

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Unclaimed Property

Generally, all property, real and personal, and every right in property of any nature is subject to escheat to the state. The reversion of such property is based on the presumption that there is no heir to assume the property upon the death of the owner. Abandoned property is also subject to escheat to the state under appropriate statutes. The escheat of abandoned property does not constitute a taking of property without due process of law which would be in violation of the Federal Constitution.¹

Unclaimed property consists of any funds or other property, tangible or intangible that has remained unclaimed by the owner for a certain period of time, (s. 717.102, F.S.; s. 717.1035, F.S.). Savings and checking accounts, money orders, travelers' checks, uncashed payroll or cashiers' checks, stocks, bonds, other securities, insurance policy payments, refunds, security and utility deposits, and contents of safe deposit boxes are all potentially unclaimed property, (s. 717.104 through s. 717.116, F.S.).

Holders of unclaimed property, which typically include banks and insurance companies, are required to submit unclaimed property to the Department of Financial Services (Department), (s. 717.119, F.S.). If the property remains unclaimed, all proceeds from abandoned property are then deposited by the Department into the Florida Department of Education School Trust Fund (State School Fund), except for a \$15 million balance that is retained in a separate account (the Unclaimed Property Trust Fund) for the prompt payment of verified claims, (see generally, s. 717.123, F.S.). Approximately \$1.5 billion has been transferred to the Department of Education since the program's inception in 1987, including \$267,095,187 transferred to the State School Fund in fiscal year 2005-2006.²

Florida Disposition of Unclaimed Property Act

The Florida Disposition of Unclaimed Property Act (Chapter 717, F.S.) provides the statutory procedure for the escheat and disposition of presumed abandoned property to the state. The general purpose of the Act is to protect the interest of missing owners of property while the people of the state derive a benefit from the unclaimed and abandoned property until the property is claimed, if ever.³ The Department administers the Act, through its Bureau of Unclaimed Property. For fiscal year 2005-2006, the Bureau received \$354,695,271 in unclaimed property, and paid 101,490,902 in claims.

Holders of inactive accounts (presumed unclaimed property) are required to use due diligence to locate apparent owners through at least one search for the owners within 180 days after an account becomes inactive (two years), (s. 717.117(4), F.S.). Once the allowable time period for holding unclaimed property has expired, a holder is required to file a report with the Department by May 1, for all property valued at \$50 or more and presumed unclaimed for the preceding calendar year. Under the provisions of s. 717.117(1)(a), F.S., the report to the Department generally must contain the name and social security number or federal employer identification number, if known, and the last known address of the apparent owner. The Department must provide information contained in a report of unclaimed property

¹ Cockrill v. California, 268 U.S. 258 (1925).

² The fiscal year begins on July 1 and ends June 30th the following year.

³ Section 717.139, F.S.

to any person who requests such information within 45 days after the report has been processed and added to the unclaimed property database.

Section 717.118, F.S., places an obligation on the state to notify owners of unclaimed property accounts valued at more than \$250, in a cost-effective manner, including through attempts to directly contact the owner. Representatives from the Department indicate that the means used to find lost property owners include social security numbers, direct mailing, Department of Motor Vehicle files and state payroll records, newspaper advertisements, and a state website, www.fltreasurehunt.org, where unclaimed property can be found. The Department is responsible for receiving property, locating the rightful owners, and returning the property (or its value, in cases of sold securities) to them. Once a claim is made through filing a form with the Department, the Department has 90 days to determine the claim, (s. 717.124, F.S.).

Bank of America, N.A. vs. McCann⁴

When a check is presented, it is often first cashed or paid by a bank other than that of the writer of the check. The bank that pays the check then transmits the check to the bank of the check writer, which then reimburses the bank that cashed the check. Banks engage in this check cashing function through arrangements between banks of first deposit (banks that initially cash or pay the check), payor banks (the check-writer's bank) and often an intermediary processing bank that sorts checks from banks of first deposit and sends them to the correct payor bank.

According to banking industry representatives, sometimes mistakes are made that result in an overpayment or underpayment between banks. Generally, banks seek to correct major errors; but because of the large volume of checks cashed, they do not seek to reconcile smaller errors due to the time and cost involved. However, consumers are never affected by such errors as a consumer cashing a check receives the full value of the check and a consumer writing a check is only debited the amount of the check.

The question of whether credit balances held by a financial institution are unclaimed property and thus should be reported and turned over to the Bureau of Unclaimed Property within the Department was the subject matter of a Qui Tam lawsuit brought against Bank of America for failure to report and turn over such funds. The lawsuit was brought under the Florida False Claims Act, with a whistleblower alleging that the bank, acting in its check clearinghouse capacity, committed fraud against the state by failing to properly process checks. The suit alleges that employees of the national bank were told not to notify other banks regarding funds owed to them due to processing errors. The suit contends that these credits should have been remitted to the Department as unclaimed property.⁵

The plaintiffs in the action sought to have the Department join the action as a party to the lawsuit, however, the Department chose not to join the plaintiffs in the action. A memorandum from the Department legal staff was entered as an exhibit in the action noted that such credit balances have never been considered unclaimed property since the enactment of Chapter 717, F.S. in 1961, nor has any other state sought to collect such balances. Additionally, the memorandum noted that the large volume of check clearing transactions makes small errors inevitable, and that reconciling small balances may be more costly for a bank than to simply write off the discrepancies. Finally, the memorandum states that the balances are not "unclaimed" property because the owners are known and in regular business dealing with the holder of the balance. The judge in the action notified the plaintiffs that if the State of Florida did not intervene as a party, the case would be dismissed on February 15, 2005. Plaintiffs again attempted to have the Department join as a party, but it refused. As a result, the plaintiffs filed for a voluntary dismissal on February 15, 2007.

Effect of Proposed Changes

⁴ 444 Fed. Supp. 2d 1227 (U.S.D.C. N.D. Fla. 2006).

⁵ Daily Business Review, March 10, 2006.

The bill exempts from the unclaimed property requirements of s. 717.117, F.S., credit balances held by a financial institution, a credit union, or a participant as defined in 12 USC s. 4001(19)⁶, which result from the performance of, or participation in, check-clearing functions. Check clearing functions may be pursuant to a contractual relationship between financial institutions, credit unions or participants; through a clearinghouse as defined by s. 674.104, F.S.; or a clearinghouse association⁷ as defined by 12 USC s. 4001(8).

Further, the bill exempts such credit balances from the unclaimed property provisions of s. 717.117, F.S., which includes requirements that the holders of unclaimed property submit such to the Department once it is presumed unclaimed.

The legislation is intended to clarify existing law and to be remedial in nature and applies to credit balances held by financial institutions, or credit unions, or participant as defined in federal, before, on, or after July 1, 2007.

Section 2. This act becomes effective July 1, 2007.

C. SECTION DIRECTORY:

Section 1. The bill creates a retroactive exemption for certain credit balances held by a financial institution, a credit union, or a participant as defined in Federal law.

Section 2. Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

⁶ 12 USC s. 4001(19) defines a “participant” as “a depository institution which—
(A) is located in the same geographic area as that served by a check clearinghouse association; and
(B) exchanges checks through the check clearinghouse association either directly or through an intermediary.

⁷ 12 USC s. 4001(8) defines a “check clearinghouse association” as “any arrangement by which participant depository institutions exchange deposited checks on a local basis, including an entire metropolitan area, without using the check processing facilities of the Federal Reserve System.”

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES