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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

THE WALT DISNEY COMPANY,

Plaintiff-Appellee,

v

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

Defendant-Appellant.
_____/

Supreme Court No. 165392

Court of Appeals No. 360291

Oakland County Circuit Court No. 2021-189464-CZ

# *AMICUS CURIAE* BRIEF FOR THE NATIONAL ASSOCIATION OF STATE TREASURERS THROUGH ITS AFFILIATE THE NATIONAL ASSOCIATION OF UNCLAIMED PROPERTY ADMINISTRATORS

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Date: April 28, 2023

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## STATEMENT OF QUESTIONS PRESENTED

1. The State Treasurer has the statutory right to examine books and records and determine compliance. Holders of property meeting the statutory definition must remit property to Treasury. The statute of limitations to enforce that obligation 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?

Appellant's answer: Yes.

Appellee's answer: No.

Court of Appeals' answer: No.

*Amicus Curiae*'s answer: Yes.

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The issue presented in the matter *sub judice* concerns whether the statute of limitations under the Michigan Uniform Unclaimed Property Act ("UUPA"), MCL 567.221, *et seq.*; see also MCL 567.250(2), continues to run after the State Treasurer has commenced an "examination" or "audit" of a holder pursuant to MCL 567.251(2). The *Amicus* submitting this brief, the National Association of Unclaimed Property Administrators ("NAUPA"), has a significant interest in the nationwide administration of state unclaimed property laws, including the continued ability of its member states and unclaimed property administrators to effectively enforce the reporting requirements of their respective unclaimed property laws, which is implicated by this appeal.

NAUPA is a network of the National Association of State Treasurers, Inc. NAUPA's membership includes the unclaimed property administrators representing all states, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands and other international governmental entities (the "states"). NAUPA seeks to promote and strengthen unclaimed property administration and interstate cooperation in order to enhance the states' return of unclaimed property to rightful owners and provide a forum for the open exchange of information and ideas. NAUPA's member states continually strive to increase the amount of unclaimed property they reunite with owners, returning in excess of $3 billion dollars annually to owners, with billions more being returned by companies in possession of unclaimed property (known as "holders") through their compliance with mandated pre-reporting owner notification requirements.[2] The

[1] Pursuant to MCR 7.312(H)(5), NAUPA as *amicus curiae* represents that no party or party's counsel authored this brief in whole or in part. Neither counsel for either party nor any party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made such a monetary contribution.

[2] Such reporting requirements include holders sending a notice to the last known address of the owner prior to the transfer of the custody of unclaimed property to the state, so as to allow the owner to reassert control over the asset and rebut a presumption of abandonment.

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issues presented in this case are important to NAUPA and its members since they affect the enforcement of unclaimed property laws both in Michigan and potentially in other states.

Unclaimed property examinations play a vital role in ensuring that holders comply with the unclaimed property laws. At the same time, however, most states have extremely small staffs and auditing departments. Moreover, unclaimed property administrators cannot obtain access to the type of information that would enable them to readily and systematically determine apparent non-compliance of holders on an annual basis. For example, unlike the Internal Revenue Service and other taxing authorities, which receive various mandatory filings (*e.g.*, W-2s, 1099s, business and income tax filings, etc.) on a quarterly or annual basis that they are able to review to identify possible under-reporting of tax liabilities, unclaimed property administrators do not have access to this information and they do not receive similar types of regulatory data submissions that can be used to assess holders' potential unclaimed property liabilities. Further complicating these difficulties, holders of unclaimed property often are large national or multi-national companies with numerous subsidiaries located far from the states to which the property is due.

The Uniform Law Commission (the "ULC") was well-aware of these enforcement limitations when it drafted the Uniform Unclaimed Property Act (1981) (the "1981 Act"), which added the 10-year limitation period, upon which MCL 567.251(2) is based, that is at issue in this case. Indeed, the ULC has recognized the constraints on states' enforcement abilities on multiple occasions. For example, in its comments to the 1981 Act, the ULC acknowledged that states have found obtaining compliance with the unclaimed property laws to be extremely difficult and that the enforcement provisions of previous uniform unclaimed property laws adopted by the ULC were inadequate. See 1981 Act, Commissioner's Prefatory Note. The ULC also acknowledged that conducting audits is very expensive and burdensome for the states and that holders often rely on

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this reality in failing to report. See 1981 Act, § 33, Comment. Additionally, in its comments to the corresponding statute of limitations provision applicable to state enforcement efforts contained in the Uniform Unclaimed Property Act (1995) (the "1995 Act"), the ULC expressly observed that "the Unclaimed Property Act is based on a theory of truthful self-reporting." 1995 Act, § 19(b), Comment.

