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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 Katherine Piazza McDonald, an associate in the New York City office, for her contributions to the article.

***40** This month's column is devoted to the MoneyGram unclaimed property cases currently before the U.S. Supreme Court. The column focuses on Exceptions to Report of Special Master and briefs filed by the State of Delaware, Reply Brief filed by Claimant States, and Amicus Briefs filed by the Unclaimed Property Professionals Organization and American Bankers Association. Oral argument is scheduled for October 3, 2022. All other petitions for writ of certiorari involving state and local tax matters, which were discussed in the last column of the Supreme Court Update, were denied by the Court. Finally, the column briefly addresses the most recent petitions denied by the Court.

MoneyGram Cases: Special Master's Report

We previously covered in the Journal of Multistate Taxation, the First Interim Report of the Special Master (the 'Special Master Report'), Pierre N. Leval, in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146.[1] The dispute is over which state is entitled to escheat, or take custody of, the proceedings of certain unclaimed monetary instruments issued by MoneyGram Payment Systems, Inc. ('MoneyGram'). The dispute is between Delaware and 30 other states, as the Claimant States.[2] The Special Master found that the MoneyGram 'Official Checks' (or, 'Disputed Instruments') were prepaid drafts 'used by a purchaser to safely transmit money to a named payee' upon which MoneyGram was directly liable, and therefore 'are 'money orders,' or, at the very least, are Similar Instruments' under the federal Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-03 (the 'Federal Disposition Act' or 'FDA '). Under the FDA the states in which the Disputed Instruments were purchased are entitled to escheat their value. Delaware had argued that the Disputed Instruments did not fall within the FDA, and were therefore subject, under the common law rule, to escheat to MoneyGram's state of incorporation, which is Delaware. The Special Master also found that the Claimant States each also have the power under their own laws to take custody of the proceeds. Accordingly, the Special Master recommended that Delaware's Motion for Partial Summary Judgment should be denied and the Claimants States' Motion for Partial Summary Judgment be granted. (Furthermore, the Special Master also recommended that Pennsylvania's claim seeking amendment of the common law rule should be dismissed as moot.)

MoneyGram Cases: Official Checks and Procedural Background

****2** MoneyGram has two lines of prepaid financial instruments, one is marketed as ‘Retail Money Orders‘ and the other is marketed as ‘Official Checks.‘ As explained in the Special Master's Report, whereas Retail Money Orders are sold by retail agents, Official Checks are sold only by financial institutions (i.e., banks and credit unions). The dispute in this case focuses primarily on the Official Checks — MoneyGram's ‘Agent Checks‘ and ‘Teller's Checks.‘

MoneyGram ‘Agent Checks‘ are prepaid financial instruments used primarily by purchasers to transmit funds to a named payee. A purchaser pays the selling financial institution the face value of the Agent Check, plus any fees. The selling bank transmits the funds (less its fees) to MoneyGram. When the payee of the Agent Check cashes it at an institution, that institution forwards the instrument to MoneyGram's clearing bank, receiving reimbursement for its payment of the Agent Checks from the clearing bank. MoneyGram then reimburses the clearing bank. MoneyGram's ‘Teller's Checks‘ are also sold at financial institutions. The purchaser pays the selling financial institution the face value of the ***41** instrument, plus any fees, and the seller issues the prepaid written instrument.

MoneyGram treated the Retail Money Orders as covered by the FDA, but not the Official Checks, and thus remitted the abandoned property proceeds to its place of incorporation - Delaware. On May 26, 2016, the state of Delaware sought leave to file a bill of complaint against the states of Pennsylvania and Wisconsin within the original jurisdiction of the Court. Delaware's complaint sought a declaration that MoneyGram's Agent Checks and Teller's Checks are not governed by the FDA, and are instead governed by federal common law principles under which, in the event of abandonment, Delaware, as MoneyGram's state of incorporation, may take custody of the proceeds by escheat, regardless of the state in which the instruments were purchased.

As explained by the Special Master, Delaware's complaint was filed in response to two earlier-filed lawsuits arising from the same dispute. First, Pennsylvania sued Delaware and MoneyGram in federal district court in Pennsylvania, asserting that MoneyGram's practice of escheating the Official Checks violated the FDA and Pennsylvania's unclaimed property law. Then, Wisconsin filed a similar lawsuit in federal district court in Wisconsin. Following the filing of Delaware's action in the U.S. Supreme Court, the Pennsylvania action was dismissed without prejudice and Wisconsin's action was stayed.

Shortly after Delaware filed its request to file its complaint, Arkansas with 20 other states moved in the U.S. Supreme Court to file a complaint against Delaware, seeking a declaration that the FDA applied to all Official Checks, and seeking an order requiring Delaware to ‘deliver to the [21] States sums payable on unclaimed and abandoned MoneyGram Official Checks purchased in those States and unlawfully remitted to Delaware.‘ The U.S. Supreme Court allowed the filing of both complaints and consolidated the two actions. Thereafter, seven additional states were granted leave to join the claims brought in Arkansas' complaint. Also, in response to Delaware's complaint, Pennsylvania filed a counterclaim seeking a declaration that the secondary rule is ‘no longer equitable, and is therefore overruled.‘

****3** The Special Master bifurcated the proceedings so that the question of which state should have priority to take custody of the proceeds at issue would precede litigation of damages due. On May 20, 2021, the Special Master issued the Special Master Report, where he made recommendations to the Court on the parties' cross motions for partial summary judgment.

