
Supreme Court Update

Supreme Court Update – State and Local Taxes

DEBRA S. HERMAN is a partner in the New York City office of the law firm Hodgson Russ LLP. *She would like to thank Mario T. Caito, an associate in the Buffalo office, for his contributions to this article.*

[pg. 45]

This column covers the unanimous Opinion of the Court in the MoneyGram Unclaimed Property cases, new Michigan Takings Clause challenges, and a Sales Tax Commerce Clause challenge.

On October 3, 2022, the Supreme Court heard oral arguments in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146. The dispute is over which state is entitled to escheat, or take custody of, the proceeds of certain unclaimed (i.e., abandoned) monetary instruments issued by MoneyGram Payment Systems, Inc. (“MoneyGram”). On February 28, 2023, Justice Ketanji Brown Jackson delivered the unanimous decision of the Court that Delaware should return the money (abandoned proceeds) it collected on certain MoneyGram Agent Checks and Teller's Checks to the states where the disputed instruments were purchased, under the purview of the Disposition of Abandoned Money Orders and Traveler's Checks Act (the “Federal Disposition Act” or “FDA”).

We still await the Court's decision in *National Pork Producers Council, et al. v. Ross,* (Docket No. 21-468), where the National Pork Producers Council and the American Farm Federation argue that

Proposition 12 violates the Dormant Commerce Clause to the U.S. Constitution, an argument advanced in many state tax cases. Also, on January 13, 2023, the Court granted certiorari in *Tyler v. Hennepin County* (Docket No. 22-166), a case which asks the Court two questions: whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?; and, whether the forfeiture of property worth far more than needed to satisfy a debt plus interest, penalties, and costs is an excessive fine within the meaning of the Eighth Amendment?

The Court has not yet determined whether it will grant certiorari in *Fair v. Continental Resources* (Docket No. 22-160) and *Nieveen v. Tax 106* (Docket No. 22-237), two other cases discussed in a prior issue of this article that address related questions. Similarly, in this issue we discuss two new petitions for writ of certiorari filed by Andrew Meisner, Oakland County Treasurer, in *Meisner v. Hall* (Docket No. 22-874) and *Meisner v. Sinclair* (Docket No. 22-894), which argue that the Sixth Circuit's decisions in a pair of cases, *Hall v. Meisner*, 51 F.4th (6th Cir. 2022) and *Sinclair v. Meisner,* 2022 WL 18034473 (6th Cir. 2022), “creates a circuit split,” in contrast to the decision reached by the Eighth Circuit Court of Appeals on the same question in *Tyler:* whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause of the U.S. Constitution. The Oakland County Treasurer requests that the Court either grant the petitions or hold them until reaching a decision in *Tyler.*

The Court also received a petition for writ of certiorari from Quad Graphics, Inc., a commercial printer headquartered in Wisconsin that prints books, magazines, catalogs, and direct mail items for customers throughout the United States. In 2018, the North Carolina Department of Revenue levied a multi-million dollar sales tax assessment against Quad Graphics, even though, in commercial terms (i.e. transfer of title and possession to the printed materials), each of the sales occurred entirely outside of North Carolina. Quad Graphics challenged the tax assessment under the Commerce Clause of the U.S. Constitution; arguing that since the sales had indisputably occurred outside North Carolina, North Carolina had no power to tax them. For its argument, Quad Graphics invoked a line of U.S. Supreme Court cases under *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327 (1944). The North Carolina Supreme Court upheld North Carolina's right to tax out-of-state sales by Quad Graphics. The court acknowledged that *Dilworth* was directly on point. But it called *Dilworth* an out-of-date “formalism” and held that the U.S. Supreme Court had implicitly overruled it, as reflected in its recent decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In *Quad Graphics, Inc. v. North Carolina Department of Revenue* (Docket No. 22-890), Quad Graphics asks the court to address “[w]hether the North Carolina Supreme Court was correct that state courts and taxing jurisdictions no longer must follow *Dilworth* because the Court has implicitly overruled it” and “[w]hether [the] Court should overrule or retain the holding in *Dilworth* that a state may not tax sales that occur outside its borders.”

