to compel a holder to turn over abandoned property, and, instead, shifted the burden by providing the property holders a pathway to challenge the administrative decision in court if they disagree with the Treasurer's decision. That is what happened here.

The UUPA also moved away from the discovery process in litigation and adopted an administrative audit process. Because of uniformity, the UUPA allows Michigan to join in with other States in a single audit of a holder whose business activities, and thus holdings, cross state lines. Now, nearly all unclaimed property examinations (audits) are conducted on a multi–state basis. For example, over 30 States joined in a single audit that resulted in the litigation involving state property currently pending before the United States Supreme Court, *Arkansas, et al, v Delaware*.

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The Court of Appeals clearly erred by ruling that the State is now barred from filing a lawsuit to compel the holder to comply with the administrative decision. The ruling renders three statutes concerning administrative examinations nugatory because it requires a lawsuit to be commenced in the first instance, before the Treasurer may even commence an audit. The Court of Appeals' decision significantly impacts the State's ability (1) to enforce the UUPA, (2) to prevent corporations from obtaining private windfalls of Michigan residents' money from lucrative silence, (3) to return abandoned property to Michigan citizens, and (4) to remain in compliance and uniformity with other States.

The UUPA's purpose is to protect the citizens of this State. The Legislature spoke, and we should listen. For the reasons outlined above, this Court should grant this application pursuant to MCR 7.305(B)(2), (B)(3), and (5)(a) and reverse.

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STATEMENT OF FACTS AND PROCEEDINGS

Factual Background

On June 18, 2013, the State Treasurer commenced an examination of Dine Brands. (App p 59.) There is no dispute that at the time the examination commenced, all reportable years at issue in this case were within the statute of limitations. The examination was a multi–state audit, and it included 17 other States. (App p 60.) The examination resulted in findings that the Plaintiff failed to report numerous properties due and owing to Michigan residents. On July 6, 2021, the State Treasurer issued her final examination determination finding $258,169.09 of reportable property. (App p 33.) The determination included $161,065.36 worth of payroll checks issued prior to March 31, 2010. (App p 108.) It also included $70,604.20 of checks payable to vendors issued on or prior to March 31, 2013, as well as $11,447.25 of checks payable to governmental agencies issued prior to March 31, 2008. (App p 108.) Upon information and belief, the remainder of the multi–state audit is ongoing as of today's date and in the remediation process.

During the examination, Dine Brands raised the statute of limitations as a defense to the ongoing examination. (App p 108.) As indicated throughout the record, Dine Brands asserted that since the State Treasurer had not commenced a lawsuit, the statute of limitations continued to run during the examination. (App p 110–111.) The State Treasurer rejected the argument. (App p 108.) Thereafter, this case ensued.

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Proceedings

After Dine Brands appealed the decision by filing its complaint in circuit court, the State Treasurer removed the case to the Court of Claims. (App p 3.) After briefing the issue, the Court of Claims held that jurisdiction was proper in the circuit court and remanded the case.

Once remanded, Dine Brands filed a motion for summary disposition. (App p 60–117.) The State Treasurer filed a response, and on January 24, 2022, prior to oral argument, the circuit court issued its opinion granting Dine Brands' motion and enjoined the State Treasurer from compelling Dine Brands to report and remit the properties disputed by Dine Brands. (App p 4–62.) The Treasurer appealed.

After briefing and oral argument, the Court of Appeals affirmed the trial court. The Court of Appeals held that an examination is not an "action or proceeding" and, therefore, the statute of limitations is continuing to run against the Treasurer to file a lawsuit to compel Dine Brands to turn over the abandoned property. This application ensued.

