

**In the  
SUPREME COURT OF MISSOURI**

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**No. SC84328**

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**NANCY FARMER, STATE TREASURER,  
Appellant,**

**v.**

**HONORABLE BYRON L. KINDER, *et al.*,  
Respondents.**

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**Appeal from the 19<sup>th</sup> Judicial Circuit Court, Cole County,  
The Honorable Ward Stuckey, Judge**

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**BRIEF OF *AMICUS CURIAE*,  
NATIONAL ASSOCIATION OF  
UNCLAIMED PROPERTY ADMINISTRATORS,  
IN SUPPORT OF APPELLANT,  
STATE TREASURER OF MISSOURI**

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**Case No. SC84328**

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## Introduction

**Consent of Parties.** In accordance with Rule 84.05(f)(2), this *amicus curiae* brief is filed with the consent of the parties to this appeal: the Appellant-State Treasurer, by the Attorney General of Missouri; the Respondent, the Hon. Byron L. Kinder, by Robert G. Russell, Esq.; the Respondent, the Hon. Thomas J. Brown, III, by Dale C. Doerhoff, Esq.; and the Respondents-Receivers, by Alex Bartlett, Esq.

***Amicus Curiae.*** The National Association of Unclaimed Property Administrators is an organization of State officials from all fifty States and the District of Columbia, officials charged with the responsibilities for unclaimed property administration and compliance. It seeks to “promote and assist in compliance efforts, while at the same time, reuniting owners with their property.”<sup>1</sup> This appeal may have two effects upon unclaimed property administration throughout the United States:

1. **Uniformity.** Like Missouri, member States have enacted versions of the uniform unclaimed property acts promulgated by the National Conference of Commissioners on Uniform State in 1954, 1981 and

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<sup>1</sup> Mission Statement of the National Association of Unclaimed Property Administrators approved during its 1997 annual conference in Nashville, Tennessee.

1995. The Missouri Uniform Disposition of Unclaimed Property Act is principally derived from the 1966 revision of the Uniform Disposition of Unclaimed Property Act of 1954.<sup>2</sup> The 1981 and 1995 Uniform Unclaimed Property Acts are consistent with the 1954 Act and its 1966 Revision.<sup>3</sup> In accord with §447.500(2) of the Missouri act, all of the Uniform Acts require that they "shall be construed as to effectuate its general purpose to make uniform the laws of those states which enact it."<sup>4</sup> The New Jersey Supreme Court has characterized this requirement

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<sup>2</sup> 2A David J. Epstein, *et al.*, *Unclaimed Property Law and Reporting Form*, MO-5 (Lexis/Matthew Bender 1994); 8A U.L.A. 207 (1993)

<sup>3</sup> 1A David J. Epstein, *supra* n.2, §13.00.

<sup>4</sup> Mo. Rev. Stat. § 447.500 (2000). "This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it." Uniform Disposition of Unclaimed Property Act (1966) §29, 8A U.L.A. 306 (1993). "This Act shall be applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it." Uniform Unclaimed Property Act (1981) §40, 8C U.L.A. 278 (2001), Uniform Unclaimed Property Act (1995) §29, 8C U.L.A. 148 (2001).

as a statutory “mandate.”<sup>5</sup> This mandate for uniformity in construction and application entails that a court having before it provisions of the Uniform Acts consider the construction given to those provisions in other States and the position of other States on the issues presented. As the New Jersey intermediate appellate court has stated, “[a] paramount objective of our uniform state laws is the standardization of particular subjects within the United States and, to that end, [courts] should refer to and seriously consider the construction given to comparable statutes in other jurisdictions.”<sup>6</sup>

2. **Substantive Issue.** The issue before the Court is whether unpaid refunds from utility rate litigation and unclaimed distributions from an insurance company liquidation, due to known persons and deposited into court, are subject to State unclaimed property laws when those funds are unclaimed by the utility customer and insurance claimant for the statutory abandonment period. This issue necessarily involves consideration of the applicability of sections 447.517 (unclaimed utility

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<sup>5</sup> *Clymer v. Summit Bancorp.*, 792 A.2d 396, 400 (2002).

