REVISION OF THE UNIFORM UNCLAIMED PROPERTY ACT
Claimant Representative (Owner's Interest) Recommendations To The ULC Drafting Committee

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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:
(1) traveler's check, 15 years after issuance;
(2) money order, seven years after issuance;
(3) stock or other equity interest in a business association or financial organization, including a security entitlement under [Article 8 of the Uniform Commercial Code], five years after the earlier of (i) the date of the most recent dividend, stock split, or other distribution unclaimed by the apparent owner, or (ii) the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner;
(4) debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, five years after the date of the most recent interest payment unclaimed by the apparent owner;
(5) a demand, savings, or time deposit, including a deposit that is automatically renewable, five years after the earlier of maturity or the date of the last indication by the owner of interest in the property; but a deposit that is automatically renewable is deemed matured for purposes of this section upon its initial date of maturity, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder;
(6) money or credits owed to a customer as a result of a retail business transaction, three years after the obligation accrued;
(7) gift certificate, three years after December 31 of the year in which the certificate was sold, but if redeemable in merchandise only, the amount abandoned is deemed to be [60] percent of the certificate's face value;
(8) amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, three years after the obligation to pay arose or, in the case of a policy or annuity payable upon proof of death, three years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;
(9) property distributable by a business association or financial organization in a course of dissolution, one year after the property becomes distributable;
(10) property received by a court as proceeds of a class action, and not distributed pursuant to the judgment, one year after the distribution date;
(11) property held by a court, government, governmental subdivision, agency, or instrumentality, one year after the property becomes distributable;
(12) wages or other compensation for personal services, one year after the compensation becomes payable;
(13) deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable;
(14) property in an individual retirement account, defined benefit plan, or other account or plan that is qualified for tax deferral under the income tax laws of the United States, three years after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty; and

(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 - See presumption of abandonment cases in Case Index(c) Property is unclaimed if, for the applicable period set forth in subsection (a), the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.
(d) An indication of an owner's interest in property includes:
(i) the presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;
(ii) owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease, or change the amount or type of property held in the account;
(iii) the making of a deposit to or withdrawal from a bank account; and
(iv) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.
(e) Property is payable or distributable for purposes of this [Act] notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.

Comments

Section 2 continues the general proposition that all intangible property is within the coverage of this Act. It provides in a single section for all the various periods of abandonment that were separately stated in several sections of the 1981 Act. With limited exceptions this reorganization does not alter the bases for presuming abandonment of the property from that established in the 1981 Act, but merely restates those standards in a unified section, more easily applied, with less repetition. One exception is that whereas the 1981 Act exempted from the presumption of abandonment certain property held by a bank if the bank held other property of the depositor not presumptively abandoned, the present Act does not. It was the conclusion of the Commissioners that an owner's knowledge of some property does not necessarily imply knowledge of all his or her property held by the bank, and that the owner is entitled to the protection of this Act as to all of the owner's property.

This section treats underlying bond obligations the same as underlying stock, except as to bearer bonds and original issue discount bonds. Thus, registered interest paying bonds will be

presumed abandoned five years after the date of an unpresented instrument issued to pay interest. In the case of bearer bonds, however, although interest held on deposit for more than five years that has not been paid out as a result of failure to present a coupon for payment will be considered abandoned, the underlying principal represented by the bearer certificate, provided such certificate is not held by an agent due to a mail return or other similar circumstance, will not be considered abandoned even if the coupons that were attached to that certificate at the time of original issuances have not been presented for payment. Where interest is accrued but not paid until the return of principal at the time the obligation matures or is called, and there is no making of periodic interest payments, there is not the same motivation for bond holders to communicate with the trustee or paying agent as in the case of interest paying bonds, and a lack of communication should not give rise to a presumption of abandonment. Therefore, bearer bonds and original issue discount bonds are excluded from paragraph (4) of this section, and will fall instead under paragraph (15). Those bonds will be presumed abandoned five years after the issuer's obligation to pay arises, i.e., five years after call or maturity.