STANDARD OF REVIEW

This case presents purely legal questions of statutory interpretation. "Statutory interpretation is a question of law" reviewed de novo. *Fradco, Inc v Dept' of Treasury,* 495 Mich 104, 112 (2014). "When interpreting a statute, courts must 'ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.'" *Id.*, quoting *Koontz v Ameriech Servs, Inc*, 466 Mich 304, 312 (2002). "This requires courts to consider the plain meaning of the critical word

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or phrase as well as its placement and purpose in the statutory scheme." *Id.* (internal citation and quotation marks omitted). "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Krohn v Home–Owners Ins Co*, 490 Mich 145, 156–157 (2011) (citation omitted). This Court "may consult dictionary definitions to give words their common and ordinary meaning." *Id.* "In the absence of ambiguity, 'the statute speaks for itself and there is no need for judicial construction; the proper role of the court is to apply the terms of the statute to the circumstances in a particular case.'" *Detroit Edison Co v Celadon Trucking Co.,* 248 Mich App 118, 121 (2001), quoting *Massey v Mandell*, 462 Mich 375, 380 (2000).

ARGUMENT

I. The State Treasurer's authority to conduct examinations is the central enforcement tool under the UUPA. Under the UUPA, the "action or proceeding" is the administrative process.

The UUPA has been in effect since 1996. MCL 567.221, *et seq*. As the Treasurer is the successor to the Board of Escheats, the UUPA defines the procedures related to the custody and disposition of escheated property as well as the statutory framework governing Michigan's common law right of *bona vacantia* (which means vacant or ownerless goods). Mich Const 1963, art 10, § 4; see also MCL 567.259. Since its adoption, the Michigan Legislature has amended the law and created administrative and judicial review of examination determinations.

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The Court of Appeals was asked to interpret the UUPA and address whether an "action or proceeding," it identified was commenced by the audit, or whether the Treasurer was required to file a lawsuit to conduct the examination in order to effectuate the purpose of the Act.

Rather than interpret the UUPA's statute of limitations within the context of the UUPA, the Court of Appeals construed the phrase "action or proceeding" as being limited to judicial relief. The Court of Appeals' decision renders the administrative process created by the Legislature meaningless because it requires the Treasurer to commence a lawsuit to enforce the UUPA—every single audit of every single holder, including Michigan's participation in multi–state audits—rather than reading the statute as providing the Treasurer statutory authority to begin the examination process expressly outlined in the Act. Moreover, in the context of this case, it ignores that the administrative decision, as well as the court decision on an appeal of that decision, create its own duty to comply with it. Finally, when the statute is read as a whole, treating the "action" as a court proceeding initiated by the Treasurer, only, conflicts with the idea that the holder has statutory appeal rights to circuit court *from the Treasurer's determination*—not from a decision by the judicial branch in the first instance.

A. The UUPA has deep roots in American jurisprudence.

The laws governing escheat in Michigan date back to 1818. *Evans Products Co v Fry*, 307 Mich 506, 519–520 (1943). Since that time, and prior to the

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enactment of Michigan's current Constitution, the State's laws were expanded to include custodial escheatment of abandoned properties. *Id*.

Michigan's treatment of unclaimed property has long, well–known roots in our jurisprudence; "From an early time, [the Supreme Court of the United States] has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time." *Texaco, Inc v Short*, 454 US 516, 526 (1982). "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons." *Standard Oil Co v New Jersey*, 341 US 428, 435–36 (1951) (footnote omitted). "Such property thus escapes seizure by would–be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations." *Id*.

"States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat." *Delaware v New York*, 507 US 490, 497 (1993). "At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia*." *Id*., fn 9, quoting *Anderson Nat Bank v Luckett*, 321 US 233, 240 (1944). Michigan has also recognized *bona vacantia* in the context of escheat. See *In re Rapoport's Estate*, 317 Mich 291 (1947) (discussing *bona vacantia* under the Code of Escheats).

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In summary, the UUPA is the current codification of Michigan's sovereign and common law rights to escheat and *bona vacantia*. "[J]ust as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Texaco*, 454 US at 526. These conditions create statutory abandonment and permit the State to appropriate the property and dispose of it as provided by the UUPA. In turn, the absent owner retains a property interest, a chose in action, and can recover the value of the disposed property from the State in perpetuity. MCL 567.245.

