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Show Us the MoneyGram: What the Supreme Court's Unclaimed Property Ruling Means

by Kendall L. Houghton and Michael M. Giovannini
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In this installment of UP Ahead, Houghton and Giovannini talk to *Tax Notes State* senior editor Doug Sheppard about the consolidated U.S. Supreme Court cases of *Delaware v. Pennsylvania* and *Arkansas v. Delaware,* in which Delaware lost its dispute with 30 states over unclaimed MoneyGram agent checks and teller's checks.

Thanks to the U.S. Supreme Court's first unclaimed property ruling in 30 years, Delaware lost its fight against 30 states over unclaimed MoneyGram agent checks and teller's checks. In this installment of UP Ahead, Kendall L. Houghton and Michael M. Giovannini of Alston & Bird LLP analyze the implications of the Court's decision in the consolidated Supreme Court cases of *Delaware v. Pennsylvania* and *Arkansas v. Delaware*, including what the case may mean for future unclaimed property litigation and state policy.

Doug Sheppard: Why did Congress enact the Federal Disposition Act [FDA],[1] given that the U.S. Supreme Court had issued and then reaffirmed two jurisdictional rules to prevent states squabbling over which one gets a particular piece of property?

Kendall L. Houghton: That's a great question. Of note, the states have resorted to Congress to trump those jurisdictional rules in only this one instance that I'm aware of. Michael, are you aware of any other time when Congress has used its affirmative commerce clause powers to enact an unclaimed property law?

Michael M. Giovannini: No, Kendall, I believe this is the first and only instance in which that has happened. And it was a direct response to the 1972 *Pennsylvania v. New York* Supreme Court decision, in which the Court revisited its common law jurisdictional rules originally articulated in *Texas v. New Jersey*. In the *Texas v. New Jersey* case, the Court originally established the primary and secondary common law jurisdictional rules of escheatment. In particular, the primary rule provides the state of the owner's last known address with jurisdiction to escheat the property, to the extent the holder's books and records indicate such an address, and the secondary rule provides the state of the holder's domicile with the alternative claim to escheat the item of property if the holder's books and records do not indicate the owner's last known address — or the state of such address does not provide for the escheat of property.

In *Pennsylvania v. New York*, which was a follow-up decision to *Texas*, the states again sued

[1] That is, the Disposition of Abandoned Money Orders and Travelers Checks Act, 12 U.S. Code section 2501-2503.

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one another to determine the proper state to escheat property. In that case, the states were fighting over Western Union money orders, regarding which the holder generally did not have last known addresses for owners. The Supreme Court was urged to deviate from its *Texas v. New Jersey* common law rules in instances when the state of domicile would greatly benefit from the lack of address records, but the Court did ultimately affirm those rules. In response to that decision, Congress enacted the FDA.

Kendall, anything else you want to share on *Pennsylvania v. New York*?

Houghton: Yes, specifically that Pennsylvania was asking the Supreme Court to reverse an escheat "windfall" that was occurring regarding money orders; money orders and similar instruments are also at issue in the MoneyGram case that was decided on February 28.

But in that 1972 dispute, Pennsylvania said, "Look, Western Union has not collected money order purchaser name and address data. And because it does not have the address states for the owners, escheat of uncashed money orders occurs pursuant to the secondary rule" — and Western Union's domicile state was New York. That's why New York state is the defendant in that lawsuit — New York was receiving 100 percent of uncashed money orders that were sold nationwide.

The Supreme Court affirmed the jurisdictional rules that control multistate escheatment but urged Pennsylvania to prevent the windfall by enacting a record collection and retention mandate, which would cause a distributed escheat of uncashed money orders to states of the owner's last known address.

In contrast to the Court's proposed after-action, Pennsylvania and other states went to Congress and secured the FDA, which specifically displaces the Court's jurisdictional rules for three categories of property: (1) money orders, (2) traveler's checks, and (3) other "similar written instrument[s]," except "third party bank check[s]." MoneyGram issues agent checks and teller's checks, which 29 states have asserted qualify as "other similar written instruments" under the FDA and therefore should be escheated under the FDA's alternative jurisdictional rule — to the states where those instruments were purchased, rather than to the holder's domicile state. As you can see, the FDA jurisdictional rule secures the outcome Pennsylvania sought in its litigation with New York state.

