



Unclaimed Property ADVISORY ■

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SCOTUS Appears Poised to Reject Delaware's Bid to Narrowly Interpret Federal Unclaimed Property Law

Unclaimed property took center stage in the U.S. Supreme Court's opening day of its 2022–2023 term, with the long-awaited oral argument in the consolidated cases of *Delaware v. Pennsylvania and Wisconsin* and *Arkansas v. Delaware* (commonly referred to as the MoneyGram case). The consolidated cases involve Delaware's response to multistate claims to funds representing the "official checks" issued by MoneyGram on the basis that they qualify as "money orders" or "similar written instruments" under the 1974 federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA) and are subject to the statute's priority rules, which assign escheat jurisdiction to the states where the instruments were purchased.

MoneyGram, the issuer of official checks (a product which did not exist in 1974), had for years escheated funds received for such uncashed checks to Delaware under the common-law escheatment secondary rule, which provides that if the last known address of the owner of property is unknown, unclaimed property is to be reported to the state of the issuer's place of domicile. Thirty states aligned against Delaware, claiming that the FDA governs the treatment of official checks and that they are entitled to such property if it becomes abandoned if purchased in their states.

Unclaimed property has become a high-stakes issue for states, particularly Delaware, which has long relied on abandoned property to fund its essential functions and operations. Since most unclaimed property is never claimed by their owners, a substantial portion of the monies collected from holders of such property effectively becomes revenue to the states without the need to impose politically unpopular taxes. Abandoned property has been included as a separate line item in Delaware's [General Fund Revenue](#) since 1990, when it generated just 3.1% of Delaware's revenue, increasing to 15.7% of the state's revenue in 2013 (before 1990, revenue from abandoned property was included in "Other."). However, in 2021, \$448.6 million was reported by Delaware from unclaimed property, the third-largest source of revenue after individual income tax and corporate franchise tax. As the states informed the Court, more than \$250 million is at issue from unclaimed official checks issued by MoneyGram.

Based on the oral argument, the Court appears poised to side with the states aligned against Delaware, but the nuances of the Court's reasoning will likely have a broader sweep than the specific MoneyGram instruments at the heart of this multistate jurisdictional scrum.

Common-Law Jurisdictional Rules Versus the FDA's Legislative Override

Although competing claims over abandoned property do not generally occur, potential conflicts have arisen with intangible property based on the variety of connections a state may assert with the owner, the holder, or the property

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itself. In response to such conflicts, the Supreme Court adopted rules for determining which state is entitled to receive unclaimed intangible property: the state with the primary jurisdictional claim is the state of the owner's last known address, and the state with the secondary claim is the state of domicile of the holder of the property.¹

Application of the secondary rule as applied to Western Union money orders was challenged by Pennsylvania. In *Pennsylvania v. New York*, 407 U.S. 206 (1972), Pennsylvania argued that the rule set forth in *Texas* should not apply to money orders because Western Union's records infrequently reflected the purchaser or the recipient of the money order and, accordingly, the state of domicile would reap a windfall. Instead, Pennsylvania argued that the property should escheat to the state where the money order was purchased or, if unknown, to the state where it was delivered. The Court rejected Pennsylvania's argument, stating "we do not regard the likelihood of a 'windfall' for New York as a sufficient reason for carving out this exception to the *Texas* rule," noting that the rejected argument would undermine the clarity of the scheme set forth in *Texas*. Congress, at the urging of the states, overruled *Pennsylvania v. New York* by enacting the FDA in 1974.

The FDA provides different jurisdictional rules than those provided by the Court in *Texas v. New Jersey*. The first priority rule is that funds from "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" is to be turned over to the state of purchase if the issuer's books and records disclose that state – which is typically the case for issuers of these instruments.

