

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 970

INTRODUCER: Senator Richter

SUBJECT: Unclaimed Property

DATE: February 8, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Knudson	BI	Pre-meeting
2.			JU	
3.			AP	

I. Summary:

Unclaimed property consists of any funds or other property, including insurance proceeds, that remains unclaimed by the owner for a certain period of time. The Florida Disposition of Unclaimed Property Act requires holders of unclaimed property to exercise due diligence to locate owners and pay them the funds. If the owner cannot be located, the holder must report and remit the unclaimed property to the Department of Financial Services (DFS) Bureau of Unclaimed Property. The bill makes the following changes to the Act:

- Eliminates the conditional \$1,000 cap on fees and costs applicable to property claimed by a claimant's representative under a power of attorney when the claimant's representative does not provide the property owner notice that the property is being held by the Bureau of Unclaimed Property;
- Removes the conditional \$1,000 limit on the discount allowed in purchase agreements when the person seeking to purchase the unclaimed property does not provide the property owner notice that the property is being held by the Bureau of Unclaimed Property;
- Eliminates the exception that removes the fee cap and disclosure requirement applicable to claims made under a power of attorney when probate proceedings must be initiated on behalf of the claimant regarding an estate that has never been probated or if the claim is being made under the right of a person outside the United States;
- Eliminates the exception that removes the fee cap applicable to a purchase agreement for unclaimed property when probate proceedings must be initiated on behalf of the seller for an estate that has not been probated, the seller is not a natural person, or the seller is outside the United States;
- Requires purchase agreements to specify the percent of the property to be paid to the purchaser when a flat fee is paid as compensation to the buyer.
- Repeals the prohibition against executing a power of attorney to act as a claimant's representative or a purchase agreement within 45 days after an unclaimed property account is added to the unclaimed property database;

- Allows for unclaimed property in a campaign account for public office to escheat to the state;
- Increases the maximum value governing documentation standards for claims related to small estates from \$5,000 to \$10,000;
- Authorizes the DFS to estimate property value if the holder fails to produce sufficient records to do so and clarifies that the estimation requirement applies without regard to whether the holder is incorporated, formed, or organized in Florida or whether the unclaimed property existed before the effective date of the bill;
- Establishes registration and renewal fees for representatives and purchasers of property claims and, by operation of law, suspends the transactional rights of registrants who fail to pay their renewal fee;
- Revises certain definitions and adds one for the term “United States”; and
- Removes the authorization for registrants to receive social security numbers.

The bill also limits a surplus trustee from having an interest in more than one company or corporation.

The effective date of the bill is July 1, 2016.

II. Present Situation:

Unclaimed Property

Unclaimed property constitutes any funds or other property, tangible or intangible, that has remained unclaimed by the owner for more than 5 years. Unclaimed property may include 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.¹

In 1987, Florida adopted the Uniform Unclaimed Property Act² and enacted the Florida Disposition of Unclaimed Property Act (ch. 717, F.S., “the Act”).³ The Act serves to protect the interests of missing owners of property, while the state derives a benefit from the unclaimed and abandoned property until the property is claimed, if ever. Under the Act, the Department of Financial Services, Bureau of Unclaimed Property (DFS) is responsible for receiving property, attempting to locate the rightful owners, and returning the property or proceeds to them. There is no statute of limitations in the Act, and citizens may claim their property at any time and at no cost.

Generally, all intangible property, including any income less any lawful charges, which is held in the ordinary course of the holder’s business, is presumed to be unclaimed when the owner fails to claim the property for more than 5 years after the property becomes payable or distributable, unless otherwise provided in the Act.⁴ Holders of unclaimed property (which typically include

¹ Sections 717.104 – 717.116, F.S.

² UNIFORM LAW COMMISSION, *Unclaimed Property Act (1952)(1981)*, [http://www.uniformlaws.org/Act.aspx?title=Unclaimed Property Act \(1952\)\(1981\)](http://www.uniformlaws.org/Act.aspx?title=Unclaimed%20Property%20Act) (last visited Feb. 5, 2016).

