

PUBLICATION

Spotlight on Unclaimed Property: A Review of 2012 Significant Developments (So Far)

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The second half of 2012 is shaping up to be an important period for state legislation and other developments affecting the unclaimed property reporting obligations for holders. In this Spotlight we highlight just some of these developments.

Delaware

While Delaware is a preferred state for incorporations, it is also an aggressive (and often controversial) auditor and enforcer of the unclaimed property reporting obligations of Delaware corporations that are holders of unclaimed property. So far in 2012, Delaware has had several notable unclaimed property developments.

In late June, Delaware enacted a voluntary disclosure program for holders of unclaimed property that have not been mailed a "notice of examination," have not previously entered into a voluntary disclosure agreement with Delaware prior to July 1, 2012, and have not been compliant with their unclaimed property reporting obligations. If a holder comes forward and participates in the program, a limited "look-back period" to 1996 is applied to agreements concluded by June 30, 2014. A longer look-back period to 1993 applies for agreements entered into by June 30, 2015. This voluntary disclosure program provides an incentive to holders that have not complied with their Delaware unclaimed property reporting obligations -- in an audit examination, the look-back period is to 1981 or the year in which the holder became incorporated in Delaware, whichever is more recent.

The Delaware Department of Finance's Bureau of Unclaimed Property has also issued proposed regulations that limit the look-back period for holders currently under audit examination, or who become subject to audit before the effective date of the regulation. Under the proposed regulations, these holders will have a look-back period subject to audit back to January 1, 1986 (instead of 1981), but only if the examination is completed by June 15, 2015. For all other holders who become the subject of a Delaware unclaimed property audit after the effective date of the regulation and for all holders whose audits are not completed by June 15, 2015, the 1981 look-back period will remain.

Delaware shortened the dormancy period from five years to three years with respect to determining when securities are deemed abandoned (i.e., a three-year period during which the owner of a security has failed to claim dividends or communicated in writing with the holder about the security). By regulation, Delaware requires the owner of securities to have demonstrated "positive" contact with the issuer, broker, transfer agent or other holder of the securities during that three-year period. While depositing a dividend check is considered positive contact, reinvestment of dividends pursuant to a dividend reinvestment plan or direct deposit of dividends into the owner's bank account is not considered positive contact by Delaware. While Delaware now considers the mailing of a Form 1099 to shareholders sufficient positive contact, as long as the 1099 is not returned as undeliverable, Delaware's treatment of "security property" jeopardizes securities held pursuant to dividend reinvestment plans, tax-deferred accounts and by foreign owners. In addition, Delaware's administration of the securities dormancy period could conflict with SEC Rule 17Ad-17 and its due diligence requirements for identifying and locating "lost" shareholders.

Lastly, Delaware and Staples, Inc. recently settled their unclaimed property dispute in Delaware Chancery Court. In this case, Staples had challenged Delaware's (and its third-party contingent fee auditor's) controversial practices of estimating unclaimed property liabilities of holders for years back to 1981 in which records were no longer available. The terms of the settlement are confidential. Previously, the Chancery Court had issued a formal opinion in response to the state's motion and ruled that rebates issued by Staples were "bills of exchange" or "credits" and subject to escheatment.

Stored Value and Gift Cards

Following injunctions issued against New Jersey and its 2010 unclaimed property law provisions applicable to stored value cards (SVCs) and gift cards in the *New Jersey Retail Merchants* and *American Express Travel Related Services* cases, New Jersey has enacted S.B. 1928 and has revised how it will now treat SVCs for unclaimed property purposes. Under the new law, SVCs issued prior to July 1, 2010 are not subject to New Jersey's unclaimed property statute. For cards issued on or after July 1, 2010 for which there has been no activity for five years, the amount that must be escheated to New Jersey is 60 percent of the unredeemed value of the SVC. However, "general purpose reloadable cards" (i.e., cards issued by a bank or financial institution that can be used at multiple merchants and that can be "reloaded" by the user) are not included as SVCs subject to escheatment. In addition, promotional, incentive, loyalty, or reward cards for which the owner paid no direct monetary consideration for the card are exempt. The new law also repeals the "place of purchase" presumption and delays implementation of the data collection requirement for merchants (the requirement that they collect zip codes from purchasers of SVCs) for 49 months after the date of enactment or until July 1, 2016.

The parties in these cases have also petitioned the U.S. Supreme Court for writs of certiorari on other issues addressed in the New Jersey SVC cases. American Express Travel Related Services is asking the Supreme Court to decide that New Jersey's retroactive shortening of the dormancy period for unused travelers checks from 15 years to three years violated the Due Process Clause and also constituted an unconstitutional taking without just compensation. In a separate petition, the state has asked the Court to reverse the Federal Court of Appeals for the Third Circuit's decision that federal common law preempted New Jersey's point of sale priority rule for reporting dormant, unused SVC balances.

Michigan Legislation

With H.B. 4563, Michigan becomes the 14th state to have a "business-to-business" exemption. Under the exemption, the Michigan unclaimed property law will not apply "to any credit balances, overpayments, deposits, refunds, discounts, rebates, credit memos, or unidentified remittances created on or after April 1, 2009 and issued, held, or owing in any transactions between 2 or more associations."

Further, Michigan H.B. 5577 shortens the time period during which the unclaimed property administrator may bring an enforcement action with respect to unclaimed property of transactions between businesses, from 10 to five years. The law also reduces the record retention period for records of business transactions from a 10-year to a five-year retention period after property becomes reportable.

Other Developments

Kentucky has enacted legislation requiring life insurance companies to perform a regular comparison between current life insurance policies and retained asset accounts against the Social Security Administration's Death Master File to identify matches with insureds. The legislation is a response to litigation commenced (and settled) by California, Florida, Massachusetts and a number of other states against life insurance companies who had been found to have not been properly escheating unclaimed life insurance proceeds.

With the enactment of H.B. 462, North Carolina now bars the use of third-party auditors that are compensated by the Department of Revenue, Treasurer and local governments on a contingent fee basis. This new statute is effective October 1, 2012 and should include unclaimed property auditors. The state may not renew contingent fee contracts or enter into new contingent fee audit contracts after October 1, 2012.

If you would like to discuss these developments or other issues concerning unclaimed property, please contact one of the attorneys in the Firm's Tax Department.