The 1981 Act shortened the general dormancy period from 7 years to 5 years. Certain exceptions continue to be appropriate. For instance, statistical evidence indicates that a period of 15 years continues to be appropriate in the case of travelers checks, and seven years in the case of personal money orders and money orders issued by express companies. Also, in certain instances shorter periods are appropriate. For instance, the likelihood of finding the owner of a payroll check is materially decreased after one year. Hence, there is a one year dormancy period for unclaimed wages. Coverage of consumer credits is specifically provided, which is a clarification of the 1981 Act. The term covers credits owed on consumer transactions such as returns of merchandise, cancellation of layaways, and various kinds of deposits. The existence and amounts of such credits will of course be dependent on the terms of the contract between the holder and the consumer.

The dormancy period for unpaid distributions from retirement accounts and plans has been modified to shorten the period of presumed abandonment from five to three years, since an earlier date of presumed abandonment should be of assistance in assuring that the assets of the plan are ultimately claimed by their owner.

Because the unclaimed property laws are matters of traditional state powers, are laws of general application, and have only a tenuous, remote and peripheral impact on ERISA plans, it has been held that they are not pre-empted by federal law. *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2nd Cir. 1989); *Attorney General v. Blue Cross and Blue Shield of Michigan*, 168 Mich. App. 372, 424 N.W.2d 54 (Ct. App. 1988), *appeal denied*, No. 83788 (March 31, 1989). These cases declined to follow two advisory opinions to the contrary, issued by the Department of Labor (Opinions 78-32A, December 22, 1978, and 79-30A, May 14, 1979). Thereafter, notwithstanding the Second Circuit and Michigan decisions, the Department continued to adhere to its position that unclaimed property laws "relate to" ERISA, and are thus pre-empted, in a letter opinion issued March 3, 1995. 22 BNA Pension & Benefits Reporter 743 (1995). That opinion relied on *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), as holding that preemption extended to state laws that had only an indirect economic affect on ERISA plans. Subsequently, the Supreme Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ____ U.S. ____ (63 Law Week 4372, April 26, 1995), expounded a

much narrower meaning of *Ingersoll-Rand*. The case held that ERISA does not pre-empt the imposition of statutorily-mandated surcharges on bills of hospital patients whose commercial insurance coverage is purchased by an ERISA plan, or on HMOs insofar as their membership fees are paid by an ERISA plan. The Court emphasized that even though such state statutes would affect choices made by plan administrators, the ERISA pre-emption was not so broad as to nullify those state laws. The Court emphasized the basic presumption that "Congress does not intend to supplant state law" (63 LW at 4374). The Court said that *Ingersoll-Rand* does not hold that "merely economic influence" on administrative decisions will trigger pre-emption. (63 LW at 4376.) *Ingersoll-Rand* was explained to hold only that pre-emption would be found where state law produced "such acute, albeit indirect, economic effects" as to force a certain substantive scheme of coverage or effectively restrict insurance choices. (*Id.* at 4375.) Thus, "the basic thrust of the [ERISA] pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (*Id.* at 4375.) *See also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), holding that ERISA does not pre-empt a state garnishment statute under which a creditor may reach plan participants' benefits. A state claim under its unclaimed property law would appear to be no more intrusive to the federal regulatory scheme than its garnishment laws. Accordingly, with one exception, the final distribution of assets of a terminated plan, which is governed by 29 U.S.C. sec. 1350, this Act presumes that it is not pre-empted by ERISA.

Intangible property held by a utility other than subscribers' deposits and refunds are subject to the five year rule of subsection (a)(15).

Subsection (e) is intended to make clear that property is reportable notwithstanding that the owner, who has lost or otherwise forgotten his or her entitlement to property, fails to present to the holder evidence of ownership or to make a demand for payment. See *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948), in which the Court stated: "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties." See also *Provident Institution for Savings v. Malone*, 221 U.S.. 660 (1911), involving savings account; *Insurance Co. of North America v. Knight*, 8 Ill. App. 3d 871, 291 N.E.2d 40 (1972), involving negotiable instruments, and *People v. Marshall Field & Co.*, 83 Ill. App. 3d 811, 404 N.E.2d 368 (1980), involving gift certificates. With respect to gift certificates, see also Section 19(a), which invalidates private periods of limitation. Thus, gift certificates will be reportable notwithstanding language on the certificate purporting to avoid escheat by creating an expiration date prior to the time of presumed abandonment. Section (c) also obviates the result reached in *Oregon Racing Comm. v. Multonamah Kennel Club*, 242 Or. 572, 411 P.2d 63 (1963), involving unpresented winning parimutuel tickets.