<sup>6</sup> *New Jersey v. Weissman*, 179 A.2d 748, 752 (N.J. Super. Ct. App. Div.), *certif. denied*, 181 A.2d 782 (1962).

refunds), 447.530 (unclaimed property held in a fiduciary capacity), 447.532 (unclaimed property held by a court), and 447.535 (unclaimed property not otherwise covered) of the Missouri Uniform Disposition of Unclaimed Property Act. All of these sections replicate provisions of the 1966 revision of the 1954 Uniform Law: §447.517(2) is §4(b) of the Uniform Act, §447.530 is §7 of the Uniform Act, §447.532 is §8 of the Uniform Act, and §447.535 is §9 of the Uniform Act.<sup>7</sup> Similar provisions are found in the 1981 and 1995 Uniform Unclaimed Property Acts.<sup>8</sup> Because utility refunds and insurance company liquidations may arise in other States, the resolution of the issue of the applicability of unclaimed property laws to utility refunds and insurance company liquidations deposited into a court may affect the enforcement of unclaimed property laws throughout the United States against similarly-situated holders of such unclaimed property.

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<sup>7</sup> 8A U.L.A. 165, 170, 171, and 172.

<sup>8</sup> The corresponding provisions in the 1981 Uniform Unclaimed Property Act are §9 (refunds of a business association), §12 (property held in a fiduciary capacity), §13 (property held by a court), and §2(a) (general rule for property (resumed abandoned). 8C U.L.A. 205, 213, 215, and 185 (2001). In the 1995 Uniform Act, those provisions are in §2(a)(13), (11), and (15), 8C U.L.A. 103 (2001).

Accordingly, the National Association of Unclaimed Property Administrators submits this brief to discuss the generally-accepted principles of unclaimed property jurisprudence, which principles lead to the conclusion that the unpaid utility refunds and insurance liquidation distributions now held in the Circuit Court are unclaimed property that should have been reported and delivered into the protective custody of the Missouri State Treasurer in compliance with the Missouri Uniform Disposition of Unclaimed Property Act.

### **Statement of Facts**

The background facts and procedural history are set forth in the Appellant's Brief that the State Treasurer has presented. On the issue of the applicability of the Missouri Uniform Disposition of Unclaimed Property Act, three facts are dispositive: one fact concerns the genesis of the unpaid funds, the other concerns the identity of the persons entitled to those unpaid funds, and the last concerns the time period that has expired since those funds were payable or distributable to those owners.

The four funds that the Circuit Court now has arose from refunds due to telephone customers and claimants against an insurance company in liquidation. In each instance the funds resulted from statutory proceedings:

1. Fund 1 resulted from two consolidated cases in the Circuit Court of Cole County, docket numbers 28594 and 28604. Both cases were statutory proceedings to review an order of the Public Service Commission pursuant to Mo. Rev. Stat. §386.510: that statute provides for a writ of review “for the purpose of having the reasonableness or lawfulness of the original order or decision ... inquired into or determined.” Those matters were before the Supreme Court in *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Comm’n Of Missouri*. The Court held that the application of a fuel adjustment clause to residential and small commercial customers “was beyond the statutory authority of the commission.”<sup>9</sup> It concluded that the “utilities have no vested right to or legitimate expectation in monies collected” pursuant to the unlawful surcharge.<sup>10</sup> In order to prevent a “windfall” to the utilities<sup>11</sup> and “afford redress for an erroneous judgment,” the Court ordered the utilities “to restore” the unlawfully-collected charges to the residential and small commercial customers from whom it was originally collected.<sup>12</sup>

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<sup>9</sup> 585 S.W.2d 41, 47 (Mo. 1979).

<sup>10</sup> *Id.*, at 59.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, at 60.

2. Fund 2 similarly resulted from consolidated proceedings in the Circuit Court of Cole County (Docket Nos. CV189-0808CC and CV189-0809CC) to review an order of the Public Service Commission pursuant to Mo. Rev. Stat. §386.510; The background of the proceedings was discussed in the Supreme Court’s opinion in *State ex rel. Southwestern Bell Telephone v. Brown*.<sup>13</sup> The Commission had ordered Southwestern Bell Telephone to reduce its rates. As Mo. Rev. Stat. §386.520 authorizes, a stay was imposed and the utility was ordered “to pay into the court registry ‘such sums as it may collect from and after the date of the entry of this Order which it would not have been entitled to collect but for this stay.’ ”<sup>14</sup> Where the Commission has ordered a reduction in rates and a stay is granted in review proceedings, the statute requires the utility “to keep such accounts ... as may... suffice to show the amounts being charged or received by such corporation, person or public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations and persons to whom overcharges will be refundable in case the charges made by the corporation, person or public utility, pending the

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<sup>13</sup> 795 S.W.2d 385 (Mo. 1990).

