In the Supreme Court of the United States

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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

REPLY BRIEF OF COMMONWEALTH OF PENNSYLVANIA TO BRIEF OF DEFENDANT NEW YORK IN SUPPORT OF REPORT OF SPECIAL MASTER

J. SHANE CREAMER
Attorney General of Pennsylvania
DANTE MATTIONI
Deputy Attorney General for Eastern Pennsylvania
HERMANN ROSENBERGER, II
Assistant Attorney General
Attorneys for Plaintiff Commonwealth of Pennsylvania

MICHAEL EDELMAN
Of Counsel

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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CASE CITED

REPLY BRIEF OF COMMONWEALTH OF PENNSYLVANIA TO BRIEF OF DEFENDANT NEW YORK IN SUPPORT OF REPORT OF SPECIAL MASTER

I. THE CORPORATE DOMICILE RULE, AND NOT PENNSYLVANIA'S POSITION, REPRESENTS DEFICIENCIES OF THE "REPUDIATED" CONTACTS CRITERION

New York states that the rule advocated by Pennsylvania (and supported by all of the other States which are party to this action—excepting Florida and Arizona) is a revival of the "repudiated" contacts criterion raised by Texas in *Texas v. New Jersey,* 379 U.S. 674 (1965). To the contrary, all rules ever proposed for resolving conflicting State claims over escheats[1] have been based on some State "contact"—be it with the creditor, debtor or debt—with the fund sought to be escheated; but it is the corporate domicile rule proposed by New York, and accepted by the Special Master, which carries the contacts criterion to its logical extreme by rejecting the commercial realities of the underlying transactions.

Texas had argued, with respect to some of the obligations unclaimed from the Sun Oil Co., that the

[1] For convenience, "escheat" as used in this brief will refer as well to custodial taking or custodially take, depending on whether that word is used as a noun or as a verb.

State of the creditor's last known address should be allowed to escheat, but with respect to others, had maintained that either location of the debtor's records or the situs of real property from which the debt was created should control. Not only did Texas' proposal threaten recurrent litigation over each new category of escheats (because of the room left for factual disputes) but it diffused superiority of a claim as between States to those having the most significant contact with the creditor, debtor, or debt in different situations. The Court wished to, and did, focus in on the factual reality that a debt is an asset of a creditor, and so adopted the rule then proposed by Florida. As between the different formulae proposed for assigning priority, the Court clearly rejected those based on a State-debtor nexus—argued then by both New Jersey and Pennsylvania, and now championed by New York—as the least workable, both in terms of equity and commercial reality, concepts which the Court found should control such controversies between the States.

The limitations of a rule for assigning inter-State priority which focuses on the debtor's, and not the creditors, contact with the escheating State, is graphically illustrated by the instant factual context. Should the corporate domicile exception of *Texas v. New Jersey* be extended as requested, unrefunded monies belonging to citizens located in the forty-eight States served by Western Union would flow into the treasury of the State of New York.

II. TEXAS V. NEW JERSEY DOES NOT PRECLUDE THE COURT FROM A REVIEW OF INTANGIBLE OBLIGATIONS WHERE THE DEBTOR DOES NOT CUSTOMARILY RETAIN THE ADDRESS OF HIS CREDITOR

The Court was quite careful to confine its holding in *Texas v. New Jersey* to the factual setting of the debtor instruments there involved. So at 379 U.S. 674, 678, the Court expressed a desire to formulate a rule which would govern "all types of intangible obligations *like these*" (emphasis supplied), and at pages 681-682 the Court formulated its holding with reference to ". . . each item of property in question *in this case*." Such precise limitation to the intended scope of the holding cannot be said to have been accidental.

The Court and the parties must have been well aware that the assorted monetary obligations of an oil producing, refining and distributing corporation could not be said to encompass all of the commercial obligations which in the course of interstate commerce go unclaimed by their holders and so give rise to conflicting State demands for escheat. To say that the Court promulgated an all-encompassing rule which was intended to govern with finality the escheat, as between the States, of all intangible property, is to attribute a prescience which even to this honorable body, is quite inconsistent with our legal history. The very variety of our modes and instruments of commerce is tribute to the opposing genius of the common law which allows for the precise, yet flexible, fitting of rules to meet the realities of situations as they arise.

