IN THE SUPREME COURT OF OHIO

WILTON S. SOGG, individually and on behalf of a class of all others similarly situated,	)	07 - 1452
Plaintiff- Appellant,	)	
v.	)	**On Appeal from the Franklin County Court of Appeals, Tenth Appellate District**
DOUG WHITE, Director of the Ohio Department of Commerce,	)	**Court of Appeals No. 06AP-883**
Defendant-Appellee.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT WILTON S. SOGG

WILLIAM C. WILKINSON (0033228)
CRAIG A. CALCATERRA (0070177)
Thompson Hine LLP
10 West Broad Street, 7th Floor
Columbus, Ohio 43215
(614) 469-3200, Fax (614) 469-3361

Of Counsel:

JOHN R. WYLIE
Futterman Howard Watkins Wylie & Ashley, Chtd.
122 S. Michigan Avenue, Suite 1850
Chicago, Illinois 60603
(312) 427-3600, Fax (312) 427-1850

ARTHUR T. SUSMAN
Susman Heffner & Hurst LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466, Fax (312) 346-2829

Attorneys for Appellant Wilton S. Sogg

MARC DANN
Attorney General of Ohio

WILLIAM A. COLE (0067778)
JOHN T. WILLIAMS (0024449)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-2980, Fax (614) 728-9470

Attorneys for Appellee Doug White, Director of the Ohio Department of Commerce

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WHY THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES AND IS OF GREAT PUBLIC AND GENERAL INTEREST

This case raises substantial constitutional issues relating to the extent of the State's power over private property interests and the due process protections afforded private property by the State and Federal Constitutions. All parties to this action have stipulated that private property subject to the Ohio Unclaimed Funds Act, R.C. 169.01 *et seq*. (the "UFA") remains private property even after the State has taken custody of that property. Mr. Sogg argued, and Judge Richard Frye of the Franklin County Court of Common Pleas held, any interest earned on that private property while it was held in custody by the State under the UFA is also private property. Judge Frye held, therefore, that by requiring the Defendant to retain that interest, R.C. 169.08(D) represents a facially unconstitutional taking of private property without compensation. *Sogg v. White* (August 7, 2006), 139 Ohio Misc. 2d 58.

The Tenth District reversed Judge Frye's judgment. *Sogg v. White* (June 21, 2007), No. 06AP-883 ("Opinion"). That court held instead that the State may make public use of unclaimed property without concern of the Takings Clauses of the Federal or Ohio Constitutions because the UFA treats such property as having been "abandoned" by its owner. As a result, the Tenth District held, despite continuing to be recognized as its owner, its owner loses his or her right to the interest earned on his or her property as soon as it become statutorily-defined as "unclaimed." In essence, the Tenth District held, contrary to due process requirements long recognized by this Court, the common law right to the interest earned on one's private property is automatically forfeited under the UFA.

Should the Tenth District's holding stand, the State could abrogate the Takings Clauses of the Ohio and Federal Constitutions with respect to any property simply by statutorily declaring property "abandoned," without regard to whether its owner ever intended to relinquish his or her property interest or not, and without regard to due process protections. In effect, the State would be allowed to "opt out" of the Takings Clauses, rendering them void whenever the State wanted to take title to private property. Moreover, the Tenth District's decision would also allow the State to declare property rights forfeited, and take those rights for itself, without following long-established due process requirements of notice, an opportunity to be heard, and a judicial determination of the owner's property rights. Such a result should not obtain without review by this Court.

The Tenth District's Opinion conflicts with *State ex rel. Hudson v. Kelly* (1936), 55 Ohio App. 314, which also involved unclaimed funds held by the government. The funds in that case were owned by the relator's decedent and initially held by the Sheriff of Auglaize County. As in the present case, the owner of those funds failed to claim them for a statutorily-prescribed period. Pursuant to statute, therefore, the Sheriff paid those funds to the county treasurer to be held in trust until claimed by the right owner. *Id.* at 317. Eventually, after a further period without a claim, the money "revert[ed] to the general fund" of the county. *Id.* at 318. The court noted that pursuant to Art. I, § 19 of the Ohio Constitution such property was "subservient to the public welfare," and could be taken for public use provided compensation was paid. *Id.* at 321. Contrary to the Tenth District's holding here, however, the court in *Hudson* found that the legislature lacked to power to enact a statute that allowed the State to take title to private property without

compensation, even if it was unclaimed for a statutory period. *Id.* at 322. The conflict created by the Tenth District with *Canel* and *Hudson* is yet another compelling reason for this Court to take jurisdiction.

Beyond the resolution of important constitutional issues, the outcome of this case is of great public and general interest. It will affect the rights of hundreds of thousands of Ohio residents, as well as residents of likely every other state, each of whom owned private property in the State of Ohio that was taken into protective custody under the UFA. According the Department of Commerce's website, it currently holds in excess of $700 million in unclaimed funds, representing more than 2.6 million accounts. *See,* http://www.com.state.oh.us/unfd/unfdabout.aspx (accessed August 2, 2007). From fiscal years 2004 through 2006, over $540 million was reported to the Unclaimed Property Division as unclaimed property held by Ohio residents and others, and more than $167 million was returned to its owners. *See,* http://www.com.state.oh.us/admn/pub/ARPDF2006.pdf at 20 (accessed August 2, 2007). In fiscal year 2006 alone, the Division returned property to 43,714 owners. *Id.*

This Court should therefore take jurisdiction in this appeal to review these substantial constitutional issues and to ensure that the property rights of Ohio residents, and those of others with property within the State of Ohio, are protected from the overreaching of the State.

STATEMENT OF THE CASE AND FACTS

A. The Ohio Unclaimed Funds Act

The Ohio Unclaimed Funds Act is concerned with money, rights to money, or other intangible property in the possession of someone other than its owner. The UFA

deems that property "unclaimed" when its owner has not taken one the actions listed in R.C. 169.02 for a statutorily-prescribed period, and the holder cannot locate the owner. For most property, that period is five years, but it can be as short as one year. All property that meets the statutory definition of "unclaimed" is placed under Defendant's custody and control. Unclaimed property always remains private property even after it is delivered into the Defendant's custody. Defendant holds unclaimed property in trust in perpetuity for the benefit of its owner, and the State never takes title to unclaimed property. In light of this, an owner may claim his property at any time, no matter how long the Defendant has held the property in custody. "No statute of limitations shall bar the allowance of a claim." R.C. 169.08(B).

All unclaimed funds are invested and earn interest. Despite the fact that the principal upon which that interest is earned is private property, R.C. 169.08(D) requires Defendant to retain the interest when he returns the principal to its owner. Moreover, in addition to retaining the interest, R.C. 169.08(D) also requires Defendant to retain "as a fee for administering the funds, five percent of the total amount of unclaimed funds payable to the claimant[.]" Thus, the State gets "two bites": the interest earned and an administrative fee. From fiscal year 1991 through fiscal year 2005, unclaimed funds retained by the Division (meaning the funds were not transferred to OHFA, the General Fund, or elsewhere within the State government, where additional interest is earned) earned interest totaling more than $73 million. Judge Frye found in granting summary judgment in favor of Mr. Sogg and the certified class, "the evidence supports a finding beyond a reasonable doubt that the Ohio unclaimed funds program makes substantial

profit for the State. *Sogg*, 139 Ohio Misc. 2d at 64. Defendant did not challenge Judge Frye's finding on appeal.

B. The Parties and the Plaintiff's Property

Mr. Sogg is the executor of the estate of his late mother, Julia Sogg. On or about November 1, 1989 and September 2, 1998, property belonging to Julia Sogg was delivered into Defendant's custodial trust as unclaimed property. Mr. Sogg submitted to Defendant a claim for the return of the estate's property, and on or about April 1, 2004, Defendant sent Mr. Sogg a check that reflected the combined principal amount of the two properties held by Defendant, plus 6% interest through July 26, 1991, less the 5% administrative fee (on both the principal and the interest) mandated since that date by R.C. 169.08(D).[1] Thus, although Mr. Sogg's money earned interest throughout the time it was held in custodial trust by Defendant (as did the Class's), none of that interest was returned to Mr. Sogg or Class members along with their principal.

C. Proceedings in the Court of Common Pleas

Mr. Sogg alleged in his Amended Complaint that by requiring the State to retain the interest earned on unclaimed property held by Defendant pursuant to the UFA, R.C. 169.08(D) is unconstitutional as a facial taking of private property without compensation.

Judge Frye initially found that under the UFA owners did not relinquish their right, title, and interest to their property. Based on that fact, and following long-established law that holds that the owner of private property also owns any interest that

[1]As originally enacted, the UFA required the payment of interest to persons who reclaimed their property. The UFA was amended effective July 26, 1991 to provide that interest was no longer payable. For claims after that date, the Defendant therefore pays interest at 6% up to July 26, 1991, but none thereafter.

accrues on that property – that "interest follows principal" – Judge Frye held R.C. 169.08(D) unconstitutional because it violated the Takings Clauses of the United States and Ohio Constitutions. In so holding, Judge Frye rejected Defendant's assertion that the legislature intended the Act to deal with "abandoned" or "escheatable" property. " *Sogg,* 139 Ohio Misc. 2d at 68. Moreover, Judge Frye also found that the UFA is not a forfeiture statute either. *Id.*, at 69.

D. The Decision of the Tenth District

The Tenth District reversed Judge Frye's judgment. Despite finding that "the State . . . does not take title to the unclaimed funds," (Opinion at ¶16), the Tenth District held that the State could treat such property as "abandoned." (*Id.*, at ¶28.) Relying primarily on *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S. Ct. 781, the Court found that the State could declare an owner's right to the interest earned on his or her property forfeited to the State.

> States invariably have the power to permit unused or abandoned property to revert to another after the passage of time. The property lapse here is not triggered by overt state action, but instead is triggered by the owner's failure to make any use of the property for a statutorily prescribed period of time.

(Opinion at ¶ 33.) As a result, the Tenth District held, there was no taking of private property for which compensation was due Mr. Sogg and the Class.

ARGUMENTS IN FAVOR OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The State Must Afford Due Process Before the Forfeiture of a Property Right.

Both the United States and Ohio Constitutions prohibit the government from asserting summary authority over private property and require that any deprivation of property must comport with due process of law. *See, e. g., Hamilton v. Brown* (1896),

161 U.S. 256, 275, 16 S. Ct. 585, 592 (a state may escheat property provided due process rights to notice and a hearing are accorded to interested parties). As this Court has held repeatedly, forfeiture of private property is disfavored, and statutes that result in the taking of private property must be strictly construed against the government agency that seeks to convert private property for its own use. *State v. Lillock* (1982), 70 Ohio St. 2d 23, 25; *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St. 3d 116, 131; *Grieb v. Department of Liquor Control of State* (1950), 153 Ohio St. 77.

