IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 40 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

and

STATES OF CONNECTICUT, CALIFORNIA and INDIANA,
Intervening Plaintiffs,

v.

STATES OF NEW YORK, FLORIDA, OREGON and VIRGINIA, and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants,

and the

STATE OF ARIZONA,
Intervening Defendant.

BRIEF OF DEFENDANT NEW YORK IN SUPPORT OF REPORT OF SPECIAL MASTER

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Preliminary Statement

The question before this Court is which States are entitled to take certain unclaimed monies paid to Western Union Telegraph Company ("Western Union") for the purchase of money orders on or before December 31, 1962

and still held by that company. The total is alleged to constitute approximately $1,500,000 (Complaint ¶ 4, 17; Report of the Special Master ("Report"), November, 1971, p. 2).

The underlying facts which gave rise to Western Union's possession of these funds are set forth at length in the Stipulation of Facts agreed to by all parties in this action, and summarized in the Master's Report (Report pp. 6-9). The agreed upon facts disclose that the funds in question are now held by Western Union on account of money orders purchased from the Company on or before December 31, 1962. The funds so held fall into 3 categories. In some cases, the funds represent negotiable drafts delivered in payment of, or as a refund for, money order purchases which were never presented and therefore never paid. In some cases, the funds represent money orders and refunds which were underpaid through error and where attempts to pay the balance were unsuccessful. In the remaining cases, apparently constituting the majority of those involved herein, the funds represent instances where payment (cash or draft) was not made to the sendee and Western Union did not issue a refund draft to the sender (Stipulation, p. 11, ¶ 21). Western Union's records of unclaimed money orders involve approximately 200,000 money order applications and about 300,000 ledger record entries. The Company's books and records do not designate any person as a "creditor" or as a "person to whom the money is owing". The ledger entries do not contain any reference to last known addresses of the sender or sendee. (Stipulation, ¶ 14, Exhibits 16-21)

The Special Master's Report

The Special Master recommended that this Court's formula, enunciated in *Texas* v. *New Jersey,* 379 U.S. 674 (1965), "for the escheat or custodial taking of intangible

claims such as ordinary debts should be applied to unpaid telegraphic money orders". (Report p. 2)

The Special Master found that the sender is the "creditor" when payment (by cash or draft) cannot be made to the sendee within the 72 hour limit (part of the terms of the contract) and the contract has therefore been cancelled, and that the sendee is the creditor when a draft has been issued to him but not cashed (Report p. 17). The Master then concluded (Report pp. 20-21):

> "Any sum now held by Western Union unclaimed for the period of time prescribed by the applicable State statutes may be escheated or taken into custody by the State in which the records of Western Union placed the address of the creditor, whether that creditor be the payee of an unpaid draft, the sender of a money order entitled to a refund, or an individual whose claim has been underpaid through error. Still following the formula of *Texas* v. *New Jersey*, if no address is contained in the records of Western Union, or if the State in which the address of the creditor falls has no applicable escheat law, then the right to escheat or take custody shall be in the domiciliary State of the debtor, in this case, New York."

The Special Master expressed "doubts" as to the constitutionality of the departures from *Texas* v. *New Jersey* advocated by the other parties. His recommendations, however, were not dependent upon such grounds, but upon the rationale expressed in the *Texas* decision. The Special Master asserted:

> "These doubts as to the constitutionality of the alternative formulas for escheat support the conclusion that the simple and workable formula established by the Court in *Texas* v. *New Jersey* should be followed with respect to telegraphic money orders which are here involved. As in the case of the obligations in

that case, this rule presents an easily administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely."

New York's Position

The rule announced in *Texas* v. *New Jersey*, 379 U.S. 674 (1965) was intended to apply to all types of abandoned intangible obligations. The very essence of the holding was that each abandoned property case should not have to be decided on the basis of its particular facts. Each case should not require the Court to, "devise new rules of law to apply to ever-developing new categories of facts", 379 U.S. at 679. The special exceptions sought by the other states would undermine that purpose. Accordingly, New York respectfully urges this Court to adopt the Special Master's recommended decree based upon his conclusion that the rule of *Texas* v. *New Jersey* should be applied to the escheat or custodial taking of these abandoned money order funds.