<sup>14</sup> *Id.*, at 386, quoting the stay order entered on September 5, 1989.

review, be not sustained by the circuit court.”<sup>15</sup> The refund to the overcharged person is to include any interest earned upon the sum while on deposit.<sup>16</sup> As the Supreme Court concluded in its opinion, because the statute authorized the review, the stay, and the deposit into court, “the circuit court’s authority extends no farther than the authority granted by the statute.”<sup>17</sup>

3. Fund 3 similarly resulted from consolidated proceedings in the Circuit Court of Cole County (Docket Nos. CV194-24CC, CV194-136CC, CV1940157CC, and CV194-163CC)) to review an order of the Public Service Commission reducing the rates of Southwestern Bell Telephone. Just as happened with Fund 2, a stay order was entered and the amount of the rate in excess of that allowed by the Commission was paid into court. Here again, the deposit into court would be accompanied by the statutory obligation imposed upon the utility to maintain a record of the amounts and names and addresses of the parties making the excess payments so that those parties could receive a refund, along with any interest accumulated thereon, if the rate reduction was upheld.

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<sup>15</sup> Mo. Rev. Stat. §386.520(3).

<sup>16</sup> Mo. Rev. Stat. §386.520(5).

<sup>17</sup> *Id.*, at 388.

4. Fund 4 resulted from an insurance company liquidation conducted in accordance with the procedures in Mo. Rev. Stat. §375.560 *et seq.* (1969). That receivership was before the Court of Appeals (Western Division) in *State ex rel. ISC Financial Corp. v. Kinder*, a case arising upon an application for a writ of prohibition challenging the authority of the Circuit Court to appoint a trustee to takeover the duties of the statutory receiver.<sup>18</sup> The Court found the receivership to be notably and unexpectedly successful because it produced funds sufficient to pay the insurer's obligations and the receivership expenses.<sup>19</sup> It noted that under the insurance company liquidation statute, all sums remaining unclaimed after one year after final settlement of the affairs of the insolvent company were to paid “ ‘into the state treasury to be held and disposed of

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<sup>18</sup> 684 S.W.2d 910 (Mo. Ct. App. 1985). The receivership was also before the Court of Appeals in *Ainsworth v. Old Security Life Ins. Co.*, 685 S.W.2d 583 (Mo. Ct. App. 1985), 694 S.W.2d 833 (Mo. Ct. App. 1985), and 694 S.W.2d 838 (Mo. Ct. App. 1985), and *Crist v. ISC Financial Corp.*, 752 S.W.2d 489 (Mo. Ct. App. 1988).

<sup>19</sup> *Id.*, at 911.

as provided by the laws for escheats.’ ”<sup>20</sup> The Court vacated the order appointing a trustee and made absolute its writ of prohibition.<sup>21</sup> It concluded that the statutory scheme for the receivership of a liquidating insurance company was a “self-contained and exclusive statutory scheme.”<sup>22</sup> Because the statutory scheme made no provision for the appointment of a trustee to take over the duties of the receiver and continue the affairs of the receivership, the Circuit Court “exceeded its jurisdiction” in appointing a trustee.<sup>23</sup>

The second dispositive fact is that the persons entitled to the monies in the four funds are known<sup>24</sup> and the amount due is fixed and certain. In the utility rate

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<sup>20</sup> *Id.*, at 912 n.1, quoting Mo. Rev. State. §375.760(4) (1969). The insurance company liquidation code was revised in 1991. The unclaimed funds provision in Mo. Rev. Stat. 375.1224 provides that “[a]ll unclaimed funds subject to distribution remaining in the liquidator’s hands ... shall be ... disposed of as provided by laws for unclaimed property.”

<sup>21</sup> *Id.*, at 913, 911.

<sup>22</sup> *Id.*, at 913.

<sup>23</sup> *Ibid.*

<sup>24</sup> A “known” person is one whose identify is actually known or can be reasonably ascertained through a diligent search of books and records. *Chemetron Corp. v.*

reduction cases that produced Funds 2 and 3, Mo. Rev. Stat. §386.520(3) imposed a statutory obligation to maintain accounts showing the sum due and the names and addresses of the overcharged customers who would be entitled to a refund. In the fuel adjustment surcharge case that produced the monies in Fund 1, the Supreme Court required the utilities to restore the monies to the residential and small commercial customers who paid the unlawful surcharge. For example and typical of the refund process that the utilities used, on October 2, 1979, Union Electric Company filed with the Clerk of the Circuit Court a *Plan for Refunding Fuel Adjustment Surcharge* in which its present customers at the same address during the surcharge period were issued credits on their monthly statement, other customers not at the same address were sent notices about the refund and asked to confirm their address during the surcharge period, and former customers were notified by advertisement in area newspapers. In each instance, the utility determined the unlawful surcharge paid from its microfiche records. In the insurance company liquidation that produced the monies in Fund 4, the unpaid funds result from checks that were issued to claimants, but were either returned as undeliverable or were uncashed, or checks for which the address of the intended