Due process requires that the government obtain court approval before it can convert private property to government property. *Lillock*, 70 Ohio St. 2d at 28 ("an adversary hearing . . . complying with Rules of Civil Procedure, is constitutionally mandated"); *Grieb*, 153 Ohio St. at 80 (because plaintiff "had a property right" in confiscated property, it "could not be taken away without judicial inquiry and determination").

Here, however, the Tenth District held that the State, through the UFA, could declare the automatic forfeiture of private property rights to the State without the due process protections afforded all other private property.

The incongruity of the Tenth District's holding with long established due process requirements and understandings of private property rights is evident when one examines the manner in which the State treats property taken into custody for suspected use in criminal activity. In such a case, R.C. 2933.41 requires that a law enforcement agency file a civil proceeding and obtain a judicial decree of forfeiture before the State may take title to the property. Yet under the Tenth District's decision here, no such proceeding or decree is required. Instead, under the UFA as interpreted by the Tenth District, property

rights in unclaimed property are forfeited simply by statute.[2] That concern led the New Jersey Supreme Court to conclude in *State v. Otis Elevator Company* (1953), 12 N.J. 1, 18, 95 A.2d 715, 723:

> [I]t is insisted that the state may escheat personal property administratively without judicial action. With this view we find ourselves in complete disagreement. Court action has been uniformly required in escheat proceedings. If the state may appropriate property other than contraband to its absolute use without compensation, a great and unbounded inroad on private property rights will have made its way into the law without any constitutional warrant.

Under the Tenth District's holding, the State could declare any property – a vacation home not visited in several years, a car parked for several weeks – "abandoned" and forfeited to the State, without recourse to the erstwhile owner. The Tenth District's expansive reading of the State's power over private property rights should lead this Court to take jurisdiction over this matter.

Proposition of Law No. 2: The State Cannot Abrogate an Owner's Property Right to Interest That Accrues on the Owner's Property Without Implicating the Takings Clauses of the United States and Ohio Constitutions.

States do not have plenary authority over private property interests. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 439, 102 S. Ct. 3164, 3178. Rather, there is a "federal constitutional barrier to the abrogation of common law rights by Congress or a state government." *Pruneyard Shopping Center v. Robins* (1980), 447

[2] The Commissioners on Uniform State Laws, the body that promulgated the model laws upon which the UFA is based, recognized that due process limitations made it impossible for the Uniform Unclaimed Property Act to divest citizens of their property rights in unclaimed property. "Although some state administrators have urged legislation that would terminate an owner's right to the property merely by the passage of time, such enactments may be unconstitutional." 8C Master Ed., *Uniform Laws Annotated* (2001); Uniform Unclaimed Property Act (1981), § 16, Comment (*citing Hamilton*, 161 U.S. at 275, 16 S. Ct. at 592).

U.S. 74, 93, 100 S. Ct. 2035, 2047 (Marshall, J., concurring). As a result, "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Foundation* (1998), 524 U.S. 156, 167, 118 S. Ct. 1925, 1931.

In *Palazzolo v. Rhode Island* (2001), 533 U.S. 606, 121 S. Ct. 2448, the Supreme Court rejected the state's argument that because it had created a property right, it could by legislation alter pre-existing property rights prospectively so that subsequent owners could not claim the protection of the Fifth Amendment. The Supreme Court held that the state's argument would in effect allow the state "to put an expiration date on the Takings Clause. This ought not to be the rule." *Id.*, 533 U.S. at 627, 121 S. Ct. at 2463. Such a rule, the Court found, would "work a critical alteration to the nature of property," stripping the owner of his property rights. "The State may not by this means secure a windfall for itself." *Id.*, 533 U.S. at 609, 121 S. Ct. at 2453.

The Ninth Circuit has observed, "the Supreme Court's decisions in [*Webb's*] and [*Phillips*] demonstrate [that] constitutionally protected property rights can – and often do – exist despite statutes . . . that appear to deny their existence." *Schneider v. California Department of Corrections* (9th Cir. 1998), 151 F.3d 1194, 1199. That is because "there is . . . a 'core' notion of constitutionally protected property into which state regulations simply may not intrude without prompting Takings Clause scrutiny." *Id.* at 1200. The court held in *Schneider*:

> The States' power vis-a-vis property . . . operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional "old property" interests found within the core. . . . Were the rule otherwise, States could unilaterally dictate the content of – indeed,

> altogether opt out of – both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

Schneider, 151 F.3d at 1200-01.

The concept that "interest follows principal" is part of that core of constitutionally protected property interests. The Supreme Court found in *Phillips* that:

> The rule that "interest follows principal" has been established under English common law since at least the mid-1700's. *Beckford v. Tobin*, 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749 ("[I]nterest shall follow the principal, as the shadow the body"). Not surprisingly, this rule has become firmly embedded in the common law of the various states.

524 U.S. at 165, 118 S. Ct. at 1930; *see also*, *Schneider*, 151 F.3d at 1201 ("The 'interest follows principal' rule's common law pedigree, and near universal endorsement by American courts . . . leave us little doubt that interest income of the sort at issue here is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause.").

Thus, contrary to the Tenth District's Opinion, the State was not at liberty to simply "re-define" Mr. Sogg's and the Class's property interests as "abandoned" to the State. In fact, the Supreme Court condemned that very thing in *Webb's*:

> [A] state, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164, 101 S. Ct. at 452.

Judge Frye properly followed that rule in holding unconstitutional the requirement in R.C. 169.08(D) that the State retain the interest that is earned on unclaimed funds. To hold otherwise, as Judge Frye recognized, would allow the State to "unilaterally dictate the content of – indeed, altogether opt out of – both the Takings Clause and the Due

Process Clause simply by statutorily recharacterizing traditional property-law concepts." 139 Ohio Misc. 2d at 65 (quoting *Schneider*, 151 F.3d at 1200-01).

The Tenth District nonetheless held that the State's "power to permit unused or abandoned property to revert to another after a passage of time" also allowed the State to take rights in such property for itself without compensation." (Opinion at ¶ 17.) But the primary authority upon which the Tenth District relied, *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S. Ct. 781, provides no support for that holding. As an initial matter, the plaintiff in *Texaco* lost its property, whereas here, as even Defendant admits and the Tenth District recognized, Mr. Sogg and the Class, and every other person who owns unclaimed property, at all times retained their property interests even after the State took their property into custody. One court, in a case with a claim identical to that brought here by Mr. Sogg, rejected *Texaco's* relevance on that very basis. *Smolow v. Hafer* (E.D. Pa. June 8, 2005), No. 04-941, 2005 WL 1377449, at *3-4.

Beyond that fact, in *Texaco*, the government did not take property *for itself*, and so, as the Supreme Court itself found in *Texaco*, that case had nothing to do with the Takings Clause.

454 U.S. at 542, 102 S. Ct. at 799 (J. Brennan, dissenting). Other courts have also recognized that distinction. *See Pascoag Reservoir & Dam, LLC v. Rhode Island* (D.R.I. 2002), 217 F. Supp. 2d 206, *aff'd* (1st Cir. 2003), 337 F.3d 87; *See also Rocket Oil and Gas Co. v. Donabar* (Ok. Civ. App. 2005), 127 P.3d 625, 637 (the fact that property is not taken for a public use "eliminate[s] any need to address . . . [a] taking [clause] argument."); *Willner v. Frey* (E.D. Va. 2006), 421 F. Supp. 2d 913, 929 n. 20

(recognizing that *Texaco* did not involve a transfer of property to the state, and so did not implicate the Takings Clause).

Thus, the Tenth District's reliance on *Texaco* was misplaced. That case does not support the State's right to alter pre-existing property rights in such a manner as to take *for the State itself* the interest earned on unclaimed property without payment of compensation. Simply put, the State is not at liberty to define property rights in such a manner as to circumvent the protections afforded by the Takings Clauses of the Federal and Ohio Constitutions. The Tenth District's holding to the opposite merits review by this Court for this reason as well.

Proposition of Law No. 3: Because Unclaimed Property Remains Private Property, the Interest on That Property Is Also Private Property.

The Supreme Court has recognized the rule that "interest follows principal" since at least as early as 1809 in *Himely v. Rose* (1809), 5 Cranch 313, 319, 1809 WL 1644, *5: "In equity, interest goes with the principal, as the fruit with the [t]ree." The Court has reaffirmed that principle consistently over the nearly two centuries that followed. *See, e.g., Webb's,* 449 U.S. at 164, 101 S. Ct. at 452 ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."); *Phillips*, 524 U.S. at 165, 92 S. Ct. at 1931 ("interest follows principal" has been part of the common law for more than 250 years); *Brown v. Legal Foundation of Washington* (2003), 538 U.S. 216, 123 S. Ct. 1406. Consistent with federal law, as Judge Frye correctly found, and as Defendant agrees, Ohio also has long recognized that the owner of property also owns any amounts that accrue on that property. *See, e.g., City of Ohio v. Cleveland & Toledo RR. Co.* (1856), 6 Ohio St. 489, 494-95.

That rule applies even when, as here, the government mandates that private property be held in a government account. *See*, *Phillips*, 524 U.S. at 172, 118 S. Ct. at 1934 ("We hold that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."); *Mary Helen Coal Corporation v. Hudson* (4th Cir. 2000), 235 F.3d 207, 210.

By upholding the constitutionality of R.C. 169.08(D), the Tenth District's Opinion denies that interest to its owner, allowing the State to take the private property of thousands of Ohio residents, and others with property in the State, without the compensation required by the State and Federal Constitutions. For this reason as well, this Court should accept jurisdiction to review that decision.

Respectfully submitted,

WILLIAM C. WILKINSON (0033228)
CRAIG A. CALCATERRA (0070177)
Thompson Hine LLP
10 West Broad Street, 7th Floor
Columbus, Ohio 43215
(614) 469-3200
Fax (614) 469-3361

Of Counsel:

JOHN R. WYLIE
Futterman Howard Watkins Wylie
& Ashley, Chtd.
122 S. Michigan Avenue, Suite 1850
Chicago, Illinois 60603
(312) 427-3600
Fax (312) 427-1850

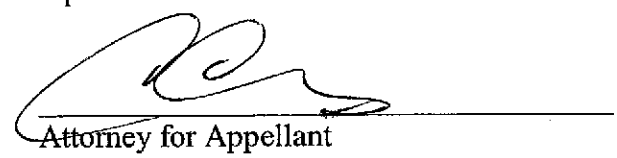
ARTHUR T. SUSMAN
Susman Heffner & Hurst LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466

Fax (312) 346-2829

Attorneys for Wilton S. Sogg and the Class

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum In Support Of Jurisdiction Of Appellant Wilton S. Sogg was served by ordinary U. S. Mail, postage prepaid, on the 6th day of August, 2007, upon Marc Dann, Attorney General of the State of Ohio, and William J. Cole and John T. Williams, Assistant Attorneys General, Executive Agencies Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, attorneys for Appellee Doug White, Director of the Ohio Department of Commerce.



Attorney for Appellant

LEXSEE 139 OHIO MISC. 2D 58

SOGG, Exr., et al., Plaintiffs, v. WHITE, Defendant.

