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SUPREME COURT OF THE UNITED STATES

DELAWARE,

Plaintiff, NOS.

vs. 220145 & 220146

ARKANSAS, ET AL., (Consolidated)

Defendants.

PROCEEDINGS HELD REMOTELY

Wednesday, October 26, 2022

4:02 p.m. (EDT)

BEFORE: JUDGE PIERRE LEVAL

Reported by:

Jaclyn Urzia, CSR

Job No. 219001

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JUDGE LEVAL: So I thank you for attending this conference on very short notice. I apologize for interrupting your busy schedules.

Let me get straight to the point to tell you why I've called this conference.

Upon reading the oral argument before the Supreme Court with the categorical assertion by counsel for Delaware that the banks are liable on the disputed instruments, I went back to restudy the papers that you filed in support of and in opposition to your respective motions for summary judgment.

I found, on doing so, to my embarrassment, that I can no longer subscribe to the entirety of my recommendations to the Supreme Court in my first interim report, at least insofar as they pertain to teller's checks.

As I read the duties of a Special

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2 Master, my situation is quite
3 different from what it would be if,
4 for example, I were the district judge
5 whose case was being heard by the
6 Supreme Court. In that case, in that
7 circumstance, my role would have ended
8 with the appeal from my judgment, but
9 in contrast, the guide for the Special
10 Masters provides that the Special
11 Master's role in formulating good
12 recommendations to the Court is
13 exercised, quote, at all times and in
14 many ways.

15 In my report, I said to the
16 Supreme Court that the distinctions
17 that Delaware drew between the
18 disputed instruments and the commonly
19 accepted perception of money orders
20 related either to issues of marketing
21 strategy or to superficial appearances
22 and did not involve differences in the
23 rights, the duties and liabilities
24 that arose from usage of the
25 instruments.

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2 It was my conclusion, as a
3 result, that there were no meaningful
4 distinctions between the disputed
5 instruments and money orders so that
6 they should be deemed to be money
7 orders, and if not, at least similar
8 instruments.

9 I now cannot understand how I
10 came to that conclusion. Delaware had
11 advanced numerous arguments which I
12 found unpersuasive because they
13 related only to other marketing
14 strategies or superficial appearances
15 of the instruments. I can only
16 surmise that I was blinded by the
17 several arguments which I found to be
18 unpersuasive to the argument that I
19 now find to be entirely persuasive,
20 and that is the fact that the banks,
21 in selling teller's checks, assume
22 liability as drawer for the payment of
23 the check.

24 That is not a difference that
25 relates only to marketing strategy or

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2 to cosmetic appearances. It changes
3 the rights and liabilities that flow
4 from the use of the instrument from
5 what they would be if the issuer
6 alone, that is MoneyGram, was liable
7 for payment of the check, as is
8 normally the case with money orders.

9 And that change, in my view, is a
10 substantial one, both in the practices
11 of the marketplace and in law. It
12 makes the instrument a bank check, one
13 defined by the UCC as a teller's check
14 that is one drawn by one bank on
15 another bank. The importance of that
16 difference lies in part in the fact
17 that in addition to the credit of
18 MoneyGram, the credit of the selling
19 bank as drawer of the check is on the
20 line.

21 As a practical matter in the
22 world of commerce, many sellers,
23 including sellers of cars, boats, real
24 estate, conventionally require payment
25 in limited ways including by a bank

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2 check.

3 It's also important, with respect
4 to the legal obligation of a bank in
5 which the item is deposited, to make
6 funds available on the next business
7 day.

8 So, while I recognize that
9 according to dictionary definitions
10 money orders can be instruments issued
11 by banks, in which case those checks
12 would similarly carry a bank's
13 responsibility, it's not the usual
14 practice for banks to issue money
15 orders, and I believe that the record
16 contains no instances of bank-issued
17 money orders.

18 In my view, that difference
19 between the MoneyGram teller's checks
20 and money orders, at least as they're
21 commonly understood, is sufficiently
22 significant and important in both
23 commerce and law that teller's checks
24 cannot be considered to be money
25 orders, nor are they sufficiently

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2 similar to qualify as other similar
3 instruments.

