



Nos. 22O145 & 22O146, Original

In the Supreme Court of the United States

STATE OF DELAWARE, PLAINTIFF,

v.

COMMONWEALTH OF PENNSYLVANIA AND
STATE OF WISCONSIN, DEFENDANTS.

**WISCONSIN'S RESPONSE IN OPPOSITION
TO DELAWARE'S MOTION FOR LEAVE TO
AMEND BILL OF COMPLAINT**

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

DANIEL P. LENNINGTON
KEVIN M. LEROY
Deputy Solicitors General

Attorneys for the State of Wisconsin

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INTRODUCTION

Delaware seeks leave to add a proposed claim against Wisconsin in this original action, alleging that unknown companies unlawfully escheated to Wisconsin an unknown amount of money from unspecified negotiable instruments of an unknown nature. *See* Del. Mot. For Leave To Amend Bill Of Complaint, ¶¶ 22–23 (Jan. 9, 2017) (“Del. Mot.”). This baseless, barebones speculation fails even the permissive standards for amending a complaint in federal district court, and certainly falls far short of the heightened standard for amending a complaint to add a new claim in an original action.

STATEMENT

Congress has provided that when a “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” is abandoned, the State where the instrument was purchased can claim the money. 12 U.S.C. § 2503. This case involves Delaware taking custody of funds from certain money order products issued by MoneyGram Payment Systems, Inc.

As relevant here, MoneyGram issues two types of money order products covered by the Federal Act. First, MoneyGram issues small denomination money orders through agents such as retail stores, grocery

stores, and pharmacies. Wis. Counterclaim ¶ 12 (filed June 3, 2016) (“Wis. Claim”). Second, MoneyGram issues larger denomination money orders through agents such as certain financial institutions. Wis. Claim ¶ 12. MoneyGram markets these higher dollar value money orders as “Official Checks.” Wis. Claim ¶ 12. Official Checks all have the commercial features of a money order. Wis. Claim ¶ 13.

Nevertheless, MoneyGram treats funds from abandoned low denomination money orders and abandoned Official Checks sold in Wisconsin differently. With regard to abandoned small denomination money orders, MoneyGram abides by the Federal Act and Wisconsin law and transfers the funds to Wisconsin. Yet, with regard to abandoned Official Checks, MoneyGram transfers the unclaimed funds to Delaware’s treasury, in violation of the Federal Act and Wisconsin law. Wis. Claim ¶¶ 29, 30.

Wisconsin filed a lawsuit against Delaware and MoneyGram to reclaim this money in the United States District Court for the Western District of Wisconsin on April 27, 2016. *See Wis. Dep’t of Revenue v. Gregor*, No. 16-cv-281, ECF No. 1 (W.D. Wis. April 27, 2016). Pennsylvania filed a similar lawsuit against Delaware. *See Treasury Dep’t of the Commonwealth v. Gregor*, No. 16-cv-351, ECF No. 1 (M.D. Penn. Feb. 26, 2016).

On May 26, 2016, Delaware filed a Motion For Leave To File Bill Of Complaint with this Court, along

with a proposed Bill Of Complaint, regarding this dispute. Wisconsin agreed with Delaware that this Court has exclusive authority to settle this dispute and also moved to file a counterclaim in the proposed action. This Court granted Delaware's motion and Wisconsin's motion on October 3, 2016.

Delaware's Bill Of Complaint alleged that "Wisconsin . . . recently retained a third-party auditor, Treasury Services Group ("TSG"), to conduct a review of MoneyGram's Official Checks." Del. Bill Of Complaint, ¶ 15 (filed May 26, 2016) ("Del. Orig. Compl."). The Bill Of Complaint further alleged that TSG's report concluded that "the funds related to Official Checks that MoneyGram had been escheating to Delaware should have been escheated to the State where the Official Checks were sold." Del. Orig. Compl. ¶ 15. Finally, the Bill Of Complaint alleged that Wisconsin had filed suit against Delaware to reclaim these funds, Del. Orig. Compl. ¶ 17, and that Delaware had "no adequate remedy at law to enforce its superior right to that of the State of Wisconsin" except through this Court exercising its original jurisdiction, Del. Orig. Compl. ¶¶ 21–22.

Wisconsin's counterclaim specifically alleged that it had "discovered that Delaware has [unlawfully] taken custody of more than \$13,000,000 in funds from abandoned MoneyGram Official Checks purchased in Wisconsin." Wis. Claim ¶ 29. Wisconsin "discovered that Delaware had been on notice of this unlawful practice since at least 2011, [and that] . . . Delaware

further agreed to indemnify MoneyGram for claims resulting from this practice and instructed MoneyGram to continue to remit funds from abandoned Official Checks to Delaware.” Wis. Claim ¶ 30. Finally, “Wisconsin attempted to resolve this dispute with Delaware and MoneyGram by sending both parties letters in July 2015 asking for these sums to be refunded to Wisconsin. MoneyGram responded by explaining that it had already remitted the money to Delaware pursuant to Delaware’s instructions. Delaware responded that it was reviewing the issue.” Wis. Claim ¶ 31.

On October 31, 2016, Wisconsin filed an answer to Delaware’s Bill Of Complaint. Delaware filed an answer to Wisconsin’s counterclaim on November 1, 2016.