Case No. 04CVG-08-8028

COURT OF COMMON PLEAS OF OHIO, FRANKLIN COUNTY

139 Ohio Misc. 2d 58; 2006 Ohio 4223; 860 N.E.2d 163; 2006 Ohio Misc. LEXIS 210

August 7, 2006, Decided

COUNSEL: Futterman, Howard, Watkins, Wylie & Ashley, Chartered, John R. Wylie, and Charles R. Watkins; Susman, Heffner, & Hurst, L.L.P., and Arthur T. Susman; Thompson Hine L.L.P., William C. Wilkinson, and Craig A. Calcaterrra, for plaintiff.

Jim Petro, Attorney General, and William J. Cole and John T. Williams, Assistant Attorneys General, for defendant.

JUDGES: RICHARD A. FRYE, Judge.

OPINION BY: RICHARD A. FRYE

OPINION

[*60] [***165] RICHARD A. FRYE, Judge.

Introduction

[**P1] This case was certified as a class action under Civ.R. 23(B)(2), in order to determine whether a portion of Ohio's Unclaimed Funds Act is unconstitutional because it results in a taking of private property. Amended in 1991 as a significant alteration to the state's program for handling unclaimed funds that began in the 1960s, the statute in question denies private owners of funds any interest on their money while it is held by the state even though, while in state custody, the funds always remain private property. Beyond retaining the interest earnings, the state also collects a five-percent administrative fee upon funds returned to private owners. Interest earned on the tens of millions of dollars returned to private owners each year [1] is taken by the state to underwrite loans to first-time homebuyers and to be used for other public purposes. For the reasons explained hereinafter, this court concludes that the federal and state Constitutions both require the state to pay interest on unclaimed funds held by the defendant and that the first sentence of R.C. 169.08(D) as amended in 1991 is unconstitutional.

1 In state fiscal year 2005, the Ohio Division of Unclaimed Funds received $ 175 million in new unclaimed funds and refunded $ 54 million to 41,000 owners. The balance remaining to be returned to owners of the property was roughly $ 825 million. Although not yet formally part of the record because the information became available only after all the briefings, on July 27, 2006, defendant announced publicly that $ 210 million was reported as new money to the Ohio Division of Unclaimed Funds during state fiscal year 2006. Sixty-four million, four hundred thousand dollars was paid out on over 43,000 claims. "Commerce News Release" found at www.com.state.oh.us/press/display.asp?ID=866 (last visited 8/5/06).

The Factual Record

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2 The parties filed stipulations of fact on Sept. 30, 2005, and March 2, 2006. The stipulations squarely focus this case upon what the parties agree is a purely legal issue. The professionalism of counsel throughout this case, particularly in streamlining the factual record, reflects the best traditions of the bar.

[**P2] Wilton Sogg is the executor of his mother's estate. Julia Sogg died, leaving unclaimed funds

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composed of an insurance-policy claim payment of $ 40.52, reported to the defendant in 1989 by Blue Cross and Blue Shield, plus dividends of $ 292.86, reported in 1998 by the Bank of New York. Early in 2004, Mr. Sogg made a claim for those funds. A few months later, the state issued a check for $ 320.72. The plaintiff was paid interest on his mother's Blue Cross and Blue Shield money calculated until July 26, 1991, when the applicable statute was amended to eliminate payment of interest. For the period [***166] after that date, the plaintiff received no interest. In addition, a five-percent fee was deducted from [*61] the amount returned to cover the defendant's administrative costs. Mr. Sogg brought suit in August 2004.

[**P3] Mr. Sogg was certified under Civ.R. 23(B)(2) as a class representative for all those who have recovered unclaimed funds since August 4, 2000, and who were not paid interest on their funds after July 1991. The class certification order was filed February 24, 2006. In a separate decision, the court determined that a four-year statute of limitations is applicable under Ohio law and under Section 1983, Title 42 U.S. Code to the "takings" claims made in this case. Thus, claims by those whose unclaimed funds had been repaid prior to August 4, 2000 (although without interest attributable to the period after July 26, 1991) were time-barred. Their legal injury manifested itself more than four years before this suit began.

[**P4] Doug White is Director of the Ohio Department of Commerce. He supervises the Division of Unclaimed Funds within the Ohio Department of Commerce. The division operates an elaborate program to gather funds, keep track of them, and advertise publicly to alert owners that their property is in state custody. According to the recent news release referenced at footnote one, outreach efforts include kiosks at the Ohio State Fair that connect directly to the division's "Online Treasure Hunt" website. Using those computer terminals, the public can determine whether their names are associated with any of the 3.2 million open accounts still waiting to be claimed.

[**P5] R.C. 169 sets forth the procedure under which unclaimed funds are collected and distributed by the division. Ohio first adopted the Unclaimed Funds Act in 1967. From fiscal year 1968 through fiscal year 2005, the state controlled almost $ 1.3 billion as unclaimed property. Over the entire period, the program successfully returned 35 percent of the property to its owners.

[**P6] For the first several decades, this program paid interest to owners upon the return of their money. However, a July 1991 amendment to R.C. 169.08(D) eliminated payment of all interest. The statute now explicitly provides, "Interest is not payable to claimants of unclaimed funds held by the state." R.C. 169.08(D). Furthermore, as discussed below, since 1991, the defendant has been statutorily authorized to, and actually does, collect a five-percent administrative charge measured against funds returned to successful claimants.

[**P7] The purpose of the Ohio Unclaimed Funds Act is threefold: (1) to protect the property right of the owner and reunite the owner with his or her funds, (2) to provide a centralized contact for potential unclaimed-funds owners, and (3) to relieve holders of unclaimed funds from further legal liability.

[**P8] Under Ohio law, money, rights to money, and intangible property are classified as "unclaimed" when the owner has not generated activity for a prescribed period--generally five years, depending upon the type of property-- [*62] and when the nonowner "holder" of such property cannot locate the owner. All funds that meet the statutory definition of "unclaimed" are placed under the division's control. "Holders" of unclaimed funds may, in the division's discretion, remit ten percent and retain 90 percent of the unclaimed funds. In instances such as these, R.C. 169.05 requires the holder to invest the retained amount into an approved FDIC-insured "income-bearing" account or a U.S. Treasury account. The holder is then required [***167] to deliver all earnings realized on such invested funds to the division.

[**P9] Marketable securities and other intangible, nonmonetary property delivered into the defendant's custody are sold and converted into cash in accordance with R.C. 169.05(A). Further, while the act does not specifically address tangible items, the division also accepts custody of property left behind in safe-deposit boxes, such as stamp and coin collections. The division inventories the items and establishes accounts for the owners. Tangible items are kept intact until such time as the division elects to liquidate them at auction. The last such auction was held in 1998. Once the items are liquidated, the division treats the proceeds like all other unclaimed funds.

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[**P10] The division holds unclaimed funds in trust for the owner in perpetuity. Funds and other property never escheat or otherwise become property of the state of Ohio. Concepts of "abandonment" or "escheat" are not a part of the Ohio statutory scheme.

[**P11] Funds held by the division are not permitted to sit idle. Many of the funds are actually invested by the state (or by another holder) to accrue interest or other earnings that are eventually paid to the state. Interest-bearing accounts contain the principal funds that are held by the defendant, including the ten percent funds not retained by holders outside state government and the interest paid in to the state that is earned on the 90 percent of funds that the state may elect to leave in private hands. Beyond those income-bearing accounts, a substantial amount of unclaimed money is transferred to finance state programs such as the Ohio Housing Finance Authority ("OHFA"), which obtained $ 570 million from the pool of unclaimed funds between state fiscal years 1991 and 2005. Those funds were then lent to the public at interest to support housing development in the state. Money so utilized remains subject to recall to repay claims of owners. However, even if the OHFA remits the principal to the division, it never remits any interest received from home loans that the OHFA has made using the unclaimed funds.

[**P12] The defendant accounts for operation of the division using three major expense categories: operating expenses, administrative and computer support, and holder mailing and other expenses. Operating expenses include payroll, external auditors, advertising, and equipment. Between fiscal years 1992 and [*63] 2005, the division showed expenses of $ 74.5 million, exclusive of amounts transferred to Ohio's General Revenue Fund. Transfers to the General Revenue Fund of the state are accounted for, within the division, as monetary losses. Between fiscal years 1992 and 2005, as the offset to expenses, unclaimed property held by the division earned $ 73 million. This figure is, however, exclusive of earnings constructively realized on the hundreds of millions of dollars transferred to the OHFA and to other state programs as well. Using its own peculiar form of bookkeeping, the division asserts that it has operated at a net loss of $ 1,466,789 since fiscal 1992.

[**P13] Insofar as earnings on unclaimed funds are concerned, the division's accounting is materially inconsistent with generally accepted accounting principles ("GAAP") or any other sensible accounting standards. The system used artificially ignores earnings realized from funds transferred to the OHFA simply because, somewhere along the way, someone in authority decided that the OHFA need not account for or pay over the interest it earns on home loans made using unclaimed funds. As of June 30, 2005, the OHFA had returned $ 316 million to the [***168] division. Interest earnings should be imputed to that $ 316 million, and for many of those years, the statutory interest rate in Ohio was ten percent. Beyond the OHFA, unclaimed funds have also been transferred to the Savings and Loan Assurance Corporation, the Ohio Job Development Fund, and the state General Fund. However, unclaimed funds transferred to destinations other than the OHFA never are returned to the defendant and, not surprisingly, no interest earnings ever are remitted or credited to the division. Furthermore, additional unclaimed funds are held by the state treasurer at interest to be used to pay approved claims and operating expenses. Since June 2005, no such interest from the treasurer's account is either remitted or credited to the division.

[**P14] Between July 1, 2000, and June 30, 2005, just the unclaimed funds retained within the division earned $ 29,074,394. Above and beyond that, the $ 9,002,403 was realized as proceeds of the five-percent claim-processing fee. Expenses claimed by the defendant for fiscal years 2004 and 2005 are aberrational. [3] Leaving those years aside, total operating expenses averaged approximately [*64] $ 5.6 million. Interest on just the unclaimed funds retained within the division plus the five-percent fee generated $ 7.6 million per year.

3 Expenses claimed for 2004 and 2005 skyrocketed because of extraordinary costs attributed to outside auditors. They were paid on a contingent-fee basis to investigate potential holders of unclaimed funds outside Ohio, leading to recovery of additional unclaimed funds due the state. It distorts the concept of "operating expenses" for the division to lump these unusual contingency fees into the mix as ordinary expenses without offsetting them with the resultant "income" received. The amount of newly discovered unclaimed funds plus the interest earnings on them generated by outside auditors is no doubt far more than the contingency fees paid -- the very definition of a contingency fee assures

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that! Without including extraordinary contingent fees in operating costs, the expense to operate the division appears relatively stable, adjusted for inflation, going all the way back to 1992. For this reason, the court attaches no significance to the nearly three-fold increase in "expenses" claimed for 2004 and 2005.