It is in this context of under-reporting and compliance challenges that the ULC included a statute of limitations applicable to state enforcement efforts in the 1981 Act. A number of states, including Michigan, have enacted a version of this provision since it was adopted by the ULC over 40 years ago. Yet the Court of Appeals' opinion (and the underlying circuit court's opinion) are the first ever that NAUPA is aware of to hold that the statute of limitations continues to run against the state even after it has identified possible non-compliance and properly initiated an examination of a holder. NAUPA has grave concerns that, if this ruling is allowed to stand, it will provide a blueprint for the unintended manipulation of unclaimed property law enforcement, encourage noncompliance by holders, result in needless litigation, and ultimately deprive citizens of their assets. Although such a ruling would only have precedential effect in Michigan, holders under audit in other states can nonetheless be expected to point to it in an effort to limit the scope of their unclaimed property liability and to cause unnecessary delay of the audit process.[3] NAUPA therefore intercedes in this action as *amicus* in order to assist the Court in understanding the intended purpose and operation of the statute of limitations contained in the 1981 Act, and

[3] See, e.g., Stephen P. Kranz, *et al.*, *Meaningful Statute of Limitations for Unclaimed Property Audits and Enforcement Actions? Michigan Court of Appeals Says Yes!*, National Law Review, published Mar 11, 2023, <https://www.natlawreview.com/article/meaningful-statute-limitations-unclaimed-property-audits-and-enforcement-actions> (last visited Apr 21, 2023) ("this is not a Michigan-specific victory and one that should be explored further for holders under audit by other states as well").

incorporated by the Michigan Legislature as part of the UUPA, as well as the practical impact the Court of Appeals' opinion would have on the administration and enforcement of Michigan's unclaimed property laws, as well as potentially for the courts in this State.

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## INTRODUCTION

This case focuses on the question of what constitutes an "action or proceeding" that will stop the statute of limitations from running against the state under MCL 567.250(2). As explained in the State Treasurer's application, this term is intended to be broadly construed and, under the UUPA, includes a timely commenced examination that results in findings that may be challenged by the holder in court. For the reasons further explained by the State Treasurer, the Court of Appeals' opinion that an "action or proceeding" is limited to an action filed in court is contrary to controlling Michigan law. NAUPA respectfully submits that consideration of the 1981 Act, upon which MCL 567.250(2) is based,[4] as well as the practical implications of allowing the statute of limitations to continue to run after an examination has been commenced, support the State Treasurer's position that the Court of Appeals' opinion should be overruled.

An examination is the mechanism specifically provided for by the 1981 Act for states to determine a holder's compliance with their unclaimed property laws. Indeed, examinations are the primary method by which states enforce the duty of holders to report unclaimed property, while actions in court are extremely rare. Moreover, as demonstrated by the cases cited in Section III.A., *infra*, courts have expressly held that an examination (audit) constitutes an administrative proceeding under a state's unclaimed property laws.[5] Based on the wording, structure, and intent of the 1981 Act, it is clear that the term "action *or* proceeding" (emphasis added) in Section 29(b)

[4] The circuit court expressly acknowledged that MCL 567.250(2) is based on the 1981 Act. Nevertheless, the Court of Appeals' opinion states that "notes" to MCL 567.250(2) "indicate it was based on Section 19 of the Uniform Unclaimed property Act (1995)." It is unclear what "notes" the Court of Appeals was referring to, but this appears to be a mistake.

[5] The UUPA, like other unclaimed property laws, uses the terms "examination" and "audit" interchangeably. See, e.g., MCL 567.251(4) (referring to both an "examination" and an "audit" within the same section).

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of the Act should be interpreted to include an examination, and the commencement of an examination stops the statute of limitations from running against the state.

Moreover, the UUPA expressly provides that the State Treasurer does not need to bring a court action in order to enforce the findings made during an examination. Instead, under MCL 567.251a, the burden is on the holder to bring a court action challenging any of the state's examination determinations. This provision, which is not included in the 1981 Act and further highlights the primacy of examinations as the state's principal enforcement mechanism, eliminates any doubt that the term "action or proceeding" is intended to include an examination.