Court Unanimously Rules Against Delaware in MoneyGram Unclaimed Property Cases

On February 28, 2023, Justice Jackson delivered the unanimous opinion of the Supreme Court in *Delaware v. Pennsylvania et al.* 220145 and *Arkansas et al v. Delaware,* 220146, the MoneyGram abandoned property cases. Before issuing the opinion, the court heard oral arguments on October 3, 2022, and reviewed the Court appointed Special Master's two expert reports on the case.

The issue in this case is whether MoneyGram's Agent Checks and Teller's checks

[pg. 46]

(collectively, the “Disputed Instruments”) are within the scope of the Disposition of Abandoned Money Orders and Traveler's Checks Act (the “FDA”) as “money order[s]” or “other similar written instrument[s] (other than a third party bank check). ” Under the common law, the proceeds of the abandoned Disputed Instruments would escheat to the state of the creditor's last known address, as established by the debtor's books and records, and if the address is unknown, they escheat to the debtor's state of incorporation. If, however, the Disputed Instruments fall within the purview of the FDA, then the abandoned proceeds escheat to the state where the instrument was purchased.

Disputed Instruments fall within the FDA

Congress enacted the FDA in response to debtors' states of incorporation consistently gaining legal right to escheatment, under the common law, of abandoned property, as it was, and still is, common business practice for business associations engaged in issuing and selling money orders and traveler's checks to not keep purchaser addresses in their books and records. Congress found this result to be inequitable and a windfall to debtors' states of incorporation, as they determined equitable escheatment would entitle the states where the purchasers of the instruments reside to the abandoned funds. Thus, Congress enacted the FDA.

Presented with the issue above, the Supreme Court concluded “that the Disputed Instruments are covered by the FDA because they are 'other similar written instrument[s],' and neither Delaware nor the Special Master has convinced us that they are 'third party bank check[s]. '” The Court reasoned that the Disputed Instruments “share two relevant similarities with money orders” in reaching its conclusion. Importantly, they are similar “in function and operation.” The Court relied on the common meaning of the term “money order” and the context in which the FDA was drafted in defining the term within the meaning of the FDA to be a prepaid written financial instrument used to transmit a certain amount of money to an intended payee. Notably, Delaware agreed that the Disputed Instruments, like money orders, have these characteristics as well. And also, as prepaid instruments are more likely to be abandoned and the FDA is a regulation on the escheatment of

abandoned financial products, the prepaid nature of the Disputed Instruments was very compelling to the Court in finding that the instruments are, at the very least, similar to money orders.

Moreover, “the Disputed Instruments are similar to the 'money orders' that the FDA targets because they inequitably escheat in the manner that the text of the FDA specifically identifies as warranting statutory intervention.” As a matter of business practice, MoneyGram does not keep creditor addresses, which under the common law would cause the Disputed Instruments to escheat to Delaware, MoneyGram's state of incorporation. The purpose of the FDA was to abrogate this exact escheatment result with regard to money orders, and the Court, again by considering the context in which the FDA arose, found this to be another telling similarity between the Disputed Instruments and money orders. The court also stated that based on the text of the FDA, inadequate recordkeeping is a “highly relevant” indicator that “the FDA, rather than the common law, should apply to the escheatment of the intangible property at issue.” So, the Court determined that the Disputed Instruments are similar to money orders and that they fall within the scope of the FDA.

The Court then goes on to debunk various arguments proposed by Delaware that the Disputed Instruments are not “other similar written instruments” in the FDA. Here, Delaware attempts to distinguish the Disputed Instruments from money orders on a number of fronts. The Court disregarded Delaware's contentions, however, and reasoned: “[s]ince money orders and the Disputed Instruments are comparators that are not identical, they are likely to be different in *some* respect. The real question is which differences and similarities matter. And none of the differences Delaware identifies relates to the statutory text or ordinary meaning of a money order, nor do they otherwise undermine [our] analysis of similarity.”

Disputed Instruments are not “third party bank checks,” subject to exclusion from FDA

Furthermore, Delaware argued that “even if the Disputed Instruments qualify as 'other similar written instrument[s]' within the meaning of [the FDA] they are also 'third party bank check[s]' and, as such, are expressly excluded from the FDA.” While the Special Master also ultimately recommended this conclusion in his Second Interim Report (a reversal from the Special Master's First Interim Report), the Court was still unpersuaded. Justice Jackson stated that Delaware and the Special Master failed to give a compelling reason “for concluding that the Disputed Instruments are 'third party bank check[s]' within the meaning of the FDA, and [that] the drafting history of the statute further confirms that the sweep of that language is not as broad as the definitions that Delaware and the Special Master have offered.” While the Court noted that defining “third party bank check” is a difficult task, as there is a lack of instructive guidance on the phrase, it declined to adopt Delaware and the Special Master's constructed interpretations of the phrase because their

proposals lacked supportive reasoning for why such interpretations should control the phrase's meaning in the context of the FDA and escheatment.

