

Delaware Unclaimed Property Law Update

September 26, 2024

Delaware Adopts Limitations on Actions Under Delaware False Claims Act Related to Escheat

On August 15, 2024, Delaware Governor Carney signed Senate Substitute No. 1 to Senate Bill No 266 adopting limitations on actions brought under the Delaware False Claims and Reporting Act (6 *Del. C.* § 1201 *et seq.*) to the extent that they relate to unclaimed property filing obligations. In general, under the Delaware False Claims and Reporting Act (“DFCRA”), a person who either (i) knowingly presents or causes to be presented a false or fraudulent claim for payment or approval to the government, OR (ii) knowingly makes, uses or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the government or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government, is subject to liability under the DFCRA. *See* 6 *Del. C.* § 1201(a). Thus, someone who knowingly and falsely underreports a Delaware tax obligation or Delaware unclaimed property obligation could be sued under the DFCRA. A person liable under the DFCRA is generally subject to a civil penalty per each occurrence plus damages equal to three times the underlying liability amount.

Furthermore, the DFCRA generally permits actions to be initiated by private persons, generally referred to as “whistleblowers,” who bring the action in the name of the government. *See* 6 *Del. C.* § 1203(b). Once an action is initiated by a private person, the Delaware Department of Justice generally has the option of either (i) taking over the action, or (ii) declining to participate and allowing the private person to prosecute the action on behalf of the state. *See* 6 *Del. C.* § 1203(b). A whistleblower in connection with an ultimately successful DFCRA action is generally entitled to receive between 15% and 25% of the recovery by the state pursuant to the action. *See* 6 *Del. C.* § 1205(a). The DFCRA was previously utilized by a private person to initiate an action related to alleged underreporting of dormant unclaimed property to the State of Delaware in *State of Delaware ex rel. French v. Card Compliant LLC, et al.*, C.A. No. N13C-06-289 PRW CCLD (Del. Super. Ct. Aug. 29, 2018); *see also Overstock v. State*, 234 A.3d 1175 (Del. 2020).

In general, Senate Substitute No. 1 to Senate Bill 266 (i) provides a limitation on the ability of a private person to initiate an action under the DFCRA to the extent that the action relates to alleged underreporting of unclaimed property to the State of Delaware; (ii) provides an alternative method for a private whistleblower to initiate a Delaware unclaimed property examination within the Delaware unclaimed property statute; and (iii) establishes a role for the Delaware State Escheator with regard to the prosecution of an action under the DFCRA related to alleged underreporting of unclaimed property to Delaware. Specifically, pursuant to Senate Substitute No. 1 to Senate Bill 266:

- a. The Attorney General may only bring an action under the DFCRA related to escheat reporting if it provides 120 days’ notice to the State Escheator and either (i) such 120 days has passed, or (ii) the State Escheator has consented to the action; and



- b. The Attorney General may not bring an action under the DFCRA if (i) the defendant is already the subject of an ongoing unclaimed property examination by the State Escheator, or (ii) the defendant has already enrolled in the Delaware Secretary of State's Unclaimed Property Voluntary Disclosure Program for the periods that would be the subject of the action under the DFCRA.

Furthermore, in addition to amending applicable provisions of the DFCRA, Senate Substitute No. 1 to Senate Bill 266 amends the applicable Delaware unclaimed property statute (12 *Del. C.* § 1130) to establish a role for potential whistleblowers to cause an examination to be initiated within that statute. Under the amended Delaware escheat statute, a whistleblower who provides information to the State Escheator that results in the initiation of an unclaimed property examination may be entitled to the interest and penalties that result under such examination. *See* 12 *Del. C.* § 1183(e). With respect to such examination, the State Escheator's general authority to waive interest and penalties is curtailed. Thus, Senate Substitute No. 1 to Senate Bill 266 essentially eliminates the ability of a whistleblower to maintain a DFCRA action on its own, but provides an opportunity to cause an audit to be initiated by the Delaware State Escheator. Upon the presentation of relevant information, the State Escheator has the first opportunity to prosecute the matter as an audit. If the State Escheator declines to initiate an audit, the Delaware Attorney General may bring an action under the DFCRA. To the extent that the State Escheator initiates an examination, the whistleblower's recovery is limited to interest and penalties collected. This is logical because unclaimed property is technically the property of other persons for which the state holds as custodian. Thus, the state is not in a position to give any of such collected amounts to a whistleblower only interest and penalties collected thereon.

For more information on the potential impact of this act or any aspect of Delaware unclaimed property law, please feel free to contact Richards, Layton & Finger to discuss further.

Related Files

- [Read Senate Substitute No. 1 to Senate Bill No. 266](#)