That the Court was influenced by the specific setting of a producing and distributing type of enterprise is quite evident from the manner in which the corporate domicile exception was grafted onto the creditor State rule, the main holding of *Texas v. New Jersey.* The great body of the opinion was devoted to a discussion of the underlying realities and equities which required application of the creditor State rule as opposed to the others proposed. Those realities and equities have been restated by Pennsylvania many times in the course of this litigation—that the unclaimed debt is an asset of the creditor, not the debtor; equitable distribution among the States of escheats in proportion to the commercial activities of their citizens; simplified application and administration of escheat laws; and a rule which ". . . in the long run will be most generally acceptable to all the States." 379 U.S. 674, 683. When it came time to state the corporate domicile exception, applicable to situations where the corporation retained no record of its creditor's address or where the creditor's State had no law which allowed for escheat, the Court made no suggestion that the same was dictated by the above considerations.

Indeed, the corporate domicile rule, proposed then by New Jersey for all of the transactions, had been rejected because "it would too greatly exalt 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. 674, 680. It was then accepted in the two situations stated above; first, because within the case's factual context those situations were presumed ". . . *likely to arise* *with comparative infrequency*" (emphasis supplied), and only second because it was conducive to "needed certainty." *Ibid.*, p. 682.

It is evident therefore that the Court did not preclude itself for all time, as argued by New York, from a review of intangible obligations such as Western Union money orders (and other forms of bearer notes and certificates) where by custom and commercial practice (as conceded by New York with respect to Western Union in paragraph 14 of its answer and at page 7 of its brief) it is not feasible to determine the creditor's last known street address from the debtor's books and records. This is the converse of the factual situation which allowed for the corporate domicile exception to be initially applied.

III. THE WESTERN UNION TRANSACTION FALLS WITHIN A LIMITED CATEGORY OF COMMERCIAL SERVICES AND BEARER INSTRUMENTS WHICH ARE DISTINCT FROM THOSE CONSIDERED IN TEXAS V. NEW JERSEY

New York repeatedly urges in its brief that application of anything more than the black letter law of *Texas v. New Jersey*, even interpretation of that law by the Court, will open a Pandora's box of litigation between the States with respect to conflicting claims of escheat. New York further infers at page 11 of its brief that the wide range of unsatisfied claims on the Sun Oil Company in *Texas v. New Jersey* so covered the gamut of intangible business obligations, that there really is not much further to consider. Then, at the bottom of page 11, New York states that "in the very limited instances where records of creditors' addresses are not available . . ." escheats will distribute themselves among the States in proportion to the commercial activities of their citizens and errors in distribution will cancel themselves out, citing *Texas v. New Jersey* in a manner which is totally inapposite to the present factual context.

In fact there are two distinct categories of transactions from which intangible obligations, susceptible among the States to escheat, arise:

> 1. Obligations incurred by an enterprise during the course of its business for services provided by employees, suppliers, investors, money-lending creditors, depositors, etc., and
>
> 2. Obligations incurred by an enterprise whose business, or a facet of whose business, is to incur such obligations as a service to the public.

The first category is typified by a continuing relationship between the debtor enterprise and its creditors or classes of creditors because of the necessity to the enterprise of the services which the latter provides in exchange for creation of the debt. Because of this continuing relationship, and the relatively limited number of creditors, each creditor's street address is usually maintained by the debtor enterprise on its books and records as a matter of commercial practice. The second category is typified by a transient relationship between the debtor enterprise and its creditors, in that the debt is, at first instance, a service which the enterprise contracts to perform in the future, and which is offered to the public at large as part of its business. It is only when, for some reason, the contracted-for service fails to be performed that the consideration paid (in the absence of an agreement to the contrary) becomes refundable, and that a claim is created in the creditor which is subject to prospective escheat. Since the service is offered to the public at large, and both debtor and creditor reasonably expect that it will be performed, as a matter of commercial practice each creditor's street address is usually not maintained on its books and records by the debtor enterprise. In the first category, the enterprise becomes indebted for services received; in the second, the debt arises from the enterprise's failure to complete services which were previously purchased by its creditor.

The first category covers the range of transactions considered in *Texas v. New Jersey* and would likewise comprehend any unclaimed obligations that Western Union might owe to its employees, shareholders, and suppliers, etc. The second category arises from the very nature of the money order business in which Western Union charges for its service in first incurring and then transmitting the obligation. (It likewise comprehends the business of other companies whose service is to incur redeemable obligations, whether in the form of travelers' cheques, gift certificates, tickets, tokens or the other types of bearer instruments which have been mentioned in prior briefs submitted by Pennsylvania and some of the other parties.) A factor which is common to most transactions in this second category is the absence of commercial practice, or any pragmatic reason therefor, of recording the street address of the obligee.

