No. SC84328

IN THE
SUPREME COURT OF MISSOURI

NANCY FARMER, STATE TREASURER

Appellant,

v.

HONORABLE BYRON L. KINDER, *et al.*

Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Judge Ward Stuckey

# BRIEF OF UTILITY CONSUMERS COUNCIL OF MO., INC. *AMICUS CURIAE*

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## INTEREST OF *AMICUS CURIAE*

*Amicus Curiae* Utility Consumers Council of Mo., Inc. is a Missouri non-profit corporation. Its purposes include the protection of the interests of Missouri residential utility consumers. It has represented such consumers' interest in rate setting proceedings. It was the initial plaintiff in one of the proceedings that leads to the present lawsuit, Utility Consumers' Council v. Public Service Commission, No. 28594, in the Circuit Court of Cole County.

It is the position of the Utility Consumers Council that the appropriate disposition of the funds at issue in this appeal is transfer to the Abandoned Fund Account administered by the State Treasurer. Such a transfer would permit the funds to be used as the General Assembly might direct for the welfare of the public of the state, while preserving the rights of claimants to recover the monies owed them.

## JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

For its jurisdictional statement and statement of facts, the Missouri Utility Consumers Council adopts the jurisdictional statement and statement of facts of Appellant, Nancy Farmer, State Treasurer.

## ARGUMENT

### I. TRANSFER OF THE FUNDS AT ISSUE TO THE ABANDONED FUND ACCOUNT IS IN PUBLIC INTEREST.

The State Treasurer, in her principal brief, sets out the history of the funds at issue in this case, described as Funds 1, 2, 3 and 4. As that history shows, Funds 1, 2 and 3 originated from utility payments made by electric and telephone customers throughout the state. Fund 4 originated from an insurance receivership. There is nothing in the record to suggest that the claimants to these funds have any relationship to Cole County. Yet, for many years (more than

twenty years in the case of Fund 1) the only Missouri residents who have derived benefit from the use of the four funds are residents of that county.

Transfer of the monies to the Abandoned Fund Account would benefit the consumers (including the residential utility customers) who were claimants in the proceedings at issue, and would benefit the public of Missouri as a whole in ways that retaining the funds under the control of the Respondents would not. Transfer to the Abandoned Fund Account would benefit the claimants, because their claims to refunds would survive indefinitely. To the extent claimants' names are known, they would be added to the database that is maintained by the Treasurer and is accessible through the Internet. The chance that refunds might actually be made to some claimants would thus increase dramatically. To the extent funds remain unclaimed, they would be put to use by the General Assembly, for purposes selected by the General Assembly. The funds could thus benefit the people of the state as a whole. They would be put to uses chosen by the elected representatives of the people whose role it is to appropriate public funds.[1]

The governing statutes in fact mandate exactly this result, and nothing in the Constitution of Missouri or the law of civil procedure prohibits it. The monies should be transferred to the Abandoned Fund Account.

[1] After Executive Branch officials demanded transfer of the funds to the Abandoned Fund Account, the circuit judges announced an intention to transfer certain of the funds to legal services organizations throughout the State. This *amicus curiae* is second to no one in its respect for the contribution of those organizations to the public welfare. However, transferring these funds outright to those organizations would cut off forever the rights of claimants to refunds. It would also involve a use of the funds selected in a vacuum, without the deliberation and balancing of priorities inherent in the legislative process.

## II. THE APPLICABLE STATUTES, R.S.MO. §§ 470.270, 447.575, AND 447.532 (2000), DIRECT THAT THE MONEYS AT ISSUE BE TRANSFERRED TO THE ABANDONED FUND ACCOUNT.

This appeal and others related to it address an issue that is neither new nor unique to Missouri: How should a court dispose of unclaimed funds resulting from a suit brought to recover refunds owed to consumers? It is common in such a case for the defendant -- often a utility or insurer -- to be unable to locate, identify and make refunds to all persons from whom overcharges have been collected. As the cases cited by the parties show, courts throughout the United States have struggled with the question of the proper disposition of the residual funds held in such cases.