Delaware's Exceptions to Special Master Report and Brief in Support of Exceptions

The State of Delaware submitted two exceptions to the Special Master's Report and an accompanying Brief addressing the exceptions.[3] First, ‘Delaware takes exception to, and this Court should decline to adopt, the Special Master's report and recommendation to deny Delaware's request for partial summary judgment and to grant Claimants request for partial summary judgment. ‘ Second, ‘Delaware takes exception to, and this Court should decline to adopt, the components of the Special Master's report and recommendation, including: (a) the Special Master's definition of ‘money order’; (b) the Special Master's definition of ‘third party bank check’; (c) the Special Master's definition of ‘other similar written instrument’; and (d) the other flaws discussed in the accompanying brief . . .‘

Delaware outlines three primary arguments in its Brief in Support of Exceptions. First, MoneyGram's Official Checks are not 'money orders' under the FDA. Second, MoneyGram's Official Checks do not otherwise fall within the FDA. Third, Delaware's interpretation of the FDA provides clarity and predictability, and it is consistent with long-standing practice.

MoneyGram's Official Checks are not 'money orders' under the FDA.

Delaware argues in its brief that '[t]he FDA exempts from the common law of escheatment a narrow set of instruments: a 'money order,' 'traveler's check,' or other similar written instrument (other than a third party bank check). ' 12 U.S.C. § 2503. Delaware further argues that '[a]t the time of the FDA's enactment, the terms 'money order' and 'traveler's check' referred to specific commercial products typically used in small-dollar transactions, often by consumers without bank accounts or when traveling, where addresses were not kept by the seller' and 'those products were labeled 'money order' and 'traveler's check.'' Delaware asks the Court to read the terms 'money order' and 'traveler's check' narrowly in the FDA to refer to those specific commercial products labeled 'money order' and 'traveler's check' which it contends does not include MoneyGram's Official Checks.

Specifically, Delaware explains that 'money orders' should be defined more narrowly 'to encompass two commercial products: The telegraphic service for rapidly transmitting money across long distances or a specific financial instrument that is titled 'money order,' is usually signed by the purchaser, and is generally used in a specific context - by a consumer without a bank account to pay a bill or send a relatively small amount of money.' Delaware asks the Court to reject the Claimant States' position, which the Special Master adopted, that is that 'the term 'money order' refers to all prepaid orders to pay money.' Delaware argues that the Claimant States (and Special Master's) position is a 'sweeping conclusion' that is 'inconsistent with the contemporary understanding of the term 'money order' in 1974 [when the FDA was enacted], as well as the structure and history of the FDA.'

****4** Delaware maintains that because the term 'money order' is not defined in the FDA, the Court should 'look to the ***42** 'ordinary, contemporary, common meaning' of that term 'at the time Congress enacted the statute.'' Delaware instructs the Court to look to dictionaries, encyclopedias, publications (i.e., journals and treatises), and contemporary litigation. The State argues that '[t]hose sources show that at the time the FDA was enacted, the term 'money order' referred to two specific commercial products, both labeled 'money order': The telegraphic service for sending money and a commercial product primarily used to send small sums of money by consumers without bank accounts as a substitute for a personal check.' For example, Delaware cites to *Munn's Encyclopedia of Banking and Finance*, which 'define[s] a 'money order' by *who* bought it: a money order is a 'form of credit instrument' used 'by persons not having checking accounts' and *where* it was purchased, 'including the Post Office Department American Express Co., and various other private organizations, and their franchised retail stores;' and financial institutions. ' Delaware makes clear that '*Munn's* stressed that companies who sell money orders often limited their *amount,* such as $100 on any single Order.' ' Similarly, Delaware cites to the 1979 edition of *Black's Law Dictionary* for the definition of the term money order. Per the State, '[t]his definition focused on *where* money orders were sold and *how* money orders were used - as a substitute for a check.'

Delaware also cites to 'contemporary litigation' to support its definition of the term 'money order' as specific commercial products, rather than all prepaid orders to pay money. Citing *Western Union Telegraph Co.,* 368 U.S. 71, 72 (1961) and *Pennsylvania v. New York*, 407 U.S. 206, 208 (1972), two cases involving the escheatment of Western Union telegraphic money orders, Delaware highlights that in both of these cases 'the Court used the term 'money order' to refer to a specific commercial product, rather than as a generic term for all orders to pay money.'

Delaware also argues that the text and structure of the FDA confirms that Congress used the term 'money order' to refer to specific commercial products. 'That provision refers to four different kinds of products: a 'money order,' 'traveler's check,' 'other similar written instrument,' and 'third party bank check.'' Delaware suggests that under the plain text of the statute, 'a money order must thus be *different* from a 'traveler's check,' 'other similar written instrument,' and 'third party bank check.'' Specifically, it argues that '[i]f the term 'money order' refers to *all* prepaid orders to pay money, however, it would sweep in *both* traveler's checks and third party bank checks, and it would afford no meaning to the phrase 'other similar written instrument.''

