

IN THE SUPREME COURT OF OHIO

WILTON S. SOGG, et al., : Case No. 2007-1452
: :
Plaintiffs-Appellants, : On Appeal from the
: Franklin County
v. : Court of Appeals,
: Tenth Appellate District
OHIO DEPARTMENT OF COMMERCE, :
: Court of Appeals Case
Defendant-Appellee. : No. 06APE-883
:

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF THE OHIO DEPARTMENT OF COMMERCE

WILLIAM C. WILKINSON* (0033228)
**Counsel of Record*

CRAIG A. CALCATERRA (0070177)
Thompson Hine LLP
10 West Broad Street, 7th Floor
Columbus, Ohio 43215
614-469-3200
614-469-3361 fax
william.wilkinson@thompsonhine.com

JOHN R. WYLIE
Futterman Howard Watkins Wylie & Ashley,
Chtd.
122 South Michigan Avenue, Suite 1850
Chicago, Illinois 60603
312-427-3600
312-427-1850 fax
jwylie@futtermanhoward.com

ARTHUR T. SUSMAN
Susman Heffner & Hurst LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
312-346-3466
312-346-2829 fax
asusman@shhllp.com

Counsel for Appellant

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM J. COLE* (0067778)
**Counsel of Record*
JOHN T. WILLIAMS (0024449)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614-466-2980
866-354-4086 fax
wcole@ag.state.oh.us

Counsel for Appellee

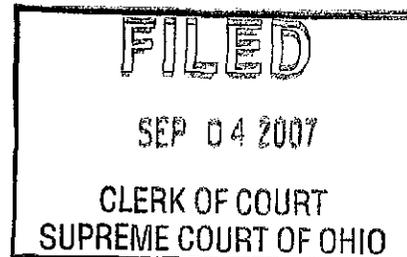


TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

A. Ohio’s Unclaimed Funds Program holds owners’ unclaimed funds but retains the interest accrued from the State’s investment of the money 2

B. Sogg filed a claim for unclaimed funds..... 4

C. After the trial court held the State’s retention of interest earned on unclaimed funds was unconstitutional, the court of appeals reversed 4

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND RAISES NO SUBSTANTIAL CONSTITUTIONAL QUESTION 6

A. The appeals court’s decision properly applies controlling precedent and is not in conflict with any other Ohio appellate court decisions..... 6

B. Sogg did not include a due process claim in his amended complaint, and the UFA fully comports with due process requirements..... 6

ARGUMENT..... 7

Appellant State of Ohio’s Proposition of Law:

The State may constitutionally keep the interest earned on unclaimed funds, and no taking occurs, where the original owner of the funds neglects to claim the property and the interest accrues while the funds are invested by the State..... 7

A. No taking occurs—and therefore no compensation is due—where the original property owner neglects to claim funds held by the State..... 7

1. Applicable United States Supreme Court precedent and the common law firmly establish that no taking occurs under the UFA 7

2. Other states’ highest courts have denied review of similar cases..... 9

3. The conflict cited by Sogg is illusory, because this Court effectively reversed the appellate case on which Sogg relies..... 10

4. The “interest follows principal” doctrine does not apply to unclaimed funds..... 11

B. Sogg’s due process claim would fail even if it were not waived 13

C. The trial court erred in determining that the applicable statute of limitations period is four years rather than two..... 14

CONCLUSION 15

CERTIFICATE OF SERVICE.....unnumbered

INTRODUCTION

The issue in this appeal is whether the State of Ohio may, consistent with the Takings Clauses of the federal and state Constitutions, keep the interest earned on unclaimed funds under the Unclaimed Property Act (codified in R.C. Chapter 169). The Court of Appeals properly held that United States Supreme Court precedent squarely controls, and its decision does not conflict with the decisions of any other Ohio court. This Court should decline jurisdiction because further review is unnecessary and unwarranted.

