SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v. Nos. 220145 & 220146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

September 24, 2018

EXPERT REPORT OF CLAYTON P. GILLETTE

I, Clayton P. Gillette, provide this Expert Report in order to assist the Court in its resolution of this matter.

1. I am currently the Max E. Greenberg Professor of Contract Law at New York University School of Law, where I have taught courses in commercial law (including payment systems), contracts, and state and local government law.

2. I have authored or co-authored numerous articles, texts, and newsletters, and have lectured in the area of payment systems on subjects including the use of checks and other negotiable instruments. The audiences for my publications and lectures have included academics, law students, practicing attorneys, and banking professionals.

3. Prior to joining the faculty of New York University School of Law in 2000, I was the Perre Bowen Professor of Law at the University of Virginia School of Law (1992-2000). From 1997 to 2000, I was also the John V. Ray Research Professor at the University of Virginia Law School, and from 1993 to 1996 I was the Caddell and Conwell Research Professor at the University of Virginia Law School. From 1978 until 1984, I was an Associate Professor of Law, and from 1984 until 1992 a Professor

of Law at the Boston University School of Law. From 1988 until 1992, I was the Harry Elwood Warren Scholar in Municipal Law at the Boston University School of Law. I served as Associate Dean of the Boston University School of Law from 1990-1992. I later served as Vice Dean of New York University School of Law from 2004 to 2007. From 1976 until 1978, I was associated with the New York City law firm of Cleary, Gottlieb, Steen & Hamilton, where a significant amount of my practice involved commercial and contract law and commercial litigation, including issues related to payments law and negotiable instruments.

4. I have provided expert testimony or consulting advice on matters of contract and commercial law, including payments issues, in arbitrations or litigation in Argentina, Australia, Austria, Canada, England, Germany, Israel, Jersey (Channel Islands), New Zealand, Sweden, and Singapore, as well as in the United States.

5. My curriculum vitae is attached hereto as Appendix A. My curriculum vitae contains a list of all the publications which I have authored within the previous ten years, as well as a list of all cases in which I have testified at trial or by deposition in the previous four years.

6. I have been retained in this matter by the States of Arkansas, California, Texas, and Wisconsin on behalf of the Defendant States (excluding Pennsylvania) to provide my opinion on various issues relating to the nature of certain products offered by MoneyGram. In particular, I have been asked to provide my opinion on the extent to which those products should be treated as falling within

the types of instruments governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. § 2501 *et seq.* (the "Federal Disposition Act"). I am being paid $800 per hour for my work on this case.

7. In this Report, I will initially describe the characteristics of traveler's checks and money orders. I will explain how money orders and traveler's checks constitute prepaid items that are purchased to make payments to third parties and with respect to which sellers typically do not maintain information concerning the purchaser. I will then describe the products that are offered by MoneyGram and that are at issue in this litigation. I will indicate how, as a functional and contractual matter, those products raise the same recordkeeping issues concerning the residence of purchaser and place of purchase that Congress considered when it developed the escheatment rules of 12 U.S.C. § 2503. Finally, I will discuss potential meanings for the phrase "third party bank check" and whether any of those meanings encompass the relevant MoneyGram instruments.

8. In preparing this Report, I have reviewed: the pleadings filed in these consolidated cases; the deposition transcripts of Eva Yingst and Kate Petrick, and all the exhibits attached to those transcripts; the text of the Federal Disposition Act and Revised Code of Washington § 63.29.010, and the legislative history of those statutes; a memorandum sent from Treasury Services Group to various State Unclaimed Property Administrators, containing the Bates numbering ALF00006603-ALF00006608; and an email from Caroline Cross to Michael Rato dated October 12, 2015, containing the Bates numbering MG0002494-MG0002496.

I. Characteristics of Traveler's Checks and Money Orders as Instruments.

9. An instrument generally falls within the scope of 12 U.S.C. § 2503 if it is a money order, traveler's check, or "other similar written instrument."[1] Therefore, as an initial matter, it is useful to understand the characteristics of a traveler's check and a money order to determine whether a particular instrument qualifies as one of those instruments, or is "similar" to those instruments.

10. A traveler's check is defined by both practice and the Uniform Commercial Code as an instrument that is payable on demand, is drawn on or payable at or through a bank, is designated by the term traveler's check or substantially similar term, and requires, as a condition of payment, a countersignature by the person whose specimen signature appears on the instrument. U.C.C. § 3-104(i). A traveler's check may be issued by a financial institution or a non-financial institution, and the issuer may or may not be the same party that sells it.[2] The seller typically acts as the agent of the issuer where the two are not the same. A purchaser of a traveler's check typically pays the face amount of the traveler's check, plus any fee, directly to the seller. If the seller is not the issuer who produces the traveler's check, the seller will remit the face amount of the traveler's check to the issuer. At the time of sale, the purchaser signs the traveler's check. When the purchaser uses the

[1] The statute imposes additional requirements in subsections (1)-(3).

[2] Under the Uniform Commercial Code, an "issuer" is the "maker or drawer of an instrument," and "issue" consists of "the first delivery of an instrument by the maker or drawer . . . for the purpose of giving rights on the instrument to any person." U.C.C. §§ 3-105(a), (c). In the case of a money order or traveler's check, the seller of the item may be different from the issuer.

traveler's check to pay for an item or service or to deposit it in an account, the purchaser signs the traveler's check a second time. This allows the transferee of the traveler's check to compare the specimen signature with the second signature and receive assurances that the purchaser is the rightful holder of the traveler's check. The traveler's check is then processed through banking channels and is paid by the issuer or paying agent. Because the traveler's check has been prepaid by the purchaser, the purchaser who transfers the traveler's check to a payee typically is not aware of whether or when the traveler's check has been presented for payment. Similarly, issuers typically do not retain information about the residence of the purchaser of the traveler's check. The issuer, might, however, have information concerning the place of purchase of the traveler's check. The funds that have been paid by the purchaser remain with the issuer until the traveler's check is ultimately presented for payment or until the passage of a period of time which, under various state laws, is sufficient to require that these funds be turned over to the state government. The fact that the issuer who holds the funds represented by an abandoned traveler's check does not retain residence information concerning the purchaser, but may have information concerning the place of purchase, motivated Congress to use those factors when it sought to create an equitable distribution of the proceeds of abandoned traveler's checks through the Federal Disposition Act. *See* Disposition of Abandoned Money Orders and Traveler's Checks, Sen. Report No. 93-505 (November 15, 1973) (hereinafter S. Rep. No. 93-505).

