

Univar Defeats State of Delaware's First Attempt to Enforce Administrative Subpoena Since the State's 2017 Amendment of the Delaware Escheats Law

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Delaware Law Update

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State of Delaware, Dept. of Finance v. Univar, Inc., C.A. No. 2018-0884-JRS (Del. Ch. Apr. 8, 2019)

Abandoned property is a key source of revenue for the State of Delaware and regularly exceeds half a billion dollars annually. McCarter represents Univar, Inc., before state and federal courts in competing lawsuits that are challenging a critical tool used by the State of Delaware in enforcing the Delaware Escheats Law. The Univar litigation represents the first-known attempt by the State of Delaware to enforce its subpoena power under the Delaware Escheats Law since the General Assembly amended the law in 2017.

On April 8, 2019, the Delaware Court of Chancery granted Univar's motion to stay the State's complaint to enforce an administrative subpoena pursuant to the Delaware Escheats Law. The Court's ruling allows Univar to move forward with the declaratory judgment complaint that it filed in the United States District Court for the District of Delaware, in which Univar has argued that certain aspects of the Delaware Escheats Law are unconstitutional.

Factual Background

Univar and Delaware were engaged in a lengthy negotiation concerning Delaware's efforts to audit Univar's books and records to ensure compliance with the Delaware Escheats Law. In 2017, during the course of these negotiations, the Delaware General Assembly enacted legislation to amend the Delaware Escheats Law. On October 30, 2018, after nearly three years of discussion, Delaware issued an administrative subpoena to Univar pursuant to 12 Del. C. § 1171, which requested the production of a wide range of documents, including tax returns, balance statements, corporate structure, and payroll.

In December 2018, in response to the subpoena, Univar filed a lawsuit in the United States District Court for the District of Delaware. The lawsuit alleges that the Delaware Escheats Law violates Univar's rights under the United States Constitution, specifically stating that the law:

- Infringes on Univar's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure
- Subjects Univar to an unconstitutional taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution
- Deprives Univar of its right to substantive and procedural due process under the Fourteenth Amendment to the United States Constitution
- Violates Univar's right to equal protection under the law according to the Fourteenth Amendment to the United States Constitution

Days later, the State of Delaware filed a separate lawsuit in the Delaware Court of Chancery, which sought an order to compel Univar's compliance with the administrative subpoena. One month later, Univar moved to dismiss the State's petition, or in the alternative, stay the Court of Chancery proceedings until the District of Delaware had an opportunity to rule on Univar's federal constitutional claims. Univar argued that the Court of Chancery should defer to the first-filed action in the District of Delaware, under *McWane v. Cast Iron Pipe Corp.* Univar further argued that the Delaware Escheats Law does not confer exclusive jurisdiction on the Court of Chancery—rather, a respondent to an administrative subpoena may seek relief in any court of competent jurisdiction. As a matter of judicial economy, Univar asserted that the Court of Chancery should dismiss or stay the proceeding to permit the District of Delaware to resolve its federal constitutional claims.

The State opposed Univar's motion, in which Delaware asserted that the Court of Chancery possesses exclusive jurisdiction over enforcement proceedings and that it, as opposed to the federal court, should be the first to interpret the scope of the State's authority under the recently amended Delaware Escheats Law. Further, the State argued that the competing actions were filed contemporaneously, and thus *McWane's* deference to the first-filed action does not apply. Finally, Delaware claimed that the Court of Chancery is fully capable of resolving the questions of federal law.

The Delaware Court of Chancery Grants Univar's Motion to Stay

The Delaware Court of Chancery held oral argument on April 8, 2019. Following oral argument, the Vice Chancellor stayed the Court of Chancery proceeding. In a ruling from the bench, the Court found that the District of Delaware action presented important, far-reaching constitutional questions that must be answered before it may opine on the narrower issue set forth in the State's petition concerning the scope of its subpoena power. Under the Court's inherent authority to control its own docket and in the interest of judicial economy, the Vice Chancellor granted Univar's request for a stay. The stay of the Court of Chancery proceeding allows Univar to seek a decision from the District of Delaware concerning its challenge to the recently amended Delaware Escheats Law under the United States Constitution.

The lawsuit pending before the United States District Court for the District of Delaware is *Univar, Inc. v. Geisenberger, et al.*, Civ. Action No. 18-1909-MN. Univar is represented by Michael P. Kelly, David A. White, and Matthew J. Rifino of McCarter & English, LLP, along with Jameel S. Turner and James G. Ryan of Bailey Cavalieri, LLC.

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