

UPdate Alert

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Delaware Litigation UPdate

Current Unclaimed Property Litigation Involving Delaware

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Here are updates on the four similar lawsuits brought against Delaware during December 2019.¹ All four cases are related to Delaware unclaimed property audits. At the end of this UPdate Alert is a matrix illustrating the complaints alleged in each original lawsuit.

AT&T Capital Services, Inc. et al. v. Geisenberger et al.

On July 10, 2020, the outstanding administrative subpoena for records was quashed in the case *State of Delaware, Department of Finance v. AT&T Inc.*,² for multiple reasons. The case was heard in the Delaware Chancery Court. The requests to stay were denied. The request to dismiss was denied. The judge noted “the scope of the subpoena is so expansive that enforcement would constitute abuse.” Also, noting with Kelmar being compensated on a contingent fee basis it is incited to “engage in aggressive enforcement tactics” and to gain information for its own use, as Kelmar represents other states. The opinion noted the Department can pursue an appeal or craft a new subpoena.

The state subsequently requested to reargue regarding the subpoena. There was a swift thirty-three page Order Denying a Motion for Reargument, citing the “Court will deny a motion for reargument that does no more than restate a party's prior arguments.” Additionally, a party cannot use a motion for reargument to “present arguments or evidence that could have been presented before the court entered the order from which reargument is sought.” Ultimately, concluding the court did not misapprehend the law applicable to this case. The motion for reargument was denied.

Eaton Corporation et al. v. Geisenberger et al. (Eaton) *Fruit of the Loom, Inc. et al. v. Geisenberger et al. (FOTL)* *Siemens USA Holdings, Inc. v. Geisenberger et al. (Siemens)*

On September 15, 2020, the United States District Court for the District of Delaware addressed three related declaratory judgment actions: referred to as *Eaton*,³ *FOTL*,⁴ and *Siemens*,⁵ in the Memorandum Opinion. All three cases raise similar issues regarding audits being conducted under Delaware's Escheat Law.

In each action, the Defendants filed a motion to dismiss and the plaintiffs each filed motions for preliminary injunction. As the parties have agreed the cases are related and each set of briefs makes similar arguments; all motions are addressed here. (As necessary, any unique arguments and issues were considered.)

¹ For more information on these cases, refer to <https://www.linkingasets.com/update-newsletter/Linking-Assets-Inc.-UPdate-May-2020.pdf>

² 2020 WL 3888310 (Del. Ch. July 10, 2020)

³ *Eaton v. Geisenberger et al*, C.A. No. 19-2269

⁴ *Fruit of the Loom, Inc. et al v. Geisenberger et al*, C.A. No. 19-2273

⁵ *Siemens v. Geisenberger et al*, C.A. No. 19-2284

The Court found the Plaintiffs' substantive due process and federal preemption claims are not ripe; however, their procedural due process and Fourth Amendment claims are. Further, the Court elaborate the State of Delaware is entitled to sovereign immunity on all claims asserted against it; and the Plaintiffs failed to state claims for procedural due process or Fourth Amendment violations regarding the lack of review by a neutral arbiter before the State Escheator terminating the expedite election.

With some interesting discussion citing both the commonalities with *Univar*⁶ and *Plains*⁷ related to the State's use of contingent fee auditors the Defendants argued Kelmar's new fee arrangement obviates Eaton and Siemens' procedural due process claims based on the use contingent-fee auditors, the Court disagrees, partially because the fee arrangements are set up by contract and not statute. Moreover, there are not any assurances the State will not enter a contingency fee payment arrangement in the future. While the character of Defendants' past violations and current actions leaves the Court with doubts as to their commitment to ending contingent fee compensation.

The Court noted the Plaintiffs had failed to establish they would suffer irreparable harm without preliminary injunctive relief, the Court denied the Plaintiff's motion for a Temporary Restraining Order and Preliminary Injunction, at this time. Should circumstances change and Plaintiffs are in a position where irreparable harm is present, injunctive relief could be sought then.

While ripe for a decision, the Court concluded the Plaintiffs termination of being in the expedited audit program is not a loss to possessing a right. Partially based on based on the Supreme Court's prior instruction, "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Therefore, the Court finds the Plaintiffs have failed to state Fourth Amendment seizure or search claims based on being terminated from the expedited audit program. Additionally, the Court concluded *Siemens* does not derive the necessary property interest for a Fourth Amendment seizure claim based on its advance payment.