Since the holder is indemnified against any loss resulting from the delivery of the property to the administrator, no possible harm can result in requiring that holders turn over the property, even though the owner has not presented proof of death or surrendered the insurance policy, savings account passbook, the gift certificate, winning racing ticket, or other memorandum of ownership.

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.

[(b) Before making a deposit to the credit of the [general fund], the administrator may deduct:
(1) expenses of sale of abandoned property;
(2) costs of mailing and publication in connection with abandoned property;
(3) reasonable service charges; and
(4) expenses incurred in examining records of holders of property and in collecting the property from those holders.]

(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.
See **case index** (pp. 2-3) in Position paper and the **Section 2** (pp. 4-9) proposal for support that the presumption of abandonment cannot result in forfeiture of a creditor's individual property rights.

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 confirm 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.
(c) Within 30 days after a claim is allowed, the property or the net proceeds of a sale of the property must be delivered or paid by the administrator to the claimant, together with any dividend, interest, or other increment to which the claimant is entitled under Sections 11 and 12.
(d) A holder who pays the owner for property that has been delivered to the State and which, if claimed from the administrator by the owner would be subject to an increment under Sections 11 and 12, may recover from the administrator the amount of the increment.

Comments

A person claiming property from the administrator is not limited to the number of times the claim may be filed or refiled prior to commencing an action under Section 16. The administrator's decision on a claim does not operate as collateral estoppel or *res judicata*. A person who has commenced an action under Section 16 may also reassert a claim before the administrator if the action has been dismissed without prejudice. A claim which has become the subject of a final judgment may not thereafter by refiled with the administrator.

The use of the term "shall' in Section 15 (b) is mandatory and is not directive. See Ditzel v the Florida Department of Financial Services Mandamus reply.

SECTION 16. ACTION TO ESTABLISH CLAIM.

A person aggrieved by a decision of the administrator or whose claim has not been acted upon within 90 days after its filing may maintain an original action to establish the claim in the [appropriate] court, naming the [administrator] as a defendant. [If the aggrieved person establishes the claim in an action against the administrator, the court may award the claimant reasonable attorney's fees.]

Comments

After property is presumed abandoned and reported to the administrator the administrator must attempt to locate the missing owner. Thereafter, if the property has been delivered to the administrator and the owner or his representative appears, the administrator must pay the claim. The owner's rights are never cut off; under this Act, the owner's rights exist in perpetuity. Although some state administrators have urged legislation that would terminate an owner's right to the property merely by the passage of time, such enactments may be unconstitutional. In *Hamilton v. Brown*, 161 U.S. 256, 275, 16 S. Ct. 585, 592, 40 L. Ed. 691, 699, (1896), the Supreme Court held that any procedure by which the State seeks to cut off the owner's title through escheat must include "actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown . . . ." Any lesser procedure appears to fall short of due process. The history of escheat, as compared with modern unclaimed property legislation, is discussed in "Unclaimed Property and Reporting Forms," Epstein, McThenia & Forslund, ch. 1 (Matt. Bend. 1984).

In any judicial action commenced to recover the property from the administrator, the claimant may proceed *de novo*, and the court will not be limited to a mere review of the administrator's decision.

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 file sits action to enhance the likelihood of access to a neutral arbiter.

SECTION 25. FINDER 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.
(b) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, sell, or assist in the recovery of property is enforceable only if the agreement is in writing, clearly sets forth the nature of the property and the services to be rendered, is signed by the owner, and states the value of the property before and after the fee or other consideration has been deducted.
(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.
(f) This section does not preclude an owner from asserting that an agreement covered by this section is valid and enforceable.

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 abandoned 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.

Subsections (b) and (d) apply to agreements entered into at any time. These subsections

apply to all 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.

The UPA Revenue and Return Report [PENDING] indicates that greater public access to unclaimed property data by owners, locators, representatives, attorneys, etc., and limited fee, contract, and licensing restrictions, increases return rates.

Conversely, this report indicates that the very consumer protection laws that were intended to protect persons with a legal right to unclaimed property are be used by legislators to forfeit individual property rights without the proper degree of due process required for a permanent taking. These artificial restrictions reduce return rates resulting in a win fall for States.

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.

