

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.

**COMMENTS OF THE COMMONWEALTH OF PENNSYLVANIA
TO THE PROPOSED CHANGES TO THE FIRST INTERIM
REPORT OF THE SPECIAL MASTER DESCRIBED IN THE
ORDER OF OCTOBER 26, 2022**

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I. INTRODUCTION

In response to the proposed changes to the First Interim Report of the Special Master described in the Order of October 26, 2022, Pennsylvania submits three comments. Pennsylvania also joins the comments submitted by the other Defendant States.

First, if the Special Master changes the Report as proposed, the Special Master will no longer have ruled in Pennsylvania’s favor under the Federal Disposition Act (FDA), meaning Pennsylvania’s Motion for Summary Judgment (filed Feb. 1, 2019; Special Master docket # 94) is no longer moot. Accordingly, if the Report is changed as proposed, Pennsylvania’s Motion must be addressed on the merits.

Second, under the UCC, teller’s checks *can be money orders*, so even if a selling bank is liable as a drawer or co-drawer on a MoneyGram Teller’s Check, and even if such MoneyGram instruments are in fact “a teller’s checks” under the UCC, the co-drawer relationship is immaterial.

Third, the drawer qualities of MoneyGram Teller’s Checks do not alter that they are—at a minimum—a “similar written instrument” to money orders and traveler’s checks.

II. COMMENTS

- A. If it is determined that the MoneyGram Teller's Checks are not subject to the Federal Disposition Act, Pennsylvania's claim for the modification of the secondary common law rule established in *Texas v. New Jersey* would no longer be moot.**

Pennsylvania moved for summary judgment on *two* grounds:

(1) the FDA; and (2) the federal common law. *See* Pa. SJ Mot.; *see also* Pa. SJ Memo. of Law at 4 (filed Feb. 1, 2019; Special Master docket # 95). Pennsylvania also expressly argued for relief under the common law during oral argument on March 10, 2021. *See* Mar. 10, 2021 Transcript at 69:3-70:21 (Special Master docket # 112). In the First Interim Report, the Special Master recommended granting full relief under the FDA and, therefore, recommended that Pennsylvania's common law claim be dismissed as moot. *See* First Interim Report at 91-92.

Now, however, under the proposed modification described in the October 26 Order, it is no longer the case that "Pennsylvania's claim and motion for summary judgment [are] moot." *See* First Interim Report at 92. Mootness no longer applies because the recommended disposition of the case would not result in complete relief in

Pennsylvania’s favor. As such, even if the Special Master modifies the First Interim Report as suggested—which Pennsylvania urges is unnecessary as set forth below—further analysis from the Special Master on Pennsylvania’s common law claims will be necessitated.

B. Even under the UCC, teller’s checks can be money orders.

Though the full written rationale for the proposed change to the First Interim Report has not yet been supplied, Pennsylvania perceives the change is in part founded on the position that teller’s checks cannot be money orders. But that position is not supported under the UCC itself.¹ Indeed, Uniform Commercial Code Comment 4 to UCC § 3-104 (“negotiable instrument”) clearly states: “[Money orders] vary in form and their form determines how they are treated in Article 3. If a money order falls within the definition of *a teller’s check*, the rules applicable to teller’s checks apply.” (Emphasis added.) Thus, under this comment alone, *if* the proposed change to the First Interim Report is

¹ With this comment, Pennsylvania does not concede either that (1) the MoneyGram Teller’s Checks are, under these circumstances, teller’s checks under the UCC; or (2) the UCC is the salient reference point for interpreting the FDA. Indeed, above all else, Pennsylvania submits the FDA should be interpreted, where ambiguous, through the lens of unclaimed property laws and concepts. *See* Pennsylvania Response to Delaware’s Objections to Special Master’s Draft First

based upon the position that money orders cannot be teller's checks, that position is unsupported by at least the UCC.

C. MoneyGram's Teller's Checks are subject to the FDA because, at a minimum, they are "similar written instruments."

1. The Federal Disposition Act does not materially distinguish between a banking or financial association, or a business association that is directly liable.

The FDA is not the Uniform Commercial Code. Its primary focus is not the regulation of commercial transactions and defining the rights and liabilities associated with negotiable instruments. Rather, the exclusive concern of the FDA is the equitable distribution of abandoned and unclaimed money orders, traveler's checks, and other similar written instruments among the states. 12 U.S.C. § 2501(3) ("the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment"). As such, the FDA does not differentiate between the holders of the payment liability, merely noting that the payable sums must be a liability or obligation of "a banking *or* financial organization *or* business

association.” 12 U.S.C. § 2503 (emphasis added). The purposeful use of the conjunction “or” denotes equal alternative holders of the payable sum. These terms, identifying each of the possible business entities that may hold in their custodial possession payable sums owed to another, are commonly found in unclaimed property statutes used to identify “holders” of unclaimed property. *E.g.*, 72 P.S. § 1301.1 (Pennsylvania Unclaimed Property Law defining “holder” as being “obligated” to pay another).