[**P15] Notwithstanding difficulties attributable to state accounting practices that systematically underreport earnings attributable to unclaimed funds (thereby obscuring the true cost of the OHFA and other public programs using such funds interest-free), the division does not operate even close to a financial loss. If GAAP accounting were employed, accurate figures would be readily available. Yet for the purpose of this opinion, the evidence supports a finding beyond a reasonable doubt that the Ohio unclaimed-funds program makes substantial profit for the state. Indeed, it is a veritable cash cow feeding an array of other public programs.

Private Property in Unclaimed Funds

[**P16] In a takings case under either the state or federal Constitution, the first question is whether private property is implicated. In this case, it is undisputed that unclaimed funds held by Ohio always remain the property of the private owner.

[**P17] That being true, the issue becomes whether interest earned on those funds while in the control of state government is also the property of the private owner. The basic rule that "interest follows principal" offers at least a partial answer to this question. That rule is of long standing but retains current vitality. The Supreme Court of the United States recently recognized that the rule that "'interest follows principal' has been established under English common law since at least the mid-1700's." *Phillips v. Washington Legal Found.* (1998), 524 U.S. 156, 165, 118 S. Ct. 1925, 141 L. Ed. 2d 174. [***169] Furthermore, "this rule has become firmly embedded in the common law of the various States." Id. and fn. 5. Ohio is among those states. The defendant concedes that "Ohio generally recognizes the common law doctrine of 'interest follows principal.'" Ohio has long recognized this rule. See, e.g., *City of Ohio v. Cleveland & Toledo RR. Co.* (1856), 6 Ohio St. 489, 494-495. The tenet that interest follows principal remains in place today. *Thompson v. Indus. Comm.* (1982), 1 Ohio St. 3d 244, 249, 1 Ohio B. 265, 438 N.E.2d 1167; *Akron v. Kalavity* (Feb. 2, 2000), Summit App. No 19678, 2000 Ohio App. LEXIS 286, 2000 WL 141048 (in eminent domain case, interest earned while funds deposited less customary clerk's fees belonged to the landowners). More generally, the rule that interest should be paid on principal sums due is recognized in Ohio statutes. E.g. , R.C. 1343.03 (assessing pre- and postjudgment interest on legal claims).

[**P18] As a corollary to "interest follows principal," it is said, generally speaking, that interest generated from private funds belongs to the owner of the principal even when the money is held in an account mandated by the government. [*65] *Phillips,* 52 U.S. at 172; *Kalavity,* supra. The question then becomes whether the Unclaimed Funds Act in Ohio mandates a different rule of property law.

[**P19] The 1991 amendment to R.C. 169.08(D) provided that "[i]nterest is not payable to claimants of unclaimed funds held by the state." Plainly, this statute is limited in scope. It did not purport to repeal the common-law recognition that "interest follows principal." Of course, the Ohio Supreme Court has recognized that the General Assembly may sometimes abrogate common-law principles through legislation. *Thompson,* 1 Ohio St.3d at 249, citing *Eshelby* v. *Cincinnati Bd. of Edn.* (1902), 66 Ohio St. 71, 74, 63 N.E. 586. But as the defendant concedes, *Thompson* "does not mean that the General Assembly may legislate away existing property rights." The Constitution places limits on how a state may tinker with established rights of private property.

[**P20] "The Takings Clause protects private property; it does not create it. * * * Even though fundamental principles of State property law may define property rights, the Takings Clause nevertheless limits a State's authority to redefine preexisting property rights. Thus, 'a State, by *ipse dixit,* may not transform private property into public property without compensation' * * * nor can it 'sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.'" *Washlefske v. Winston* (C.A.4, 2000), 234 F.3d 179, 183-84, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358, and *Phillips,* 524 U.S. at 167, 118 S.Ct. 1925. "The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional 'old

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property' interests found within the core. *See* Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies,* 93 Colum.L.Rev. 309, 329 (1993). Were the rule otherwise, States could unilaterally dictate the content of - indeed, altogether opt out of - both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts." (Emphasis sic.) *Schneider v. California Dept. of Corr.* (C.A.9, 1998), 151 F.3d 1194, 1201; subsequent opinion [***170] at 345 F.3d 716 (2003). *McIntyre v. Bayer* (C.A.9, 2003), 339 F.3d 1097, followed *Schneider* and observed that "'constitutionally protected property rights can--and often do--exist *despite* statutes * * * that appear to deny their existence.'" (Ellipses sic.) Id. at 1100, fn. 5.

[**P21] Consistent with the logic of these decisions, the court cannot readily accept the state's argument that the General Assembly retained broad authority in 1991 to redefine interest on unclaimed funds as something other than private [*66] property. In considering this question, it is noteworthy that the 1991 amendment to R.C. 169.08 both altered a longtime rule of common law *and* completely reversed the prior version of the same statute that *had* mandated payment of interest on unclaimed funds held by the state. R.C. 169.08(D) provided in 1967 that an owner of funds whose claim was allowed by the Director *would* receive interest "computed at the rate earned by such funds during the period the director of commerce held the funds or at the rate agreed to by the holder and the owner, whichever is higher." Thereafter, a provision setting interest at the fixed rate of six percent was added to R.C. 169.08(D). That provision continued through several statutory amendments. See, e.g., Sub.H.B. No. 201, 141 Ohio Laws 2005 (1985). Finally, in the 1991 biennial state budget bill (Am.Sub.H.B. No. 298, 144 Ohio Laws 4038), the right to any interest was abruptly eliminated. Not only was the "interest is not payable" language added, which is the primary focus of this suit, but also a five-percent "fee for administering the funds" was introduced for the first time, to be assessed against any funds repaid to an owner. Uncodified Sections 151 and 194 of that 1991 budget bill make it abundantly clear that those enactments occurred during a period of great revenue uncertainty for the state of Ohio, although standing alone, this historical fact is of no more constitutional importance than the presumed social benefit derived from subsidizing housing loans.

[**P22] For these reasons, the court holds that the common-law rule of property law that "interest follows principal" was not subject to legislative repeal in 1991 as it pertains to the unclaimed-funds statutes. Accordingly, because private property is implicated, the court turns to the federal and state takings claims made on behalf of the plaintiff class.

Takings Actionable under the United States Constitution

[**P23] Counts IV and V of the amended complaint set out federal "takings" claims. Count V specifically relies upon Section 1983, Title 42, U.S. Code, the federal civil-rights statute providing a remedy for constitutional violations occurring under color of state law. The Takings Clause of the Fifth Amendment has been applicable to the states, through the Fourteenth Amendment, since *Chicago, Burlington & Quincy RR. Co. v. Chicago* (1896), 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979. *Kelo v. New London* (2005), 545 U.S. 469, 125 S.Ct. 2655, 2658, 162 L.Ed.2d 439, fn.1.

[**P24] "The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation.' U.S. Const. Amend. V. This restraint on the power of the government to take private property * * * is 'designed to bar [the government] from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by [*67] the public as a whole.' *Penn Central Transp. Co. v. City of New York* (1978), 438 U.S. 104, 123, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)." *Prater v. Burnside* (C.A.6, 2002), 289 F.3d 417, 424.

[**P25] [***171] The United States Supreme Court has consistently recognized that the act of separating interest from the principal that earned it, when done by a state or political subdivision, may constitute a taking of property for constitutional purposes. *Brown v. Legal Found. of Washington* (2003), 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376; *Phillips,* 524 U.S. at 168; *Webb's,* 449 U.S. at 164-65. Moreover, *Brown* clarified that the straightforward application of per se legal rules is the appropriate method of analysis in a case like this one, in which interest is taken by the government. *Brown,* 538 U.S. at 233-235. This case is not one in which the alternative legal analysis in takings cases, requiring "complex factual assessments of the purposes and economic effects of government actions," such as is used to evaluate the constitutionality of zoning or other government regulatory action, is appropriate. Id.

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at 234; see, also, *Schneider,* 345 F.3d at 720.

[**P26] The defendant concedes that interest generally follows principal, but postulates several reasons why that common-law rule is inapplicable to funds held in trust by the division. First, it is argued that the plaintiffs have no right to interest on the unclaimed funds because the General Assembly abrogated the common-law rule that interest follows principal as it pertains to unclaimed funds when it amended R.C. 169.08(D) on July 26, 1991. That argument has been rejected above. Second, the director argues that since unclaimed funds are essentially "abandoned," the owners of those funds no longer enjoy any right to their funds, much less to interest accrued thereon. Third, the defendant claims that plaintiffs are not entitled to compensation because they suffered no pecuniary loss, in that without the unclaimed-funds program, all interest would be lost on these funds. Fourth, the state contends that it is not liable because the amount that the division retains from the interest on unclaimed funds does not meet the division's administrative costs. That argument fails based upon the factual record, as already discussed. The remaining arguments will be separately examined.

Unclaimed Property in Ohio Is Not "Abandoned"

[**P27] The defendant argues that common-law principles of escheat or abandonment apply and supplies ample legal authority to seize unclaimed funds in their entirety. Hence, it is said, that same sovereign power necessarily includes the lesser power to retain just the interest generated by unclaimed funds. The defendant suggests that the legislature's definition of "unclaimed [*68] funds" is tantamount to a definition of abandoned property subject to escheat. From this, he reasons, all the old common-law legal rules applicable to owners who truly abandon property are determinative here.

[**P28] It is well established at common law that sovereign states have the power to take custody of or assume title to abandoned personal property as bona vacantia, through a process commonly called escheat. *Delaware v. New York* (1993), 507 U.S. 490, 497, 113 S. Ct. 1550, 123 L. Ed. 2d 211; see, also, *Smyth v. Carter* (Ind.App., 2006), 845 N.E.2d 219, 222 (addressing a takings claim under Indiana's unclaimed-funds program). When considering a state's power of escheat, one must look to the law that creates the property right and binds others to honor it. *Delaware v. New York,* 507 U.S. at 501.

[**P29] The unclaimed-funds statutes, rather than the general common law of [***172] abandonment or escheat, must be consulted to determine whether the defendant may assert abandonment with respect to unclaimed funds. The Ohio statutes so comprehensively regulate the defendant's operation of the program that it cannot be thought that the legislature left such an important matter outside the Code. Thus, notwithstanding the defendant's attempt to straddle the proverbial line by stating in P12 of his Amended Answer that the Ohio unclaimed-funds law "is not strictly an escheat statute," one must turn to the statutes to determine whether "escheat" or any related doctrine genuinely applies.

[**P30] The notion of an "escheat" based upon an "abandonment" of private property runs contrary to the language of the Unclaimed Funds Act, as well as division operations under the act for nearly forty years. The Unclaimed Funds Act does not define unclaimed funds as "abandoned" property at all. R.C. 169.01(B) and 169.02 define the term "unclaimed funds." Neither refers to funds for which Ohio asserts jurisdiction as "abandoned" property. On the other hand, in referring to unclaimed-funds programs operated in other states, the Ohio law specifically recognizes the concepts of escheat and abandonment. Funds will not be considered unclaimed funds under Ohio law "if they may be claimed as unclaimed, abandoned, or escheated funds under the laws of such other state." R.C. 169.04(A). This wording plainly shows that the drafters recognized a distinction between "unclaimed," "abandoned," and "escheated" funds. The absence of the words "abandoned" and "escheated" elsewhere in the Act cannot be attributed to mere inadvertence. Therefore, the statutory language actually written does not support the defendant's argument that this is merely a disguised form of an "abandoned" property program.

