

## Delaware Loses Claim to Unclaimed Property; May Owe Hundreds of Millions to Competing States



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*“Delaware can no longer collect amounts due on the disputed MoneyGram financial products, from which State Escheator Brenda Mayrack has estimated Delaware derived \$20 million annually.”*

Delaware realizes countless benefits as the most popular jurisdiction for entity formation. Not the least of those benefits has historically been Delaware’s ability to collect unclaimed property held by Delaware corporations. But, in *Delaware v. Pennsylvania and Wisconsin*, 598 U.S. \_\_\_\_ (2023), the U.S. Supreme Court rejected the First State’s right to collect certain classes of unclaimed property based solely on the state of incorporation of the entity in possession of such property.

For those unfamiliar with the concept of unclaimed property: each state has the right to take custody of property deemed to be abandoned under state law. Most state laws require the individual or entity in possession of such property (the “holder”) to report and remit the property to the state only to the extent that the property, the domicile of the person who is entitled to the property (the “owner”), and/or the place where the property was purchased, is located within that state. Delaware law, on the other hand, seeks to collect unclaimed property based solely on the domicile of the holder—in the case of a corporation, the holder’s jurisdiction of incorporation. Thus, Delaware and other states often assert colorable claims to the same unclaimed property.

In prior cases, the U.S. Supreme Court attempted to resolve states’ competing claims by developing a two-tiered rule to override conflicting state laws. Under this rule, the right to collect unclaimed property was given, in the first instance, to the state of the owner’s last known address, but if such address was not documented in the holder’s books and records, the state in which the holder was incorporated could collect.

Then in 1974, Congress, perceiving the Supreme Court’s rule as inequitable and difficult to administer with respect to certain intangible property, enacted the Federal Disposition Act (the “FDA”), which abrogated the high Court’s rule whenever applicable. The FDA directs that unclaimed property consisting of a “sum payable on a money order, traveler’s check, or other similar written instrument (other than a third party bank check)” shall, in the first instance, be subject to the unclaimed property law of the state in which such property was purchased. If such place-of-purchase state

cannot be ascertained from the holder’s books and records, the FDA provides that the property is collectable by the state in which the holder’s principal place of business is located, regardless of the state of incorporation. Therefore, when the FDA applies, it negates Delaware’s advantage of being the preferred jurisdiction of entity formation.

Undeterred by the FDA, Delaware continued to enforce its unclaimed property laws based on a holder’s domicile—relying on the Supreme Court’s pre-FDA rule—with respect to unclaimed property that was not obviously within the ambit of the FDA. Despite several unsuccessful challenges brought by other states, Delaware’s collections of unclaimed property proved extremely lucrative for the First State, which derived \$319 million - \$566 million annually from unclaimed property collections between 2007 and 2022.

But the Supreme Court’s 2023 decision could significantly restrict these collections. In *Delaware v. Pennsylvania and Wisconsin*, a majority of other states challenged Delaware’s practices with respect to amounts due on certain financial products issued by MoneyGram Payment Systems, Inc., a Delaware corporation. The high Court construed the FDA broadly, ruling that it applied to all of the property at issue, and thus the Court disallowed Delaware’s collection based on state of incorporation under the pre-FDA rule.

The result: at the very least, Delaware can no longer collect amounts due on the disputed MoneyGram financial products, from which State Escheator Brenda Mayrack has estimated Delaware derived \$20 million annually. In addition, the Supreme Court is poised to render a second decision on the matter, in which the Court could order Delaware to repay to the challenging states unclaimed amounts previously collected on MoneyGram products. Worse yet, Delaware may need to cease collecting and/or disgorge past-collected amounts due on similar financial products—such as non-MoneyGram teller’s checks, cashier’s checks, certified checks, money orders, and gift cards—when such collections are or have been made based solely on Delaware’s status as the holder’s state of incorporation.

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