As a statute of escheatment, it is unsurprising that the FDA defines each business entity that may be obligated for the payable sum (bank, financial organization, and business association) similarly to how those terms are used in state unclaimed property laws. *See e.g.*, 72 P.S. § 1301.² Like most states, Pennsylvania’s Unclaimed Property law was amended following the enactment of the FDA to specifically define the term “financial association” to not only include banks and “financial organizations” as used in the FDA, but also to include *any*

² Pennsylvania’s earlier version of its Unclaimed Property Law identified banks and corporations in terms similar to those used in the FDA. Act of April 9, 1929, § 1301 *et seq.* (P.L. 343, No. 176), *as amended*.

entity that was an “issuer” of a traveler’s check, money order or similar monetary obligation.³

The business entity provisions contained in the Pennsylvania law and the FDA are both concerned with verifying that payable sums exist as a “liability,” “commitment,” or “obligation” held by “any issuer” of a money order, traveler’s check, or similar instrument. The FDA’s congressional finding section specifically refers to banking, financial organizations and business associations “engaging in issuing and selling” money orders and traveler’s checks. 12 U.S.C. § 2501(1). In fact, the term “directly liable,” found in Section 2503 of the FDA to identify those banks, financial organizations, or business associations that are obligated for payment of a sum, is not a UCC term. Rather, the phrase, “any sum payable . . . on which a banking or financial organization or a business association is directly liable,” as used in the FDA, is intended

³ Pennsylvania’s Unclaimed Property Law defines “financial association” as follows:

a bank, a private bank, a bank and trust company, a savings association, a savings bank, a trust company, a savings and loan association, a building and loan association, a credit union, and *any issuer of traveler’s checks, money orders, or similar monetary obligations or commitments*, whether organized or operated under State or Federal law.

72 P.S. § 1301.1 (emphasis added).

to identify the escheatment obligation of a bank, business association or financial organization as a “holder” of payable sums to another.

Therefore, that the MoneyGram Teller’s Check may feature a bank as a co-drawer is of no moment since the FDA itself expressly contemplates banks *or* other entities being directly liable on the instrument at issue.

2. Abandoned Teller’s Checks are not presented for payment.

Though the UCC’s definition of written negotiable instruments is informative, the specific manner in which the UCC defines the settlement of payment rights and liabilities within the interbank collection system has little practical application to unclaimed property. Abandoned and unclaimed Teller’s Checks, by definition, never settle through the interbank collection system. They are lost and unpaid instruments. The fact that a drawer or drawee bank may be liable for its payment pursuant to the UCC is of no importance to the remitter who has been dispossessed of the Teller’s Check. What is important to the FDA is that the payable sum is within the custodial possession of a “holder.” In this case, MoneyGram is the *de facto* “holder” of the payable sums for *any* abandoned and unclaimed MoneyGram remittance

instruments, including Teller's Checks, that remain unpaid over an extended period.

The payment liability of MoneyGram Teller's Checks is, in practice, governed by contract. MoneyGram Teller's Checks are sold to purchasers through financial institutions pursuant to a contractual agreement with MoneyGram. Financial institutions sell MoneyGram Teller's Checks to customers whose accounts with the financial institutions are debited for payment (amount of the check, plus a service fee). Once sold to the customer, the amount of the Teller's Check is immediately transferred to MoneyGram by the selling financial institution. Gillette Report at ¶ 70; Yingst at 139. Pursuant to a separate contract between MoneyGram and its drawee bank (BNY-Mellon), MoneyGram "holds" the payable sums until the Teller's Check is presented to BNY-Mellon for payment. Yingst at 156.

However, because the Teller's Checks have been abandoned or otherwise lost by the purchaser, the associated payable sums never move from the custodial possession of MoneyGram. In other words, in every case in which the Teller's Check has been abandoned, it is never presented for settlement to the drawee bank. Under these

circumstances, MoneyGram assumes the legal status of a “holder” of unclaimed property, obligated or liable to hold for the account of or deliver or pay to the remitter / purchaser of the Teller’s Check pursuant to each state’s unclaimed property statute. *See, e.g.,* 72 P.S. § 1301.1 (Pennsylvania Unclaimed Property Law definition of “holder”).

MoneyGram’s business practice directs the processing of Teller’s Checks (as is common with all MoneyGram marketed “Official Checks”) through its Official Check program system. The financial institution that sells a MoneyGram Teller’s Check is contractually directed to report to MoneyGram, within a day of the sale, the check number, payable amount, issuance date and MoneyGram account number. Yingst at 209-210, 267. MoneyGram’s contracts with financial institutions that sell Teller’s Checks do not direct the reporting of the retail purchaser’s identity beyond the location of the transaction.

