

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.

**JOINT SUBMISSION IN RESPONSE TO
CASE MANAGEMENT ORDER NO. 1**

In response to paragraph 2 of Case Management Order No. 1 (May 15, 2017), the Parties in the above matter jointly submit the following.

I. COUNSEL OF RECORD

A combined service list was previously filed with the Clerk of the Second Circuit, Catherine Wolfe. A copy of that service list (as revised) is attached hereto as Exhibit A.

Counsel of Record are indicated on the service list by asterisk (*). Lead counsel for the various state groups are as follows:

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II. WHO WILL BE SERVED AND METHOD OF SERVICE

The Parties have agreed that service will be made by email on the service list (as revised) that was previously filed with the Clerk

of the Second Circuit, Catherine Wolfe and which is also attached hereto as Exhibit A.

A motion for a Third-Party Complaint against Moneygram Payment Systems, Inc. has been filed by the Commonwealth of Pennsylvania. If granted, counsel for MoneyGram will be Michael Rato of McElroy, Deutsch, Mulvaney & Carpenter, LLP. Mr. Rato's email is mrato@mdmc-law.com.

Additional states have inquired about the procedure for being added as parties to this Action. Delaware does not object to the addition of additional states provided that any such addition takes place no later than 30 days from the entry of the Case Management Order.

III. PROCEDURAL RULES TO BE FOLLOWED

The Parties agree that this matter should be generally governed by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Southern District of New York. The parties will discuss possible exceptions to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Southern District of New York and will include such exceptions in the case management plan to be filed with the Special Master.

IV. AGREEMENT ON METHODS OF COMMUNICATION, DISTRIBUTION, AND DESIGNATION OF DOCUMENTS

The Parties agree that all communications and distribution of documents in this matter should occur via email, to the individuals listed on the previously filed combined service list.

The Parties will discuss the necessity of designating documents as confidential and will include any necessary procedures in the case management plan to be filed with the Special Master.

V. IDENTIFICATION OF POSSIBLE INTERVENORS AND/OR AMICUS CURIAE

The Parties are currently unaware of any possible intervenors. Possible *amicus curiae* may include The Unclaimed Property Professionals Organization, which filed a brief *amicus curiae* in this matter on August 1, 2016.

VI. IDENTIFICATION OF ISSUES OF LAW OR FACT, ESPECIALLY ANY THRESHOLD OR POTENTIALLY DISPOSITIVE ISSUES

POSITION OF THE 29 STATES AND COMMONWEALTHS

This case involves only a single, straightforward liability issue, the resolution of which is entirely dispositive of the merits of this case: does the product that MoneyGram markets as “Official Checks” qualify as 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 [are] directly liable” under 12 U.S.C. § 2503?

This dispositive liability issue is amenable for resolution on cross-motions for summary judgment, after the completion of a limited discovery period. *See Nebraska v. Wyoming*, 507 U.S. 584, 589 (1993). To decide whether Official Checks fall within 12 U.S.C. § 2503’s reach, the Supreme Court needs only to know what the objective characteristics of Official Checks are, and then to apply the statutory terms of 12 U.S.C. § 2503 to those facts. The objective characteristics of Official Checks can be determined by publicly available information and limited discovery directed to MoneyGram, which presumably has all of the relevant information about its own products. After that, the Supreme Court will be left only with a single “pure question of statutory construction,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987): determining whether Official Checks fall within the legal meaning of 12 U.S.C. § 2503.

On the other hand, the damages issues in this case are likely far more complicated and require a fact-intensive inquiry, which will be unique for each state and commonwealth.

Pennsylvania joins in the above statement but adds its belief that a bench memorandum better explains the narrow legal and factual issues that it contends are in dispute. To that end, Pennsylvania is separately submitting such a memorandum to aid the Court in deciding what Pennsylvania believes to be the threshold scope-of-discovery issues in this case.

POSITION OF THE STATE OF DELAWARE

Under Supreme Court precedent in the *Texas* trilogy, unclaimed property for which there is no record of an owner's address escheats to the unclaimed property holder's state of incorporation. The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Act") provides for a limited statutory exception to the *Texas* rule. The Act states that for 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 is directly liable" the state in which such an instrument was purchased has the exclusive right to escheat the sums payable on such instruments. The dispute before this Court is whether the Act's exception to the *Texas* rule covers financial products marketed under the name of "official check."

