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Stale-dated warrants;
unclaimed property

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This memorandum responds to an opinion request in which a series of questions was posed relative to unredeemed warrants and the unclaimed property law. The memorandum was delayed in anticipation of two events: the ruling by the Alaska Supreme Court on the issue of whether warrants are negotiable instruments, and the passage of legislation changing the treatment of warrants for the payment of permanent fund dividends. An additional group of related questions also was received.

1. Which statutes govern the disposition of money represented by unredeemed warrants?

Both the Unclaimed Property Act (AS 34.45.110 -- 34.45.780) and the stale-dated warrant provisions of AS 37.05.180 apply, depending on the circumstances. (See AS 37.05.900).

2. Is there a statute of limitations that would set a time limit on when a payee of a stale-dated warrant could file a claim?

No, there is no generally applicable period of limitation. However, the six-year limitation imposed by AS 09.10.050 applicable to actions on contracts may apply under certain circumstances. Other limits could apply in certain circumstances.

3. Is the state required to honor requests to reissue warrants? Does AS 37.05.180 mean that the warrant is no longer valid but the underlying obligation continues to exist?

Yes to both questions, if the underlying claim is valid. See AS 45.03.802(b).

4. Could the state put money into a special liability account when a warrant becomes stale-dated?

The money must go to the general fund except in certain enumerated instances, AS 37.05.180;¹ however, there does not appear to be any reason a special liability account *within the general fund* could not be established for ease of accounting.

5. Can the state reissue a warrant in place of a stale-dated warrant to a party other than the original payee, such as a "fee finder"² with a power of attorney? What documentation should be required?

Yes, warrants can be reissued to a third party with the clear authority to make a claim on behalf of the original payee. A valid power of attorney with specific authority would be sufficient, although not the exclusive means of granting such authority.

¹ It may be helpful to explain what really happens in the course of a state payment. This is somewhat simplified but may explain the process sufficiently.

The general fund contains all the money the state has for paying its bills. The legislature makes an appropriation, an authorization to use a certain amount to pay for certain matters. The state prepares a warrant to pay an obligation from the money appropriated; however, no money ever really leaves the fund. If the warrant is presented for payment, the state's paying bank gives the money to the payee and then presents the warrant for money to actually be withdrawn from the state treasury to "reimburse" itself.

If the warrant is not presented for payment and becomes stale-dated, no money has to be returned to the fund, since none ever left. For that reason it is misleading to speak in terms of "returning" or "transferring" monies to the general fund. All that really occurs is a paper accounting entry.

² The term "fee finder" has been coined by the Division of Finance to refer to entities that, for a fee or a share of the payment, locate unpaid monies, unclaimed funds, and the like, for third parties to whom these are due.

6. Can money representing unredeemed warrants issued from trust funds such as retirement funds, permanent fund dividend fund, and public guardian funds be returned to the fund from which the warrant was issued?

Except for warrants representing permanent fund dividends,³ monies represented by stale-dated/unredeemed warrants must be returned to the general fund.⁴

7. Are there any restrictions on cancelling a warrant before it becomes stale-dated? Must there be a legal basis for cancelling a warrant earlier than the date it becomes stale-dated?

A warrant, upon delivery⁵ to the payee, is a contract⁶ and could only be cancelled if returned to the issuer for some reason, such as returned by the Postal Service as undeliverable, or perhaps returned by the payee because it is for the wrong amount. Cancelling a warrant before it becomes stale-dated would only be permissible if the underlying reason for payment becomes altered and if the warrant is returned to the issuer. Otherwise cancellation would be a breach of contract just as would be placing a stop payment order on a check without good cause.

³ An exclusion for permanent fund dividends was enacted by sec. 3, ch. 4, SLA 1992.

⁴ We suggest that for ease of tracking such funds, some form of separate accounting within the general fund be created to hold these funds. This would prevent their being "lost" from control for fiduciary purposes. See the answer to question 4.

⁵ Commercial paper (e.g., negotiable instruments) must be delivered to become binding on the issuer. See 5 Ronald A. Anderson, *Uniform Commercial Code* § 3-101:22 and § 3-102:7 (3d ed. 1984); 11 Am. Jur. 2d *Bills & Notes* § 270 (1963).