The Positions of the Other Parties

The "Pennsylvania" Position

Pennsylvania takes exception to the Special Master's Report and asserts that the formula set forth in *Texas* v. *New Jersey* governing "ordinary debts" cannot be applied to telegraphic money orders (Pennsylvania, Exceptions p. 1).

Pennsylvania argues that Western Union "does not require the purchaser to fill in his address" on his application for a money order (Pennsylvania, Exceptions p. 1), "never makes records showing the address of the sender". (Pennsylvania, Exceptions p. 4), and therefore the rule that should be applied in the "money order transaction

where payment has not been effected nor refund made is that the State of origin" is entitled to escheat or take custody of the unclaimed amounts (Pennsylvania, Exceptions p. 2). Pennsylvania also proposes that if the State of origin cannot be determined from the records of the Company then the State of Western Union's domicile should take (Pennsylvania, Exceptions, pp. 2, 7-8).*

Pennsylvania, accordingly, explicitly states that the formula in *Texas* v. *New Jersey, supra,* should be confined to intangibles such as "ordinary debts" (Pennsylvania, Exceptions p. 1). It asserts that a different rule should be adopted where the transaction is of the type where the "obligor does not make entries upon its books and records showing the address of the obligee", in which event the only State entitled would be "the State of origin of the transaction" (Pennsylvania, Exceptions p. 8).

The following States have supported or adopted Pennsylvania's position (California, Brief and Motion p. 1; Connecticut, Exceptions pp. 1-2, Motion p. 4; Indiana, Exceptions pp. 4-5, Motion pp. 1-2; Oregon, Answer pp. 2-3, Brief p. 5; Virginia, Answer pp. 1-4; New Jersey, *Brief Amicus Curiae* p. 5; See Report p. 13 where the Special Master outlines the positions of these States).

The American Express Company ("Amexco") essentially supports Pennsylvania's position. Like Western Union it does so on the ground that it does not maintain records of the purchaser's address and that a requirement to do so would be an unnecessary burden upon it. (Amexco, Brief p. 21)

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* The Special Master understood Pennsylvania's position to have receded from the above so that it no longer claims amounts where drafts were issued and the records of Western Union show an address for the payee in a State which is different from the State of origin (Report, pp. 10-11).

The "Florida" Position

Florida takes exception to the Special Master's Report and maintains that the State of the sendee should be entitled to take or hold the funds in question (Florida, Exceptions p. 2). Arizona has taken the position that the State of destination should prevail and apparently recognizes the right of the State of the payee's last known address to take where this address is known (Arizona, Answer p. 6; See Report p. 13).

ARGUMENT

The rule established in *Texas* v. *New Jersey* was intended to apply to all types of abandoned intangible obligations. It was not intended to be subject to change in particular circumstances.

In 1965, with the stated intention of settling the issue "once and for all", this Court announced a "clear rule which will govern all types of [abandoned] intangible obligations . . . and to which all States may refer with confidence." *Texas* v. *New Jersey,* 379 U.S. 674, 678 (1965). In establishing this rule, the Court sought to avoid a test which would require each escheat case to be decided "on the basis of its particular facts" or require the Court to "devise new rules of law to apply to ever-developing new categories of facts". 379 U.S. at 679. The Court concluded that the rule it adopted "is the fairest, is easy to apply and in the long run will be the most generally acceptable to all the States". 379 U.S. at 683.

Barely five years after the decision in *Texas* v. *New Jersey,* and despite this Court's unequivocal statement that it was establishing a rule applicable to "all types of [abandoned] intangible obligations", in order to avoid the necessity of deciding each escheat case on its facts, Pennsylvania brought this action to graft an exception on the *Texas* rule.

New York maintains that *Texas* v. *New Jersey* disposed of the issues here presented and that a special exception in relation to money orders would undermine the primary purpose of the Court in that case—to provide an all-encompassing rule which could be relied upon by States and debtors alike, while safeguarding the interests of owners (creditors).

A. The Modification of the *Texas* v. *New Jersey* Rule Proposed by Pennsylvania

As noted above, Pennsylvania in its Exceptions clearly seeks the formulation of a distinct rule where "the company does not keep records of the last known address" in addition to the rule for "ordinary debts" (Pennsylvania Exceptions p. 1). Amexco explicitly seeks to establish a distinct rule for issuers of certain "commercial instruments" while at the same time asserting that telegraphic money orders embrace certain features "peculiar only to it" (Amexco, Brief *Amicus Curiae* p. 7).

