

TESTIMONY BY GEORGINA K. KAWAMURA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEES ON CONSUMER PROTECTION & COMMERCE
AND JUDICIARY
ON
HOUSE BILL NO. 2559, H.D. 1

February 21, 2008

RELATING TO THE UNIFORM UNCLAIMED PROPERTY ACT

House Bill No. 2559, H.D. 1, adds a new chapter to the Hawaii Revised Statutes to update the State's Unclaimed Property statutes (Chapter 523A, HRS) to conform to the 1995 version of the Uniform Unclaimed Property Act.

The Department supports the intent of this bill, however, we are recommending amendments to the proposed 1995 version as contained in this bill. The proposed changes incorporate existing revisions made to the 1981 version of the Uniform Unclaimed Property Act which was the basis for the current Unclaimed Property Statutes. First, we suggest changing the effective date from July 1, 2008 to July 1, 2009. This would enable the holder community and all affected entities to incorporate the statutory changes and reporting requirements into their reporting systems. Should the bill be enacted and the effective date remain at July 1, 2008, we do not believe that this would allow the holders, the State, and other affected entities to change their reporting systems to meet the November 1, 2008 annual reporting deadline for Hawaii.

The Department respectfully recommends the following additional amendments:

- Revise Section 8(b)(6) to include an indication if the property is an interest bearing account.

- Add a new subsection 10 (b) as follows:

“(b) The notice shall be given by using one or more of the following methods:

(1) Posting on the State of Hawaii, department of budget and finance internet website;

(2) Publication in a daily or weekly publication of statewide circulation; or

(3) Any other method the administrator deems effective for publicizing the notice.”

This language is currently in Chapter 523A, HRS, and will allow the Department to utilize the various methods to publicize the required notice.

- Re-label the current subsection 10(b) to 10(c).
- Revise Section 12 to reflect payment of simple interest at a nominal fixed rate on the amount of the property at the time it was submitted to the Department and clearly state that the Department is not required to pay compound interest (interest on interest). We are recommending a nominal fixed rate as opposed to the floating “legal rate” or any lesser rate the property earned while in possession of the holder. Further, we recommend language to be added to this section to clarify that only property received after the effective date of this bill shall be subject to the provisions of this Section 12. The Department does not have sufficient information for all of the current property held to determine if the property was an interest bearing demand, savings, or time deposit account at the time it was reported to the State.

While the Department understands the benefits to updating Chapter 523A, HRS, these changes to the administration of the Unclaimed Property Program will increase the

costs to the program and may require additional staffing. For example, as the Department does not currently pay interest earnings, the Department will have to acquire and maintain a monitoring system to compute the amount of interest to be paid for each property. Furthermore, we will be required to prepare and distribute IRS Form 1099 to all owners who have been paid interest earnings on their property.

Thank you for the opportunity to provide testimony on this bill.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

**ON H.B. No. 2559, H.D. 1
RELATING TO THE UNIFORM UNCLAIMED PROPERTY ACT.**

**BEFORE THE HOUSE COMMITTEES ON CONSUMER PROTECTION AND
COMMERCE AND ON JUDICIARY**

DATE: Thursday, February 21, 2008, at 2:00 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: KEN TAKAYAMA or
PETER HAMASAKI
Commission to Promote Uniform Legislation

C:/cpuleg,UUPA.tes.2/5/08

E-MAIL to CPCtestimony@Capitol.hawaii.gov.

Chairs Herkes and Waters and Members of the House Committees on
Consumer Protection and Commerce and on Judiciary:

On behalf of the State Commission to Promote Uniform Legislation
(CPUL), thank you very much for this opportunity to testify in support of
H.B. No. 2559, H.D. 1, relating to the Uniform Unclaimed Property Act.

This bill enacts the most recent (1995) version of the Uniform Unclaimed
Property Act that was developed by the National Conference of Commissioners
on Uniform State Laws (NCCUSL). As such, it replaces the older 1981 version of
the Act which Hawaii enacted in 1983 (codified as part I of chapter 523A, Hawaii
Revised Statutes). A summary of the Uniform Unclaimed Property Act (1995)
prepared by the NCCUSL is appended to this testimony.

This version of the Uniform Act (as did its predecessors) applies almost
exclusively to intangible personal property such as traveler's checks, money
orders, and stocks. As such, it is not and will not be a solution to the problem of
abandoned vehicles. It DOES, however, apply to property left unclaimed in
financial institutions, insurance companies, securities firms, and the like.

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Under the old common law approach to abandoned personal property, the property for the most part was either available to the next person who took possession and control, or otherwise escheated to the State. The original Unclaimed Property Act and its successors changed that traditional approach to one in which the property or proceeds are transferred to the State as a permanent custodian for the owners. By enacting earlier versions of the Unclaimed Property Act, Hawaii has already adopted the general scheme of the Acts.