On January 9, 2016, Delaware moved for leave to amend its Bill Of Complaint against Pennsylvania and Wisconsin, seeking to add a proposed claim “for certain unclaimed negotiable instruments that Delaware believes have been wrongly escheated to Pennsylvania and Wisconsin.” Del. Mot. 2.

ARGUMENT

Delaware is seeking leave to amend its Bill Of Complaint to add a new claim against Wisconsin, but does not explain to this Court the heightened standard applicable to its request: “the solicitude for liberal amendment of pleadings animating the Federal Rules

of Civil Procedure, Rule 15(a) . . . does not suit cases within this Court’s original jurisdiction.” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). As such, “proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what [this Court] reasonably anticipated when [this Court] granted leave to file the initial pleadings.” *Id.* Delaware’s claim here would not even satisfy Rule 15(a)’s liberal amendment rule, and therefore does not come close to satisfying this Court’s higher standard for amendments to add new claims in original actions.

A. Under Rule 15(a), leave to amend should not be granted if the proposed claim is “futil[e].” *Foman v. Davis*, 371 U.S. 178, 182 (1962). A proposed claim is futile when it “would not survive a motion to dismiss”—that is, when the proposed claim does not “contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted)).

“While a complaint . . . does not need *detailed* factual allegations,” the “[f]actual allegations” that make up a proposed claim “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (emphasis added); *accord Iqbal*, 556 U.S. at 678. The complaint must assert more than a “formulaic recitation of the elements of a cause of action,” *Twombly*, 550 U.S. at

555, or “‘naked assertion[s]’ devoid of ‘further factual enhancement,’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (brackets in original). Rather, the claim “must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face,” *id.* (citations omitted)—meaning “the plaintiff [must] plead[] *factual content* that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (emphases added). In short, the claim must contain enough factual information to “give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (citation omitted).

Twombly illustrates the operation of these principles. There, this Court held that a complaint alleging a violation of the Sherman Act was insufficient because it included only “a conclusory allegation of [an] agreement at some unidentified point.” *Twombly*, 550 U.S. at 557. Such an allegation “d[id] not supply facts adequate to show illegality,” *id.* at 557; indeed, it is merely a recitation of an element of a Sherman Act claim, *see id.* at 555. The plaintiffs had to explain and identify “the statement of circumstances, occurrences, and events in support of the claim[ed]” illegal agreement. *Id.* at 555 n.3 (quoting 5 Wright & Miller § 1202, at 94, 95).

Similarly, in *Iqbal*, this Court considered the plaintiff’s claim that the “defendants adopted an unconstitutional policy that subjected [the plaintiff] to

harsh conditions of confinement on account of his race, religion, or national origin.” *Iqbal*, 556 U.S. at 666. The plaintiff alleged that the defendants “willfully . . . agreed to subject him to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin.” *Id.* at 680 (brackets removed and citations omitted). The plaintiff asserted that one defendant “was the principal architect” of this policy while another was “instrumental” in carrying it out. *Id.* (citations omitted). This Court held that these “bare assertions . . . amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim.” *Id.* at 681 (citations omitted).

B. Delaware’s proposed claim falls short of the standards this Court articulated in *Twombly* and *Iqbal*, and, *a fortiori*, does not come close to satisfying this Court’s more demanding requirements for amendments to add new claims to original actions. See *Nebraska*, 515 U.S. at 8.

Delaware’s proposed claim is as follows:

22. On information and belief, other companies have erroneously applied 12 U.S.C. § 2503(1) and have wrongly escheated unclaimed negotiable instruments to . . . the State of Wisconsin based on the State of purchase of the negotiable instruments.

23. These certain other unclaimed negotiable instruments, including but not limited to official checks which were issued by companies other than MoneyGram, do not fall within the definition of 12 U.S.C. § 2503.

...

27. As the ultimate proper recipient of sums payable on these certain other unclaimed negotiable instruments, Delaware is entitled to bring this action to enforce its laws and recover property unlawfully remitted to . . . Wisconsin.

Del. Mot. ¶¶ 22, 23, 27. Stated more plainly, an unknown number of unnamed “*other* companies” violated § 2503 by erroneously escheating to Wisconsin “certain *other* unclaimed”—and unnamed—“negotiable instruments.” Del. Mot. ¶¶ 22, 23, 27 (emphases added). Put another way, Delaware basely speculates that unknown companies illegally escheated to Wisconsin an unknown amount of money from negotiable instruments of an unknown nature.

Delaware’s proposed claim does not contain “sufficient factual matter . . . to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation omitted). It does not explain the factual circumstances supporting the claim, like who acted wrongly (“other companies”); it does not state the occurrences of the alleged wrongs supporting the claim (“other unclaimed negotiable instruments,” “have wrongly escheated” to Wisconsin); and it is completely silent on

the number of alleged events supporting the claim. See *Twombly*, 550 U.S. at 555 n.3. Rather, just like the insufficient claims at issue in *Twombly* and *Iqbal*, Delaware's proposed claim is nothing more than a "formulaic recitation of the elements of a cause of action" under § 2503, devoid of enough factual information to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 555 (citation omitted).

CONCLUSION

Delaware's motion to amend its Bill Of Complaint should be denied.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

DANIEL P. LENNINGTON
KEVIN M. LEROY
Deputy Solicitors General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

Attorneys for the State of Wisconsin

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