⁶ See Ronald A. Anderson, *Uniform Commercial Code* § 3-101:22 and § 3-119:1 (quoting from *Official Code Commentary* n.3 (3d ed. 1984)). See also *Boyles Bros. Drilling Co. v. Orion Industries, Ltd.*, 761 P.2d 278 (Col. App. 1988) ("As between the parties a negotiable instrument . . . is merely a contract.")

8. Is the state prohibited by AS 34.45.700 from releasing information pertaining to stale-dated warrants or unclaimed property to "fee finders"?

No. Alaska Statute 34.45.700 governs the enforceability of agreements to recover unclaimed property and affects the liability between the agent and the principal for whom recovery would be made. This section has no effect on whether information could or should be released. However, there are limitations on how much information may be released. See question 10 below.

9. Is an agreement to locate unclaimed property enforceable if made prior to the report required by AS 34.45.280 or delivery of the property required by AS 34.45.320?

No. Any agreement to locate unclaimed property for a fee is not enforceable -- as between the intended finder and the person whom the finder acts -- if made within 24 months *after* the payment or delivery of the property required by AS 34.45.320. The date of making the report has no effect on enforceability, though it is likely that in most cases reporting would precede delivery or at least occur at the same time. The comments on this question refer to an organization that contacted the department asking for a list of outstanding warrants. The concern is that with this list, the "fee finder" could get an agreement in place prior to your department reporting or delivering unclaimed property to the Department of Revenue. Any agreement made within this scenario would be unenforceable; however, this unenforceability would not affect the Department of Revenue's obligation to pay a valid claim on unclaimed property under the Act. It would be incumbent on the person entitled to the property to exercise the unenforceability section.

10. Are "fee finders" entitled to receive a listing of the state's outstanding warrants?

If such a list is routinely kept, yes. Under AS 09.25.110 all state records are open to inspection and copying unless an exception is provided for under AS 09.25.120 or a privilege can be claimed under state or common law. There is no exception for such a list, nor any privilege that might apply, and it must, therefore, be provided upon request. The types and amounts of information, however, may be limited. Although open records laws dictate the availability of virtually all government records to the public, privacy considerations may intervene to

prohibit dissemination of all the information maintained in those records. We believe you would be required to disclose the names, addresses, and telephone numbers, if available, to anyone seeking this information. The amount of money involved, however, should probably be expunged to comply with AS 44.99.350.⁷

11. Should the state advise "fee finders" who are given lists of outstanding warrants of the provisions of AS 34.45.700?

There is nothing prohibiting such advice; however, there is also no obligation to provide advice. All persons are presumed to know the law. *Ostrosky v. State*, 704 P.2d 786 (Alaska App. 1985), *appeal on remand*, 725 P.2d 1087 (Alaska App. 1986).

12. Should the state inform the original payee when placing a stop payment order on a warrant?

Generally, yes, if it is reasonably possible to do so. A warrant does not become stale-dated until the passage of two years from the date of issuance. During that time, absent some overriding reason, payment on warrants cannot be stopped except at the request of the payee, but even in that case, also for good cause. (See answer to Question 7, above.) An individual may retain an unpaid warrant -- at his peril -- for whatever reason. The state may make no judgments about an unpaid warrant before the two-year stale-date period is ended. After that, because the warrant is considered to have been paid, it is cancelled and the monies it represented returned to the general fund.⁸

13. Can a payee hold a warrant for an extended period (even up to two years) without concern that a "fee finder" could make a claim for it?

Yes. Except for payroll warrants,⁹ no one can do

⁷ Although explored in another context, these concerns are directly addressed in 1992 Inf. Op. Att'y Gen. (Apr. 1; 663-92-0163), a copy of which is attached.

⁸ It is returned to the general fund unless it may properly be returned to some other fund, in which case that would be the fund to which the monies would be credited.

⁹ Under AS 34.45.250, payroll warrants become abandoned property one year after issuance. This means that, even though

anything about making a claim for an unredeemed warrant until it becomes stale-dated, unless the payee asks for a stop-payment and reissuance of a substitute warrant, such as might occur if the payee knows the original warrant has been lost. Furthermore, the "fee finder" acting to secure a contract to locate unclaimed property before an additional two years has passed could not enforce the contract. (See the answer to Question 9 above.)