11. A money order is a prepaid draft, or payment order, that the seller provides to a purchaser in a specified amount that is typically imprinted on the face of the instrument. A money order frequently serves as a substitute for a personal check from an individual's bank account. The term "money order" traditionally comprises related but different forms of payment. Some money orders, sometimes referred to as "personal money orders," are sold by banks or merchants. They consist of orders that are drawn by the issuer or the purchaser and bear a machine-impressed face amount. That type of money order may be a check (if it is drawn on a bank). See UCC § 3-104(f). In these cases, the money order essentially serves as a checking account on which one deposit has been made and one check (the money order itself) can be drawn. In the case of a personal money order, no bank signs the instrument at the time of its sale. Thus, any drawee bank has liability on the money order only when it has been accepted.

12. Other money orders, sometimes referred to as "bank money orders," are sold and issued by banks and are drawn and signed by the issuing bank. They may be drawn either on the issuing bank or on another bank. Thus, these money orders may also constitute cashier's checks (checks drawn by a bank on itself) or teller's checks (checks drawn by a bank on another bank). *See* U.C.C. § 3-104 cmt. 4; *Bank of Niles v. American State Bank*, 303 N.E.2d 186 (Ill. App. Ct. 1973).

13. Notwithstanding their differences, purchase and processing of bank and personal money orders is essentially similar. Like a traveler's check, a money order is typically issued to a purchaser who pays the face amount of the money order plus

any fee to the seller, whether that seller is a financial institution or not. The seller may or may not be the same as the issuer of the money order. Where the seller is not the same as the issuer, the seller will remit the face amount of the money order to the issuer. Because the money order has been prepaid by the purchaser, the purchaser who transfers the money order to a payee typically is not aware of whether or when the money order has been presented for payment. Similarly, sellers of money orders or holders of funds represented by abandoned money orders would not have information about the residence of the purchaser of the money order or about who owned it at any given point in time. Similarly, issuers would not have information about the payee of the money order or about who owned it at any given point in time. The issuer, might, however, have information concerning the place of purchase of the money order. As in the case of a traveler's check, the funds that have been paid by the purchaser remain with the issuer until the money order is ultimately presented for payment or until the passage of a period of time which, under various state laws, is sufficient to require that these funds be turned over to the state government. The fact that the issuer who holds the funds represented by an abandoned money order does not retain residence information concerning the purchaser, but may have information concerning the place of purchase, motivated Congress to use those factors when it sought to create an equitable distribution of the proceeds of abandoned money orders through the Federal Disposition Act. *See* Sen. Report No. 93-505.

II. Characteristics of MoneyGram Instruments.

14. I understand that MoneyGram offers its customers four different products relevant to this litigation: Retail Money Orders and three products sold pursuant to its Official Check program. MoneyGram labels those Official Check products "Agent Check Money Orders," "Agent Checks," and "Teller's Checks."

15. I understand that the last three of these products are processed on the same MoneyGram platform, the Official Check platform. Dep. of Eva Yingst ("Yingst") at 84; Yingst Ex. 13 at 29 (stating that Primelink Official Checks Operating Instructions apply to Agent Check Money Orders, Agent Checks, and Teller's Checks, as well as to cashier's checks, the last of which are not involved in this litigation).

A. MoneyGram Retail Money Orders.

16. A MoneyGram Retail Money Order is issued through entities that contract with MoneyGram to sell money orders to purchasers. Those entities, which can be financial institutions or nonfinancial institutions (such as retailers), serve as agents for MoneyGram for the purpose of selling MoneyGram Retail Money Orders. The purchaser of the Retail Money Order pays the seller the face amount of the instrument, plus any fee. The Retail Money Order may also be subject to a service charge. The Retail Money Order states that it is both issued and drawn by MoneyGram and that it is "payable through" a bank. As may be the case with the traditional "personal money order" (see Paragraphs 11-13, *supra*) no bank signs the MoneyGram Retail Money Order at the time of its sale. At the time of sale, the selling agent prints the amount of the Retail Money Order using equipment and/or a form

provided by MoneyGram. The selling agent also remits the face amount of the Retail Money Order to MoneyGram. I understand that remittance occurs by the selling agent depositing the funds into its bank account and MoneyGram withdrawing the amount from the agent's bank account through an automated clearing house process. MoneyGram deposits funds remitted to it from the sale of its various instruments into a commingled fund. *See* Yingst at 54-56, 108-109, 115-116, 153, 363-364. The purchaser signs the Retail Money Order on purchase. The signature line indicates that the purchaser is signing "for drawer," so that the purchaser is serving as MoneyGram's agent for purposes of making MoneyGram an issuer, because an instrument must be signed by, or on behalf of a drawer, in order to become a negotiable instrument. *See Smith v. Farmers Union Mut. Ins. Co.,* 260 P.3d 163, 172 (Mont. 2011). The Retail Money Order also includes terms on the back that relate to service charges and the limited recourse that a holder of the instrument may have against MoneyGram. Typically, MoneyGram Retail Money Orders are not issued in amounts in excess of $1,000. Yingst at 58-59. When a MoneyGram Retail Money Order is presented for payment to the "payable through" bank, that bank pays the face amount of the Retail Money Order; MoneyGram provides funds in the amount of the presented items to that bank from MoneyGram's commingled fund containing the proceeds of the sale of its instruments and in accordance with a contract between MoneyGram and the clearing bank. MoneyGram's forms include a serial number and a customer or agent ID that permits MoneyGram to track its Retail Money Orders and determine the location where the Retail Money Order was sold. Yingst at 57,

264-265. MoneyGram, however, does not have information about the specific purchaser. Yingst at 57.

