



# TaxNewsFlash

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## Delaware: Court holds enforcement of unclaimed property subpoena would constitute abuse

The Delaware Court of Chancery held that enforcement of an administrative subpoena issued by the Delaware Department of Finance to a company undergoing an unclaimed property audit would constitute abuse. Although ultimately recognizing that the state has broad authority to seek records, the court expressed significant concerns over the scope of the records being requested and the audit methodology being used.

The case is: *Delaware Department of Finance v. AT&T Inc.*, C.A. No. 2019-0985-JTL (July 10, 2020). Read the [decision](#) [PDF 559 KB]

### Background

Delaware initiated an unclaimed property audit of the company in January 2012. The Delaware Department of Finance (which operates the state's unclaimed property program) retained a private, third-party firm to conduct the audit on its behalf. In the years following commencement of the audit, the third-party auditor sent numerous document requests to the company, and information was exchanged between the parties.

After the company expressed concerns about the scope and breadth of the third-party auditor's requests, the Department issued an administrative subpoena related to the company's check disbursement and rebate data. In response to the subpoena, the company in late 2019, filed an action in federal court alleging certain infringements of its rights under the U.S. Constitution. Then, the Department in December 2019 filed a lawsuit in the Delaware Court of Chancery to enforce the subpoena. A month later, the company filed a motion in the Chancery Court action to either stay that lawsuit in favor of the federal case or, in the alternative, to quash or modify the subpoena.

### Court's decision

In its decision, the Chancery Court denied the company's request to stay the action, but granted its request to quash the subpoena. Although the court supported the Department's authority to conduct broad investigations and to issue administrative subpoenas for records to determine compliance with the Delaware unclaimed property law, the court ultimately declined to enforce the subpoena at issue.

In so doing, the court noted that the state's authority to seek records through an administrative subpoena is limited when such enforcement "would constitute an abuse of the court's process to enforce it."

To determine whether abuse would exist if the court enforced the subpoena, it evaluated a number of factors regarding the breadth and scope of the records sought through enforcement. These included:

- **Records sought beyond the statute of limitations.** The court noted that the mere request for such records does not itself lead to a finding that a subpoena is unauthorized. Here, however, the court noted: "The Department seems to be pursuing information about the property that it knows it cannot recover, and it has supported those requests with only bareboned allegations."
- **Records related to other state property.** The court further considered that the records requested by the third-party auditor included information about property that would be due to other states, as the property owners had last known addresses in states other than Delaware. Like its statute of limitations rationale, the court indicated that since the records requested may pertain to property not escheatable to Delaware, without a creditable explanation by the Department for requesting such information, enforcing the subpoena for such information may be an abuse of the court's process.
- **Lack of explanation for the volume of records requested.** The extensive amount of data requested was another factor weighed by the court. The request was for all checks, regardless of their status, which the court indicated was "a massive request for information, and one would expect the Department to have articulated some rational basis for seeking it."
- **Burden of proof.** The company expressed concern that the broad requests related to voided check data would shift a burden to the company to show that not all checks issued were in fact abandoned. The court, citing the Delaware escheats law, reinforced that "the State Escheator has the burden to show that a check was improperly voided because it was unclaimed."
- **Auditor motives and methodology.** Lastly, the court considered the motives of the third-party auditor in crafting the initial requests for information which the Department sought to compel with its subpoena. The court indicated concern about whether: (1) the Department was involved with the requests for information, (2) the third-party auditor's contingent fee encouraged aggressive enforcement tactics, and (3) the third-party auditor was motivated by its contracts with other states to conduct unclaimed property audits.

## KPMG observation

Companies undergoing unclaimed property examinations frequently experience overly broad and expansive records requests. Although the court here upheld a broad authority for the state to request records in conducting its examination, it clearly found certain aspects of the specific requests in the company's case troubling. In so doing, the court provides some valuable insights to holders about how expansive records requests may be handled in current and future unclaimed property examinations. Companies undergoing unclaimed property audits and confronted with challenging records requests need to consider how this decision, as well as other developments, may affect their examinations going forward.

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