ADDITIONAL COMMENTS, EXPLANATION FOR REVISIONS, AND CASE CITATIONS FOR RECOMMENDED CHANGES TO THE UUPA

1. Finder Agreements and Agreements to Recover Identified Property

Section 25 of the 1995 UUPA addresses the following: (a) finders and/or locators agreements, (b) the time in which a finder or locator may enter into a valid agreement, (c) compensation that includes a portion of underlying mineral rights not then presumed abandoned, (d) compensation that is considered unconscionable, and (e) exclusion of the provisions of this section when applied to an owner's agreement with an attorney to file a claim as to identified property or contest the administrator's denial of a claim.

The present Act restricts an owner's right to contract with finder and locators but does not address professional claim representative who are not attorneys.

(a) Finder or Locator Agreements

A finder or locator is one who agrees to find or locate property, provide sufficient property information and location to the owner for the owner to make a claim for the property. The owner agrees to pay to finder or locator their fee when the owner receives possession of the property. (*See FDIC Finder Agreement and ASC Finder Agreement*)

(b) Agreements to Recover Identified Property

A claimant's representative is one who an owner enters into an agreement with to file a claim as to identified property or contest the administrator's denial of a claim.

An owner's agreement to recover identified property would require 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 contingent upon owner regaining possession of their unclaimed property. Claimant's representative agrees to absorb all costs in the event the claim fails.

Comments

The current Act does not address agreements to sell unclaimed property. A basic individual property right is to sell, assign or gift ones interest in the property. Florida has provisions in its unclaimed property statutes for the acquisition of unclaimed property. The sale of a future expectancy is a common form of business transaction that should not have stripped in favor of administrative convenience.

(c) Time in which a finder or locator may enter into a valid agreement

The argument for shorter dormancy periods is "earlier efforts will result in more effective notification, as "the missing owner trail" will be "warmer."(1). The same argument also supports the rationale that finders/locators/claimant's representatives should be allowed to contract with owners sooner. Like unclaimed property auditors, finders/locators/claimant's representatives have a high incentive to expend resources to locate owners and increase the rate reunification in the same why that auditors have a high incentive to find unreported property for States.

Justifications for restricting when an owner and a finder/locator/claimant's representatives may enter into a valid contract are: (a) an owner would not want to hire a finder/locator/claimant's representatives until the time restrictions have expired; (b) owners are devoid of choice and cannot claim on their own once they have been contacted by a finder/locator/claimant's representatives; (c) all owners would rather locate their property and claim it without the assistance of a finder/locator/claimant's representatives, to avoid paying a fee.

It is true that some people would rather claim without assistance. It is also true that there are people who would rather pay someone to handle the location and claim of their property rather than doing so themselves. The United State economy is primarily a service driven capitalistic economy. Laws should not unduly restrict an owner contract rights or service providers from engaging in lawful enterprise.

The benefits associated with an owner knowing they have unclaimed property outweighs the temporary annoyance related to unsolicited calls and letters regarding unclaimed property for private parties in the same way attempts to engage the public in the election process outweighs the annoyance related to unsolicited campaign calls and letters.

(d) Compensation that includes a portion of underlying mineral rights not then presumed abandoned

We support this portion of Section 25

(e) Exclusion of the provisions of this section when applied to an owner's agreement with an attorney to file a claim as to identified property or to contest the administrator's denial of a claim.

The drafters of the 1995 Act recognized that there is a distinction between a property Finder or Locator and someone who acts as a legally authorized representative of the owner to claim identified property and contest an administrator's denial of a claim. The update of the Act should either include claimant's representatives with attorneys in the exclusion or state that existing general State laws governing contracts shall apply to agreements between owners, claimant's representatives, and attorneys and that the Act imposes no additional restrictions.

(d) Compensation that is considered unconscionable

We support the right of an owner to bring a civil action for compensation or consideration that is considered unconscionable. We do not support a provision that would extent this right to the administrator. Administrator's are not direct parties to the contract and thus have on standing to initiate an action. This would also place too much power in the hands of the administrator, who have taxpayer supported attorneys, to bring frivolous or harassing actions against service providers.

Comments

During the ULC meeting in Washington D.C. administrator's touted the benefits contingency fee auditors provide. An auditor is a contingent fee locator of dormant property. Owners have limited or no authority to intervene in the contract negotiations between the State and auditors a States should refrain from engaging in undue contract impediment between owners and contingent fee services providers.