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*Jones*, 72 F.3d 341, 346 (3<sup>rd</sup> Cir. 1995), *cert. denied*, 517 U.S. 1137, 116 S. Ct. 1424, 134 L. Ed. 2d 548 (1996).

recipient could not located. Generally for all four funds, the unpaid funds arose because the owners could not be located or because checks issued to them were not cashed.<sup>25</sup> In all instances then, the identity and amount due to the utility customer or insurance claimant were known.

The last dispositive fact is that the abandonment period under any provision of the Missouri Uniform Disposition of Unclaimed Property Act has expired. The monies in Fund 1 were to be distributed as of November 1, 1979, pursuant to the Circuit Court's refund order of October 19, 1979. The proceeds of the refunds in Fund 2 that were deposited into court pending the adjudication were to be distributed pursuant to the Circuit Court's distribution order of April 8, 1991. The proceeds of the refunds in Fund 3 that were deposited into court pending the adjudication were to be distributed pursuant to the Circuit Court's order distributing say funds on October 7, 1994. The sums remaining from the insurance company liquidation in Fund 4 were distributed by an Order entered on December 31, 1986. At the time of the commencement of the State Treasurer's enforcement action in the Circuit Court on July 25, 2001, the statutory abandonment period was generally 5 years.<sup>26</sup> Regardless of whether the monies in the four funds are considered utility refunds, monies held by a fiduciary or by a court, or any other intangible property

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<sup>25</sup> L.F. 8.

<sup>26</sup> Mo. Rev. Stat. §447.536.

owing in Missouri, the five-year abandonment period has expired since the time that the monies in the four funds were payable to the utility customers and insurance liquidation claimants.

## **Argument**

**The Missouri Uniform Disposition Of Unclaimed Property Act Governs The Disposition Of The Monies In The Four Funds Because It Is A Comprehensive Program For The Administration Of Property Presumed Abandoned, Was Enacted By The Legislature In The Exercise Of The State's Police Power, And Is Binding Upon The Parties And The Court**

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### **Unclaimed Property Legislation and Public Policy**

Unclaimed property legislation is an exercise of a State's police power over property rights<sup>27</sup> and the succession to property.<sup>28</sup> As the United States Supreme

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<sup>27</sup> "Control over the ownership and transfer of property, both real and personal, is an area traditionally left to the states under the rubric 'police power.'" *U.S. v. Alabama*, 434 F. Sup. 64, 67 (M.D. Ala. 1977).

Court has explained, unclaimed property laws emanate from a State’s legislative authority and seek to promote the public good:

As a broad principle of jurisprudence rather than as a result of evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations.<sup>29</sup>

As the New Jersey Supreme Court cogently explained, an unclaimed property law “represents the public policy of the State and it manifests the legislative will that such unclaimed moneys be used for the good of all of [the State’s] citizens.”<sup>30</sup>

On the one hand, unclaimed property laws embody the moral imperative that undisputed obligations to known persons should be satisfied, either by payment to

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<sup>28</sup> “The United State Supreme Court has distinctly held that the right of escheat is a right of succession ... .” *Barker v. Leggett*, 102 F.Supp. 642, 644 (W.D. Mo. 1951), *appeal dismissed*, 342 U.S. 900, 72 S. Ct. 295, 96 L. Ed. 674 (1952).

<sup>29</sup> *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36, 71 S. Ct. 822, 827, 95 L. Ed. 1078 (1951).

