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U.S. SUPREME COURT UPDATE

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Special Master Report in MoneyGram Unclaimed 'Official Checks' Cases and Respondents' Brief in Opposition in New York Opioid Stewardship Act Tax Injunction Act Case

***36** In this month's column, we cover the [DRAFT] First Interim Report of the Special Master, Pierre N. Leval, in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146. The dispute isover 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, as Plaintiff, and 30 other states, asthe Defendants. 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 (the 'Federal Disposition Act' or 'FDA').[1]

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 (discussedmore fully below), to escheat to MoneyGram's state of incorporation, which is Delaware. The Special Master also found that the Defendant states each also have the power under their own laws to take custody of the proceeds. Accordingly, the Special Masterrecommends that Delaware's Motion for Partial Summary Judgment should be denied, and the Defendants' Motion for Partial Summary Judgment be granted. (Furthermore, the Special Master also recommends that Pennsylvania's claim seeking amendment of the commonlaw rule should be dismissed as moot.)

We also detail the Brief in Opposition filed by the Respondents in *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611). The issue in that case is whether the New York Opioid Stewardship Act's payment is a 'tax' withinthe meaning of the Tax Injunction Act.[2]

MoneyGram Cases: Special Master Concludes Official Checks Fall Within Scope of the FDA

Procedural background.

****2** 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'sChecks 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 inwhich 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'spractice of escheating Agent Checks and Teller's Checks (collectively referred to as 'official checks' or 'Disputed Instruments') violated the FDA and Pennsylvania's unclaimed property law. Then, Wisconsin filed a similar lawsuit in federaldistrict 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 requiringDelaware 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 consolidatedthe 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 ***37** (discussedmore fully below) is 'no longer equitable and is therefore overruled.'

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 its [DRAFT] FirstInterim Report (the 'Report'), where he made recommendations to the Court on the parties' cross motions for partial summary judgment.

Background: unclaimed property law.

The Special Master began the Report with an overview of unclaimed property law. As explained by the Special Master, '[a]s sovereigns, States are entitled to take custody of, or escheat abandoned personal property. See *Delaware,* 507 U.S. at 497. The term 'escheat' originally applied only to land; its common law origin derived from the notion that all land titles in England derived from the Crown . . .' Consequently, an analogous common law principle- *bona vacantia* - developed to allow the sovereign to take possession of personal property deemed to have no owner. Overtime, however, as noted by the Special Master, the term 'escheat' has evolved to apply to both realand personal property.

****3** The Special Master details how these common law principles were adopted into American law, with the sovereign right to escheat belonging to the states. For tangible personal property, the Special Master explains that 'it has always been the unquestionedrule in all jurisdictions that only the State in which the property is located may be escheated. *Texas,* 379 U.S. at 677.' However, for intangible personal property, states passed laws authorizing escheatment, which were subsequently reviewedand upheld by the U.S. Supreme Court and resulted in the creation of federal common law priority rules, as the Court examined disputes among the states. More particularly, in *Texas v. New Jersey*[3], the Supreme Court established the federal common law rule that debts left unclaimed by creditors would escheat 'to the State of the creditor's last known address as shown by the debtor's books and records' (known as the 'primary common lawrule') but, if no record of the creditor's address is shown by the books and records of the debtor, to the state of the debtor's incorporation (known as the 'secondary common law rule').

Juxtaposed with the federal common law priority rules is the 1954 Uniform Disposition of Unclaimed Property Act (the '1954 Uniform Act') published by the Uniform Law Commission. Per the Special Master, this Act was 'intended both to fill the 'very real need' for 'comprehensive legislation covering the entire field of unclaimed property,' and to address the risk that the Court's early decisions upholding States' power to escheat intangible personal property could subject holders to multipleliability from the competing claims of States as they enacted more and more expansive laws providing for escheat of unclaimed property.'

In 1966, the Uniform Law Commission published a Revised Uniform Disposition of Unclaimed Property Act to addresscertain issues, but not the issue currently before the Court.