The language of the FDA confirms that the intent of Congress was to permit states where the money orders and traveler's check purchasers are based to receive "the proceeds of such instruments in the event of abandonment" as a "matter of equity." The Senate's report for the FDA bill provided that it was "designed to assure a more equitable distribution among the various States of the proceeds of the subject instruments," rather "than continuing to permit a relatively few States to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another State."²

The Cases' Procedural Path

On March 29, 2017, the Court appointed Judge Pierre Leval as Special Master in this Article III original jurisdiction case. On July 23, 2021, after hearing from the parties and considering the motions for summary judgment, Leval issued a 93-page [first interim report](#) concluding that MoneyGram's official checks "fall within the scope of the FDA" and that the states where the "Disputed Instruments" were purchased "have the power under their own laws to take custody of the proceeds of presumptively abandoned Disputed Instruments purchased in their respective states." (For a discussion of the draft first interim report, see our [advisory](#), "Supreme Court–Appointed Special Master Applies Place-of-Purchase Jurisdictional Rule to MoneyGram's Unclaimed 'Official Checks'")

Delaware submitted exceptions to the Special Master's report and requested that the Court reject his recommendations, and on February 22, 2022, the Court agreed to hear oral argument, which was set for the first day of the 2022–2023 term, October 3, 2022. The Unclaimed Property Professionals Organization (UPPO) and others filed amicus briefs.³

¹ *Texas v. New Jersey*, 379 U.S. 674 (1965) (set out the first and second priority rules based on "ease of administration and equity"). See also *Delaware v. New York*, 507 U.S. 490 (1993) (applying *Texas v. New Jersey* priority rules and rejecting Special Master's recommendation that the Court deviate from those rules and escheat unclaimed interest and dividends based on the principal domestic executive officers).

² S. Rep. No. 93-505, at 1, 6 (1973).

³ Alston & Bird partner Ethan D. Millar was on the UPPO amicus brief.

Highlights from the Oral Argument

The oral argument engaged the entire bench, with every Justice asking questions of counsel. A few highlights:

- **Substance v. labels:** Justice Thomas was the first to jump in, asking counsel for Delaware, Neal Katyal, whether changing the label of the disputed instruments would “solve” the issue. Katyal appeared to concede that labels matter and if the instruments were called “money orders,” they would come within the scope of the FDA. He also acknowledged that the distinctions between money orders and the disputed instruments “sound[] formalistic” and suggested that the states could cure the “informational hiccup” by requiring banks dealing with MoneyGram to collect and provide address information so that the primary rule, rather than the secondary rule, would apply. Justice Jackson challenged the argument that Congress was concerned with collecting addresses rather than “inequitable escheatment” given the fact that the FDA intentionally overrides the rules relied upon by Delaware’s counsel. Justice Gorsuch homed in on what constituted “other similar instruments,” and Katyal conceded that substance, rather than labels, would control the analysis, yet “labels matter because they matter.” Justice Kagan attempted to address the conflict between labels and substance with Katyal, stating that labels matter because the FDA specifically named products and substance comes into play in determining whether a product constitutes a “similar written instrument.”
- **What is a “similar written instrument” under the FDA?** Justice Kavanaugh suggested that in determining “similar written instruments,” features other than those suggested by Katyal (i.e., disputed instruments can only be purchased at banks, you must have a bank account to purchase them, and they are signed by the bank) should be considered, such as whether the instrument was a prepaid money transmission product, where the address of the purchaser is unknown and the windfall purpose is involved. Katyal responded that instruments with the characteristics proposed by Justice Kavanaugh would “blow up the statute” to include products Congress did not intend to cover. Nicholas Bronni, the solicitor general of Arkansas, argued on behalf of the states aligned against Delaware that the disputed instruments “function precisely like other money orders but are marketed differently” and urged that “marketing strategies do not define commercial instruments and they don’t justify the \$250 million windfall [to Delaware].” Katyal alternatively proposed that even if the Court did not accept the position that the disputed instruments were not money orders or other similar instruments, the disputed instruments were third-party bank checks, a stated FDA exception. Bronni retorted that MoneyGram was not a third party and the official checks were not bank checks, hence the FDA’s third-party bank check exception was inapplicable.
- **Slippery slope / parade of horrors?** Justice Thomas asked Bronni to address the “parade of horrors,” with Chief Justice Roberts focusing on why MoneyGram did not obtain address information collected by the selling financial institutions. Bronni argued that when the FDA was being considered, Congress understood that address collection and maintenance were burdensome regardless of the value of the instruments. Justice Roberts suggested that the states could simply require that MoneyGram obtain address information and suggested that the differences between money orders and the disputed instruments went beyond marketing strategy differences and, significantly, that the disputed instruments are high value and are not anonymous. Justices Kagan and Alito asked about the scope of similar written instruments, such as prepaid cash cards, gift cards, and gift certificates, with Bronni seeming to acknowledge that these would not be covered by the FDA.
- **Damages v. windfall:** Justice Gorsuch asked about “money damages” claimed by the states and what would permit such relief; Bronni tried to deflect the question on the basis that the issue of damages was not yet addressed since Leval bifurcated the proceedings, but reminded the Court that the money was not Delaware’s since unclaimed property is held by states in trust for the property owners. Justice Gorsuch appeared to recognize that whether there is an implied cause of action for the states to obtain relief from Delaware would need to be dealt with by the Special Master if the states were to be successful.