Giovannini: Kendall, thank you for that summary. So in other words, the FDA — which was enacted in 1974 — overrode the Supreme Court's common law jurisdictional rules as it relates to those covered instruments listed in the FDA and substituted Congress's rules in their place.

On paper, the MoneyGram litigation involves a dispute over whether the MoneyGram instruments in question — the teller's checks and the agent checks — satisfy the applicable definition within the FDA and are thus subject to the FDA's jurisdictional rules rather than the common law jurisdictional rules established in *Texas v. New Jersey*.

The stakes for the states are very clear. Delaware is the state of domicile of MoneyGram, so it would stand to escheat the unredeemed teller's checks and agent checks under the secondary rule established by the Supreme Court's common law jurisprudence, as it had been established that MoneyGram does not have a record of the addresses of the purchasers of these checks. There's no law requiring MoneyGram to collect and maintain that information. Indeed, MoneyGram had historically escheated these items to Delaware, whereas the other states — basically all the states where these agent checks and teller's checks were sold — would stand to gain under the FDA rules established by Congress. In other words, these states were seeking to claw back those amounts back from Delaware on a place-of-purchase basis.

One interesting aspect of the opinion is where Justice Ketanji Brown Jackson comments that this was the direction that Congress itself could have gone in by requiring companies to collect and maintain address information for purchasers of these checks and other payment instruments covered by the FDA. But instead, Congress opted to change the jurisdictional rules so as not to consider the address of the owner, but rather focus on the state where the check was purchased to the extent the holder has that information.

Houghton: In terms of what's at stake in this specific case, potentially up to $250 million worth of those MoneyGram instruments have

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historically been escheated to Delaware. Note, however, that the decision we're discussing addresses only the substantive question; the Supreme Court has remanded the case back to the special master to address the secondary issue of damages. We don't know yet if the clawback from Delaware will be of $250 million or some subset of that amount, but this certainly was material enough to spawn litigation under Article III of the Constitution, which is heard first and only by the U.S. Supreme Court because the dispute arises between two or more states.

While MoneyGram's instruments and unclaimed property reporting practices are under the microscope, MoneyGram itself is not a party to the case and is watching this play out on the sidelines with every other member of the unclaimed property community. That said, MoneyGram's prospective filing method will be directly affected by this guidance. We expect that there are other issuers of instruments that may look or function like MoneyGram instruments, and plenty of other instruments that might — at least theoretically — fall within the ambit of the FDA.

Giovannini: The Court certainly did make a couple of interesting points in this opinion that will be much talked about. First of all, just to be clear, the opinion states that the Court is specifically not addressing cashier's checks, certified checks, and teller's checks because those are different from the teller's checks and agent checks that MoneyGram sold. So there is no precedent established by this opinion directly for those other types of bank-issued instruments. That said, the Court did establish a two-part test for determining whether an instrument is covered by the FDA. The first part is based on the substance of the instrument. In particular, the instrument must be a prepaid written instrument used to transmit money to a named payee.

Part two of the test is particularly interesting in that it asks whether applying the common law secondary rule will inequitably escheat the items to the holder state of incorporation because of the holder's business practice of not retaining a record of the owner's address. Thus, there's a very clear equitable prong to the test in which the Court not only looks at the nature and substance of the instrument, but also the specific facts around the given holder's business practices related to address collection.

Houghton: While the test set forth to identify "other similar written instruments" seems to have a potentially broad sweep, there are certainly going to be limitations on the application of this decision. For one thing, the FDA specifically references banking and financial institutions when it addresses recordkeeping gaps. This framing of the act limits the sweep of the Court's decision — in other words, even if there are numerous property types for which a similar recordkeeping gap exists, because (1) the business model is such that an issuer of an instrument would not typically collect owner address data or (2) there's just been a failure to retain such records over time.