Finally, limiting the term "action or proceeding" to an action filed in court, as the Court of Appeals did, would result in holders being able to avoid their obligations to return funds legally owned by Michigan residents based upon their own conduct during an audit. This would effectively "allow the regulated to become the regulator," a concept that has been soundly rejected by other courts. See, e.g., *Fryzel v Chicago Title & Trust Co*, 173 Ill App 3d 788, 796; 527 NE2d 1025, 1029–30 (1st Dist 1988). Nevertheless, under the Court of Appeals' ruling, the only option available to Michigan to preserve its authority to enforce its unclaimed property laws would be to preemptively file an action in court at the earliest possible opportunity, even before an examination has been completed, and in some cases, contemporaneous with audit commencement.[6] Such a result should be rejected as it would both discourage holders from cooperating during the examination process and encourage needless litigation.

[6] Where the State faced the potential of becoming unable to recover material sums because of an impending time-bar, it would thus be compelled to file suit, even where its facts and cause of action were not fully developed. This is not the optimal use of the courts; however, this outcome can be anticipated if the Court of Appeals' interpretation is upheld. See Section III.B. *infra*, at p. 14.

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## ARGUMENT

### I. The Court of Appeals' opinion that the statute of limitations continues to run until the State Treasurer commences an action in court is contrary to Section 29(b) of the 1981 Act, upon which MCL 567.250(2) is based.

MCL 567.250(2) is based on § 29(b) of the 1981 Act, both of which provide that "no action or proceeding" may be commenced "by the administrator with respect to any duty of a holder" more than 10 years "after the duty arose."[7] Notwithstanding the broad and unrestricted nature of the phrase "action or proceeding," the Court of Appeals held that an examination does not constitute an action or proceeding, and the only way for the State Treasurer to stop the statute of limitations from running under MCL 567.250(2) is to file an action in court pursuant to MCL 567.253 (which is based on Section 32 of the 1981 Act). The Court of Appeals' decision is contrary to both the letter and intent of the 1981 Act.

As the Court of Appeals acknowledged, the Michigan UUPA (like the 1981 Act), does not define either an "action," a "proceeding," or an "examination." See *The Walt Disney Co v Eubanks*, __ Mich App __, (2023) (Docket No 360291); slip op at 5. As a result, it is necessary for these terms to be read in context, taking into consideration their ordinary definitions, to determine their meaning. See, e.g., *PNC Bank Nat'l Ass'n v Dep't of Treasury*, 285 Mich App 504, 506 (2009) ("Unless defined in the statute, 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.") (citation omitted); *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370 & 378 (2014);

[7] Under MCL 567.250(2), an alternative five-year period applies to duties of holders related to transactions involving two or more associations, and, under MCL 567.250(3), an alternative four-year period applies to duties of "eligible holders" participating in the "streamlined audit process" provided for by MCL 567.251b. These alternative periods are not contained in the 1981 Act.

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see also MCL 8.3a.[8] In construing these terms, it is important to note that "[i]t has been universally held that statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the government." *Livingstone v Dep't of Treasury*, 434 Mich 771, 785–86 (1990). As explained in the State Treasurer's application, the Michigan Legislature intended for the phrase "action or proceeding" to be interpreted broadly, and the initiation of an examination under the UUPA constitutes an action or proceeding that stops the statute of limitations from running. An analysis of Subsection 29(b), read in the context of the entire 1981 Act, leads to the same conclusion.

The 1981 Act authorizes two methods for unclaimed property administrators to enforce the statute: a suit in court and an examination. Specifically, under Section 32 of the 1981 Act, an administrator "may bring an action in a court of competent jurisdiction to enforce this Act." This provision is not limited to a suit against any specific entity or concerning any particular duty. Thus, a suit may be brought under Section 32 to enforce any aspect of the 1981 Act against any party, including holders (regardless of whether an examination has been conducted), claimants or another state. Importantly, this provision expressly identifies the forum for the action (a court of competent jurisdiction). Separately, under Subsection 29(b) of the 1981 Act, an examination (or audit) by an administrator may be commenced of any holder "to determine whether the [holder] has complied with the provisions of this Act." Thus, an examination is the mechanism expressly authorized by the 1981 Act for the administrator to enforce the duty of holders to report unclaimed property under the Act.

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[8] As noted in the State Treasurer's application, the definition of "action" in Black's Law Dictionary is "the process of doing something; conduct or behavior." Additionally, the definition of "proceeding" in Black's Law Dictionary incorporates the definition of an "administrative proceeding" which includes, among other things, an "investigation" before an "administrative agency." *Black's Law Dictionary* (11th ed).

