No. 22O145 & 22O146, Original (Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES

DELAWARE,
Plaintiff,
v.
PENNSYLVANIA AND WISCONSIN,
Defendants.
****
ARKANSAS, ET AL.,
Plaintiffs,
v.
DELAWARE,
Defendants.

MEMORANDUM IN SUPPORT OF COMMONWEALTH OF PENNSYLVANIA'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In 1974, the U.S. Congress enacted the Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), 12 U.S.C. §§ 2501-03, to remedy an inequity caused by this Court's decision in *Pennsylvania v. New York*, 407 U.S. 206 (1972) with regard to escheatment of certain abandoned, prepaid financial instruments. Under the FDA, Congress established federal priority rules between States regarding the custody of an unclaimed "money order, traveler's check or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable[.]" Under the rules, provided certain preliminary requirements are met, the State where the instrument was purchased has the right to escheat the unclaimed funds payable on these instruments.

As set forth more fully in all Defendants' Brief in Support of Summary Judgment, which Pennsylvania joins, the MoneyGram Payment Systems, Inc. ("MoneyGram") instruments at issue here, "Official Checks," fall squarely within the scope and purpose of the FDA. Abandoned funds payable on these Official Checks, specifically, "Agent Checks" and "Teller's Checks," therefore, should be escheated to the State in which they were purchased—not to the State where MoneyGram has unilaterally chosen to incorporate, Delaware.

In the event this Court finds that the MoneyGram Official Check products are not subject to the FDA, then Pennsylvania further respectfully requests that the Special Master recommend that the Court overrule the secondary escheat rule

set forth in *Texas v. New Jersey*, 379 U.S. 674 (1965), which provides that certain intangible financial instruments escheat to the State of corporate domicile of the debtor (MoneyGram here) only when the address of the creditor is unknown. Here, MoneyGram has set up a process with regard to its Official Check product whereby it does not obtain or preserve the addresses of purchasers of the instruments, meaning every instrument not cashed and later abandoned becomes "creditor address unknown." MoneyGram thus escheats funds from its abandoned Official Checks to the State of its incorporation. Having set up such a scheme, however, MoneyGram, under the secondary rule in *Texas v. New Jersey*, has created a windfall for Delaware. To remedy this inequity, therefore, the rule in *Texas v. New Jersey* should be overruled.

Further, while this case is primarily about statutory interpretation, the field in which Congress enacted the FDA and in which the Supreme Court decided *Texas v. New Jersey* cannot be ignored: unclaimed property or escheat. Escheat is the oldest form of consumer protection. The ancient law is animated by the fundamental notion that if the true owner of abandoned property cannot be found, then the true owner should in fairness at least derive an indirect benefit from the property by receiving communal benefits from the owner's State (*e.g.*, roads, police, public welfare, etc.). Against this, to allow the citizens of Delaware—who generated just $1 million of the over $250 million at issue here (less than one half of one percent)—to retain all of the funds in dispute does violence to the long-settled principles of equity and protection driving escheat laws. Putting it more bluntly

still: to allow the present state of affairs to stand gives Delaware's citizens a windfall sourced entirely from the private funds of the citizens of every other State in the Nation.

Accordingly, for the reasons set forth below and in the principal brief of the Defendant States, which Pennsylvania incorporates herein and joins, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on its Counterclaim I against Delaware and judgment in favor of Pennsylvania and against Delaware on Delaware's Bill of Complaint. That is, the Court should declare that the FDA entitles Pennsylvania—and not Delaware—to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders. In the alternative, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on Counterclaim II, and overrule the secondary escheatment rule set forth in *Texas v. New Jersey*, declaring that when the address of a purchaser/payee on an unclaimed, prepaid financial instruments is unknown, this intangible property shall escheat to the State where the instrument was purchased.

II. BACKGROUND

Pursuant to the Court's rules and procedures, Pennsylvania incorporates herein Defendant States' Statement of Material Facts ("SMF").

III. ARGUMENT

A. The Court Should Grant Judgment in Favor of Pennsylvania and Find that the FDA Entitles Pennsylvania -- and not Delaware -- to Escheatment of Unclaimed Funds Payable on MoneyGram Official Checks Purchased Within Pennsylvania's Borders.

In support of its motion for summary judgment on Counterclaim I, and judgment in favor of Pennsylvania on Delaware's Bill of Complaint, Pennsylvania joins and incorporates Defendant States' Brief in Support of Summary Judgment.