The current version of the Act proposed in this bill updates the existing law by:

- (1) Clarifying certain jurisdictional issues in response to a decision of the U.S. Supreme Court concerning interests in investment securities when the owner's addresses could not be ascertained;
- (2) Clarifying what constitutes unclaimed property by reducing the heavy emphasis placed on the written records of the holder of the property;
- (3) Placing restrictions on the "dormancy" charges that holders may impose, for example, on the inactivity of an account; and
- (4) Restricting the ability of third parties to charge fees for the "service" of "finding" unclaimed property for people.

This bill does not, however, change certain features of the existing law that the Department of Budget and Finance, as the administrator of the unclaimed property law, asked to have retained because they were working well. These are:

- (1) The five-year dormancy period (instead of three) for a variety of property items;
- (2) The six-month period before which the holders of property have to turn over the unclaimed property reported (thereby enabling the property owners to retrieve their property directly from the holder

- rather than having to do so from the state government); and
- (3) Retaining the unclaimed property trust fund established in section 523A-23.5, Hawaii Revised Statutes.

The State Commission additionally agreed to the amendments made by the House Committee on Economic Developments and Business Concerns—all of which were requested by the Department of Budget and Finance.

To the best of our knowledge, the only remaining point of disagreement is the requirement in section -12 of this H.D. 1 draft of the bill that the administrator pay interest on certain property. The Department has expressed concern that the interest rates earned may not be adequate to meet the requirements of the bill at page 23, lines 18-21. To allay the concerns of the Department, the State Commission would agree to an amendment as follows:

"the administrator shall pay interest at the legal rate of interest established in section 478-2, or any lesser rate the property earned while in the possession of the [~~holder~~] administrator."

With this change in the wording, the Department would not have to pay any higher rate of interest than what the Department is actually able to earn.

Thank you very much for this opportunity to testify.



Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

SUMMARY

Uniform Unclaimed Property Act (1995)

If an individual abandons an automobile on a street in almost any city in the United States, it is generally a problem of litter, of junk. Nobody is likely to want it, although abandonment provides another person with the opportunity to take it if that person wants to do so. Abandonment implies opportunity to others -- an opportunity that most people don't bother about.

The law of abandoned property is an infrequently visited corner of American property law. There is some concern over abandoned real property interests, and most of the rules governing personal property are derived from real property law. An automobile is tangible personal property. There is very little concern for tangible personal property, except in statutes and ordinances pertaining to clearing away junk and trash.

But abandonment of intangible personal property raises significant public policy concerns. An example of intangible personal property is a share of stock. We cannot see, touch, taste, or hear a share of stock. It is a property right in an intangible, created-by-law entity called a corporation. What we can see and feel, if the share of stock is certificated, is the paper certificate which represents the property rights in the corporation. If the share is uncertificated, we do not even have the paper representation and must depend upon statements of issuers as evidence of ownership.

Other kinds of intangible property are bank accounts, travelers checks, insurance proceeds, and other investment securities. To list these items of intangible property is to suggest their importance -- and value. Huge amounts of money are involved.

Besides the values involved, there is another characteristic of most kinds of intangible personal property that makes abandonment rules very important. Most kinds of valuable intangible personal property interests are held in the owners' names by other entities -- the holders. The assets in a bank account are not held by the owner, but by the owner's bank. Some entity other than the owner actually possesses the intangible property when and if it is abandoned by its rightful owner. That entity is in position to assume title to abandoned intangible personal property virtually by doing nothing except to continue to hold it. In fact, it is possible to surmise that a holding institution for intangible personal property can find doing nothing with its customers' property and communicating as little as possible with its customers to be lucrative silence.

The problem of "lucrative silence" motivated the Uniform Law Commissioners (ULC) to promulgate the Uniform Disposition of Unclaimed Property Act in 1954. It was amended in 1966 and then was wholly revised in 1981 to become the Uniform Unclaimed Property Act (UUPA). In 1995, the Uniform Law Commissioners have once again revised the UUPA. It updates UUPA (1981) and should greatly assist the States in dealing with the unclaimed intangible personal property problem.

UUPA (1995) and its predecessor Acts are designed to change the common law and the law of escheat pertaining to abandoned intangible personal property. A finding of abandonment of property requires some evidence of intent to relinquish title to that property, usually a period of time during which the owner shows no interest in the property, does nothing with the property, gives up possession of the property, does nothing to control other people's use of the property, pays no assessed taxes on the property, and/or generally indicates an intent to relinquish possession and control. Abandoned property is usually available to the next person who assumes possession and control.

The common law calculus is complicated by the notion of escheat. If a person dies without heirs, property ultimately devolves or escheats to the State. Many States historically treated valuable abandoned property as property devolving at death to the State. The period of time that accrues for a determination of abandonment was treated as raising a presumption of death, making the State the ultimate heir upon its probate. There are a few States which still retain vestiges of this escheat notion.

UUPA (1995) and its predecessors essentially abolish the common law on abandoned property and significantly change the escheat notion for intangible personal property. Intangible personal property that is unclaimed (the term that succeeds abandoned) does not escheat to the State nor is it available for anyone who can assert possession and control over it, but is transferred to the State as a permanent custodian for its owners. The State keeps the property or the proceeds from its sale for its owners.

