



Unclaimed Property ADVISORY ■

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Delaware's Escheats Law Faces Due Process Challenge

In 2015, following Delaware's commencement of an unclaimed property audit of Plains All American Pipeline, that holder initiated a lawsuit in the U.S. District Court for the District of Delaware seeking declaratory judgment that the proposed audit was unconstitutional because the proposed audit and components of the state's Escheats Law violated the Fourth Amendment and the Ex Post Facto, Due Process, Equal Protection, and Takings Clauses of the U.S. Constitution.

The state defendants moved for dismissal of all claims, and in August 2016, the district court granted the defendants' motion to dismiss [Plains All American Pipeline LLP v. Cook](#). In part, the court said the plaintiffs brought their suit based on potential and not actual threats – the case was not “ripe” because the state had not conducted its audit yet (i.e., no assessment of liability had been issued, nor had subpoenas been issued by the state to enforce audit-related document requests). Hence, while Plains anticipated that Delaware's outsourcing of its audit to a contingent-fee contract audit firm, Kelmar Associates, would violate Plains's due process rights, and that the audit practices of Kelmar and Delaware (including the estimation of liability) would violate other constitutional mandates, there were no actual injuries to present to the court for its consideration.

In addition, the district court dismissed Kelmar from the lawsuit because a judgment against Kelmar could not redress its proposed injuries. In essence, while unclaimed property audits can be time intensive, expensive, and administratively burdensome, the district court opinion suggested that [holders would need to engage in the audit process](#) in order to develop a sufficient factual record to support their claims before litigating.

Plains appealed this decision to the Third Circuit Court of Appeals, and on Aug. 9, 2017, that court reversed the dismissal of Plains's procedural due process claim while affirming the district court's dismissal in all other respects. The court's decision begins with a statement that seemed to foreshadow a more welcoming review of the plaintiff's claims, if not the due process ruling itself: “[I]n recent years, state escheat laws have come under assault for being exploited to raise revenue rather than reunite abandoned property with its owners. Delaware's Escheats, or Unclaimed Property, Law is no exception....”

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The court applied a three-part test it had articulated in an earlier case to assess whether any of the plaintiff's claims were ripe for judicial review:

- (1) Whether the parties' interests were adverse (i.e., will harm result if declaratory judgment is not entered?).
- (2) Whether judgment in the matter would be conclusive (i.e., is there a real controversy where specific relief could be provided by the court?).
- (3) Whether judgment in the matter would be useful (i.e., will the parties' plans/actions be affected by the judgment, and can the judgment affect others?).

The court wrote, "We hold that the District Court improperly concluded that Plains's as-applied procedural due process claim is not justiciable. To establish a due process violation, all Plains must show is that it was required to submit a dispute to a self-interested party." Kelmar was identified as the self-interested party for purposes of this analysis "because Kelmar has been vested with responsibility for conducting the Plains audit and has issued document demands." As for the other two prongs of the test, the court concluded that a ruling on the procedural due process claim could be issued by a court at this stage of the examination, and such ruling would have impact on the plaintiff as well as other holders. Lastly, the court stated that the state defendants had not identified any "exceptional circumstances" that would override this justiciability analysis. The case is now remanded to the district court for review of the procedural due process claim.

What are the implications of this development for holders, both those under audit by Delaware and those that may in the future undergo such an examination?

- **Continuing Litigation of the Plains Due Process Claim:** This development is *not* a ruling that outsourcing an audit to a financially interested contract audit firm per se violates holders' procedural due process – there is potentially a long road ahead for the parties to this case, with the prospect of having to conduct discovery in order to secure evidence from and about other holders' treatment by Delaware and Kelmar (since Plains does not yet have its own facts to present to the court).
- **Pending Delaware Contract-Firm Audits:** Holders currently under audit by Delaware – whether the audit is conducted by Kelmar Associates or another of Delaware's stable of contract audit firms – may well be considering an election to convert to a VDA if the recently amended Escheats Law election is available to them; but if not, they will need to consider whether this development provides any real opportunity to slow down or even halt their audit or otherwise to secure concessions from the state in the context of audits that have proceeded.

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Please direct any questions to the following members of Alston & Bird’s Unclaimed Property Group:

John L. Coalson, Jr.
john.coalson@alston.com
404.881.7482

Ethan D. Millar
ethan.millar@alston.com
213.293.7258

Michael M. Giovannini
michael.giovannini@alston.com
704.444.1189

Matthew P. Hedstrom
matt.hedstrom@alston.com
212.210.9533

Andrew W. Yates
andy.yates@alston.com
404.881.7677

Maryann H. Luongo
maryann.luongo@alston.com
202.239.3675

Kendall L. Houghton
kendall.houghton@alston.com
202.239.3673

Kathleen S. Cornett
kathleen.cornett@alston.com
404.881.4445

ALSTON & BIRD

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, CA 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333