It is worth noting that the UCC does not materially distinguish between an “issuer” of an instrument or a “drawer.” UCC § 3-105(c). MoneyGram’s agreements with financial institutions, which may be a bank, identify the financial institution as the selling agent of MoneyGram Teller Checks. Yingst Ex. 15, clause 5. The contracting

financial institution becomes the drawer of the Teller Check in name only, only responsible for transmitting the check sales record and associated funds to MoneyGram upon the sale of the Teller's Check. Gillette Report at ¶ 74. Once the financial institution completes the retail sale, reporting of the transaction and transmission of the payable sums listed on the Teller's Check, it has no additional role or responsibility. Yingst Ex. 15, clause 31(A); Gillette Report ¶¶ 76-77.

If the Teller's Check is not abandoned or unclaimed, the check is presented to MoneyGram's contracted drawee bank, BNY-Mellon, for payment. Pursuant to its agreement with MoneyGram, the drawee bank settles the check payment with funds received by MoneyGram. Yingst at 279; Gillette Report at ¶ 80. However, as abandoned and unclaimed property, neither the Teller's Check nor any MoneyGram "Official Check" is settled through this process. The payable sums on the abandoned Teller's Checks remain in the custodial possession of MoneyGram and are subsequently escheated to the appropriate state unclaimed property administrator. Thus, the MoneyGram Teller's Checks appear just like statutory "money orders" or "traveler's checks" in that the originator of the instrument (i.e., MoneyGram) is ultimately

the holder of its value, merely awaiting presentment or escheatment.

That a bank has some brief role in the transaction does not eliminate or materially alter this reality.

3. The relevant reference points for comparison of “similarity” are between “money orders” and “traveler’s checks.”

Finally, as the First Interim Report correctly notes, the relevant reference points for comparison of “similarity” are not between “money orders” and the MoneyGram instruments, but between “money orders” *and* “traveler’s checks.” See First Interim Report at 59.⁴ As explained in the Defendant States’ Memorandum of Law in Support of Summary Judgment (filed Feb. 1, 2019; Special Master docket # 89), which Pennsylvania joined, see Pa. SJ Memo. of Law at 1, money orders and traveler’s checks: (1) are prepaid instruments for transmitting funds; (2) are cash equivalents in the market; and (3) are instruments for which the owner address information is not kept, making them prone to

⁴ “The structure of the FDA, by referring to a ‘money order, traveler’s check, or other similar written instrument’ manifests a clear intent for the word ‘similar’ to refer to the shared characteristics of ‘money orders’ *and* ‘traveler’s checks.’ That is, the characteristics to which a written instrument must be ‘similar’ to fall within the scope of the FDA are those features that are common to a ‘money order’ and a ‘traveler’s check,’ and are of significance to the purposes of the FDA.” First Interim Report at 59 (emphasis in original).

escheatment to the issuer's state of incorporation (rather than the place of purchase, where the true owner most likely lives). *See* Def. SJ Memo. of Law at 26-27.

Here, all three of these qualities are overwhelming true of MoneyGram's Teller's Checks. They are prepaid. *See* Del. Response to Defendant States' Statement of Undisputed Facts, at ¶ 87 (filed Mar. 8, 2019; Special Master docket # 98). They are cash equivalent in the market. *See id.* And they are prone to escheat (exclusively to Delaware) because MoneyGram does not retain—or, in fact, ever receive—the purchaser's address information. *See id.* at ¶ 87(d), ¶ 93, ¶ 94, ¶ 98.

Therefore, for purposes of the FDA, Teller's Checks are, if not money orders, at least similar written instruments, regardless of who is or is not a drawer on the instruments. Indeed, it matters not for purposes of analyzing the FDA on this point—a statute *about* unclaimed property and not a statute *about* financial instruments generally, *see supra*—that the MoneyGram Teller's Checks may have qualities (such as who is the drawer) that make them in *some* ways different. This is so because money orders and traveler's checks *themselves* are somewhat different, and really markedly different in

many respects. Regardless of those differences, the statute commands a court to focus on the similar qualities of prepaid instruments for the transmission of money that make them prone to escheat and thus prone to a grossly inequitable escheatment paradigm under common law; the very concern the statute was designed to address. *See* 12 U.S.C.

§ 2501(3) (describing equitable purpose of FDA). Through that lens here, the Teller's Checks are similar to money orders and traveler's checks, fine distinctions about who is a drawer notwithstanding.

III. CONCLUSION

The First Interim Report correctly concludes that Delaware has wrongfully received custody of sums—several hundred million dollars—that should have rightfully been submitted to the respective Defendant States under the FDA. Accordingly, Pennsylvania respectfully urges the Special Master to maintain the First Interim Report as is without the modifications described in the Special Master's Order of October 26, 2022.

Respectfully submitted,

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Dated: November 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2022, I served by email the foregoing Comments on all counsel listed in the Amended Service Lists of October 31, 2022.

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