The formulation of a new and different rule in addition to that for "ordinary debts" is predicated by these parties upon the conclusion that addresses of creditors are characteristically not available in the instant situations. However, while the parties herein have not disputed (as to the instant funds received by Western Union over a period in excess of 30 years, and still held by it) that it is "not feasible to determine the last known address of the creditor from the books of Western Union" (New York, Answer p. 4) there are an undetermined number of applications in which such information is available (Stipulation of Facts pp. 5-6; Amexco, *supra,* p. 9).

In a highly mobile society where trade even on the simplest levels is largely consummated through adjustments of individuals' various credit balances, i.e., through the exchange of "intangible" rights to property, a considerable incidence of failure to promptly exercise such

rights is a factor of some economic significance. This unclaimed property may not be recoverable by owners if adequate records are not maintained.*

In addition, unless adequate record keeping practices are utilized, it will not, as a practical matter, be possible for States to ascertain the amounts of funds actually left unclaimed and being used by holders who have no equitable interest in property inadvertently left with them. Indeed, to the extent records are incomplete or destroyed the way may be paved to write-off such amounts as profits.

In sum, the facts of this case present no basis for carving out the proposed Pennsylvania exception. The *Texas* rule is easily applied to the funds held by Western Union. Of equal importance, continued adherence to this rule will avoid setting a precedent suggesting to States the utility of proposing exceptions favorable to them whenever the facts of a particular case vary in any manner from those in *Texas* v. *New Jersey.*

B. The Exception to the Rule Proposed by Florida

Florida excepts to the Special Master's Report on the following grounds (Florida, Exceptions p. 2):

> "(4) In concluding that the place designated on debtor's records for payment of money order funds does not constitute a creditor's address according to the debtor's books, within the rule of *Texas* v. *New Jersey,* supra, the Special Master has construed that decision to require a technically complete address supplied by the creditor to establish a factual foundation for a finding of legal residence, when the decision

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* The interests of owners (creditors) in this situation are protected under the New York Abandoned Property Law since it is custodial only and no statute of limitations can be invoked by the State to preclude an owner's right to claim and receive previously unclaimed property.

instead is based on a rule of equity and expedience and a presumption of residence which in the absence of contrary evidence is adequately supported by a debtor's record of the address at which payment is to be made to a creditor."

Florida, therefore argues first that the "creditor" is and remains the "sendee" until a draft is issued, and second that the place designated as the destination of the money order should be assumed to be the State of this creditor's address.

This argument is contrary to the stipulated facts in this case. If the paying office cannot locate the sendee, or after notice the sendee refuses a draft or does not appear to obtain one, or for any other reason the paying office cannot effect payment to the sendee, then after 72 hours (or other specified period) the money order is cancelled under the terms of the order by the paying office, requiring a refund to the sender (Stipulation at p. 8, ¶ 14 and Exhibits 11-14). Therefore, by the terms of the money order and in actual practice Western Union "cancels" unpaid or undelivered money orders. Following cancellation, the "creditor" is the sender, and not the sendee as Florida contends.

Florida's further contention that the State of destination of the money order should be presumed to be the last known address of the creditor (as defined by Florida) faces the same difficulties with which the converse presumption advocated by Pennsylvania is confronted.* This second aspect of Florida's argument therefore involves, as does

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* Where no draft is issued to the sendee, Florida's claim as the State of destination is particularly tenuous. It is well known that Florida is a "vacation" State. At the very least, a substantial number of Florida "sendees" are residents of other States merely travelling in Florida. Accordingly, when a money order destined for Florida is cancelled, Florida in most cases will have no relationship with the sendee other than his temporary presence.

Pennsylvania's principal argument, the carving out of an exception from the rule laid down in *Texas* based on the contention that in *Texas* the debtor had records from which creditors' addresses could be ascertained. It is argued by Pennsylvania and Amexco that this determinative factor is not present in the instant situation.*

This contention that *Texas* depended upon the existence of last known addresses, is groundless. Both the opinion in *Texas* v. *New Jersey* and the Master's Report (Report pp. 8-12) on which it was based are devoid of any statement as to how many creditors' last known addresses were shown by the debtor's books and records, much less contain any statement that as to "most" of the debts the creditors' last known addresses were shown. It was therefore quite impossible for the Court to have grounded its decision on the "fact of maintenance of such records".