Delaware also addresses the argument advanced by the Claimant States and Special Master who argue that 'the term 'money order' could refer to draft, while the term 'traveler's check' could refer to notes or drafts [to avoid this]

****5** surplusage problem.' Delaware alleges that 'historic sources indicate . . . that money orders could sometimes be notes or drafts. ' Furthermore, Delaware argues the FDA's preamble and history explain why Congress was narrowly focused on 'money orders' and 'traveler's checks,' as characterized by Delaware. Per Delaware, '[i]n the FDA's preamble, Congress expressed concern that States would force sellers of money orders and traveler's checks to record addresses' and 'the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce.' Delaware maintains that Congress enacted the FDA to address 'the cost of keeping addresses for money orders and traveler's checks, which are small-value instruments for which addresses are not typically kept.' Delaware continues, explaining 'that same concern does *not* apply to other orders to pay money - such as teller's checks, cashier's checks, certified checks, and other bank checks - which involved larger amounts of money and where sellers had in the past recorded customers' addresses.'

Finally, Delaware argues that the 'canon against derogation of the common law counsels in favor of interpreting the term 'money order' narrowly.' When a statute is enacted to address an issue previously governed by common law, Delaware argues 'this Court interprets the statute with the presumption that Congress intended to retain the substance of the common law.' Delaware suggests that here, Congress 'did not express a clear intent to subject *all* prepaid instruments ordering the payment of money to the FDA's escheatment rules. ' Thus, the state argues that the Court should define the term 'money order' narrowly 'applying the canon of construction that statutes in derogation of the common law should be narrowly construed.'

MoneyGram's Official Checks do not otherwise fall within the FDA.

After arguing that the Official Checks are not 'money orders' under the FDA, Delaware phrases the issue for the Court, as whether the Official Checks are 'third party bank checks' excluded from the FDA; 'other similar written instruments' subject to escheatment under the FDA; or another category of instrument that is not mentioned in the FDA and thus subject to the common-law rule of escheatment. Delaware argues that the Court 'should hold that the term 'third party bank check' encompasses bank checks paid through third parties, and thus includes MoneyGram teller's checks and agent checks.' Alternatively, Delaware argues that 'if this Courts holds that the term 'third party bank check' refers only to personal checks, as the Special Master held, it should interpret the term 'other similar written instrument' narrowly and conclude that MoneyGram teller's checks and agent checks are not 'similar written instruments' and are thus subject to escheatment under the common-law rule.'

In support of its first argument, Delaware argues that 'according to contemporary sources, three instruments - 'cashier's, certified, and teller's checks' - were all 'collectively known as bank checks.'' Delaware explains that '[a]ll three were easily identified by the fact that they became effective when signed by a bank employee and typically transmitted large amounts of money. Delaware argues that MoneyGram's Official Checks are bank checks because these products become effective on the signature of a bank employee and serve the same core commercial function of ***43** bank checks. Delaware also argues that the Court should hold that the term 'third party bank check' is a bank check that is *paid through* a third party. Specifically, Delaware maintains that 'MoneyGram teller's checks and agent checks are bank checks paid through third parties, namely MoneyGram and a clearing bank, and should thus be subject to escheatment under the common-law rule.' Delaware asks the Court to reject the interpretation adopted by the Special Master, which was to interpret that phrase to encompass only personal checks. Delaware argues that the Special Master's interpretation 'is inconsistent with the text of the FDA, which refers to written instruments on which a banking or financial organization or a business association is directly liable. Banks (and other organizations) are *not* directly liable on personal checks; that is precisely why consumers purchase bank checks such as cashier's checks, certified checks, and teller's checks. And there is no evidence that Congress was concerned about the escheatment of personal checks in 1974.' Per the State of Delaware, 'there is simply no reason to believe that Congress would have included personal checks in the FDA at all, much less as the sole category of instruments that are exempted from the FDA's scope.'

****6** Delaware next argues, if the Court holds that the term 'third party bank check' refers only to personal checks, then the Court must also conclude that the term 'other similar written instrument' is too narrow to include the Official Checks. Specifically,

Delaware argues that '[by] referring to 'a money order, traveler's check, or other similar written instrument (other than a third party bank check),' . . . . Congress indicated that the term 'similar written instrument' refers to instruments that share similar features to a 'money order' and 'traveler's check.'' Delaware further argues that these three instruments 'share an important feature: they typically become effective when signed *by the purchaser*, distinguishing them from a bank check, which typically become effective when it is signed *by an employee of the bank.*' According to Delaware, bank checks are not like money orders, traveler's checks, and personal checks because these products must be signed by a bank employee and not by the purchaser. Consequently, Delaware argues that the Court 'should interpret the phase 'other written instrument' narrowly to exclude the MoneyGram products at issue.' In sum, Delaware argues that there is 'no clear intent from the text of the FDA that MoneyGram teller's checks and agent checks - or any other bank check - should be subject to escheatment under the FDA.'

Delaware's interpretations of the FDA provides clarity and predictability, and it is consistent with long-standing practice.

Delaware argues that by construing MoneyGram Official Checks as 'third party bank checks' it serves 'two goals that this Court has consistently underscored in its escheatment cases: ease of administration and equity.' Delaware articulates that bright-line rules for determining which state can escheat abandoned intangible property 'allow[s] companies and States alike to easily determine where abandoned property should be escheated.' According to Delaware, using its 'test for identifying money orders and traveler's checks - by the label on the instrument - is precisely the type of bright-line rule that this Court prefers for escheatment,' as well as 'limiting the phrase 'other similar written instrument' to products labeled with alternate spellings of 'traveler's check' and 'money order.''