[**P31] Viewing the unclaimed-funds statutes as, in substance, addressed to funds subjected to a form of "forfeiture" to the government would also be contrary to the stated purposes of the Act, which are (1) to protect the property [*69] right of the owner and reunite the owner with the funds, (2) to provide a centralized location of contact for potential unclaimed-funds owners, and (3) to relieve holders of unclaimed funds turned over to the state from further legal liability for the property. The defendant's argument that funds administered by the defendant are not truly private property also contradicts public statements by the defendant in operating this

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program. Nowhere is it said that unclaimed funds have been forfeited or are no longer private property, much less is it suggested that title to a part of the funds has become vested in state government. Nothing, even by implication, would lead a reasonable observer to conclude that unclaimed funds ever escheat to Ohio. The "Frequently Asked Questions" and answers posted on the defendant's official website prove beyond a reasonable doubt that this is not a forfeiture program or one grounded in the concept of escheat.

[**P32] Pragmatic reasons also support the conclusion that the General Assembly did not enact a forfeiture statute. Passage of legislation that would work a forfeiture of millions of dollars each year, and under which ill, elderly, careless, or forgetful Ohio citizens would simply lose their property to the state forever would be of broad public concern. There is no evidence before the court suggesting that any such apprehension arose from the 1991 amendment to the unclaimed funds statute. It is far more sensible to read the entire body of related unclaimed funds statutes as they were written and consistently administered since Ohio's program began in the 1960s: funds remain private property forever while in state hands. Property is [***173] never treated as abandoned or forfeited. R.C. 169.08(D) cannot be understood to passively cause that result.

[**P33] The defendant relies upon the Indiana appellate decision announced earlier this year in *Smyth,* 845 N.E.2d 219, Ind.App. 4th Dist., 2006. That court held that although the common-law maxim "interest follows principal" is recognized in Indiana, the maxim did "not apply where an owner's actions cause the loss of rights of ownership." Id. at 223. Under Indiana's version of the unclaimed-funds law, such property is "presumed abandoned." Id. at 222, quoting portions of the Indiana Code. This, in turn, indicated to that court that "an owner's failure to exercise his or her right of possession results in a presumption that the property has been abandoned" so that the state has plenary power over it, including the right to retain interest earnings. Id. at 223. The Ohio act operates differently. Nothing in Ohio law "presumes" abandonment of title. Accordingly, *Smyth* is not relevant to the takings claims addressed to R.C. 169.08(D).

[**P34] Certainly one could argue that Ohio *might* have legislated differently. Perhaps, like Indiana, Ohio could provide that no owner could recover his property once it fell into state hands. Yet to acknowledge that legislative authority may exist to create a system of property rights in which unclaimed funds are treated as abandoned, with title to escheat to the state, does not mean [*70] that the different system actually created in Ohio works the same way, the 1991 amendment to R.C. 169.08(D) notwithstanding. For present purposes, this court must concentrate on what was adopted by the General Assembly. "[J]ust compensation is not to be measured by what would have happened in a hypothetical world." *Brown,* 538 U.S. at 245 (Scalia, J., Rehnquist, C.J., Kennedy, and Thomas, JJ., dissenting).

Do Plaintiffs Suffer a Property Loss for Constitutional Purposes?

[**P35] The defendant next argues that but for the Unclaimed Funds Act, interest could never accrue on unclaimed funds, so that although a taking of property may occur, there is no compensation due. In *Brown,* 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376, and *Phillips,* 524 U.S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174, the United States Supreme Court grappled with the appropriate constitutional analysis to apply when government takes property, generates interest earnings with it, but then retains those earnings. Both decisions were decided by five-to-four votes. Both addressed Interest on Lawyers Trust Account ("IOLTA") systems adopted across the nation. The factual premise for IOLTA is simple yet essential to an understanding of the ultimate outcome in these two recent decisions. All lawyers in private practice have, from time to time, client funds in their possession. Under longstanding practice, lawyers are expected to maintain clients' money separate from their own. Beyond this, statutory mandates in R.C. 4705 and in rules for the bar, including Disciplinary Rule 9-102(E)(1), require use of IOLTA accounts. Such accounts pool insubstantial sums of client money until the funds are disbursed, or hold larger amounts of money for insubstantial periods of time. In either event, the premise is that absent pooling with similar funds belonging to clients of other lawyers, there would be no interest earnings that could ever be meaningful and that would exceed the expense of opening separate bank trust accounts (with related record keeping) for each specific client having even a small amount of money. Interest earned on pooled IOLTA funds is then siphoned off. In Ohio, those earnings [***174] directly support the Ohio Legal Assistance Foundation. It, in turn, financially supports the Legal Aid Society of Columbus and

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comparable organizations serving low-income residents across the state. Given these facts, the Supreme Court of the United States concluded in 2003 in *Brown,* that while a "taking" of property (the interest) occurs with IOLTA accounts, there is no net loss to the property owner. This is because, by definition, funds in IOLTA accounts would never have earned any interest without the pooling arrangement mandated by these programs. A "taking" requires not only that property be devoted to "public use" 4 but also that "just compensation" be due the owner. Under the [*71] facts in *Brown,* there simply was no pecuniary loss to the owner triggering any right to just compensation. The Supreme Court reaffirmed Justice Holmes' observation that '"the question is what has the owner lost, not what has the taker gained.'" *Brown,* 538 U.S. at 236, quoting *Boston Chamber of Commerce v. Boston* (1910), 217 U.S. 189, 195, 30 S. Ct. 459, 54 L. Ed. 725.

4 No one questions the "public use" element of this unclaimed funds case that clearly is equivalent to the public use of IOLTA fund interest recognized in *Brown,* 538 U.S. at 232.

[**P36] Absent a pecuniary loss, there is no violation of the Takings Clause. *Brown,* 538 U.S. at 235. However, that holding from *Brown* does not assist the defendant. Here, the record shows that unlike the facts before the Supreme Court in the IOLTA litigation, unclaimed funds managed by the defendant are not trifling in amount. The average amount of money returned to successful claimants since fiscal year 1992 (when the statute eliminated payment of interest) has been $ 1,010. Furthermore, Ohio's Act affords particularized attention to unclaimed accounts worth $ 50 dollars or more, an amount of money that, despite inflation, remains meaningful to the legislature and that is capable of generating some interest if held for any duration. See R.C. 169.03(A)(2) and (D). As was true with the property of Julia Sogg, furthermore, unclaimed funds appear to remain under the division's control for substantial periods of time. Since fiscal year 1992, over $ 1 billion in unclaimed funds have been reported to or deposited with the division, but over that recent period, only $ 381 million (or 36 percent) have been paid out. Viewed more broadly, beyond a reasonable doubt, the unclaimed funds program generates millions of dollars in net interest each year that is simply expropriated by the state. Restitution is therefore due the class of property owners represented by Mr. Sogg based upon the value of interest earned on each individual account retained by the division. See *Brown,* 538 U.S. at 239, 123 S.Ct. 1406, 155 L.Ed.2d 376, fn. 10.

[**P37] *Brown,* supra, and *Leider v. United States* (C.A. Fed, 2002), 301 F.3d 1290 are argued for the proposition that Ohio has no duty to either hold unclaimed funds for owners or to create an arrangement under which funds accrue interest. *Brown* has already been discussed at length. The facts in *Leider* were that a creditor was owed a distributive share of a bankruptcy settlement. When the bankruptcy court was unable to locate him, it deposited the money in the United States Treasury as unclaimed funds, which earned no interest. When Leider finally received his payout, he sued for interest, relying on the Takings Clause of the Fifth Amendment and the "interest follows principal" rule. In rejecting that claim, the Federal Circuit recognized that since Leider's funds never were invested by the government, no interest [***175] could follow the principal. *Leider,* 301 F.3d at 1296. *Leider* also relied upon an earlier decision in *U.S. States Shoe Co. v. United States* (C.A. Fed, 2002), 296 F.3d 1378, 1384, holding "that 'for the accrued interest to rise to the level of private property, the principal must be held in an [*72] identified private account.'" *Leider,* 301 F.3d at 1297, fn. 5, quoting *United States Shoe,* 296 F.3d at 1384.

[**P38] In contrast, Ohio explicitly provides that unclaimed funds will be maintained in identifiable private accounts. R.C. 169.03(A)(2). Ohio law plainly recognizes that interest will be earned on unclaimed funds while in the defendant's possession. For instance, R.C. 169.05(A) provides that upon the funds' actual transfer to the state, the Director may either forward the funds over to the state Treasury or place them in a financial institution, whereupon "[a]ny interest earned on money * * * shall be credited to the [unclaimed funds] trust fund." Furthermore, unclaimed funds are always intended to be returned to their rightful owners. Thus, *Leider* was based upon factual circumstances unlike those presented here (and in *Webb's,* 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358) and is not relevant in deciding this case.

The Effect of the Five-Percent Fee

[**P39] The defendant's arguments also overlook the constitutional significance of the five-percent administrative fee that the defendant collects. R.C. 169.08(D) provides, "The director shall retain * * * as a fee for administering the funds, five per cent of the total

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amount of unclaimed funds payable to the claimant." Between fiscal years 1992 and 2005, this fee yielded $ 15,621,288.

[**P40] *Webb's,* 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358, was a unanimous decision of the Supreme Court announced in 1980. It addressed money interpleaded into a court, pending the outcome of a lawsuit. Florida took an administrative fee and also kept the interest earned on the funds. Recognizing that there was a property right in the interest earnings and the rule that interest follows the principal, the Supreme Court held that "where there is a separate and distinct state statute authorizing a * * * fee 'for services rendered' based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the * * * [government's control] is required by state statute," the retention of interest earned over and above the fee was "a taking violative of the Fifth and Fourteenth Amendments." *Webb's,* 449 U.S. at 164-65. The Court in *Webb's* expressed no view on the constitutionality of a statute under which retention of interest earned would be the only return to the government, but as noted already, this case is exactly like *Webb's* in that both a five-percent administrative fee and retention of interest earnings occur.

[**P41] Consistent with *Webb's,* 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358, it is unconstitutional for the defendant to retain interest on unclaimed funds when the Unclaimed Funds Act already provides a specific five-percent administrative fee for the services given to owners of unclaimed funds. While *Webb's* left [*73] open a decision on whether interest could be retained in the absence of an administrative fee or if the government program was operating at a loss, those questions are not pertinent here. The claimed poverty of the division reflects nothing more than creative bookkeeping. The General Assembly's decision to use the division's coffers like a piggybank runs afoul of *Webb's:* "[T]he exaction is a forced contribution to general governmental revenues, and it is [***176] not reasonably related to the costs of using * * * [the Division of Unclaimed Funds]. Indeed, 'the Fifth Amendment's guarantee was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Id. at 163, quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554.

