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Cases to Watch



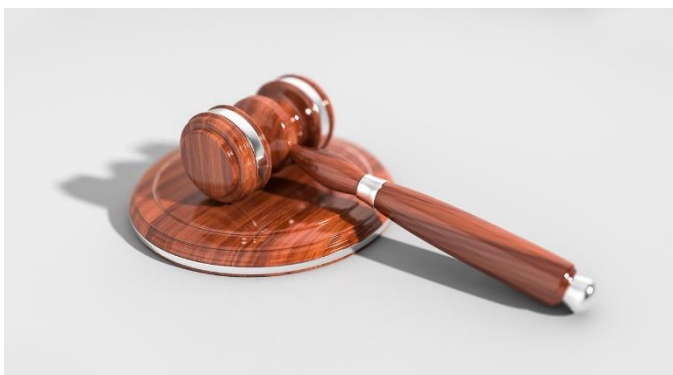
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*Linking Assets Inc. UPdate* periodically provides articles and information regarding legislation, regulatory, compliance, and/or associated developments. Keeping you informed about unclaimed property, search and location, owner outreach, and related areas of interest.

### Unclaimed Property Cases to Watch

By *Christa DeOliveira, CIA, CCEP*

For many of us our daily lives have been impacted during this time of COVID-19. Not surprisingly, courts have slowed. However, there are unclaimed property cases wending their way through the courts. This summary focuses on some of the key current cases with unclaimed property implications.



#### ***State of New York ex rel. Raw Data Analytics LLC v. JP Morgan Chase & Co. et al., Defendants***

This is a qui tam action where a relator brought a qui tam or whistleblower action against JP Morgan Chase and specified affiliates; alleging JP Morgan Chase violated New York's False Claims Act (FCA) by way of not self-assessing and proactively remitting interest for late reported unclaimed property.

The defendants argued it was at the discretion of the Office of the State Comptroller to determine whether to assess interest. Therefore, by not self-assessing and reporting interest it does not rise to the level needed under New York's FCA. Further, the relator alleged that for the required reports, the defendants neglected to calculate and pay, self-assessed interest on any properties that were reported and remitted late. Moreover, the relator alleges each year the defendants' reports contained false statements due to the defendants verifying the statements as true and accurate. They did this by completing and signing the required Verification Checklist, even though the purportedly missing interest or underpaid interest was not paid. The relator also alleges the defendants, at times, falsely represented the last date of contact on the holder reports.

To address a question from a July 6, 2017, court order, the New York Office of State Comptroller (OSC) responded in a December 22, 2017, letter. In part, the letter noted, "With regard to the period January 1, 2005 to February 19, 2015, what was the Comptroller's interpretation of Abandoned Property Law Section 1412 relating to any obligation of banks to self-calculate and pay interest when they escheated abandoned property late?" Likewise, the OSC's letter cited § 1412 (1) and (2) of the Abandoned Property Law (APL), and specified, the "direction provided by the

Office of the State Comptroller's Office of Unclaimed Funds (OUF) during the relevant time period noted the potential imposition of interest at the discretion of the Comptroller." The letter also referenced the OSC's Handbook for Reporters of Unclaimed Funds. On this topic the Handbook reads:

#### Interest Charges for Late Payment or Delivery of Abandoned Property

If you are late paying or delivering abandoned property, you may be assessed late filing interest. Interest is 10% per year from the date payment or delivery was due to the date you make the payment or delivery. Interest on securities is based on the closing price of the securities, on the tenth day of the month in which delivery was due. Refer to APL §1412.<sup>1</sup>

In contrast, New York's Office of Attorney General (OAG) submitted a letter dated May 14, 2018, regarding arguments in the motions. In this letter, the OAG stated the defendants "incorrectly characterize the interest obligation under Abandoned Property Law § 1412 as discretionary and contingent."<sup>2</sup> Also, the OAG's letter went on to say the "defendants are incorrect in concluding that the alleged violation was not material."<sup>3</sup> These contrasting views of the OAG and the OSC clearly illustrates the agencies are not in agreement regarding the legal interpretations and/or practices at issue.