- **Easy fix?:** On rebuttal, Katyal suggested that states should employ the “easy fix” of requiring that MoneyGram collect the address information and stated that if the states prevail, they would be making the place of purchase the primary jurisdictional rule rather than the last known address of the owner, and suggested that the Court leave the resolution of the issue to Congress or the states.

Some Takeaways and Handicapping the Outcome

This is a big-dollar issue for states even though in virtually all states unclaimed property is held in trust and technically is never truly escheated to the state. States routinely publicize a few examples of unclaimed property being reunited with their owners, but as is evident by states’ continuing attempts to expand the types of property subject to escheat, decrease dormancy periods, hire contract auditors, and impose interest and penalties for late reporting, states have a clear (and arguably cynical) eye toward retaining a windfall rather than reuniting property with owners.

The “windfall” question becomes crucial when, as in these cases, the vast majority of money orders and similar bearer instruments are never returned to the parties that purchased them or that are listed as payees. The Court seemed fully aware that the FDA was passed to avert a single-state windfall for specified instruments and did not seem inclined to hand Delaware such a windfall given the FDA’s inclusion of both money orders and “similar instruments” within the scope of Congress’s override of the Court’s common-law jurisdictional rules.

Indeed – and consistent with its prior affirmations of *Texas v. New Jersey* – the Court’s narrow focus on what constitutes a “money order” under the FDA signals that it will not consider the possibility of revising the federal common-law jurisdictional rules set out in the Court’s three seminal cases, *Texas v. New Jersey*, *Pennsylvania v. New York*, and *Delaware v. New York*. The place-of-purchase jurisdictional standard, which was rejected by the Third Circuit in *N.J. Retail Merchants Association, et al. v. Sidamon-Eristoff* for gift cards, would continue to be restricted to FDA-covered instruments (whatever the Court decides they include).

The Court certainly entertained the “slippery slope” question of whether a similar written instrument could include cashier’s checks, gift cards, and such – and this issue was raised by amici (including UPPO). But it appears to us that the Court will figure out how best to circumscribe the parameters of the FDA without expanding it beyond its reasonable contours. The Court may provide some additional guidance of how the “similar written instruments” language of the FDA is to be interpreted and may use the statute’s stated legislative intent as a guide.

Finally, although Justice Gorsuch raised the issue of “damages” given the custodial nature of virtually all states’ unclaimed property laws, the question is really how to distribute the funds among the various states; no state should be “damaged” by having to return to another state property that is held for the benefit of true owners. However, if the Court rules for the states and requires application of the FDA’s place-of-purchase jurisdictional standard, the Court is likely to want to restrict the lookback to avoid disrupting Delaware’s fisc.

While we expect the Court to rule for the states and for the issue of “damages” to be remanded to Leval, as Yogi Berra said, “it ain’t over till it’s over.”

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