14. Would an original payee's claim be jeopardized by release of information that enables a "fee finder" to establish a claim against the same funds.

No. For the same reasons stated in the answer to Question 13.

15. Can an original payee come back to the state if the state places a stop payment against a warrant being intentionally held and information is released to a "fee finder"?

The concern underlying this question is not well founded. First, the original payee never loses the right to come back to the state for payment. However, until the warrant becomes stale-dated the original payee can always cash the warrant. If a stop is placed on payment, a new warrant would have to be issued to effect payment. This would not only require an appropriation, but gives another two-year life to the succeeding warrant. (See also the answers to Questions 13 and 14 above.)

16. Can the costs involved be passed on to the "fee finder"?

Any costs for producing information may be charged to a
(..continued)
the warrant is still negotiable (it has another year to run before becoming stale-dated), the money it represents must go to the proper unclaimed property account. This possibly raises the question of whether the employee/payee of the warrant could be paid twice, once by cashing the warrant and then again by making a claim against unclaimed property. That is unlikely to happen considering the amount of investigating by the Department of Revenue before paying on an unclaimed property claim. Additionally, as soon as the warrant were cashed, the Department of Administration presumably would be prompted to seek reimbursement from the unclaimed property account in order to pay the warrant.

"fee finder" at the same rate and under the same circumstances any other persons are charged for the same information.

17. What information concerning warrants can be released to "fee finders"?

Whatever information is not made confidential for some reason under state law and is reported through some vehicle may be and must be released to any member of the public who asks for it. See AS 09.25.110 and 09.25.120. See also the answer to question 10 above.

18. Before stale-dated warrant information can be released to a "fee finder," does the warrant have to be turned over to the abandoned property section in the Department of Revenue and advertised as such?

There is no link between the two. Nothing need be turned over to the Department of Revenue until the property becomes abandoned. In the case of warrants (except for payroll warrants, see n.8), they do not become stale-dated until the passage of two years from the date of issuance. Although it is common to speak of a check or other negotiable instrument becoming abandoned property, it is not the instrument itself that is the property abandoned; it is the money the instrument represents that is the property which becomes abandoned. The property, i.e., the money, does not become *abandoned* until five years from the date the warrant became payable. Therefore, information could be released well before the date of presumed abandonment.

General Discussion

The stale-dated warrant statute, AS 37.05.180,¹⁰ provides:

A warrant upon the state treasury may not be paid unless presented at the office of the commissioner of revenue within two years of the date of its issuance. A warrant not presented within that time is considered paid and money held at the expiration of that time in a special fund or account for the payment of the warrant shall be transferred to the general fund, except where the

¹⁰ As amended by sec. 3, ch. 4, SLA 1992.

warrant is for the payment of a permanent fund dividend or where transfer is prohibited by the federal government for state participation in a federal program.

The Department of Law has construed AS 37.05.180 as an "accounting device . . . [that] simply allows the state to remove from its books after two years any uncashed warrants since these are deemed paid and no longer outstanding debts." 1977 Inf. Op. Att'y Gen. (Aug. 19; Arnold). However, the two-year limitation does not terminate liability for an otherwise valid claim. See 1985 Inf. Op. Att'y Gen. (Mar. 21; 366-324-85). In addition, the Alaska Administrative Manual provides that a stale-dated warrant cannot be reissued unless the legislature makes a supplemental appropriation. AAM 35.205 (1990).

Alaska Statutes 34.45.110 -- 34.45.780,¹¹ known as the Unclaimed Property Act ("Act"), amended the statutory scheme relating to the disposition of unclaimed or abandoned property. The Act was patterned after the Uniform Unclaimed Property Act (1981) and its purpose is two fold: first, to return abandoned property to its rightful owner; and second, to generate revenue for the state.

Real property continues to be subject to escheat¹² provisions under which title to real property reverts to the state upon a judgment of escheat by the superior court. A person may bring an action to reclaim the escheated property or its value within seven years of the judgment of escheat. The Act, however, replaced the personal property escheat statutes that were found at AS 09.50.070 -- 09.50.160.