States have inherent sovereign authority both to reasonably define property as abandoned or unclaimed under conditions short of common law abandonment, and to take custody of and title to such property, with the lesser power to retain only an increment of such property. The State has no constitutional duty to compensate the owner for the consequences of his or her neglect. Because the lapse of the property right is due to the owner's lack of diligence, not any action of the State's, no taking has occurred, and no compensation is due.

Nor is this case one of public or great general interest. This dispute affects not *all* owners of unclaimed funds, but only those who were not paid interest actually earned on amounts successfully claimed within the two-year statute of limitations period. An adverse ruling, however, could have significant financial consequences for the State—not to mention that it would be contrary to clear United States Supreme Court precedent.

Accordingly, the Court should decline to review this case.

STATEMENT OF THE CASE AND FACTS

The facts in this case are undisputed and were stipulated in the trial court.

A. Ohio's Unclaimed Funds Program holds owners' unclaimed funds but retains the interest accrued from the State's investment of the money.

In 1967, the General Assembly adopted the Unclaimed Funds Act ("UFA"), codified in R.C. Chapter 169. "Unclaimed funds" are money, rights to money, and intangible property described in R.C. 169.02, where the owner has not done any of the following for a statutorily prescribed (usually five-year) period:

(a) Increased, decreased, or adjusted the amount of such funds; (b) Assigned, paid premiums, or encumbered such funds; (c) Presented an appropriate record for the crediting of such funds or received payment of such funds by check, draft, or otherwise; (d) Corresponded with the holder concerning such funds; (e) Otherwise indicated an interest in or knowledge of such funds; [or] (f) Transacted business with the holder.

R.C. 169.01(B)(1)(a-f).

The purposes of the UFA are to (a) protect the property rights of the owner and reunite the owner with the funds; (b) provide a centralized contact location for potential owners; and (c) provide the holders of unclaimed funds (such as banks and financial institutions) relief from liability. Consistent with these purposes, the Ohio Division of Unclaimed Funds ("Division") regularly publishes notice of unclaimed funds in newspapers of general circulation. R.C. 169.06.

The UFA requires holders to report annually to the Director of the Ohio Department of Commerce ("Director") what unclaimed funds they possess. R.C. 169.03. Before the UFA's enactment, no law required holders to remit unclaimed funds to the State. When a holder reports that it possesses unclaimed funds greater than \$50, the holder may (a) remit the entire amount to the Director, or (b) at the Director's discretion, remit 10% and retain 90%. In the latter case, the holder must deposit the retained amount in an approved, income-bearing FDIC-insured or U.S.

Treasury account. R.C. 169.05. The holder must deliver all earnings on those invested funds to the Director. *Id.* If the holder reports less than \$50, the entire amount must be remitted to the Director. *Id.* Once reported, the Division sets up an account for the reported property and credits the property to that account. The Director may deposit such funds in a trust fund or place them in a financial organization. R.C. 169.02, 169.05.

The State holds unclaimed funds in perpetual custody for the benefit of the owner and does not take title to such property. Owners may submit claims to the Division without time limitation. R.C. 169.08(B). Successful claims are paid from the trust fund. R.C. 169.08(D).

The Division invests unclaimed funds and uses the earnings to fund both its expenses and other programs. The Division's expenses include payroll, auditing, maintenance, advertising, equipment, operations, and mailing costs. Amounts delivered as unclaimed property (including the 10% not retained by holders), as well as all interest on the 90% retained funds, are deposited into a depository account at a financial institution. Currently, those funds are deposited into the Mortgage Insurance Fund. From that account, some of 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. At the General Assembly's discretion, some unclaimed funds are transferred to other state programs, primarily the Ohio Housing Finance Authority, to support housing development in Ohio.

The UFA originally provided that an owner was paid interest on a successful claim at the rate of actual earnings while the unclaimed principal was held by the State, or at a rate agreed to by the holder and the owner, whichever was greater. That provision was later amended so that an owner was paid 6% interest with the unclaimed principal. Since July 26, 1991, the UFA

provides that interest is not payable on claims, and the Division retains a 5% administrative fee from the total amount paid. R.C. 169.08(D).