B. In the Alternative, the Court Should Grant Summary Judgment on Counterclaim II, and Overrule *Texas v. New Jersey* With Regard Solely to the Secondary Common Law Escheatment Rule Established Therein.

In the event that the Court finds that MoneyGram's Official Checks products titled "Agent Checks" and "Teller's Checks" are not subject to the priority rules of the FDA and are, instead, governed by the primary and secondary common law rules established in *Texas v. New Jersey*, Pennsylvania respectfully requests that the Court revisit and revise the secondary rule as applied therein.

The *Texas v. New Jersey* secondary rule was established in 1965 to achieve ease of administration and fairness among the States concerning escheatment of abandoned intangible property. In the intervening years, however, this rule (with regard to the MoneyGram instruments at issue here) has proven to accomplish the opposite with regard to fairness and equity. Indeed, as applied to the MoneyGram Official Checks, the secondary rule results in gross inequity where the citizens of one State, who generate *less than 0.5% of the funds at issue*, reap the benefits of *hundreds of millions of dollars* generated by the citizens of the other 49 States. *See*

SMF at ¶¶ 102-103. This unjust windfall to Delaware, which is the type of inequity that Congress sought to alleviate when it passed the FDA, should be remedied by the Court.

To more fully illuminate why relief on Counterclaim II is appropriate, the Court should examine the following: the original intent of the secondary rule; how it was treated by the Court in a split decision in 1972 when other purchased instruments were tested under the rule; Congress's swift response to that split decision; and, finally, why the Court can and should amend the rule if it finds that the Official Checks at issue here are not covered under the FDA.

1. The Origins of the Secondary Rule and Application of the Secondary Rule in *Pennsylvania v. New York*

The secondary rule is sourced in the Court's 1965 original jurisdiction decision in *Texas v. New Jersey*, 379 U.S. 674 (1965). There, the Court addressed how to fairly escheat among several States eight types of abandoned, "intangible" property; that is, property, like a debt, that "is not a physical matter which can be located on a map." 379 U.S. at 675 n.4 (listing categories of property at issue), at 677 (defining intangible property). The Court reviewed various proposals on how to potentially apportion the funds, one of which was to simply escheat the funds to the domicile of the debtor. 379 U.S. at 679-80. The Court rejected that proposal, however, saying "it seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exhalt [sic] a *minor factor* to permit escheat of obligations incurred all over the country by the

State in which the debtor happened to incorporate itself." 379 U.S. at 680 (emphasis added).

Ultimately the Court settled on a two-prong approach to govern the interstate escheat of unclaimed intangible property by establishing a primary and a secondary common law rule. Under the primary rule, the intangible property would escheat to "the State of the creditor's last known address as shown on the debtor's books and records." 379 U.S. at 680-81. But where the books and records do not reveal such an address (or where the State to which the property should otherwise escheat does not have a State law allowing it to take the property), the secondary rule applies. The secondary rule is simply that the property escheats to the State of corporate domicile of the debtor, *i.e.*, what the Court had referred to a "minor factor." 379 U.S. at 682.

For present purposes, the Supreme Court made *three* critical observations while articulating these rules. *One*, the rules were intended to serve the ends of "ease of administration" and "equity." 379 U.S. at 683. The Court articulated that the rules it adopted, it believed, would be "the fairest" and "easy to apply" and "in the long run will be the most generally acceptable to all the States." 379 U.S. at 683. *Two*, the Court fashioned the secondary rule under the premise that its application would "infrequen[tly]" arise given its then-belief that creditor information would likely be readily available. *Id.* at 682. This belief of "infrequency" of the secondary rule's application likely swayed the Court to permit a "minor factor" like a debtor's corporate domicile to dictate where intangible property would

escheat. *Three*, the Court recognized that the rules it selected were entirely ones of the Court's own dominion to fashion; that is, because the matter was in the Court's limited *original* jurisdiction and because of the discrete subject matter (interstate escheat), the Court was not bound by "statutory or constitutional provisions or by past decisions," or, indeed, it was not even bound by "logic." *See* 379 U.S. at 683. In other words, the Court could do what it wanted, using only ease of administration and equity as its guides.

