



United States: Unclaimed Property Hunger Games: States Seek Supreme Court Review In 'Official Check' Dispute

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Background

As [detailed in our blog last month](#), MoneyGram Payment Systems, Inc. (MoneyGram) is stuck in between a rock and a hard place as states continue to duel with Delaware over the proper classification of (and priority rules applicable to) MoneyGram's escheat liability for uncashed "official checks." The dispute hinges on whether the official checks are properly classified as third-party bank checks (as Delaware directed MoneyGram to remit them as) or are more similar to "money orders" (as alleged by Pennsylvania, Wisconsin and numerous other states participating in a recent audit of the official checks by third-party auditor TSG). If classified as third-party bank checks, the official checks would be subject to the federal common law priority rules set forth in *Texas v. New Jersey*, 379 U.S. 674 (1965) and escheat to MoneyGram's state of incorporation (Delaware) since the company's books and records do not indicate the apparent owner's last known address under the first priority rule. However, if the official checks are classified as more akin to money orders under the federal Disposition of Abandoned Money Orders and Traveler's Checks Act of 1974 (Act), as determined by TSG and demanded by Pennsylvania, Wisconsin and the other states, they would be subject to the special statutory priority rules enacted by Congress in response the Supreme Court of the United States' *Pennsylvania v. New York* decision and escheat to the state where they were purchased. See 12 U.S.C. § 2503(1) (providing that where any sum is payable on a money order on which a business association is directly liable, the state in which the money order was purchased shall be entitled exclusively to escheat or take custody of the sum payable on such instrument).

In addition to the [suit filed by the Pennsylvania Treasury Department](#) seeking more than \$10 million from Delaware covered in our prior blog, the [Wisconsin Department of Revenue recently filed a similar complaint](#) in federal district court in Wisconsin, alleging Delaware owes the state in excess of \$13 million. Other states participating in the TSG audit (such as Arkansas, Colorado and Texas) also recently made demands to MoneyGram and Delaware.

It is interesting to note that in 2015, Minnesota (MoneyGram's former state of incorporation) turned over in excess of \$200,000 to Pennsylvania upon its demand for amounts previously remitted to Minnesota for MoneyGram official checks. Apparently not only do the states in which the transaction occurred disagree with but even a former state of incorporation took the majority path.

Directly to the Supreme Court?

On May 19, Pennsylvania sought an order by the district court to administratively suspend the case so that the Supreme Court could consider a motion for leave to file a bill of complaint and invoke the Court's original jurisdiction. Notably, both MoneyGram and Delaware have argued that the federal district courts lack subject matter jurisdiction, and that the case can only be heard by the Supreme Court. The federal district court judge granted Pennsylvania's order on May 23 and instructed the state to file a report within seven days of the US Supreme Court's decision.

On May 26, things got much more interesting when Delaware (not Pennsylvania) submitted a motion for leave to file a Bill of Complaint with the Supreme Court, attempting to invoke the Court's exclusive and original jurisdiction over suits between the states. The named defendants (as filed) include both Pennsylvania and Wisconsin (who stated it intends to move imminently to stay its federal district court suit against Delaware and MoneyGram, pending resolution by the Supreme Court). In the Bill of Complaint, Delaware states that the Court has exclusive and original jurisdiction and it has no sufficient remedy except to invoke such jurisdiction. Specifically, Delaware requests that the Supreme Court: (1) declare the official checks to not be a money order or other similar instrument pursuant to the Act; (2) issue a decree commanding Pennsylvania and Wisconsin to not assert any unclaimed property claim over the official checks; and (3) issue a decree that all future sums payable on abandoned official checks should be remitted to Delaware. In making a case for the Court to invoke its original jurisdiction and take the case, Delaware stated that the two-factor test outlined in *Mississippi v. Louisiana* weighs in favor of granting review. *See* 506, U.S. 73, 77 (1992). Specifically, Delaware highlighted the seriousness and dignity of Delaware's claim and that no alternative forum can provide full relief as reasons why the Court should exercise its original and exclusive jurisdiction in this case.

Just two weeks later, on June 3, 2016, Wisconsin filed its own brief and motion for leave to file a counterclaim. It encouraged the Court to grant Delaware's motion for leave to file its Bill of Complaint (and its own motion to file a counterclaim). In support of this, Wisconsin noted that Delaware has seriously harmed Wisconsin's sovereign interests and it has no alternative forum to vindicate its rights. Unlike Delaware, Wisconsin requested that the Court resolve the legal questions at issue promptly, without the appointment of a special master—which will cause resolution to be significantly delayed (see discussion below). In its counterclaim, Wisconsin requests that the Court: (1) declare the rights of Wisconsin with regard to the unclaimed funds from official checks purchased in Wisconsin, which Delaware has wrongfully seized; (2) issue an order commanding Delaware to cease taking custody of funds from abandoned official checks purchased in Wisconsin; and (3) issue an order commanding Delaware to pay Wisconsin damages in the amount of the unclaimed official checks purchased in Wisconsin that were wrongfully seized, plus interest.

