REVISION OF THE UNIFORM UNCLAIMED PROPERTY ACT

Claimant Representative (Owner's Interest)

Abbreviated Recommendations Without Supporting Argument

To The ULC Drafting Committee

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ADDITIONAL COMMENTS, EXPLANATION FOR REVISIONS, AND CASE CITATIONS FOR RECOMMENDED CHANGES TO THE UUPA – (Please see Original submission with explanations)

CASE INDEX REGARDING PROPERTY RIGHTS AND POLICE POWERS– (Please see original submission with explanations)

ATTACHMENTS

NO. 1 – AUDIT CONTRACT (please see original submission with attachments)

NO 2 – FINDER AGREEMENT (EMAIL) – (please see original submission with attachments)

NO 3 – David Knott's, United Asset Recovery, April 21, 2014 – Position Paper to the ULC Drafting Committee.

NOTE: Recommended additions (change) in language are set forth as follows: in **italics**, and or **yellow highlight**, or reference as **{Additional Comments to be added to existing document}**. Also, new language added different from original submission in **red highlight**.

SECTION 2. PRESUMPTIONS OF ABANDONMENT.

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below for the particular property:

(15) all other property, five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs.
(b) At the time that an interest is presumed abandoned under subsection *(a) property rights accruing to the owner as a result of the interest are not subject to forfeiture of any of the individual property rights of owners, assignees, transferees, and creditors.*
(*See presumption of abandonment cases in Case Index)*

Comments

{Additional Comments to be added to existing document}

The law requires that we favor individual property rights and avoid forfeiture and limits the state's exercise of its police power, the amendment to 15 (a) is proposed to recognize that absent a judicial determination of abandonment, individual property rights subject to escheat under the presumption of abandonment do not result in a forfeiture of the owner property rights the owner could have exercised prior to escheat.

State v. Lilliock (1982), 70 Ohio St.2d 23, 25, 24 O.O.3d 64, 434 N.E.2d 723 and *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, 605 N.E.2d 368 " [f]orfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes."

Kiser v. Logan Cty. Bd. of Commrs. (1911), 85 Ohio St. 129, 131, 97 N.E. 52 ("Whether or not a proprietor has abandoned his rights or his property, is usually a question of fact for a jury to answer, and the answer must depend primarily upon an intention by the proprietor to abandon. * * * But mere non-user is not ordinarily sufficient to establish the fact of abandonment").

Froelich v. Cleveland (1919), 99 Ohio St 376, 124 N.E. 212. Private property rights may be limited through the state's exercise of its police power when restrictions are necessary for the public welfare. Just as private property rights are not absolute, however, neither is the state's ability to restrict those rights. Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public require its exercise and the means of restriction must not be unduly oppressive upon individuals.

Id., 84 Ohio St. 3d at 131 Further, the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only "when the restriction thereof bears a substantial relationship to the public health, morals and safety."

Kiser v. Board of Corn'rs of Logan County (1911), 85 Ohio St. 129, 133-34, 135,: when state action is directed toward property that does not pose a danger to public health or safety, it may be unconstitutional unless the state pays compensation.

This Court has held repeatedly that forfeiture of private property rights is disfavored in both law and equity, and that statutes that result in the loss of private property interests must be strictly construed against the government agency that seeks to convert private property for its own use. See, e.g., Lihliock, 70 Ohio St. 2d at 25; Pizza, 84 Ohio St. 3d at 131. Indeed, "[t]he law requires that we favor individual property rights when interpreting forfeiture statutes." Pizza, 84 Ohio St. 3d at 131, quoting Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917 (1992), 65

"Mere possession of cash is not unlawful." State v. Roberts (1995), 102 Ohio App. 3d 514, 518.

Id., 449 U.S. at 164, 101 S. Ct. at 452. Thus, the Court held, the statute violated the Takings Clause.

> [A] state, by ipse dixit, may not transform private property into public property without compensation. .. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

The Ninth Circuit has observed that "the Supreme Court's decisions in [Webb's] and [Phillips] demonstrate [that] constitutionally protected property rights can - and often do - exist despite statutes .. that appear to deny their existence." Schneider v. California Department of Corrections (9th Cir. 1998), 151 F. 3d 1194, 1199. That is because "there is.. a 'core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny." Id. at 1200. The court held in Schneider:

The States' power vis-à-vis property ... operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional "old property" interests found within the core. ..Were the rule otherwise, States could unilaterally dictate the content of - indeed, altogether opt out of - both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

SECTION 13. DEPOSIT OF FUNDS.

