

Straight Outta Delaware: JLI Invest S.A. et al. v. Cook et al.

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As soon as we start to think that Delaware's unclaimed property practices and administration couldn't possibly get any more egregious, another lawsuit like [*JLI Invest S.A. et al. v. Cook et al.*, Case No. 11274](#) surfaces. The facts alleged in the complaint highlight the fundamental issue of just how much "protection" state unclaimed property laws provide to owners. In this case, Delaware apparently protected two scientists out of \$12,024,148.25. Yay Delaware. The scientists are not happy (we would be crying on the floor with either (a) a vat of Graeter's ice cream or (b) a barrel of Sancerre) and have sued Delaware for their lost value.

Facts

Dr. Gilles Gosselin and Dr. Jean Louis Imbach are the two Belgian scientists who headed the research team responsible for creating a Hepatitis B drug. Idenix Pharmaceuticals, Inc. was established to commercially develop this drug. As the creators of the drug, Dr. Gosselin and Dr. Imbach were given an ownership interest amounting to approximately 10 percent of the Idenix shares. These shares were held by JLI Invest S.A. and LIN Invest S.A. (the plaintiffs), two Belgian companies established for this purpose.

Despite the facts that (a) both Idenix and Computershare (their transfer agent) had record of the mailing address of each plaintiff and no mail was ever returned undeliverable—as required by Delaware law at the time for property to be deemed abandoned— and (b) that scientists both continued to perform professional services for Idenix, Computershare reported the Idenix shares to Delaware in November 2008 and delivered all of the shares to Delaware on January 2, 2009. Three days later, Delaware sold the shares for a total of \$1,695,851.75 (approximately \$3.03 per share). At the time, Idenix had approximately 50 shareholders, and the market for the shares was illiquid.

After making an inquiry concerning the stock to Computershare three years later in 2012, the plaintiffs learned that their shares had been escheated to Delaware. Upon contacting the Delaware Office of Unclaimed Property to claim their property, the plaintiffs were forced to provide substantial documentation verifying their status as the rightful owner, which they did in October and December 2012. After over a year of "pending" status, the plaintiffs were directed to complete a "Request Form" in May 2013, at which time it was noted that a response could take another 12 weeks.

On June 9, 2014, Merck and Idenix announced that Merck would acquire Idenix via a cash tender offer for \$24.50 per share. Because the plaintiffs' shares had been escheated to (and immediately sold by) Delaware in 2009, they were not able to participate in the tender offer despite their desire to. Had they been able to participate, the plaintiffs would have been entitled to receive a total of \$13,720,000 for their shares. Meanwhile, Delaware had still not responded regarding the status of their claim. Notably, it was not until October 2014 (over two years after their initial request) that the Delaware Office of Unclaimed Property confirmed that the plaintiffs' Idenix shares were sold (and for how much). The plaintiffs subsequently completed a claim for the market value of their shares (*i.e.*, \$13.72 million based on the Merck tender offer). Delaware immediately responded that they could only refund \$1,695,851.75, and could do so without any additional documentation—which had previously delayed the process. Without agreeing to the lower amount, Delaware took the initiative to send the plaintiffs a check for the lesser amount. The plaintiffs accepted the check in June, after agreeing that the acceptance would not affect their rights to seek recovery of the remaining amount of their claim. In July, they filed this complaint.

Alleged Claims

The plaintiffs are requesting damages in the amount of \$12,024,148.25, which represents the amount that would have been received via the Merck tender offer, minus the amount actually received from Delaware. The named defendants include the State of Delaware, plus two current and three former Department of Finance (Department) officials. The plaintiffs highlight the fact that contrary to the primary purpose of the Escheat Law, Delaware never attempted to locate or contact the plaintiffs regarding the unclaimed shares, even though they had the ability and resources to do so. The eleven counts alleged against the defendants include:

- Violations of Delaware Escheat Law (Code tit. 12, §§ 1101 *et seq.*)
- Violation of the Friendship, Establishment and Navigation Treaty Between the United States and Belgium
- Violation of the United States and Delaware Takings Clauses
- Violation of the United States and Delaware Due Process Clauses
- Violation of the Foreign Commerce Clause
- Violation of Federal Common Law (*Texas v. New Jersey*)
- Gross Negligence
- Conversion
- Civil Rights Violations under 42 U.S.C. § 1983
- Injunctive Relief
- Declaratory Judgment

Practice Note

It is important to remember that the holder in this case had a last known address for the owner, only it was in a foreign country. Delaware, without any statutory authority, takes the position that foreign addressed property escheats to the state of the holder's incorporation. This case challenges this position directly, and holders should seriously consider the risks of escheating foreign address property while this case is pending.

This case is yet another example of a state being much less concerned about returning property to its rightful owner (as it should be) and more concerned with using the unclaimed property laws as a revenue raising tool. It has many similarities to the case in which a federal court shut down California's unclaimed property system for insufficient notice requirements. *Taylor v. Westly*, 488 F.3d

1197 (9th Cir. 2007). Here, based on the allegations in the complaint, the Department does not seem to have acted in good faith to return the wrongfully abandoned shares to the plaintiffs; in fact, it never even attempted to. It failed to publish the names and addresses of the plaintiffs in any newspaper or the State Escheator's website, as it was required to do by law. Finally, once they received the shares, the Department never attempted to notify the plaintiffs that their shares had escheated—and instead decided to sell them after a mere three days. Prior to the tender offer when the plaintiffs contacted the Department to redeem their shares, they forced the plaintiffs to jump through a series of administrative hurdles for over two years—all the while concealing the fact that the shares had been sold.

The defendants answer to the complaint is still pending and in late July the Department issued a Request for Proposals for Special Litigation Counsel to represent them in defending against this complaint. In this request, the Department stated that they anticipated requesting an extension of time to file a responsive pleading in order to engage Special Litigation Counsel.

This post was written with contributions from Eric Carstens.

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National Law Review, Volume V, Number 238

Source URL: <https://natlawreview.com/article/straight-outta-delaware-jli-invest-sa-et-al-v-cook-et-al>