



Unclaimed Property ADVISORY ■

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Delaware's Escheats Law Is Back in Court

On December 3, 2018, Univar Inc. filed a complaint in the U.S. District Court for the District of Delaware seeking to enjoin Delaware from continuing to conduct an unclaimed property audit through a third-party auditor, Kelmar Associates LLC, and seeking declaratory judgment that the audit violates Delaware's Escheats Law, federal common law, the Fourth Amendment, and the Ex Post Facto, Due Process, Equal Protection, and Takings Clauses of the U.S. Constitution.

Delaware notified Univar in December 2015 that it was the subject of an unclaimed property audit for years going back to 1991, which would be conducted by Kelmar as the state's agent. Univar objected to the audit on multiple grounds, and spent over two years going back and forth with Delaware and Kelmar disputing the legitimacy of the audit and Kelmar's audit procedures. On October 30, 2018, Delaware issued Univar a subpoena requesting the information sought by Kelmar in its initial document request, which Univar had not yet provided. (The 2017 amendments to Delaware's Escheats Law makes explicit that the State Escheator has the authority to subpoena records.) In response, Univar filed this lawsuit to enjoin the audit.

Univar makes several statutory and constitutional claims, including:

- The use of a third-party auditor engaged in a multistate audit, which leads to Kelmar's sharing of confidential information with other states, violates the confidentiality provisions in Delaware's Escheats Law.
- The retroactive application of estimation of liability to audit years for which Univar lacks sufficient records, even though Delaware law does not require Univar to keep those records, violates the Ex Post Facto Clause.
- The selection of Univar for audit based on "perceived profitability" violates equal protection.
- 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.

- The estimation process is an unconstitutional taking of Univar's property for public use without just compensation because it results in a taking of Univar's own property, rather than a transfer of others' property to be held in trust by Delaware.
- Delaware's engagement of Kelmar to conduct the audit on a contingency-fee basis violates Univar's procedural due process rights by requiring it to submit disputes to a self-interested party.

Univar's complaint will look familiar to those who have been following *Plains All American Pipeline LP v. Cook*. In 2015, Plains brought suit against Delaware in federal court seeking a declaratory judgment that the proposed audit, which was also outsourced to Kelmar, was unconstitutional. Plains made many of the same claims that Univar is making. The district court dismissed all of Plains's claims, holding that they were not yet ripe because the state had not conducted its audit yet. Last year, the Third Circuit reversed the dismissal of Plains's claim that vesting a contingency-fee auditor, as a self-interested party, with authority to conduct an audit and demand documents violates procedural due process, holding that this claim was ripe for judicial review. But the circuit court affirmed the dismissal of all the other claims. Plains later converted its audit into the Delaware voluntary disclosure program, mooting the contingency-fee auditor issue.

While Univar is not the first holder to challenge Delaware's audit conduct and use of estimation methodologies (see also *Temple-Inland v. Cook*), it appears to be the first holder to seek to enjoin an unclaimed property audit after Delaware amended its unclaimed property statute in February 2017 to address some of the apparent constitutional deficiencies associated with its audit program. Univar alleges that Section 1172(a) of Delaware's amended Escheats Law, which authorizes the state to "use a reasonable method of estimation" if the holder lacks sufficient records, is so vague that it violates the Due Process Clause. Univar also alleges that applying Section 1172(a) retroactively to estimate Univar's liability violates the Ex Post Facto and Due Process Clauses of the Constitution.

Delaware will likely file a motion to dismiss Univar's lawsuit on ripeness grounds. Univar argues that its claims are ripe under the standards set by the Third Circuit in *Plains All American*. In that case, the Third Circuit noted that most of Plains's claims were not ripe because it brought suit "before Delaware assessed liability based on its audit or sought a subpoena to make its audit-related document requests enforceable." Here, Univar brought suit after receiving a subpoena from Delaware, so it appears to be in a better position than Plains.

We will closely follow this case to see if it leads a federal court to finally address the constitutionality of Delaware's problematic unclaimed property audit process following the 2017 statutory amendments.

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