



Unclaimed Property ADVISORY ■

AUGUST 9, 2016

Settlement in *Temple-Inland* After District Court Declared Delaware's Estimation Methodology Unconstitutional

On August 5, 2016, plaintiff Temple-Inland Inc. and defendants Delaware Secretary of Finance, State Escheator and Abandoned Property Audit Manager filed a joint motion to dismiss with prejudice the *Temple-Inland Inc. v. Cook*, No. 1:14-cv-00654, action. The motion to dismiss was filed pursuant to a voluntary settlement agreement, which puts to rest Temple-Inland's claims arising out of Delaware's controversial estimation methodology, and comes just over a month after the U.S. District Court for the District of Delaware found that Delaware's estimation practices violated due process. The decision to dismiss the action is disappointing for those that hoped for a decision from the Third Circuit once and for all striking down Delaware's current estimation practices as unconstitutional. Nevertheless, the voluntary settlement agreement is very good news for holders, especially those that are currently under audit or participating in a voluntary disclosure agreement with the state.

Background

In 2014, Temple-Inland filed a complaint in the District of Delaware challenging Delaware's estimation methodology used by the state to estimate Temple-Inland's unclaimed property liability under the Delaware Escheats Law, specifically Section 1155. In its complaint, Temple-Inland alleged various violations of the U.S. Constitution.¹ Delaware filed a motion to dismiss the action. The district court granted Delaware's motion on Temple-Inland's federal common law claim, but allowed the case to move forward on the constitutional claims. The parties filed cross motions for summary judgment on Temple-Inland's claims that Delaware's estimation techniques violated substantive due process, the takings clause and the ex post facto clause.

On June 28, 2016, the district court granted Temple-Inland's motion for summary judgment on its substantive due process claim.² The court's opinion focused on Delaware's practices during the audit, including its current estimation methodology, which the court held "shocked the conscience" in violation of substantive due process. In his opinion,

¹ For additional background and facts, see our prior advisories: "[Delaware's First Published Administrative Appeals Decision Addresses Validity of Estimation Techniques](#)" and "[Temple-Inland District Court Denies Delaware's Motion to Dismiss – Looks Good for Temple-Inland and Holders.](#)"

² For complete discussion of the district court's decision, see: "[Delaware's Estimation Practices Declared Unconstitutional in Recent Temple-Inland Decision.](#)"

Judge Gregory M. Sleet criticized Delaware's estimation methodology as "contrary to the fundamental principle of estimation" and stated that it created "significantly misleading results" by using unclaimed property owed to residents of other states to extrapolate unclaimed property owed to Delaware.

The Settlement Agreement

We understand that under the settlement agreement, Delaware agreed to withdraw its entire assessment of Temple-Inland's unclaimed property liability to Delaware, which totaled \$2,128,834.13. Delaware also agreed to pay Temple-Inland's attorneys' fees and costs, including expert witness reports and copying costs.

Alston & Bird Observations

Although the settlement means that holders will not receive guidance from the Third Circuit in the immediate future regarding Delaware's use of estimation, the settlement is nonetheless clearly good news for holders. Most obviously, the settlement is a complete and total victory for Temple-Inland, which not only got the assessment withdrawn in its entirety, but also got its fees and costs paid. As a result, the settlement is almost certain to lead to more litigation, as more and more holders—encouraged by Temple-Inland's favorable settlement and Judge Sleet's decision—challenge the state's estimation methodology in audits or voluntary disclosure agreements. The calculus is particularly favorable for holders given that Judge Sleet's decision, which remains the only published court decision to have considered Delaware's estimation methodology, found that the methodology created "significantly misleading results," "is contrary to the fundamental principle of estimation" and (at least as applied to Temple-Inland) was unconstitutional.

Thus, although Delaware presumably thought that a settlement would buy it a little time and perhaps induce some holders in audits and VDAs to consent to the use of the old estimation methodology, it is difficult to imagine a holder with any significant assessment simply paying up at this point. As a result, we predict that sooner or later (and probably sooner) the same issue will be before the Third Circuit in another case. Alternatively, the state could buckle under pressure and voluntarily cease or limit its aggressive estimation practices—though any significant self-reform appears exceedingly unlikely given Delaware's heavy reliance on revenues from unclaimed property. One way or another, therefore, Delaware will be forced to address its administrative practices.

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