

## PARTIES COMPLETE BRIEFING ON UCC ISSUES IN *STAPLES* CASE; STATE ALSO FILES MOTION TO COMPEL

Staples, Inc. and the State of Delaware have completed their briefing on the issue of whether Staples's rebates related to the sale of goods are unclaimed property. Oral arguments are scheduled for December 19, 2011 in the Delaware Court of Chancery.

As part of Count I of its April 30, 2010 **Complaint**,<sup>1</sup> Staples seeks a declaratory judgment "that rebates, refunds, and other items related to the sale of goods are not unclaimed property . . ." (Complaint, ¶ 112). In its Complaint, Staples alleges that claims arising from the sale of inventory are subject to the 4-year statute of limitations under Delaware's Uniform Commercial Code (DUCC), which is a shorter period than the 5-year dormancy period under Delaware's abandoned and unclaimed property law. Staples contends the DUCC must override Delaware's unclaimed property law because "any other interpretation would produce the absurd result of enabling a business customer or vendor to wait 5 years and claim property from Delaware (as unclaimed property) that the customer/vendor could not lawfully have claimed from Staples because the 4-year statute of limitations had extinguished all claims [against Staples], known or unknown." (Complaint, ¶ 91).

On August 17, 2011, Delaware filed a motion for partial judgment on the pleadings, arguing in its **opening brief** that the concurrent 4-year and 5-year statutes of limitations do not lead to an absurd result, but rather are the result of the specific legislative intent of the Delaware General Assembly. The State argues that

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<sup>1</sup> Links to each of the pleadings mentioned are embedded within this Update and identified in bold/underlined text.

Delaware's unclaimed property law has its own statute of limitations (12 *Del. C.* § 1158) and includes a section entitled "Statutes of Limitations Not a Bar" (12 *Del. C.* § 1140), which, the State contends, undermines Staples's DUCC argument. The State also argues that there is a recognized public policy in favor of custodial escheat, and that a statute of limitations does not apply to the government as a sovereign unless the statute provides otherwise or the government has waived its immunity—neither of which apply here in the context of Delaware unclaimed property law generally or in the context of its examination of Staples specifically.

In response, on October 14, 2011, Staples filed a cross-motion for partial judgment on the pleadings. In its **answering brief**, Staples contends that the State has "incorrectly frame[d] the question presented as an issue of two conflicting statutes—the UCC's statute of limitations or [sic] the Delaware Escheat Law's dormancy period—and the State's sovereignty." (Staples's Ans. Br. at 8). Staples argues that the relevant question is whether rebates are even contained with the definition of "property" under Delaware law. Staples points to the language of Title 12, Section 1198(11)a, which excludes from the definition of "property" "any property, except the items specifically enumerated [in Section 1198(11)] . . . the right to recover which in a proceeding brought by the owner would be barred by any statute of limitations, state or federal . . ." Staples argues that this plain language of Section 1198(11)a, along with the application of the DUCC's statute of limitations, renders rebates not subject to escheatment. Staples also argues that, for several reasons, the plain language of Section 1198(11)a overcomes the policy arguments the State makes in favor of escheatment. Staples contends that this plain language reflects the General Assembly's specific intent, and that enforcing the language as argued for by Staples avoids an absurd result and reconciles the statute of limitations under the DUCC and Delaware's unclaimed property law.

The State of Delaware responded in an October 28, 2011 **reply brief**. The State argues that "[t]he fundamental flaw in Staples' argument is that it fails to analyze what

constitutes a ‘rebate,’ and thus ignores categories of property that are in fact enumerated in Section 1198(11) that are clearly applicable.” (State’s Reply Br. at 7). According to the State, Staples’s rebates fall within a least four specifically enumerated categories: bills of exchange, liquidated choses in action, credits, and money. The State draws on dictionary definitions and case law to argue that Staples’s rebates fit within each of these four categories, and thus receive no protection from Section 1198(11)a. In regards to the first category, the State argues that a “check” is a “bill of exchange” and that Staples’s own Complaint refers to Staples’s rebates as “rebate checks.” (Complaint, ¶ 90). The State also argues that because the rebates are in the form of checks, a 10-year statute of limitations applies, rather than the 4-year statute of limitations applicable to the sale of goods—and, consequently, “the property rights of the trust owners of the uncashed checks are very much alive when Staples becomes legally obligated to report and escheat such property to the State of Delaware.” (State’s Reply Br. at 20-21).

In its **final brief**, dated November 4, 2011, Staples reiterates its position that Section 1198(11)a exempts rebates from the definition of “property.” Staples points to the phrase “items specifically enumerated” and contends that the State is “try[ing] to fit a square peg in a round hole simply by calling rebates something else that *is* specifically enumerated in § 1198(11) . . . .” (Staples’s Sur-Reply Br. at 2). Staples argues that because the plain language of Section 1198(11) does not include rebates, rebates are not specifically enumerated therein. Staples

also argues that the motions pending before the Court are motions for judgment on the pleadings, and that nothing in the pleadings alleges or suggests that Staples is holding bills of exchange, liquidated choses in action, credits, or money. In response to the State’s argument that a 10-year statute of limitations applies, Staples points to the United States Supreme Court case of *Delaware v. New York*, 507 U.S. 490 (1993), which Staples contends demonstrates that the true nature of the property is to be determined by the underlying law that creates the property—here, Article 2 of the UCC, and its corresponding 4-year statute of limitations.

The Court of Chancery is scheduled to hear oral arguments on these issues on December 19, 2011, although the parties are now in a dispute regarding this date. Also now in the briefing phase is the State’s October 28, 2011 motion to compel the production of documents. In its **opening brief**, the State argues that the Court of Chancery’s discovery rules are sufficiently broad to require Staples to provide more meaningful responses to the State’s third set of document requests and interrogatories, and that Staples is evading its disclosure obligations and seeking to delay the litigation. (State’s Opening Br. for Mot. to Compel at 2). Staples has yet to file an answering brief.

Please contact Morris Nichols attorneys in the Unclaimed Property Counseling Group if you would like to discuss the implications of this development in the *Staples* litigation. We also will continue to provide updates as this litigation moves forward.

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