[**P42] Accordingly, the court finds and declares that the nonpayment of interest on unclaimed funds and the further enforcement of the first sentence of R.C. 169.08(D), as amended in July 1991, violate the Fifth Amendment of the United States Constitution. The plaintiff class is entitled to a remedy under Section 1983, Title 42, U.S. Code.

Takings Analysis under the Ohio Constitution

[**P43] Counts I and III of the amended complaint seek relief premised upon a violation of the "takings" clause in the Ohio Constitution. Section 19, Article 1 of the Ohio Constitution provides, "Private property shall ever be held inviolate, but subservient to the public welfare." In approaching one recent takings case under this Ohio provision, Chief Justice Moyer began "by reaffirming the premise that the law does not favor forfeiture." *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 131, 1998 Ohio 313, 702 N.E.2d 81. R.C. 169.08(D) demands, in a very real sense, a forfeiture of interest earnings to the state.

[**P44] As the *Pizza* decision recognized, the takings clause of the Ohio Constitution provides an independent basis for deciding such a case, although the legal analysis used tracks closely that given a takings claim under the United States Constitution. [5] See, also, *Norwood v. Horney,* 110 Ohio St.3d 353, 2006 Ohio 3799, P 43, 853 N.E.2d 1115. "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." (Citations omitted.) Id. at P38. The Sixth Circuit recently [*74] observed that decisions granting relief from takings have become almost routine in the state courts of Ohio in the last decade. *Coles v. Granville* (C.A.6, 2006), 448 F.3d 853, 863-864. This, too, speaks to the viability of Article 1, Section 19 of the state Constitution.

5 Equal protection and due process are other Ohio and federal constitutional provisions viewed as "nearly identical" in their application. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 424, 1994 Ohio 38, 633 N.E.2d 504; *Warren v. Athens* (C.A.6, 2005), 411 F.3d 697, 704, n.6.

[**P45] The analysis of the factual record under the Fifth Amendment applies with full force under the Ohio

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Constitution. The plaintiff and the class he represents are entitled to restitution. See, e.g., *Santos v. Ohio Bur. of Workers' Comp.,* 101 Ohio St.3d 74, 2004 Ohio 28, 801 N.E.2d 441, syllabus.

Conclusion

[**P46] Constitutions exist in America to arrest the devolution of power over certain key features of life. They assure that the will of majorities expressed in laws enacted by the legislative branches of the state and national governments always remain within predetermined boundaries. One important boundary surrounds private property. Ohio's legislature crossed that boundary in 1991 when it amended the first sentence of R.C. 169.08(D) and coupled retention of interest earnings with imposition of the five-percent administrative [***177] fee against all unclaimed funds returned to their rightful owners.

[**P47] Pursuant to Civ.R. 57, the court grants a declaratory judgment consistent with this opinion. Furthermore the court holds that under Ohio law, the first sentence of R.C. 169.08(D) shall be deemed severed from the balance of the statute. See *Norwood,* 110 Ohio St. 3d 353, 2006 Ohio 3799, at P126-127, 853 N.E.2d 1115.

[**P48] To enforce the declaratory relief granted to the plaintiff class, the court grants the additional relief of an injunction barring the defendant and all those acting in concert with him from further enforcement of the first sentence of R.C. 169.08(D).

[**P49] Recognizing that this opinion resolves substantial claims by the plaintiff class but may give rise to questions of fiscal management for the defendant's operations and other programs operated by state government using unclaimed funds, the court grants a stay of the effectiveness of this declaratory judgment and injunctive relief pending appeal, pursuant to Civ. R. 62(C) and (E). The stay is conditioned upon the defendant and all those under his control within the Division of Unclaimed Funds continuing to maintain careful records of all persons who are or become successful claimants during the pendency of appeals, and remaining in compliance with Class Action Management Order # 1 filed February 24, 2006, to assure that if the judgment is ultimately affirmed, all class members entitled to relief can readily be located and provided all relief to which they are entitled.

[*75] [**P50] In the judgment being entered simultaneously with this opinion, the court certifies this case for immediate appeal, consistent with prior discussions with the parties, finding pursuant to Civ.R. 54(B) that there is no just reason for delay in entering the declaratory judgment and injunction because they determine the liability issues in this case. The court further finds that immediate interlocutory review of the judgment is in the interests of all parties and of the public. If these portions of the case are affirmed, the parties have stipulated that restitution or other equitable relief will be appropriate. Determining the amount of restitution due individual class members, a method of contacting them and distributing interest owed, consideration of an award of a reasonable attorney fee to the plaintiffs' counsel either on a common-fund basis or pursuant to the Civil Rights Attorney Fees Act, Section 1988, Title 42, U.S. Code, are steps appropriately postponed until the core issues of legal liability discussed above are finally determined on appeal.

So ordered.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wilton S. Sogg, Executor of the Estate of Julia Sogg, Individually, et al.,	:	
	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	
		No. 06AP-883
v.	:	(C.P.C. No. 04CV-8028)
Director, Ohio Department of Commerce,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant/ Cross-Appellee.	:	

O P I N I O N

Rendered on June 21, 2007

Thompson, Hine, LLP, William C. Wilkinson, and *Craig A. Calcaterra*; *Futterman, Howard, Watkins & Wylie*, and *John R. Wylie; Susman, Heffner & Hurst, LLP, Arthur T. Susman*, and *Matthew T. Hurst*, for appellee Wilton S. Sogg.

Marc Dann, Attorney General, *William J. Cole*, and *John T. Williams*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, the Ohio Department of Commerce ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas denying its motion

for summary judgment and granting summary judgment in favor of plaintiff-appellee Wilton S. Sogg ("appellee").

{¶2} At issue in this litigation is Ohio's Unclaimed Funds Act codified in R.C. 169.01 et seq. On August 3, 2004, appellee filed a class-action complaint in the Franklin County Court of Common Pleas seeking a declaration that appellant's retention of interest earned on unclaimed funds pursuant to R.C. 169.08(D) violates the Takings Clause of both the United States and Ohio Constitutions. After appellee amended the complaint, appellant sought dismissal. The trial court denied appellant's motion to dismiss except as to appellee's claim for mandamus. The trial court certified the class, and in a separate decision, limited class membership to a four-year period. After the submission of stipulated facts, both parties moved for judgment as a matter of law. The trial court found that the provision of Ohio's Unclaimed Funds Act authorizing appellant to retain the interest earned on unclaimed funds was unconstitutional. The trial court also granted appellee a permanent injunction, but stayed its decision and allowed the parties to immediately appeal.

{¶3} On appeal, appellant raises the following three assignments of error:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO SOGG AND THE CLASS, AND IN DENYING SUMMARY JUDGMENT TO THE STATE, ON THE ISSUE OF LIABILITY BECAUSE THE STATE MAY LAWFULLY RETAIN THE INTEREST EARNED ON UNCLAIMED FUNDS.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED BY FAILING TO DISMISS SOGG'S AND THE CLASS' DEMANDS FOR EQUITABLE AND EXTRAORDINARY RELIEF, BECAUSE THE EXCLUSIVE REMEDY FOR AN UNCONSTITUTIONAL TAKING IS COMPENSATION.

THIRD ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN HOLDING THE STATUTE OF LIMITATIONS ON THE CLASS IS FOUR YEARS, BECAUSE THE APPLICABLE LIMITATION PERIOD IS TWO YEARS UNDER R.C. 2305.10.

{¶4} Appellee raises the following assignment of error in his cross-appeal:

THERE IS NO STATUTE OF LIMITATIONS APPLICABLE TO PLAINTIFF'S AND THE CLASS' CLAIMS FOR RESTITUTION OF THE EARNINGS ON THEIR PRIVATE PROPERTY. ALTERNATIVELY, THE TRIAL COURT CORRECTLY HELD THAT THE LIMITATIONS PERIOD SHOULD BE FOUR YEARS AS PROVIDED IN R. C. 2305.09.

{¶5} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181.

{¶6} For purposes of their respective motions for summary judgment, appellee and appellant filed with the trial court a stipulated statement of material facts. The following factual recitation is taken from that stipulation. Ohio's Unclaimed Funds Act ("UFA") was enacted in 1967. (Stipulation.) The UFA is currently supervised and administered by the Ohio Department of Commerce's Division of Unclaimed Funds ("Division"). Id. The purpose of the UFA is threefold: (1) to protect the property rights of the owner and to reunite the owner with the funds; (2) to provide a centralized location of contact for potential owners of unclaimed funds; and (3) to provide the holders relief from liability. Id. Pursuant to R.C. 169.01, money, rights to money, or intangible property becomes unclaimed when the owner has not generated activity for a statutorily prescribed period, and the holder of the property cannot locate the owner. Id. In most cases, the holder of the property is a bank, investment broker, insurance company, or utility, and generally the statutorily prescribed time period is five years. Id. However, the time frame for property to be considered unclaimed may vary depending on the type of fund at issue. Id. R.C. 169.03 requires a holder of unclaimed funds to report unclaimed funds to the Division. Id. Pursuant to R.C. 169.05, all funds that meet the statutory definition of unclaimed are placed under the control of the Division. Id. Securities and other intangible, non-monetary property that are delivered into the Division's custody and control are to be "within a reasonable time converted to cash," and the proceeds of the sale are to be deposited with other unclaimed funds. R.C. 169.05(A).

{¶7} If a holder reports that it possesses unclaimed funds greater than $50, the holder may (a) remit the entire amount to the Division, or (b) at the Division's discretion, remit 10 percent and retain 90 percent. (Stipulation.) If the holder retains 90 percent, R.C. 169.05 requires the holder to deposit the retained amount in an income-bearing FDIC insured or U.S. Treasury Account as approved by the Division. Id. All earnings on those invested funds are to be delivered to the Division. Id. If the holder reports less than $50, the entire amount must be remitted to the Division. Id. In any event, unclaimed monies are held in perpetuity for the benefit of the owners of the unclaimed property, and never become the property of the state. Id. The Division deposits all principal amounts delivered as unclaimed property into a depository account at a financial institution. Id. From there, the funds are placed in income-bearing accounts which invest primarily in low-risk short term U.S. Treasury instruments, and are used for logistical cash management purposes to fund the Division's needs. Id. Additionally, some unclaimed property is transferred, at the discretion of the state legislature, to other state programs, primarily the Ohio Housing Finance Authority ("OHFA"). Id. One of the activities in which OHFA engages is to lend its funds at interest to OHFA's Housing Development Fund ("HDF"), to support housing development in the state. Id. When the loans are repaid, OHFA remits the principal amounts back to the Division, but does not remit the interest paid on the loans. Id. In addition to the OHFA, the Division has also transferred unclaimed property to other state agencies and programs, including the Savings and Loan Assurance Corporation, the Ohio Job Development Fund, and the State's General

Fund. Id. Regardless of where funds are transferred, all unclaimed funds are subject to call by the Division when necessary to pay claims by owners. Id.