In Missouri, this issue has been resolved by legislation. The General Assembly has provided by statute for the disposition of monies of this kind. Until the last session of the General Assembly, they were either to be escheated or transferred to the Abandoned Fund Account, with the choice made by the executive branch of government. R.S.Mo. §§ 470.270, 447.575, & 447.532 (2000).[2] The appropriate officials of the executive branch have chosen that these funds be transferred to the Abandoned Fund Account. Nonetheless, the courts and receivers holding the funds here have found it to be their duty to withhold the monies from the fund. They have concluded that the statutes requiring transfer to the Abandoned Fund Account violate the Constitution of Missouri in several respects. They have also concluded that the actions brought to force transfer of the monies to the fund suffer from fatal procedural

[2] The only choice now available is transfer to the Abandoned Fund Account. R.S.Mo. § 420.270, as amended, S.B. 1248 (91st General Assembly, eff. June 19, 2002). In this brief (unless indicated otherwise) statutory references are to R.S. Mo. as they existed at the time of the judgment below.

infirmities. The Utility Consumers Council respectfully suggests that the Respondents are in error. The statutes should be applied as written.

Statutes can be ambiguous. Sometimes the General Assembly's intent cannot be determined from the plain and ordinary meaning of the language it uses. In such a case the statute in question must be given a reasonable reading and should be construed in a manner consistent with the legislature's purpose in enacting it. Sullivan v. Carlisle, 851 S.W.2d 510, 512 (Mo. banc 1993). Sometimes a statute contains language so contradictory and uncertain that it is beyond the judicial power to correct; in such a case the offending provision is void for vagueness. See, e.g., Bd. of Educ. of the City of St. Louis v. State of Missouri, 47 S.W.3d 366, 371 (Mo. banc 2001). This is not such a case. In addressing the fate of funds of the kind at issue here, the General Assembly has spoken with such unmistakable clarity that no construction of the statute is required. In enacting R.S.Mo. Sections 470.270, 447.575, and 447.532 (2000), the General Assembly unambiguously directed that funds of the kind at issue here be transferred to the State Abandoned Fund Account.

Section 470.270 was enacted to deal precisely with funds of the kind at issue in the case at bar. Section 470.270 applies to moneys, refund of rates or premiums or effects that come into being:

> by reason of any litigation concerning rates, refunds, refund of premiums, fares or charges collected by any person or corporation in the state of Missouri for any service rendered or to be rendered in said state, or for any contract of insurance on property in this state, or under any contract of insurance performed or to be performed in said state . . .

This language describes the funds here precisely: they arose from litigation seeking refunds of rates collected by utilities, or the payment of amounts owed under contracts of insurance.

Section 470.270 applies when such monies "have been paid into or deposited in connection with any cause in any court of the state of Missouri or in connection with any cause in any United States court, or so paid into the custody of any depositary, clerk, custodian, or other officer of such court. . . ." Again, this language describes precisely what has happened to these funds: they were paid into the custody of the Circuit Court of Cole County, and are under the custody of appointed receivers, who are officers of that court.

Section 470.270, as it stood at the time of the judgment below, further provided that if "the owner, his assignee, personal representative, grantee, heirs, devisees or other successors" of such moneys so held "remain unknown, or the whereabouts of such person or persons shall be and has been unknown" for five years, or if "such moneys, refund of rates or premiums or effects remain unclaimed for the period heretofore, or hereafter, of five successive years, from the time such moneys or property are ordered repaid or distributed by such courts," then one of two things could happen: the funds could be escheated on suit by the Attorney General or "this state may elect to take custody of such unclaimed property by instituting a proceeding pursuant to Section 447.575, R.S.Mo."

The funds at issue here were paid into the courts by the utilities and insurers in question more than five, and in some instances more than twenty, years ago. They have not been claimed. They fall within the statute precisely, and thus could have been the subject of an escheat action or of an action under Section 447.575 of the Unclaimed Property Law.[3] See R.S.Mo. § 447.575

[3] Formally, R.S. Mo. §§ 447.500 to 447.595 are to be cited as the "Uniform Disposition of Unclaimed Property Act." R.S. Mo. § 447.500 (2000). In this brief, the shorter reference "Unclaimed Property Law" is used.

(2000). Section 447.575 authorizes the State Treasurer to "bring an action in a court of appropriate jurisdiction to enforce such delivery," if the person holding moneys subject to the Unclaimed Property Law has refused to transfer them to the fund. That is precisely what the Treasurer has done in bringing this action.