<sup>30</sup> *New Jersey v. Jefferson Lake Sulphur Co.*, 176 A.2d 329, 334 (N.J. 1962).

that person, or if the person is absent and the obligation is presumed abandoned, by payment to the State on behalf of the person to whom the obligation is owed. They prevent unjust enrichment by persons who have custody of the unclaimed funds “but no moral or legal claim to their retention.”<sup>31</sup> They prevent forfeitures and expropriation of undisputed rights to payment; forfeiture is a result that the law despises and that equity will avoid in whatever way possible.<sup>32</sup>

On the other hand, unclaimed property laws are “consumer protection and public interest legislation, protecting the interests of the true owner of property against confiscation by the holder while giving the State the benefit of its use until the owner claims it.”<sup>33</sup> In a case applying the Uniform Disposition of Unclaimed Property Act to a utility, the South Carolina Supreme Court found the Act to be “custodial in nature”; “[i]t does not result in the loss of the owner’s rights in the property” because “[t]he State simply takes custody of the unclaimed property and remains the custodian in perpetuity, keeping records on a permanent basis because of the fact that the owner retains the right to present his claim to the property at any

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<sup>31</sup> *New Jersey v. American Sugar Refining Co.*, 119 A.2d 767, 773 (N.J. 1956).

<sup>32</sup> *Yank v. Juhrend*, 729 P.2d 941, 944 (Ariz. Ct. App. 1986).

<sup>33</sup> *Clymer v. Summit Bancorp.*, 726 A.2d 983, 993 (N.J. Super. Ct. Ch. Div. 1998), *rev’d on other grounds*, 758 A.2d 652 (N.J. Super. Ct. App. Div. 2000), *rev’d*, 792 A.2d 396 (2002).

time, no matter how remote.”<sup>34</sup> Unclaimed property laws have the salutary and “remedial effect of increasing the period during which claims may be asserted by [apparent] owners or claimants without being barred by [any limitations period].”<sup>35</sup> They “offer[] the owner an opportunity to reclaim the [property] at any time, with the credit of the state insuring [the owner’s] regaining the property upon satisfactory proof of ownership.”<sup>36</sup>

Unclaimed property laws serve the public interest because they mandate that the State “attempt to locate, notice, and inform missing owners of their right of ownership ... and to restore their property to them.”<sup>37</sup> The States have effective and successful programs for reuniting missing owners with their property, including newspaper publication,<sup>38</sup> nationwide searchable databases on websites,<sup>39</sup>

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<sup>34</sup> *South Carolina Tax Comm’n v. York Electric Coop., Inc.*, 270 S.E.2d 626, 628 (S.C. 1980).

<sup>35</sup> *Pennsylvania v. Kervick*, 274 A.2d 626, 631 (N.J. Super. Ct. Ch. Div. 1971), *rev’d on other grounds*, 288 A.2d 289 (1972).

<sup>36</sup> *Boswell v. Citronelle-Mobile Gathering, Inc.*, 294 So. 2d 428, 432 (Ala. 1974).

<sup>37</sup> *Clymer v. Summit Bancorp.*, *supra* n.33.

<sup>38</sup> In the Uniform Disposition of Unclaimed Property Act, “[p]rovision is made for the publication of notice for the purpose of finding the true owner of the property

and outreach efforts at public places and through the mass media. The State's function as the repository of unclaimed property is now so widely known and notorious<sup>40</sup> that the citizenry reasonably expects to be able to obtain information and their property from the State.

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and for the owner to redeem it by a comparatively simple process.” *Oregon ex rel. Mallicot v. Coe*, 460 P.2d 357, 358 (Or. 1969).

<sup>39</sup> The Missouri State Treasurer provides a searchable database and claims information website at <<http://www.sto.state.mo.us/ucp/ucp1.htm>>. The National Association of Unclaimed Property Administrators provides information to owners searching for unclaimed property at <<http://www.unclaimed.org/mainframe.asp?VisitorType=owner>>. The National Association also sponsors a searchable national database of unclaimed property at <<http://www.missingmoney.com>>.

<sup>40</sup> See, for example, Fran Berger, *Simple Searches Can Reveal Forgotten Finances*, AARP Bulletin, December 2001; Marcia Vickers, *In Search of Lost Shareholders: Is a Windfall Waiting for You?*, N. Y. Times, October 6, 1996, Section 3, at 6; and Sims, *Get Your Piece of this \$8 Billion Pie*, Money, November 1992, at 87.

## **Applicability of Missouri Uniform Disposition Of Unclaimed Property Act to the Four Funds**

Whether from the conceptual or statutory standpoint, the disposition of the unclaimed monies in the four funds is governed solely by the Missouri Uniform Disposition of Unclaimed Property Act. Conceptually, under unclaimed property jurisprudence, the State succeeds “to the procedural rights and protections as well as the substantive rights afforded” the missing owner.<sup>41</sup> As the Texas Supreme Court has stated, the State “essentially steps into the shoes of the absent owner.”<sup>42</sup> Stated another way, in the unclaimed property situation, the State acts as a fiduciary for the missing owner, either “as a conservator of a missing person’s property,” as the United States Supreme Court has concluded,<sup>43</sup> or as “a trustee for

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<sup>41</sup> *Bank of America, etc. v. Cory*, 210 Cal. Rptr. 351, 356 (Ct. App. 1985). “When the fund escheats to the State, the State ‘is thereby invested with all the rights, privileges, priorities, and appurtenances incident thereto and with which it was held by the persons from whom it escheated.’ *Barker v. Leggett*, *supra* n.28, at 645.