⁶ *Univar, Inc. v. Geisenberger*, 409 F. Supp. 3d 273

⁷ *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534

⁸ *Marathon Petroleum Corp. v. Secretary of Finance. for Delaware*, 876 F.3d 481 (December 4, 2017)

The Court stated it is satisfied the Plaintiffs' contentions and supporting claims are sufficient to support procedural due process claims that the Plaintiffs are required to submit to non-neutral adjudicators for their unclaimed property audits. Instead, the state has appointed third-party contingent fee auditors to conduct its audits.

Escheat or Cheat?

“In other words, it appears that many observers - not to mention targeted parties - have come to think "escheat" should be written without the initial "es."”

The Opinion quoted from *Marathon*,⁸ stating, “In fact, it has been pointed out that Delaware in particular 'relies on decidedly old-fashioned methods for providing notice of escheatment, methods that are unlikely to be effective.’⁹” Further stating, “In other words, it appears that many observers - not to mention targeted parties - have come to think "escheat" should be written without the initial "es.””

Motions to dismiss in *Eaton*, *FOTL*, and *Siemens* are each granted-in-part and denied-in-part and Plaintiffs' motions for preliminary injunctions in *Eaton*, *FOTL*, and *Siemens*, are each denied.

The Court has ordered the Plaintiffs (including Eaton, FOTL, and Siemens) and the Defendants shall file a joint two page letter directly with the Court, within five days of the issuance of the opinion, articulating their proposals for how these cases should move forward on the remaining claims.

⁹ Which quotes in part *Taylor, et al. v. Betty Yee Alito* 15-169_1a72 (02/29/2016), Justice Alito with Justice Thomas joined concurring in the denial of certiorari

This matrix summarizes the various original complaints alleged in the *AT&T*, *Eaton*, *FOTL*, and *Siemens* lawsuits:

Case	Listed in Complaints
AT&T Eaton Fruit of the Loom Siemens	Federal preemption violation ignores relying on debtor's books and records to establish actual obligations in determining priority regime established in <i>Texas v. New Jersey</i> ; applies the use of estimation, though "statistical surrogates" were rejected by the Supreme Court. - In <i>Siemens</i> : if two states can establish the existence of unclaimed property through extrapolating the same property, then a holder would be compelled to report and remit the same estimated property to two different states. - Siemens had previously settled past due liabilities to New York, Defendants included property with NY addresses in extrapolations. Thereby, interfering with NY's sovereign rights to settle unclaimed property liabilities.
AT&T Eaton Fruit of the Loom Siemens	Substantive due process violations made in the various cases include: - extensive lookback period (in the case of AT&T it was 27 years) - ex post facto, while the majority of the audit period in question Delaware had no document retention requirements or associated penalties for not keeping sufficient records - lack of an opportunity to present every available defense - audit conducted by a self-interested party - findings are estimates so cannot defend against individual claims and difficult for owners to recover.
AT&T Eaton Fruit of the Loom	Procedural due process, participation in Delaware's expedited audit program was terminated without the opportunity for the right to be heard or review by a neutral arbiter; thereby, denying the Plaintiff the opportunity to defend against this in contradiction to the Fourteenth Amendment.
Eaton Fruit of the Loom Siemens	DUPL violation, the DUPL does not allow for a review of the termination of the expedited audit, Plaintiff alleges this violates the Fourth Amendment. Also, with penalties and interest calculated as a percentage of the audit liability from the time the property was due and payable through the date paid, these will continue to accrue until the conclusion of the audit.
AT&T	Procedural due process violations primarily based on not being granted the right to be heard, DUPL "fails to satisfy the commands of the due process clause by depriving a person of property without any opportunity for a hearing" either pre-deprivation or post-deprivation violating the Fourteenth Amendment.
AT&T	Unconstitutional taking violating the Fifth Amendment requires just compensation for the taking of private property for public use.
AT&T	Unreasonable search and seizure violation, Delaware's audit is an unreasonable, warrantless search and seizure of AT&T's non-public documents violating the Fourth Amendment.
AT&T	Equal protection violation, the Fourteenth Amendment prohibits states from denying equal protection, DUPL does not specify selection for audit targets; but rather, it is alleged that Kelmar and Delaware "look for "large and famous" companies that they believe will produce a large amount of money for the State's General Fund."
AT&T	Void for vagueness violation, the DUPL allows the vague right to "use a reasonable method of estimation" if insufficient records are available. Also, the unconstitutionality with respect to estimation is further reinforced by Delaware broadly delegating its authority to a self-interested auditor.
AT&T	Additionally, AT&T requested the Court to exercise discretion and require the Defendants to pay reasonable attorneys' fees, if it prevails.
Fruit of the Loom	Procedural due process concerns, as audit is being conducted by a self-interested party and "when no property escheatable to Delaware was found IAG [Innovative Advocates Group] selected new populations of mere journal entries for Plaintiff to research without first identifying a record of debt."