³ Chapter 87-105, Laws of Fla. See also UNIFORM LAW COMMISSION, *Unclaimed Property Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Feb. 5, 2016).

⁴ Section 717.102(1), F.S.

banks and insurance companies) of \$50 or more are required to use due diligence to locate and notify apparent owners of inactive accounts, at least 60 days but not more than 120 days prior to filing a report with the DFS.⁵ If the owners cannot be located, holders must file an annual report with the DFS for all property, valued at \$50 or more, that is presumed unclaimed for the preceding year.⁶ The report must contain certain identifying information, such as the apparent owner's name, social security number or federal employer identification number, and last known address of apparent owners.⁷ The holder must deliver all reportable unclaimed property to the DFS when it submits its annual report.⁸

Upon the payment or delivery of unclaimed property to the DFS, the state assumes custody and responsibility for the safekeeping of the property.⁹ The original property owner retains the right to recover the proceeds of the property, and any person claiming an interest in the property delivered to the DFS may file a claim for the property, subject to certain requirements.¹⁰ The DFS is required to make a determination on a claim within 90 days. If a claim is determined in favor of the claimant, the DFS is to deliver or pay over to the claimant the property or the amount the DFS actually received or the proceeds, if it has been sold by the DFS.¹¹

If the property remains unclaimed, all proceeds from abandoned property are then deposited by the DFS into the Unclaimed Property Trust Fund.¹² The DFS is allowed to retain up to \$15 million to make prompt payment on verified claims and to cover costs incurred by the DFS in administering and enforcing the Act. All remaining funds received must be deposited into the State School Fund to be utilized for public education.¹³

Claims for recovery of unclaimed property held by the DFS under the Act may be filed by or on behalf of any person with an interest in the property.¹⁴ While the Act provides the opportunity for anyone to recover the full value of their property at no cost, provision is made for claimants to designate someone who may perfect the claim for them. The claimant may designate and empower a representative to pursue their claim by executing a power of attorney agreement. Or, the claimant may sell their right to the property to certain individuals that are registered with the DFS for this purpose.¹⁵ In either case, the transaction is subject to a fee limitation, unless a

⁵ Section 717.117(4), F.S.

⁶ Section 717.117, F.S.

⁷ For unclaimed funds owing under any life or endowment insurance policy or annuity contract, the report must also include the last known address of the insured or annuitant and of the beneficiary according to records of the insurance company holding or owing the funds. s. 717.117(1)(b), F.S.

⁸ Section 717.119, F.S.

⁹ Section 717.1201, F.S. Like many other states' unclaimed property acts, the Act is based on the common-law doctrine of escheat and is a "custody" statute, rather than a "title" statute, in that the DFS does not take title to abandoned property, but instead obtains its custody and beneficial use pending identification of the property owner.

¹⁰ Sections 717.117 and 717.124, F.S.

¹¹ Section 717.124, F.S.

¹² Section 717.123, F.S.

¹³ *Id.*

¹⁴ Section 717.124, F.S.

¹⁵ Only a Florida licensed attorney, certified public accountant, private investigator or an employee of a private investigator, or an employer of the private investigator if the employer holds a Class "A" license under ch. 493, F.S., may execute such purchase agreements, s. 717.1351, F.S. Additionally, the purchaser must be registered with the DFS. The DFS reports that there are currently 246 registrants under this provision. Florida Department of Financial Services, Agency Analysis of 2016 SB 970, p. 3 (Dec. 14, 2015).

disclosure statement is provided to the claimant, in the form and with the content specified in the Act. The fee limitations are:

For representatives operating under a power of attorney:¹⁶

- 20 percent of the value of the property, not to exceed \$1,000;
- However, the fee limitation does not apply if the representative must initiate probate proceedings for an estate that has never been probated before or if the claimant is outside of the United States.