The Supreme Court of the State of New York, County of New York stated the New York abandoned property law is "abundantly clear," requiring for holders altogether failing to report and remit unclaimed property or are late in doing so shall pay interest to New York. JP Morgan Chase has appealed this decision.

This ruling leaves unanswered questions.<sup>4</sup> The case is worthy of monitoring for future developments to provide holders with the knowledge to be informed and take any appropriate actions. Additionally, holders can

increase proactive measures to reduce unclaimed property, late or otherwise.

### **Univar**

There have been a series of Univar cases<sup>5</sup> relating to an audit notice which was originally sent in 2015. Records back to 1991 were requested by third-party (at the time) contingency fee audit firm, Kelmar. Univar has repeatedly refused to comply with these records requests as defined responsibilities and restrictions related to concerns over privacy and confidentiality of its records remain unaddressed to Univar's satisfaction.

In a complaint filed in December 2018 in U.S. District Court for the District of Delaware to enjoin Delaware from having its third-party audit firm, conduct the audit. Multiple constitutional violations were asserted including:

- The method of paying the third-party auditor on a contingent fee basis; citing Kelmar being a self-interested third party.<sup>6</sup>
- The retroactive use of the subpoena power.
- The estimation process violates Univar's substantive due process rights by relying on prior unclaimed property filings in states not participating in the audit, which subjects Univar to multiple liabilities for the same unclaimed property.
- Estimations are being sought to be applied retroactively, after the law allowing them was enacted.
- The estimation process itself amounts to an unconstitutional taking of Univar's property for public use without just compensation. This is due to taking Univar's property and not a transfer of owners' property to be held in the custody of Delaware.
- The methodology used by the third-party auditor.<sup>7</sup>
- Univar also maintained that the multi-state audit potentially exposed its confidential information to

<sup>1</sup> New York State Office of the State Comptroller, *Handbook for Reporters of Unclaimed Funds*, last modified August 20, 2019, <https://osc.state.ny.us/ouf/reporters/files/oufhandbook.pdf>, page 10.

<sup>2</sup> NY State Courts Electronic Filing [NYSCEF] Doc No. 61.

<sup>3</sup> NYSCEF Doc No. 62.

<sup>4</sup> <https://www.linkedin.com/pulse/unclaimed-property-gui-tam-lawsuit-moves-forward-new-christa/>

<sup>5</sup> Including: *Univar Inc. v. Richard J. Geisenberger, et al, State of Delaware, Dept. of Finance v. Univar, Inc.* and *State of Delaware Department of Finance v. Univar, Inc.*

<sup>6</sup> "Kelmar's financial incentive to claim as much escheatable property as possible taints the entire process with an appearance of self-interested overreaching." *Marathon Petroleum Corporation; Speedway LLC; Marathon Prepaid Card LLC; Speedway Prepaid Card LLC, Appellants v. Secretary of Finance for Delaware, et al.*

<sup>7</sup> See also *Temple-Inland Inc. v. Cook*, No. 1:14-cv-00654

other states because of the states' public disclosure laws.

-Another argument is that the states are violating the equal protection clause, based on audit selection focusing on wealthy companies.

Some of the premise of Univar's arguments include the law granting Delaware subpoena power did not go into effect until 2017 and is being retroactively applied to periods before that. Univar has requested details of the audit methodology or the states' audit manuals. Kelmar the third-party audit firm for this audit rejects this request based on protecting proprietary data.

The most recent development in this case is the May 21, 2020, decision of the Court of Chancery of Delaware in State of Delaware, *Department of Finance v. Univar, Inc.* The decision denied Univar's motion to dismiss Delaware's enforcement an administrative subpoena compelling Univar to produce certain corporate books and records based on the case not being ripe for adjudication. The opinion stated Univar has not complied with the examination and this has led to litigation in this Court and the United States District Court for the District of Delaware.

Delaware contended any such prerequisites have been satisfied and the case is ripe for adjudication. The judge determined Univar has not met its burden to demonstrate, "as a matter of law, that the claims asserted here are not ripe."

***Joseph M. Torsella, in his official capacity as the Treasurer of the Commonwealth v. PPL***

At issue in this case is what exactly constitutes a holder's books and records and how they can or must be provided during an unclaimed property audit. In the seminal *Texas v. New Jersey* case, the Supreme Court ruled unclaimed property reporting should be based on a holder's books and records.

