

No. 22O145 & 22O146, Original (Consolidated)

**IN THE
SUPREME COURT OF THE UNITED STATES**

DELAWARE,
Plaintiff,

v.

PENNSYLVANIA AND WISCONSIN,
Defendants.

ARKANSAS, ET AL.,
Plaintiffs,

v.

DELAWARE,
Defendants.

**REPLY OF THE COMMONWEALTH OF PENNSYLVANIA IN
FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Matthew H. Haverstick, Esq.
Mark E. Seiberling, Esq.
Joshua J. Voss, Esq.
Lorena E. Ahumada, Esq.
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Phone: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
lahumada@kleinbard.com

Christopher B. Craig, Esq.
Jennifer Langan, Esq.
PENNSYLVANIA TREASURY
OFFICE OF CHIEF COUNSEL
127 Finance Building
Harrisburg, PA 17120
Phone: (717) 787-2740
Eml: ccraig@patreasury.gov
jlangan@patreasury.gov

Attorneys for Pennsylvania

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. REPLY ARGUMENT 3

 A. The Court Should Grant Judgment in Favor of Pennsylvania and Find that the FDA Entitles Pennsylvania -- and not Delaware -- to Escheatment of Unclaimed Funds Payable on MoneyGram Official Checks Purchased Within Pennsylvania’s Borders. 3

 B. In the Alternative, the Court Should Grant Summary Judgment on Counterclaim II, and Overrule *Texas v. New Jersey* With Regard Solely to the Secondary Common Law Escheatment Rule Established Therein. 3

 1. Pennsylvania’s Challenge to the Secondary Rule Established in *Texas v. New Jersey* is Properly Before the Court. 4

 2. *Stare Decisis* Does not Command this Court to Retain the Secondary Common Law Escheatment Rule it Created in *Texas v. New Jersey*..... 5

 3. The Record Before the Court is Sufficient to Modify the Secondary Common Law Escheatment Rule it Established in *Texas v. New Jersey* with Regard to the Pre-Paid Instruments at Issue in this Case..... 8

III. CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).....6

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 108
L.Ed.2d 652 (1990)6

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d
753 (2010)6

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448,
201 L. Ed. 2d 924 (2018)6

Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)6

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

United States v. International Business Machines Corp., 517 U.S. 843, 116 S.Ct.
1793, 135 L.Ed.2d 124 (1996)6

I. INTRODUCTION

Pennsylvania joins in Defendants’ Reply Brief in Support of Summary Judgment on Liability. As set forth therein and in Defendants’ Motion for Summary Judgment, which Pennsylvania also joined, the MoneyGram Payment Systems, Inc. (“MoneyGram”) instruments at issue here, “Official Checks,” fall squarely within the scope and purpose of the Disposition of Abandoned Money Orders and Traveler’s Check Act (the “FDA”). Abandoned funds payable on these Official Checks, specifically, “Agent Checks” and “Teller’s Checks,” therefore, should be escheated to the State in which they were purchased—not to the State where MoneyGram has unilaterally chosen to incorporate, Delaware.

In the event this Court finds that the MoneyGram Official Check products are not subject to the FDA, Pennsylvania submits this reply brief in further support of its Motion for Summary Judgment on Counterclaim II, to respectfully request that the Special Master recommend that the Court overrule the secondary escheat rule set forth in *Texas v. New Jersey*, 379 U.S. 674 (1965), which provides that certain intangible financial instruments escheat to the State of corporate domicile of the debtor (MoneyGram here) only when the address of the creditor is unknown.