For purchasers obtaining rights under a purchase agreement:¹⁷

- 20 percent discount off of the value of the property, not to exceed a discount of \$1,000;
- However, the \$1,000 discount limitation does not apply if the representative must initiate probate proceedings for an estate that has never been probated before, if the claimant is outside of the United States or is not a natural person, such as a business or similar entity.

The Act also prescribes the form and content of the purchase agreement that transfers the right of the claimant to another person and the document granting the power of attorney.

Since the public policy of the state is to provide the DFS with the first opportunity to locate the owner of the unclaimed property and for the owner to receive the full value of their property.¹⁸ There are limitations on claiming by others through powers of attorney and purchase agreements. Powers of attorney and purchase agreements that are executed less than 45 days after the property is received by the DFS and that relate to accounts over \$250 in value are void under the Act.¹⁹ The 45 day limit on such claims provides the DFS the opportunity to attempt to locate the property's owner. However, placing time and value limits on claim eligibility requires the DFS to track accounts and audit claims to identify the amount and timing of the claims. The DFS reports that this is inefficient and the public purpose can be served through other provisions of the Act. The DFS recommends repealing s. 717.1381, F.S., to eliminate administrative inefficiency.²⁰ It is notable, though, that repealing s. 717.1381, F.S., would include the repeal of statements of legislative intent regarding the right of the claimant to recover their property without charge and the obligation of the DFS to make a meaningful attempt to locate the claimant.

¹⁶ Section 717.135, F.S., requires the disclosure that the property is held by the DFS pursuant to the Act, the mailing and Internet addresses of the DFS, the person or name of the entity that held the property prior to the property becoming unclaimed, the date of the holder's last contact with the owner, if known, and the approximate value of the property, and the categories of unclaimed property the claimant's representative is seeking to recover. The categories of unclaimed property are: cash accounts; stale dated checks; life insurance or annuity contract assets; utility deposits; securities or other interests in business associations; wages; accounts receivable; and contents of safe-deposit boxes.

¹⁷ Section 717.1351, F.S. The content of the disclosure statement has the same elements as the disclosure described in s. 717.135, F.S., related to powers of attorney. However, the fee limitation does not apply if the representative must initiate probate proceedings for an estate that has never been probated, if the claimant is outside of the United States or is not a natural person, such as a business or similar entity.

¹⁸ Sections 717.118 and 717.1381, F.S.

¹⁹ Section 717.1381, F.S.

²⁰ Florida Department of Financial Services, Agency Analysis of 2016 HB 783, p. 3 (Dec. 14, 2015) and email from Elizabeth Boyd, Director of Legislative Affairs, Department of Financial Services, Re: 45 Day issue from HB 783 (Jan. 27, 2016).

Surplus Trustees

Upon the conclusion of a foreclosure, any undisbursed funds are held in surplus by the clerk of the court for 60 days. If no legal claim is made for the surplus, the clerk is required to appoint a “surplus trustee” to locate the owner of the surplus. A surplus trustee is an entity that holds and administers surplus proceeds from a foreclosure pursuant to ss. 45.031–45.035, F.S. Surplus trustees are certified by the DFS. The clerks assign the surplus trustees to cases using a rotational system developed by the DFS.²¹

The primary duty of a surplus trustee is to locate the owner of record within 1 year after appointment. Upon locating the owner of record, the surplus trustee files a petition with the court on behalf of the owner of record seeking disbursement of the surplus funds. If more than one person appears to be the owner of record, the surplus trustee shall obtain agreement between such persons as to the payment of the surplus or file an interpleader. The interpleader may be filed as part of the foreclosure case. Surplus trustees are paid by the clerk from the foreclosure surplus.²²

Various entities may qualify for certification by the DFS as a surplus trustee. Their application must include the following:

- The name and address of the entity and one or more principals of the entity;
- A certificate of good standing from the Secretary of State indicating that the entity is an entity registered in this state;
- A statement under oath by a principal of the entity certifying that the entity, or a principal of the entity, has a minimum of 12 months’ experience in the recovery of surplus funds in foreclosure actions;
- Proof that the entity holds a valid Class “A” private investigator license pursuant to ch. 493, F.S.;
- Proof that the entity carries a minimum of \$500,000 in liability insurance, cash reserves, or bonding;
- A statement from an attorney licensed to practice in this state certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis and that the attorney will supervise the management of the entity during the entity’s tenure as a surplus trustee;
- A statement under oath by a principal of the entity certifying that the principal understands his or her duty to immediately notify the DFS if the principal ever fails to qualify as an entity entitled to be a surplus trustee; and
- A nonrefundable application fee of \$25.