<sup>42</sup> *Melton v. Texas*, 993 S.W.2d 95, 102 (Tex. 1999).

<sup>43</sup> *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 547, 68 S. Ct. 682, 686, 92 L. Ed. 863 (1948).

the rightful owner,” as concluded by the New Jersey Tax Court.<sup>44</sup> Surely in these circumstances where the obligation to pay is fixed and the amount is certain, neither the utility company, nor the insurance company receiver, nor the Circuit Court, nor any trustee could properly refuse a demand for payment by the utility customer, insurance claimant, or a fiduciary, conservator, or guardian acting for that customer or claimant. In the unclaimed property situation, the State stands in the place of the customer or claimant, with all of the rights afforded that customer or claimant. *A fortiori* neither the utility company, nor the insurance company receiver, nor the Circuit Court, nor any trustee can properly refuse the State Treasurer’s demand for payment of the sum due to the missing customers or claimants.

Statutorily, the utility refund provision in §447.517(2), the fiduciary provision in §447.530, the courts provision in §447.532(1), and the miscellaneous property provision in §447.535 govern the disposition of the unclaimed monies in the four funds. Pursuant to the public utilities and insurance company liquidation statutes and the decision of the Supreme Court in the fuel surcharge case, the unclaimed monies are due to the utility customers and the insurance company liquidation claimants, whose identify was known. The amount due is fixed and certain, based on the records of the utilities and the insurance company receiver.

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<sup>44</sup> *Safane v. Cliffside Park*, 5 N.J. Tax 82, 88 (Tax Ct. 1982).

The abandonment period specified in the unclaimed property provisions has expired. All requirements for the custodial taking of the unclaimed monies under the Missouri Uniform Act have thus been satisfied. Here, the statutory language is unambiguous and the intent of the Legislature is clear; it is then the obligation of the Supreme Court “to give effect to that intent whenever possible.”<sup>45</sup>

As the California Supreme Court concluded in an unclaimed property case involving public utility refunds where several unclaimed property provisions might apply, the Supreme Court “need not decide” which one controls.<sup>46</sup> It suffices that either one of several provision may apply. Concerning utility refunds, other State courts have held that provisions such as §447.517(2) of the Missouri Uniform Act and its counterpart in §4(b) of the 1966 Uniform Act controls:

1. In *Lewis v. Public Service Comm’n*, the Florida Supreme Court held that the Florida unclaimed property act law provision that replicated §4(b) of the 1966 Uniform Act “controls the disposition of unclaimed municipal utility refunds created by an improper rate structure.”<sup>47</sup>
2. In *Boswell v. Whatley*, a case involving utility refunds where the Alabama unclaimed property act replicates §4(b) of the 1966 Uniform

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<sup>45</sup> *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. 1993).

<sup>46</sup> *Cory v. Public Utilities Comm’n*, 189 Cal. Rptr. 386, 388 (Cal. 1983).

<sup>47</sup> 463 So. 2d 227, 228 (Fla. 1985).

Act, the Alabama Supreme Court found the terms of the statute “clear” and held that the disposition of the unpaid refunds was “governed by directions contained in [the utility refund provision] and those sections which follow it.”<sup>48</sup> Once the refund is established, the utility “customers, known or unknown, easily identified or difficult to locate, are entitled to their share which constitutes a chose in action. Should these remain unclaimed ... , the provisions of the Uniform Disposition of Unclaimed Property Act control them.”<sup>49</sup>

3. In *Cory v. Public Utilities Comm’n*, the California Supreme Court held that the provision of the California Unclaimed Property Law “are sufficiently broad to encompass utility refunds of overcollections.”<sup>50</sup> Without deciding which unclaimed property provision controlled, the Court found that custody of the refunds could be taken under the fiduciary provision, which is the same as §447.530 of the Missouri Uniform Act, or under the miscellaneous property provision, which is the same as §447.535 of the Missouri Uniform Act.<sup>51</sup> The Court also

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<sup>48</sup> 345 So. 2d 1324, 1328 (Ala. 1977).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra* n.46.