When holders (such as a bank) remit property to the State, they are disposing their obligations for the property. See MCL 567.241. If cash, the disposition is immediate. For property other than money, the UUPA directs the State Treasurer to liquidate and convert tangible and intangible abandoned property into cash. MCL 567.243. The money is then disposed of by depositing it in the State's General Fund. MCL 567.244(1). In short, the UUPA dictates that abandoned property is to be turned over to the State and disposed of. The UUPA also provides that an absent owner of such property has the ability, in perpetuity, to file a claim, and recover the value of the property at the time of its disposition. MCL 567.245. Whether labeled as a temporary or custodial escheat, the UUPA unmistakably draws its power from the doctrines of escheat and *bona vacantia*.

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B. The UUPA is designed to be uniform amongst the States.

The UUPA is to be "construed as to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it." MCL 567.261. The examination in this case, like nearly all unclaimed–property examinations, was conducted on a multi–state basis. An auditing company is contracted for the job, it conducts the audit, and it presents individual findings to the specific States. See MCL 567.251(2); MCL 567.254(3). At the outset of the audit, the parties need to know what is legally within scope for the audit. It cannot be a continually moving target. Michigan was one of many States participating in this audit.

Upon information and belief, and as stated by amicus before the Court of Appeals, there does not appear to be a single appellate decision nationwide, besides the decision in this case by Michigan's Court of Appeals, ruling that the administrative examination and its administrative decision (the examination determination) has no effect on the statute of limitations, and ruling that the administrative decision does not create a duty for the holder to comply with the determination. (Amicus Br, p 3.) Contrary to the Court of Appeals' published ruling, under the UUPA, a lawsuit filed by the Treasurer is not a required step in the statutory process; it is only used when the holder fails to comply with the statutory process.

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C. Under the UUPA, the commencement of the examination was the commencement of an "action or proceeding."

The UUPA requires holders of unclaimed property meeting the applicable dormancy periods to report and remit that property to the State. MCL 567.238; MCL 567.240. Holders are required to maintain records regarding those properties and their respective owners. MCL 567.252. The record retention requirements mirror the applicable statute of limitations. Compare MCL 567.250 and MCL 567.252. The three sections separating those provisions all concern the examination or audit. MCL 567.251 through MCL 567.251b. Importantly, the records required to be maintained are explicitly the records subject to examination or audit. MCL 567.251(7). And the Treasurer is tasked with enforcing the UUPA's record retention and reporting requirements. MCL 567.251. In short: the statute requires holders to retain records for the statutory period, and correspondingly, the Treasurer may conduct an audit to review those years.

The Treasurer is granted the administrative authority to commence examinations to determine not only whether the holder kept records and reported the property, but also whether the holder's records are substantially complete. MCL 567.251(5)–(9). The examination process outlined in the Act replaces the Code of Escheats provision permitting the Attorney General to file suit or bill of discovery. Compare MCL 567.251 through MCL 567.251b with former MCL 567.27 (attached as Ex A). Importantly, under the Code of Escheats, the statute of limitations was not a defense to a lawsuit filed by the State. See *Attorney General v Blue Cross & Blue Shield of Michigan*, 168 Mich App 372, 380 (1988) (quoting the

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text of the statute). If that examination results in findings of reportable property, the Treasurer is required to issue an examination determination from which the holder can contest in circuit court directly or contest it first administratively. MCL 567.251a. Or, the holder may agree and turn the property over to the state.

