

## DELAWARE FILES MOTION AGAINST STAPLES FOR PARTIAL JUDGMENT ON THE PLEADINGS

The State of Delaware has filed a motion for partial judgment on the pleadings in the ongoing *Staples* litigation in the Delaware Court of Chancery.

Delaware's August 17, 2011 motion and supporting brief take issue with Staples' argument that Delaware's Uniform Commercial Code (DUCC) "trumps" Delaware's unclaimed property law.

In the *Staples* case, Delaware seeks to recover from Staples unclaimed property from several categories, including rebates and refunds. Among its arguments, Staples contends that some of this unclaimed property arose from the sale of goods between merchants and, thus, is governed by the DUCC, which has a 4-year statute of limitations. Staples asks how the State can claim this property after a 5-year dormancy period has run under the unclaimed property law if the DUCC gives the owners themselves only four years to bring a suit to recover the property from Staples. 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, known or unknown" (Complaint, ¶ 91).

Delaware's motion for partial judgment on the pleadings indicates that Delaware does not see the concurrent 4-year and 5-year statutes of limitations as an absurd result, but rather as the result of specific

legislative intent. The State argues that Delaware's unclaimed property law has its own statutes 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' DUCC argument. The State notes that while no Delaware court has yet interpreted or applied Section 1140, the majority of states have adopted similar or identical provisions—and in some of those states, courts have already ruled in favor of the position Delaware takes in this litigation.

Delaware contends there is a recognized public policy in favor of custodial escheat, bolstered by (i) Delaware's right to collect unclaimed property, independent from the owner's ability to collect the unclaimed property, (ii) the fact that a statute of limitations is a procedural device that influences a plaintiff's ability to seek recovery, not a substantive right, and (iii) the fact that in all events, a party barred (in this case by a statute of limitations) from recovering property from a holder through litigation can still recover the property by making a claim with the State—after the holder has escheated the property to Delaware. Delaware also argues 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.

Staples and Delaware are likely to enter into a stipulated briefing schedule (or the Court may order a schedule, if the parties cannot agree). Staples will have the opportunity to file an answering brief, and Delaware will then have the opportunity to file a reply brief. The Court may then hear oral arguments or decide the issue simply on the basis of the written briefs. A final decision on the motion may be rendered by late 2011 or early 2012. Regardless of how the Court rules, since Staples' complaint

includes several other counts, this litigation is likely to continue beyond any Court ruling on the issue of whether the DUCC overrides Delaware's unclaimed property laws.

Click on the following document titles to download a copy of Delaware's August 17, 2011 [motion](#) and [supporting brief](#) and Delaware's April 30, 2010 [verified complaint](#).

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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