

McCarter Achieves Significant Win In the Delaware Supreme Court for Overstock.com

Litigation Alert

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McCarter attorneys recently achieved a significant victory in the Delaware Supreme Court when the Court unanimously reversed a multi-million dollar judgment in a unique case involving both Delaware escheat law and a *qui tam* action.

On June 24, 2020, the Court unanimously reversed a multimillion-dollar judgment for treble damages, attorneys' fees, and civil penalties entered against Overstock.com, Inc., and in favor of the State of Delaware and a whistleblower in *State of Delaware ex rel. William Sean French v. Card Compliant, et al.*, Del. Superior Ct. Case No. N13C-06-289; Delaware Supreme Court Case No. 327, 2019. The case stems from a *qui tam* action brought under the Delaware False Claims & Reporting Act ("DFCRA," 6 Del. Code Sec. 1201 et seq.) and the Delaware Unclaimed Property Law ("DUPL," 12 Del. Code Secs. 1101-1224).

The Relator, who had previously worked for Ohio-based defendants CardFact, Ltd. and Card Compliant, Ltd., accused his former employers of creating shell companies and conspiring with numerous retailers (including Overstock.com) to evade obligations to report and return to Delaware the value of unclaimed/unused retail gift cards under the DUPL. The State intervened, alleging that the defendants attempted to circumvent DUPL reporting requirements by forming "cardco" entities in Ohio and Florida (where unredeemed gift card balances do not revert to state coffers), contractually assigning the retailer's existing obligation to cardholding customers to these entities, and thus terminating/evading the retailers' obligations to report and account for unclaimed property to the State of Delaware.

The retailer defendants moved for summary judgment, seeking dismissal of all claims in 2017. The defendants argued, among other things, that the assignments to non-Delaware "cardco" entities were legally valid and that the retailers had no duty to report or pay the value of the gift cards under Delaware's unclaimed property laws. They also argued that the failure to submit unclaimed property reports, even if required, was not a "false statement or record" under the relevant provision of the DFCRA in effect during the period at issue. The trial court denied the motion and most of the defendants settled with the State. Overstock.com was the only defendant to proceed to trial in the civil action.

Related People:

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After a six-day trial, the jury returned a verdict against Overstock.com, finding that Overstock.com violated the applicable provision of the DFCRA (the 2009 version of 6 Del C. Sec. 1201(a)(7)) in each of the years 2010, 2011, 2012, and 2013 by not filing unclaimed property reports with the State of Delaware. After statutory trebling, penalties, and attorneys' fees, the judgment liability against Overstock.com was in excess of \$7.5 million.

The Delaware Supreme Court, sitting *en banc*, unanimously reversed the judgment of the trial court. The Supreme Court addressed only one substantive issue in its ruling: that the evidence presented at trial failed to establish the making or use of a false statement under the applicable version of the DFCRA. Because the failure to file reports does not satisfy the Act's requirement that a false record or statement be made to avoid, conceal, or decrease and obligation to pay money to the government, the Delaware Supreme Court held that the jury award was based on an erroneous legal instruction and a failure of proof and it reversed the judgment.

The McCarter team representing Overstock.com included Michael P. Kelly and Matthew Wright and associates Hayley J. Reese and Matthew J. Rifino.