The phase "action or proceeding" is broad and often used to describe things other than judicial proceedings. For example, the well–known automatic stay provision for the Bankruptcy Code includes ***every*** "action or proceeding." 11 USC 362(a)(1) ("the commencement or continuation, including the issuance or employment of process, of a ***judicial, administrative, or other action or proceeding*** against the debtor that was or could have been commenced before the commencement of the case under this title . . . .") (Emphasis added.) In Michigan's Administrative Procedures Act (APA), the word "proceeding" describes administrative contested cases. MCL 24.203(3). Indeed, the APA uses the word "action" to describe agency, administrative actions. MCL 24.304(1). Even the Michigan Constitution uses the words "acts" and "proceedings" to describe legislative processes. Mich Const 1963, art 4, § 18. While there are many more examples throughout Michigan law, suffice to say, it is unreasonable to conclude that the phrase "action or proceeding" used in isolation only refers to judicial actions, especially when, as here, the following three sections of the UUPA after its use describe the examination process and its appealable decisions as administrative actions and proceedings.

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The Treasurer's broad authority to commence litigation, see MCL 567.253, does not replace the administrative process set forth by the UUPA. The Treasurer's authority to commence a lawsuit to enforce the UUPA is an overarching authority to enforce the entirety of the UUPA when the statutory, administrative process is not followed—it is not a routine step in that process, much less a step that *must* occur in every audit.

If the Legislature intended to exclude examinations from an "action or proceeding" then it would have either (1) provided a time to file suit after the examination, or (2) excluded the examination process and the right to appeal its findings. By interpreting the phrase "action or proceeding" as used within the UUPA to exclude the examination, the entire examination process outlined in sections 31 through 31b would be rendered nugatory. Indeed, Michigan previously had an explicit provision permitting the Attorney General to file a lawsuit and seek a bill of discovery. That statute was repealed. The Legislature clearly intended the statute of limitations at issue to outline the scope of the audit or examination. This intent is buttressed by other provisions of the UUPA permitting the holder to appeal the examination determination administratively as well as judicially. MCL 567.251a. And the Legislature clearly granted the authority to initiate an examination to the Treasurer. The UUPA does not require a lawsuit to determine compliance with the reporting and record retention requirements concerning property due to Michigan citizens.

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1. "Actions or proceedings" include administrative actions or proceedings by the State Treasurer.

The Court of Appeals concluded that the phrase "action or proceeding" was limited to judicial actions or proceedings. (Op, p 6.) That is inconsistent with the context, purpose, and spirit of the UUPA. The UUPA sets forth an examination process that creates duties for holders to comply with. MCL 567.251. That administrative process results in an appealable decision. MCL 567.251a. Additionally, contrary to the Court of Appeals' analysis, just as that administrative decision triggered the statute of limitations for Dine Brands to contest it, it also triggered the statute of limitations for the Treasurer to enforce it. MCL 567.251a; MCL 567.250(2).

There is no dispute in this case that when the examination was commenced, all years at issue, and the corresponding duties imposed for those years by statute, were within the statute of limitations. See MCL 567.250(2). The examination process is the primary/initial enforcement mechanism to determine compliance with the UUPA. MCL 567.251.

MCL 567.250(2) states as follows:

> Except as otherwise provided in subsection (3), *an action or proceeding* shall not be commenced by the administrator with respect to any duty of a holder under this act more than 10 years, or, for the holder of records of transactions between 2 or more associations as defined under section 37(a)(2), more than 5 years, after the duty arose. [Emphasis added.]

This subsection immediately proceeds the four sections concerning the State Treasurer's administrative examination (executive branch action, not judicial action) and appeal rights after that decision, and the time periods for the review

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and appeal are the same as the record retention requirements that are subject to the examination. MCL 567.251, 251a, 251b, 252. See, e.g., MCL 567.251(2):

> The administrator [i.e., the State Treasurer], at reasonable times and upon reasonable notice, may examine the records of a person to determine whether the person has complied with this act. The administrator may conduct the examination even if the person believes he or she is not in possession of any property reportable or deliverable under this act. The administrator may contract with any other person to conduct the examination on behalf of the administrator.