Finally, in 1974, Congress enacted the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the 'Federal Disposition Act' or 'FDA ')[4]. As explained by the Special Master, '[t]he FDA . . . alter[ed] the priority framework established in *Texas* as applied to certain specified instruments. Instead of allowing the issuer's state of incorporation totake custody of funds from the purchase of abandoned financial instruments, where the purchaser's and payee's addresses were unknown to the obligor (the secondary rule established in *Texas* and *Pennsylvania*), the FDA provides thatthe State in which the instrument was *purchased* is entitled to take custody of those funds (so long as the books and records of the instrument's issuer show that State, and that State's laws entitle it to take custody of the funds at issue). TheFDA applies 'only to sums payable on '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 isdirectly liable."

The MoneyGram Official Checks.

****4** 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 Report, whereas Retail Money Orders are sold by retail agents, OfficialChecks are sold only by financial institutions (i.e., banks and credit unions). As noted above, the dispute in this case focuses primarily on MoneyGram 'Agent Checks' and MoneyGram 'Teller's Checks', collectively referred to as official 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 ***38** selling bank transmitsthe 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 'Teller's Checks' are also sold only at financial institutions. The purchaser pays the selling financial institution the face value of the 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 proceeds to its place of incorporation - Delaware. As explained above, the Defendants contend that the Official Checks arecovered by the FDA, and the proceeds should have been sent to the place of purchase, pursuant to the FDA.

The FDA.

The central issue in the case is whether the Official Checks (Agent Checks and Teller's Checks) are 'within the scope of the FDA as 'money orders', or in the alternative as 'similar written instruments' (other than a third-party bank check) onwhich a banking or financial institution or a business association is directly liable.' The FDA does not define the terms 'money order,' 'similar written instrument,' 'directly liable' or 'third party bank check.' Accordingly,the Special Master examines the terms ordinary meaning, dictionary definitions and legislative history to determine the intent of Congress when enacting the FDA. As noted above, the Special Master concludes that the Official Checks fall within the scope ofthe FDA 'as 'money orders', or at the very least, are 'Similar Instruments'.'

Money orders under the FDA.

In this regard, the Special Master finds that '[t]he Defendants are on sounder ground in interpreting the FDA's use of the term 'money order' by reference to definitions and usages in contemporary sources. They cite the 1968 Black's LawDictionary (which was current at the time that the FDA was enacted in 1974) discussing postal money orders and making clear that 'they are

prepaid drafts.' ' Accordingly, '[d]rawing from such sources, Defendants contend that the ordinarymeaning of 'money order' is 'a prepaid draft issued by a post office, bank, or some other entity and used by the purchaser to safely transmit money to a named payee.'' Per the Special Master, 'I find the Defendant's position considerably morepersuasive than Delaware's.' Specifically, '[as compared to MoneyGram's products labeled as 'money orders'], [i]f the unlabeled instrument serves the same commercial purpose,and is recognized in law as having the same effects as the one bearing the legend 'money order',' the absence of the name appearing as a legend on the instrument is an insufficient reason not to deem it what it is for purposes of laws governing thatclass of instrument. By the same token, 'the fact that an instrument identifies itself on its face as a particular sort of instrument would not make it such if the instrument does not have the fundamental characteristics of that sort of instrument.'The Special Master also indicates that other differences Delaware highlights as to whether the Official Checks are money orders, are even less compelling, such as whether the issuer distributes its instruments through agents or entities with which it hasa different relationship.

****5** The Special Master also maintains that Delaware's argument that a defining characteristic of a money order is that it is marketed to individuals who do not have checking accounts and therefore cannot send personal checks, is not persuasive. In this regard,the Special Master finds that 'Delaware's cited sources do not suggest that marketing to unbanked persons is an essential characteristic of a money order - only that money orders are particularly useful to such persons because of their inabilityto send money via personal checks.' The Special Master also concludes that 'Delaware's argument, it suggests no logical connection between the characteristics it describes as definitional features of 'money orders' and Congress's objectives in enactingthe FDA.' In this regard, as discussed in the 'Congressional findings and declaration of purpose' section of the FDA, these instruments - like money orders - are sold without the collection ofpurchaser and payee data, and therefore are more likely to reside in the state of purchase. Or stated differently, the 'Defendants are more persuasive in pointing out that the stated purposes of the FDA are served by treating the Disputed Instrumentsas 'money orders,' because MoneyGram does not maintain records of the addresses of purchasers (or payees) of the Disputed Instruments and there is no contention that purchasers of the Disputed Instruments are more likely to reside outside the State ofpurchase than what Congress noted with respect to purchasers of money orders.'

'Other similar written instruments' under the FDA.