Claimant States' Reply Brief

The Claimant States filed a Reply to Delaware's Exceptions to the Report of the Special Master.[4] The Claimant States ask the Court to overrule Delaware's Exceptions and remand for a damages proceeding. The Claimant States argue that the Official Checks are each a 'money order' under the FDA; or in the alternative, the Official Checks are 'at a minimum, similar to money orders and traveler's checks' and thus, fall within the FDA as 'other similar written instruments.'

MoneyGram Official Checks are 'money orders' under the FDA.

The Claimant States argue that while Congress did not define the term 'money order,' the term's ordinary meaning at the time of the FDA's enactment covers the Official Checks. Per the Claimant States, 'a money order was understood to be a prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee.' Similar to Delaware, the Claimant States cite to dictionary definitions to support their interpretation of the ordinary meaning of the term 'money order' at the time the FDA was enacted. For example, the Claimant States cite to *Webster's Second New International Dictionary* which defines the term 'money order' 'simply as '[a]n order for the payment of money.'' The Claimant States further argue that '[a]s an order for the payment of money, a money order is a 'draft,' citing the Uniform Commercial Code, Section 3-104(2)(a). In addition, the Claimant States also cite to *Black's Law Dictionary* (5th ed. 1979) for the position that 'prepayment is an essential characteristic' of a money order' and that '[a] money order 'is purchased for [the] purpose of paying a debt or to transmit funds *upon credit of the issuer of the money order.*''

****7** Based on these sources, the Claimant States argue that MoneyGram's Official Checks are money orders 'because they are prepaid drafts issued by a trusted business entity for safely transmitting money to a named payee.' More specifically, the Claimant States argue that '[a]n Agent Check is a draft, because it is an order to pay a named payee. *See e.g.* App. 510 (exemplar). The purchaser of an Agent Check prepays its value plus a fee, and the selling institution (who acts only ***44** as MoneyGram's agent) then sends the funds to MoneyGram, which deposits them in its commingled account. *Id.* at 545-46; *see id.* at 368-69, 390-91, 443-44. The selling agent does not transmit any information about the purchaser. Exceptions 12: see App. 370-72,

436-38. And MoneyGram holds the funds payable on an Agent Check in a commingled fund from Retail Money Orders and Agent Check Money Orders until the Agent Check is presented for payment.‘

Likewise, the Claimant States argue that the ‘same is true for MoneyGram Teller's Checks. They too, are drafts, because they are orders to pay a named payee. *See Id.* at 467, 470, 514 (exemplars). The purchaser prepays the instrument's value plus any fee. *Id.* at 381-83. MoneyGram is the issuer. *See, e.g., Id.* at 497. The seller transfers the funds payable to MoneyGram, which keeps them in the same commingled investment portfolio as the funds from its other paper-based payment products until presentment.‘ The Claimant States also maintain that ‘[h]olding that Agent Checks and Teller's Checks are money orders furthers the FDA's purposes‘ because ‘Congress enacted the FDA to address the fact that purchasers' addresses are not typically kept for money orders and traveler's checks.‘ The Claimant States argue that ‘[b]ecause MoneyGram maintains no address records for Agent Checks and Teller's Checks, they fall within the description of the instruments that concerned Congress.‘

Finally, the Claimant States argue that Delaware's definition of a money order ‘as a specific commercial product labeled money order lacks support.‘ Per the Claimant States, ‘[t]he key questions for determining whether an instrument is a money order, both in 1974 and today, are whether it is a prepaid draft and whether it is issued by a trusted entity.‘ In rebutting Delaware's argument that a money order is defined by ‘*where* it is purchased,‘ the Claimant States provide that ‘Delaware says money orders are 'typically sold by a post office or companies such as Western Union or American Express,‘ *Id.* at 33. Yet it elsewhere acknowledges that money orders are sold ‘at a variety of retailers, such as drug stores and supermarkets' - even at ‘banks.’ *Id.* at 5. Thus, focusing ‘on *where* money orders were sold’ is of no help.‘ Similarly, the Claimant States argue ‘[n]or is it helpful to focus on ‘their *amount.*’‘ *Id.* at 18. Delaware claims only that issuers ‘*often* limited their amount.‘ *Id.* (emphasis altered). It nowhere claims that issuers always - or even usually - limited their value. And there was ‘no legal reason why a money order [could] not be issued at any amount desired.‘ Baily, supra 81 Banking L. J. at 681.

****8** Western Union, which Delaware notes was a leading issuer in 1974, *see* Exceptions 33, issued money orders without any limit on their face value, *see* Del. App. 334 (exemplar); *see also* Report 43, n.30. Lastly, the Claimant States argue that Delaware's attempt to define money orders in terms of *who* used them and *how* is ‘[s]imilarly unhelpful‘ as ‘no sources limit the terms ‘money order’ to instruments‘ used by consumers without bank accounts.

Alternatively, MoneyGram Official Checks are ‘other similar written instruments.‘

Arguing in the alternative, the Claimant States assert that ‘[e]ven if agent checks and teller's checks do not come within the FDA by being money orders, they undoubtedly come within the statute's coverage of ‘other similar written instruments.’‘ The Special Master concluded that MoneyGram's Official Checks meet ‘each of the FDA's three requirements: (1) they are ‘similar written instruments' to money orders and traveler's checks, *Id.* at 57-64; (2) they are not ‘third party bank checks,’ *Id.* at 72 - 79; and (3) a ‘business association is directly liable’ on them.‘ The Claimant States note in their brief that Delaware only excepts to Judge Leval's first two conclusions.