B. Sogg filed a claim for unclaimed funds.

As executor of his mother's estate, Appellant Wilton Sogg filed a claim with the Division for a \$40.52 insurance policy payment and \$292.86 in bank dividends. The Division had taken custody of the insurance payment in 1989, and the dividends in 1998. The Division paid Sogg the principal amount of the two claims, plus interest statutorily earned to July 26, 1991, on the insurance payment, less the 5% administrative fee.

C. After the trial court held the State's retention of interest earned on unclaimed funds was unconstitutional, the court of appeals reversed.

Sogg brought a class action suit against the State for damages, claiming the interest-retention provision of R.C. 169.08(D) facially violated the Takings Clauses of the Fifth Amendment to the United States Constitution and Section 19, Article I of the Ohio Constitution.¹ He later amended his complaint, adding claims for equitable restitution and mandamus relief. The State moved to dismiss, which the trial court denied except as to the mandamus claim. The trial court also certified the case as a class action. In a separate decision, the trial court held, over the State's objection, that a four-year statute of limitations period applies to the claims, rather than the two-year statute of limitations period applicable to personal injury claims.

¹ The trial court recognized, and the parties do not dispute, that for this case the Fifth Amendment's Takings Clause is coextensive with the Ohio Constitution's Takings Clause in Section 19, Article I. *Sogg v. White*, 139 Ohio Misc.2d 58, 2006-Ohio-4223 ¶¶ 44-45. "[W]here the provisions are similar and no persuasive reason for a differing interpretation is presented . . . protections afforded by Ohio's Constitution are coextensive with those provided by the United States Constitution." *State v. Robinette* (1997), 80 Ohio St.3d 234, 238, 1997-Ohio-343. See, also, *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 70, 1998-Ohio-424 (stating federal and Ohio Takings Clauses have a "common purpose"). But cf. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799 ¶ 9 (holding the "public use" prong of

After stipulating to the material facts, both parties moved for summary judgment on liability. The trial court declared the challenged statutory provision unconstitutional, severed that portion from the rest of the statute, and permanently enjoined its enforcement. *Sogg v. White*, 139 Ohio Misc.2d 58, 2006-Ohio-4223 ¶¶ 42, 47-48. The trial court also certified its decision for immediate appeal and stayed the effectiveness of the declaratory and injunctive relief pending appeal. *Id.* ¶¶ 49-50.

The State timely appealed with three assignments of error: (1) the State's retention of interest earned on unclaimed funds is constitutional; (2) the trial court could not award equitable and extraordinary relief for an unconstitutional taking; and (3) the statute of limitations for the class is two (not four) years. Sogg cross-appealed, arguing the class is not subject to any statute of limitations.

The Tenth District Court of Appeals unanimously reversed the trial court opinion, sustaining the State's first assignment of error. *Sogg v. Ohio Dept. of Commerce*, 10th Dist. No. 06APE-883, 2007-Ohio-3219 ("Opinion below") ¶¶ 33-36. The court overruled as moot the State's remaining assignments of error, as well as Sogg's cross-appeal. *Id.* ¶¶ 35-36.

the Ohio Constitution's Takings Clause affords landowners greater protection than its federal counterpart).

**THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST
AND RAISES NO SUBSTANTIAL CONSTITUTIONAL QUESTION**

A. The appeals court's decision properly applies controlling precedent and is not in conflict with any other Ohio appellate court decisions.

Sogg's suit to recover a modest amount of money—the interest earned on \$333.38 in unclaimed funds—does *not* impact the hundreds of thousands of persons who ever owned unclaimed funds in Ohio. Contrary to Sogg's assertion, the scope of this case is narrow: It affects only those who, within the applicable two-year statute of limitations period, made a claim to the State to recover interest-bearing unclaimed funds, and were not paid the interest actually accrued while the funds were in the State's custody.

Were Sogg's takings claim to succeed, the financial consequences for the State would be significant. But Sogg's claim can only succeed if clear United States Supreme Court precedent were ignored. As explained below, this case is squarely controlled by *Texaco, Inc. v. Short* (1982), 454 U.S. 516. The Court of Appeals properly applied that dispositive precedent, and its decision does not conflict with any opinion by an Ohio state court.