B. MoneyGram "Agent Check Money Orders."

17. A MoneyGram Agent Check Money Order is issued through financial institutions that contract with MoneyGram to sell these instruments. The selling bank is designated as "agent for MoneyGram," and MoneyGram is designated as the drawer of the Agent Check Money Order. *See* Yingst Ex. 4 (ex. E); Yingst Ex. 8. The purchaser of the Agent Check Money Order pays the seller the face amount of the instrument, plus any fee. While the purchaser of a MoneyGram Retail Money Order may pay with cash, the purchaser of the Agent Check Money Order will often be a customer of the financial institution from which the instrument is purchased, so that the face amount of the instrument plus any fee may be debited from the purchaser's account at that institution. MoneyGram Agent Check Money Orders may also be sold in face amounts greater than those available on MoneyGram Retail Money Orders.[3] The purchaser will sign the Agent Check Money Order on purchase. The signature line indicates that the purchaser is signing "for drawer," so that the purchaser is serving as MoneyGram's agent for purposes of making MoneyGram an issuer, because an instrument must be signed by, or on behalf of a drawer, in order to become a negotiable instrument. Neither the financial institution that sells the Agent Check Money Order nor the bank designated as drawee signs the Agent Check Money Order

[3] I understand that MoneyGram's cap on the value of Retail Money Orders is an internal requirement imposed by the company.

at the time of issuance. *See, e.g.*, Yingst Ex. 8. Thus, the Agent Check Money Order qualifies as a personal money order and may be so designated on its face.

18. An Agent Check Money Order states that it is drawn on a specific bank. In fact, however, I understand that the bank designated as the drawee is actually a clearing bank, rather than a bank that holds a pre-existing deposit for MoneyGram. Yingst at 97-98. When a MoneyGram Agent Check Money Order is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Yingst at 82-85, 117-118. Thus, the functions that the clearing banks and MoneyGram play with respect to the processing of Agent Check Money Orders are the same as the functions that it plays with respect to MoneyGram Agent Checks and Teller's Checks, which are also issued through its Official Check platform. *See* Yingst Exs. 13, 16.

19. Agent Check Money Orders are issued through MoneyGram's Official Check platform rather than through MoneyGram's Retail Money Order program. Thus, the seller of a MoneyGram Agent Check Money Order is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold. That information includes serial number, dollar amount, date of issuance, and account number or customer ID with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267; Yingst Ex. 13 at 6. The required information does not include information about the specific purchaser.

C. MoneyGram "Agent Checks."

20. A MoneyGram Agent Check is issued through financial institutions that contract with MoneyGram to sell these instruments. As in the case of Retail Money Orders, Agent Check Money Orders, and Teller's Checks, the financial institution sells Agent Checks to its customers and may charge its customer a fee. The Agent Check form designates MoneyGram as the "drawer" and the financial institution as "agent for MoneyGram." Because MoneyGram's financial institution customer is only an agent on these instruments and is designated as such, that financial institution is not liable on an Agent Check. Another bank is designated as the "drawee." As in the case of MoneyGram Agent Check Money Orders and Teller's Checks, the bank that is designated as the "drawee" serves as a clearing bank. MoneyGram holds the funds that are sent to it by the selling financial institution until the item is presented for payment to the clearing bank. When a MoneyGram Agent Check is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Agent Checks are often used to pay obligations of the financial institution designated as agent. Yingst at 168-169. Funds represented by Agent Checks do not have next-day availability under the federal Expedited Funds Availability Act. *See* 12 U.S.C. § 4002(a)(2)(F). I understand that MoneyGram created this instrument to help its financial institution customers minimize their reserves under Federal Reserve Board Regulation D. Yingst Ex. 13 at 31.

21. MoneyGram Agent Checks are processed through MoneyGram's Official Check program systems. Thus, MoneyGram's customer is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold. That information includes serial number, dollar amount, date of issuance, and account number or customer ID with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267. The required information does not include information about the specific purchaser.

22. A MoneyGram customer who has elected to use both MoneyGram Agent Checks and Agent Check Money Orders may choose to treat an Agent Check as an Agent Check Money Order. *See* Yingst Ex.14 clause 3, Ex. 15 clause 3. That demonstrates that the two instruments do not have significant operational differences, though the instrument would have to bear the appropriate money order language to serve as an Agent Check Money Order. *See* Yingst at 249-251.

D. MoneyGram "Teller's Checks."

23. A MoneyGram Teller's Check is issued through financial institutions that contract with MoneyGram to sell these instruments. The Teller's Check form designates MoneyGram as the "issuer" and the selling financial institution as the "drawer." Another bank is designated as the "drawee." Teller's Checks are typically issued to customers of the selling financial institution that contracts with MoneyGram. When the financial institution sells the Teller's Check to its customer, it typically debits its customer's account and sends the amount of the Teller's Check to MoneyGram. As in the case of Retail Money Orders, Agent Check Money Orders,

and Agent Checks, the financial institution may charge its customer a fee for the Teller's Check. Alternatively, the financial institution may use a MoneyGram Teller's Check to pay its own obligations. Yingst at 139. As in the case of MoneyGram Agent Checks, the bank that is designated as the "drawee" serves as a clearing bank. MoneyGram holds the funds that are sent to it by the selling bank until the item is presented for payment to the clearing bank. Yingst at 156. When a MoneyGram Teller's Check is presented for payment to the "drawee" bank, MoneyGram provides funds in the amount of the presented items to that bank in accordance with a contract between those two institutions. Unlike the case of Agent Check Money Orders and Agent Checks, funds represented by Teller's Checks may have "next business day availability" under the federal Expedited Funds Availability Act. *See* 12 U.S.C. § 4002(a)(2)(F). The depositor of funds that have next-day availability has access to those funds, i.e., can withdraw them as a matter of right, on the first business day following the banking day of deposit. Types of deposits eligible for next-day availability include cash, United States Treasury checks, and cashier's checks and teller's checks where those instruments have been deposited in person into an account held by the payee of the check. Instruments that do not have next-day availability may not be available to the depositor for a longer period of time, generally extending up to five business days following the banking day of deposit. *See* 12 C.F.R. § 229.12.

24. MoneyGram Teller's Checks are processed through MoneyGram's Official Check program systems. Thus, MoneyGram's customer is obligated to report to MoneyGram information concerning the instrument within a day of when it is sold.

That information includes serial number, dollar amount, date of issuance, and account number or customer ID with MoneyGram, the last of which may indicate the location where the instrument was purchased. Yingst at 209-210, 267. The required information does not include information about the specific purchaser.