Addressing the first requirement that MoneyGram's Official Checks are similar to money orders and traveler's checks, the Claimant States argue that ‘Delaware has no answer to Judge Leval's conclusion ‘that the Disputed Instruments share with money orders features identified by Congress as motivating the enactment of the FDA.’‘ To the contrary, the Claimant States highlight several statements made by the State of Delaware that support the Claimant States argument that ‘[i]n general, money orders and traveler's checks are instruments for the transmission of money. Del. App. 579 (floor statement of Sen. Sparkman).‘

Addressing the second requirement, MoneyGram checks are not third party bank checks, the Claimant States point out that three experts on American payment systems offered opinions on this issue, and all three, including Delaware's expert, concluded that MoneyGram's Official Checks are not third party bank checks. Per the Claimant States, relying on historical evidence, the Special Master determined that a third party bank check is ‘an ordinary check drawn on a checking account whether personal or business checking account.‘ The Claimant States also make clear that ‘Delaware misstates this determination, claiming instead that he defined a ‘third party bank check’ [to be] *only* a personal check.‘ Exceptions 41. This is a subtle but important distinction.

Judge Leval's actual definition covers checks drawn by businesses on their business checking accounts. *See* Report 75-76. If the FDA had not excluded such checks, its coverage for instruments on which 'a business association is directly liable' might have been misunderstood to cover businesses' checks drawn on their checking accounts. Judge Leval concluded, therefore, that a 'third party bank check' is a 'non-prepaid instrument[] drawn on a checking account.''

Applying the FDA to MoneyGram Official Checks promotes equity and provides an administrable rule.

****9** The Claimant States argue that the Special Master's recommendation promotes Congress's goals of ease of administration and equity in unclaimed property. The Claimant States explain that 'Delaware has received $250 million in unclaimed MoneyGram products when less than 0.5% of the underlying transactions occurred in Delaware.' Thus, the Claimant States argue that '[r]equiring MoneyGram to remit funds payable on these instruments to the State of purchase, therefore, is most likely to ***45** serve Congress's goal of distributing unclaimed funds 'as a matter of equity among the several States.' ' Very simply, the Claimant States maintain that 'the current situation is exactly what the FDA was designed to prevent. By virtue of MoneyGram's choice to incorporate in Delaware, that State has received hundreds of millions of dollars in unclaimed property. 'It is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States in which they were purchased.' 12 U.S.C. 2501(4).' The Claimant States further argue that 'Delaware essentially argues that the Claimant States ought to protect their interests by requiring the very sorts of recordkeeping that Congress hoped to pretermit. *See* Exceptions 47. This is contrary to one of the express purposes of the FDA, which is to avoid the burden and expense of requiring businesses to maintain and retrieve purchaser's addresses. See 12 U.S.C. 2501(5).'

The Claimant States also argue that the Court must reject Delaware's approach - 'that the FDA's application should turn 'on the label' that a company gives an instrument' noting that 'this approach 'would do nothing to further the stated purposes of the FDA.'' Lastly, the Claimant States make clear that 'any ruling for the Claimant States would not upset any reliance interests' and if the Court rules for the Claimant States it should decline Delaware's request that the reward be for 'prospective relief only.'

Delaware's Sur-Reply Brief

In response to the Claimant States brief (discussed above) and amicus briefs filed by the Unclaimed Property Professionals Organization and American Bankers Association (discussed below) Delaware filed a Sur-Reply Brief In Support of Exceptions to the Special Master's Report.[5] Delaware again argues that MoneyGram Official Checks are not 'money orders' under the FDA, the Official Checks do not otherwise fall within the FDA, and the Claimant States' interpretation of the FDA is 'unadministrable and unfair.'

MoneyGram's Official Checks are not 'money orders' under the FDA.

In its Sur-Reply Brief, Delaware makes three primary arguments: (1) the Claimant States 'dictionary definitions do not support their position;' (2) the Claimant States 'interpretation renders the rest of the FDA superfluous;' and (3) the Claimant States 'discussion of congressional purpose is unsupported.'

First, Delaware criticizes the dictionaries used to support the Claimant State's analysis of the term 'money order.' Delaware argues that the Claimant States 'cite six non-legal dictionaries that they claim support broad meaning. But none defines a 'money order' as any 'prepaid draft issued by a post office, bank, or business entity used to transmit money to a named payee. See Defs.' Br. 22. None actually states that money orders are 'prepaid,' which [the Claimant States]

****10** claim is the 'essential characteristic' of a money order. None refers to money orders as 'drafts.' And most don't even refer to a 'named payee.' . . . [The Claimant States'] idiosyncratic definition of 'money order' is found nowhere outside their brief.'

Second, Delaware argues that using the Claimant States' interpretation would render the rest of the FDA superfluous: [i]f a 'money order is any prepaid draft payable to a named payee, it would swallow both traveler's checks and any conceivable other similar written instrument.' Per Delaware, the Claimant States' only argument in response was 'to argue that a 'money order' is a 'draft,' whereas a 'traveler's check' can be *either* a 'draft,' or 'note.' But nothing indicates that Congress distinguished between notes and drafts in the FDA; the statute uses neither term.' In short, Delaware argues that the Claimant States' 'supposed distinction between drafts and notes holds no water.'