Unclaimed Campaign Funds

Section 106.141, F.S., requires candidates for public office to dispose of the funds in their campaign account within 90 days of the date that their candidacy ended.²³ Paragraph 106.141(4)(a), F.S., specifies a variety of options for the disposal of surplus campaign funds.

²¹ Sections 45.034 and 45.035, F.S.

²² *Id.*

²³ The triggers for disposition are when the candidate withdraws their candidacy, becomes an unopposed candidate, is eliminated, or is elected. s. 106.141(1), F.S.

With certain exceptions, they may take any combination of the following actions when disposing of the surplus:

- Return, pro rata to each contributor, the funds that have not been spent or obligated;
- Donate the funds that have not been spent or obligated to a charitable organization or organizations that meet the qualifications of s. 501(c)(3) of the Internal Revenue Code;
- Give not more than \$25,000 of the funds that have not been spent or obligated to the affiliated party committee or political party of which such candidate is a member; or
- Give the funds that have not been spent or obligated:
 - In the case of a candidate for state office, to the state, to be deposited in either the Election Campaign Financing Trust Fund or the General Revenue Fund, as designated by the candidate; or
 - In the case of a candidate for an office of a political subdivision, to such political subdivision, to be deposited in the general fund thereof.

If the candidate accepted contributions under the Florida Election Campaign Financing Act, the surplus funds must be returned to the General Revenue Fund, after satisfying certain monetary obligations. If the candidate takes office, they may transfer a limited amount of the funds to their office account.

Violations of the campaign finance law are subject to criminal penalties, both misdemeanors and felonies. Failure to properly dispose of surplus campaign funds is a first degree misdemeanor punishable by up to a year in jail and/or a fine of \$1,000. Candidates are prohibited from accepting campaign contributions following the end of their candidacy. They are allowed to receive and deposit refund checks to be disposed of consistent with the requirements of law, as described above. However, the law does not specify how to dispose of cash (or other property), received in forms other than a check, that would otherwise go into the campaign account but comes into the possession of the former candidate after the end of their candidacy and the disposition of the campaign account.

Retroactive and Remedial Application of Law

Newly enacted legislation is presumed to apply prospectively absent clear legislative intent to the contrary.²⁴ However, the intent for retrospective application of enacted legislation can be established through the express language of the statute or by analyzing the practical effect of the statute. If the intent for retrospective application is established, then it must be determined whether such application of the statute is constitutionally permissible.²⁵

III. Effect of Proposed Changes:

Unclaimed Property

The bill revises the definitions of “business association,” “domicile,” and “insurance company” to simplify their text and improve understandability. Limited liability companies are specifically included in the definition of “business association.” A definition of “United States” is created to

²⁴ See *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999).

²⁵ *Id.*

specify the meaning of that term, which is currently used throughout the Act to determine various rights and conditions.

Generally, a claim for property related to the estate of a deceased person must be accompanied by an order from a probate court. However, there are documentary exceptions for estates with an aggregate value of \$5,000 or less and no probate proceeding is pending.²⁶ The bill increases the maximum threshold value of this small estate provision from \$5,000 to \$10,000.

