

New Unclaimed Property Litigation Filed Against the State of Delaware Does Not Delay Another Round of VDA Invitations

The State of Delaware's unclaimed property program faces continued legal challenges from the holder community. In December 2019 alone, four new holders filed complaints in the U.S. District Court for the District of Delaware raising a series of constitutional challenges to Delaware's conduct of its unclaimed property audits. These new complaints in many ways mirror the lawsuit filed by Univar against Delaware at the end of 2018, picking up where the last wave of post-*Temple-Inland* lawsuits left off.

Univar, as well as the new cases, allege a number of constitutional claims against the State, including violations of substantive due process, violations of procedural due process, unreasonable search and seizure and an unconstitutional taking. These claims are largely based on two elements of Delaware's unclaimed property audit procedures – Delaware's estimation methodology and use of contingency fee contract auditors. In addition, several of the new complaints challenge Delaware's escheatment of foreign addressed property based on concerns of multiple liability and the retroactive application of Delaware's revised unclaimed property statute, 12 Del. C. ch. 11 ("Unclaimed Property Laws"), which was adopted in 2017.

This new litigation has not had a chilling effect on the State's continued initiative to encourage compliance with its Unclaimed Property Laws. In fact, Delaware's VDA Administrator sent an email yesterday advising holder advocates, such as the members of the Morris Nichols' Unclaimed Property Counseling Group, that invitations to enter into the State's Abandoned and Unclaimed Property Voluntary Disclosure Agreement Program ("VDA Program") will be mailed to more than 100 companies identified as likely being out of compliance with Delaware's Unclaimed Property Laws today.

To our clients and friends who are not already under an unclaimed property audit by the State of Delaware or enrolled in Delaware's VDA Program, we urge you to please watch your mail carefully for a letter from the Delaware Secretary of State. As a reminder, if an invitee does not enroll in the VDA Program within 60 days of the invitation's mailing, the company will be referred to the State Escheator for audit.

If you have any questions regarding this Alert, the pending lawsuits, or Delaware's unclaimed property program in general, please contact one of the members of the Morris Nichols Unclaimed Property Counseling Group identified below.

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