Third, Delaware claims that the Claimant States' discussion of Congressional purpose is unsupported. Specifically, Delaware argues that 'unable to support their position with text or structure, [Claimant States] argue that Congress's purpose must have been to subject a broad range of financial products to escheatment under the FDA. *See* Defs. Br. 30. But they offer no support for that theory, and the statute and its history say otherwise.' Delaware maintains to the contrary that the preamble to the FDA and 'legislative content demonstrate that Congress intended that the FDA apply narrowly. The preamble mentions only two products — 'money orders' and 'traveler's checks.' 12 U.S.C. § 2501. It does not refer to other instruments [...]. This suggests that Congress was narrowly focused on specific commercial products, rather than all prepaid drafts.'

Lastly, Delaware argues that '[t]he Court should adopt a bright-line rule and hold that a 'money order' is a financial instrument that is labeled 'money order.'' This approach, it maintains, would not only be easily administrable, it would also be consistent with the Uniform Commercial Code and other historical examples of money orders. Delaware further argues that '[r]egardless of whether the Court relies on the label alone or considers other characteristics, *see* Del. Br. 34 - 35, the Court should hold that MoneyGram's teller's checks and agent checks are not 'money orders.' They are not labeled 'money order,' and they do not 'share the common characteristics of money orders. They are not sold in low-dollar denominations at retail locations to unbanked consumers as a substitute for a personal check.'

MoneyGram's Official Checks do not otherwise fall within the FDA.

Delaware argues that neither of the two alternative definitions provided by the Claimant States for the term 'third party bank check' makes sense. First, Delaware explains that the Claimant States argue that 'a third party bank check' is a bank check 'endorsed over to a new' payee. But even the Special Master rejected this definition, because to determine whether a check has been endorsed, the holder must look[] at the instrument itself.' Second, Delaware argues that '[r]elying on the Hunt Commission's discussion of 'third party payment services,' the [Claimant States] claim that a 'third party bank check' could also mean an ordinary check drawn on a checking account.' However, Delaware maintains that 'the Hunt Commission does not ***46** define 'third party payment services' as *only* ordinary checks. It uses the term broadly to include any kind of payment services offered to customers, including credit cards and teller's checks.' Finally, Delaware argues that the Claimant States' definition of 'third party bank check' 'is irreconcilable with the FDA's structure. Delaware assets that the FDA specifically applies to ''similar written instruments' on which banks are 'directly liable.' But no bank is 'directly liable' on an ordinary personal bank account.'

MoneyGram's Official Checks are 'third party bank checks.'

****11** Delaware argues that MoneyGram Official Checks are third party bank checks. According to Delaware, '[a] bank check is easily identified on its face by a bank employee's signature. MoneyGram teller's checks and agent checks are signed by bank employees.' Accordingly, per Delaware, these Official Checks 'are thus bank checks paid through a third party - in this case, MoneyGram and its routing bank - and thus are 'third party bank check[s].'' According to Delaware, the Claimant States 'incorrectly define 'bank checks' to mean *only* checks 'drawn by a bank on a bank.' More specifically, Delaware argues that at the time the FDA was enacted, 'bank checks referred to a category of checks that transmitted large sums or paid the bank's own bills.' Furthermore, Delaware argues that the Uniform Commercial Code does not say that 'a teller's check cannot have another drawer. Nor is there any indication that Congress intended to subject checks to different escheatment rules based on the number of drawers.'

Delaware also argues that the Court should interpret 'other similar written instruments' narrowly to mean 'an alternate spelling of the term money order or traveler's check.' Given the Court's preference for bright-line rules, a narrow interpretation is appropriate. Regardless, Delaware argues that if the Court decides to adopt a different definition of the term money order, 'MoneyGram products are not 'other similar written instruments.' MoneyGram teller's checks and agent checks are ordinary bank checks [...] simply processed through a third-party to save overhead costs.'

Claimant States Interpretation of the FDA is unadministrable and unfair.

Delaware points to the Claimant States concession that their rule 'will lead to endless and destabilizing litigation over the escheatment of other instruments that may fall under the FDA.' Delaware argues that the Court should 'reject any rule leaving so much for decision on a case-by-case basis unless none is available which is more certain and yet still fair.' Delaware further argues that its interpretation 'avoids further litigations, provides necessary clarity, upholds the FDA's purpose, and protects holders and States who relied on the FDA in good faith.' Additionally, Delaware argues that the Claimant States are 'wrong to suggest that their approach will make recovery of unclaimed property easier and more predictable to its owners.' Instead, Delaware argues that the 'opposite is true. The common-law rule incentivizes States to require holders to collect owners' information and transmit it to States. That incentive has two positive ramifications: *First*, when holders have owners' information, there is a greater chance the property will be returned before it is transferred to a State. . . . *Second*, when States have owners' information, owners may search lost property registries using their name and address. By contrast, if the [Claimant States] prevail under the FDA, registries will likely contain only limited data, such as the instrument's value (e.g., $150) - and fewer owners may locate and recover their property as a result.'