Importantly, the phrase "action or proceeding" in MCL 567.250(2) is not tied to any forum, judicially or administratively. Indeed, in multiple other statutes within the UUPA, the Legislature linked the term "action" to a forum where it could be commenced. See MCL 567.247; see also MCL 567.251a(1); see also MCL 567.253.[2] It also used the term "action" within the statutes to describe a non–judicial action. MCL 567.249 ("An action or proceeding shall not be maintained against the state or any officer or against the holder for or on account *of* ***any action*** *taken by the administrator under this section*.") (Emphasis added.). By not including any forum, the Legislature intended the term "action or proceeding" to have broad meaning, including executive action.

In other words, commencement of an "examination" pursuant to MCL 567.251(2) is an "action" or "proceeding" as contemplated the plain language of MCL 567.250(2), and the Treasurer can file a lawsuit to compel a holder's compliance for

[2] Even the *Westlaw* title of MCL 567.253 confirms the point, naming the section as "Enforcement of actions." MCL 567.253 (West). The title clearly implies that the term "action" as used with the UUPA is broader than just judicial actions and includes all "actions" commenced by the Treasurer in administering the UUPA.

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all years within statute, when the examination begins to either compel the holder to turn that property over to the State, or return it directly to the owner.

It is also important to note that the Treasurer's interpretation of this provision has been consistent with other States' practices in administering their versions of the UUPA. The National Association of Unclaimed Property Administers (NAUUPA) viewed the analysis that the Court of Appeals adopted as an outlier. (Amicus Br, p 3.) To repeat, NAUUPA, the entity that would know, represented to our courts that it is not aware of a single appellate decision nationwide that interprets the UUPA in such a fashion. And our UUPA is to be construed in a uniform fashion with other States. MCL 567.261.

This understanding is further supported by the dictionary definitions of "action" and "proceeding." Black's Law Dictionary defines "action" as "the process of doing something; conduct or behavior." *Black's Law Dictionary* 32 (9d ed. 2009) It also defines an "administrative proceeding" as "[a] hearing, inquiry, investigation, or trial before an administrative agency, usu. adjudicatory in nature but sometimes quasi–legislative." *Id.*, p 51. Similarly, the term "investigation" is commonly defined as the act of "mak[ing] a systematic examination." Merriam–Webster, https://www.merriam–webster.com/dictionary/investigation. In short, the examination, which results in an examination determination that the holder can contest in court, falls within the broad scope of an "action or proceeding."

The record retention time periods contained within MCL 567.252 mirror that statute of limitations time periods contained in MCL 567.250(2) & (3). This makes

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sense since it is the maximum scope permitted to be reviewed within the examination as defined by statute. MCL 567.251(7). What makes little sense is requiring the Treasurer to file a lawsuit and conduct the examination through a bill of discovery when the statute already grants her the administrative authority to conduct the examination without a judicial proceeding. In so doing, Michigan would no longer be conducting examinations in a collaborative fashion with other States. Everything would be done through a court proceeding, which raises more questions, including *how Michigan could participate in multi–state examinations* since Michigan's Courts would not necessarily have authority over out of state property or other states' unclaimed property examinations through their executive officers. Moreover, the Court of Appeals' holding is a reversion to the process under the Code of Escheats, one that the Legislature sought to replace nearly thirty years ago.

There is no dispute that when the examination was commenced, the Treasurer had the authority to request an examination of the full period permitted by statute. MCL 567.250(2); see also MCL 567.251(2) & (7). If the holder failed to maintain the records required by § 32 (MCL 567.252), and the records were insufficient to permit preparation of a report, the Treasurer had authority to require the holder to report and pay amounts that can be reasonably estimated. MCL 567.251(7). This subsection makes it explicitly clear that the record retention requirements of § 32 are linked with the time periods subject to examination. MCL 567.250(2). The Treasurer is tasked with determining whether the records were maintained for the time specified. If the Legislature intended to require the

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Treasurer to file a lawsuit to commence an examination and ensure discovered properties would be reported, it would have stated as much in the statutes granting the Treasurer the authority to conduct examinations as well as providing the pathway for holders to contest those determinations. MCL 567.251; MCL 567.251a; MCL 567.251b.

