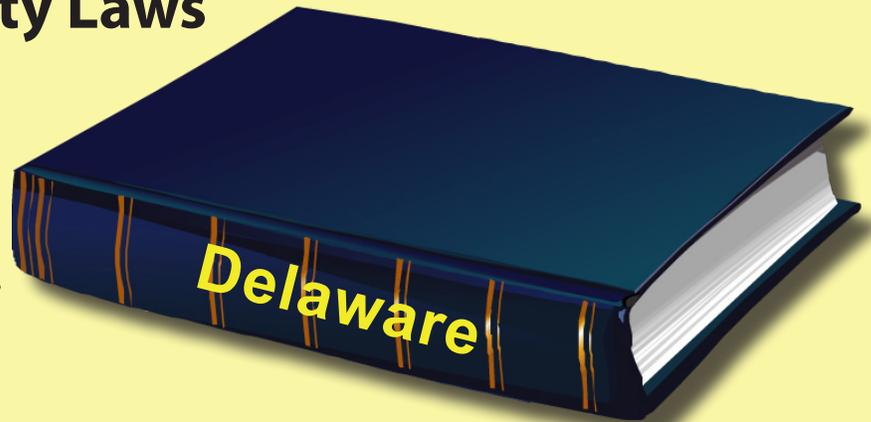


Delaware Further Reforms Its Unclaimed Property Laws

By Rafael X. Zahralddin-Aravena, Esq.
Eric Suttly, Esq.
of Elliott Greenleaf



On July 1, 2015, Delaware passed far-reaching reforms to its unclaimed property laws in the form of Senate Bill 141. The legislation makes Delaware's voluntary disclosure program ("VDA"), which allows corporations to avoid Delaware's contract audits under the Department of Revenue, permanent. This is the second of two bills introduced this legislative session affecting Delaware's unclaimed property laws and comes as Delaware faces new legal challenges to its unclaimed property program.

Delaware receives unclaimed property from a mix of voluntary reporting from corporations and enforcement audits. Unclaimed property has been a revenue boon to Delaware for years, bringing in more than \$500 million annually and funding as much as fifteen percent of the state's annual budget.

Earlier this year, on January 29, 2015, Senate Bill No. 11 was signed into law and limited Delaware's retention and use of unclaimed property contingent fee auditors, amended the appeal process relating to unclaimed property, and required the State to promulgate a manual and create standards governing the conduct of unclaimed property examinations.

The recent bill, Senate Bill No. 141, provides that no Delaware company can be audited by the State unless the company has first been notified in writing by the Delaware Secretary of State that it may enter into a voluntary disclosure program administered by the Secretary of State ("SOS"). This effectively extends Delaware's VDA program, which has been in place for several years and allows companies to voluntarily assess their potential liability for review by the State, with shorter "look-back" periods than those employed in audits by the State's contingent fee contract auditors, which typically look-back to 1981.

Under Senate Bill No. 141, if a company does not enter into the SOS VDA program within 60 days after a request

to enter has been mailed by the Delaware Secretary of State, the company "will be referred to the State Escheator for examination". Also, effective July 1, 2015, the Delaware Division of Revenue will no longer unilaterally select companies for audit. Rather, only those companies that have received the express written invitation to enter the SOS VDA program, and have had the chance to voluntarily report their unclaimed property liability to Delaware – and declined to participate – will be subject to an audit by the State.

These legislative developments come as Delaware faces an increasing number of challenges to its unclaimed property laws. As previously noted by Elliott Greenleaf, United States District Court Judge Sue Robinson issued a memorandum decision in March of this year in the case of *Temple-Inland, Inc. v. Cook*, No. 1:14-cv-00654-SLR (D. Del. March 11, 2015). In that matter, Temple Inland Inc., a division of International Paper Co., filed the suit in federal court to contest a \$1.4 million audit demand based mostly on technical estimates of unclaimed property liability dating back to 1986. In the opinion, Judge Robinson refused to dismiss the lawsuit that argued Delaware's practice of estimating a corporation's unclaimed property liability is unlawful and violates constitutional due process rights. A trial is currently scheduled for January 11, 2016.

Another recent challenge to Delaware's unclaimed property laws has come from two Belgian scientists. On July 9, 2015, Gilles Gosselin and Jean Louis Imbach, two research scientists in Brussels, commenced a lawsuit in Delaware's Court of Chancery against state Finance Secretary Thomas Cook, Deputy Finance Secretary David M. Gregor, former finance secretaries Richard S. Cordrey and Gary M. Pfeiffer and former deputy finance secretary Mark E. Udinski. The lawsuit claims that asset management company Computershare Inc., wrongly surrendered their shares in Idenix Pharmaceuticals, Inc. to Delaware in January 2009, without notice or their knowledge.

The two scientists were allegedly told only in March 2011 that their stock was declared unclaimed property and given to Massachusetts. Later, they learned that the shares actually went to Delaware who had sold the stock years earlier. A month after Delaware acknowledged the sale, Merck & Co. Inc. began an acquisition of Idenix at a share price eight times higher than the amount Delaware collected for the shares. The scientists would have netted \$13,720,000, but Delaware officials offered to return only the \$1,695,851.75 collected from the sale.

The scientists seek more than a \$12 million recovery and punitive damages, and claim that Delaware wrongly sold their company shares as unclaimed property. The suit also seeks the court to declare some state abandoned property practices unconstitutional and “unlawful” under both state and federal law, as well as violations of a decades-old friendship treaty between the United States and Belgium. The time for the defendants to respond to the complaint has been extended.

The outcomes of these cases will impact Delaware’s unclaimed property laws and could result in more legislative changes in the near future.

About the authors:

Rafael X. Zahralddin-Aravena is the chair of Elliott Greenleaf’s Commercial Bankruptcy and Restructuring practice and a founding shareholder of the Wilmington, Delaware office. Mr. Zahralddin is a business lawyer who concentrates his practice in the areas of commercial litigation, bankruptcy and creditors’ rights, entity formation, and international and comparative law. He has also represented creditors in unclaimed property (escheat) matters.



Eric M. Suttty has experience in complex Chapter 11 reorganization and liquidation cases, and practices in many aspects of bankruptcy, representing unsecured creditors’ committees, equity committees, trustees, and unsecured creditors. Mr. Suttty represents reorganized debtors, committees, and trusts in bankruptcy related litigation, including preference actions and fraudulent conveyance actions. He has also represented creditors in unclaimed property (escheat) matters.