



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 26, 2017

The Honorable Pierre N. Leval  
United States Court of Appeals for the Second Circuit  
40 Foley Square  
New York, NY 10007

Re: *State of Arkansas, et al. v. State of Delaware*, No. 22O146; and *State of Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, No. 22O145; Consolidated Original Actions in the Supreme Court of the United States – Request for Bifurcation

Judge Leval:

On behalf of the coalition of 27 states and commonwealths in Case No. 22O146, as well as the Commonwealth of Pennsylvania and the State of Wisconsin (“Plaintiff States”), we thank you for serving as Special Master in this proceeding. We look forward to working with you toward the efficient resolution of this matter.

At the outset, the Plaintiff States suggest that this proceeding be bifurcated into two stages: one to first determine liability, and then a second phase to determine damages.

The determination of liability in this case requires deciding a discrete legal issue based on the construction of one controlling statute—whether the “official checks” sold by MoneyGram Payment Systems, Inc. are subject to the Disposition of Abandoned Money Orders and Traveler’s Checks Act, 12 U.S.C. § 2501 *et seq.* Plaintiffs believe that this question of law may be decided through dispositive motions following a limited and expedited period of discovery. If testimony is needed, it will be confined to the nature of official checks compared to other negotiable instruments and similar discrete topics applicable to the claims of all of the Plaintiff States.

On the other hand, the damages determination will require a more fact-intensive inquiry that will be unique for each state and commonwealth. Discovery in this phase will likely require detailed financial analyses to determine the amount that the State of Delaware owes to each of the 29 Plaintiff States. Each state and commonwealth will then have to put on individualized evidence regarding the value of each state’s particular claim.

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Consistent with Federal Rule of Civil Procedure 42(b), bifurcating this case will serve judicial economy, promote convenience for all the parties, and avoid prejudice. For example, the two proposed phases will require different types of evidence. See *Vichare v. AMBAC, Inc.*, 106 F.3d 457, 466 (2d Cir. 1996) (bifurcation may be appropriate “where the evidence offered on two different issues will be wholly distinct . . .”); *Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir. 1984) (“Bifurcation of the trial in the present case was reasonable because the two phases involved different types of evidence.”); see also *Kansas v. Colorado*, No. 105, 1994 WL 16189353, at \*10 (U.S. Oct. 3, 1994) (special master bifurcated original proceeding into liability and damages phases). The liability phase will consist largely of legal argument, and any evidence about the nature of the negotiable instruments in dispute will likely apply globally to all of the claims of the Plaintiff States. In contrast, evidence to support damages will be individualized based on each claim of each state and commonwealth. The parties can complete discovery for phase one in a matter of months; phase two could take much longer.

Similarly, the resolution of the first issue could eliminate the need to litigate the second issue. See *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999) (“[B]ifurcation may be appropriate where, for example, the litigation of the first issue might eliminate the need to litigate the second issue.”). If a final determination were made in favor of Delaware on liability, it would obviate the need for a damages determination.

Those benefits of economy and convenience coincide with considerations of prejudice to the parties. Without bifurcation, all of the parties will be burdened by expending resources to measure damages prior to a determination on liability. The State of Delaware will not suffer any prejudice if the proceedings are bifurcated.

For these reasons, we respectfully request that you bifurcate the pending proceedings. Please do not hesitate to contact us if we can provide any other information.

Sincerely,

Patrick K. Sweeten  
Telephone: (512) 463-4139  
[patrick.sweeten@oag.texas.gov](mailto:patrick.sweeten@oag.texas.gov)

Austin R. Nimocks  
Todd Lawrence Disher

*Counsel for the State of  
Texas*

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CC: Steven S. Rosenthal, Counsel For Delaware (email only)  
Matthew H. Haverstick, Counsel For Pennsylvania (email only)  
Misha Tseytlin, Counsel For Wisconsin (email only)  
Michael Rato, Counsel for MoneyGram Payment Systems, Inc. (email only)