



Unclaimed Property ADVISORY ■

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Supreme Court Issues First Unclaimed Property Opinion in 30 Years

On February 28, 2023, the U.S. Supreme Court issued its opinion in the consolidated cases of *Delaware v. Pennsylvania and Wisconsin* and *Arkansas v. Delaware* (commonly referred to as the MoneyGram case) and ruled for the 30 states aligned against Delaware in a dispute involving more than \$250 million of unclaimed official checks issued by MoneyGram. As readers remember, we predicted this result in our [advisory](#) that summarized the legal issues of the dispute and the October 3, 2022 oral argument.

Justice Jackson's Opinion

In Justice Ketanji Brown Jackson's thoughtful opinion, the Supreme Court held that MoneyGram's agent checks and teller's checks (the "disputed instruments") are "sufficiently similar" to money orders to fall under the 1974 federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA), determining that the disputed instruments were improperly escheated to Delaware.

While the Supreme Court declined to define "money orders" or decide whether the disputed instruments are money orders, the Court concluded that the disputed instruments are "other similar written instruments" under the FDA. The Court reasoned that an instrument is sufficiently similar to a money order, and therefore falls under the FDA's escheatment rules, when it (1) is a prepaid written instrument used to transmit money to a named payee; and (2) will inequitably escheat to the holder's state of incorporation under the federal common law's secondary escheatment rule due to the holder's business practice of not retaining a record of the instrument owner's address. The second prong of this test is particularly noteworthy because it hinges the analysis not just on the nature of the instrument itself but also on the particular holder's address collection and retention practices, which is somewhat of a departure from the bright-line rule principles informing the *Texas v. New Jersey* line of precedent.

The Court recognized that check issuers, such as MoneyGram, generally do not collect creditor addresses as a matter of business practice. Therefore, the primary escheatment rule under federal common law, escheating unclaimed intangible property to the address of the creditor, would not apply. The Court emphasized that Congress enacted the FDA to prevent such inequitable escheatment that creates a "windfall" to the state of the holder's incorporation.

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The Court rejected Delaware's contention that the disputed instruments fall within the FDA's third-party bank checks exception simply because the disputed instruments are signed by bank employees and paid through MoneyGram. The Court's opinion also clarified the confusion caused by the Special Master's filing of a second interim report after the Court held oral argument. The Special Master made a U-turn and recommended treating one category of MoneyGram instruments (teller's checks) as falling within the FDA's third-party bank check exception because those instruments designate the selling bank as the "drawer" and MoneyGram as the issuer, leading the Special Master to believe that both are liable on the checks. The Court rejected the Special Master's second interim report and instead adopted the recommendations of the first interim report, concluding that the disputed instruments fell within the scope of the FDA.

The unanimous decision of the Court, as to all parts except Part IV-B (exploring the legislative history associated with the "third party bank check" exception), represents a victory for the 30 states, which can divide over \$250 million in abandoned MoneyGram checks, and provides clarity for issuers of instruments that are substantially similar to the disputed instruments. However, it should be noted that the Court explicitly stated that it was *not* opining on whether the FDA applies to cashier's checks, certified checks, or non-MoneyGram teller's checks because those instruments were not before the Court. And while the Supreme Court handed the 30 states a victory, the Court's decision did not address damages, which will be addressed by the Special Master.

Final Thoughts

The future of the federal common-law rules of jurisdiction

The Court had the opportunity, but declined, to address the future of the federal common-law rules of jurisdiction. Pennsylvania, one of the states aligned against Delaware, requested that the Court remand to the Special Master the question of whether *Texas v. New Jersey*, establishing the primary and secondary rules based on the "ease of administration and of equity," is still good law, but only if the Court ruled in favor of Delaware. Because the Court did not adopt the Special Master's second interim report, the Court refused Pennsylvania's request as articulated in the opinion's final footnote.

However, the Court's opinion acknowledged that inequitable escheatment outcomes can result from the federal common-law rules of jurisdiction, stating that such rules "were permitting inequitable escheatment (insofar as our primary rule mistakenly relied on the assumption that the holders of such instruments regularly collected creditors' address information), and the statute that Congress enacted in the wake of our *Pennsylvania* ruling [i.e., the FDA] details the inequitable escheatment problem." States may use the Court's acknowledgement as an opportunity to resort to legislative action to enact statutory rules for property types that states want to be escheated on a multistate basis, prospectively—e.g., provisions requiring holders to collect and maintain owner address information for certain property types.

Implications for other property?

In declining to define "money orders" or decide whether the disputed instruments are money orders, the Court provided a two-part test to determine whether an instrument is sufficiently similar to a money order to fall under the FDA's escheatment rules. Given the guidance provided in the two-part test, issuers of an ostensibly similar property type for which the business model does not entail collection and retention of owner address information should consider the implications of the Court's two-part test and whether such property falls under the FDA's escheatment

rules. These holders should engage in a detailed factual analysis of how their address collection and retention practices relate to these property types.

However, the Court's guidance and two-part test will not apply to *every holder's* business model that entails the noncollection of owner address information because the Court provided guidance in the narrow context of the FDA and not in a broader commercial context. Ultimately, there may be no definitive answers that come from holders engaging in such analysis unless and until the states initiate a follow-up dispute, perhaps to fight over jurisdiction to escheat cashier's checks, certified checks, and teller's checks, which were expressly carved out of the Court's opinion.

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