Under AS 34.45.110, as a general rule, intangible property that has remained unclaimed by the owner for more than five years is presumed abandoned under the Act. However, the time limits for specific types of property vary depending upon the type of property involved. For example, unpaid wages that remain unclaimed for more than one year are presumed abandoned; unclaimed proceeds of life insurance policies are presumed abandoned after the passage of five years from the date of the event triggering their payability; money represented by traveler's checks is

¹¹ Enacted by ch. 133, SLA 1986.

¹² AS 38.95.200 *et seq.*

presumed abandoned if unclaimed after more than 15 years beyond the date of issuance. Persons holding abandoned property are required to report and deliver the property to the Department of Revenue. Unlike real property, the state assumes custody of the property and must sell tangible personal property within three years after receiving it to the highest bidder. Money and proceeds from the sale of abandoned property must be deposited in the general fund, except that the department must retain at least \$100,000 in a separate trust fund for the purpose of paying claims by the rightful owner -- whose rights are never cut off.

AS 34.45.120 provides in pertinent part that "[u]nless otherwise provided in this chapter or *by another statute of the state*, intangible property is subject to the custody of the state as unclaimed property" (Emphasis added.)

The definition of "intangible property"¹³ does not explicitly include "warrants"; it does, however, explicitly include checks, drafts, dividends, unpaid wages, and pension distributions or similar benefits.

The term "draft" is not defined under the Act. However, a warrant may be considered a draft under the Uniform Commercial Code -- Commercial Paper. See AS 45.03.104(a) and (b)(1).

¹³ AS 34.45.760(10).

AS 34.45.250 provides:

Unpaid wages, including wages represented by unrepresented payroll checks, owing in the ordinary course of the holder's business and that remain unclaimed by the owner for more than one year after becoming payable are presumed abandoned.

The term "checks" is not defined under the Act. When read together, AS 34.45.760(8) and (13) define a "holder" to include a state. However, a warrant is not a check under the U.C.C. because it is not "drawn on a bank." See AS 45.03.104(b)(2). For the sake of clarity, this office recommends an amendment to AS 34.45.760(10)(A) to make it clear that "warrants" are to be considered as "intangible property" under the Act.

It is difficult to conclude with absolute certainty that the money represented by state warrants is included in "intangible property" under the Act as presently in force. It can be argued by analogy that, because warrants have been ruled to be negotiable instruments, they should be considered to be the same as checks and drafts and therefore "intangible property" under the Act. The state has argued in the past that warrants are distinguishable from checks and drafts and therefore are not negotiable instruments under the U.C.C. See 1987 Inf. Op. Att'y Gen. (Jan. 5; 663-87-0282). However, in *National Bank of Alaska v. Univentures 1231*, 824 P.2d 1377 (Alaska 1992), the Alaska Supreme Court ruled that warrants are negotiable instruments under the U.C.C.. Thus, this memorandum assumes for the purpose of discussion that money payable on warrants is to be treated as "intangible property" subject to the Act.

The term "unpaid wages," as used in AS 34.45.250, most probably includes the value of unredeemed state payroll warrants. As such, these monies should be presumed abandoned if unclaimed for more than one year. For example, if a payroll warrant were returned to the state as undeliverable and a year passed, the Department of Administration, Division of Finance, would be required to report the money payable on the warrant as abandoned property under the Act. Similarly, if a payroll warrant is in the possession of a third party for some reason and remains unnegotiated for more than one year, it would be presumed abandoned and the holder would be required to report the warrant to the state as abandoned property under the Act.

All other state warrants that come within the Act's definition of intangible property -- for example, permanent fund dividends, longevity bonuses, and pension distributions -- fall under the general rule established by AS 34.45.110, and the money payable on them would be presumed abandoned after five years.

There is no general statute of limitations that would cut off a claimant's right to the property. As previously discussed, the state simply takes custody of, not title to intangible property reported and delivered to it under the Act.

As discussed, the Department of Law has construed the stale-dated warrant statute (AS 37.05.180) as not terminating liability for a claim. 1985 Inf. Op. Att'y Gen. (Mar. 21; 366-324-85).