The Special Master explains that to come within the 'other similar written instruments' provision, an instrument must satisfy three-conditions: '(1) an instrument in question must be similar to a money order and traveler's check, (2) it mustnot be a 'third party bank check;' and (3) a 'banking or financial organization' or 'business association' must be 'directly liable' on it.' The Special Master concludes that the first inquiry can be decided on a motion for summary judgmentand that the Official Checks were similar to a money order or traveler's check. With respect to the second inquiry, the Special Master concludes that such term means ordinary checks drawn on a checking account and that the Official Checks are not ordinarychecks drawn on a checking account. Finally, with respect to the third inquiry, the Special Master rejects Delaware's argument that the statutory term 'directly liable' must be read as synonymous with theconcept of unconditional liability under the UCC. Thus, the Special Master concludes that all three conditions are met by the Official Checks, and thus, the Defendant's arguments are more compelling than Delaware's that the Official Checks are 'othersimilar written instruments' under the FDA.

Special Master finds Defendant States have the power to escheat the Official Checks.

Delaware argued that if the Official Checks are considered 'other similar written instruments,' ten of the states did not have laws that would provide for ***39** their escheatment. The Special Master 'conclude[s] that all ten Defendant Stateswhose laws are in dispute have the power to escheat the Disputed Instruments' even assuming they are covered under the FDA as Similar Instruments, but not as 'money orders.'' He reaches this conclusion by noting that the states that had adoptedthe 1995 Uniform Unclaimed Property Act did reference 'similar instruments' in other sections of their act even though the provision addressing money orders and travelers' checks did not reference 'similar instruments' and that the drafterscommented that this provision was intended to track the FDA. Specifically, the Special Master 'conclude[s] that the language of the 1995 Uniform Act's 'Rules for Taking Custody,' as adopted in the unclaimedproperty laws of the Eight States, should be construed, in this context,

to authorize taking custody of instruments covered by the Similar Instruments clause of the FDA.‘ Also, with respect to the remaining two states, Iowa and Texas, the Special Masterconcludes that ‘the laws of these two States sufficiently share the features of the Uniform Act noted above to justify interpreting them as similarly providing for escheatment of instruments over which the FDA would grant them priority to escheat, andthus providing for the escheatment of MoneyGram's Agent Checks and Teller's Checks, regardless of whether the FDA covers those instruments under the label ‘money order’ or ‘other written similar instrument.’‘

Pennsylvania's argument to overrule the secondary rule under federal common law.

****6** Pennsylvania argues that, should the Court determine that the Official Checks are not money orders or other similar written instruments under the FDA, the Court should overrule the secondary rule set forth in *Texas* and declare that ‘whenthe address of a purchaser/payee on an unclaimed prepaid financial instrument is unknown, this intangible property shall escheat to the State where the instrument was purchased.‘ The Special Master concludes that ‘[i]f the Supreme Courtaccepts the recommendation of this Report ruling that the Disputed Instruments are covered by the FDA, Pennsylvania's claim and motion for summary judgment will be moot.‘

New York Attorney General Files Brief in Opposition in Challenge to Ruling that New York Opioid Stewardship Payment is a ‘Tax‘ Under the ‘Tax Injunction‘ Act

A petition for writ of certiorari in *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611) asks whether the New York Opioid Stewardship Act's payment (the ‘Payment‘) is a ‘tax‘ within the meaning of the Tax InjunctionAct (the ‘TIA‘).[5] The TIA forbids federal district courts from ‘enjoin [ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courtsof such State.‘ The Second Circuit Court of Appeals determined that the annual Payment required of opioid manufacturers and distributers under New York's Opioid Stewardship Act ‘OSA‘) is a ‘tax‘ within the meaning of the TIA, and thereforethe United States District Court for the Southern District of New York lacked jurisdiction to invalidate or enjoin enforcement of the Payment.

As discussed in the last issue, the National Taxpayers Union Foundation and the Chambers of Commerce of the United States of America separately filed amicus briefs in support of the Petitioners. In this issue, we cover the Brief in Opposition filed by theRespondents - - the Attorney General of the State of New York (‘Attorney General‘), Solicitor General and Deputy Solicitor General of the State of New York. The brief asserts two main arguments. First, that the Second Circuit's conclusion that thePayment is a tax within the meaning of the TIA, and that the district court lacked jurisdiction to declare it invalid or enjoin its enforcement, ‘implicates no circuit split and is correct in any event.‘ Second, the Respondents maintain that thiscase presents a poor vehicle to address the question presented: ‘Whether the Opioid Stewardship Act's revenue-raising assessment was a tax within the meaning of the Tax Injunction Act.‘

First argument: no circuit split and correct in any event.