Just seven years after *Texas v. New Jersey*, the newly created intangible property rules were tested in *Pennsylvania v. New York*, 407 U.S. 206 (1972). There, the intangible property was certain unclaimed Western Union money orders. 407 U.S. at 207. The Court's majority revisited the rationale behind the *Texas v. New Jersey* rules and re-affirmed their application to intangible property. 407 U.S. at 214-15.

The Court in *Pennsylvania v. New York*, however, was not unanimous, with three justices dissenting. 407 U.S. at 216-22. The dissent, authored by Justice Powell, revisited the twin aims of the *Texas v. New Jersey* rules—ease of administration and fairness—and concluded that they could be served by "a relatively minor but logical deviation in the manner in which [the rules are] implemented in this case." 407 U.S. at 219 (Powell, J., dissenting). In a commonsense approach, the dissent observed that in most cases, the place where the debtor-creditor relationship was formed "is likely also to be the site of the creditor's domicile." 407 U.S. at 219-20. Thus, the dissent further reasoned, in

relevant part, "the State in which the money order was purchased may be presumed to be the State of the purchaser-creditor's domicile." 407 U.S. at 220.[1] The dissent's proposed "minor" modification was proffered as a way to satisfy the twin aims of the existing *Texas v. New Jersey* rules while simultaneously avoiding an unfair "windfall" to a single State and while also fairly dividing the unclaimed property among the states "in a proportion approximating the volume of transactions in each State[.]" 407 U.S. at 220.

The *Pennsylvania v. New York* majority, however, ultimately opined that the Western Union money orders would escheat pursuant to the primary and secondary rules promulgated in *Texas v. New Jersey*. The Court made its decision on a record that showed New York, the place of Western Union's corporate domicile, would likely receive a windfall benefit given that "Western Union does not regularly record the addresses of its money order creditors, [and therefore] it is likely that the corporate domicile will receive a much larger share of the unclaimed funds here …." *Pennsylvania*, 407 U.S. at 214.

2. Congress' Response to the Majority Opinion in *Pennsylvania v. New York*

In a swift response to the 1972 majority opinion in *Pennsylvania v. New York*, Congress repudiated it, and essentially adopted the dissent, by enacting the FDA in 1974. In crafting the law concerning prepaid instruments (traveler's checks,

[1] The dissent also proposed a rule dealing with situations where a money order had been received but not negotiated, suggesting the place of issue should control the proper escheatment. *See* 407 U.S. at 220.

money orders, and "other similar written instruments"), Congress set forth some material findings of fact, including that:

- Sellers of money orders do not, "as a matter of business practice", retain the last known address of purchasers of those instruments;
- "a substantial majority of such purchasers reside in the States where such instruments are purchased;
- "the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;" and
- "it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto."

See 12 U.S.C. § 2501.

Hence, with the FDA, Congress codified its views that (1) the place of purchase of these intangible financial instruments is the most significant event in the transaction and (2) principles of equity and fairness should first dictate where such instruments should be escheated, not where a seller/debtor entity unilaterally chooses to incorporate. Were this Court to find that there is something so unique about MoneyGram's Official Checks as to disqualify these instruments from the clear escheatment rules set forth in the FDA, this Court should nevertheless rely on Congress' considerations under that statute to inform the Court's decision on the secondary rule under *Texas v. New Jersey*. Specifically, the rule should be modified

to promote fairness by providing that where the last known address of the purchaser/creditor cannot be located, the State in which the intangible financial instrument was purchased should have the right to these unclaimed proceeds.

3. Why the Court *Can* and *Should* Change the Secondary Rule of *Texas v. New Jersey*

It is axiomatic that the Court is empowered with the right to craft interstate escheat rules where Congress has not yet spoken. *See, e.g., Texas,* 379 U.S. at 677, 679. Accordingly, it also is empowered to change such rules where legislation is silent as to the specific instrument, and where the current application of the original rule defeats its very justifications.

In fashioning the escheatment rules in *Texas v. New Jersey,* the Court found it to be the "fairest," "easy to apply," and "in the long run . . . most generally acceptable to all the States." 379 U.S. at 683. The Court further reasoned that the primary rule would likely dominate, leaving the "minor" secondary rule as an infrequently applied backup. None of that holds true today, however, with regard to the subject MoneyGram Official Checks. Indeed, the regularly applied secondary rule is not fair (given the windfall for Delaware), it is not easier to apply, and it is not acceptable to a majority of the States.