{¶8} When initially enacted, the UFA provided that an owner of funds whose claim was allowed by the Division would receive interest "computed at the rate earned by such funds during the period the director of commerce held the funds or at the rate agreed to by the holder and the owner, whichever is greater." Id. The UFA was later amended so a property owner was given 6 percent interest along with the principal. Id. Effective July 26, 1991, R.C. 169.08(D) was amended to provide that "[i]nterest is not payable to claimants of unclaimed funds held by the state." Id. Also effective July 26, 1991, was the amendment directing the Division to retain "as a fee for administering the funds, five percent of the total amount of unclaimed funds payable to the claimant[.]" R.C. 169.08. The UFA also provides in R.C. 169.08 that any person claiming a property interest in unclaimed funds delivered or reported to the state under Chapter 169 of the Revised Code may file a claim, and there is no statute of limitations to bar the allowance of a claim. Id.

{¶9} The specific factual circumstances giving rise to this litigation are as follows. Appellee is the executor of his mother's estate. Appellee's mother passed away leaving unclaimed funds consisting of the following: $40.52, reported to appellee in 1989 by Blue Cross & Blue Shield, and $292.86 in dividends reported in 1998 by the Bank of New York. In 2004, appellee made a claim for those funds, and was issued a check for $320.72, representing the principal amounts, interest earned on the $40.52 until July 26, 1991,

minus the five percent fee for administrative costs. Asserting that the UFA is unconstitutional, appellee filed this class action suit in 2004. As previously indicated, the trial court agreed with appellee, and severed the first sentence of R.C. 169.08(D), which provided that the state shall not pay interest.

{¶10} The underlying rationale for the trial court's decision was that since the funds at issue "always remain the property of the private owner," under the "interest follows principal" rule, which the trial court held was not subject to legislative abrogation, the interest earned on those funds is also private property. *Sogg v. White*, 139 Ohio Misc.2d 58, 2006-Ohio-4223, at ¶16-26. Finding a pecuniary loss resulting from the interest retention, the trial court held the nonpayment of interest on unclaimed funds was in violation of the Fifth Amendment of the United States Constitution, and that appellee was entitled to relief.

{¶11} On appeal, appellant first directs us to the basic premise that legislation is presumed constitutional unless it is shown beyond a reasonable doubt to violate a constitutional provision. *State ex rel Dickman v. Defenbacher* (1955), 164 Ohio St. 143, paragraph one of the syllabus. Appellant next contends that states have the power to permit unused or abandoned interests in property to revert to another after the passage of time. Pursuant to this power, it is appellant's position that it may constitutionally retain the interest earned on the unclaimed funds by taking custody of unclaimed property without taking title to the unclaimed property. According to appellant, it is not required to take an "all-or-nothing" approach to dispose of unused or abandoned property. In support of its

position, appellant relies on *Smyth v. Carter* (Ind. App. 2006), 845 N.E.2d 219, transfer denied, 2006 Ind. LEXIS 755. Appellant further argues that because the state is permitted to abrogate common law principles through legislation, it did so in this instance and abrogated the "interest follows principal" doctrine when it amended the UFA in 1991. Additionally, appellant contends that appellee has not suffered a pecuniary loss, and therefore has no right to compensation. Lastly, appellant contends the decisions in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 101 S.Ct. 446, and *Canel v. Topinka* (2004), 212 Ill.2d 311, upon which the trial court relied, are inapposite to the matter at hand, and therefore, the trial court's reliance on these cases was misplaced.

{¶12} To the contrary, appellee contends the trial court correctly held that R.C. 169.08(D) is unconstitutional, because unclaimed property is not abandoned property, but rather always remains private property, and pursuant to the "interest follows principal" rule, the interest earned on private property also constitutes private property. Arguing that the state is not permitted to nullify the "interest follows principal" doctrine, appellee takes the position that the state's retention of interest earned on unclaimed funds contravenes the Fifth Amendment protection of private property interests.

{¶13} "[W]e are mindful that all legislation is presumed constitutional and will not be struck down absent proof of its invalidity beyond a reasonable doubt." *Dayton Supply & Tool Co. v. Montgomery Cty. Bd. of Revision*, 111 Ohio St.3d 367, 2006-Ohio-5852, ¶20, citing *State v. Hayden,* 96 Ohio St.3d 211, 2002-Ohio-4169, ¶7, citing *Defenbacher*, paragraph one of the syllabus. With that premise in mind, we begin our analysis with a

discussion of *Webb's* and its relevance here. In *Webb's*, Eckerd's of College Park, Inc. ("Eckerd") entered into an agreement to purchase the assets of Webb's. Because Webb's debts were greater than the purchase price, to protect itself as permitted by Florida law, Eckerd filed a complaint of interpleader in a Florida Circuit Court. Pursuant to Florida law, the Circuit Court ordered the amount tendered to be paid to the court's clerk. The court's clerk was required to deposit the money in an interest bearing account. All accrued interest was deemed to be income of the clerk's office. The Supreme Court of Florida ruled that the statute was constitutional and did not involve an unconstitutional taking because (1) the deposited funds were considered public money from the date of deposit until the funds left the account; (2) the statute took only what it created; and (3) the interest earned on the deposited funds was not private property.

{¶14} In reversing the Supreme Court of Florida, the United States Supreme Court stated:

> * * * [a] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. at 164.

{¶15} The court went on to state:

> We hold that under the narrow circumstances of this case -- where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's

> registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others -- Seminole County's taking unto itself, under § 28.33 and 1973 Fla. Laws, ch. 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

Id. at 164-165.

{¶16} Because the state admittedly does not take title to the unclaimed funds, the trial court found the funds to be analogous to the private property at issue in *Webb's*. While we appreciate *Webb's* holding, we find the trial court's reliance on it to be misplaced. Our reading of *Webb's* reveals that not only did *Webb's* explicitly confine its ruling to the facts before it, but also, it in fact did not concern the type of property at issue before this court. As will be further explained, in our view, analysis premised on *Webb's* glosses over two key distinguishing facts: (1) the property at issue here is unclaimed; and (2) the statute at issue in *Webb's* required the depositor to deposit funds in a court registry in order for the depositor to avail itself of certain statutory protections.

{¶17} The remainder of the trial court's analysis with respect to the constitutionality of the state's retention of the interest earned on unclaimed funds while in the custody of the state stems from *Phillips v. Washington Legal Foundation* (1998), 524 U.S. 156, 118 S.Ct. 1925, and *Brown v. Legal Foundation of Washington* (2003), 538 U.S. 216, 123 S.Ct. 1406, which concerned interest on lawyers trust account ("IOLTA") systems. Together, *Brown* and *Phillips* hold that interest earned on funds in IOLTA

accounts is private property; however, there is no governmental taking by the state's retention of said interest because the owner suffers no pecuniary loss. The trial court, relying on *Phillips* and *Brown*, concluded there is not only a governmental taking by the state's retention of interest earned on unclaimed funds, but there is also a pecuniary loss because the amount of unclaimed funds is significantly greater than the "trifling" amount involved in most IOLTA accounts. In our view, reliance on *Brown* and *Phillips* suffers from the same flaw that exists with reliance on *Webb's*, and that this matter is readily distinguishable from the same. In *Phillips* and *Brown*, the court's discussion centered around an individual owner's actual loss, or the interference with an owner's investment-backed expectations, a notion that is present with respect to property that unquestionably belongs to the owner. At this time, we are presented with a scenario caused not by government action, but by owner neglect. As will be explored further, though the UFA provides that title to unclaimed funds remains with the owner, there is unquestionably a property lapse that occurs because of the owner's failure to act with respect to said property within a statutorily prescribed period of time. Therefore, under our analysis, because there is no governmental taking that requires compensation, this matter does not fall within the confines of *Brown* or *Phillips*, and it matters not whether there is a pecuniary loss to the owner.

{¶18} In *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S.Ct. 781, decided two years after *Webb's*, and making no mention of the same, the United States Supreme Court had occasion to review an Indiana statute that provided that a severed mineral

interest that is not used for a period of 20 years automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner filed a statement of claim in the county recorder's office. The court stated, "[f]rom an early time, this Court has recognized that States have the power to permit *unused or abandoned* interests in property to revert to another after the passage of time." (Emphasis added.) Id. at 526. In addressing the plaintiff's claims, the Court stated:

> Two of appellants' arguments may be answered quickly. Appellants contend that the Mineral Lapse Act takes private property without just compensation in violation of the Fourteenth Amendment; they also argue that the statute constitutes an impermissible impairment of contracts in violation of the Contract Clause. The authorities already discussed mandate rejection of each of these arguments.
>
> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property -- and not the action of the State -- that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

Id. at 530.

{¶19} Thus, there is an important distinction between property like that at issue in *Webb's* and property like that in *Texaco* that is unused for a statutorily prescribed period of time — a difference that is critical in our analysis.

{¶20} Most, if not all, of the 50 states have enacted legislation to manage unclaimed property. To date, only a few of these statutes have been challenged, and even fewer have presented an issue similar to the one before us, i.e., the constitutionality of the sovereign's retention of interest earned on unclaimed funds while the funds are in the sovereign's custody. One such statute is found in *Smolow v. Hafer* (2005), 867 A.2d 767. In that case, Smolow sought the payment of interest on property recovered pursuant to Pennsylvania's Disposition of Unclaimed and Abandoned Property Act ("Unclaimed Property Law"), and declaratory and injunctive relief on the grounds that the Unclaimed Property Law violates the Just Compensation and Due Process Clauses of the United States Constitution.

{¶21} Pursuant to the Unclaimed Property Law, the state took possession of 300 shares of Smolow's stock in 2002. In early 2003, the shares were sold and the state earned interest on the proceeds. Thereafter, Smolow sought return of his property. The state returned the amount received from the sale of the stock and did not include interest. Smolow then filed a class action complaint seeking, among other things, a determination that Pennsylvania's Unclaimed Property Law was unconstitutional.

{¶22} Under the Unclaimed Property Law, "property that is presumed abandoned is subject to the custody and control of the Commonwealth." Id. at 768, fn. 2. Property is

presumed abandoned if it is "unclaimed by the apparent owner for a specified period of time." Id. Pennsylvania's Unclaimed Property Law also provided that the state would be responsible to an owner "only for the amount actually received" by it upon the sale of any property. Id. *Smolow* argued that "to the extent the Unclaimed Property Law does not require the payment of interest, the statute is unconstitutional since it does not provide just compensation for the taking and use of private property for public purposes." Id. at 769. The court in *Smolow* held that the Commonwealth was exercising its right to take "custody and control" of abandoned property, as opposed to taking absolute title. Relying on *Texaco*, the court stated, "it is Smolow's abandonment of his property, not the action of the Treasurer, which caused his pecuniary loss. There was no taking that requires compensation." Id. at 775. The court held, " * * * where an owner's interest in property is transferred to another pursuant to the Unclaimed Property Law, and due to the original owner's abandonment, the delivery of the property to the Treasurer does not constitute a taking." Id. Because the Unclaimed Property Law did not provide for the payment of interest, the court found no violation of the Unclaimed Property Law.