25. A MoneyGram customer who elects to use either MoneyGram Teller's Checks or Agent Checks typically makes the decision based on whether it prefers to have an item that has next-day availability rather than because of any operational or processing differences. Yingst at 255.

III. For Purposes of 12 U.S.C. § 2503, MoneyGram Teller's Checks and Agent Checks Share the Relevant Characteristics of Money Orders and Traveler's Checks, as well as MoneyGram Retail Money Orders and Agent Check Money Orders.

26. The provisions of 12 U.S.C. § 2503 apply to any "money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." I understand that MoneyGram escheats Retail Money Orders to the states in which the Retail Money Orders were purchased pursuant to that statute. Likewise, MoneyGram escheats Agent Check Money Orders sold through its Official Check Program to the states in which the Agent Check Money Orders were purchased pursuant to that statute. In my opinion, the products that MoneyGram labels as Agent Checks and Teller's Checks sold through its Official Check program share the same relevant characteristics as Retail Money Orders and Agent Check Money Orders for the purposes of the Federal Disposition Act.

27. In determining whether MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as traveler's checks or money orders more generally, I consider the similarities between traveler's checks and money orders that make them subject to the statute. For example, different types of instruments may be similar with respect to the purposes for which they are used or the process of issuance, but not similar with respect to the amounts in which they are typically issued or with respect to the ability of the purchaser of the instrument to stop payment.

28. MoneyGram Agent Checks and Teller's Checks are issued through a similar process as traveler's checks and money orders. In each case, the purchaser obtains the instrument by prepaying the seller the amount in which the instrument is issued plus any fee. In turn, in each case if the seller of the instrument is different from the issuer (as is true for MoneyGram instruments and some traveler's checks and money orders), the seller remits the face amount of the instrument to the issuer and provides information concerning the sale to the issuer. That information includes the date of sale, the amount, the serial number of the instrument, and the seller identification, which may include location of sale information. It does not include customer information.

29. In addition, MoneyGram Agent Checks and Teller's Checks are similar to traveler's checks and money orders in that MoneyGram is unaware of the identity or specific address of the purchaser, just as the non-seller issuer of a traveler's check or money order would generally be unaware of the identity of the purchaser. *See*

Deposition of Kate Petrick ("Petrick") at 208. The purchaser, in turn, is unaware of when or whether a traveler's check, money order, or MoneyGram instrument is presented for payment; that is because the purchaser has prepaid for all such instruments and the account that that is debited when the instrument is presented for payment is not an account of the purchaser.

30. MoneyGram Agent Checks and Teller's Checks are also similar to traveler's checks and money orders in the sense that, like the latter products, they are typically used in place of a personal check. That may be because the purchaser is a person who does not have a personal checking account or because the payee of the check prefers the security of receiving an instrument on which a bank or well-known business association is liable.

31. Primarily, however, MoneyGram Agent Checks and Teller's Checks are similar to traveler's checks and money orders for purposes of 12 U.S.C. § 2503 because those MoneyGram instruments are "similar" in respect of the characteristics of instruments with which Congress was concerned when it enacted the Federal Disposition Act.

32. The allocation of funds represented by abandoned instruments under 12 U.S.C. § 2503 depends on the information on the holder's books and records concerning the state in which the instrument was purchased. If the holder's books and records reveal that information, funds representing abandoned instruments escheat to the state of purchase. Only if that information is not available on the books or records of the financial organization or business association that is the holder of

those proceeds is that entity entitled to escheat the funds represented by abandoned instruments to its state of incorporation.

33. Congress made the place of purchase the determining factor based on its findings that the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments, but that a substantial majority of such purchasers reside in the states where such instruments are purchased. 12 U.S.C. §§ 2501(1), (2). Congress further found and declared that the states wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several states, be entitled to the proceeds of such instruments in the event of abandonment, and that the failure to distribute the proceeds of such instruments to the states entitled thereto created a burden on interstate commerce. 12 U.S.C. §§ 2501(3), (4). Finally, Congress found that, because most purchasers reside in the state of purchase of such instruments, the cost of maintaining and retrieving addresses of purchasers of these instruments in order to achieve the proper equitable distribution of proceeds in the event of abandonment would constitute an additional burden on interstate commerce. 12 U.S.C. § 2501(5).

34. In light of these Congressional findings and purposes, the relevant characteristics of an instrument for purposes of 12 U.S.C. § 2503 involve not only similarities to money orders and traveler's checks in issuance or use, but also similarities with respect to whether sellers and holders of funds generated by the sale

of the instruments, as a matter of business practice, are likely to retain or report the addresses of the purchasers or any other information about the purchasers and thus are in a position to effect the equitable distribution of those proceeds that Congress desired. In addition, given Congress's presumption that the purchasers of money orders and traveler's checks are residents of the state in which the instrument is purchased, a "similar instrument" would also be likely to have been purchased in the purchaser's state of residence.

35. That is consistent with the legislative history of the Federal Disposition Act. The Report of the Senate Committee that analyzed and proposed the bill that became that Act contains a letter from Arthur Burns, then-Chair of the Federal Reserve Board. Chairman Burns recognized that the objective of the bill was to correct what he called the "obvious inequity" of allowing escheat of proceeds represented by money orders and traveler's checks to the debtor's corporate domicile in the event that the creditor's (purchaser's) address was unknown. The inequity arose in the case of money orders and traveler's checks because the holders of funds in those transactions typically did not record the address of the creditor (purchaser). Indeed, Chairman Burns recommended changing the initial bill from making escheat depend on the state of issuance to the state of purchase. He noted that, at least in the case of traveler's checks, the instruments were sold by banks locally although most of them were "issued" by a few organizations and banks. Thus, the equitable distribution of abandoned proceeds would be frustrated if the state of incorporation of the "issuing" entity, rather than the state of purchase, could receive the unclaimed

proceeds of traveler's checks. Chairman Burns's proposed amendment to the statutory language, therefore, was intended to ensure that escheat of prepaid instruments, the sale of which generated funds held until the instrument was presented for payment, should occur to the state of purchase, as long as the holder of the proceeds of the instrument had information about that location within its records.