First, contrary to Delaware’s position otherwise, Pennsylvania has properly pled its alternative argument concerning the secondary escheat rule. The Court therefore should address Pennsylvania’s claim and remedy the inequities created by this secondary rule. Second, *stare decisis* does not preclude the Court from overriding the secondary escheat rule set forth in *Texas v. New Jersey* and the

Court has a sufficient record before it to rule on this question. Indeed, the record makes clear that the underpinnings of the secondary rule, which include the goal of fairness and a prediction of infrequent use, have been eroded. MoneyGram has set up a process with regard to its Official Check products that has created a windfall for Delaware at the expense of all other States. To remedy this inequity, the rule in *Texas v. New Jersey* should be reviewed and overruled. Permitting the present state of affairs to stand gives Delaware's citizens a windfall sourced entirely from the private funds of the citizens of every other State in the Nation. This is contrary to the long-settled principles of equity and consumer protection that drive escheat laws.

Accordingly, for the reasons set forth below, in Pennsylvania's Motion for Summary Judgment, and in the principal brief of the Defendant States and reply, which Pennsylvania incorporates herein and joins, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on its Counterclaim I against Delaware and judgment in favor of Pennsylvania and against Delaware on Delaware's Bill of Complaint. That is, the Court should declare that the FDA entitles Pennsylvania—and not Delaware—to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders. In the alternative, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on Counterclaim II, and overrule the secondary escheatment rule set forth in *Texas v. New Jersey*,

declaring that when the address of a purchaser/payee on an unclaimed, prepaid financial instruments is unknown, this intangible property shall escheat to the State where the instrument was purchased.

II. REPLY ARGUMENT

A. **The Court Should Grant Judgment in Favor of Pennsylvania and Find that the FDA Entitles Pennsylvania -- and not Delaware -- to Escheatment of Unclaimed Funds Payable on MoneyGram Official Checks Purchased Within Pennsylvania's Borders.**

In support of its motion for summary judgment on Counterclaim I, and judgment in favor of Pennsylvania on Delaware's Bill of Complaint, Pennsylvania joins and incorporates Defendant States' Brief in Support of Summary Judgment on Liability and Reply Brief.

B. **In the Alternative, the Court Should Grant Summary Judgment on Counterclaim II, and Overrule *Texas v. New Jersey* With Regard Solely to the Secondary Common Law Escheatment Rule Established Therein.**

In the event that the Court finds that MoneyGram's Official Checks products titled "Agent Checks" and "Teller's Checks" are not subject to the priority rules of the FDA and are, instead, governed by the primary and secondary common law rules established in *Texas v. New Jersey*, Pennsylvania respectfully requests that the Court revisit and revise the secondary rule as applied therein. Nothing contained in Delaware's Response Brief and Memorandum of Law filed on March 8, 2019 (Doc. No. 97) (the "DE Memo"), should persuade the Court otherwise.

1. Pennsylvania’s Challenge to the Secondary Rule Established in *Texas v. New Jersey* is Properly Before the Court.

Delaware incorrectly posits that a challenge to the *Texas v. New Jersey* trilogy is, procedurally, not before the Court, *see* DE Memo. at 58, but this ignores prior filings and Orders in this case. To illuminate, Delaware filed a Motion for Leave to Bill of Complaint against Pennsylvania and Wisconsin on May 26, 2016. *See* DE Mot. (Doc. No. 1). After the Court granted Delaware’s Motion, *see* Order Oct. 3, 2016 (Doc. No. 9), Pennsylvania Answered the Complaint and filed Counterclaims on October 28, 2016. *See* PA Answer and Counterclaims (Doc. No. 11). In Counterclaim II, Pennsylvania challenged the application of the *Texas* trilogy to MoneyGram’s Official Checks. *See* PA Answer and Counterclaims at ¶¶ 111-18. Critically, rather than object to Pennsylvania’s Counterclaims through a motion or otherwise, Delaware instead agreed they were part of the case and *filed an answer to them*. *See* DE Answer to PA’s Counterclaims (Doc. No. 18).