Thus, when read together, Sections 470.270 and 447.575 clearly resolve the question that this case presents. Another section of the Unclaimed Property Law, Section 447.532, likewise makes clear that funds held by courts are subject to the Unclaimed Property Law. That Section makes subject to the law "[a]ll intangible personal property held for the owner by any court, public corporation, public authority, or public officer of this state, or a political subdivision thereof" for the statutory periods.

The people of Missouri, through their elected representatives in the General Assembly, have thus chosen what disposition is to be made of these funds. The only remaining question is whether anything in the Constitution of Missouri or the law of civil procedure precludes the General Assembly from making the choice it has made. In resisting the demands of the Attorney General and State Treasurer to transfer the monies in question to the Abandoned Fund Account, Respondents rely on a number of constitutional and procedural arguments. Among their arguments are the following:

(1) That the funds in question are not state funds or funds received from the federal government, and that the State Treasurer's duties under the Unclaimed Property law go beyond "the receipt, investment, custody and disbursement" of such funds, so that the statutes are unconstitutional under Article IV, Section 15 of the Constitution of Missouri;

(2) That the funds are subject to the "pending case doctrine" and so cannot appropriately be subject of a new suit brought by the Director;

(3) That if the monies in question are abandoned or unclaimed property, the Treasurer should present her claim in the pending receiverships, which the Treasurer has so far declined to do;

(4) That the attempt by the Treasurer to collect and hold the funds is a violation of the separation of powers provision of Article Two, Section One of the Constitution of Missouri;

(5) That the bringing of this action is an attempt by the State Treasurer to exercise superintending control and supervisory authority over the Circuit Court of Cole County in violation of Article Four, Section Four of the Constitution of Missouri.

Proper disposition of these arguments is assisted by an understanding of the long history of the statutes involved. That history sheds light on both the constitutional and the procedural arguments that the Respondents make.

The General Assembly first addressed the question of the proper disposition of leftover funds from utility rate cases in 1946. This was the year following that in which the current Constitution, containing the descriptions of the State Treasurer's powers that is important to Respondents' position, was adopted. The 1946 statute was Senate Bill 460. See 1945 Mo. Laws 915 (approved July 17, 1946). It provided:

> After the owner, beneficial owner, or person entitled to any monies, or effects, by reason of any litigation concerning rates, fares or charges collected by any corporation or person in the State of Missouri, which monies, or effects, have been paid into or deposited in any court in the State of Missouri, or in any United States court having jurisdiction within and for the State of Missouri, or in the custody of any depository, clerk, custodian or

> other officer of such court, shall be and remain unknown, or the whereabouts thereof shall be or shall have been unknown, for the period of five successive years, such monies, or properties shall be escheatable to the state of Missouri, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

The 1946 statute provided for only one disposition of the funds in question: escheat. The Public Service Commission was to bring an action in the nature of a bill in equity in the circuit court, with the depository, clerk, custodian or other officer named as defendant. Id. at 914-15. The circuit court would declare whether an escheat had occurred and, if so, the funds subject to escheat would be transferred to the State Treasurer. Id. at 916. The Treasurer would publish notice and any unclaimed funds would be escheated to the state after a period of two years in which claimants could still recover their funds. Id. This was a pure escheat statute, in the sense that after the escheat any interests of claimants would be cut off and title would vest absolutely in the State of Missouri. Id.

In enacting the statute, the General Assembly was exercising a power that had been recognized by the Supreme Court of the United States in United States v. Klein, 303 U.S. 276, 58 S.Ct. 536, 82 L.Ed. 840 (1938). The Supreme Court had there held that a state, through its courts, had the authority to escheat not only funds held in state courts, but unclaimed funds held by the courts of the United States as well. Id. at 282. Thus, the Missouri statute applied not only to funds held in state courts, but also to funds held by the courts of the United States.

