No. 22-0145 & 22-0146

IN THE
Supreme Court of the United States

DELAWARE,

Plaintiff,

v.

PENNSYLVANIA AND WISCONSIN,

Defendants.

ARKANSAS, *et al.*,

Plaintiffs,

v.

DELAWARE,

Defendant.

On Exceptions to Second Interim Report Of the Special Master

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* AMERICAN BANKERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The American Bankers Association (ABA) is the principal trade association of the financial services industry in the United States. ABA members are located in all fifty states, the District of Columbia, and Puerto Rico, and include financial institutions of all sizes that collectively hold a majority of the domestic assets of the U.S. banking industry. The ABA frequently appears as amicus curiae in litigation involving issues of widespread importance to the industry.

ABA banks are the holders of substantial amounts of unclaimed property, annually reporting hundreds of millions of dollars in unclaimed property to various States. Banks are thus keenly interested in having clear rules of priority for resolving competing State claims to unclaimed property: banks can remit particular funds only to a single State, and they face penalties, administrative burdens, and potential liability if ambiguities in the priority rules permit States and others to challenge the banks' good faith determinations of the proper recipient. The ABA submits this supplemental brief to ensure that, in resolving this action, the Court interprets the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-2503 (the "FDA") in a manner that eliminates, rather than exacerbates, uncertainties in those rules.

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus*, its members and its counsel made any monetary contribution toward the preparation and submission of this brief.

STATEMENT

As the ABA explained in its prior submission in this matter, the Special Master's First Interim Report threatened to perpetuate and exacerbate uncertainties about the scope of the FDA. The Special Master recognized that the phrase "other similar written instrument" in the FDA is inherently ambiguous, and he suggested an interpretation that would make clear it does not apply to instruments such as cashier's checks. But the Special Master refrained from adopting a definitive interpretation of this clause, and urged this Court to do the same. Even more problematically, the Special Master suggested that the statutory term "money order" might *itself* cover cashier's checks, but he again refrained from resolving the question.

For reasons set forth in the ABA's prior submission, an interpretation of the FDA that would sweep in cashier's checks and other instruments that were widely used before the FDA, but that are not mentioned in the Act, would have destabilizing effects. ABA Amicus Br. 3–5, 11. Such an interpretation would also be inconsistent with the 1981 Model Uniform Unclaimed Property Act, which has been adopted by nearly half of all States and provides that cashier's checks and certified checks fall outside the scope of the FDA. *Id.* at 10–11. Accordingly, the ABA urged the Court to adopt an appropriately narrow interpretation of "money order" and "other similar written instrument" that makes clear that these phrases exclude cashier's checks and other financial instruments that (like cashier's checks) were commonly used prior to 1974 and lack the characteristics that could gave rise to a "windfall" recovery by a single escheating State.

In support of that position, the ABA argued that interpreting the ambiguous language of the FDA to include instruments such as cashier's checks would lead to incongruous results inconsistent with the Act's purpose. If Congress had intended to extend the FDA's new priority rules to unclaimed cashier's checks and other well-known instruments in use before 1974, it surely would have said so explicitly, rather than rely on the undefined phrase "money order," or the even vaguer "other similar written instrument" clause. *Id.* at 17–21.

Moreover, cashier's checks do not give rise to the problems that the FDA was designed to prevent. "Bank-issued" cashier's checks (*e.g.*, those issued by banks to facilitate banking transactions) are not "purchased" at all, and the FDA directs unclaimed funds to the State where the instrument "was purchased." Consequently, the practices associated with such cashier's checks do not give rise to the uncertainty and resulting inequities that Congress sought to rectify by enacting the FDA because the bank's creditor is the payee, and that creditor's last known address is ordinarily maintained by the bank. *Id.* at 22. Although the separate category of "bank-purchased" cashier's checks may give rise to some payee uncertainty, such checks are issued by banks across the country domiciled in numerous states.[2] Thus, even when the secondary escheatment rule of *Texas* v. *New Jersey*, 379 U.S. 674 (1965), applies, there is no massive windfall to a single State of the kind that New York gained in *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), and that the FDA was adopted to prevent. ABA Amicus Br. 24–25.

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[2] Indeed, every state, as well as the District of Columbia and several U.S. territories, has at least one bank headquartered there.

In his Second Interim Report, the Special Master no longer appears to be urging the Court to refrain from adopting a definitive interpretation of the FDA. In addition, he has concluded that Congress did not intend the FDA to apply to instruments such as cashier's checks. He states that these types of instruments

> were so well known that it can be assumed with confidence that if Congress had intended to include them within the scope of the bill [that became the FDA], it would have mentioned them by name. The fact that the bill focused on money orders and traveler's checks without mention of cashier's checks or teller's checks (or certified checks) gives strong assurance that Congress did not intend that they be covered, regardless of their similarities to money order and traveler's checks.