B. Sogg did not include a due process claim in his amended complaint, and the UFA fully comports with due process requirements.

Sogg did not include a due process claim in his amended complaint: He stated only a takings claim under the Fifth Amendment to the United States Constitution and Section 19, Article I of the Ohio Constitution. The State's due process provision is found in Section 16, Article I of the Ohio Constitution, and Sogg's amended complaint does not cite this provision. This Court cannot review on appeal issues—even constitutional issues—not presented in the proceedings below. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220 (citing cases). Thus, Sogg waived his due process argument.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

The State may constitutionally keep the interest earned on unclaimed funds, and no taking occurs, where the original owner of the funds neglects to claim the property and the interest accrues while the funds are invested by the State.

A. No taking occurs—and therefore no compensation is due—where the original property owner neglects to claim funds held by the State.

1. Applicable United States Supreme Court precedent and the common law firmly establish that no taking occurs under the UFA.

This case does not raise a significant constitutional question because it is resolved by long-established abandoned property principles set forth by United States Supreme Court precedent and the common law. Four governing principles control here: First, governments historically may treat private property as abandoned or forfeited under conditions short of common law (i.e., intentional) abandonment, see *Hawkins v. Barney's Lessee* (1831), 30 U.S. (5 Pet.) 457, 467, meaning that this case will have no impact upon how abandoned property is defined in other contexts. Second, states may require property owners to perform certain affirmative acts as a condition of retaining ownership. *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 526. Third, states may take custody of and title to abandoned or forfeited property. *Delaware v. New York* (1993), 507 U.S. 490, 497; *Standard Oil Co. v. New Jersey* (1951), 341 U.S. 428, 436. That power necessarily includes the lesser power to take only an increment of such property. Finally, the state is never required to compensate the owner, because any property loss is a consequence of the owner's inaction or neglect. *Texaco*, 454 U.S. at 530.

The issue in this case—whether the State may constitutionally keep the interest earned on unclaimed funds pursuant to the UFA—is foreclosed by the settled rule that the State is not required “to compensate the owner for the consequences of his own neglect.” *Texaco*, 454 U.S. at 530. *Texaco* involved a state mineral lapse statute that provided that a severed mineral interest

lapses and reverts to the current surface owner of the property where the mineral owner fails for twenty years either to use the interest or to file a claim with the county recorder. Addressing a mineral owner's claim that the statute caused an unconstitutional taking of private property, the Court observed that, "[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." *Id.* at 526. Given that "the State may treat a mineral interest that has not been used for 20 years and for which no statement of claims has been filed as abandoned," the Court stated that "it follows that, after abandonment, the former owner retains no interest for which he may claim compensation." *Id.* at 530. "It is the owner's failure to make any use of the property," the Court explained—"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.* Having simply relied on this clear holding, the Tenth District in its decision raised no significant constitutional issue to invoke this Court's discretionary review.

Despite *Texaco's* explicit rejection of the taking claim, Sogg argues, based on the *dissenting* opinion in that the case, that *Texaco* "had nothing to do with the Takings Clause" because the state did not take the mineral interest for itself. See Sogg's Jurisdictional Memo at 11, citing *Texaco, Inc.*, 454 U.S. at 542 (Brennan, J., dissenting)). But "comments in [a] dissenting opinion . . . are just that: comments in a dissenting opinion." *United States R. Ret. Bd. v. Fritz* (1980), 449 U.S. 166, 176 n.10. Sogg's argument cannot be squared with the *Court's* disposition of the taking claim. That disposition makes irrelevant whether the State takes title to unclaimed funds for itself, because the State is never required to compensate an owner for the consequences of his or her own inaction or neglect.