4 It's therefore my present
5 thinking that I should modify the
6 recommendations that I made in the
7 first interim report to recommend that
8 with respect to MoneyGram's teller's
9 checks, the Court should rule in favor
10 of Delaware that these instruments are
11 not covered by the FDA.

12 Turning to agent checks, I
13 believe I should leave my original
14 recommendation unchanged. I recognize
15 that Delaware contends that merely by
16 virtue of the bank employee's
17 signature the banks are liable on
18 them. And Delaware's expert witness,
19 Professor Mann, asserted that many of
20 the agent checks should be found to
21 have the status of teller's checks
22 excepting those that state on their
23 face that the selling bank signs them
24 as agent for MoneyGram.

25 But I find Professor Mann's

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2 reasoning on this point not
3 persuasive. Professor Mann classes
4 the banks that sell agent checks as
5 the drawers of the instruments, but
6 none of the agent checks identify that
7 bank as the drawer.

8 To the contrary, all of them
9 identify MoneyGram as the drawer; at
10 least all of them to the extent
11 exhibited to me in the papers that
12 were submitted.

13 Some forms of agent check are
14 expressly labeled "Agent Check" and
15 they say on them "Agent for
16 MoneyGram." Others, even when they do
17 not use the word "agent," they
18 nonetheless identify MoneyGram as the
19 drawer of the check. No other entity
20 is identified as drawer of the check.

21 Further, unlike MoneyGram's
22 teller's checks, none of the agent
23 checks claim on their face to be
24 teller's checks.

25 Finally, Delaware's statement of

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2 undisputed facts includes a MoneyGram
3 chart showing that MoneyGram treats
4 its teller's checks but not its agent
5 checks as requiring next-day funds
6 availability under Reg CC.
7 Apparently, MoneyGram does not believe
8 the selling banks are liable on the
9 agent checks, all of which identify
10 MoneyGram, and MoneyGram alone, as the
11 drawer of the check.

12 So, in the light of these
13 observations, I believe that the
14 features of agent checks, that
15 Delaware validly invokes to
16 differentiate agent checks for money
17 orders, pertain only to marketing
18 decisions or superficial
19 characteristics and do not
20 meaningfully distinguish agent checks
21 from money orders. Delaware has
22 identified no true difference between
23 agent checks and instruments generally
24 acknowledged as money orders that
25 changes the rights, duties and

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2 liabilities arising from the use of
3 the instrument. Accordingly, with
4 respect to agent checks, unlike
5 teller's checks, I stand by my
6 original recommendation.

7 So, it's my present intention to
8 file a supplemental master's report
9 with the Supreme Court changing my
10 recommendation as to teller's checks
11 and adhering to it as to agent checks.

12 Now, given the fact that you've
13 had no prior notice of what I wanted
14 to say to you here, I will not call on
15 any of you at this time to respond or
16 say anything. If you wish to say
17 something I'd be happy to hear
18 anything you would like to say, but I
19 will ask you to file comments on what
20 I've said. I would welcome your
21 comments on the propriety of a Special
22 Master filing a change of
23 recommendation with the Court as well
24 as on the merits of the issues. It's,
25 of course, unnecessary for you to

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2 extensively reiterate all of the
3 arguments you have previously made.

4 So I would like to request that
5 the Defendant States file their
6 comments on what I've said here and my
7 intentions a week from today, and
8 Delaware a week thereafter, and if I
9 think it would be helpful after that,
10 I may request another conference to
11 discuss the issue.

12 So does any of you wish to be
13 heard now or do you just prefer to
14 leave it to your written comments?

15 MR. KATYAL: Your Honor, we
16 appreciate very much the dialogue
17 here. This is the second time in a
18 month that I've seen you search for
19 the truth and reconsider some of your
20 premises and we appreciate that. We
21 would be happy to do that.

22 I guess my only concern is just
23 with the Supreme Court itself and
24 making sure that there's some notice
25 somehow for them maybe in the next

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2 couple weeks before --

3 JUDGE LEVAL: Yes, I will -- I
4 will file -- I will call the clerk of
5 the Supreme Court to tell them my
6 intentions and I will file on the
7 record a document just briefly
8 stating, speaking of my intention to
9 file an altered recommendation.