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In sum, the 1981 Act provides two enforcement methods available to an unclaimed property administrator (a court action and an examination), and a statute of limitations provision (Subsection 29(b)) applicable to any "action or proceeding"). Based on this statutory structure alone, the most reasonable interpretation of "action or proceeding" would be that it is not limited to a court action but would include both a court action and an examination. This interpretation is further supported by the fact that—in direct contrast to Section 32, which requires the administrator to bring an "action" in court—Subsection 29(b) contains no such language or other venue limitation. Moreover, the statute of limitations section immediately follows the section authorizing examinations, further supporting the interpretation that the limitations provision of Subsection 29(b) applies to examinations, as well as to court actions, such that an initiation of an examination by the administrator constitutes an administrative proceeding that stops the statute of limitations from running against the state.[9] The wording and structure of the 1981 Act strongly supports, if not compels, interpreting the phrase "action or proceeding" to include an examination. See, e.g., *Livingstone*, 434 Mich at 785 (holding that in construing statute of limitations provision "the 'whole chapter' in which a statute of limitation was contained, [is] 'to be read as one act, with its several parts and clauses mutually acting on each other as their sense requires'").

Notwithstanding the foregoing, the Court of Appeals held that "the terms 'action' and 'proceeding' [as used in the UUPA] refer to *judicial* actions and proceedings." *The Walt Disney Co.*, __ Mich App __; slip op at 5 (emphasis added). The Court's ruling effectively treats these

[9] The 1981 Act was the first unclaimed property act adopted by the ULC to contain a limitations period applicable to state enforcement efforts. In addition to adding this limitations provision, the 1981 Act also added a provision requiring holders to retain records for 10 years after property becomes reportable. See 1981 Act, § 31. This provision setting a record retention requirement that is coterminous with the 10-year limitation on state enforcement efforts comes immediately after the provision authorizing states to conduct unclaimed property examinations.

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two terms to be synonymous. Doing so relegates the reference to "proceeding" in the phrase "action or proceeding" in MCL 567.250(2) to be mere surplusage, as any judicial proceeding would need to take place in connection with a judicial action. Such an interpretation of MCL 567.250(2) violates the fundamental rule of statutory construction that "[i]n reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." See, e.g., *PNC Bank Nat'l Ass'n*, 285 Mich App at 506. Interpreting the reference to "proceeding" to include administrative proceedings, however, avoids this problem and gives meaning to all of the terms contained within the statute.[10]

Additionally, the Court of Appeal's conclusion that the term "action or proceeding" is limited to judicial actions or proceedings is predicated entirely on its analysis of sections of the UUPA (in addition to MCL 567.250(2) and MCL 567.253) containing the terms "action" or "action or proceeding" that do not support the Court's holding. As an initial matter, with one exception, where the UUPA refers to an "action" by itself, it expressly states that the action at issue is a judicial action. See MCL 567.251a(1) (referring to an "action in the circuit court"); MCL 567.251a(2), (4), (8), (9), (13), & (14) (each referring to an "action in the circuit court"); MCL 567.254(4) (referring to an "action . . . in a court of competent jurisdiction").[11] These provisions

[10] *Root v Ins Co of North America*, 214 Mich App 106 (1995) further supports this conclusion. In that case, the Court explained that "[t]he primary rule of statutory interpretation is to ascertain and give effect to legislative intent." *Id.* at 109. As the Court noted, the term "or" is disjunctive and is "generally construed as referring to an alternative or a choice between two or more things." Nevertheless, making an exception to this general rule, and looking at the specific purpose of the no-fault insurance statute at issue in the case, it construed the phrase "the laws of any state or the federal government" in the conjunctive in order to accomplish the legislation's intent of reducing insurance costs by eliminating payment for all duplicative benefits. *Id.* at 109–10. Here, to give effect to all the terms in §29(b) and to effectuate the enforcement scheme of the 1981 Act, it is appropriate to conclude that an examination is a proceeding that stops the statute of limitations from running against the state.

[11] The sole exception to this is MCL 567.254(5), which allows for "the administrator to request that the attorney general of another state bring an action in the name of the administrator in the

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clearly demonstrate that when the legislature intended to limit enforcement activity under the UUPA to a judicial action, it knew how to do so.