The General Assembly revisited this subject in 1947. See H.B. 140, 1947 Mo. Laws 297. The statutes as reenacted applied not only to utility refunds but amounts owed by insurers as

well. The funds covered by the 1947 act included, "any monies, refund of rates or premiums or effects by reason of any litigation concerning rates, refunds, refund of premiums, fares or charges collected by any person or corporation in the State of Missouri for any service rendered or to be rendered in said state, or for any contract of insurance on property in this state, or under any contract of insurance performed or to be performed in said state…." Id. at 298. As in the 1945 act, the statute provided that after five years such property, "shall be escheatable to the State of Missouri, and shall be escheated to the State of Missouri in the manner hereinafter provided."

The 1947 statute shifted the enforcement power to the Attorney General, who was to bring an action in equity to escheat the funds, with the clerk, custodian or other officer of the court having custody of the monies named as a defendant. Id. at 298-99. Again, the funds were to be transferred to the State Treasurer. Id. The Attorney General was to publish notice. Id. at 299. The 1947 act contained provisions providing for a class action type procedure to escheat unclaimed funds. After the escheat, the funds would be held by the Treasurer for two years at which point they would vest absolutely in the State of Missouri. Id. at 302. There is at least one reported decision in which the state exercised its power to escheat such funds under these statutes. See State v. Goodbar, 297 S.W.2d 525, 526 (Mo. 1957) (escheating funds from federal district court insurance premium refund action from the 1930's).

The ability of states to escheat intangible personal property led to jurisdictional disputes among states, with two or more states sometimes competing to escheat the same property. See, e.g., Connecticut Insurance Co. v. Moore, 333 U.S. 541 (1947). To resolve these conflicts, the National Conference of Commissioners On Uniform State Laws devised the Uniform Disposition of Unclaimed Property Act. The first version of this statute was promulgated in

1954; the Uniform Act was revised in 1966. See Joseph P. Giljum Note, A Survey of State Abandoned or Unclaimed Property Statutes, 9 St. Louis U. L. J. 85e (1964); Jo Beth Prewitt, Unclaimed Property - A Potential Source of Non-Tax Revenue, 45 Mo. L. Rev. 493, 1494 (1980).

The drafters of the Uniform Law departed from traditional escheat law in two important respects: a portion of the funds taken by states under the Uniform Law could be used for state purposes, but the credit of the state would always be subject to claims for refunds by the true owners of the funds in question. In this sense, the Uniform Act was described as, "a custodial act," rather than one providing for true escheat. In addition, holders of unclaimed property were required to report to a state official the existence and amount of the funds they held.[4]

The drafters of the Uniform Law intended that unclaimed funds held by courts, which could be subject to escheat, would be subject to the unclaimed property laws as well. Section 8 of the 1954 version of the Uniform Law provided that all intangible property held by any "court, public corporation, public authority, or public officer" that had remained unclaimed for seven years would be presumed abandoned. A comparable provision was contained in Section 8 of the 1966 version of the Uniform Law.

In 1984, the Missouri General Assembly adopted the 1966 version of the Uniform Law. See H.B. 1088, p. 702. Enforcement authority was given to the Director of the Department of Consumer Affairs, Regulation and Licensing. Id. Monies paid over were to be delivered to the Treasurer. Id. If a person required to deliver properties to the state under the Act refused to do so, the Director was empowered to "bring an action in a court of appropriate jurisdiction to

[4] The State Treasurer contends that the reporting provisions of the Missouri law apply to judges and receivers. If in fact they do, it would have the salutary effect of avoiding the long periods of inactivity in disposing of the funds that occurred here.

enforce such delivery." Id. The 1984 act adopting the Uniform Law made no reference to the escheat laws.

In 1989, the Unclaimed Property Law was amended once again. See H.S.H.B. 506, 1989 Mo. Laws 1025. The provision dealing with funds held by courts, now R.S.Mo. § 447.532, was amended to make clear that it applied to intangible personal property held for an owner who was last a resident of Missouri or whose last known residence was located in Missouri, by a "public officer, official, agency, court, or instrumentality of the United States or any corporations organized under its laws. . . ." Id. at p. 1027-28. Again, no reference was made to any interaction between the unclaimed property law and the escheat law.