Additionally, the FDA's legislative history persuaded the Court that the Disputed Instruments were not “third party bank checks.” The Senate Report described the addition of the third party bank check exclusion as a “technical” change. Thus, the Court determined the exclusion to be best understood to “merely clarify[] the intended initial scope of [the FDA's] coverage,” rather than interpret the exclusion to “exempt from the statute entire swaths of prepaid financial instruments

[pg. 47]

that are otherwise similar to money orders in that they operate in generally the same fashion and would likewise escheat inequitably pursuant to the common law due to the business practices of the company holding the funds.”

The Court concluded that “[w]hen a financial product operates like a money order — *i.e.*, when it is a prepaid written instrument used to transmit money to a named payee—and when it would also escheat inequitably solely to the State of incorporation of the company holding the funds under our common-law rules due to recordkeeping gaps, then it is sufficiently 'similar' to a money order to fall presumptively within the FDA.” Thus, the Court held, in adopting the Special Master's recommendations in his First Interim Report to the extent they coincide with the Court's opinion, that the FDA controls the escheatment of the Disputed Instruments, and therefore the states where the Disputed Instruments were purchased are entitled to the abandoned funds.

County Treasurer's Challenges to Sixth Circuit's Takings Clause Decisions

In *Hall v. Meisner*, 51 F.4th (6th Cir. 2022) and *Sinclair v. Meisner*, 2022 WL 18034473 (6th Cir. 2022), plaintiff-appellants Tawanda Hall et al., and Marion Sinclair, respectively, originally brought suit against Oakland County, Michigan et al., for its failure to reimburse the plaintiffs for their equity in their homes with surplus proceeds after Oakland County foreclosed on their homes and satisfied the plaintiffs' outstanding tax debts. At times, Oakland County would convey the homes to a different Michigan government entity, which would be the entity to retain the surplus proceeds, rather than Oakland County itself. Michigan's General Property Tax Act, as written when the facts relevant to these proceedings occurred, allowed for such foreclosure and retention of surplus proceeds.

Tawanda Hall appealed to the Sixth Circuit Court of Appeals, claiming a violation of the Takings Clause of the Fifth Amendment and the Michigan Constitution, inverse-condemnation, Excessive Fines in violation of the Eighth Amendment, violations of Procedural and Substantive Due Process, and unjust enrichment. The Sixth Circuit found Oakland County to have violated the Takings

Clause, weighing heavily on long-settled rules of law and equity, and affirmed the dismissal of the other claims. The Court reasoned that Oakland County took the plaintiff's property without just compensation, violating the Takings Clause, when the county took absolute title in the property, and thus plaintiff's equitable interest in their property, without compensating the plaintiff for such, regardless of a different government entity, other than Oakland County itself, retaining the surplus proceeds. Instrumental to the decision was the Court's ruling that an individual's equitable title in their home is an interest the Takings Clause protects.

Similarly, Marion Sinclair appealed to the Sixth Circuit, claiming a violation of the Takings Clause of the Fifth Amendment and the Michigan Constitution, inverse-condemnation, a violation of procedural due process rights, unjust enrichment, and civil conspiracy. Here, the Court relied on its decision in *Hall* in finding that a homeowner's equitable interest in their property is a cognizable property interest protected by the Takings Clause. In doing so, the Court vacated the lower court's dismissal of the plaintiff's Takings Clause, procedural due process, unjust enrichment, and civil conspiracy claims.

Question presented

The question presented to the Court in *Meisner v. Hall*, Docket No. 22-874, and *Meisner v. Sinclair*, Docket No. 22-894, is “[w]hether foreclosing on a home for the nonpayment of taxes constitutes a violation of the federal Takings Clause whenever the home is worth more than the tax delinquency.”

