BCLP. Client Intelligent

Insights

U.S. SUPREME COURT RE-ROUTES ESCHEATMENT OF PAYMENT PRODUCTS

Mar 15, 2023

The U. S. Supreme Court has redirected escheatment of certain unclaimed funds from states that were previously presumed properly to claim the funds. In this decision, instead of escheating all of the unclaimed funds arising from certain payment instruments to the State of Delaware, where the issuer is incorporated, the Court's decision allocates escheatment rights to several states based on where the instruments were purchased.

In *Delaware v. Pennsylvania*, et al.[1] ("Delaware"), the Court applied the Federal Disposition of Abandoned Money Orders and Traveler's Checks Act ("Federal Disposition Act " or "FDA")[2] in determining that payment products sold by banks on behalf of MoneyGram, Agent Checks and Teller Checks (the "Disputed Products"), are subject to the state escheatment law priorities prescribed pursuant to the FDA rather than under the "federal common law" state escheatment law allocation rule previously announced by the Court in *Texas v. New Jersey ("Texas")*.[3] Though the direct holding is limited to the specific Disputed Products, the Court's reasoning may have important implications for other payment instruments that are currently escheated to the issuer's state of organization under the *Texas* rule.

Under the rule in *Texas*, intangible unclaimed property would be subject to escheatment under the law of the state where the owner of the funds, sometimes called the "creditor," resided according to the last address known to the holder. If the holder of the funds (or other intangible property) does not keep records of the owners' addresses, the law of the holder's state of organization would control. For property covered by the FDA, and for which records of the purchasers' addresses are not kept, the law of the state where the financial product is sold controls. This statutory allocation scheme is based on Congress' assumption that the great majority of such products are purchased in the state of the buyer's residence. In *Delaware*, the Court classified the Disputed Products within the coverage of the FDA, thereby changing the state of escheatment to which issuers of the products had been escheating unclaimed funds. As a result, from 2002 through 2017, approximately $250 million of unclaimed funds arising from these particular Disputed Products were improperly remitted to Delaware instead to other states.[4] The amounts of funds and other

intangible property that may be re-routed may be greater to the extent that the Court's reasoning affects the escheatment rights related to other financial instruments.

In *Delaware*, the Court based its decision on the FDA's coverage of products that are similar to money orders, i. e., "other similar written instrument," finding it unnecessary to define "money order" *per se*.[5] Thus the Court determined that the Disputed Products shared sufficient features with money orders to fall within the statute and therefore held that unclaimed funds must be escheated according to the laws of the states where sold instead of under the law of the state of the issuer's organization. The Court cited two key factual circumstances supporting its finding: 1) the Disputed Products are "similar in function and operation" to money orders, in that they are "a prepaid financial instrument used to transmit a specified amount of money to a named payee"; and 2) MoneyGram does not keep a record of the address of the purchaser (referred to as the "creditor" in the opinion).[6] Ironically, although the Court expressed concern that a definition of money order adopted on this factual record might inadvertently extend coverage of the FDA to additional unintended payments products, its application here of the FDA's "other similar written instruments" clause may have a similar effect, raising questions as to coverage of additional payment instruments that are sold without keeping records of the purchaser's address. This decision would shift the analysis to a determination of whether the payment product in question is similar in function and operation to money orders or traveler's checks.

Justice Jackson's opinion provides background for the decision:

> "'Escheatment' is the power of a State, as a sovereign, to take custody of property deemed abandoned. *Texas v. New Jersey,* 379 U.S. 674, 675 (1965). In the context of tangible property, the escheatment rules are straightforward: The State in which the property is located has the power to take custody of it. *Id.* at 677. But determining which State has the power to escheat intangible property, which has no physical location, can be complicated, as multiple States may have arguable claims. *See Ibid.*
>
> These original jurisdiction cases require us to decide which States have the power to escheat the proceeds of certain abandoned financial products that MoneyGram Payments Systems, Inc. possesses. Delaware argues that this Court's common-law rules of escheatment apply, which means that the abandoned proceeds should go to Delaware as MoneyGram's State of incorporation. A collection of other States (the Defendant States) argues that [the FDA] governs the products at issue, and therefore, as a general matter, the abandoned proceeds should escheat to the State where the products were purchased."[7]