The Court of Appeals also pointed to two other provisions in the UUPA (in addition to MCL 567.250(2)) where the term "action or proceeding" is used without defining the type of action or proceeding or where it is to be brought. See MCL 567.248(1) (prohibiting any "action or proceeding" from being brought against a holder as a result of a holder "destroying or otherwise disposing of the property pursuant to the authorization of the administrator"); MCL 567.249 (authorizing the administrator to destroy property after it has been delivered under the UUPA if the administrator determines it has "insubstantial commercial value," but prohibiting any "action or proceeding" from being brought "against a holder for or on account of any action by the administrator" in destroying such property). The Court of Appeals correctly noted that both of these provisions involve some initial conduct by the administrator. The Court further concluded, without any substantive explanation, that "the initial conduct at issue [by the administrator under these provisions] would be the examination, and the subsequent forbidden 'action' is the judicial action to enforce the examination determination." *The Walt Disney Co.*, __ Mich App __; slip op at 6. NAUPA respectfully submits that this conclusion is demonstrably incorrect.

Specifically, the Court of Appeals analysis of these two sections fails to recognize that the majority of property reported by holders under the UUPA does not take place as a result of an examination but rather through the annual reporting process required by MCL 567.238. Accordingly, authorization received from the administrator that a holder may destroy property is

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other state," without specifying the venue for the action. Read this section in context (including the fact that it involves actions brought by an attorney general and immediately follows a subsection specifying that an action be brought "in a court of competent jurisdiction"), however, it appears clear that this section is intended to refer to a judicial action.

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likely to be given, not in connection with an audit but rather in response to the holder requesting guidance in preparing its annual report. Similarly, property that an administrator decides to destroy because the administrator determines that it has insubstantial commercial value is equally likely, if not more likely, to have been received in connection with a holder's annual report rather than following an audit. Under these circumstances, the enforcement activity "forbidden" by MCL 567.248(1) and MCL 567.249, should not be limited to just an action in court under MCL 567.253, but should also include an examination under MCL 567.250(2) concerning the property. Any other conclusion would leave holders open to being examined for property that the administrator has told them they do not need to report or that the administrator has already determined to be of no value. In short, a review of the various enforcement provisions contained in the UUPA, read in the context of the entire Act, makes clear that, although the Act mandates that certain "actions" be brought in court, the term "action or proceeding" is not intended to be so limited, and properly includes an examination under MCL 567.250(2).[12] This conclusion is further supported by consideration of relevant case law from other jurisdictions holding that an audit or examination constitutes a "proceeding" in the context of enforcing state unclaimed property laws.

[12] Citing *Mays v Snyder*, 323 Mich App 1 (2018), the Court of Appeals also found that the absence of the word "examination" in MCL 567.250(2), even though it is used elsewhere in the UUPA, indicated that it was intentionally omitted from the section by the legislature. *The Walt Disney Co.*, __ Mich App __; slip op at 6. Similar to the conclusion reached by the Court in *Mays*, however, the legislature did not omit any language from the statute of limitations provision in the UUPA that is contained in some other relevant provision. See *Mays*, 323 Mich App at 40 (finding that "the Legislature did not 'omit' from the CCA any language from the statute-of-limitations provisions of the RJA"). Indeed, the question at issue in this case is not whether "examination" was intentionally or mistakenly omitted from MCL 567.250(2), but whether the term "action or proceeding" includes an examination. Reading all relevant provisions of the UUPA in context, an "examination" constitutes a form proceeding that is covered by MCL 567.250(2).

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For example, in *Total Asset Recovery Services, LLC v MetLife, Inc*, unpublished opinion of the Second Judicial Circuit, issued Aug 20, 2013 (Docket No 2010-CA-3719); 2013 Fla Cir LEXIS 18463, at *2, the court held that an unclaimed property audit of an insurance company initiated by the state constituted an "administrative proceeding."[13] Therefore, the court dismissed the plaintiff's complaint brought under the Florida False Claims Act on the grounds that it was precluded by the provision of the Act barring private actions that are "'based upon allegations or transactions that are the subject of ... an administrative proceeding'" involving the affected agency. *Id.* at *3 (quoting Florida Statutes 68.087(2)) (ellipses in original). See also *State ex rel French v Card Compliant, LLC*, unpublished opinion of Del Superior Ct, issued Apr 21, 2017 (Docket No N13C-06-289 PRW CCLD); 2017 Del Super LEXIS 198; slip op at *22–24 (holding that an unclaimed property audit constituted an "administrative proceeding" in dismissing claims brought under Delaware's False Claims and Reporting Act based on the Act's "administrative proceedings bar"). Courts have reached the same conclusion with regard to audits or examinations in other regulatory areas as well. See, e.g., *United States v Beckham*, 917 F3d 1059, 1065 (CA 8, 2019) (holding that an audit constituted "a pending proceeding" under the Internal Revenue Code); *Bowen v M Caratan, Inc*, 142 F Supp 3d 1007, 1022–23 (ED Cal 2015) (holding that an audit by the Department of Labor is a "proceeding" under the Fair Labor Standards Act); *Inland Manpower Ass'n v US Dep't of Labor*, 882 F2d 343, 344 (CA 9, 1989) (holding that "auditing process" by the Department of Labor constituted administrative "proceedings" under the Comprehensive Employment Training Act); see generally *United States v Leo*, 941 F2d 181, 198–99 (CA 3, 1991) (noting that "[o]ther courts of appeals have broadly construed the term 'proceeding'") (citing

[13] Florida has adopted Subsection 29(b) of the 1981 Act and requires an "action or proceeding" to be brought within 10 years after the duty arose. See Fla Stat 717.129(2).