Second Interim Report 17. The Special Master's reasons, however, differ from those advanced by the ABA in its initial submission.

For the reasons set forth in its initial submission and briefly summarized above, the ABA believes that the phrases "money order" and "other similar written instrument" should be construed narrowly to exclude instruments like cashier's checks that were well-known when the FDA was enacted. On that reading, the exclusion of such instruments does not turn on the meaning of the phrase "third party bank check."

However, the Special Master concludes that the phrase "other similar written instrument" created the risk that the Act would cover cashier's checks, teller's checks, and certified checks. He then reasons that the Treasury Department perceived this risk and sought to address it by proposing to exclude "third party

payment bank checks," and that Congress adopted the slightly different phrase "third party bank check" in order to exclude instruments like cashier's checks, which would otherwise be captured by the phrase other "similar written instrument." *Id.* at 17 & n.9.

The Special Master's interpretation excludes cashier's checks and other instruments that were well-known prior to enactment of the FDA, as the ABA has urged. There is language in the Second Interim Report, however, that future litigants might seek to use to argue that the "third party bank check" exclusion covers only cashier's checks that are purchased, not all cashier's checks.

Such a limitation would be inconsistent with the Special Master reasoning. He rejects the idea that the term "third party" refers to "checks drawn at the instance of a third party." *Id.* at 19. Instead, he concludes that it means "an instrument that is designed to be used for making payments to a third party." *Id.* This understanding of the phrase means that both bank-purchased and bank-issued cashier's checks are excluded by the "third party bank check" clause, since both forms of cashier's checks are used for this purpose.

Elsewhere, however, the Special Master states that the clause "means essentially a check (an instrument that is designed for making payments to third parties) on which a bank has *assumed* liability." *Id.* at 20 (emphasis added). It is odd, and potentially confusing, to say that, when a bank issues a cashier's check to pay its own bills, it is "assuming" a liability.

ARGUMENT

As the ABA explained in its initial brief, its members are interested in having clear rules of priority for

resolving competing State claims to unclaimed property. Moreover, its members believe that those rules should be consistent with the banking industry's understanding, as reflected in the 1981 Model Uniform Unclaimed Property Act, that the FDA does not apply to instruments, like cashier's checks, that were widely used before 1974 and are not mentioned in that Act.[3] Given those paramount objectives, the ABA submits that the Court should conclude that the FDA does not apply to instruments such as cashier's checks either (1) because those instruments are not encompassed by the phrases "money order" and "other similar written instrument," or (2) because those instruments are excluded by the "third party bank check" exclusion.

If the Court adopts the second theory, the ABA further submits that the Court should make clear that this exclusion applies to both bank-issued and bank-purchased cashier's checks. Specifically, if the Court adopts the second theory, it should make clear that the exclusion for a "third party bank check" "means essentially a check (an instrument that is designed for making payments to third parties) on which a bank *is* liable." This phrasing, rather than the Special Master's reference to an instrument "on which a bank has *assumed* liability," Second Interim Report at 20 (emphasis added), would eliminate any possible misunderstanding that the "third party bank check" exclusion would apply only to bank-purchased cashier's checks (and not to bank-issued cashier's checks).

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[3] Given the size of its membership, the ABA cannot represent that all member banks have followed the same practice in escheating such unclaimed financial instruments. All member banks, however, benefit from a clear rule.

As the ABA has explained, because cashier's checks are issued by banks across the country, application of the secondary escheatment rule of *Texas* v. *New Jersey* to such checks does not result in a massive windfall to a single State. Thus, neither form of unclaimed cashier's check gives rise to the inequity that Congress sought to prevent through enactment of the FDA. ABA Amicus Br. 24–25. Moreover, because bank-issued cashier's checks are used to pay a bank's own bills and liabilities, the issuing bank will typically possess the creditor's last known address. Overriding the ordinary escheatment rules in that situation makes no sense.

The clarification the ABA proposes would eliminate potential, inadvertently-caused, confusion, and make clear that the FDA does not apply to any form of cashier's checks.

CONCLUSION

For the foregoing reasons as well as those set forth in the ABA's initial submission, the Court should interpret the FDA in a manner that exclude cashier's checks and other financial instruments that (like cashier's checks) were commonly used prior to 1974 and lack the characteristics that could give rise to a "windfall" recovery by a single escheating State.

Respectfully submitted,

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