In *Delaware*, the Court determined that coverage of the Disputed Products under the FDA, enacted in 1974, supersedes application of the Court's prior declaration in *Texas* (in 1965) of general common law escheatment allocation rules. The Court considered Congress' declared purpose of the FDA to avoid "inequitable escheatment" that resulted from the application of the common law rule

when issuers do not keep records of the creditors' addresses. In that case, since the last known address of the purchaser is not known, by default under the *Texas* rule, unclaimed funds escheat according to the law of the state in which the issuer is organized. Rather than requiring companies to keep records, which the FDA identifies as an "additional burden on interstate commerce," Congress chose to direct escheatment to the state where purchased, "since it [was] determined that most purchasers reside in the State of purchase of such instruments."[8]

The Court did not extend the FDA's legislative declaration of "equity among the several States" to overturn the rule in *Texas,* which remains in force with respect to unclaimed property that is not subject to alternative disposition under federal law. However, the Court's reasoning brings into question whether other prepaid financial instruments may be similar enough "in function and operation" to money orders or traveler's checks to bring them into the escheatment allocation rules of the FDA. At least one court has previously noted uncertainty as to whether certain other financial instruments, e. g., cashier's checks, fall under the category of other written instruments "similar to money orders".[9] Of particular concern would be whether stored value cards ("SVCs"), such as gift cards or gift certificates, might be swept into coverage under the FDA, since they are prepaid instruments indicating a specified value and for which a record of the address of the owner is not generally maintained.

There is at least one very significant difference between gift card SVCs and money orders and traveler's checks. Generally, certain SVCs are not redeemable for cash. Since they may be redeemed only for merchandise or services, they may not be seen to function as "a prepaid financial instrument used to transmit a specified amount of money to a named payee." One federal Court of Appeals, in considering the application of New Jersey's escheatment statute to SVCs, recognized this as a key difference distinguishing SVCs (and gift certificates) from money orders. The court described the importance of this difference: "If the State were to escheat gift certificates, the issuers would have had to turn over the value of the gift certificates in cash to the State, when they were originally bound to turn over only merchandise or services to the owner."[10] The amount escheated to the state would deprive the issuer of the profit it expected to realize upon the owner's redemption of the SVC's value. The Third Circuit characterized this difference as imposing on the issuer "an obligation different from the obligation undertaken to the original owner . . . ." [11]

Although the Third Circuit did not consider whether an SVC would be considered another "written instrument similar to a money order or traveler's check," it identified an important difference in its function that might preclude application of the FDA to SVCs under the Court's framework for analysis in *Delaware*. Furthermore, as the lower court had also pointed out, many SVCs would also be subject to the federal CARD Act[12], enacted in 2009, which might preempt state escheat laws, depending on a state-by-state analysis as to which law is more protective of consumers.[13] Although the CARD Act does not address which state's escheatment law applies to unredeemed value on an SVC, arguably, it would pose a significant difference in the function and operation of an

SVC from a money order or traveler's check so as to take SVCs that are covered by the CARD Act out of the coverage the FDA. SVCs did not exist in 1974 when the FDA was adopted, and the operating differences of the electronic transactions initiated by an SVC and the elaborate web of federal and state laws regulating SVCs suggest that application of the FDA to SVCs would likely require a difficult stretch of the reasoning employed the Court in *Delaware* to disrupt the existing allocation of state escheatment laws.

---

[1] *Delaware v. Pennsylvania*, 143 S. Ct. 696 (2023).

[2] 12 U.S.C. §2501 *et seq.*

[3] *Texas v. New Jersey*, 379 U.S. 674, 682 (1965).

[4] *Delaware*, 143 S. Ct. at 707 n.7.

[5] *Id.* at 709.

[6] *Id.* at 705.

[7] *Id.* at 700.

[8] *Id.* at 703; 12 U.S.C. § 2501(5).

[9] Lower courts have mainly examined arguments as to whether cashier's checks are subject to the FDA. *See e.g.*, *Illinois ex rel. Elder v. JPMorgan Chase Bank*, N.A., No. 21 C 85, 2022 WL 3908675, at *4 (N.D. Ill. Aug. 30, 2022) (holding that the phrase "other similar instrument" is ambiguous).

[10] *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 384 (3d Cir. 2012).

[11] *Ibid*.

[12] 15 U.S.C. § 1693 *et seq*.

[13] *See American Express Travel Related Serv. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 587-92 (D.N.J. 2010).

RELATED PRACTICE AREAS

- Fintech

MEET THE TEAM

Stanton R. Koppel

San Francisco

stanton.koppel@bclplaw.com
+1 415 675 3437

Emily O. Yu

San Francisco

emily.yu@bclplaw.com
+1 415 675 3443