2. Other states' highest courts have denied review of similar cases.

The Tenth District's decision below is in accord with other states' intermediate appellate decisions upholding similar statutory "custodial escheat" provisions against constitutional challenges. In three other states, further appellate review by the state's highest court has been denied without dissent. Most recently, the Indiana Supreme Court unanimously declined to review an appellate decision that rejected a similar taking challenge to a materially identical provision in Indiana's Unclaimed Property Act. See *Smyth v. Carter* (Ind. App. 2006), 845 N.E.2d 219, transfer denied (2006), 860 N.E.2d 588. The United States Supreme Court also denied certiorari review. (2007), 127 S.Ct. 1155.

The high courts of Texas and California have denied review of similar appellate court holdings. See *Clark v. Strayhorn* (Tx. App. 2006), 184 S.W.3d 906, review denied sub nom. *Hajek v. Strayhorn*, 2006 Tx. LEXIS 473, certiorari denied (2006), 127 S.Ct. 508; *Fong v. Westly* (Cal. App. 2004), 117 Cal.App.4th 841, 12 Cal. Rptr.3d 76, review denied, 2004 Cal. LEXIS 5805. No dissents are recorded in these denials. See also, *Hooks v. Kennedy*, La. App. No. 2006-0541, 2007 La. App. LEXIS 826, rehearing denied (Aug. 3, 2007) (Louisiana case).

The Illinois Supreme Court is the sole state high court to affirm an appellate decision that invalidated a state unclaimed property provision for the state to keep dividends earned on unliquidated stock. See *Canel v. Topinka* (Ill. 2004), 818 N.E.2d 311. In that case, however, the court stressed that its opinion was limited only to dividends accruing on unliquidated stock held by the state under the unclaimed property statute. 818 N.E.2d at 320, 326. Unlike Illinois, Ohio liquidates the unclaimed stock it holds. See R.C. 169.05(A); Ohio Adm. Code 1301:10-5-02. *Canel* is also based in part on the holdings in *Brown v. Legal Foundation of Washington* (2003), 538 U.S. 216; *Phillips v. Washington Legal Foundation* (1998), 524 U.S. 156; and *Webb's*

Fabulous Pharmacies, Inc. v. Beckwith (1980), 449 U.S. 155, none of which concerned the type of property in this case. Therefore, *Canel* is legally inapposite and factually distinguishable from this case. See *Sogg*, 2007-Ohio-3219 ¶¶ 16-17.

3. The conflict cited by Sogg is illusory, because this Court effectively reversed the appellate case on which Sogg relies.

Although he did not seek to certify a conflict, Sogg argues the opinion below should be reviewed because it conflicts with the Third District Court of Appeals' decision in *State ex rel. Hudson v. Kelley* (3d Dist. 1935), 55 Ohio App. 314. While *Hudson* involved a former unclaimed funds statute, it was primarily a statute of limitations case,² which is not an issue raised in Sogg's appeal. Moreover, *Hudson* was effectively reversed five years later by this Court in *State ex rel. McLeary v. Hilty* (1941), 139 Ohio St. 39, a case which the Sixth District Court of Appeals had certified in conflict with *Hudson*. *Id.* at 42.

Both *Hudson* and *McLeary* construed former General Code Section 286, which provided:

The term "public money" as used herein shall include all money received or collected under color of office All money received . . . shall be . . . paid into the treasury thereof . . . , there to be retained until claimed by the lawful owner; *if not claimed within a period of five years . . . such money shall revert to the general fund of the political subdivision where collected.*

(Emphasis added.) The *Hudson* court interpreted the statute's reversion clause to provide merely for a transfer, not forfeiture, of unclaimed money, and such reversion could not limit claims without violating the Ohio Constitution's Takings Clause. *Hudson*, 55 Ohio App. at 322. In *McLeary*, however, this Court ruled otherwise. Affirming the Sixth District's decision, the Court held:

[T]he relator insists that the word "revert" is not employed in the statute in its ordinary acceptance but that this provision is simply a bookkeeping requirement

² This is not to be confused with applicable the statute of limitations for 42 U.S.C. 1983 claims. See *infra* page 14.

to the effect that such money shall be merely transferred. The difficulty with this theory is that careful study of the context discloses nothing tending to indicate inaccuracy of expression on the part of the General Assembly; nor can it be assumed that this provision was incorporated in the statute without purpose. Surely, it was not intended to require the treasurer to perform a wholly vain act by placing in its own general fund money the county under no circumstances could use.