36. MoneyGram Teller's Checks and Agent Checks are similar to traveler's checks and money orders in that each of these instruments is "purchased" by a remitter from a financial or business association rather than issued by a customer from the customer's personal checking account. As I have indicated above, as a matter of business practice, the contractual arrangements between MoneyGram and its customers who sell Agent Checks and Teller's Checks require the customers to report to MoneyGram information concerning those instruments within one day of their sale. As I have also noted above, the required information may allow MoneyGram to determine the location of purchase. But MoneyGram does not receive the address of the purchaser or any other information about the purchaser.

37. I understand that MoneyGram currently escheats funds represented by abandoned Agent Check Money Orders to the state of purchase. Because MoneyGram's contractual arrangements with its financial institution customers provide that Agent Check Money Orders are governed by the same operational rules that apply to Agent Checks and Teller's Checks, the same information is reported to MoneyGram with respect to each of these products. Moreover, each of these products is issued through the similar process of prepayment by purchasers in amounts

imprinted on the face of the instruments, and remission of those amounts to MoneyGram, which holds the funds in the same commingled investment account until the instruments are presented for payment or until escheat to the state is required. The fact that MoneyGram has sufficient information to escheat funds represented by abandoned Agent Check Money Orders to the state of purchase suggests that it has similar information and capacity with respect to its Agent Checks and Teller's Checks. Thus, MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as its Agent Check Money Orders for purposes of 12 U.S.C. § 2503.

38. Indeed, I understand that, although MoneyGram currently escheats funds represented by abandoned Agent Check Money Orders to the state of purchase, it escheats funds represented by abandoned Agent Checks to the State of Delaware. As I have noted above, MoneyGram Agent Check Money Orders are interchangeable with MoneyGram Agent Checks at the election of the selling bank if that bank has contracted with MoneyGram to sell both instruments. The primary distinctions between these instruments—which, again, similarly consist of prepaid instruments for which MoneyGram holds the funds generated by purchase—involves the designation as a "money order" on the form where the institution prefers to use an Agent Check Money Order. There does not appear to be any difference at all between the two with respect to the capacity of MoneyGram to detect the location at which the instrument was purchased. Nor does there appear to be any material difference in the function of these instruments from a perspective of their use for payments or from

their use as negotiable instruments. The interchangeability of Agent Check Money Orders and Agent Checks thus also indicates that the two are "similar" for purposes of 12 U.S.C. § 2503.

39. In addition, given the presumption that Congress created based on its findings that money orders and traveler's checks were purchased in the purchaser's state of residence, I note that MoneyGram has stated that funds used to purchase one of its Teller's Checks will tend to be taken from the purchaser's bank account. *See* Yingst at 138. It is a reasonable assumption that the purchaser of a MoneyGram Teller's Check maintains its bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Teller's Checks.

40. MoneyGram has also stated that financial institutions typically issue MoneyGram Agent Check Money Orders only to their own customers and that payment for MoneyGram Agent Check Money Orders sold by a financial institution will tend to be made from the purchaser's account at the financial institution. *See* Yingst at 90, 119. Again, it is a reasonable assumption that the purchaser of a MoneyGram Agent Check Money Order maintains its bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Agent Check Money Orders.

41. Moreover, as I have noted above, MoneyGram Agent Checks are interchangeable with MoneyGram Agent Check Money Orders. *See supra*

Paragraphs 22, 38; Yingst at 238-239, 251, 254-255. I assume, therefore, that financial institutions also typically issue MoneyGram Agent Checks only to their own customers and that payment for MoneyGram Agent Checks sold by a financial institution will tend to be made from the purchaser's account at the financial institution. Again, it is a reasonable assumption that the purchaser of a MoneyGram Agent Check maintains its bank account from which the funds for the instrument will be drawn in the purchaser's state of residence. I conclude, therefore, that the Congressional presumption is equally appropriate for MoneyGram Agent Checks.

42. Thus, consistent with Congress's findings that states wherein the purchasers of money orders and traveler's checks reside were entitled to the proceeds of those abandoned instruments, and that the states of purchase were likely to be the states of purchaser residence, I conclude that instruments about which MoneyGram obtains and retains the records of purchase as a matter of business practice share the same relevant characteristics as traveler's checks and money orders for the purposes of the Federal Disposition Act. In addition, given the place of purchase information that MoneyGram receives as a result of its contractual arrangements and business practices, in my opinion MoneyGram Agent Checks and Teller's Checks share the same relevant characteristics as traveler's checks and money orders for the purposes of the Federal Disposition Act.

43. MoneyGram Teller's Checks are dissimilar from its Agent Checks in that a bank is designated as the drawer on the former, while MoneyGram is designated as the drawer on the latter. Teller's Checks also vary from Agent Checks

in that the former are subject to Regulation D of the Federal Reserve Board, while the latter are not. Finally, as I have noted above, Teller's Checks are different from Agent Checks and Agent Check Money Orders in that only Teller's Checks are subject to next-day availability. But, in my opinion, none of these distinctions implicate whether, or the way in which, information concerning the purchase is conveyed to MoneyGram. For example, while next-day availability may cause purchasers or payees of Teller's Checks to favor them over Agent Checks, next-day availability is not an important distinction for purposes of the Federal Disposition Act. Next-day availability affects only the timing of the use of funds by a depositor, not the information concerning the purchaser or the place of purchase on which Congress focused. Indeed, the Federal Disposition Act was enacted prior to the Expedited Funds Availability Act, so next-day availability could not have been a factor on which Congress was defining "similar written instrument[s]" under the Federal Disposition Act.

44. In addition, consistent with Congress's findings regarding the typical case with respect to the sellers or issuers of traveler's checks and money orders, MoneyGram does not collect information on the residence of purchasers of its Retail Money Orders, Agent Check Money Orders, Agent Checks, or Teller's Checks. Indeed, obtaining that information with respect to MoneyGram instruments would require MoneyGram or its financial institution customer to incur the very costs of maintaining and retrieving addresses of purchasers that Congress indicated it did not want issuers or sellers of traveler's checks to incur. As Congress stated in 12

U.S.C. § 2501, it incorporated the presumption that place of purchase was the place of the purchaser's residence because a requirement of recording and maintaining the purchaser's residence would impose costs that burden interstate commerce.

IV. MoneyGram Teller's Checks and Agent Checks are not "Third Party Bank Checks" for Purposes of the Federal Disposition Act.