Multiple entities offer a financial product marketed under the name of "official check." While the original dispute sought the resolution of only those official checks marketed by MoneyGram Inc., Delaware believes that to avoid expensive, unnecessary duplication and potential follow-on litigation it is prudent to resolve the allocation of unclaimed official checks between the 29 states in this litigation as a complete category rather than in a piecemeal fashion based on the company marketing the "official check" product. To be clear, Delaware is not seeking to make MoneyGram or any other company that sells "official check" products a party to this litigation. However, because the financial products marketed under the name of "official check" are far from uniform, and are (to quote Pennsylvania) "not subject to a uniform definition under

accepted authorities,” a review of the types of “official check” offered by various entities and how the States treat official checks for unclaimed property reporting purposes is necessary to determine whether the Act’s exception to the *Texas* rule applies to a given “official check.” Therefore, Delaware believes the following issues of law and fact must be resolved:

- Whether official checks, whether marketed by MoneyGram Payment Systems or some other entity, are money orders under The Disposition of Abandoned Money Orders and Traveler’s Checks Act.
- Whether official checks, whether marketed by MoneyGram Payment Systems or some other entity, are “other similar written instruments” under The Disposition of Abandoned Money Orders and Traveler’s Checks Act.
- Whether official checks, whether marketed by MoneyGram Payment Systems or some other entity, are “third party bank checks” under The Disposition of Abandoned Money Orders and Traveler’s Checks Act.
- Whether official checks, whether marketed by MoneyGram Payment Systems or some other entity, is a written instrument on which a banking or financial organization or a business association is directly liable.
- Whether unclaimed property related to official checks should be escheated to the state of incorporation of the holder of those official checks pursuant to the priority rules established in *Texas v. New Jersey*, 379 U.S. 674 (1965), *Pennsylvania v. New York*, 407 U.S. 206 (1972) and *Delaware v. New York*, 507 U.S. 490 (1993).
- Whether unclaimed property related to official checks should be escheated to the state of their purchase pursuant to the priority rules adopted by the Federal Disposition Act, 12 U.S.C. §§2501-03.
- Whether Delaware is entitled to custody and control of the sums payable on abandoned official checks, whether marketed

by MoneyGram Payment Systems or some other entity, purchased in states other than Delaware, where the holder of such sums is incorporated in Delaware.

- How do each of the definitions under U.C.C. § 3-103 and § 3-104 correspond to each of the entities involved in the issuance of an official check.
- Whether the term “official check” has a legally accepted definition.
- Whether or not MoneyGram is the drawer on MoneyGram official checks
- Whether or not the drawee on MoneyGram official checks is MoneyGram’s own bank
- What entity is the drawer on official checks marketed by entities other than MoneyGram
- What entity is the drawee official checks marketed by entities other than MoneyGram
- Whether the books and records of MoneyGram and other entities marketing official checks record the addresses of the purchasers of official checks
- What are the contractual obligations of financial institutions that use official checks, as evidenced by exemplar checks and related various documents from those financial institutions
- What are the practical and marketing uses for official checks, as evidenced by exemplar checks and related various documents from those financial institutions that use official checks
- Whether other states accept unclaimed property under NAUPA Property Types CK01-08, CK-15 filed based on state of purchase, as evidenced by filings to those states. If such property types are filed in other states based on state of purchase, what are the amount of funds at issue and where have such funds been remitted.

- If other states accept unclaimed property under NAUPA Property Types CK01-08, CK-15 filed based on state of purchase, whether instruments filed under those property types are similar to official checks.

- What enforcement action, if any, the State of Ohio took in 2006 in response to MoneyGram's assertion to Ohio that its instruments were Third Party Bank Checks.

VII. ANY ISSUES WITH THE PARTIES ARE WILLING TO STIPULATE TO IN THE CASE MANAGEMENT PLAN

The parties agree to continue their discussion and include any issues on which they can stipulate in the Case Management Plan.