Quad Graphics, Inc.: Sales Tax Commerce Clause Challenge Against North Carolina

In *Quad Graphics, Inc. v. N.D. Dep't of Revenue*, 881 S.E.2d 810 (N.C. 2022), the North Carolina Supreme Court upheld the North Carolina Department of Revenue's right to tax out-of-state sales by Quad Graphics. The sole issue framed by the court is whether the U.S. Supreme Court's decision in *“Dilworth* remains controlling precedent in this case or if subsequent Supreme Court decisions supersede *Dilworth's* holding and provide an alternative method for determining the constitutionality of North Carolina's sales tax regime.” The North Carolina Supreme Court answered its question in the affirmative. Specifically, the court thought that the Supreme Court's decision in *Complete Auto Transit, Inc. v. Brady* implicitly overruled the underpinnings of *Dilworth*, followed by the Court's more recent opinion in *South Dakota v. Wayfair*, _ U.S. _ , 138 S. Ct. 2080, 201 L.Ed. 403 (2018): “Because *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), provides the relevant modern test for the imposition of a state tax on interstate commerce and because *South Dakota v. Wayfair, Inc. . . .* applies this test to a tax

regime materially identical to that of North Carolina without regard for *Dilworth's* holding, we hold in favor of respondent and reverse the Business Court's decision below."

Facts and procedural background

Quad Graphics, Inc. is a commercial printer headquartered in Wisconsin that prints books, magazines, catalogs, and direct mail items for customers throughout the United States. During the period at issue (September 1, 2009, through December 31, 2011: "Period at Issue"), Quad Graphics had no commercial printing facilities in North Carolina. After producing the printed materials in Wisconsin, Quad Graphics would deliver orders to the United States Postal Service or another common carrier for delivery to in-state customers or their third-party representatives. According to the sales contracts, possession, legal title, and risk of loss for any orders passed from Quad Graphics to its customers when those materials were delivered to common carriers outside of North Carolina. Accordingly, although the carrier then shipped the order to recipients in North Carolina, title to the merchandise (and risk of loss) had already passed from Quad Graphics to its customers when the orders arrived at the common carrier's shipping dock in Wisconsin.

The North Carolina Department of Revenue conducted an audit of Quad Graphics and concluded that "Quad Graphics failed to establish that its customers took possession

[pg. 48]

of purchased materials outside of North Carolina and, as such, concluded that the sales were properly sourced to the state under North Carolina's sourcing statute N.C.G.S. § 105-164.4B, since the printed materials were received by petitioner's customers or their designees within the state," and issued a sales tax assessment of $3,238,022.52 of sales tax for the Period at Issue. Quad Graphics appealed and filed a petition with the Office of Administrative Hearings ("OAH"). The OAH petition set forth two main arguments: (1) the disputed transactions were not subject to North Carolina retail sales tax because all aspects of the transactions took place outside of the state; and (2) the assessment of North Carolina sales tax on these transactions violated the Due Process and Commerce Clause of the U.S. Constitution. OAH decided in favor of the North Carolina Department of Revenue and Quad Graphics petitioned for judicial review.

Quad Graphics petitioned for judicial review arguing that: (1) OAH erred in holding that Quad Graphics was a "retailer" under the provisions of the law that was required to pay sales tax to North Carolina on the sales at issue, and (2) the North Carolina Department of Revenue's assessment of sales tax on the sales at issue was unconstitutional under the Due Process Clause and Commerce Clause of the U.S. Constitution. The Business Court ruled in favor of the Department of Revenue on the first issue, but rejected the constitutionality of the imposition of sales tax on Quad Graphics. As explained by the North Carolina Supreme Court, the "Business Court discredited respondent's assertion that the decisions of the Supreme Court of the United

States in *Complete Auto* and *Wayfair* overruled *Dilworth* formalism, and therefore concluded that *Dilworth* remains controlling precedent in this case" and granted summary judgment in favor of Quad Graphics on the basis that North Carolina did not have a sufficient nexus under the Commerce Clause to impose sales tax. The North Carolina Department of Revenue appealed the decision to the North Carolina Supreme Court.

Dilworth - out-of-date formalism or controlling precedent?