Brief of Amicus Curiae American Bankers Association in Support of Neither Party

****12** The American Bankers Association (the 'ABA') filed a brief amicus curiae[6] in support of neither party. In its brief, the ABA made two primary arguments: (1) 'the Court should definitively interpret the phrases 'money order' and 'other similar written instrument' in the FDA;' and (2) '[t]he FDA should not apply to financial instruments like cashier's checks, which existed in 1974 but are not named in the statute and do not pose the same 'windfall' concerns.'

With respect to its first argument, the ABA argues that the Court should reject the Special Master's approach and adopt controlling and narrow definitions of the terms 'money order' and 'other similar written instrument.' Per the ABA, the Special Master recognized that the Claimant States 'definition of 'money order' 'has potential flaws' and 'might perhaps be subject to narrowing refinement.' Report at 40, 54. Yet the Special Master deemed it unnecessary to 'adopt, or depend on the validity of, th[at] definition in order to resolve the parties' dispute. Instead, he concluded that the [Claimant States] should prevail because their arguments for why the Disputed Instruments are 'money orders' within the meaning of the FDA are 'more persuasive.'' The ABA further explains that the Special Master went on to conclude that, '[i]f the Disputed Instruments do not come within the FDA by being money orders, they undoubtedly come within the statute's coverage of 'other similar written instruments.'' The ABA highlights the reasoning of the Special Master: 'arguing that, by *not* adopting a definitive definition of 'money order,' the Court will avoid adverse consequences for entities that are not parties in this case, but are involved in the escheat of various categories of abandoned instruments.' The ABA makes clear that while this approach may be well-intentioned 'it is mistaken both as a matter of practical realties and as a matter of law.' In the ABA's view the Special Master's approach has 'reintroduced the same uncertainty and risk for holders of cashier's checks by suggesting that the term 'money orders' itself should capture cashier's checks.' Also, the ABA argues that the Special Master's approach is inconsistent with the 'bedrock principles underlying Article III,' which provides that 'it is the *duty* of the judicial department to say what the law is.' The ABA instructs the Court that it, '[a]t a bare minimum, . . . should rule that these terms exclude instruments, like cashier's checks, that were commonly used when the FDA was enacted.'

With respect to its second argument, the ABA contends that the terms ***47** 'money order' and 'other similar written instrument' 'should be interpreted narrowly so that they do not reach financial instruments, such as cashier's checks, that were commonly

used when the FDA was enacted but were not named in the statute.‘ Per the ABA, the Claimant States ‘relied on inconclusive and inapposite dictionary definitions to propose a broad definition of ‘money order’ that is incongruous and inconsistent with the broader context of the FDA, including the statutory text explaining the purpose of the law.‘ The ABA also points out that the Claimant States reliance on the 1979 version of the Black's Law dictionary ‘is improper, as it post-dates the FDA by five years. ‘ The ABA explains that cashier's checks were commonly used in 1974 and were often used to facilitate transactions by banks, and ‘[h]ad Congress intended to extend the FDA's new priority rules to unclaimed cashier's checks, it surely would have said so explicitly, rather than rely on the phrase - ‘money order’ - that is not defined in the FDA.‘ The ABA further argues that other textual evidence shows that the FDA does not apply to cashier's checks and other financial instruments used in 1974. Or, stated differently, that ‘other textual evidence demonstrates that Congress did not use 'money order’ or 'other written instrument' to encompass any and all '[prepaid] written orders directing another person to pay a certain sum of money on demand to a named payee,' including cashier's checks.‘ Specifically, the ABA contends that ‘the statutory context makes clear that the FDA was intended to address an inequity attributable to two aspects of money orders and traveler's checks: the inability to determine the creditor (which rendered the primary priority rule inapplicable) and the limited number of issuers (which generated unfair windfalls under the second priority rule). But, for bank issued cashier's checks, the creditors' state-of-residence can often be determined, and the banks that issue cashier's checks are located throughout the country.‘ Lastly, the ABA argues that the 1981 Uniform Unclaimed Property Act and various state laws confirm that the FDA does not reach cashier's checks.

Brief of Amicus Curiae Unclaimed Property Professionals Organization in Support of the Claimant States

****13** The Unclaimed Property Professionals Organization (‘UPPO‘) filed an amicus brief in support of the Claimant States.[7] UPPO contends that the Special Master reaches the correct conclusion that MoneyGram's Official Checks are subject to the FDA as a ‘money order‘ or ‘other similar written instrument.‘ However, UPPO ‘respectfully disagrees with the Special Master's recommendation that the Court should not define these terms.‘ UPPO urges the Court to define the phrase “money order . . . or other similar instrument’ to mean ‘a paper instrument that is purchased from an issuer for the transmission of money.’ If such an instrument bears the label ‘money order,’ then it is a money order, if it does not bear the label ‘money order,’ then it is an ‘other similar written instrument.’‘

Per UPPO, this proposed definition is consistent with the canon of *noscitur a sociis* and the ordinary public meaning of the term money order at the time Congress enacted the FDA, supported by the legislative history and purpose of the statute, and easy to administer (e.g., a holder should usually be able to determine whether an instrument fits within this definition, as the elements look to facts in the holder's possession). Finally, UPPO asks the Court to remand to the Special Master with instructions to expand the scope of the case to include any disputes regarding the application of the definition to any instruments that have been remitted to a state to avoid any undue burdens on MoneyGram or similarly situated holders that may have erroneously remitted instruments to the wrong state.