VIII. ANTICIPATED DISCOVERY PROCESS

A. Process Generally

The Parties agree that the ordinary tools of discovery available under the Federal Rules of Civil Procedure and the Local Rules for the Southern District of New York should be used in this matter. The Parties will discuss exceptions to these Rules and will include such exceptions in the case management plan to be filed with the Special Master. Possible exceptions may include: the number of depositions each party may take; the number of interrogatories each party may serve; the number of document requests each party may make; and the number of requests for admission each party may issue.

IX. PROCESS FOR COMPLETION AND APPROVAL OF THE CASE MANAGEMENT PLAN

The Parties will confer telephonically and by email to attempt to prepare an agreed-upon Case Management Plan and will file it with the Special Master by June 30, 2017.

X. COVER-COLOR OF BOUND DOCUMENTS

The parties agree to adopt the Supreme Court's color chart, found here:

<https://www.supremecourt.gov/casehand/courtspecchart10012007.aspx>

For purposes of determining cover colors, the state of Delaware, as the Plaintiff State in the first-filed Original Action No. 145, will be Appellant. The other states will be Appellees.

XI. TENTATIVE DATES FOR COMPLETION OF THE PHASES OF LITIGATION

Position of the 29 States and Commonwealths:

The 29 States and Commonwealths believe that the liability phase of this case can be completed quickly. Liability depends on deciding one discrete legal issue, which requires limited discovery. Delaware's concerns about the nature of official checks can be resolved by the deposition of MoneyGram's corporate representative and similar targeted discovery. As a result, Plaintiff States believe that any factual issues can be addressed in four months of discovery, starting from the date that the Special Master signs the Case Management Order. Plaintiff States suggest that reports from retained experts be due 30 days after the end of the fact discovery period, followed by a period of 30 days to depose the retained experts. Dispositive motions should be due 60 days after the close of the expert deposition period, with a trial set for the summer of 2018.

Additionally, the deadline for joining additional parties and amending pleadings should occur at the middle point of the discovery period. Therefore, if the discovery period closes four months from the signing of the Case Management Order, the deadline to join parties and amend pleadings should occur two months from the signing of the Case Management Order.

If the case is not bifurcated, or if Delaware is permitted to bring additional claims regarding unnamed instruments and

parties, discovery would certainly take much longer. It is difficult for the 29 States and Commonwealths to assess precisely how much longer discovery would take under those circumstances, as Delaware's proposed counterclaims do not specify exactly what companies' products are at issue and which of the 29 States and Commonwealths allegedly escheated proceeds from the sale of those products. The 29 States and Commonwealths estimate that discovery on damages and Delaware's proposed counterclaims would at least triple the amount of discovery necessary at this stage, up to a year or more.

Position of the State of Delaware :

While Delaware is not opposed to the bifurcation of the liability and damages phases, Delaware strongly believes that a single, unified discovery process is necessary to avoid duplicative and burdensome fact and expert document production and testimony. Despite the other states' assertions to the contrary, how those states treat official checks, regardless of what company is marketing those official checks, informs both the legal question of liability and the damages calculation in this action. For example, if Arkansas receives sums on unclaimed official checks sold at a Texas branch of an Arkansas-incorporated bank, such information directly informs the question of how Arkansas applies the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act to its own corporations.

As a result, Delaware proposes the following schedule:

1. **Initial disclosures due:** 21 days from the entry of the Case Management Order.
2. **Final date for joining additional parties:** 30 days from the entry of the Case Management Order.
3. **Final date for amending pleadings:** 30 days from the entry of the Case Management Order.
4. **All fact discovery completed by:** 12 months from the entry of the Case Management Order.

5. **Reports from Retained Experts Due:** 60 days following the close of discovery.
6. **Expert Deposition Deadlines:** 90 days following the filing of expert reports.
7. **Dispositive Motions Due:** 60 days following the close of expert depositions
8. **Tentative Trial Date:** Spring 2019.

XII. ANY OTHER PERTINENT MATTER TO BRING TO THE SPECIAL MASTER'S ATTENTION

At this time, the parties have not identified any additional matters to bring to the Special Master's attention.

Respectfully submitted,	Respectfully submitted,
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Exhibit A

Combined ECF Service List

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Arkansas, et al., v. Delaware, 22O146 ORG (consolidated)

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