After the close of pleadings, the orders of the Supreme Court and the Special Master then signaled that Pennsylvania’s Counterclaims were very much before the Court. For instance, the Court itself issued not one but two orders after the close of pleadings, neither of which rejected Pennsylvania’s Counterclaims as somehow not at issue. *See* Order Dec. 6, 2016 (Doc. No. 20); Order Mar. 29, 2017 (Doc. No. 31). Next, after Delaware unsuccessfully attempted to expand the scope of the case beyond the existing claims involving MoneyGram, the Special Master expressly defined the universe of issues, stating: “the question of which State or States are

entitled to escheat the so-called ‘Official Checks’ of MoneyGram will be first presented to the Special Master in a liability phase, prior to presentation of evidence on damages. During the liability phase, parties may demand discovery *on any issue relevant to the merits of a State’s entitlement to escheat.*” See Order July 24, 2017, at ¶ 6 (Doc. No. 43) (emphasis added).

In pursuit of the mandate in the emphasized language, Pennsylvania did indeed seek and establish evidence of its entitlement to escheat the sums payable on the MoneyGram Official Checks at issue. It did so to prove not only its right to relief under the FDA, but also under a modification to the *Texas* secondary rule, as requested in Counterclaim II. That Delaware ignored this same opportunity is not reason to dismiss Pennsylvania’s Counterclaim from the case (moreover, the notion that extensive discovery is needed to resolve the *Texas* common law issue is misleading, see DE Memo. at 60-61, as the question presented is merely one of commonsense, and not one requiring extensive factual development). Simply put, that claim is before the Court, as even Delaware is compelled to acknowledge based on its Answer to the Counterclaims, since it is unquestionably an issue that concerns a “State’s entitlement to escheat.”

2. *Stare Decisis* Does not Command this Court to Retain the Secondary Common Law Escheatment Rule it Created in *Texas v. New Jersey*.

As Pennsylvania argued in its initial brief in support of summary judgment, the Court should revisit and revise the secondary escheatment rule the Court established in *Texas v. New Jersey* because — as the record here makes clear —

application of this secondary rule has created an unjust windfall for just one State, Delaware. This unjust result, however, is the very type of inequity that the Court sought to alleviate when it fashioned the escheatment rules (and precisely what Congress addressed when it passed the FDA). In this regard, the reasoning in *Texas v. New Jersey* supporting that secondary rule has proven invalid and the rule itself unworkable. Accordingly, this Court should overrule the secondary escheatment rule.

While the Court has stated that it will not overturn a past decision unless there are strong grounds for doing so, *see United States v. International Business Machines Corp.*, 517 U.S. 843, 855–856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996), it also has “often recognized [that] *stare decisis* is ‘not an inexorable command.’” *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478, 201 L. Ed. 2d 924 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). Notably, when the “underpinnings” of a prior decision are eroded and the decision has proven to be not well-reasoned, the Court has overruled its precedent. *See Janus*, 138 S. Ct. 2448 (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363, 130 S. Ct. 876, 912, 175 L. Ed. 2d 753 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)). As the record here shows, the secondary escheatment rule created in *Texas v. New Jersey* is not well-reasoned and, in fact,

has led to the opposite intended consequences of being both unfair and exclusively applied by MoneyGram with regard to Agent Checks and Teller's Checks.

In initially adopting its primary and secondary escheatment rules, the Court in *Texas v. New Jersey* opined that it would be “the fairest”, “easy to apply” and “in the long run will be the most generally acceptable to all the States.” *Texas*, 379 U.S. at 683. The Court also reasoned that the secondary rule would be “infrequently” applied and therefore was at ease permitting a “minor factor” like a debtor’s corporate domicile to dictate where intangible property would escheat. *Id.* at 682. None of this, however, has borne out with regard to the MoneyGram instruments at issue here. Indeed, application of the *Texas v. New Jersey* escheatment rules has resulted in the citizens of Delaware, who generate **less than 0.5%** of the funds at issue, reaping the benefits of hundreds of millions of dollars generated by the citizens of the other 49 States. *See* Defendants’ Statement of Material Facts (“SMF”) at ¶¶ 102-103. This result has occurred because MoneyGram purposely divorces owner information at the time of sale of its Official Check products so that it does not retain information on the rightful owners of Tellers Checks and Agent Checks. Under the secondary rule, therefore, MoneyGram summarily escheats these intangible abandoned instruments to the place it has unilaterally decided to incorporate, Delaware. This scheme is certainly not fair and, of course, it is not generally acceptable to a majority of States given the case at bar.