Furthermore, the Department of Law has previously concluded that stale-dated permanent fund dividends need not be returned to the general fund under AS 37.05.180, but may be "held and used for payment." 1985 Inf. Op. Att'y Gen. (Mar. 21; 366-324-85). This conclusion appears to be based, at least in part, upon the fact that the dividend fund is established as a separate fund in the state treasury under AS 43.23.045(a).¹⁴ Therefore, to the extent that a warrant is issued against a fund other than the general fund, it would seem appropriate and consistent to credit the fund from which the warrant was issued rather than the general fund.

By law then, a warrant representing unpaid wages that remains unclaimed for more than a year is presumed abandoned and the money would be delivered to the Department of Revenue as abandoned property *before* the warrant becomes stale-dated under AS 37.05.180. In other words, money represented by the warrant would have been either returned to the general fund or the \$100,000 trust fund before the warrant became stale-dated. See AS 34.45.370. A supplemental appropriation would not be required to pay on a valid claim so long as the warrant had not become stale-dated.

¹⁴ This rationale for returning PFDs to the dividend fund was rendered unnecessary, as AS 37.05.180 was amended in 1992 specifically to exempt permanent fund dividend warrants from its requirement that the monies represented by them be returned to the general fund. See the answer to question 6.

By contrast, a warrant representing a longevity bonus, pension distribution, or other state payment that remains unclaimed for more than five years is presumed abandoned and would be delivered to the Department of Revenue *after* the warrant becomes stale-dated under AS 37.05.180. Under AAM 35.205, a supplemental appropriation would be required to pay on a valid claim.

Under AS 34.45.370, the money represented by an abandoned warrant must be returned to either the general fund or the unclaimed property trust fund. A nonpayroll warrant will never be presumed abandoned before it is stale-dated under AS 37.05.180 and presumably returned to the fund upon it was drawn.

AS 34.45.760(12) provides that the term "owner" means a "claimant, or payee in the case of other intangible property, or a person having a legal or equitable interest in the property subject to AS 34.45.110 -- 34.45.780; the term includes a person's legal representative[.]" Under the Act the state may pay an allowed claim to a person other than the original payee, if that person is the payee's legal representative. Therefore, if a "fee finder" is a payee's attorney-in-fact, the state is obligated to pay on a valid claim presented by the "fee finder."

AS 34.45.700 provides that "[a]n agreement to pay compensation to recover or assist in the recovery of property reported under AS 34.45.280, made within 24 months after the date payment or delivery is made under AS 34.45.290, is unenforceable."

According to a section-by-section analysis of the Act prepared by the Department of Revenue, Division of Audit, on October 2, 1985, AS 34.45.700 "provides the department 24 months in which to locate owners of abandoned property before permitting heir finders access to the department's records of unclaimed property." This analysis appears, however, to conflict with another section of the Act and with other statutory provisions regarding open records.¹⁵

AS 34.45.370(a) provides in part:

Before making the deposit [of money received under the Act], the department shall record the name and last known address of each person appearing from

¹⁵ See also the answer to question 10 above.

the holders' reports to be entitled to the property *The department shall make the record available for public inspection at all reasonable business hours.*

(Emphasis added.)

AS 09.25.110(a) provides in part:

Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.

(Emphasis added.)

AS 09.25.120 provides in part:

Every person has a right to inspect a public record in the state, including public records in recorders' offices except . . . (4) records required to be kept confidential by a federal law or regulation or by state law[.]

(Emphasis added.)

While AS 09.25.110(a) and 09.25.120 provide for exceptions to the strong bias in favor of broad public access, the terms of the Act itself appear to be inconsistent with respect to the issue of whether a "fee finder" may have access to the department's unclaimed property records.

It could be that AS 34.45.700 is not intended to mean what the Department of Revenue interpreted it to mean. The statute talks essentially about the enforceability of a contract - - presumably entered into between a finder and a person entitled to the unclaimed property. It does not talk about the issue of the finder's authority to access public records. Rather, the statute appears to be aimed at protecting owners from overzealous "fee finders."

Therefore, based upon the strong public policy favoring access to public records (See *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584 (Alaska 1990), and AS 34.45.370, requiring the department to make unclaimed property

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records available for public inspection), this office concludes that "fee finders" are entitled to receive a listing of unclaimed warrants recorded under AS 34.45.370. The same conclusion applies to warrants stale-dated under AS 37.05.180.

We hope this responds to your questions. If there is anything further you require, or any amplification needed, please contact us.

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