In 1990, the General Assembly again amended the Unclaimed Property Law. See H.C.S.H.B. 1052, 1990 Mo. Laws 1082. At the same time, and for the first time, it amended the escheat law, R.S.Mo. § 470.270, to make clear how the two statutes related to one another. Id. at 1084. The last sentence of the former § 470.270, which had provided that unclaimed funds held in the registry of a court, "shall be escheated to the State of Missouri in the manner herein provided," was changed to provide that such funds, "may be escheated to the State of Missouri in the manner herein provided." (emphasis added). Id. A new sentence was added: "The provisions of this Section notwithstanding, this state may elect to take custody of such unclaimed property by instituting a proceeding pursuant to Section 447.575, R.S.Mo." Id. Section 447.575 was the provision of the unclaimed property law authorizing the Director of the Department of Economic Development [to whom enforcement powers had then been transferred] to "bring an action in a court of appropriate jurisdiction" to enforce delivery of unclaimed property. See H.B. 1088, 1984 Mo. Laws 712, § 23.

In 1993, as part of a larger statute entitled, "Additional Executive Departments: Relating to Economic Development," the duties of the Director of Economic Development under the Unclaimed Property Act were transferred to the State Treasurer. See C.C.S.S. C.S.H.C.S.H.B. 566, 1993 Mo. Laws 1595. In particular, the authority to bring an action "in a court of appropriate jurisdiction to enforce" delivery of unclaimed property passed from the Director of the Department of Economic Development to the Treasurer. Id. at 1664. The prior statute conferring that authority on the Director of Economic Development was repealed.

In 1995, various provisions of the Unclaimed Property Law were again repealed and reenacted. The Treasurer was again authorized as the person who would bring an action to enforce delivery. S.B. 757, 1994 Mo. Laws 1040, 1051. In the most recent session of the General Assembly, the legislature again amended the statutes, eliminating the escheat option for these funds and shortening the holding period to three years. S.B. 1248 (91st General Assembly, eff. June 19, 2002).

As this recitation of history makes clear, the General Assembly intended for funds of the type at issue in this appeal to be paid over to the Abandoned Fund Account. As Section 470.270 provides, "this state may elect to take custody of such unclaimed property by instituting a proceeding pursuant to Section 447.575, R.S.Mo." Indeed, neither the trial court (Judge Stuckey) nor the Respondent judges (Judges Kinder and Brown), nor the various receivers in the appeals to which they are parties, dispute that it is the intention of the political branches of Missouri government, the General Assembly and the executive, that these funds be paid into the Abandoned Fund Account.

Rather, those officials have raised the constitutional and procedural arguments listed above as to why the intention of the legislature cannot be carried out. A careful review of each of these justifications for the Respondents' position shows that they are without merit.

## III. THE LIMITATION ON THE POWERS OF THE STATE TREASURER CONTAINED IN ARTICLE IV, §15, IS NO BAR TO THIS ACTION.

### A. FUNDS SUBJECT TO THE UNCLAIMED PROPERTY LAW ARE STATE FUNDS.

Article Four, Section 15 of the Constitution of Missouri limits the powers of the State Treasurer to those involving the receipt, investment, custody and disbursement of state funds. The circuit judges and receivers have contended that the provisions of the Unclaimed Property Law authorizing the State Treasurer to hold unclaimed monies are unconstitutional, because the funds in question are not "state funds." This argument, if valid, would require a holding that the Unclaimed Property Law in its entirety violates the Constitution. It would preclude the Treasurer's holding of any funds under the Law, not just unclaimed funds held by courts.

The flaw in Respondents' argument results from the assumption that only funds held by the state that are not subject to any claims by other parties are "state funds." As the examples that the Treasurer cites show, this is not the case. Perhaps the best example is funds held under the escheat statute. Under S.B. 460, adopted in the year after the current Constitution, funds to be held by the Treasurer for possible escheat would be, for an initial two year period, subject to claims by the true owners. See 1945 Mo. Laws at 916. There is no record of any suggestion that this provision was unconstitutional because the moneys in question were not "state funds" during the two year period. When the General Assembly enacted the Unclaimed Property Law, it

simply eliminated the time limit on claims by owners for their funds. This did not transform what had been state funds into something else.