<sup>51</sup> *Ibid.*

concluded that the utility commission’s statutory authority to direct the final disposition of refunds did not authorize it “to subsequently repudiate the property rights of unlocated former customers, declare a forfeiture, and provide a windfall” to others.<sup>52</sup>

That the proceeds of the four funds are deposited into the Circuit Court, properly or improperly, does not change the result. State Courts have held that funds under the control of a public agency or deposited into court are subject to reporting and delivery into the protective custody of the State:

1. The Rhode Island Supreme Court, applying a provision that is generally the same as the courts provision in Missouri’s Uniform Act, has held that the State Treasurer was entitled to take custody of unclaimed funds in the registry of the probate court.<sup>53</sup>
2. Applying provisions of the Uniform Disposition of Unclaimed Property Act, the Tennessee Court of Appeals has held that unclaimed funds held by a special master under the control of the chancery court should be delivered to the State Treasurer either under the provision addressing

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<sup>52</sup> *Id.*, at 389.

<sup>53</sup> *City of Providence v. Solomon*, 444 A.2d 870, 871 (R.I. 1982).

property held by courts or the one addressing miscellaneous property held for another person.<sup>54</sup>

3. The Texas Court of Appeals has held that “[c]ash bail bonds, being funds deposited in the registry of a court, are personal property covered by the unclaimed property provisions of the [Texas] Property Code.”<sup>55</sup>

Accordingly, in a case involving the application of the Oregon unclaimed property provision that is the same as the court deposits provision in §447.532(1) of the Missouri Uniform Act, the Oregon Supreme Court concluded that the prevailing principle of law is that “the abandoned property act was intended to apply to any holder, public or private, of property found to be abandoned.”<sup>56</sup>

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<sup>54</sup> *Dyer v. Davenport*, No. 01A01-9103-CH-00106, 1991 Tenn. App. LEXIS 632, at \*9 (August 14, 1991). The Court also held that “title [to the unpaid funds] was vested in the claimants” so that the special master “was merely a holder of ‘unclaimed property.’ ” *Id.*, at \*7.

<sup>55</sup> *Texas v. Melton*, 970 S.W.2d 146, 149 (Tex App. 1998), *aff’d*, 993 S.W.2d 95 (Tex. 1999).

<sup>56</sup> *Oregon ex rel. Mallicot v. Coe*, *supra* n.38.

## **The Unclaimed Property Laws Bind Parties And Courts**

Private citizens, business organization, and public entities and officers are bound by the provisions of the State's unclaimed property law and can make no disposition of such property other than as specified in that law. The legislative enactment "rises above, supersedes, and sets aside any rule or regulation adopted or promulgated with the approval and consent" of private parties.<sup>57</sup> As the New Jersey Supreme Court explained, unclaimed property law is a part of the general law of the State and is a "continuing constituent part" of any contract or agreement entered into by parties that are subject to the State's laws.<sup>58</sup> Any private agreement

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<sup>57</sup> *Pennsylvania v. York Water Co.* 36 Pa. D. & C. 603, 610 (C.P. 1939).

<sup>58</sup> *New Jersey v. Jefferson Lake Sulphur Co.*, *supra* n.30, at 335. In a case dealing with unclaimed insurance premium refunds, the Supreme Court applied that same principle to a contract involving a matter covered by the insurance code. "The statutory provisions of the insurance code with respect to the payment of expenses of the department are exclusive and became a part of plaintiff's contract of employment as fully as if written therein." *Jacobs v. Leggett*, 295 S.W.2d 825, 829 (Mo. 1956). The intertwined requirements of the Missouri insurance code and its unclaimed property law are now express. Mo. Rev. Stat. §375.1224 specifically

that is “obnoxious to,” “conflicts with a general law enacted of the Legislature for the common weal,” or “is clearly opposed to the spirit and essence of the public custodial escheat law and to the broad public policy represented thereby” cannot “survive.”<sup>59</sup>

The comprehensive legislative scheme for the disposition of unclaimed property that is binding upon persons and organizations is equally binding upon the courts for two inter-related reasons: one, statutory provisions govern the rights of the parties and the authority of a court, and two, courts of equity follow the law. The Supreme Court in *Weatherby v. Jackson* and *State ex rel Johnson v. Leggett*, cases involving the escheat of refunds of excessive insurance premiums, ruled that where the Legislature had enacted a comprehensive law governing a subject, the courts “are without authority to interfere with [the] administration” of the law and

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provides that unclaimed funds remaining in the hands of the insurance company liquidator are to be “disposed of as provided by laws for unclaimed property.”