Stare decisis should not stand as a bar to the Court remedying the inequity it created in *Texas v. New Jersey*. Rather, the Court should take this opportunity

pursuant to its limited original jurisdiction to fashion a remedy actually guided by the principles of fairness and ease of administration. Time has shown that the secondary escheatment rule, which assigns an undue value on the place MoneyGram has chosen to incorporate, is neither fair, popular among the States, infrequently applied nor any easier to apply than escheating to the place where Official Checks are actually purchased.

3. The Record Before the Court is Sufficient to Modify the Secondary Common Law Escheatment Rule it Established in *Texas v. New Jersey* with Regard to the Pre-Paid Instruments at Issue in this Case.

The additional discovery sought by Delaware in its response brief is unwarranted to address a commonsense review and reconsideration of the secondary escheatment rule. As set forth above, Pennsylvania's Counterclaim II is properly before the Court as it concerns a "State's entitlement to escheat". Delaware therefore could have sought discovery on the issues it raises now prior to the close of discovery. It did not. Delaware should not be allowed to prolong this case due to its own inactions.

Further, the record and issues that Delaware argues should be developed are unnecessary for this Court to rule on Pennsylvania's Counterclaim II. Indeed, the Court in *Texas v. New Jersey* fashioned the primary and secondary rules with a record concerning just one discreet type of intangible property — \$26,461.65 in unclaimed debts owed by a single private company. The parties therein did not develop a record like the one advocated here by Delaware. It was unnecessary then as it is now.

III. CONCLUSION

For the reasons set forth in Pennsylvania Motion for Summary Judgment, this Reply Brief, and in the principal brief of the Defendant States and Reply, which Pennsylvania joins, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on its Counterclaim I against Delaware, and judgment in favor of Pennsylvania and against Delaware on Delaware's Bill of Complaint. The Court should declare that the FDA entitles Pennsylvania—and not Delaware—to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders. In the alternative, Pennsylvania respectfully requests that the Special Master recommend to the U.S. Supreme Court that it grant judgment in favor of Pennsylvania on Counterclaim II, and overrule the secondary escheatment rule set forth in *Texas v. New Jersey* with regard to the MoneyGram Official Check products. This result too, as with that suggested above, would result in a declaration that Pennsylvania—and not Delaware—is entitled to escheatment of unclaimed funds payable on MoneyGram Official Checks purchased within Pennsylvania's borders.

Respectfully submitted,

s/ Matthew H. Haverstick
Matthew H. Haverstick, Esq.
Mark E. Seiberling, Esq.
Joshua J. Voss, Esq.
Lorena E. Ahumada, Esq.
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Phone: (215) 568-2000/
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
lahumada@kleinbard.com

Christopher B. Craig, Esq.
Jennifer Langan, Esq.
**PENNSYLVANIA TREASURY
OFFICE OF CHIEF COUNSEL**
127 Finance Building
Harrisburg, PA 17120
Phone: (717) 787-2740
Eml: ccraig@patreasury.gov
jlangan@patreasury.gov

Attorneys for Pennsylvania

Dated: March 29, 2019

CERTIFICATE OF SERVICE

Counsel of record for the Commonwealth of Pennsylvania certifies that on March 29, 2019, its Reply Brief in Further Support of its Motion for Summary Judgment was served, as required by Case Management Order No. 5, on all counsel of record.

s/ Matthew H. Haverstick
Matthew H. Haverstick, Esq.
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Phone: (215) 568-2000/
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com

Attorneys for Pennsylvania