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*United States v Fruchtman*, 421 F2d 1019, 1021 (CA 6, 1970), cert denied, 400 US 849 (1970) ("'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency"). These authorities and others demonstrate that an examination initiated by a state administrator to enforce compliance with the unclaimed property laws constitutes a "proceeding" that stops the statute of limitations from running under Subsection 29(b) of the 1981 Act.

The role that examinations play in bringing holders into compliance with state unclaimed property laws further supports the conclusion that the commencement of an examination stops the statute of limitations from running against the state. In this regard, examinations are the primary method by which unclaimed property administrators seek to enforce holders' duties to report unclaimed property, and most examinations are resolved cooperatively. See, e.g., G. Allen Mayer, *Unclaimed Property Programs Are Alive and Well*, 101 TAX NOTES STATE 615, 619–20, issued Aug 9, 2021 <https://www.taxnotes.com/tax-notes-state/unclaimed-property/unclaimed-property-programs-are-alive-and-well/2021/08/09/76xx7> (accessed April 21, 2023) (explaining that unclaimed property examinations are necessary both to "check the accuracy of a holder's voluntary self-reporting and serve as a deterrent to noncompliance by other holders" and that "most unclaimed property examinations are conducted in a highly cooperative manner with few, if any, disputes"). Actions in court, by contrast, are rare and represent a tiny fraction of the administrators' enforcement efforts. However, if the phrase "action or proceeding" is interpreted not to include an examination, MCL 567.250(2) would require the state to preemptively file an action in court in order to ensure its ability to enforce any liability determinations made during the examination process. Such a result is untenable and can only serve to discourage cooperative resolutions of examinations and encourage unnecessary litigation.

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Consistent with the foregoing, other than the Court of Appeals' opinion that is the subject of this appeal, NAUPA is unaware of any other case in which a court has held that the statute of limitations on a state's ability to enforce a holder's duty to report unclaimed property continues to run against the state after it has initiated an examination of a holder in the 40 years since the 1981 Act was adopted.

## II. Changes made to the 1981 Act by the Michigan Legislature in adoption the UUPA further clarify that the initiation of an examination stops the running of the statute of limitations under MCL 567.250(2).

As described above, the provisions contained in the UUPA limiting the State Treasurer's time to enforce duties under the Act, the authority of the State Treasurer to conduct examinations of holders, and the ability of the State Treasurer to bring an action in court are each based on, and virtually identical to, provisions contained in the 1981 Act. Cf. 1981 Act, § 29(b) with MCL 567.250(2), 1981 Act § 130(b) with MCL 567.251(2), and 1981 Act § 32. The wording, structure, and intent of the enforcement scheme established by these provisions taken from the 1981 Act make clear that an examination constitutes an "action or proceeding" that stops the statute of limitations from running against the state. Changes made by the Michigan Legislature to the 1981 Act in adopting the UUPA eliminate any doubt that this conclusion is correct.

Specifically, MCL 567.251a, a section that is not contained in the 1981 Act, expressly provides that the State Treasurer does not need to bring a court action in order to enforce the findings from an examination that a holder has failed to report unclaimed property. Instead, once the State Treasurer issues a "notice of examination determination" setting forth "the property that is deliverable by the holder to the administrator as a result of an examination" (MCL 567.251a(15)), the burden is on the holder to dispute any determinations made in the examination, either through a request for reconsideration, and/or by the holder bringing an action in court. See

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MCL 567.251a(l)–(4). Property that is not contested by the holder is required to be delivered to the state by operation of law, without any further action by the State Treasurer. See MCL 567.251a(5); see also *Livingstone*, 434 Mich at 777–78 (describing how under the Michigan use tax statute, MCL 205.22(2), an "unappealed final assessment becomes due and payable by operation of law"). This additional section that has been added to the UUPA unequivocally demonstrates that an examination is the State Treasurer's primary method of enforcing a holder's duty to report unclaimed property to the state, and that the Michigan Legislature intended that an examination constitutes an "action or proceeding" under MCL 567.250(2).[14]

Under the Court of Appeals' ruling, however, in order to preserve the State Treasurer's ability to enforce a holder's reporting obligations for all of the years that were in scope at the start of an examination, the State Treasurer would be compelled to file an action in court in essence at the same time that it commences the examination. Such a paradoxical result, in addition to encouraging needless litigation and discouraging holder cooperation, should be rejected as being directly contrary to the enforcement procedures established by the Michigan Legislature.