{¶23} Even more similar to the matter before us is *Smyth*, supra, which concerned Indiana's Unclaimed Property Act ("IUPA"). Like Ohio's, the IUPA was designed to serve the dual purposes of reuniting owners with the value of unclaimed property and giving the state, rather than the holder, the benefit of the use of the unclaimed property pending reclamation by the owner. Id. at 222, citing *Fong v. Westly* (2004), 117 Cal.App.4th 841, review denied 2004 Cal. LEXIS 5805. In *Smyth*, pursuant to the IUPA, the state took

custody of Smyth's stock and dividends in 2001. The state sold the stock in 2002. In 2003, Smyth made a claim for the stock and any accruements. The state paid Smyth the amount of the sale proceeds and dividends earned before the state took custody, and the state retained the interest that had accrued after the liquidation of the stock. In early 2004, Smyth filed suit seeking a declaration that the IUPA was unconstitutional and that the state took his private property without just compensation. Under the IUPA, "the State takes *custody* of unclaimed property if it is presumed abandoned." (Emphasis added.) Id. at 222. Property is presumed abandoned under the IUPA "if the owner has not shown any interest in the property for a statutorily prescribed period of time." Id. Like Sogg, Smyth's contention of the IUPA's unconstitutionality was premised on the belief that the state's possession is "purely" custodial because the IUPA provides that title remains with the owner, and the common law maxim "interest follows principal." Id. at 223.

{¶24} The court in *Smyth* noted that the forfeiture of interest and dividends pursuant to the IUPA resulted from the owner's failure to assert his or her property rights. Despite acknowledging the "interest follows principal" doctrine, the court, relying on *Texaco*, explained that the maxim does not apply where an owner's actions, and not that of the state, cause the loss of rights of ownership.

{¶25} Recently, a Louisiana appellate court issued a decision concerning Louisiana's Unclaimed Property Law ("LUPL"), in *Hooks v. Kennedy* (May 4, 2007), La.App. 1 Cir. No. 2006 CA 0541. In this class action suit, the plaintiffs challenged the

constitutionality of the LUPL. Though paying interest to reclaiming property owners of certain types of property,[1] the court described Louisiana's statutory scheme as follows:

> Louisiana chose a custodial scheme for handling certain types of abandoned property, rather than one in which the title to the abandoned property reverts to the sovereign. Under Louisiana law, after a specified passage of time, holders of property abandoned by missing owners must report the possession of the abandoned property and relinquish custody to the state. Upon transfer from the holder, the state "assumes custody and responsibility for the safekeeping of the property." As notice to possible owners, the state is required to publish lists of the unclaimed property. The state then holds the property, or cash equivalent, in perpetual custody for the absent owner. "Pending a claim by a missing owner, the [s]tate receives the use of the property as well as any income that it may provide." Thus, state custody protects the property of the missing owner while awaiting possible reclamation, and reflects "a policy that unclaimed property should benefit the general public rather than holders of the property."

Id.

{¶26} Like Indiana's, Louisiana's UPL contained a provision finding that property is presumed abandoned if it is unclaimed by the owner for a statutorily prescribed period of time. Relying on *Texaco*, *Smyth*, *Smolow*, *Fong*, and *Louisiana Health Service and Indemnity Co. v. Tarver*, (La.App. 1994), 635 So.2d 1090, the court concluded that Louisiana's statutory scheme did not constitute an actionable "taking," and therefore,

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[1] La.Rev.Stat.Ann. 9:163 provides that a successful reclaiming owner is "entitled to receive from the [state] any gain realized or accruing on the property at or before liquidation or conversion of the property into money. If the property was interest bearing to the owner on the date of surrender by the holder, the [state] shall pay interest at a rate of five percent a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the [state] and ceases on the earlier of the expiration of ten years after delivery or the date on which payment is made to the owner."

there was no basis to claim a constitutionally mandated payment of just compensation. Id.

{¶27} The trial court summarily dismissed *Smyth* because under the IUPA unclaimed property is presumed abandoned.[2] Since "nothing in Ohio law 'presumes' abandonment of title," the trial court found *Smyth* bears no relevance to the claims asserted here. (Aug. 7, 2006 Decision at 13.) Thus, the question becomes, does the lack of the presumption of abandonment in the Ohio UFA render unconstitutional the portion of the Act that retains interest earned on unclaimed funds while such funds are in the custody of state? We find that it does not.

{¶28} We acknowledge that Ohio's UFA does not contain a presumption of abandonment as do the statutes at issue in Indiana, Louisiana, and Pennsylvania. However, for purposes of the UFA, and by virtue of its action, unclaimed property is essentially abandoned property. The operation of the Louisiana's UPL and Indiana's UPA, is similar, if not identical to Ohio's. The same or similar criteria are used in the IUPA and the LUPL to presume abandonment as the criteria used in Ohio to constitute unclaimed property. The three statutes have notice requirements to property owners, as well as reporting requirements to required state agencies. Both the IUPA and Ohio UFA have the stated purposes of reuniting owners with the value of unclaimed property and giving the state, rather than the holder, the benefit of the use of the unclaimed property pending reclamation by the owner. Finally, and perhaps most notably, is that *under the IUPA, the LUPL, and Ohio's UFA, the states do not actually take title to the property.*

Thus, even in Indiana and Louisiana where property is presumed abandoned (under virtually identical criteria to Ohio's to be considered unclaimed), the state *never* takes title to the property, only custody, until the owner reclaims the property.

{¶29} Appellee argues that unclaimed property in Ohio cannot be considered abandoned property because by definition abandonment requires that an owner *intentionally* disclaim ownership with the *intention* of not reclaiming it. However, as previously discussed, unclaimed property legislation, by its very operation, considers property abandoned without an element of intent, but instead by the owner's failure to make use of the property – which is how Ohio's UFA operates.

{¶30} In assessing the nature of the property at issue under the IUPA, the court in *Smyth* made the following observations:

> Unclaimed property laws, such as Indiana's Act, do not operate as a true escheat because the States take possession of, but not title to, property received from the holder. The passing of possession of property from the holder to the State under unclaimed property acts is generally referred to as a "custodial escheat." *See e.g., Fong v. Westly,* 117 Cal.App.4th 841, 12 Cal.Rptr.3d 76, 77 (2004), *rev. denied.*
>
> Unclaimed property acts are designed to serve the dual purposes of reuniting owners with the value of unclaimed property and giving the state, rather than the holder, the benefit of the use of the unclaimed property pending reclamation by the owner. *See e.g., Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission,* 74 S.W. 3d 377, 382 (Tx. 2002). Such acts serve a public purpose by raising revenue to benefit all citizens of the state. *See Commonwealth v. Vega,* 174 F.3d 870, 872 (7th Cir. 1999), *cert. denied,* 528 U.S. 873,

[2] The trial court cited only to *Smyth*, as *Hooks* was decided after the trial court rendered its decision.

> 120 S.Ct. 176, 145 L.Ed.2d 149 (1999); *Louisiana Health Service and Indemnity Co. v. Tarver,* 635 So.2d 1090, 1092 (La. 1994).

Id. at 222.

{¶31} In finding the IUPA constitutional, the court stated:

> While it is true that the Act is not a true escheat act, it is also true that it is not purely custodial in nature. The chief incidents of ownership of property are the rights of possession, of use and enjoyment, and of disposition. *Rhoades v. State,* 224 Ind. 569, 70 N.E.2d 27, 29 (1946); *Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue,* 633 N.E.2d 359, 367 (Ind.Tax 1994). Under the Act, however, an owner's failure to exercise his or her right of possession results in a presumption that the property has been abandoned. Once the property has been presumed abandoned and has been remitted to the State by the holder, the State then may, contrary to the owner's right of disposition, sell the property. A state's exercise of this incident may have significant consequences. *See Fong,* 12 Cal.Rptr.3d at 79-80 (sale of stock for $ 7,000 per share by the State that was allegedly worth approximately $ 70,000 per share). The forfeiture of interest and dividends pursuant to the Act also results from the owner's failure to assert his or her property rights and is a further indication that the Act is not purely custodial. Thus, Smyth's reliance on the custodial nature of the Act is misplaced.
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> * * *
>
> The Act conditions the retention of full property rights upon the owner's exercise of such rights. Failure to exercise those rights results in a presumption of abandonment and a custodial escheat that deprives the owner of some of the incidents of ownership. Because it is the owner's failure to act, and not the State's exercise of its sovereign power, that causes the deprivation, there is no "taking" that requires compensation.

Id. at 223-224.

{¶32} In *Hooks*, the Louisiana court reasoned that the triggering event in an unclaimed property case is not the state's overt act of taking private property from an owner, but is the owner's act of abandonment over a period of several years. Id. Consequently, the court held the state's exercise of its statutorily imposed custody, and the legislature's decision to award owners only the interest provided for by statute, did not equate to a "taking." Id.

{¶33} We are presented with property, that though title admittedly remains with the owner, custody has passed to the state, and is not the sort of private property as is at issue in *Webb's*, *Brown*, *Phillips*, and their progeny, that is subject to an overt taking by the government. Rather, this litigation presents property that is akin to that in *Texaco*, *Smyth*, *Smolow*, and *Hooks*. As established by *Texaco* and its successors, the judiciary had never required the state to compensate an owner for the consequences of his own neglect. States invariably have the power to permit unused or abandoned property to revert to another after the passage of time. Id. The property lapse here is not triggered by overt state action, but instead is triggered by the owner's failure to make any use of the property for a statutorily prescribed period of time.

{¶34} We find that for purposes of Ohio's UFA, unclaimed property is the equivalent of abandoned property. Because of the unique nature of the property, the state's retention of the interest earned on unclaimed funds while those funds are in the custody and control of the state, due to the owner's failure to take any action with respect to the property for the statutorily prescribed period of time, does not constitute a taking

that requires compensation. It is the owner's conduct, and not that of the state that causes the lapse of the property right. Therefore, appellee has not established that the challenged legislation is unconstitutional beyond a reasonable doubt, and thereby has failed to overcome the presumption that the challenged legislation is constitutional.

{¶35} Accordingly, appellant's first assignment of error is sustained. Because we have sustained appellant's first assignment of error, appellant's remaining assignments of error, and appellee's cross-assignment of error are rendered moot.

{¶36} For the foregoing reasons, appellant's first assignment of error is sustained, appellant's second and third assignments of error and appellee's cross-assignment of error are overruled as moot, and the judgment of the Franklin County Court of Common Pleas is reversed. This matter is hereby remanded to that court for further proceedings consistent with law and this opinion.

Judgment reversed;
cause remanded.

KLATT & FRENCH, JJ., concur.