McLeary, 139 Ohio St. at 45. Based on this holding, *Hudson* is not good law, even in the Third District where it originated. Therefore, the purported conflict between *Hudson* and the opinion below is illusory, and it is not grounds for this Court to accept jurisdiction.

4. The “interest follows principal” doctrine does not apply to unclaimed funds.

Sogg’s Second and Third Propositions of Law are grounded in the common law “interest follows principal” doctrine. However, the doctrine does not apply where an owner’s neglect or inaction causes a lapse in ownership. *Texaco, Inc.*, 454 U.S. at 530; *Smyth v. Carter* (Ind. App. 2006), 845 N.E.2d 219, 223-24, transfer denied (2006), 860 N.E.2d 588, certiorari denied (2007), 127 S.Ct. 1155. Moreover, this Court has recognized the General Assembly’s prerogative to abrogate the doctrine through legislation. *Thompson v. Indus. Comm.* (1982), 1 Ohio St.3d 244, 249-50; *Eshelby v. Cincinnati Bd. of Edn.* (1902), 66 Ohio St. 71, 74.

Sogg relies on several cases, including *Brown v. Legal Foundation of Washington* (2003), 538 U.S. 216; *Phillips v. Washington Legal Foundation* (1998), 524 U.S. 156; *Webb’s Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155; and *Schneider v. California Dept. of Corr.* (9th Cir. 1998), 151 F.3d 1194. None of these cases, however, involved abandoned property. *Brown* and *Phillips* addressed interest on lawyers trust account (“IOLTA”) systems. *Webb’s* involved a statute requiring the state keep the interest earned on funds interpleaded into a court

along with an administrative fee. *Schneider* involved a state's diversion of interest earned on prisoners' money to fund prison programs.³

Sogg also relies on cases that do not involve abandoned property to argue the UFA is not a forfeiture statute. See Sogg's Jurisdictional Memo at 7 (citing *State v. Lillock* (1982), 70 Ohio St.2d 23 (van containing stolen property); *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 1998-Ohio-313 (drug houses); *Grieb v. Dept. of Liquor Control* (1950), 153 Ohio 77 (liquor confiscated and destroyed because owner's liquor license had been revoked)). Those authorities are inapposite, however, because they do not concern the type of property involved in this case. Therefore, the opinion below does no violence to the "interest follows principal" doctrine, because the doctrine does not apply to unclaimed funds. This is not new constitutional law, but application of longstanding property law principles and precedent.

Given that the "interest follows principal" doctrine does not apply to unclaimed funds, it follows that Sogg cannot claim any common law or constitutional "right" to the interest earned on unclaimed funds. This is because the rights of ownership lapse by owner inaction or neglect, and no compensation is required when the government appropriates such property. The State's power to take custody of and title to abandoned or forfeited property necessarily includes the lesser power to take only an increment of such property. The owner's ability to recover the unclaimed principal is strictly a matter of legislative grace, not constitutional right. Cf. *Gorny v. Trustees of Milwaukee Cty. Orphans Bd.* (7th Cir. 1937), 93 F.2d 107, 109-10.

³ Courts have criticized *Schneider* because it fails to analyze and determine to what extent the prisoners had any common law property rights to the funds in question. See *Givens v. Ala. Dept. of Corr.* (11th Cir. 2004), 381 F.3d 1064, 1069, certiorari denied (2005), 545 U.S. 1104; *Washlefske v. Winston* (4th Cir. 2000), 234 F.3d 179, 186; *Young v. Wall* (D.R.I. 2005), 359 F.Supp.2d 84, 92.