Petitions Denied

***48** 1 **Challenge to $10,000 Cap on SALT Deduction:** *New York, et al. v. Janet L. Yellen, Secretary of the Treasury, et al.* (Docket No. 21-966), cert. denied Apr. 18, 2022, asked ‘[w]hether Congress's imposition of a $10,000 cap on the SALT deduction violates Article I, Section 8 and the Tenth and Sixteenth Amendments of the United States Constitution.‘ The New York Court of Appeals concluded that Congress did not exceed its broad authority over taxation by placing a $10,000 limit on the amount of state and local taxes that individual taxpayers may deduct from their incomes.

2 **First Amendment Challenge to Cincinnati Billboard Tax:** *City of Cincinnati, Ohio, et al. v. Lamar Advantage GP Company, LLC, et al.*. (Docket No. 21-900), cert. denied May 2, 2022, asked ‘[w]hether a municipal excise tax on the business privilege of charging for the use of billboard space bridges the freedom of speech, or of the press.‘ The Supreme Court of Ohio held that the City of Cincinnati's billboard tax violated the First Amendment of the U.S. Constitution.

3 **First Amendment Challenge to Baltimore Billboard Tax:** *Clear Channel Outdoor, LLC v. Henry J. Raymond, Director, Department of Finance of Baltimore City.* (Docket No. 21-219), cert. denied May 2, 2022, asked '[w]hether a tax singling out off-premises billboards is subject to heightened scrutiny under the First Amendment.' The Maryland Court of Appeals held that the City of Baltimore's billboard tax did not violate the First Amendment of the U.S. Constitution.

****14** 4 **Commerce Clause Challenge to Washington Business and Occupation (B&O) Tax:** *Washington Bankers Association, et al. v. Washington, et al.* (Docket No. 21-1066), cert. denied Jun. 13, 2022, asked 'does a law that is triggered by a proxy for participating in interstate commerce and that burdens out-of-state entities almost exclusively violate the dormant Commerce Clause?' The Supreme Court of Washington affirmed and upheld the Superior Court of Washington's ruling that Washington's B&O surtax on 'specified financial institutions' did not violate the U.S. Dormant Commerce Clause.

5 **Commerce Clause Challenge to Oregon's E911 Tax:** *Ooma, Inc. v. Oregon Department of Revenue* (Docket No. 21-1488), cert. denied Jun. 21, 2022, asked 'does the Commerce Clause prevent the imposition of Oregon's E911 tax in this case where the lower court wholly dismissed the 'virtual contacts' inquiry as irrelevant to the determination of substantial nexus?'

6 **Challenge Whether Texas Tax is a Regulatory Fee Under the Tax Injunction Act (TIA):** *Glenn Hegar, Comptroller of Public Accounts of the State of Texas, in His Official Capacity v. Texas Entertainment Association, Inc.* (Docket No. 21-1258), cert. denied Jun. 21, 2022, asked 'whether, under the TIA, a state revenue measure is a tax if it raises public revenue, notwithstanding a regulatory purpose, as three circuits would hold; if the measure lacks corresponding administrative benefits, as eight circuits would hold; or only if it serves no regulatory purpose at all, as the Fifth Circuit has held.' The Court of Appeals for the Fifth Circuit held that Texas' 'sexually oriented business' fee is a regulatory fee, rather than a tax, and thus, the Tax Injunction Act does not preclude federal court jurisdiction over the case.

7 **Challenge to New York Tax on Recording of Federal Credit Union Mortgages:** *O'Donnell & Sons, Inc. v. New York State Department of Taxation and Finance, et al.* (Docket No. 21-1245), cert. denied Jun. 27, 2022, asked 'whether the Federal Credit Union Act - which exempts federal credit unions 'from all taxation' other than taxes on credit unions' real property and tangible personal property, 12 U.S.C. § 1768 - prohibits the imposition of a state tax on the recording of federal credit union mortgages.' The Supreme Court Appellate Division, Second Department, New York, found that it was bound by a decision of the New York Court of Appeals, *Hudson Va. Fed. Credit Union v. New York State Dept. of Taxation and Fin.,* 20 N.Y.3d 1, 13, 956 N.Y.S.2d 425, 980 N.E.2d 473.

Footnotes

1 JMT0920213631 31 JMT 36 (September 2021).

2 In No. 145, the plaintiff is the State of Delaware; and the defendants are the States of Pennsylvania and Wisconsin. In No. 146, the plaintiffs are 28 States: Arkansas, Texas and California, along with Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, Virginia, Washington, West Virginia and Wyoming; and the defendant is the State of Delaware. In this column, we refer to the defendants in No. 145, and the 28 States that are plaintiffs in No. 146, as the Claimant States.

3 Exceptions to Report of The Special Master By The State of Delaware and Brief in Support of Exceptions, filed Nov. 18, 2021.

4 Reply of Defendants in No. 145 and Plaintiffs in No. 146 to Delaware's Exceptions to First Interim Report of Special Master and Supporting Brief, Filed Dec. 20, 2021.

5 Sur-reply in Support of Exceptions to the Report of the Special Master filed by Delaware, filed Jan. 19, 2022.

6 Brief of Amicus Curiae American Bankers Association in Support of Neither Party, filed Nov. 24, 2021.

7 Brief of Amicus Curiae Unclaimed Property Professionals Organization in Support of the Defendant States, filed Dec. 27, 2021.

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