Money held by the State Treasurer is fungible. A claimant to funds held in the Abandoned Fund Account does not hold title to specific currency in the Treasurer's possession. Rather, the true owner of unclaimed property has a claim on the general credit of the state for refund of the amount owed. R.S.Mo. § 447.565 (2000). Because from experience it is known that only a small portion of unclaimed property is ever refunded to the true owners, the state can make use of the funds by transferring most of them to general revenue without risk to its credit. R.S. Mo. § 447.543 (2000). Because each potential claimant has a right against the State to full recovery of his or her funds, the monies can be transferred to the Abandoned Fund Account without the due process steps required under the escheat law.

Monies that the state has and may use for general revenue purposes are "state funds," even if in order to acquire them the state has pledged its credit. Monies held in the Abandoned Fund Account are, in a sense, no different from funds held as the proceeds of sales of the state's bonds. In a bond sale, the full amount of the proceeds is subject to repayment, but the proceeds are still "state funds." The same is true of income tax revenue. Some portion of income tax payments are subject to refunds, but the full proceeds remain "state funds." Funds held in the Abandoned Fund Account are "state funds" for purposes of the Constitution.

### B. THE ARGUMENT THAT THE TREASURER MAY NOT BE AUTHORIZED TO BRING THIS ACTION DOES NOT WARRANT DENYING THE STATE THE RELIEF SOUGHT.

The receivers have made a separate Article Four, Section 15 argument that does not turn on whether the funds in question are state funds. They claim that the Treasurer cannot

constitutionally be given collection powers with respect to unclaimed property, because those collection powers go beyond "the receipt, investment, custody or disbursement" of funds. One could argue that the authority to "receive" funds includes the implicit authority to sue to collect them when they have not been received. This argument is not necessary to sustain the State's position, however. The State Treasurer now holds the collection powers only because of the 1993 statute transferring those powers to the Treasurer from the Director of the Department of Economic Development. See 1993 Mo. Laws of 1664. That same statute repealed the former law. If a statute that expressly repeals and replaces a former statute fails for unconstitutionality of its substantive provisions, then the repeal fails as well. The prior statute remains in effect. State v. Cameron, 342 Mo. 830, 117 S.W.2d 1078, 1083 (Mo. banc 1938); Missouri Ins. Co. v. Morris, 255 S.W. 2d 781, 782 (Mo. banc 1953); but see Ray Smith Ford Sales, Inc. v. Mitchell, 6515 S.W.2d 487, 488-89 (Mo. banc 1983).

If this Court concludes that the transfer of collection functions to the State Treasurer violates the Constitution, then the former version of the Abandoned Fund Account giving enforcement powers to the Director of the Department of Economic Development remains in effect. The proper course for this Court would be to order substitution of the Director of the Department of Economic Development as the plaintiff in this action, thus solving any alleged constitutional problem and allowing the will of the people, as expressed through their legislators, to be carried out.[5]

[5] In related appeals, the Receivers have contended that the 1993 statute conferring enforcement powers on the State Treasurer is unconstitutional on clear title and multiple subject grounds. Even if this were so, it would be of no moment, because substantially the same provisions were enacted in 1995, in a statute that was devoted to a single subject and had an appropriate title. 1995 Mo. Laws at 1051.

## IV. RESPONDENTS' ARGUMENTS BASED ON THE LAW OF CIVIL PROCEDURE AGAINST TRANSFER OF THE FUNDS TO THE ABANDONED FUND ACCOUNT ARE WITHOUT MERIT.

Judge Stuckey articulated two separate but related rationales based on the law of civil procedure why the funds in question could not be transferred to the State Treasurer. The first contention is that the receiverships are ongoing lawsuits, so that the funds are involved in "pending litigation." Judge Stuckey thus concluded that the funds are subject to the "pending case doctrine" and so immune from any claim by the State Treasurer. The second, related argument, is that because the State Treasurer had the opportunity to present her claim to the circuit court in the ancillary proceedings in the various receivership cases, she may not prosecute the action that gives rise to the pending appeal. (L.F. 212-213).

As the Treasurer's brief shows, there is a serious question whether there are in fact "pending cases" presenting the same issues that are the subject of the present action.[6] The pending case doctrine is well recognized. See Bellen Wrecking & Salvage Co. v. David Orf, Inc., 983 S.W.2d 541, 548 (Mo. App. E.D. 1998); State es inf. Riederer v. Collins, 799 S.W.2d 644, 650 (Mo. App. W.D. 1990). It had its origins in the common law. Bellen Wrecking & Salvage Co., 983 S.W.2d at 548. Its purpose is to avoid a multiplicity of suits on the same subject. For the doctrine to apply, there must generally be an identity of parties; abatement is "appropriate if the second cause of action is essentially identical to the first action filed." Id.