45. The requirements of 12 U.S.C. § 2503 do not apply to a "third party bank check." The term "third party bank check" is not defined in the statute. In my opinion, the term has no clear meaning and is not widely used in the law or practice of payment systems. There are a few potential meanings that I describe below. However, none of those potential meanings of the term apply to MoneyGram Agent Checks or Teller's Checks given those instruments' characteristics.

46. The legislative history of the Federal Disposition Act, which is quite sparse, does not provide significant guidance on the meaning of the term "third party bank check." The original version of the bill that became 12 U.S.C. § 2503 did not contain the exception for "third party bank checks." The Report of the Senate Committee that reviewed the bill added the relevant language. It apparently did so because the General Counsel of the Treasury issued a letter of November 1, 1973 in which he contended that

> The introductory language of section 2 could be interpreted to cover third party payment bank checks since it refers to a "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable." It is recommended that this ambiguity be cured by defining these terms to exclude third party payment bank checks.

S. Rep. No. 93-505 at 5.

47. The letter from the General Counsel did not further indicate what he meant by "third party payment bank checks" or why it was problematic to include them within the bill that became 12 U.S.C. § 2503. Nor did the Report of the Senate Committee elaborate on the language in the letter. The Report of the Senate Committee noted only that it had "adopted the technical suggestions of the Department of the Treasury." S. Rep. No. 93-505 at 6. It is noteworthy, moreover, that whatever the General Counsel of the Treasury meant when he proposed to exclude a "third party payment bank check" from the Federal Disposition Act, the language inserted into the statute was, in fact, different, i.e., "third party bank check."

48. I am aware of only one judicial decision that has construed the term "third party bank check." That case, *U.S. v. Thwaites Place Associates*, 548 F. Supp. 94 (S.D.N.Y. 1982), involved the auction of foreclosed property by the United States Marshal. The terms of the auction required the successful bidder to pay by cash or certified check made payable to U.S. Treasury or the U.S. Marshal. A bidder sought to pay with two "bank checks" that were payable to another person and that the bidder desired to have indorsed to the U.S. Treasury or the U.S. Marshal. Consistent with business usage, the court equated "bank check" with a check "issued by a bank." 584 F. Supp. at 97. Throughout the opinion, the court refers interchangeably to the bank checks at issue as "third party checks," "a doubly indorsed check," and 'third party bank checks." Thus, the court used the term "third party bank check" to mean

a check drawn that the original payee transfers to another payee and that happens to be a bank check.

49. In my opinion, the use of the term "third party bank check" in the *Thwaites Place Associates* case to mean a bank check (a check issued by a bank and drawn on a bank) that has been indorsed by the original payee to a new indorsee is the most natural reading of "third party bank check." The phrase "third party check" is a common term that refers to a check that has been indorsed by the original payee and transferred to a third party. This terminology was used at the time of the enactment of the Federal Disposition Act. *See, e.g.*, *Von Gohren v. Pacific Nat. Bank of Washington*, 505 P.2d 467 (Wash. Ct. App. 1973).

50. A "bank check" is commonly understood to mean a check that is both drawn on a bank and by a bank. If the drawer and drawee are the same bank, the bank check is a cashier's check. If the drawer and the drawee are different banks, then the bank check is a teller's check.

51. The term "bank check" has also been used more generally to mean any check drawn on a bank, including checks drawn on personal or business checking accounts. *See, e.g.*, JOHN EDSON BRADY, THE LAW OF BANK CHECKS 1-6 (2d ed. 1926).

52. Indeed, the edition of Brady's treatise on The Law of Bank Checks (a leading treatise on payment systems since its first edition in 1916) that was current at the time that the Federal Disposition Act was enacted specifically noted that "the term 'bank check' as used in this volume is, unless the context specifies otherwise, interchangeable with the term 'check' and does not necessarily denote a direct bank

obligation, such as a cashier's check, certified check, or bank draft." HENRY J. BAILEY, THE LAW OF BANK CHECKS 1 n.1 (4th ed. 1969). It is plausible that the author retained this usage because the treatise he was editing had wide acceptance and retaining the existing title may have had value, even if the term "bank check" to refer to any check drawn on a bank had become redundant. But the footnote would have been unnecessary unless the term "bank check" would otherwise have been understood to refer only to checks on which a bank was directly liable.

53. Because a "third party check" was commonly understood in the 1970s to refer to a check indorsed by the payee to another person, and a "bank check" was commonly understood to refer to a check drawn by and on a bank, in the absence of a clear alternative definition, it is natural to conclude that a third party bank check is a check drawn by and on a bank, but that the original payee has indorsed to another person.

54. It is plausible that "third party bank check" as used in 12 U.S.C. § 2503 means a personal check, that is, any personal draft drawn on a bank. While, as I have noted above, that construction may entail some redundancy, it is an apt description of a personal check in that all checks have three parties, a drawer, a payee, and a drawee, and Congress may have been attempting to distinguish between drafts drawn on banks and drafts (such as documentary drafts, which may be drafts that a seller of commodities draws on a buyer) not drawn on banks. Congress might, for example, have wanted to exempt from otherwise applicable escheatment rules

personal checks that the drawer had issued but that had not been presented for payment.[4]

55. Alternatively, the term "third party bank check" could mean any check indorsed by the original payee to a new indorsee, i.e., any check indorsed over to a "third party," regardless of whether it was a bank check.

56. In my opinion, other sources provide very little information about the meaning that Congress may intended when it used the term "third party bank check."

57. A statute of the State of Washington contains the language "third party bank check" and provides a definition of that term. *See* Wash. Rev. Code 63.29.010(17). That provision defines a "third party bank check" as "any instrument drawn against a customer's account with a banking organization or financial organization on which the banking organization or financial organization is only secondarily liable." To my knowledge, there have been no cases construing the statutory definition since its enactment in 1983.