First, as a result of MoneyGram's procedures with respect to Teller's Checks and Agent Checks, escheatment of these funds almost always defaults to the secondary rule, which creates an inherent inequity. Indeed, the primary rule (escheatment to the State of creditor's last known address) cannot be implemented for these instruments because MoneyGram, who contractually agrees to undertake

escheatment functions with its financial-institution-clients, does not obtain any information about the creditor (*i.e.*, purchaser or payee) on the instruments. *See* SMF at ¶¶ 22; 35; 48; 55; 75; 87(d); and 98. To the contrary, MoneyGram divorces owner information at the time of sale, so that the only holder of the creditor's information, the selling agent, is a stranger to the escheat transaction. See, *id*. at ¶¶ 34; 48; 55; 57; 91 and 93. MoneyGram does admit, however, that its system records the State in which these instruments are purchased. *See, id*. at ¶¶ 36; 56; and 96. MoneyGram further admits that it does not perform any due diligence whatsoever to try to locate the rightful owner of Agent Checks or Teller's Checks—despite the acknowledgement that the selling financial institutions may indeed have that information. *See, id*. at ¶¶ 35; 48; 80 and 99. This, of course, results in one thing: MoneyGram escheats abandoned proceeds on these instrument to just one State, Delaware, its place of incorporation.

Second, the result of MoneyGram's business practice is that Delaware has and continues to receive an unfair windfall at the expense of the other States and their citizens. An audit prepared at the requests of several States has found that MoneyGram remitted more than $250 million to Delaware. *See* SMF at ¶¶ 101-03. That audit further found that ***less than one half of one-percent*** of all MoneyGram Official Checks escheated to Delaware were actually purchased in Delaware. *See, id*. at ¶¶ 102-03.

The gross windfall upon Delaware is at the expense of citizens of every other State in the Nation. A fundamental purpose of escheat laws, however, is the return

of abandoned property to a rightful owner and if that cannot be accomplished to return it to the sovereign where the owner resides in order for the owner to reap indirect benefits. *See generally Stand. Oil Co. v. State of N.J., by Parsons*, 341 U.S. 428, 435-36 (1951) ("[A] state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations."). The Court in *Texas v. New Jersey* similarly recognized this principle when it sought to create escheat rules that "tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Texas*, 379 U.S. at 680. The application of the secondary rule here, however, has shown over time to thwart that fundamental purpose. Here, MoneyGram does not even attempt to locate the rightful owners of abandoned Teller's Checks and Agent Checks. Instead, it summarily escheats the funds from these instruments to a state where less than 0.5% of those funds were derived.

Third, a modification to the secondary rule where abandoned Agent Checks and Teller's Checks are escheated to the State in which they were purchased when the purchaser information is unknown or unavailable (or where the State of purchase has not enacted an escheat law), is no more difficult to apply than the current scheme. Indeed, MoneyGram already escheats funds from certain of its abandoned instruments to each of the 50 States and has testified in this case that escheating to every State is as easy as escheating to one. *See* SMF at ¶ 100.

Lastly, given the inequity caused by MoneyGram's mechanical application of the secondary rule, it stands to reason that the secondary rule is not generally acceptable to any other State but Delaware. Indeed, 30 States have come before the Court now to remedy this inequity. And, critically, this inequity is not created by a rule that Congress enacted, but by a rule that *this Court* created and has several-times applied (*see Delaware v. New York*, 507 U.S. 490 (1993)). Yet as information on the unfairness of the rule grows, so too should the Court's willingness to change course on that rule because, in the end, the law of escheat should promote the interests of the true owners of the property at stake. Those interests, Pennsylvania submits, are best-served by making sure that if the property cannot be restored to the owner, at least the owner should receive an indirect benefit through the common good fostered by the State where the owner lives and receives State benefits.

IV. CONCLUSION

For the reasons set forth herein and in the principal brief of the Defendant States, which Pennsylvania joins, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on its Counterclaim I against Delaware, and judgment in favor of Pennsylvania and against Delaware on Delaware's Bill of Complaint. The Court should declare that the FDA entitles Pennsylvania—and not Delaware—to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders. In the alternative, Pennsylvania respectfully

requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on Counterclaim II, and overrule the secondary escheatment rule set forth in *Texas v. New Jersey* with regard to the MoneyGram Official Check products. This result too, as with that suggested above, would results in a declaration that Pennsylvania—and not Delaware—is entitled to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders.

Respectfully submitted,

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