In the case at bar, there has never been a pending action in the "ancillary proceedings" in which the issue presented was the ultimate disposition of the funds held. Rather, in its orders

[6] If there were a pending case, the parties (including this *amicus*, which was a party to one of them) should have received copies of any motions and orders entered over the years. No such notice was provided.

creating the receiverships, the circuit court made no attempt to direct the ultimate disposition of whatever residual funds might go unclaimed. In the lawsuit in which the Utility Consumers' Counsel was Plaintiff, no action had been taken for twenty years other than administrative orders related to the holding and distribution of the funds. Thus, the considerations of judicial economy that underlie the pending case doctrine simply do not apply here.

As a principle of common law, the pending case doctrine is subject to legislative action. As the recitation of the legislative history above shows, it has always been the intention of the General Assembly that funds held by courts in receivership or otherwise could be the subject of independent suits to determine their ultimate disposition, without regard to the pending case doctrine. As long ago as 1946, the Public Service Commission was empowered to bring an independent lawsuit in the nature of a bill in equity to escheat funds held in the registry of the courts. See 1945 Mo. Laws at 916. In 1990, the General Assembly specifically authorized "the state" to recover funds held in court registries by bringing proceedings under the Unclaimed Property Law. See R.S.Mo. § 470.270. Nothing in the Constitution of Missouri prohibited the General Assembly from doing so. The pending case doctrine is thus no bar to this action.

If this Court concludes that the pending case doctrine requires that any such claim be asserted as an ancillary claim in the receivership proceedings, the appeals from the judgments in those actions should be sustained and the causes remanded with directions to enter judgment for the Treasurer as a party in those actions. In the end, it should make no difference in which of the Cole County Circuit Court proceedings the State Treasurer asserts the present claim, or even which executive branch official asserts the claim. The General Assembly has directed that these funds be paid into the Abandoned Fund Account. The Court should take the appropriate action to see that result is achieved.

## V. THERE IS NO VIOLATION HERE OF THE SEPARATION OF POWERS DOCTRINE, MISSOURI CONSTITUTION, ARTICLE II, SECTION 1.

The circuit judges have concluded that the statutes requiring payment of the funds at issue here into the Abandoned Fund Account violate Article Two, Section One of the Constitution of Missouri. That Section prohibits one branch of government from exercising any power properly belonging to either of the others. Respondents argue that disposing of funds held under court authority is inherently a judicial function, and that the General Assembly improperly treads on judicial authority when it legislates on the subject.

This argument misapplies Article Two, Section One. The separation of powers provision "was not intended to protect turf claimed by judges." Savanna R-III Sch. Dist. v. Pub. Sch. Ret. Sys., 950 S.W.2d 854, 859 (Mo. banc 1997). Rather, "[t]he reason for the separation of powers is to protect the liberty and security of the governed." Id.

When it is asserted that the General Assembly, by statute, has improperly impinged on the judicial function, the interest of the public that is protected is "the citizens' rights established either by a specific provision in the Constitution or by a final adjudication in a court of law." Id. There is no specific provision in the Constitution addressing the issues now before the Court. Likewise, in the case at bar there has never been a "final adjudication in a court of law" as to the ultimate disposition of the residual funds held in these cases. Indeed, given the long years of inactivity of the circuit court in dealing with these funds prior to the recent demands for action by officers of the Executive branch, it is doubtful whether the ultimate disposition of the funds would ever have been determined. Application of the statutes enacted by the General Assembly to the funds at issue in this case does not violate any constitutional provision or abrogate any

final, judicially determined right of any person. These facts dispose of the separation of powers arguments.

Nothing in the separation of powers doctrine precludes the legislative department from adopting generally applicable rules of decision that are binding upon the courts in particular cases. "[T]he determination of whether a civil claim for relief exists is within the province of the legislature, or in the absence of legislative enactment, with the court as a matter of common law." Kilmer v. Mun, 17 S.W.3d 545, 552 (Mo. banc 2000). That is precisely what has occurred here. The General Assembly has enacted generally applicable statutes that govern the distribution of funds of the kind at issue in this case. There has been no violation of the doctrine of the separation of powers.

