

April 22, 2010 Unclaimed Property Act

Secretary Rick Homans
New Mexico Taxation and Revenue Department
P.O.Box 630
Santa Fe, NM 87504-0630

Re: Opinion Request-Unclaimed Property Act

Dear Secretary Homans:

You have requested our opinion regarding the Taxation and Revenue (“Department”) and Uniform Unclaimed Property Act. In 1997, the New Mexico legislature adopted the nationwide “Uniform Unclaimed Property Act (1995)” into state law. See NMSA 1978, ch.7, art.8A (amended through 2007). According to your letter: “[Section] 7-8A-25...relates to agreements to locate property entered into between owners of unclaimed property and persons providing services to locate such property.” This section prohibits certain types of “locator” agreements for a forty-eight month period. Your letter asks:

1. What is the general rule and exceptions in Section 7-8A-25?
2. Does the Department have authority to promulgate a rule defining unconscionable compensation in connection with agreements to locate property?

Based on our examination of the relevant New Mexico law, and on the information available to us at this time, we conclude that the Uniform Unclaimed Property Act bars most locator agreements for a forty-eight month period. The law exempts attorney-owner agreements used to file claims for “identified property” and attorney-owner agreements used to contest the administrative denial of a claim. We also conclude that the Department may promulgate a rule regarding Section 7-8A-25 as long as the rule reflects the New Mexico Supreme Court’s definition of “unconscionable”.

1. Scope of NMSA 1978, Section 7-8A-25(A)

NMSA 1978, Section 7-8A-25(A) states:

An agreement by an owner, the primary purpose of which is to locate, deliver, recover or assist in the recovery of property that is presumed abandoned, is void and unenforceable if it was entered into during the period commencing on the date the property was presumed abandoned and extending to a time that is forty-eight months after the date the property is paid or delivered to the administrator. This subsection does not apply to an owner’s agreement with an attorney to file a claim as to identified property or contest the administrator’s denial of a claim.

(Emphasis added.)

A rule of statutory interpretation is that the plain language of a statute is the primary indicator of legislative intent. The words used in the statute are to be given their ordinary meaning unless the legislature indicates a different intent. Smith v. Bernalillo County, 137 N.M. 280 (2005). The plain language of this statute creates a 48 month period for the state to exclusively locate, deliver, recover or assist in the recovery of property that is presumed to be abandoned, with two explicit caveats. It exempts an owner's agreement with an attorney to file claims for "identified property" or to contest the administrative denial of a claim.

An expansion of the attorney representation exemption to cover the non-legal work of a locator would defeat the object of the statute, which is to protect the public from being charged for locator activities that the state is providing within the 48 month period.

Our interpretation of the statutory language is reasonable and is supported by reference to the drafter's comments to this section of the Unclaimed Property Act of 1995, which was the model for this state statute. It states in relevant part,

This section is intended to enhance the likelihood that the owner of the abandoned property will be located by the efforts of the State, and will receive a return of the property without payment of a "finder's fee." In the past, it appears to have been the practice in many States for unclaimed property locators or heir finders to utilize the State's lists of names and addresses of missing owners to contact them and propose to find their property for them for a fee, before the State has had an opportunity to locate the missing owners. ..This section is not intended to apply to situations such as the probating of an estate, which may incidentally include a necessity of locating unclaimed property. Agreements in such cases do not have as their principal purpose, the rendition of services to locate, deliver or recover unclaimed property. This section also does not apply to agreements for legal representation of an owner who is claiming property the identity of which is already known to the owner.

Uniform Unclaimed Property Act 1995, Chapter 25, Section 25.

In summary, the statute was intended to limit finder's fees during the period that the state is providing free finder services and the exemptions were designed to allow for specified legal representative work, not for locator work. The statute does not permit attorneys to act as locators nor does it permit attorneys to contract with locators to perform location work during the 48 month prohibition period .

2. Department's Authority to Adopt Rules

You ask whether the Department may promulgate rules defining unconscionable compensation and limiting the amount of compensation allowed under agreements to locate property. This question stems from Section 7-8A-(D) of the Uniform Unclaimed Property Act, which provides:

D. An agreement covered by this section which provides for compensation that is unconscionable is unenforceable except by the owner. An owner who has agreed to pay compensation that is unconscionable or the administrator on behalf of the owner may maintain an action to reduce the compensation to a conscionable amount. The court may award reasonable attorney fees to an owner who prevails in the action.

The Secretary has general powers to promulgate a rule regarding laws administered by the Department. This authority is limited to promulgating a rule that is consistent with law and is not arbitrary and capricious. NMSA 1978, Section 9-11-6.2(A) states:

A. The secretary is empowered and directed to issue and file as required by law all regulations, rulings, instructions or orders necessary to implement and enforce any provision of any law the administration and enforcement of which the department, the secretary, any division of the department or any director of any division of the department is charged, including all rules and regulations necessary by reason of any alteration of any such law. In order to accomplish its purpose, this provision is to be liberally construed.

The Uniform Unclaimed Property Act also specifically provides the authority to promulgate a rule. It reads: “The administrator may adopt...rules necessary to carry out the Uniform Unclaimed Property Act...” NMSA 1978, Section 7-8-28 (1997). In addition, “The Uniform Unclaimed Property Act...shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act...” NMSA 1978, Section 7-8A-29 (1997).

Thus, the Department may promulgate rules to carry out the purpose of the act; yet this power is limited to those aspects of the Act that the Department is responsible for enforcing. Here, the legislature has limited the Department’s authority with regard to defining and policing unconscionable contracts. The statute provides that unconscionable fee contracts are unenforceable but it does not define unconscionable. The legislature provided that one who disputes conscionability may “maintain an action” referring to a suit in the court system. The legislature further provided that the prevailing party in such action would be entitled to attorney fees. This referral of conscionability disputes to the courts is consistent with NMSA 1978, Section 55-2-302 (1961) NMSA 1978, Section 55-2-302 (1961), where the legislature provided that courts, as a matter of law, may police against contracts or clauses found unconscionable. Fiser v Dell Computer Corp. 144 NM 464, 188 P.3d 1215, (2008)(the issue of unconscionability of a contract is a matter of law and is reviewed de novo).

3. Standard for determining Unconscionability

New Mexico Courts have defined “unconscionability”. That definition requires judicial application of a test that requires an analysis of the facts of each case. In Fiser, supra., the New Mexico Supreme Court adopted what has become a classic articulation of unconscionability: a two pronged test applying the facts of an individual case to an

analysis of substantive unconscionability, and procedural unconscionability. Substantive Unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy or grossly unfair. Procedural Unconscionability analyzes the circumstances surrounding contract formation and the relative bargaining power of the parties. Under this test, a significant imbalance in bargaining power that is used to take advantage of one part is unconscionable. The relative weight of procedural and substantive unconscionability varies with each case and it is not necessary that both be present. In Fiser, supra., the court found that there was no evidence of procedural unconscionability, yet a contract clause banning class actions was unconscionable because it violated New Mexico Public Policy and was substantively unconscionable.

The Department is empowered to promulgate rules to interpret legislative language in a reasonable manner consistent with legislative intent. Morningstar Water Users Ass'n v. N.M. 579, 583, 904 P.2d 28 (1995). This might be accomplished by creating regulatory guidelines for agreements that are fair. The Department could define unconscionability exactly as the New Mexico Supreme Court has done, and such regulation may provide some guidance to parties seeking to create enforceable fee agreements. The Department is not however, empowered to create a definition for unconscionability that is independent or distinct from the definition employed by the courts.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

MELANIE CARVER
Assistant Attorney General