

Supreme Court of the United States

DELAWARE, *Plaintiff*,

v.

Nos. 22O145 & 22O146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

October 27, 2022 Emails from Parties Responding to Special Master's Request for Record Citations of Examples of Bank-Issued Money Orders

Email from the Defendant States:

As the Defendant States noted at yesterday's conference, Delaware's own materials include sources that describe money orders as items that are sometimes issued by banks—and reproduce examples of bank-issued money orders. There are at least two places in Delaware's Supreme Court appendix that discuss money orders issued by banks. See Delaware's App'x 380 (reproducing Compton's Encyclopedia and Fact Index (Vol. 14) (1972) (excerpt) ("Money orders issued by banks and savings institutions are of two forms---the bank money order and the personal money order.")); Delaware's App'x 389-93 (reproducing Am. Bankers Ass'n, Bank Mgmt. Pub. No. 140, Money Order Services (1956) (discussing money orders issued by banks)); *id.* at 391, 393 (reproducing bank money orders). The modern UCC also recognizes that money orders can be issued by banks. See UCC 3-104 cmt. 4 (stating that money orders "are sold both by banks and non-banks," and that some money orders "fall[] within the definition of a teller's check," which by definition under the UCC are drawn by banks). Additionally, in its briefing before the Supreme Court, Delaware affirmatively argued that banks issue money orders. See Delaware's Exceptions 20-21, 24-25 (discussing money orders issued by banks); see also Delaware's Sur-Reply 8.

Defendant States plan to address this more fully in the briefing we file pursuant to the Special Master's recent order. But given that banks issued money orders are the time of the FDA's enactment, the fact that banks are listed as nominal drawers on the face of MoneyGram's so-called teller's checks does not alter their status as money orders under the FDA.

One other point to note—we are planning to request Delaware's consent to an extension to file our briefing in response to the Special Master's order. Given that we do not yet have the transcript of the conference and would like to review it before filing our comments on the Special Master's proposed revisions, we plan to ask that our filing be due one week after the transcript is complete.

Nicholas Bronni

Email from Delaware:

In addition to the sources my friend Nicholas cited below, there are a few other places in the appendixes before the Supreme Court where historical sources discuss "bank money orders," on which the banks themselves were liable as signatories.

The 1967 law review article beginning on page 428 of our appendix provides a discussion of bank money orders (on which banks were liable as signatories) and modern personal money orders (on which purchasers, not banks, are liable as drawers).

We would specifically direct the special master to: Delaware's Appendix Vol II 431 n.8 ("Bank money orders are notes, the official instruments of the issuing bank, signed by an authorized agent thereof and issued to a named payee."); *id.* at 435 ("[B]ank money orders are signed by an authorized agent of the issuing bank and are thus considered to be notes—primary obligations of the bank and unconditional promises to pay."); *id.* at 489 ("Bank money orders are also obligations executed by the bank itself, in the nature of promissory notes with the bank as maker.").

I am using the term "liable as a signatory" or "drawer"—rather than "issue"—to avoid injecting any potential confusion. In addition to being a synonym for a drawer, "issue" can sometimes be used in a colloquial or non-technical sense to mean "sell." I understood the special master yesterday to be concerned with who was legally liable on the instrument as the drawer, not who sold the instrument. We agree with the special master that, for all MoneyGram teller's checks, a selling bank is always liable as the drawer. Additionally, for all MoneyGram money orders and agent check money orders, no bank is ever liable as a drawer.

As my friend Nicholas also alluded to below, in our Exceptions Brief before the Court, Delaware took the position that bank money orders were historically considered distinct instruments from things like cashier's checks and teller's checks. *See, e.g.*, Exceptions Br. 21 (citing additional law review articles).

Finally, Delaware of course consents to Defendants' request for an extension. Immediately following the hearing yesterday, Delaware contacted the court reporter and asked the service to expedite production of the transcript. The service has informed us that the transcript will be complete tomorrow. However, that schedule would have Delaware's brief due on Friday, November 11, which is a federal holiday; it may be difficult for us to muster paralegal support on a long weekend. Would we be correct in thinking that, under those circumstances, Delaware's brief would be due the following Monday?

Thank you.

Neal Katyal