2. The Court of Appeals erred in its construction of the UUPA.

The Court of Appeals engaged in a narrow construction of the UUPA, ignoring its context, and emphasized the point that the term "examination" is different from "action or proceeding." (Op, p 6.) While that is certainly true in one sense, it entirely misses the mark. Applying the plain meaning of proceeding, and consist with both context and common sense, the use of "proceeding" here encompasses the more precise terms of "examination" and "audit" (used interchangeably), as "proceeding" is the broader word, particularly when all three words within the context of the UUPA are describing the same thing: an administrative investigation that ends with a hearing (if the holder so chooses). MCL 567.251a. The language used within the applicable statute of limitations is broad, including all–encompassing terms that regulate the Treasurer's ability to enforce the UUPA, from requiring a holder to file a verified report, MCL 567.251(1), to conducting an examination, MCL 567.251(2), to enforcing a final unchallenged examination determination, MCL 567.251a(1), as well as her authority to commence a lawsuit to do the same. MCL 567.253. Given the context of the UUPA, given the

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context of what was repealed and replaced by the UUPA, and given the context of the provision as it is placed within the UUPA (immediately preceding the statutes concerning examinations), it makes sense that the statute of limitations at issue contains broader language than the term "examination." Again, the Court of Appeals' decision now makes Michigan an outlier in its enforcement of the uniform Act.

Moreover, Michigan has adopted administrative rules to administer the UUPA. Both parties are required to work with each other in good faith to conduct the examination within the time frame established at the entrance conference. Mich Admin Code R 567.10. In other words, holders have a say in how long the examination takes. The remediation process of the examination, the processing following the substantive examination, is by itself at least 120 days, followed by a closing conference and time for the auditor to prepare an examination report. Mich Admin Code R 567.13 & 567.14. The Court of Appeals was troubled by the amount of time it took to complete this multi–state audit, but control over the length of the audit process is not unilateral. The Treasurer does not fully control the length of an audit and pushing the pace would conflict with the collaborative intent set forth in the administrative rules.

Additionally, the UUPA contemplates that a normal examination will last multiple years. A streamlined audit, with a substantially limited scope under review, see MCL 567.250(3), is to be conducted with the goal of completion within 18 months of the audit notice. MCL 567.251b(2)(a). Given the amount of time at

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issue, it would make little sense to have the years subject to the audit continually change while the audit is underway—that is, that years under audit would continually lapse while the audit was underway, wasting effort and incentivizing stalling or delay tactics. The plain text of the UUPA also demonstrates that the Treasurer is permitted to work collaboratively with other States in auditing and enforcing the UUPA. MCL 567.254(3). A multi–state audit necessarily increases the number of records to be reviewed and issues to be sorted.

The Court of Appeals' opinion ultimately means that unless the Treasurer files a lawsuit to commence the examination and require the reporting of properties before the examination is even conducted and conclusions reached, then the statute of limitations continues to cut off record retention requirements and corresponding duties to report and remit those properties while the examination is ongoing.

From a regulatory standpoint, common sense, and reading the UUPA in both its plain meaning and its context, it contradicts the UUPA to conclude that the statute of limitations runs the entire time the examination is underway while knowing the examination is likely to take multiple years, and the holder has a seat at the table in determining how long the examination will take. Reading the UUPA in its entirety, it is evident that the commencement of the examination is a commencement of an "action or proceeding" described in MCL 567.250(2).

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D. The administrative decision creates a legal duty to comply with it.