With particular respect to Western Union, though its ledgers indicate the city and State of purchase for each money order, and its applications provide space for the purchaser's insertion of his or her street address and that of the prospective recipient, "in many cases" the customer will forego insertion of his or her address, and in still others will not insert the address of the intended recipient (*Stipulation*, §7). (This logically flows from the fair assumption that the purchaser does not contemplate that the transaction will not be completed so as to necessitate a refund.) With respect to "over the counter" money orders sold by Western Union, American Express, and other like companies, neither identity nor street address of the purchaser is retained, but again the records show the location and State of each sale (*Stipulation*, footnote 10).

It cannot fairly be said, as argued by New York, that this second category of intangible instruments which are subject to escheat—where the street address of creditors is rarely maintained on either the books or records of the enterprise—is "limited", or that given application of the corporate domicile rule, errors in distribution will tend to cancel themselves out. The transparency of this argument is apparent if only from the absence of one State, other than New York, which supports extension of the corporate domicile exception to the rule of *Texas v. New Jersey* to the facts of this case.

At page 14 of its brief, New York argues that the corporate domicile rule recognizes the continuing relationship between the debtors and one particular State. What New York ignores is that to at least 80 percent of the Western Union money order transactions it has no relationship whatsoever (*Stipulation,* Exhibit 24). As to the others, New York would escheat under the rule proposed by Pennsylvania. While there are no demonstrable elements in this second category of transactions which require a rule giving preference for purposes of escheat to the State of corporate domicile, the same equitable and pragmatic rationale which underlay the primary holding of *Texas v. New Jersey,* supports a rule in the instant case which again gives preference to the creditor State.

IV. ADOPTION OF THE CORPORATE DOMICILE, AND NOT THE CREDITOR STATE, RULE WILL PROMOTE LEGAL UNCERTAINTY AND ADMINISTRATIVE EXPENSE

It is the corporate domicile rule and not the rules supported by the other States to this litigation—each of which focuses on the creditor's State—which will promote legal uncertainty and administrative expense. New York to the contrary, the monies involved in the instant case and its prospective ramifications are substantial, and the remaining thirty-four States which have laws relating to escheat will not sit idly by and watch unclaimed sums from transactions which originated in their States drain to one State for failure of adequate records. The possibilities for legislation and related lawsuits are obvious, and the resulting commercial expense and even dislocation is equally so. Western Union has estimated the cost of a survey of what applications it retains from its prior history to be from $100,000.00 to $175,000.00, for purposes of determining last known street addresses (*Stipulation,* §32, Exhibit 21). This expense can be magnified many times when considering the probability of legislatively required retention, processing and reporting of such records by the industry (and the cost of resulting litigation should the industry resist the imposition of such requirements) should the creditor State rule of *Texas v. New Jersey* be narrowly construed and the corporate domicile exception extended as requested by New York. As stated by Western Union at pages 13 and 14 of its brief to the Special Master, these records are not required in the operation of the money order business.

> "Since it is reasonable to assume that the vast majority of such money orders are paid and never fall into the category of abandoned property, maintaining adequate, permanent records of names and addresses of purchasers in all such transactions, for the sake of documenting in such additional respects the tiny proportion which might some day become escheatable, would certainly be costly and unpalatable, and arguably unreasonable. Moreover the costs of so doing must ultimately be borne by patrons of the service, so that such requirement might also not be in the public interest."

CONCLUSION

Each of the proposed rules in this case, as in *Texas v. New Jersey,* presupposes some sort of State "contact" with either the creditor or debtor to the instruments sought to be escheated. The corporate domicile rule, however, embodies the deficiencies of the contacts criterion, as proposed by Texas in *Texas v. New Jersey,* in their logical extreme. This is because it focuses entirely on the debtor and not the creditor to the underlying transaction. The corporate domicile rule was grafted onto the main holding of that case within a context of the creditor's last known street address being ordinarily evident on the books and records of the debtor in the types of transactions there involved. That is not so within the present factual context, which encompasses a wholly distinct and definable category of transactions where the debtor's enterprise is to obligate itself to perform services on a transient basis to the public at large, and where knowledge of the creditor's street address is neither required by the business nor ordinarily recorded on its books and records. Because the corporate domicile exception, in this context, is so out of touch with commercial reality and considerations of fairness to the great majority of States, its adoption will only promote legal uncertainty and administrative expense.

Dated: Philadelphia, Pennsylvania, March 22, 1972.

Respectfully submitted,

J. SHANE CREAMER
Attorney General of the Commonwealth of Pennsylvania

DANTE MATTIONI
Deputy Attorney General for Eastern Pennsylvania

HERMANN ROSENBERGER, II
Assistant Attorney General

MICHAEL EDELMAN
of Counsel