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Unclaimed Property ADVISORY ■

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False Claims Act Is Again in Focus, This Time in New York

In a decision that will be hard to ignore, on August 30, 2019, the Supreme Court of the State of New York, County of New York, ruled that the defendants, an international bank and various of its affiliates, were not entitled to judgment as a matter of law for their failure to self-assess and pay interest on late-reported unclaimed property under New York's False Claims Act (FCA).[1] The court's ruling allows the qui tam lawsuit against the defendants to continue and could have broader implications for unclaimed property holders that report unclaimed property to New York. In particular, this decision creates a new risk that holders must consider and possibly creates increased compliance obligations to report potentially applicable interest in the absence of an assessment from the state.

Background

The relator brought this qui tam action on behalf of New York in 2015 pursuant to the FCA alleging that since at least 2005, the defendants as holders of unclaimed property failed to pay statutory interest to New York on unclaimed property that was not timely turned over to the state. Notably, as is statutorily permissible under the FCA, the Office of the New York State Attorney General (OAG) had an opportunity to intervene in this FCA action but declined to do so.

The chief contention advanced by the relator was that the defendants failed to pay (or underpaid) interest to the Office of the State Comptroller (OSC) under the New York Abandoned Property Law (APL) after the defendants were late in reporting certain items of unclaimed property to the OSC. The relator argued that the APL required the defendants to pay interest to the OSC and that the defendants were statutorily *required* to self-assess and remit this interest payment to the OSC rather than wait for the OSC to issue an assessment. The relator contended that in each year at issue, when the defendants submitted reports with the OSC, they failed to state their obligation to pay interest (or stated that the defendants owed less interest than was due) but nonetheless verified the reports as true and accurate. Under the relator's argument, the defendants' reports constituted the submission of false documents for the purpose of avoiding payment of interest to New York. In addition, the relator alleged that the defendants falsely represented the date of

[1] The case in question is *State of New York ex rel. Raw Data Analytics LLC v. JP Morgan Chase & Co.*

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last customer contact on their reports, which is the relevant date for determining whether the property was timely reported.

In filing their motion to dismiss, the defendants, in part, argued that the imposition of interest was within the discretion of the OSC and thus was a "contingent obligation." Because the OSC could choose when to impose the interest (and had, in fact, *not* imposed it on the items in question), the defendants argued that the failure to self-assess was not actionable under the FCA. To support this argument, the defendants relied on what they classified as permissive language contained in the OSC's various published guidance, specifically that the OSC "can charge" interest and that "interest charges may also apply for late payment or delivery of abandoned property."

In seeking to interpret the language of the APL, the court sought guidance from the OSC itself. The OSC responded to the court's request and submitted a letter stating that "during the relevant time period… the potential imposition of interest [was] at the discretion of the Comptroller," consistent with the defendants' argument. On the other hand, however, the OAG submitted a letter to the court stating that the defendants were incorrect in characterizing their interest obligation as discretionary and contingent. The OAG also disagreed that the violation was not material.

After the OSC issued its letter to the court, the court converted the defendants' motion to dismiss into a motion for summary judgment and addressed the question of whether the defendants had an obligation to pay interest on the late filing of unclaimed property.

The Court's Decision

Notwithstanding the various arguments presented by the defendants and the letter submitted by the OSC in support of the defendants' interpretation of the statute, the court denied the defendants' motion for summary judgment, which was premised on the argument that the defendants did not have an obligation to pay late-filing interest. In denying the defendants' motion, the court relied upon the language of the APL and concluded that it is "abundantly clear" that a holder of unclaimed property that fails to turn over the property or is late in turning over property to New York "shall pay… interest" to the state. Further, the court found that the APL's language is "free from ambiguity and doubt," which foreclosed the defendants' argument that the court should rely upon OSC guidance to determine their interest obligation. Finally, the court stated that the OSC's discretionary ability to waive the late-filing interest is "the exception and not the rule," and therefore the late-filing interest always applies, unless the OSC decides otherwise. Accordingly, the court concluded that "defendants are unable to meet their prima facie burden to establish that there was no obligation to pay late filing interest or to accurately report information related to same."

What's Next?

As a result of the denial of the defendants' motion for summary judgment, the unclaimed property qui tam action will go forward. However, that does not necessarily mean that the defendants will be found to have violated the FCA. One of the issues that will be litigated is whether the defendants' statutory violation was material in nature. On this issue, the court held that further factual development was necessary. In addition, the relator will need to prove that the defendants had the necessary scienter for liability under

the FCA, which generally requires willfulness or recklessness. The defendants will likely again point to the OSC's published guidance, as well as the industrywide practice not to self-assess and remit interest with the report, as evidence that they lacked scienter in this regard. Indeed, in our experience, holders of unclaimed property routinely do not report or remit any interest along with their reports, but instead pay (or seek abatement/contest the validity of) such interest if, and when, an assessment is issued by the state.

That said, holders of unclaimed property cannot ignore the ramifications of the decision, even if they feel it was wrongly decided at the summary judgment stage and/or that the defendants will ultimately prevail. Instead, holders of unclaimed property should consider whether to start affirmatively self-assessing and remitting interest to the OSC along with reports that contain late-filed property until the issue is resolved through the courts or via a statutory amendment clearly stating that holders of unclaimed property need not self-assess interest. A holder of unclaimed property might also consider making certain disclosures on its annual report that could be effective in defending against a possible FCA-based claim. Finally, holders of unclaimed property may want to consider whether they are at risk of a qui tam lawsuit (or perhaps regulatory action) in other states with similar statutory interest regimes.

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