The Court of Appeals failed to address whether the examination determination creates a duty to comply with it. In this case, Dine Brands appealed a final administrative decision. That decision has preclusive effect if not appealed. "The preclusion doctrines are applicable to administrative decisions (1) that are 'adjudicatory in nature,' (2) when a method of appeal is provided, and (3) when it is clear that the Legislature 'intended to make the decision final absent an appeal.'" *William Beaumont Hosp v Wass*, 315 Mich App 392, 399 (2016), quoting *Nummer v Dep't of Treasury*, 488 Mich 534, 542 (1995). "To determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar." *William Beaumont Hosp,* 315 Mich App at 399, quoting *Natural Resources Defense Council v Dep't of Environmental Quality,* 300 Mich App 79, 86 (2013). "Quasi–judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents." *Id.*, quoting *Natural Resources Defense Council*, 300 Mich App at 86.

The UUPA defines unclaimed property, gives the Treasurer authority to audit holders to identify property not voluntarily turned over, and it provides a holder the right to an administrative hearing, complete with the right to representation, to present testimony, as well as documentary evidence before an

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individual that has the requisite skill to qualify as an administrative law examiner. MCL 567.251a(8), (10), (11), & (12). Additionally, under UUPA the statute provides an appeal to the circuit court from that ultimate administrative decision. MCL 567.251a(13).

Alternatively, the holder can bypass the hearing and go directly to circuit court, which is what occurred here. MCL 567.251a(1). If a holder elects to waive its rights to both hearings, there is no subsequent administrative decision entered, nor any hearing. A holder's choice in such a case is to waive its right to a hearing and allow the decision to achieve finality. In other words, the Legislature clearly intended Treasury's decision resulting from the examination of a holder of unclaimed property to be final absent the holder affirmatively contesting the decision by electing either a judicial or administrative hearing, or both. This is not a novel process; initial administrative enforcement and investigation occurs in virtually every area of administrative state and federal law—including in Treasury's other rolls administering tax laws through tax assessments that, if not appealed, are final determinations. See, e.g., MCL 205.22.

This does not leave the holder with a requirement in perpetuity to comply with in an audit. Both parties have statutory and administrative duties during the audit. If the holder believes there is a lack of good faith, and the audit is needlessly prolonged, the holder can raise the issue by filing suit, and raise those issues including failure to comply with the statutory and administrative requirements for

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the audit and seek to bar future enforcement. That is not what happened here, as the decision has already been rendered and that decision was appealed.

In summation, Dine Brands has a legal duty to comply with the administrative decision, the decision it appealed, and that duty arose when the Treasurer issued the decision. The statute of limitations does not run through that decision to a prior accrual date that is the subject of the decision. By analogy, a person cannot refuse to comply with a court decision reducing an installment payment contract to a judgment by referring back to the accrual date of the breach of the installment contract. The Act provides for an examination, not a lawsuit. If the Legislature wanted the Treasurer to file a lawsuit in the first instance, it would have said as much.

In the end, Dine Brands owes its former or current employees as well as countless others for unclaimed property. Some of the property may have been final paychecks never received, or money due and owing to its current or former customers. None of it belongs to Dine Brands, and Michigan law (and the uniform act) make the abandoned property the property of the State for the beneficial use of the general public until the absent owner reclaims the value of it. Whether property or its value is returned to the owner done or through the State is immaterial because the UUPA requires the holder to contact the owner prior to remitting any property to the State. MCL 567.238(5). The short answer is Michigan law, the UUPA, prohibits Dine Brands from pocketing unclaimed property belonging to others.

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CONCLUSION AND RELIEF REQUESTED

Accordingly, for the reasons stated above, The State Treasurer respectfully asks that this Honorable Court grant this application for leave to appeal and reverse the Court of Appeals.

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type–volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 5184 words.