## VI. PERMITTING THE TREASURER TO PROCEED WITH THIS ACTION WOULD NOT AFFORD HER ANY "SUPERINTENDING CONTROL AND SUPERVISORY AUTHORITY" OVER THE CIRCUIT COURT OF COLE COUNTY IN VIOLATION OF ARTICLE V, SECTION 4 OF THE CONSTITUTION OF MISSOURI.

Article Five, Section Four of the Constitution of Missouri confers on this Court superintending control and supervisory authority over the inferior courts of Missouri. That this constitutional provision does not apply to this case is best shown by contrasting the case at bar to one to which Article Five, Section Four was held to apply. In City of St. Louis v. Mummert, 875 S.W.2d 108, 108 (Mo. banc 1994), the voters in St. Louis City and County adopted a plan for the creation of the St. Louis Metropolitan Sewer District. The Plan provided for a board of six trustees, with three each appointed by the executives of the city and county. Id. The identity of the trustees for the board would be subject to approval of a majority of the judges of the circuit

courts for St. Louis City and County. Id. The Plan did not afford this Court any supervisory authority or superintending control over the action of the circuit courts in approving the appointments. Id. at 109. This Court concluded that the plan therefore violated Article Five, Section Four. Id.

In the case at bar, in contrast, nothing in the governing statutes purports to give any supervisory authority to the State Treasurer over the actions of the circuit court, or authorizes the circuit judges to act without appellate review. Rather, the statute directs the State Treasurer to bring an action in a circuit court of appropriate jurisdiction to cause transfer of the funds to the Abandoned Fund Account. R.S.Mo. §§ 470.270, 447.575 (2000). As occurred here, a circuit judge rules on the petition brought by the State Treasurer. The circuit court's final judgment is subject to appellate review, including review by this Court if the case reaches this Court as in the ordinary course of civil proceedings. Because this Court has the ultimate authority to determine whether the circuit courts and officers appointed by them have appropriately carried out the requirements of law, there is no violation of Article Five, Section Four.

Like the separation of powers doctrine, the Constitution's grant to this Court of superintending control over the lower courts exists, not to protect the prerogatives of any court, but to protect the rights of the people. See In re Rules of Circuit Court for Twenty First Judicial Circuit, 702 S.W.2d 457, 460 (Mo. 1985). If the statutory scheme at issue here is carried out in the way that the people, through their representatives, have directed the people will not lose the benefit of superintending control by this Court. Rather, this Court retains the ultimate judicial authority to determine whether the statutory requirements for the transfer of funds to the Abandoned Fund Account have been met. Article Five, Section Four therefore has no application here.

## CONCLUSION

As the foregoing demonstrates, nothing in the law of civil procedure or in the Constitution of Missouri precludes the Executive Branch from exercising its authority to compel the transfer of the funds at issue here to the Abandoned Fund Account, as the Legislative Branch has directed. The judgment of the circuit court should be reversed. The cause should be remanded with directions to take such steps as are necessary to effect transfer of the funds in question to the Abandoned Fund Account.

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## CERTIFICATE OF SERVICE

This is to certify that one hard copy of the foregoing brief and one computer disk containing the foregoing brief were sent this 27th day of June, 2002, via first class U.S. Mail to each of the following individuals:

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## CERTIFICATE PURSUANT TO RULE 84.06(c)

The undersigned counsel for *amicus curiae* Utility Consumers Council of Mo., Inc., state as follows:

(a) The foregoing brief contains 7,018 words, which is within the applicable limitation in length; and

(b) *Amicus curiae* is filing a floppy disk pursuant to Rule 84.06(g), appropriately labeled, containing the brief in Word format. That disk has been scanned for viruses and the virus check software has reported that the disk is virus-free.

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The undersigned counsel for *amicus curiae* Utility Consumers Council of Mo., Inc., hereby certifies that he has contacted counsel for the parties to this appeal (James McAdams, Esq., Dale C. Doerhoff, Esq., Robert G. Russell, Esq., and Alex Bartlett, Esq.) and each has consented to the filing of this brief *amicus curiae*.

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