The bill eliminates the \$1,000 cap on fees and costs applicable to property claimed through a representative under a power of attorney and the \$1,000 limit on the discount allowed in purchase agreements. Since these caps limit the application of the primary fee limitation, which is 20 percent of the value of the property recovered under a power of attorney or a 20 percent discount on the purchase of the property right, the \$1,000 limitation is only triggered when value of the property exceeds \$5,000 (i.e., $\$5,000 \times 0.20 = \$1,000$). Currently, there is no fee cap if the specified disclosure statement is provided to the claimant. The bill increases the cap on fees and costs to the current 20 percent standard on property valued over \$5,000 where the specified disclosure is not made to the claimant.

The bill also eliminates the exception that removes the fee cap and disclosure requirement in the case of a claim made under a power of attorney, or the \$1,000 discount limit (but not the disclosure requirement) in the case of a claim for a property right obtained under a purchase agreement. The exception applies when probate proceedings must be initiated on behalf of the claimant regarding an estate that has never been probated or if the claim is being made under the right of a person outside the United States or, in the case of a purchase agreement, the seller is not a natural person.

Currently, purchase agreements are required to specify the percent of the property to be paid to the purchaser on a discrete line item of the purchase agreement pursuant to the form and content requirements of the Act. However, this line may be deleted if the purchaser is paid a flat fee instead of a percentage of the recovery. The bill eliminates this exception and requires every purchase agreement to include the required text regarding the percent of the property to be paid to the purchaser and the insertion of the appropriate percentage figure, which varies depending upon the amount of the flat fee and the value of the property to be recovered.

Individuals who register with the DFS as a potential purchaser under the Act are permitted to receive the social security numbers of apparent property owners of property reported to the DFS. This is in addition to other information related to the unclaimed property. The bill deletes the authorization for registrants to receive social security numbers. Currently, there is no fee for registering with the DFS under the Act. The bill establishes a \$500 registration fee and an annual \$250 renewal fee. The registration fee is due upon application or reapplication following a lapse of registration. The renewal fee is due July 1st each year, with reapplication being required if the renewal fee is not paid by December 31st. Registrants who fail to pay their registration renewal fee lose their privileges until the fee is paid.

²⁶ Section 717.1243, F.S.

Unclaimed Campaign Funds

The bill provides that if unclaimed property is owned by the campaign account of a candidate for public office, following a report of the property to the DFS, the property shall become the property of the state and the proceeds of the property shall be paid into the State School Fund.

Surplus Trustees

The bill prohibits the surplus trustee from being an owner, shareholder, officer, member, employee, or participant in more than one surplus trustee company or corporation. The bill also requires the DFS to suspend the certification of the surplus trustee for 1 year, if the DFS finds that the surplus trustee has violated this limitation. Since surplus trustees are assigned by clerks using a rotation system developed by the DFS, the limitation on interests in multiple surplus trustees will prevent a disproportionate distribution of assignments that favors affiliated entities over independent entities.

Retroactive and Remedial Application of Law

The holder of unclaimed property is obligated to report the value of property to the DFS. If the holder's records are insufficient to permit preparation of the required report, the value of the property may be estimated. However, there is no authority for the DFS to estimate the value of the property when the holder fails to produce the record. The bill authorizes the estimation to occur if the holder fails to produce records following a request by the DFS. Additionally, it clarifies that the estimation requirement applies without regard to whether the holder is incorporated, formed, or organized in Florida.

The bill expressly states that this change is intended to be remedial in nature and apply to unclaimed property existing before July 1, 2016. This would apply the bill's provisions to unclaimed property regardless of the date that it first came within the provisions of the Act. Please see section entitled Other Constitutional Issues below regarding this provision of the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill expressly states that the law change to s. 717.1333, F.S., is intended to be remedial in nature and apply to unclaimed property existing before July 1, 2016. This would apply the bill's provisions to unclaimed property regardless of the date that it first came within the provisions of the Act.

Newly enacted legislation is presumed to apply prospectively absent clear legislative intent to the contrary.²⁷ However, the intent for retrospective application of enacted legislation can be established through the express language of the statute or by analyzing the practical effect of the statute. If the intent for retrospective application is established, then it must be determined whether such application of the statute is constitutionally permissible.²⁸ Retroactive application is unconstitutional, and thereby prohibited, if:²⁹

- Vested rights are adversely affected or destroyed;³⁰
- A new obligation or duty is created or imposed; or
- An additional disability is established.