What is clear is that the Court was fully aware that with respect to portions of four of the eight categories of "debts" involved in *Texas* there were creditors "some of whom had no last known address indicated", 379 U.S. at 675-76, fn. 4. With this fact in mind, the Court laid down

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* Amexco argues also that the place of purchase should be presumed to be the place of the creditor's address. In support of this presumption, it discusses a 1963 survey (Amexco, *supra* p. 16) which was objected to when offered into evidence (Transcript, p. 9) as hearsay and incompetent, and not admitted into evidence by the Special Master (Report pp. 5-6) as immaterial. It may be noted that "1963" is not a year included in the instant litigation and that the period in question, ending with December, 1962, included the War years with its extraordinary mobility among members of the armed services and others who presumably made frequent use of telegraphic money order services. In addition, Amexco cites various publications (Brief *Amicus Curiae,* p. 15) pertaining to "banking" matters. Without considering the specifics of these factual assertions, which are not in evidence, it appears tenuous at best to presume that banking practices can be assimilated to telegraphic money orders or with traveler's checks. Further, no documentation is necessary to establish that mobility has become a way of life in the United States and this fact has given rise to many problems in adjusting to a federal system.

a rule applicable to "all" abandoned intangible obligations, making specific provision for those obligations where the creditor's last address was unknown. Moreover, when this Court decided *Texas* v. *New Jersey,* in 1965 it had already confronted these factual issues in *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 in 1961, and therefore was aware of the instant facts when it formulated the unqualified *Texas* rule for intangibles of all kinds.

In this regard, it should be noted that *Texas* v. *New Jersey* involved a wide variety of intangibles such as uncashed checks for wages, reimbursements, goods and services, shareholder dividends and minor obligations; unclaimed mineral proceeds and payroll deductions; and undelivered fractional stock certificates. In short, *Texas* v. *New Jersey* concerned the types of intangible business obligations common, in one facet or another, to a multitude of business operations.

In reality, Pennsylvania's and Florida's contentions are nothing more than that in this case there are larger percentages of unknown last addresses than there were in *Texas* and that this fact justifies an exception to the rule. This is precisely what this Court said was to be avoided, that is, a decision in each case based on its "particular facts" or the creation of "new rules of law to apply to ever-developing new categories of facts". Moreover, if different rules were to be formulated depending on which debtors kept records of last known addresses and which did not, endless litigation would ensue to determine in each case the proper category for each holder of unclaimed property—depending upon whether its records essentially contained this information.

In the long run, in the very limited instances where records of creditor's addresses are not available escheats "will tend [to be] distribute[d] . . . among the States in the proportion of the commercial activities of their residents". Errors in distribution, "if indeed they could be

errors, probably will tend to a large extent to cancel each other out". 379 U.S. at 681.

Moreover, it is within the power of Pennsylvania and other States to correct this situation with little cost to Western Union. The Company's "money order application form" has a blank space for the "sender's address". (See Exhibit 2 to Stipulation). States can require Western Union to maintain adequate records of the addresses of senders. The only change necessary in Western Union's record keeping would be the addition in their "ledgers" of a column showing "sender's address". (See Stipulation at p. 14, ¶ 26). On the other hand, Pennsylvania's position herein may in effect discourage maintenance of such records.

C. The Excepting Parties In Effect Advocate A Return to the "Contacts" Criterion Which This Court Has Repudiated.

The effect of the positions of the excepting parties and Amexco in advocating a criterion for escheat or custodial holding based upon the place of the original "transaction" or place of "purchase" is to apply a form of "contacts" criterion.

In the instant case Pennsylvania asserts the predominant right of the state where the transaction or purchase was initially effected. In another fact situation, however, a different "contact" may be urged, or issue may be drawn as to the state where in fact the "transaction" or "purchase" occurred. Contemporary business practices continuously involve interstate transactions and purchases. To retread the long road to such a "contacts" theory is to invite endless litigation.