10 MR. KATYAL: Terrific.

11 MR. BRONNI: Your Honor, can I
12 just clarify because I want to make
13 sure I have right what you want us to
14 respond to now. It's on the
15 proprietary question, or is there also
16 a merits question, you want us to
17 bring forth those issues now or...

18 JUDGE LEVAL: You can -- you mean
19 what I'm inviting you to talk about
20 right now?

21 MR. BRONNI: Well, I mean, in the
22 filing that you wanted, your Honor, a
23 week from today. I know you said on
24 the propriety of supplementing the
25 report.

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2 JUDGE LEVAL: You can talk about
3 anything you would like to talk about,
4 anything you think is appropriate, but
5 I just wanted to make clear that, of
6 course, I expect you to talk about the
7 merits of the issue, but if you wanted
8 to talk about the propriety of a
9 Special Master doing what I propose to
10 do, filing an amended report, I would
11 welcome any such comments as well.

12 MR. BRONNI: Understood.

13 JUDGE LEVAL: Am I being clear
14 about that?

15 MR. BRONNI: Yes, your Honor. I
16 just wanted to make sure I understood.

17 JUDGE LEVAL: Anything else that
18 anybody wants to say?

19 MR. BRONNI: One point. Thank
20 you, your Honor. Immediately I want
21 to make sure here, your Honor said
22 there was no evidence that banks
23 issued money orders.

24 I just, as a preliminary matter,
25 your Honor, I would point you to

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2 Delaware's own appendix material that
3 discusses bank-issued money orders.

4 JUDGE LEVAL: I'm not hearing you
5 very clearly. Can you -- are you --
6 your voice is coming across to me in
7 kind of a muddy way.

8 MR. BRONNI: Let me try one
9 thing, see if this --

10 JUDGE LEVAL: Maybe if you can
11 just speak a little slower. You're
12 calling my attention to exhibits?

13 MR. BRONNI: Yes, your Honor.
14 Can you hear me better now?

15 JUDGE LEVAL: Yes.

16 MR. BRONNI: Okay. Just one
17 point is in Delaware's own appendix
18 materials. I believe it's the
19 contents encyclopedia and the AVA
20 report on money orders discusses
21 extensively bank money orders, which
22 are money orders issued by banks,
23 because your Honor noted that there
24 wasn't evidence in the report of money
25 orders that were issued by banks and I

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2 just, off the top of my head, I wanted
3 to draw your attention to that.

4 JUDGE LEVAL: I'll have to look
5 at that. Can you cite me with, either
6 counsel cite me to specific pages on
7 that or where to look?

8 MR. BRONNI: I'm happy to send
9 you an e-mail. I don't have it in
10 front of me right now unfortunately.

11 JUDGE LEVAL: Okay. Do you know,
12 Mr. Katyal, where that is?

13 MR. KATYAL: I don't, I'm sorry,
14 your Honor. But, in fact, this case
15 is far out of my mind. I have another
16 one to argue in a couple days, so
17 sorry on the page number but we'd be
18 happy to look at my friend's
19 submission and get back to you.

20 JUDGE LEVAL: I'm not sure that
21 point is vital to my analysis, but
22 certainly look at it. Is that it?
23 Okay.

24 Thank you very much. I look
25 forward to hearing from you and if

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2 I -- if I think it would helpful to
3 have a discussion after you have filed
4 your responses, I will have my clerk
5 call to set up another conference.

6 Many thanks.

7 MR. KATYAL: Neal Katyal for
8 Delaware. We would like a copy,
9 please.

10 MR. BRONNI: Nick Bronni for
11 Arkansas. We would, too.

12 JUDGE LEVAL: And I would -- the
13 Special Master, I would like one. Do
14 you have my address and my e-mail
15 address?

16 MR. KATYAL: We can get it to
17 them, Judge.

18 JUDGE LEVAL: Okay. Thank you.

19 (Time noted: 4:17 p.m.)
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C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, JACLYN URZIA, CSR, do hereby
certify that the within is a true and
accurate transcript of the remote
proceedings taken on October 26, 2022.

I further certify that I am not
related to any of the parties to this
action by blood or marriage and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this October 28,
2022.

Nicolette Urzia

JACLYN URZIA