B. Sogg's due process claim would fail even if it were not waived.

Even if Sogg's due process claim were not waived—and, as explained above, it is—it would fail on the merits. The State's retention of interest under the UFA raises no serious procedural due process concerns because property owners are charged with constructive knowledge of statutes and the procedures adopted by them. *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 532; *N. Laramie Land Co. v. Hoffman* (1925), 268 U.S. 276, 283. Such notice is sufficient to satisfy "all requirements of due process." *Anderson Natl. Bank v. Lockett* (1944), 321 U.S. 233, 243. No deprivation hearing is required since any property lapse is not caused by state action, but by owner inaction. *Texaco, Inc.*, 454 U.S. at 530.

Sogg also suggests that if the opinion below stands the State can arbitrarily declare any property "abandoned" and forfeited without any limitation, such as appropriating a car parked for several weeks. It is well-established, however, that a State must exercise its police power reasonably to comport with substantive due process requirements. "What right has any one to complain, when a reasonable time has been given to him, if he has not been vigilant in asserting his rights?" *Hawkins v. Barney's Lessee* (1831), 30 U.S. (5 Pet.) 457, 466. Sogg has never argued that the UFA's five-year period of inactivity required before funds become unclaimed is unreasonably short. The UFA's comprehensive scheme of defining and disposing of unclaimed funds is a self-evident legislative exercise of the State's authority to reasonably dispose of abandoned property.

Thus, Sogg's First Proposition of Law is not only waived, but it is also clearly foreclosed by United States Supreme Court precedent. This Court accordingly should decline jurisdiction.

C. The trial court erred in determining that the applicable statute of limitations period is four years rather than two.

In a separate ruling before it found an unconstitutional taking, the trial court determined that the applicable statute of limitations period for cases filed under 42 U.S.C. 1983 in Ohio is four years. The Court of Appeals did not address the issue, having instead found no takings problem.

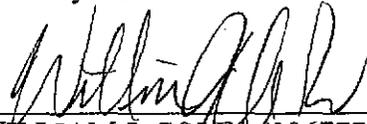
If this Court, as it should, denies review of this case, then the statute of limitations issue is moot. If, however, this Court were to grant review of this case and reverse the appeals court's correct judgment on the takings question, then the statute of limitations question again becomes relevant. The trial court was wrong to determine that the four-year period applies. Most courts to have considered the issue have correctly concluded that a different, two-year limitations period—the one for personal injury actions, R.C. 2305.10(A)—applies to Section 1983 actions in Ohio. See, e.g., *Browning v. Pendleton* (6th Cir. 1989), 869 F.2d 989 (en banc); *Peoples Rights Org., Inc. v. Montgomery, Ohio Atty. Gen.* (12th Dist. 2001), 142 Ohio App.3d 433, 483.

This Court is currently reviewing the question of the proper limitations period for Section 1983 actions in *Nadra v. Mbah*, No. 2007-0525. If the Court were to grant review and reverse the appeals court's judgment on the takings claim, then it should remand with instructions for the lower court to review its statute of limitations decision in light of *Nadra*.

CONCLUSION

For the above reasons, the Court should decline to review this case.

MARC DANN (0039425)
Attorney General of Ohio



WILLIAM J. COLE* (0067778)

**Counsel of Record*

JOHN T. WILLIAMS (0024449)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614-466-2980
866-354-4086 fax
wcole@ag.state.oh.us
Counsel for Appellee

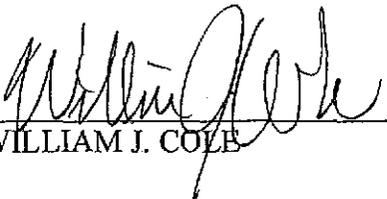
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum In Opposition To Jurisdiction of Appellee Ohio Department of Commerce* was served by U.S. mail on September 4, 2007, upon the following Counsel for Appellant:

William C. Wilkinson
Craig A. Calcaterra
Thompson Hine LLP
10 West Broad Street, 7th Floor
Columbus, Ohio 43215

John R. Wylie
Futterman Howard Watkins Wylie & Ashley, Chtd.
122 South Michigan Avenue, Suite 1850
Chicago, Illinois 60603

Arthur T. Susman
Susman Heffner & Hurst LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603


WILLIAM J. COLE