58. In my opinion, the Washington statutory definition of "third party bank check" provides little assistance in construing the same term under 12 U.S.C. § 2503. Not only does the statute post-date the enactment of 12 U.S.C. § 2503, but the Washington definition is confusing, if not self-contradictory. The Washington definition appears to apply when a relevant banking organization is a drawee,

[4] While this construction may be thought to be unlikely since the statute refers to instruments that have been "purchased," and one does not think of personal checks as being purchased, it is worthwhile to recall that the earlier version of the bill that became the Federal Disposition Act used the term "issued" rather than "purchased." It is plausible that when Congress added the exception for "third party bank checks" and also substituted "purchased" for "issued," it failed to consider the anomaly created by the simultaneous changes.

because it applies when the relevant instrument is "drawn against" a customer's account with such an organization. But it also applies only when the financial organization is only "secondarily liable" on the instrument. That language, which dates from 1983, appears to incorporate the provisions of Article 3 of the Uniform Commercial Code that were in effect prior to promulgation of the revision of Article 3 in 1990. The pre-revision version, in effect in Washington in 1983, defined a "secondary party" as "a drawer or indorser." *See* Pre-Revision U.C.C. § 3-102(1)(d) (1972). Those parties were deemed to be "secondarily liable" because a draft, such as a check, is supposed to be paid by the drawee, not by the drawer or indorser. Only on dishonor of the draft by the drawee is there a right against the drawer or indorser. *See id.* §§ 3-413, 3-414. However, the drawee itself is not "secondarily liable." Indeed, the drawee is not liable on an instrument at all until it "accepts" the instrument. *Id.* §§ 3-409(1), 3-410. At that point the drawee becomes primarily liable on the instrument. In other words, a bank acting solely as drawee has either primary liability or no liability; it cannot be secondarily liable.

59. Revised Article 3 eliminated the language of secondary liability. Nevertheless, it retained the concepts inherent in that language. Drawees do not have liability until they accept an item, and drawers have liability only when the drawee dishonors the instrument. *See* U.C.C. § 3-408, 3-414. Thus, the scenario described in the Washington statute, i.e., that there is a banking organization that 1) is the drawee (because the relevant instrument must be "drawn against a customer's account with" the banking organization), and 2) is "only secondarily liable" will not

actually occur. As a result, the definition in the Washington statute of a "third party bank check" as an instrument drawn on a financial institution on which that institution is only secondarily liable does not make sense and cannot be assumed to reflect what Congress meant when it used the term in a statute a decade earlier.

60. It is, of course, possible that a banking organization could be a drawer as well and thus have secondary liability even though it is also a drawee. That would be the case if the banking organization issues a cashier's check drawn on itself. But that case seems to be outside the scope of the Washington statute. That statute defines a "third party bank check" in terms of an instrument that is 1) drawn on a banking organization, where 2) that banking organization is "only" secondarily liable. In the case of a cashier's check, the issuing bank is generally liable for the amount of the instrument according to its terms when issued. It would not be "only" secondarily liable. *See* U.C.C. § 3-412. As a result, I admit to confusion concerning the meaning and scope of the Washington definition of "third party bank check" and do not find it useful for purposes of construing 12 U.S.C. § 2503. I have reviewed the legislative history of the Washington statute and have not found anything therein that affects my analysis.

61. I understand that Delaware has previously argued that the most natural reading of the term "third party bank check," i.e., a check that is a bank check and that has been indorsed by the payee to a new indorsee, is not the definition that should apply to 12 U.S.C. § 2503. That is because, according to Delaware, the objective of that statute is to allocate the escheatment of funds in a manner that takes

into account the information that is likely available to the holder of the funds concerning the escheated instrument. Delaware contends that the holder would not have information about whether a check, bank check or otherwise, has been transferred by the original payee. The holder would only obtain that information once the check was presented for payment, at which time the check is no longer unclaimed. Thus, Delaware contends that reading the term "third party bank check" in accordance with what, in my opinion, is its most natural reading, would be inconsistent with the statute's purpose.

62. I am not persuaded by Delaware's argument, primarily because, as I have indicated above, there is no alternative obvious or rational interpretation. Moreover, I reiterate that the language of 12 U.S.C. § 2503 varies from language in the letter that the Senate Committee purported to be implementing, i.e., "third party payment bank check," a term for which I have found no allusion or interpretation in any judicial decision or legislation. Thus, it is plausible that Congress was, in fact, simply misguided in its use of language in the statute and/or was unclear about its own intentions.

63. I understand that Delaware has also contended that "third party bank check" means a teller's check. In my opinion, this is incorrect. If what Congress meant by excluding a "third party bank check" was to exclude a teller's check from the reach of 12 U.S.C. § 2503, one would think that Congress would have used a more specific and familiar term to accomplish that purpose. Both the term "teller's check" and "bank draft" were commonly understood in 1973 to mean a draft drawn by one

financial institution on another institution. *See, e.g.*, *Perry v. West*, 266 A.2d 849 (N.H. 1970) (stating that a "bank draft" is a draft drawn by one bank upon its deposits at another bank); *Manhattan Imported Cars, Inc. v. Dime Sav. Bank of New York*, 355 N.Y.S.2d 356 (N.Y. App. Term 1st Dept. 1972); *Levin v. Union National Bank of Westminster,* 168 A.2d 889 (Md. 1961); HENRY J. BAILEY, THE LAW OF BANK CHECKS 34, 405-406 (4th ed. 1969).

64. Moreover, there would be little reason for Congress to have excluded teller's checks from 12 U.S.C. § 2503. Because banks can be issuers or holders of funds who are liable for escheatment on traveler's checks or money orders, which clearly are included in 12 U.S.C. § 2503, it would make little sense to exclude other instruments, such as teller's checks, solely on the grounds that banks are liable on them.

65. As I have noted above, the Congressional purpose of the Federal Disposition Act is set forth in 12 U.S.C. § 2501. That provision indicates that the purpose of the Act was to create an equitable allocation of the abandoned proceeds of instruments such as traveler's checks and money orders, taking into account 1) that the books and records of banking and financial organizations and business associations that issue and sell those instruments typically do not show the last known addresses of purchasers of such instruments, and 2) a presumption that a substantial majority of purchasers of such instruments reside in the states where such instruments are purchased.

66. I have noted above that the purpose of the Federal Disposition Act is relevant to determining what are the relevant characteristics of an instrument that would subject it to 12 U.S.C. § 2503. In my opinion, those characteristics are also relevant to resolve the ambiguity in the definition of a "third party bank check" that is excluded from the escheatment provisions of the statute. That is, the term "third party bank check" does not make sense to the extent that it excludes from 12 U.S.C. § 2503 escheatment rules instruments for which the holders of abandoned funds maintain "place of purchase" information in their records as a matter of business practice. That is because those are the very types of instruments for which Congress desired to make this legislation applicable to ensure equitable distribution of abandoned proceeds.