The "streamlined audit process," provided for by MCL 567.251b, further illustrates that the Michigan Legislature did not intend for the statute of limitations to continue to run after an examination has been initiated. This section, which was added to the UUPA in 2015, sets a "goal" of completing this type of examination within 18 months from the holder's receipt of the audit notice. MCL 567.251b(2)(a). However, under MCL 567.250(3), an "action or proceeding" with

[14] Should a holder fail to deliver the uncontested property identified in a "notice of examination determination," the State Treasurer might find it necessary to bring an action in court under MCL 567.253. Such an action, however, would be based upon the holder's failure to comply with its duties under MCL 567.251a. The statute of limitations for this type of action would run, not from when the property was originally due to be reported, but rather from when the property was required to be delivered under MCL 567.251a(l) (*i.e.*, 90 days after the mailing of the "notice of examination determination" if uncontested by the holder).

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respect to the duty of a holder participating in the "streamlined audit process" must be brought within four years "after the duty arose." Therefore, under the Court of Appeals' ruling that the statute of limitations continues to run after an examination has been commenced, even if a streamlined audit was initiated a day after a holder filed its annual unclaimed property report, and the goal of completing the audit within 18 months was met, one full report year (or 25%) of the reduced time period that was within the scope of the streamlined audit at its commencement would necessarily be beyond the state's judicial enforcement abilities at its conclusion if the holder were to dispute any of the examination determinations. And if the examination was not commenced until several months after the annual report was filed, and it took just a few months longer than 18 months to complete the audit (which the statute itself describes as merely a "goal") to be completed, two full years (or 50%) of the reduced four-year time period would be lost.[15] Such an absurd result could not have been the intent of the Michigan Legislature, and further demonstrates that the only rational interpretation of MCL 567.250(2) is that the initiation of an examination stops the statute of limitations from running against the state for purposes of enforcing a holder's duty to report unclaimed property.

[15] Moreover, procedural mechanisms available under the UUPA provide the holder with the ability to extend the examination process for many months, if not years. See Mich Admin Code, R 567.9(1)–(2) (providing process for holder to request reconsideration that it is not eligible to participate in streamline audit process); MCL § 567.251a(l), (6)–(8), & (10)–(12) (providing processes for holder to request reconsideration of examination determinations that could take over a year to resolve). Under the Court of Appeals' decision, however, a holder, simply by using these procedural mechanisms, could make it possible for all, or almost all, of the period that was within scope of a streamlined audit at its commencement to be beyond the state's judicial enforcement abilities at its conclusion.

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## III. Measuring the 10-year period established by Section 29 of the 1981 Act from the initiation of an examination accomplishes the underlying purposes that statutes of limitations are intended to serve.

Recognizing that an examination constitutes an "action or proceeding" that stops the statute of limitations from running accomplishes the purpose of establishing a liability cut-off for holders that Section 29 of the 1981 Act (upon which MCL 567.250(2) is based) was intended to serve. Doing so also prevents holders from being able to unilaterally dictate the scope of the state's enforcement powers through their own conduct during the examination process, a concept that other courts have squarely rejected as being necessary to prevent holders becoming their own regulators. See e.g., *Fryzel*, 173 Ill App 3d at 796 (holding that a holder could not prevent the state from conducting an examination of property based solely on the holder's assertion that the property at issue was outside the scope of the Illinois' Unclaimed Property Act because doing so would "allow the regulated to become the regulator").

Statutes of limitations are intended to prevent unfair surprise by giving defendants notice of potential suit and the nature of potential claims against them, as well as to ensure the preservation of evidence. See, e.g., *Livingstone*, 434 Mich at 795 ("[limitation] statutes are not enacted for the sake of defeating legal claims, but only to require notice of such claims within a reasonable time and thus guard against the unfair handicaps of defending against unfounded and belated suits") (citation and internal quotations omitted and alteration in original); *Lansing Gen Hosp, Osteopathic v Gomez*, 114 Mich App 814, 824 (1983) ("The purpose of the statute of limitation is to compel action within a reasonable time so the opposing party has a fair opportunity to defend, to protect against stale claims, and to protect defendants from protracted fear of litigation."). In the unclaimed property enforcement context, measuring the statute of limitations from the initiation of an examination accomplishes all of these goals.

