



## Unclaimed Property ADVISORY ■

**OCTOBER 11, 2019**

### Unclaimed Property Update: A Qui Tam Win for Holders, New Federal Common-Law Ruling, an Appeal Is Filed in NY Qui Tam, and a Possible California Amnesty Program

There is never a dull moment in the world of unclaimed property. Just in the past few weeks, there have been several significant unclaimed property developments that may have broad implications for holders.

#### **Qui Tam Action Against CVS and CardFact Dismissed**

On August 7, 2017, in *Delaware ex rel. French v. CVS Health Corporation, et al.*, No. N17C-07-313, relator Sean French, a former employee of CardFact, filed a qui tam action against CVS, CardFact, and other defendants, alleging that the defendants violated the Delaware False Claims and Reporting Act (DFCRA) by not reporting unredeemed gift cards to Delaware. The defendants filed a motion to dismiss on various grounds. On September 24, 2019, Judge Wallace [granted](#) the motion to dismiss, holding that the claims against CVS were barred under the DFCRA because CVS was under audit by the state of Delaware for its gift card program at the time the qui tam was filed. The court also held that the same provision of the DFCRA also barred the relator's claims against CardFact and the other defendants because a suit against them would provide "no useful or proper return to the State because it is inarguably based upon the precise same allegations or transactions at issue in the State Escheator's CVS examination and CVS's [voluntary disclosure agreement with the Secretary of State]." Alston & Bird is representing CVS in this litigation.

#### **Federal Court Weighs In on Federal Common-Law Escheat Rules and Removal**

On May 29, 2019, in *Yee v. ClubCorp Holdings Inc., et al.*, No. 3:19-cv-03953, the California State Controller's Office (SCO) filed an action against ClubCorp and its affiliates, seeking an injunction to audit the defendants and a declaratory judgment that membership initiation deposits constitute unclaimed property. The defendants removed to federal court, arguing that the SCO's claims raised significant questions of federal law based on the federal common-law rules created by the U.S. Supreme Court in *Texas v. New Jersey* and *Delaware v. New York* for determining when states have jurisdiction to escheat unclaimed property. The SCO moved to remand the case to state court, arguing that the federal common-law rules applied only to interstate disputes. On October 3, 2019, the U.S. District Court for the Northern District of California granted

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the motion to remand. However, the court's decision is ultimately another victory for holders since the court held that "Because these [U.S. Supreme Court] decisions impact what property a state may escheat, and may not be superseded by states, they naturally affect every state's escheatment laws. *In order to adjudicate escheatment claims, then, all states necessarily have to apply federal common law.*"

The court also specifically took issue with a provision of California's unclaimed property law (which is based on the Uniform Unclaimed Property Act) that allows California to escheat property if "[n]o address of the apparent owner appears on the records of the holder and the last known address of the apparent owner is in this state ... Cal. Civ. Proc. Code § 1510(b)." The court recognized that "This would allow the Controller to use information other than the records of the holder to ascertain the address of the owner. ClubCorp points out, and this order agrees, that this addition by the UPL may not be in line with the federal common law rules." Yet, the court held that this potential dispute was insufficient to justify removal here. The court also held that the SCO did not dispute ClubCorp's other federal common-law arguments (e.g., that California can only escheat debts from debtors), and therefore these issues did not give rise to removal. Finally, the court held that the defendants' argument that the state's actions violate federal common law is a defense rather than an element of the SCO's claim, and so does not support removal. At the same time, the court was clear: "If an audit should go beyond the scope of a legitimate inquiry, ClubCorp is able to raise this as a defense before the state judge." Alston & Bird is representing ClubCorp in this litigation.

## Holder Appeals Qui Tam Ruling

A relator sued an international bank and certain affiliates in the Supreme Court of the State of New York, County of New York,<sup>1</sup> alleging that the defendants violated New York's False Claims Act (NYFCA) by not self-assessing and paying interest on late-reported unclaimed property. The defendants filed a motion to dismiss (which was converted into a motion for summary judgment), arguing that the imposition of interest was within the discretion of the Office of the State Comptroller and therefore the defendants' failure to self-assess could not give rise to liability under the NYFCA. As we previously discussed ([see False Claims Act Is Again in Focus, This Time in New York](#) (Sept. 10, 2019)), the court denied the motion, concluding 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. On October 3, 2019, the defendants appealed this decision and order to the Appellate Division, First Judicial Department.

## Possible California Amnesty Program

On September 27, 2019, California Senate Bill 109 was signed into law. That bill—[the Budget Act of 2019](#)—includes a provision that states: "On or before March 1, 2020, the Controller shall provide the Joint Legislative Budget Committee and the chairpersons of the fiscal committees in each house of the Legislature with a report on plans to provide for a one-time unclaimed property amnesty, or other options to increase compliance with unclaimed property law in lieu of an amnesty program, and options for increasing the return of unclaimed property to rightful owners." This is a promising development and suggests that it is likely that California will adopt a "one-time" amnesty program next year.

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<sup>1</sup> *State of New York ex rel. Raw Data Analytics LLC v. JP Morgan Chase & Co.*

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Alston & Bird offers clients unparalleled experience dealing with issues involving state unclaimed property/escheat laws. Our five senior attorneys with unclaimed property experience together have more than 85 years of experience advising major corporations on unclaimed property matters. We assist our clients in analyzing complex legal issues, obtaining legal opinions, conducting multistate/multi-entity internal compliance reviews, designing corporate compliance policies, advising clients on planning and related restructurings, negotiating voluntary disclosure agreements, defending single-state and multistate audits, litigating unclaimed property issues, and influencing unclaimed property policy and administration.

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