The Brief in Opposition asserts that the Second Circuit's decision ‘implicates no ‘open discord’ among the circuits regarding the test for determining whether an assessment is a tax for purposes of the TIA.‘ In particular, the brief notes thatthe Second Circuit ‘applied the same three-factor test also adopted by several other circuits . . ., drawn from then -Chief Justice Breyer's decision in *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1stCir. 1992).‘

****7** The Respondents argue ‘that Petitioner's attempt to characterize the Second Circuit's test as ‘an extreme outlier ***40** among recent TIA precedents' relies on mischaracterizations of the decision below.‘ In addition, the Respondents maintain that ‘Petitionersalso overstate the significance of cases from other circuits where courts have found particular exactions to be outside the scope of the TIA.‘ In addition, per the Attorney General ‘[t]hose cases do not reflect any deep-seated disagreementregarding the underlying test for determining a tax for TIA purposes. Rather, the divergent outcomes stem from the distinct features of the

statutory schemes at issue.‘ Finally, the Attorney General asserts that the Second Circuit's application of the*San Juan Cellular* factors is uncontroversial and consistent with the application of the test elsewhere, such as the D.C. Circuit, First Circuit, Sixth Circuit, and Ninth Circuit.

The brief also emphasizes the following arguments as to why the Second Circuit's decision is correct: ‘numerous courts of appeals have found assessments to be taxes for purposes of the TIA even when they are not labeled 'taxes,’‘ ‘courts haveroutinely found assessments to be taxes notwithstanding‘ that they are not codified under the tax law, and the Payment is not a fine inasmuch as ‘[m]any assessments that are undisputedly taxes, including cigarette taxes, are levied againstspecified industries to account for their role in contributing to social problems. [citations omitted.] And taxes retain that status for purposes of the TIA even if they are intended to affect individual behavior or corporate behavior.‘

Second argument: case is a poor vehicle to address question presented.

The Attorney General argues that certiorari is unwarranted because ‘this case presents a poor vehicle to address the question presented.‘ The Attorney General makes two claims with respect to this argument.

First, the Attorney General makes clear that ‘the decision below can be defended on an alternative ground, even in the absence of a jurisdictional bar under the TIA.‘ Specifically, the Attorney General explains that ‘Petitioners' principal claimin the court below was that the OSA surcharge was inseverable from the statute's pass-through prohibition and thus was automatically invalidated when the district court declared the pass-through prohibition unconstitutional.‘ However, in Respondents' view,‘severability is a 'question of legislative intent. And here, New York's Legislature spoke with exceptional clarity when expressing its intent that the OSA payment should survive without the pass-through prohibition.‘ The brief highlights how theNew York Legislature specifically added that ‘it is the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.‘ Accordingly, the brief arguesthat ‘even without the TIA's jurisdictional bar, petitioner's principal challenge to the OSA surcharge would fail.‘

****8** Second, the Attorney General argues that the decision below has no ramifications beyond this case because the reasoning of the court rests on case-specific features of the statutory scheme, which has no close analogue in any other state. She also remindsthe Court that the statute at issue was in effect for only two years and replaced with a different statutory scheme. Accordingly, per the Respondents' certiorari is unwarranted because the Petitioners' challenge ‘concerns a unique statute, which has beenreplaced by a new tax that does not implicate the question presented.‘

Denied Petitions

In ***Olson v. Minnesota Commissioner of Revenue*** (Docket No. 20 - 1583), cert. den. June 21, 2021, Jeffrey Olson filed a petition for writ of certiorari challenging the Supreme Court of Minnesota's ruling that the Department of Revenue'snotice of a tax order by ordinary mail (versus certified mail) meets constitutional requirements of procedural due process under the Due Process Clause of the U.S. Constitution.

Footnotes

1 12 U.S.C. §§ 2501-03.

2 28 U.S.C. § 1341.

3 *Texas v. New Jersey*, 379 U.S. 674 (1965).

4 12 U.S.C. §§ 2501-03.

5 28 U.S.C. § 1341.

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