Giovannini: Another key piece of the decision is found in footnote 9, which admits that the determination of whether instruments fall within the FDA could shift, so the same instrument issued by a holder one day may fall within the FDA because the escheatment of it would result in an inequitable distribution to the state of domicile under the common law rules. But then presumably if the holder started to collect owner address information, that particular instrument could fall outside of the scope of the FDA and instead be subject to the common law rules. This is certainly a departure from the hard-and-fast principles underlying the Court's original jurisprudence from *Texas v. New Jersey*.

Houghton: That's really well stated, Michael. Since you alluded to the Court's express statement that this is not a decision on cashier's checks, certified checks, or non-money teller's checks, the other issue I think the courts left open for future litigants to sort through is how to interpret the catchall prong of the FDA. Again, the Court held that the MoneyGram instruments are similar written instruments to money orders. The Court said, "We're not going to define the term 'money order.' We're not going to decide if the MoneyGram instruments are money orders because we conclude that they are other similar written instruments."

But the Court also had to decide that these instruments didn't fall within the exception to that catchall prong for third-party bank checks. A decent portion of this decision is dedicated to

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exploring what a third-party bank check exactly is. I really appreciated Justice Jackson's footnote that cites not one, not two, not three — in fact, *six* different definitions for the term "third-party bank check" that were proffered by the parties and their respective experts. Certainly the Court had to wade through a muddled mess of theories in this regard. The Court ultimately resorts to the legislative history of the FDA to conclude that the third-party bank check carveout was a mere clarification and not its own express exemption. Nevertheless, financial institutions and banks will spend time parsing that term and the Court's discussion of it to evaluate whether instruments not addressed — or even contemplated — in this case fall outside of the FDA based on the third-party bank check carveout.

I may be cutting to the chase here, but I think that whether you're a holder, a state, or a state's audit agent, your interpretation and application of this decision may be reverse-engineered to the outcome that you find most appealing or advantageous — perhaps even equitable? There are enough moving parts in the MoneyGram decision that I think we're going to see the case being cited to support 180-degree opposite outcomes — depending on fact patterns.

Giovannini: Right, I agree. I think there's so much to analyze between the lines in this case. And even though the Court's opinion is stated to apply narrowly to the MoneyGram instruments in question, it has clearly given banks and other holders a lot to think about in terms of their specific instruments: what the Court specifically had to say about what is an "other similar written instrument," what is a third-party bank check, and what it means for holders to have sufficient records as it relates to owner address information.

This certainly sets the stage for future disputes between states and holders in asserting that particular instruments or other items of property should be reported under the FDA instead of the common law rules. But I also would envision a scenario in which the states don't necessarily stop with these particular instruments but also seek to consider what other property types they may be able to recover from Delaware or other states of domicile to which holders may have been escheating under the common law rules, where such escheatment has created inequitable outcomes.

Houghton: This was another very well-reasoned Supreme Court decision that arms us with a number of analytical frameworks, standards, and tests, but by no means has it resolved every potential multistate fight and put to bed the jurisdictional questions and tensions that exist in the unclaimed property legal realm.

Giovannini: Agreed, Kendall, and one final thought: Here we have the Supreme Court's first real unclaimed property opinion in 30 years — since *Delaware v. New York* in 1993. If there's any indication of where the Court may go in future proceedings, to me the equitable escheatment theory stands out; it certainly represents a shift away from what is more of the bright-line test set forth in *Texas v. New Jersey*, in which property was very clearly either going to be escheated by the state of the last known address of the owner or the state of the holder's domicile if there was no address. Thus, the MoneyGram holding introduces a very interesting and potentially unpredictable additional component to escheat determinations.

Houghton: That's right — I believe we're going to see the law evolve through legislative action, certainly at the state level. As we noted at the beginning of our conversation, Pennsylvania was told by the U.S. Supreme Court in the '70s: "Go enact record collection and retention laws." We'll see if there's interest in trying to get a version 2.0 of federal legislation for other types of property, but that seems to be a steeper hill to climb. We also anticipate audit positions, publication of state administrative guidance, and the like. There's plenty more to come in the aftermath of the MoneyGram decision. ■

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