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Exhibit A

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herwise, wherein certificates of shares
erest therein remain unclaimed by the
or neglected to claim interest, profit,
declared in such reorganization or
or refused to accept a reissue of said
nge therefor, and such failure, neglect
nancy, as defined in this act, then such
nd the interest, profits, dividends or
nge for cash provided for in such
property and shall be reported to the
ny committee or other fiscal agent in
equired by section 6 or 8 of this act:
l agent may deliver such property,
e board of escheats, notwithstanding
elapsed, in which case the further
otection of the interests of the owners
ns of section 19 of this act: Provided
apsed the attorney general or the state
gs to be instituted for a determination
to the state of Michigan as an escheat

d property in possession of holder

in this act, all property, as that term is
ontrol of a holder and for which the
is unpaid to, uncashed by, unclaimed,
d against which the full period of
nd devolution to the state under the
reported by the holder thereof at the

ense of payment or accord and or estoppel of defense.

defined herein, shall be relieved from
by this act by reason of a claim of
nge of corporate name, insolvency,
he holder, or any special or adversary
ction: Provided, That the making and
an admission of liability by the holder
alid defense in a suit or proceeding
ch such holder is a party or otherwise

567.25 Reports of holder required; period of dormancy, statement of beginning.

Sec. 15. In any report, demand for report, notice or other procedure provided for by this act, the beginning of the period of dormancy of a given account may be stated and referred to in general terms as the date of last activity thereof.

History: CL 1948, 567.25.

567.26 Reports of holder required; filing; period of dormancy not tolled or suspended.

Sec. 16. The period of dormancy as defined in this act shall not be tolled or in any manner suspended, nor shall any holder be relieved of the duty of making any report as in this act required, by any act of the holder in charging an account, or other item of property, with a carrying or service charge, counterclaim, or debit of any kind, or in entering a credit thereto after the last action or transaction by the owner in relation to said account or other item of property. Nothing in this section contained shall affect a contractual right of the holder to charge such carrying or service charge, counterclaim or debit of any kind or to enter a credit thereto or any lien of such holder upon such account or other item of property or its right to enforce said lien by sale or otherwise. In the event of the charging of such account or other item of property with such a contractual carrying or service charge, counterclaim or debit of any kind, or in the event of the enforcement of such lien by sale or otherwise, the reports required by this act shall be made and filed by the holder with respect only to the remainder, if any, of such account or other item of property, or to the proceeds arising from the enforcement of said lien after payment therefrom of all charges secured by said lien and the expenses of the enforcement thereof.

History: CL 1948, 567.26.

567.27 Failure to file reports; penalties; procedures to recover.

Sec. 17. The state board of escheats shall see that all reports by this act required are properly made at the time and in the manner and form herein provided and shall take any necessary action to secure compliance with the provisions of this act. Any holder who shall fail, neglect or refuse to make and file any report, required by this act, shall be liable to the state in the penal sum of $300.00 for each and every such failure, neglect or refusal, and an additional penal sum of $10.00 for each and every day of the period of default. Such penalty may be recovered by the state in an action of assumpsit, or other appropriate legal proceeding instituted by the state upon the relation of the attorney general. The net proceeds of collection of any judgment recovered in such an action shall be paid into the state treasury to the credit of the general fund of the state. The recovery of such penalty shall not relieve the defendant holder from the duty of making and filing said reports. The state, at the instance or relation of the attorney general, shall have the benefit of the remedy of mandamus to compel compliance with the requirements of this act relative to the making and filing of said reports or the attorney general may compel compliance by suit or bill for discovery commenced in a court of competent jurisdiction.

History: CL 1948, 567.27;—Am. 1965, p. 26, Act 17, Imd. Eff. Apr. 22.

567.28 Abandoned property; delivery by holder to board; payment of claims of owner, receipts; release of holder.

Sec. 18. Any holder who has made and filed the report of abandoned property pursuant to the provisions of this act may deliver such property to the state board of escheats, or may satisfy any claim or demand for which he is accountable to an owner