What is not clear in *Texas v. New Jersey* is when a holder is under an unclaimed property audit, how the records must be conveyed. Is it required that records must be supplied electronically? Pennsylvania law allows for books and records to be examined; however, it does not specify records must be produced or transferred, neither does it specify any type of format, such as a

requirement to provide records electronically.<sup>8</sup> Additionally, it is under dispute whether all records need to be included or just records related to the state or states that are being audited.

PPL has offered onsite review of unredacted records on a local computer. However, Pennsylvania Treasury office has rejected solution. Instead, asserting this would hamstring the auditors review and analysis of the records and undermine the audit.

Lastly, there are legitimate concerns surrounding data privacy laws and risks to turning over electronic data, specifically, electronic data that is not redacted to withholding personally identifiable information. In addition to any risks with security breaches and privacy, there are now risks associated with CCPA, GDPR, and other state and federal privacy laws. Further, not all states have restrictions on what records can be release in a FOIA request.

The most recent development in this case is the unreported opinion decided on May 6, 2020, and published on May 20, 2020 in *Torsella v. PPL Corp.*, Commonwealth Court of Pennsylvania. The decision was related to PPL's filing a preliminary objection and the Treasurer's preliminary objection. The Treasurer's preliminary objection was sustained in part and PPL's preliminary objection was struck in part.

The remaining open questions are whether the Treasurer has the statutory authority necessary to compel the production of records in an electronic format, particularly records containing sensitive shareholder records with personally identifiable information. As well as whether the Treasurer has the authority to conduct any cross-checks on the records. Parties have been instructed to brief what remains.

***Matter of Mackenzie Hughes LLP et al., Petitioners v. New York State Tax Appeals Tribunal et al., Respondents***

This state tax case was heard in the New York Supreme Court, Appellate Division court. In this case the three-factor standard in determining the constitutionality of the application of a retroactive tax law. The ruling decided that a retroactive decertification of tax credits violated the taxpayer's due process rights.

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<sup>8</sup> 72 P.S. § 1301.23

In a growing number of suits against Delaware, it is cited that Delaware, or its auditors as agents, are attempting to apply laws changes retroactively. Commonly, there are objections to the retroactive application of laws, including: the requirement to retain records, the escheat of foreign property, subpoena power, and the use of estimation.

**The following four cases are all suits against Delaware and have many similarities.**

Holders are not done pushing back on Delaware. In all four of these cases the audits had a long lookback window, the expedited audit was terminated (see graphic below), or the audit had reached an impasse.

Plaintiff	Expedited Audit Terminated	Third Party Auditor
AT&T Capital Services, Inc., et al.	Y	Kelmar Associates
Eaton Corporation, et al.	Y	Kelmar Associates
Fruit of the Loom, et al.	Y	Innovative Advocates Group
Siemens USA Holdings, Inc., et al.	N	Kelmar Associates

Presumably, because of these and other cases being filed, Kelmar is no longer compensated on a contingent fee basis. This begs the question, will this become the new normal for Delaware auditors? Will alternate compensation models spread to other states? Curiously, Delaware has engaged two different law firms to help defend these cases.

All these cases are ongoing with the plaintiffs and the defendants filing various briefs and motions.

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

In a complaint filed on December 6, 2019, AT&T seeks declaratory judgement and injunctive relief. AT&T alleges Delaware, through its agent and auditor, have violated its constitutional rights in 10 different ways:

1. Unreasonable search and seizure- Delaware’s audit is an unreasonable, warrantless search and seizure of AT&T’s non-public documents violating the Fourth Amendment.
2. Procedural due process violation- based on not being granted the right to be heard, Delaware Unclaimed Property Law (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.
3. Substantive due process violation- 27-year lookback period, while for much of this time there was no statutory duty to retain record.
4. Procedural due process- protectable property interest, both in the forms of
  - a. The money and corporate resources that will need to be expended “if is forced to comply with the Defendants’ limitless,<sup>9</sup> irrational Audit” and
  - b. Confidential business information- information that Kelmar intends to share with other states and any associated public disclosure requirements/laws of the other states.
5. Ex post facto- for the majority of the audit period in question Delaware had no document retention requirements or associated penalties for not keeping sufficient records.
6. Unconstitutional taking- the Fifth Amendment requires just compensation for the taking of private property for public use.
7. Equal protection- the Fourteenth Amendment prohibits states from denying equal protection, Delaware’s Unclaimed Property Law (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.”
8. Void for vagueness- 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