As explained by the North Carolina Supreme Court, in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327. 330, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944), the Supreme Court determined that the state of Arkansas had no authority under the Commerce Clause to the U.S. Constitution to impose a sales tax on the sale of machinery or mill supplies from Tennessee corporations that did not have any offices, branches, or other places of business in Arkansas, where title to the goods passed upon delivery to a common carrier within Tennessee before the goods were ultimately brought into Arkansas for delivery to Arkansas customers. "Since these sales were, in the high court's view, 'consummated in Tennessee for the delivery of goods in Arkansas[,] Arkansas could not tax them without project[ing] its powers beyond its boundaries and . . . tax[ing] an interstate transaction.'"

However, the North Carolina Supreme Court maintains that "[n]early thirty years later, the Supreme Court began to dissociate its approach in this legal arena from the strict formalism that had characterized *Dilworth* and the *Dilworth* progeny." Per the North Carolina Supreme Court, the U.S. Supreme Court in *Complete Auto,* "abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States[,] recognizing, in its place, that interstate commerce may be required to pay its fair share of state taxes." Quad Graphics argues to the contrary that *Complete Auto* did not overrule *Dilworth*, nor eliminate the line between sales taxes and use taxes.[1]

As noted above, the North Carolina Supreme Court ruled in favor of the North Carolina Department of Revenue: "We hold that the formalism doctrine established in *Dilworth* has not survived the subsequent decisions of the Supreme Court in *Complete Auto* and *Wayfair* so as to render the sales tax regime of North Carolina violative of the Commerce Clause and the Due Process Clause of the Constitution of the United States. Further, North Carolina's imposition of sales tax on the transactions at issue in this case is constitutional under the relevant test provided by *Complete Auto.* Accordingly, we reverse the Business Court's order and opinion and hold in favor of respondent."

Supreme Court precedent as binding law

An important part of the North Carolina Supreme Court's decision is its treatment of U.S. Supreme Court precedents. The decision cites to *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490

U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), for the holding that: “[i]f a precedent of the [U.S. Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.)” However, the North Carolina Supreme Court “[n]onetheless [concludes that] there is no 'magic words' requirement that must be used for the nation's premier legal forum to overrule its own precedent; indeed, it may implicitly overrule precedent by issuing a decision in direct contradiction with its prior holdings.” (citations omitted). Quad Graphics (as well as other amicus briefs filed with the Court in support of Quad Graphics) asks the U.S. Supreme Court to reaffirm that its precedents are binding law until the Court states otherwise.

Dissent

Justice Berger dissented from the majority's ruling, criticizing the majority for “disregard[ing] the Supreme Court's interpretation of the Commerce Clause and the federal Constitution.”

Questions presented

“Whether the North Carolina Supreme Court was correct that state courts and taxing jurisdictions no longer must follow *Dilworth* because the Court has implicitly overruled it” and “[w]hether [the] Court should overrule or retain the holding in *Dilworth* that a state may not tax sales that occur outside its borders.”

Petition Denials

In *Gunn v. Wild* (Docket No. 22-477), Leslie J. Gunn appealed a decision by the United States Court of Appeals for the Sixth Circuit, which dismissed her diversity action for lack of personal jurisdiction. Ms. Gunn alleged that Mr. Wild's business and personal contacts with the State of Kentucky gave rise to the federal court's jurisdiction over him in a breach of contract lawsuit. Mr. Wild alleged that he is a citizen and resident of Switzerland, and therefore, the court must dismiss Ms. Gunn's complaint for lack of personal jurisdiction.

---

1 As explained in the *Quad Graphics* Petition for Writ of Certiorari, there are distinctions between sales taxes and use taxes: “[S]ales transactions generally result in two types of state taxes: sales taxes and use taxes. See Charles A. Trost, *Federal Limitations on State and Local Tax* § 11:1 (2d ed. 2022 update). Though the taxes function in similar ways, and both types are typically collected and remitted by sellers, they are different in conception and effect. Sales taxes apply directly to the sales transaction itself, while use taxes apply to the post-sale use (or consumption) of the goods within the taxing state. See *ibid.* States do not impose both

sales and use taxes for the same transactions. See Jerome Hellerstein & Walter Hellerstein, *State Taxation* § 16.01 (3d ed. 2022). Instead, states often maintain a complementary tax regime. They apply a sales tax to transactions that occur within the state's jurisdiction; and they apply a use tax when goods sold outside the state are brought within the state's borders to be used or consumed there."

END OF DOCUMENT -