<sup>59</sup> *Id.*, at 338-39. Accord, *Blue Cross of Northern California v. Cory*, 174 Cal. Rptr. 901, 912 (Ct. App. 1981), *People v. Marshall Field & Co.*, 404 N.E.2d 368, 374 (Ill. App. Ct. 1980), and *Riggs Nat’l Bank v. District of Columbia*, 581 A.2d 1229, 1241 (D.C. 1990).

can do only what that law permits the court to do.<sup>60</sup> In the earlier proceedings regarding the monies in fourth fund, the Court of Appeals applied this principle in ruling that the Circuit Court had no authority to appoint a trustee to take over the duties of the director of insurance acting as the receiver.<sup>61</sup>

More generally, the Texas Court of Appeals has explained that the principle of law is that “[t]he judiciary ... , as the third but nonetheless equal branch of government, is charged with the duty to interpret and apply the law as declared by the Legislature, and to give effect to its stated purpose or plan.”<sup>62</sup> Because the purpose and effect of State unclaimed property laws is to place unclaimed property in the State’s perpetual custody for the protection of individuals who fail to claim their property, a court has “no discretion or authority to order any unclaimed property to an escrow agent who would then transfer the funds to a ... charity.”<sup>63</sup>

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<sup>60</sup> *State ex rel Johnson v. Leggett*, 359 S.W.2d 790, 794 (Mo. 1962); *Weatherby v. Jackson*, 358 Mo. 542, 549 (1948).

<sup>61</sup> *State ex rel. ISC Financial Corp. v. Kinder*, *supra* n.18.

<sup>62</sup> *Texas v. Snell*, 950 S.W.2d 108, 113 (Tex. App. 1997).

<sup>63</sup> *Id.* The Texas Court of Appeals discussed the governing principles in the context of a case involving a proposed allocation plan in a class action. *Id.*, at 109

The Missouri courts follow this principle even where courts of equity are involved. “It is well established that equity follows the law, and that a court of equity just as a court of law is bound by established rules and precedents.”<sup>64</sup> Hence, “a court of equity may not act merely upon its own conceptions of what may be right or wrong in a particular case” and may not “ ‘exercise its equity powers to fashion a “better” remedy than exists in the statutes.’ ”<sup>65</sup> The federal Third Circuit Court of Appeals has summarized the concept to be that “[a] ... court’s independent determination of policy is quite irrelevant, ... if it is inconsistent with the State law which the court is obliged to follow.”<sup>66</sup>

Last, any discussion of or reliance upon class action cases and their result is unwarranted because they are inapposite to the four funds involved in this case.

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<sup>64</sup> *State ex rel. State Highway Comm’n v. Morganstein*, 649 S.W.2d 485, 487 (Mo. Ct. App. 1983). “Wherever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules.” 2 Pomeroy, *Equity Jurisprudence*, §425, at 190 (5<sup>th</sup> Ed. 1941).

<sup>65</sup> *Ford v. Dir. Of Revenue*, 11 S.W.3d 106, 110 (Mo. Ct. App. 2000), quoting *Cotton v. Wise*, 977 S.W.2d 263, 264 (Mo. 1998).

<sup>66</sup> *Systems Operations, Inc. v. Scientific Games Development Corp.*, 555 F.2d 1131, 1142 (3<sup>rd</sup> Cir. 1977).

These funds were produced by statutory proceedings arising upon review of Public Service Commission orders and from a liquidation of an insurance company. The issues that are peculiar to class action proceedings, such as fluid class recoveries, the identity of class members, the ascertainment of the individual damages, and the applicability of the *cy pres* distribution, are not present here where the State statutes govern entirely, the identity of the missing owners is known, and the amount due is certain.

## Conclusion

For the foregoing reasons, the National Association of Unclaimed Property Administrators urges that the Supreme Court reverse the Judgment entered by the Circuit Court on December 17, 2001, and hold that the unclaimed monies in the four funds are unclaimed property that should be reported and delivered into the protective custody of the State of Missouri in accordance with Mo. Rev. Stat. §§447.539(1) and 447.543.

Respectfully submitted,

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3. Service was made using Federal Express for delivery on Friday morning, June 28, 2002.

4. I certify that the foregoing statements made by are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 27, 2002

/s/ Robert P. Krenkowitz  
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