The scheme of UUPA (1995) and its predecessors is fairly simple. Its rules determine when eligible property is unclaimed. Once property may be identified as unclaimed, the holder is required to report that property to the state unclaimed property administrator. After the report is made, and notice to owners is formally attempted by the holder, the property is transferred to the unclaimed property administrator.

The administrator once again attempts notice to owners. Cash goes into the state general fund. Non-cash is held for a period of time and then sold. The administrator maintains a fund from which owners can make claims for payment. A claims procedure is provided for owners to make their claims.

Since unclaimed property administration is an interstate problem, the Uniform Acts have provided the States with authority to work with each other and to cooperate in the collection and holding of unclaimed property.

UUPA (1995) retains the basic scheme. What does it update? The first issue it addresses is the jurisdiction issue. Holders and owners may be in different States (which is the principal justification for a Uniform Act on this subject). The basic rule as of UUPA (1981) is that the owner's State is the State entitled to custody over unclaimed property. If that State cannot be ascertained, the holder's State is entitled to custody. These rules respond to constitutional decisions prior to 1981.

UUPA (1995) does not change the basic rule, but provides specific rules to meet the test of *Delaware v. New York*, 113 S.Ct. 1550, decided in 1993. That case dealt with interests in investment securities for which no owner's address could be ascertained. The question it decided was whether the State that was the domicile of the issuing corporation, or the State which was the intermediary's (broker's, transfer agent's, depository's) domicile was entitled to the property. The U.S. Supreme Court decided that the intermediary's domicile prevails. UUPA (1995) meets the test of this case as UUPA (1981) did and could not.

Abandonment of property is a concept of time -- the time during which the owner shows no interest in the property, takes no action to maintain its possession and control, and refrains from communicating with a holder -- in the case of intangible personal property. The original Uniform Act provided a basic time of seven years for the evidence of abandonment to accrue, but had an array of time periods for different property. Travelers checks required fifteen years (and continues to do so in UUPA 1995) before abandonment occurs. Unclaimed proceeds from the dissolution of a business entity became abandoned within two years.

In 1981, the basic period of time was reduced from seven to five years. Specific property continued to be treated separately, and some of the specific abandonment periods were reduced. There were new items of intangible property added like unclaimed wages, which were presumed abandoned after only one year.

UUPA (1995) retains the basic five years, but revises some of the periods for specific property. For example, an unclaimed stock dividend will be presumed abandoned after five years rather than seven years under UUPA (1981). The time for gift certificates and retail credits or refunds is

reduced from five years to three years. Proceeds on insurance policies are considered abandoned after three years rather than five or two years. IRA and similar tax-deferred retirement plan distributions go from five to three years. For these specific assets, lack of activity and communications on behalf of owners for these shortened periods of time clearly can raise a presumption of abandonment. Also, the shorter time periods prevent losses of assets that might otherwise be dissipated without the supervision of the State.

UUPA (1995) more clearly specifies what constitutes unclaimed property. The general rule is: "Property is unclaimed if, for the applicable period of time set forth in subsection (a) (of Section 2), the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property."

None of the earlier Uniform Acts attempts to state a general rule. Note the language referring to communication by other means than writing. The earlier Uniform Acts tended to put strict reliance upon the written records of holders, which would put in doubt computer communications and records as sufficient to indicate communications or interest shown by an owner, but also allowed rather rigid formalistic determinations about the fact of abandonment. UUPA (1995) erases these deficiencies in the former Uniform Acts.

UUPA (1995) states a general rule with respect to dormancy charges for all types of unclaimed property. Dormancy charges are charges imposed by holders for inactivity with respect to any property held. An example would be a specific charge for not depositing or withdrawing money from a bank account. The rule is that no dormancy charges can be levied against assets held unless there is a specific, enforceable contract between owner and holder for assessing such charges. "The amount of the deduction is limited to an amount that is not unconscionable."

The earlier Uniform Acts did not apply this kind of rule generally to all kinds of unclaimed property. The rule was applied only to travelers checks, money orders, checks and drafts, and deposit accounts. In addition, there was no limitation on amount in the earlier Uniform Acts.

UUPA (1995) limits heir finder agreements. No person can enter agreements to charge a fee for finding unclaimed property less than two years from the time specific property is transferred to the unclaimed property administrator. There are specific disclosure requirements for such an agreement, when permitted, to make it enforceable, and agreed upon compensation may not be "unconscionable." Nothing like these provisions appears in the earlier Uniform Acts.

There is a kind of tangible personal property that is subject to the Uniform Acts. This kind of tangible property is that contained in safe deposit boxes or accounts. UUPA (1995) continues to include such tangible personal property within its scope.

There are other clarifications and adjustments to the provisions in the prior Uniform Acts in UUPA (1995). This summary attempts only to describe some of the principal differences. Although UUPA (1995) changes no fundamental principle of modern unclaimed property law, it updates, modernizes and substantially improves this law over its predecessors. It should be adopted in every State in the United States.

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111 North Wabash, Suite 1010
Chicago, Illinois 60602

tel: (312) 450-6600 | fax: (312) 450-6601 | e-mail: nccusl@nccusl.org