The Florida Supreme Court previously ruled that retroactive application of a remedial statute is constitutionally permissible and should occur to achieve the intended purpose of the statute.³¹ Remedial statutes operate to further a remedy or confirm existing rights and do not create new obligations or adversely affect vested rights.³² Further, when an amendment to a statute is enacted soon after controversies as to the interpretation of the original statute arise, a court may consider that amendment as legislative interpretation of the original law and not a substantive change of the law.³³

The bill authorizes an estimation of property value if the holder fails to produce records following a request by the DFS. Additionally, it clarifies that the estimation requirement applies without regard to whether the holder is incorporated, formed, or organized in Florida. This creates a right of the DFS to provide an estimation. It does not limit the holder's opportunity to provide information or make an estimation prior to the DFS being prompted to make an estimate of its own. This does not appear to trigger any of the three considerations identified by the courts. The holder's rights are unaltered; none are affected, destroyed, created, or imposed. Nor is the holder's ability or capacity to exercise their right altered.

²⁷ See *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999).

²⁸ *Id.*

²⁹ *Id.*

³⁰ For example, a law which retroactively criminalizes a vested legal right, such as the right to marriage, would be considered unconstitutional. Similarly, a zoning law which retroactively prohibits the use of real property is unconstitutional if the right to that particular use had previously vested in the owner.

³¹ See *City of Lakeland v. Cantinella*, 129 So.2d 133 (Fla. 1961); see also *Smiley v. State*, 966 So.2d 330 (Fla. 2007); *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla. 1986).

³² *Id.*

³³ See *Lowry v. Parole and Probation Commission*, 473 So.2d 1248 (Fla. 1985).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill creates a new \$500 registration fee and \$250 renewal fee for claimant representatives who apply with DFS.

The bill eliminates the \$1,000 fee cap that third parties may collect for assisting in the recovery of unclaimed property.

The bill allows for small estates up to \$10,000 to file an affidavit with the department for a claim made by a beneficiary.

C. Government Sector Impact:

The \$500 registration fee and \$250 renewal fee for claimant representatives created by the bill would be collected by the DFS.

VI. Technical Deficiencies:

Section 1 of the bill, amending s. 45.034, F.S., relates to surplus trustees and may be outside the scope of the bill, which relates to unclaimed property. Among other specified limitations, the bill prohibits a surplus trustee from being an officer, member, or employee of more than one surplus trustee. These three descriptors relate to natural persons. Pursuant to s. 45.034, F.S., only entities can be a surplus trustee. This portion of the bill also provides for the suspension of violators by the DFS. This grant of disciplinary power may be incomplete or improperly located within statute.

The bill deletes authority currently in s. 717.1351(7), F.S., which authorizes the removal of certain language required in purchase agreements, if the agreement is based on a flat fee paid by the seller, rather than a percentage value of the property. However, the related provision in s. 717.135(4), F.S., which authorizes the deletion of substantively identical language in grants of limited power of attorney is not deleted. The deletion of one provision and not the other may be inconsistent with the intent of the bill to require the disclosure of the percentage value of the property that will be paid to a third party for their service in locating and recovering property.

The bill repeals s. 717.1381, F.S., which contains certain legislative intent language regarding the right of the claimant to recover their property without charge and the obligation of the DFS to make a meaningful attempt to locate the claimant. Deleting this language may be inconsistent with the intent of the bill.

On line 292, the term “registrant” is used regarding the payment of a fee upon application to register. The context indicates that the term “registrant” should be replaced with the term “applicant.”

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 45.034, 717.101, 717.1243, 717.1333, 717.135 and 717.1400.

This bill creates the following sections of the Florida Statutes: 717.1235 and 717.1351.

This bill repeals section 717.1381 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.