[(a) Except as otherwise provided by this section, the] [The] administrator shall promptly deposit in the [general fund] of this State all funds received under this [Act], including the proceeds from the sale of abandoned property under Section 12. [The administrator shall retain in a separate trust fund at least *the amount of claims paid by the administrator two fiscal quarters prior to the current fiscal quarter from* which the administrator shall pay claims duly allowed.] The administrator shall record the name and last known address of each person appearing from the holders' reports to be entitled to the property *and the name, date of birth, social security number or other personal identified, email address, telephone number(s), the owner's title or interest in the property, and last known, date of birth, social security number or other personal identified, email address, telephone number(s), the owner's title or interest in the property*, address of each insured person or annuitant and beneficiary and with respect to each policy or annuity listed in the report of an insurance company, its number, the name of the company, and the amount due.

(c) *Before making a deposit to the credit of the [general fund], the administrator shall audit holder reports to ensure that all holder report fields contain all owner identification information contained in the records submitted to the administrator by the holder.*

Funds held in trust for the benefit of owners shall not be considered public funds subject to sovereign immunity protection and shall not be barred from garnishment.

Comments

This section increases from $100,000 to the total amount of claims paid by the administrator, based upon the two fiscal quarters prior to the current fiscal quarter, regarding the sum which is recommended to be retained in a trust account for payment of claims. It is contemplated that the amount of the trust fund which is ultimately established will reflect a State's experience in paying owners' claims.
Some states do not audit holder reports until a claim is made. Holder reports should be audited by the administrator when received to reduce the probability that owner identifier information is lost due the passage of time.

SECTION 15. FILING CLAIM WITH ADMINISTRATOR; HANDLING OF CLAIMS BY ADMINISTRATOR.

(a) A person, excluding another State, claiming property paid or delivered to the administrator may file a claim on a form prescribed by the administrator and verified by the claimant *or claimant's representative.*
(b) Within 90 days after a claim is filed, the administrator shall *review each claim received applying a standard of evidence consistent with the preponderance of evidence standard. Claims shall be reviewed by the administrator to reasonably determine the absence of fraud and to verify that the claimant is more likely than not, an owner of the property. The Administrator*

shall allow or deny the claim and give written notice of the decision to the claimant or claimant's representative. If the claim is denied, the administrator shall inform the claimant or claimant's representative of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant *or claimant's representative* may then file a new claim with the administrator or maintain an action under Section 16.

Comments

{Additional language to be added to existing document}

The use of the term "shall' in Section 15 (b) is mandatory and is not directive.

SECTION 16. ACTION TO ESTABLISH CLAIM.

2. ***Meditation, civil action, administrative appeals regarding adverse agency rulings***

   A person who is aggrieved by a decision of the administrator or whose claim has not been acted upon within 90 days after its filing may bring an action to establish the claim in the circuit court, naming the administrator as a defendant. The action shall be brought within 90 days after the decision of the administrator or within 180 days after the filing of the claim if the administrator has failed to act on it. The court shall award the prevailing party ***costs*** *and reasonable* ***attorney's fees****.*

   The aggrieved person and the administrator may mutually agree to meditation, an informal administrative hearing, or formal administrative hearing. The aggrieved person shall control the forum selection to assure that the arbiter is a neutral party.
   .

3. The presumption of abandonment shall not subject the owner to forfeiture of pre-escheat individual property rights. The submission of a valid claim terminates the States interest in the property.

Comments

{Additional language to be added to existing document}

If access to a formal or informal administrative hearing, mediation, or the court is available to the aggrieved party, the aggrieved party shall have the right to select the forum in which it files its action to enhance the likelihood *that the Claimant will have* access to a neutral arbiter.

SECTION 25. FINDER, *TRANSFER,* AND CLAIMANT'S REPRESENTATIVE AGREEMENTS.

(a) An agreement by an owner, the primary purpose of which is to locate property that is presumed abandoned is void and unenforceable if it was entered into during the period commencing on the date the property was presumed abandoned and extending to a time that is 3 months after the date the property is paid or delivered to the administrator. This subsection does not apply to an owner's agreement with an attorney or claimant's representative to assist in the recovery of identified property that is presumed abandoned or contest the administrator's denial of a claim.

(c) If an agreement covered by this section applies to mineral proceeds and the agreement contains a provision to pay compensation that includes a portion of the underlying minerals or any mineral proceeds not then presumed abandoned, the provision is void and unenforceable.

(d) This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation. An agreement covered by this section which provides for compensation or consideration that has been judicially determined to be unconscionable is unenforceable except by the owner. An owner who has agreed to pay compensation or accept consideration that is alleged to be unconscionable, may maintain an action to reduce the compensation or increase consideration to a conscionable amount. The court may award reasonable attorney's fees to an owner who prevails in the action. [Former e. moved to 1st sentence of (d)]

(e) (f. renamed to e.) This section does not preclude an owner from asserting that an agreement covered by this section is valid and enforceable.