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The initiation of an examination puts a holder on notice that the state is commencing a process to determine whether the holder has complied with the unclaimed property laws, which will ultimately lead to a determination of the holder's unclaimed property liability. It also informs the holder of the time period that is within the scope of the examination—namely, ten years from the date the examination is initiated, and that the holder is required to retain records encompassing the same period. Thus, measuring the statute of limitations from the start of an examination, the state's primary method for enforcing the unclaimed property laws, would plainly give the holder a fair opportunity to defend itself. At the same time, measuring the statute of limitations from the commencement of an examination would not result in a holder being kept perpetually at risk of a claim being brought against it. Instead, the examination initiation establishes a clear cut-off to potential liability and for every day that the state does not initiate an examination, any time period that is more than 10 years prior to that date would no longer be subject to a judicially enforceable claim.

Nevertheless, although the Court of Appeals did not address this issue, the circuit court expressed concern over the possibility of the state being able to retain the ability "to bring an action at any point in the future by extending the examination indefinitely." *The Walt Disney Co v Eubanks,* unpublished opinion of Oakland Circuit Court (Docket No 2021-189464-CZ), issued Jan 24, 2022; 2022 Mich Cir LEXIS 57, at *17. This concern is based on a fundamental misunderstanding of the realities of unclaimed property examinations. Contrary to the circuit court's suggestion, states have no incentive to delay concluding examinations because property is not delivered to a state until after an audit has been completed, and, thus, the opposite is true. In other words, every day that a state does not complete an examination is another day the state does not have custody of the property. Moreover, states are aware that the sooner unclaimed property

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is reported, the greater the likelihood it can be reunited with its rightful owner.[16] In contrast, holders have strong incentives to extend the examination process as long as possible because they are able to retain the benefit of the unreported property until the conclusion of an examination.[17]

Moreover, under the Court of Appeals' ruling that the statute of limitations continues to run until the state files an action in court, the longer a holder is able to delay the conclusion of an examination, in addition to retaining the benefit of holding on to unreported property longer, a holder will actually be able to unilaterally reduce the scope of its potential unclaimed property liability. Indeed, for each year that the examination remains unresolved, one year of unclaimed property liability that was undisputedly in scope at the time the examination was commenced would no longer to subject to judicial enforcement. Thus, even after a routine, cooperative examination is completed, a holder would be incentivized not to turn over any unclaimed property absent the initiation of a court action, because the longer a holder fails to comply, the shorter its scope of liability would become.

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[16] Contract examiners engaged by the states (including Michigan) likewise have no reason to delay the completion of the examination, because they are compensated on the basis of results rather than the time required to perform the audit, and no compensation is paid whatsoever until completion of the exam, and delivery of property to the state based on the state's determination of liability.

[17] See Mayer, *Unclaimed Property Programs are Alive and Well*, Tax Notes <https://www.taxnotes.com/tax-notes-state/unclaimed-property/unclaimed-property-programs-are-alive-and-well/2021/08/09/76xx7> (discussing the problem of "lucrative silence," whereby holders are disincentivized from communicating with property owners so as to retain the benefit of holding property, as well as the "financial incentive for 'audit defense' firms to prolong a compliance examination in ways that would increase their billable hours"). Indeed, in this case, the Court of Appeals noted the State Treasurer's contention that the delays in the examination process were, in fact, caused by the holders. See *The Walt Disney Co.*, __ Mich App __; slip op; slip op at 2. The Court of Appeals, however, did not address the issue of how a holder's delay might affect an examination and the scope of a holder's liability.

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In sum, if upheld, the Court of Appeals' ruling would completely undermine the examination process, allow the statute of limitations to be used by holders to benefit from their own delay and game the ability of state administrators to enforce the unclaimed property laws, and encourage unnecessary litigation. Such a result should be rejected as being flatly inconsistent with the purposes of adding a statute of limitations applicable to the state in the 1981 Act. See, e.g., *Livingstone*, 434 Mich at 785 ("statutes of limitations should be construed in a manner that best effectuates the policies the Legislature intended to promote").

## CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, NAUPA respectfully submits that the Court should grant the State Treasurer's application for leave to appeal and reverse the ruling issued by the Court of Appeals.

Respectfully submitted,

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Date: April 28, 2023