<sup>9</sup> AT&T estimates extensive disbursement records request would take 23.6 years to complete. Therefore, on November 27, 2018 AT&T objected to the request. After some negotiating on the scope, Kelmar demanded quarterly cumulative bank statements and reconciliations, as well as bank generated paid, outstanding, and void check listing for all accounts for each of the 34 entities under audit, back to the year

1992. The request continues to demand data related to all checks issued from every check-disbursing bank account for 34 separate entities, for over 20 years. It also demands names and street addresses for all payees, including addresses outside of Delaware.

its authority to a self-interested auditor. The complaint goes on to state,

The power to define a vague law is effectively left to those who enforce it, and, as set forth herein, private auditors who enforce the DUPL operate without court oversight in a setting of unconstitutional secrecy and informality. The vagueness of the DUPL—coupled with its absence of any standards to apply and enforce the law—facilitates prejudiced, arbitrary, discriminatory, and overreaching exercises of state authority by Delaware’s delegates. Delaware’s delegation of authority is so extensive that it has led to arbitrary and overreaching assessments of liability for unclaimed property, such as in the case of Temple-Inland.

9. Violation of Federal Common Law Preemption- in *Delaware v. New York* the Supreme Court decided the priority rules established in *Texas v. New Jersey* could not be supplanted by “statistical surrogates.” Additionally, doing so potentially exposes AT&T to multiple liabilities for the same property in disagreement with the Full Faith and Credit Clause.
10. Attorney’s Fees- AT&T requests the Court to exercise discretion and require the Defendants to pay reasonable attorneys’ fees if it prevails.

***Eaton Corporation et al. v. Geisenberger et al.***

In a complaint filed on December 12, 2019, Eaton alleges four counts of violations of its constitutional rights. Eaton seeks declaratory judgement and preliminary and permanent injunctions. The alleged four counts of constitutional violation are:

1. Federal Preemption- audit/estimation process does not establish actual obligations; ignores establishing the creditor-debtor relationship, ignores priority regime established in *Texas v. New Jersey*; applies the use of estimation, though rejected by the Supreme Court; and subjects Eaton to multiple liability.
2. Substantive Due Process- violation of the Fourteenth Amendment as “an opportunity to present every available defense” is not possible
  - a. Delaware law did not require record retention for all the covered periods,

- b. Also applying this is retroactively enforced and in contradiction to Delaware’s statute of limitations
  - c. The lack of records denies Plaintiffs the ability to defend against individual claims, and
  - d. Further, estimations are not tied to individual owners and this makes it difficult for owners to claim property.
3. Procedural Due Process- Eaton’s participation in Delaware’s expedited audit program was terminated without the opportunity for review by a neutral arbiter; thereby, denying the Plaintiff the opportunity to defend against this in contradiction to the Fourteenth Amendment.
4. Violation- As the DUPL does not allow for a review of the termination of the expedited audit, Plaintiff alleges this violates the Fourth Amendment.
  - a. 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.

***Fruit of the Loom, Inc. et al. v. Geisenberger et al.***

On December 13, 2019, Fruit of the Loom filed a complaint citing four counts of violations of its constitutional rights. Fruit of the Loom seeks declaratory judgement and preliminary and permanent injunctions. The alleged four counts of constitutional violation are:

1. Federal Preemption- ignores relying on debtor’s books and records in determining priority regime established in *Texas v. New Jersey*; applies the use of estimation, though “statistical surrogates” were rejected by the Supreme Court; and subjects Fruit of the Loom to multiple liability.
2. Substantive Due Process- violation of the Fourteenth Amendment as “an opportunity to present every available defense” is not possible.
  - a. Most of the findings were estimates are not tied back to individual owners; this lack of records denies Plaintiff the ability to defend against individual claims.
  - b. Additionally, this makes it difficult for owners to claim property.
3. Procedural Due Process- Fruit of the Loom’s participation in Delaware’s expedited audit program was terminated without the opportunity

for review by a neutral arbiter; thereby, denying the Plaintiff the opportunity to defend against this in contradiction to the Fourteenth Amendment. The audit is being conducted by a self-interested party. Also, “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.”