In what came as a surprise to most, on Thursday, June 9, 2016, Arkansas, Texas and 19 other states joined the fight against Delaware and filed a motion for leave to file a Bill of Complaint with the Supreme Court. The separate and distinct filing seeks similar relief for the MoneyGram official check funds they allege were wrongfully remitted to Delaware (which they allege may total as much as \$400 million). Specifically, they have asked the Court to: (1) declare their current and future right to the sums payable on unclaimed and abandoned MoneyGram official checks purchased in their states and unlawfully remitted to the State of Delaware; (2) issue a decree commanding Delaware to deliver sums payable on unclaimed and abandoned MoneyGram official checks purchased in their states and unlawfully remitted to Delaware and cease-and-desist all actions that will interfere; and (3); award damages to the plaintiff states, including interest for the violation.

What's Next?

Pennsylvania has not filed a brief with the Supreme Court yet (despite invoking a motion to stay in the federal district court) and we expect them to chime-in soon. It is notable that the suit filed by the 21 other states is separate and distinct from the Pennsylvania and Wisconsin suit.

Procedurally with original jurisdiction cases, the Supreme Court must first determine whether it will even invoke its original jurisdiction in the case, usually based on review of a motion (as Delaware and Wisconsin have requested). The Supreme Court has discretion to not take exclusive original jurisdiction cases, although many (including Justice Thomas and Justice Alito) have noted that "[n]othing in §1251(a) suggests that the Court can opt to decline jurisdiction over such a controversy." *See Nebraska et al. v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., joined by Justice Alito in dissenting from the denial of motion for leave to file complaint).

If the Court decides to tackle a case (such as this one) with disputed facts, the Court will typically appoint a special master (as requested by Delaware and objected to by Wisconsin) to gather evidence and report back to the Justices. (A special master was appointed in each the Court's three previous cases addressing the unclaimed property priority rules). If a special master is appointed, the case may disappear from the radar for months, even years. Special masters are called upon to weigh the facts and legal arguments through briefing and hearings, with the scope of witness testimony and discovery at the discretion of the special master assigned to the case. Notably, the Court has held that the Federal Rules of Evidence are only guidance in original jurisdiction cases and are not binding.

At the conclusion of a typical original jurisdiction case today, the special master files a report with the Court and the parties file briefs responding to the special master's findings and conclusions. The Court will then decide whether to accept the views of the special master or to hear arguments over the disagreements about the special master's report. Only then will the Justices decide the case (which can be years after review is requested).

We plan to continue monitoring this litigation and will provide an update as new developments occur. For those interested in tracking the Supreme Court litigation as well, a permanent link to the Pennsylvania and Wisconsin case docket is [available here](#).

Practice Note

The background to these cases raises serious questions regarding the efficacy of states' statutory promise to indemnify holders for unclaimed funds remitted to the state. As noted by MoneyGram, "this is a fight between states over property over which MoneyGram has no control, and in which MoneyGram has no interest, other than not wanting to be required to escheat the same property twice." MoneyGram has already remitted the entire amount in dispute to Delaware and has been subject to multiple audits of the same property. Nevertheless, Pennsylvania and other states participating in the TSG audit recently put the dog poo on the ugly shoe by demanding amounts already paid to Delaware from MoneyGram and seeking interest, penalties and even attorneys' fees and costs for allegedly remitting to the wrong state.

While the issues involved in this litigation are narrow in scope, watching Godzilla, Mothra, King Kong and a slew of Cthulhus fight it out is an entertaining spectator sport. More importantly, this is yet another example of Delaware's unilateral stranglehold on unclaimed funds. The profile of this case before the Supreme Court will give the Court a front row seat at the dysfunctions of current unclaimed property enforcement. This case could prime the Court for accepting a due process case involving states' unclaimed property enforcement tactics, as suggested in Justices Alito's and Thomas' concurrence in the denial of *cert.* in *Taylor v. Yee* earlier this year. *See* 136 S. Ct. 929, 930 (2016) (Alito, J., concurring, stating that the combination of "shortened escheat period with minimal notification procedures raises important due process concerns . . . [and] the constitutionality of current state escheat laws is a question that may merit review in a future case"). This suggestion was recently echoed by the prominent think tank, [Cato Institute](#). As the interested parties pile on, the possibility of Supreme Court engagement can only increase.