



## Unclaimed Property ADVISORY ■

**SEPTEMBER 20, 2019**

### Univar, Chapter Two: Only a Pair of Constitutional Claims Survive Dismissal (For Now)

In what turns out to be Chapter 2 of an unfolding epic ([see our prior coverage of the \*Univar\* litigation](#)), the U.S. District Court for the District of Delaware [ruled](#) on September 17 that Univar’s procedural due process and equal protection challenges to its Delaware unclaimed property audit survive the state’s motion to dismiss, though the court dismissed Univar’s numerous other claims as unripe.

- Univar’s procedural due process claim is based on the allegation that Delaware is requiring Univar to submit to an audit by a private firm—Kelmar Associates LLC—with a financial stake in the outcome of the audit. Univar’s complaint contends that “Kelmar has a hand in the audit process from the selection of targets through the determination of the final unreported unclaimed property total and then receives its compensation based on money calculated and escheated.” This claim was ripe, in the district court’s view, because “the state of Delaware has engaged Kelmar as a third-party auditor ... and Kelmar has already taken part in lengthy discussions with the Plaintiff to begin its audit.” The court also held that Univar had sufficiently stated a claim for which relief may be granted because Univar had alleged that Kelmar is a self-interested party adjudicating Univar’s unclaimed property audit.
- The equal protection claim is premised on Univar’s allegation that Kelmar develops a list of wealthy companies for Delaware to target for audit, with the goal of generating significant revenue. Univar argued that the extent to which a company was “large and famous” had “no rational relationship to the purpose of” the unclaimed property law. Relying on the [Plains All American](#) ruling by the Third Circuit, the district court found that the equal protection claim ripened once Univar was targeted for audit by Delaware. The court also held that Univar had sufficiently stated a claim for which relief may be granted because Delaware had “offered no legitimate purpose for the selection of wealthy companies” such as Univar “aside from raising revenue.”
- Addressing Univar’s other claims—consisting of unreasonable search and seizure, substantive due process, ex post facto, unconstitutional taking, preemption, etc.—the court stated that “[c]urrently, there is no certainty that [Univar] will be subjected to the challenged provisions of the audit” despite the fact that the state had issued a subpoena and sought to enforce it. The court found it significant that the chancery court had not yet ruled on Delaware’s enforcement action.

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- In addition, the court found that any constitutional injury stemming from Delaware's use of its traditional estimation methodology was "contingent upon it actually being used against" Univar and was thus theoretical, a result consistent with the Third Circuit's prior ruling in *Plains All American*.

Although the district court held that the procedural due process and equal protection claims were ripe, the court nonetheless exercised its discretion to stay the case until the Delaware Chancery Court rules on whether the state's subpoena of Univar's records is enforceable.

- If the subpoena is held to be unenforceable, the district court noted that Univar would remain in the same posture as the plaintiffs in [Marathon Petroleum](#) and *Plains All American*, former litigants that challenged similar audit tactics by the state and its auditor, where Univar can "simply refuse to cooperate" with the audit.
- On the other hand, if the subpoena is held to be enforceable, then Univar would be subject to the audit, and discovery on Univar's procedural due process and equal protection claims would presumably commence. Furthermore, certain of Univar's claims that the court dismissed due to lack of ripeness—for example, its challenge to the state's retroactive enforcement of the 2017 subpoena statute to a company whose audit commenced in 2015—might then become ripe for review, in which case the district court indicated that such claims could be reasserted by Univar.

Notably, the chancery court granted Univar's motion to stay proceedings in April of this year pending the district court's review of Univar's constitutional claims. With this ruling, the federal court has lobbed the ball back to the state court, under the judicial doctrine of comity. Stay tuned for Chapter 3, wherein the chancery court fields the subpoena enforceability question upon which further chapters may be predicated.

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

John L. Coalson, Jr. 404.881.7482 john.coalson@alston.com	Kendall L. Houghton 202.239.3673 kendall.houghton@alston.com
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Kathleen S. Cornett 404.881.4445 kathleen.cornett@alston.com	Joshua A. Labat 212.210.9569 josh.labat@alston.com
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Michael M. Giovannini 704.444.1189 michael.giovannini@alston.com	Maryann H. Luongo 202.239.3675 maryann.luongo@alston.com
--	--

Matthew P. Hedstrom 212.210.9533 matt.hedstrom@alston.com	Ethan D. Millar 213.293.7258 ethan.millar@alston.com
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Andrew W. Yates  
404.881.7677  
andy.yates@alston.com

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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: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, TX 75201 ■ 214.922.3400 ■ Fax: 214.922.3899  
 LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA ■ +44.0.20.3823.2225  
 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  
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 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: 950 Page Mill Road ■ Palo Alto, CA 94304-1012 ■ 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