4. Violation- As the DUPL does not allow for a review of the termination of the expedited audit, Plaintiff asserts this violates the Fourth Amendment.
  - a. 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.

***Siemens USA Holdings, Inc. v. Geisenberger et al.***

In its December 17, 2019, complaint Siemens seeks declaratory judgement and injunctive relief. Further, Siemens seeks a refund of the overpaid funds deposited as “an advance payment against findings of liability by Delaware’s auditors, which findings have now been finalized.” Siemens seeks to reclaim at least \$5,638,785 of an initial deposit of \$7.4 million.

The complaint lists four different counts of constitutional violations:

1. Federal Preemption- audit/estimation process does not establish actual obligations; ignores establishing the creditor-debtor relationship, ignores priority regime established in *Texas v. New Jersey*; applies the use of estimation, though rejected by the Supreme Court; and subjects Siemens to multiple liability.
  - a. 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.
  - b. Plaintiff previously had settled past due liabilities to New York State through 2014; although, Defendants included property with New York addresses in their extrapolations. Thereby, interfering with New York’s sovereign rights to settle unclaimed property liabilities.

2. Substantive Due Process- violation of the Fourteenth Amendment as “an opportunity to present every available defense” is not possible
  - a. The lack of records denies Plaintiff the ability to defend against individual claims,
  - b. Further, estimations are not tied to individual owners and this makes it difficult for owners to claim property, and
  - c. Moreover, the audit is being conducted by a self-interested party.
3. Procedural Due Process- Eaton’s participation in Delaware’s expedited audit program was terminated without the opportunity for review by a neutral arbiter; thereby, denying the Plaintiff the opportunity to defend against this in contradiction to the Fourteenth Amendment.
4. Violation- As the DUPL does not allow for a review of the termination of the expedited audit, Plaintiff alleges this violates the Fourth Amendment.
  - a. Additionally, 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.

Ultimately, it is anticipated together AT&T, Eaton, Fruit of the Loom, and Siemens are likely to change the environment of unclaimed property audits for Delaware and possibly beyond. It will be interesting to continue to monitor the future developments of all of these and other cases germane to unclaimed property.



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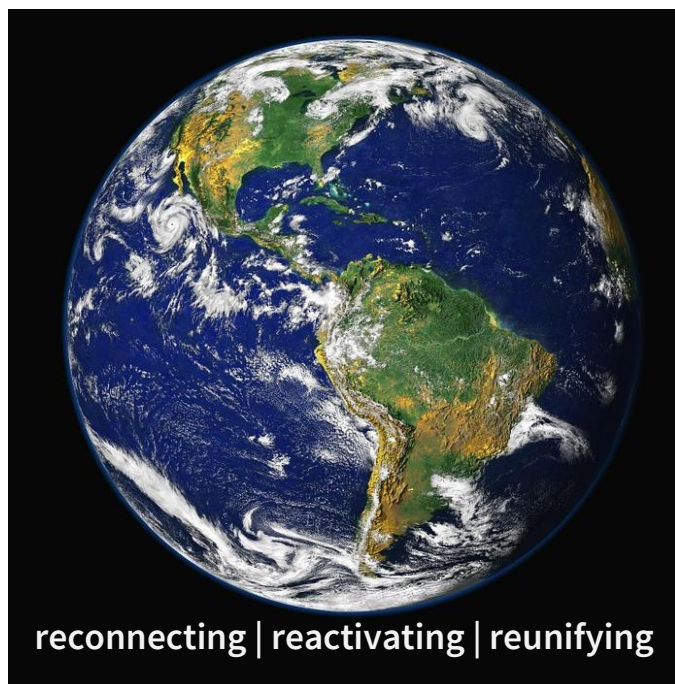
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