Texas v. *New Jersey* is unequivocal in this respect:

> "The 'contacts' test as applied in this field is not really any workable test at all—it is simply a phrase

> suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim to those pennies or dollars seems stronger than another's * * *. The uncertainty of any test which would require us in effect to either decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts, might in the end create so much uncertainty and threaten so much expensive litigation that the states might find that they would lose more in litigation expenses than they might gain in escheats." 379 U.S. at p. 679

As a logical consequence, the Court has refused to adopt any rule which would result in its treating this subject on a case-by-case basis:

> "Moreover, application of the rule Pennsylvania suggests would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located. Similar uncertainties would result if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat. Any rule leaving so much for decision on a case-by-case basis should not be adopted unless none is available which is more certain and yet still fair". 379 U.S. at 680

In establishing the rule in *Texas* v. *New Jersey,* this Court was fully aware that the "case could have been resolved otherwise". The Court recognized that it was "fundamentally a question of ease of administration and of equity", and concluded that the rule it adopted "is the fairest, is easy to apply and in the long run will be the most generally acceptable to all the States." 379 U.S. at 683

The concern for ease of administration and equity dictated, in the Court's view, that the question of which State should take abandoned intangible obligations be

> "settled once and for all by a clear rule which will govern all types of intangible obligations . . . and to which all States may refer with confidence."* 379 U.S. at 678

Moreover, in repudiating any "contacts" criterion in *Texas* this Court acted upon the basis of preceding decisions which had initiated a direction away from a place of "transaction" theory to one premised upon the location of either the creditor or debtor. While in *Connecticut Mutual Life Insurance Co. et al.* v. *Moore,* 333 U.S. 541 (1947) the Court did not deal with potential opposing claims by different states it premised its decision on the location of the "owner". On the other hand, the *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951) decision was based on the domicile of the "debtor". Accordingly, these decisions logically implied an ultimate rule which takes account of the continuing relation of either the creditor or debtor or both with a particular state, as opposed to a rule based upon the vagaries and transitory character of the place of "transaction".

Further, this Court in *Texas* in arriving at the conclusion that it had settled the matter "once and for all" observed, "In some respects the claim of Pennsylvania, where Sun's principal offices are located, is more persuasive, since this State is probably foremost in giving the benefits of its

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*At another point, the Court stated: "in other words in both situations the State of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat. Such a solution for these problems, likely to arise with comparative infrequency, seems to us conducive to needed certainty and we therefore adopt it." 379 U.S. at 682

economy and laws to the company whose business activities made the intangible property come into existence". 379 U.S. at p. 680 In this context, it should be noted that New York is not only the State of corporate domicile but is the situs of the principal place of business of Western Union, the place where its executive offices are located, where its books of accounts are maintained, where the meetings of the Board of Directors take place and where its management and fiscal policies are determined. (Stipulation, p. 1, ¶ 1). Moreover, as noted by this Court in *Western Union* v. *Pennsylvania,* 368 U.S. 71, 78 (1961), the New York Statute, Abandoned Property Law, § 1309, is a custodial and not an escheat statute, "leaving the way clear for all claimants to bring action to recover them at any time * * *." New York has no statute of limitations on claims by rightful owners to abandoned funds or property held by its State Comptroller. Abandoned Property Law § 1404; *Matter of New York University* (State Comptroller), 271 App. Div. 131, 63 N.Y.S. 2d 556, aff'd 296 N.Y. 913, 73 N.E. 2d 36 (1947).

State legislation governing unclaimed property has not evolved in any uniform manner. In adopting the *Texas* rule with respect to unclaimed property and conflicting state claims, this Court did not create the necessity for more State legislation than would have been required by other rules. Such conforming legislation is not a problematical matter once a definite rule is established.

In summary, the eroding exceptions proposed to the rule adopted by this Court "with a unique tone of finalty"* in *Texas* v. *New Jersey,* should be rejected. Any other determination would be tantamount to a reversion to the "contacts" test which was rejected by this Court in *Texas* v. *New Jersey.*

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* Sentell, "Escheat Unclaimed Property, and the Supreme Court", 17 Western Reserve Law Review 50, 78 (1965).

Conclusion

The rules announced in *Texas* v. *New Jersey,* are applicable to the abandoned funds held by Western Union in this case. Each of the proposed exceptions to the rule should be rejected. The abandoned money order funds held by Western Union should be disposed of as recommended in the Special Master's Report, pursuant to the rules adopted by this Court in *Texas* v. *New Jersey.* Such funds, when paid to New York, will be held for the benefit of the persons entitled thereto without limitation of time.

Dated: New York, New York, February 24, 1972.

Respectfully submitted,

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