Owners should have the option to hire contingent fee claim representatives on their own terms for the same reasons and advantages States enjoy when they employ contingent fee auditors. Similar to auditors, contingent fee claim representatives advance all costs to locate and obtain records required to establish entitlement, locate heirs and missing persons, pay attorneys and court filing fees for probate expenses, administrative and/or civil appeals to overturn adverse claim determinations, and other legal actions required to prove ownership. The hard costs of often exceed fee limitations making it impossible for professional representatives to assist people who need help claiming unclaimed property below the value necessary to pay a professional.

We support changes to UUPA that reinforce the owner's right to contract when they want to, waive consumer protection laws related to fees and private notification of the existence of their unclaimed. Furthermore, we support claimant representative contract disclosures that provide owner's with information regarding their unclaimed property, rights to claim property without representation, rights to seek legal counsel, and a three day right to rescind the contract.

2. **Rights of persons other than the original owner to claim and receive payment of unclaimed property**

The case cited in the index also support the rights of creditor's, bankruptcy trustee, receivers, successors in interest, and assignees to exercise their rights to claim and receive payment of unclaimed property and prohibit states from forfeiture of these property rights.

NEW SECTION PROPOSALS

3. 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

4. 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.

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5. 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.

CASE INDEX REGARDING PROPERTY RIGHTS AND POLICE POWERS

The cases cited below stand for the premise that States have a constitutional duty to property core property rights and refrain from unduly restricting the exercise of these rights.

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."

McKeehan v. U.S. (1971), 438 F.2d 739, 744-45 (because there was no "legislative policy that forfeiture under the circumstances of this case will aid in enforcing the criminal laws or make the instrumentalities of crime more difficult or costly to obtain," or "any sound administrative or revenue purpose," the government's "imposition of forfeiture on [the owner] is penal and causes an unconstitutional deprivation of personal property without just compensation. (citations omitted))."

The Court of Appeals for the Sixth District (Ohio) recently noted the distinction between a taking requiring compensation and a proper exercise of the government's police power:

The distinction between an exercise of eminent domain power that is compensable under the fifth amendment and an exercise of the police power is that in an exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public .: [whereas] in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare.

City of Perrysburg v. Toledo Edison Company (2007), 171 Ohio App. 3d 174, 180 (citation omitted). Thus, state action that restricts or infringes upon private property may not be a taking where the property "endangers public health or safety." Id. at 179. But as this Court held in Kiser v. Board of Corn'rs of Logan County (1911), 85 Ohio St. 129, 133-34, 135, the obverse is also true: 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.

The forfeiture of the interest called for in R.C. 169.08(D) does nothing to prevent any criminal activity or abate any nuisance, 12 and bears no "substantial relationship to the public health, morals and safety." Pizza, 84 Ohio St. 3d at 131. Rather, the Act punishes owners of unclaimed property for leaving their property unattended, and the only purpose for ordering the forfeiture of the interest is to raise revenue for the State's use. Therefore, the Act's retention of that interest under R.C. 169.08(D) is not a proper exercise of the State's police power. Because "the imposition of forfeiture ... is penal [it] causes an unconstitutional deprivation of personal property without just compensation." McKeehan, 438 F. 2d at 745 (citation omitted); see also, Li/hock, 70 Ohio St. 2d at 28-29 (if a property disposition statute does not serve a legitimate State purpose, it is an unconstitutional taking without just compensation); Pizza, 84 Ohio St. 3d at 132 (because it bore "no substantial relationship to the public health, morals, or safety, " "the mandatory closure-order provisions of R.C. 3767.06(A) is an improper exercise of police power under Section 19, Article I of the Ohio Constitution.]"

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.

Ohio St. 3d 532, 535. As noted, Defendant admitted that the State never takes title to unclaimed property. (R. 106, 1[11.) Defendant also admitted that Ohio recognizes the rule that "interest follows principal." (R.106, 11111, 24.) Those admissions should have led the Tenth District to reject the conclusion that that the Act is an expression of the State's power to deal with abandoned property, when in fact the Act only deals with unclaimed property held in trust by the State.

In Webb's Fabulous Pharmacies, Inc. v. Beckwith (1980), 449 U.S. 155, 101 S. Ct. 44610 the Supreme Court struck down a Florida statute that allowed a clerk of the court to keep the interest earned on interpleader funds. The Supreme Court stated:

Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

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.