[J-20-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RONALD J. SMOLOW, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS AND ENTITIES SIMILARLY SITUATED,	:	No. 32 MAP 2005
Appellant	:	Appeal from the Order of the Commonwealth Court entered on 2/9/05 at No. 208 MD 2004
v.	:	
BARBARA HAFER, TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA AND TREASURY DEPARTMENT OF COMMONWEALTH OF PENNSYLVANIA,	:	
Appellees	:	ARGUED: March 5, 2008

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: NOVEMBER 19, 2008**

As the majority observes, other courts are divided on the subject matter of this appeal, namely, whether a state implementing a scheme of custodial escheat for unclaimed property may appropriate interest earned on reclaimed funds. Compare Suever v. Connell, No. C 03-00156 RS, slip op., 2007 WL 3010423, at *7 (N.D. Cal. Oct. 12, 2007), with Simon v. Wiessman, No. 04-941, 2007 WL 2461707, at *8 (E.D. Pa. Aug. 27, 2007). The majority, however, makes relatively short work of the question. Notably, although its analysis rests integrally upon a concept of presumed negligence on the part of property owners subject to the operation of the custodial escheat statute,

see Majority Opinion, slip op. at 8-9, the majority does not pause to discuss the justification for such a presumption or the availability (or non-availability) of due process protections available under the statute to those subject to its operation who are not, in fact, negligent. Cf. Suever v. Connell, No. C 03-00156 RS, slip op., 2007 WL 3313954, at *1 (N.D.Cal. Nov. 6, 2007) ("Having unequivocally declared that it is holding the property on behalf of its true owner, the state cannot thereafter constitutionally refuse to return interest that is, under long established common law principles, part of that property, at least without a clearly delineated statutory scheme that, with adequate due process protections, justifies permanent escheat of the interest." (emphasis deleted)).[1]

Although I do not necessarily disagree with the majority's decision on the merits to the extent that it is read as rejecting only a facial (as opposed to as-applied) constitutional attack on the statute as implemented by the Department, left to my own devices, I would not reach the merits of Appellant's arguments at this juncture. Rather, I believe the Commonwealth Court should have considered the general principle that courts will not address debatable constitutional challenges where there is an alternate basis for disposition. See Commonwealth v. Hughes, 581 Pa. 274, 312 n.24, 865 A.2d 761, 783 n.24 (2004) (collecting cases).[2] Had it applied this principle, the court would have deferred decision on Smolow's constitutional claim pending consideration of

[1] The majority's suitcase-of-cash example can be contrasted with a continuum of other situations in which an owner may not have the present ability to monitor his or her property, such as circumstances of medical incapacity or inheritance of unknown assets.

[2] It occurs to me that the consistent application of this prudential sort of approach to the review is particularly preferable in cases reaching this Court via direct appeal, as it ensures that appeals as of right are appropriately framed and developed for the appellate review. Notably, in the direct-review matters, this Court does not have the ability to pre-screen the cases based upon suitability considerations, as it does on the discretionary review docket.

whether the Commonwealth's expenses in the administration of his property and claim were equal to or exceeded his interest claim. This matter has been raised by the Department and is an issue Smolow agrees could be dispositive. See Brief for Appellant at 33. Moreover, it is noteworthy that the federal district court presiding over the federal claims asserted by Smolow considered the net-loss question as a threshold one, rejecting Smolow's individual claims on the basis that he suffered no net loss prior to consideration of the constitutional challenge maintained by substitute named plaintiffs. See Smolow v. Hafer, 513 F. Supp. 2d 418, 437 (E.D. Pa. 2007). Indeed, the majority finds it obvious that Smolow could not have suffered a loss, albeit as an alternative basis for its disposition, set forth in a closing footnote. See Majority Opinion, slip op. at 11 n.12.

In summary, I believe that the most prudential approach to this appeal would be to enforce the application of the settled approach of screening for grounds for resolution alternative to addressing a debatable constitutional claim, particularly since this would clarify whether the decision on the constitutional question is in any way meaningful to the party in interest. Notably, again, the majority ultimately concludes that its own decision simply is not. See id.