(f) An agreement by an owner to sell, assign, or gift their property, grants to the person acquiring the interest all of the rights and obligation of the owner to obtain the property from the unclaimed property administrator.

Comments

This section is intended to enhance the likelihood that the owner of the unclaimed property will be located by the efforts of the State, and will receive a return of the property without payment of a "finder's fee." In the past, it appears to have been the practice in many States for unclaimed property locators or heir finders to utilize the State's lists of names and addresses of missing owners to contact them and propose to find their property for them for a fee, before the State has had an opportunity to locate the missing owners. Some States have enacted legislation that prohibits examination of these lists by anyone except an apparent owner or other person having a legal interest in the property, but in many States that kind of provision may be in conflict with the State's public records laws. *This section is also intended to enhance the likelihood that the owner of the unclaimed property will be located by means other than those employed by the State and recognizes that services provided by locators, heir finders, claimant's representatives, and attorneys enhance the likelihood that a greater number of owners will be found and will recover their unclaimed property. This section is also intended to preserve the rights of owner to freely alienate their property and to preserve the rights of successors in interest.*

Subsections (b) and (d) apply to agreements entered into at any time. These subsections apply to all [deletion] contracts, regardless of when the contract is made, including agreements with an owner as a result of a holder providing to private parties, the holder's information regarding an inactive account.

This section is not intended to apply to situations such as the probating of an estate, which may incidentally include a necessity of locating unclaimed property. Agreements in such cases do not have as their principal purpose, the rendition of services to locate, deliver or recover unclaimed property. This section also does not apply to agreements for representation of an owner who is claiming property the identity of which is already known to the owner.

Florida's Unclaimed Property Bureau Chief and current president of NAUPA expressed in the last ULC meeting that his State returns higher than average amounts of unclaimed property to owners. He also stated that approximately 25% all of funds returned to owners occur with the assistance of registered claimant's representatives.

The Florida Unclaimed Property Act contains provisions that recognize that the owner and claimant's representative are free to negotiate fees for services as well as the sale of unclaimed property rights subject to certain disclosure requirements and contract formats. See F.S. 717.135 and 717.1351.

F.S.717.1381 supports the proposal to reduce the time frame in which a contract may be entered into pursuant to Section 25 (a). Florida statutes void owner agreements entered into within 45 days from the dated the holder reported is processed and added to the unclaimed property database.

Rights affected:

Right to assign or sell property
Right of buyer or assignee of property to collect property
Right of finder, locator, claimant's representative to receive payment from UPA
Right of owner to control contract terms
Right of Creditor to collect property (See Weingarten v Chiang & AB 1275)
Right of Bankruptcy Trustee to collect property (see Death Row Inmates)

Modification of Private Contracts

The Supreme Court laid out a three-part test for whether a law conforms with the Contract Clause in *Energy Reserves Group v. Kansas Power & Light* 459 U.S. 400 (1983). First, the state regulation must not substantially impair a contractual relationship. Second, the State "must have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *459 U.S. at 411-13* Third, the law must be reasonable and appropriate for its intended purpose. This test is similar to rational basis review

Finder or Locator Agreements

A finder or locator is one who agrees to find or locate property for a fee that the owner will claim without the assistance of the finder or locator. A contingency fee agreement between a finder or locator and an owner provides for the finder or locator to locate property and provide the property information to the owner sufficient for the owner to make a claim for the property. The owner agrees to pay to finder or locator when the owner receives possession of the property.

Recovery Agreements

A claimant's representative is one who an owner hires to claim funds on their behalf for a contingency fee. A recovery agreement between an owner and a claimant's representative requires the claimant's representative to advance all costs necessary to document entitlement, legal fees and court cost, translation expenses, research costs, etc. at the discretion of the claimant's representative. Claimant's representative agrees to absorb all costs in the event the claim fails.

Agreements to Transfer Property

An agreement to transfer property is one which the owner of the property executes to transfer their rights, title and interest to another for valuable consideration or affection. The person acquiring the property obtains all of the rights to recover the property from the unclaimed property from the unclaimed property administrator.

NEW SECTION PROPOSALS FOR THE ACT:

1. *Uniform search and display of unclaimed property information on unclaimed property websites:*

1. *The following unclaimed property data shall be displayed in the search results on the State Unclaimed Property Search database via the internet.*

   (a) Owner name(s)

   (b) Owner relationship to property (i.e. Joint Tenants, Tenants in Common, Beneficiary, Insured, Payee, Payor, Trustee, Executor, etc.)

   (c) Last known address

   (d) Name and contact information of the Reporting Institution (holder)

(e) Property type (stocks, bank account, etc.)

(f) Value of property

(g) Year property escheated

(h) Date holder last had contact with owner(s)

(i) Claim inquiry information

(j) Claim status information