A. MoneyGram Instruments Designated as Agent Checks Are Not Third Party Bank Checks, Even Accepting Delaware's Previously Articulated Definition of the Term.

67. Even if "third party bank check" did mean a teller's check, the instruments issued by MoneyGram do not necessarily qualify as teller's checks. Delaware defines a teller's check as a check that is "drawn by a bank (i) on another bank, or (ii) payable at or through a bank." *See* E-mail from Caroline Cross to Michael Rato (Oct. 12, 2015, MG0002494-MG0002496). That is also the definition of a teller's check in the Uniform Commercial Code. *See* UCC § 3-104(h).

68. In my opinion, MoneyGram Agent Checks are not bank checks at all and certainly are not teller's checks (which are a type of bank check, as described above). Therefore, they cannot be "third party bank checks" for purposes of 12 U.S.C. § 2503.

I reach that conclusion because Agent Checks denominate MoneyGram as the "drawer" of the check, and MoneyGram is not a bank. On some specimens, the preprinted specimens designate the party in the upper left hand corner, typically reserved for the name of the drawer, as "agent," presumably as agent for MoneyGram. Thus, these checks do not even nominally designate a bank as a drawer. As MoneyGram's contract with its financial institution customers states, "Financial Institution is not a party to Agent Checks even though its name may appear on the Agent Checks." Yingst Ex. 15 clause 3. Again, in my opinion, at the time that the Federal Disposition Act was enacted, the common understanding of a bank check was that it was a check drawn by a bank on a bank.

69. Where a MoneyGram Agent Check designates the selling bank as an "agent," that agent bank bears no drawer liability on the check, even if the designated agent is a bank. That is because the agent bank purports to be signing in a representative capacity as agent and the check shows unambiguously that it is made on behalf of MoneyGram, the principal, who is identified on the instrument. In such a situation, UCC § 3-402(b)(1) provides that the agent bears no liability on the instrument. *See also* Yingst at 164-166. Thus, the true drawer of the Agent Check, both nominally and functionally, is MoneyGram. Because Agent Checks are not drawn by a bank at all, they represent the clearest examples of instruments created by MoneyGram that do not qualify as teller's checks or bank checks because they indicate clearly that the drawer is not a bank.

B. MoneyGram Instruments Designated as Teller's Checks Are Not Third Party Bank Checks, Even Accepting Delaware's Previously Articulated Definition of the Term.

70. Instruments designated by MoneyGram as a "Teller's Check" also should not be considered as "third party bank checks" for purposes of 12 U.S.C. § 2503, even assuming for the sake of argument that teller's checks were for some reason excluded from the statute as "third party bank checks." MoneyGram Teller's Checks designate a bank as a drawee, designate a bank as a drawer, and designate MoneyGram as the "issuer." *See, e.g.*, Yingst Ex. 6. Under the Uniform Commercial Code, however, an "issuer" is also a drawer of a check. There is no difference between the two terms for purposes of a check. *See* UCC § 3-105(c) ("'Issuer' applies to issued and unissued instruments and means a maker or drawer of an instrument."). As a consequence, there are two drawers on MoneyGram Teller's Checks, one of which is a bank and one of which is not a bank.

71. I have not discovered any cases that deal with the issue of whether a check that has two drawers, one of which is a bank and one of which is not, can qualify as a bank check or as a teller's check. In my opinion, it should not be so considered at least with respect to Teller's Checks that are drawn by MoneyGram.

72. I reach that conclusion because as a functional matter, the nominal drawer bank with respect to such instruments serves solely as an agent for MoneyGram. Indeed, the contract between MoneyGram and its financial institution customers recites that "MoneyGram hereby appoints Financial Institution as its limited agent and authorized delegate for the sole purpose of using and selling the

Products as set forth in this Agreement; and Financial Institution hereby accepts this appointment." Yingst Ex. 15 clause 5. The "Products" under that agreement include any Agent Checks, Agent Check Money Orders, cashier's checks and Teller's Checks that the financial institution has elected to have provided by MoneyGram. Yingst Ex. 15 clause 2.

73. In addition, examination of the functional manner in which MoneyGram "Teller's Checks" operate indicates that the nominal "drawer" bank is acting as an agent of MoneyGram rather than in the traditional role of a bank drawer. Traditionally, the bank designated as the "drawer" of a teller's check maintains an account with the drawee bank, and that account is debited when the drawee pays a check drawn from the account of the drawer. Alternatively, a teller's check may be drawn on a nonbank, but be payable at or through a bank. In the latter case, that bank typically collects the amount of the teller's check from the drawer bank.

74. MoneyGram Teller's Checks work very differently. The selling institution that is denominated as the "drawer" on the Teller's Check sends to MoneyGram the funds that are received in return for the Teller's Check. When the payee on the Teller's Check deposits it into the payee's account, the depositary bank forwards the check to the bank denominated as the drawee on the check. That bank, however, does not debit an account of the bank denominated as the drawer on the instrument. Instead, the nominal drawee is MoneyGram's clearing bank, which pays the item. MoneyGram provides funds in the amount of the presented items to the clearing bank in accordance with a contract between those two institutions. Thus,

once the nominal "drawer" issues the instrument, it plays no role whatsoever in the check collection, payment, or escheatment process.

75. This agency relationship is made clear in the contracts between MoneyGram and the financial institutions that sell its Teller's Checks. Under those contracts, a financial institution that sells a MoneyGram Teller's Check holds the funds received in exchange for those items in trust for MoneyGram until it sends the funds to MoneyGram. *See* Yingst Ex. 15 clause 7(A). Unlike the typical case of a teller's check, therefore, the funds received by the seller of a MoneyGram Teller's Check do not become general funds of the financial institution that sells the instrument.

76. In addition, under its contract with its financial institution customers, MoneyGram, not the financial institution, maintains copies of both sides of a check that has been presented for payment. Yingst Ex. 15 clause 18. MoneyGram, not the financial institution, is responsible for unclaimed property related to MoneyGram instruments other than cashier's checks. Yingst Ex. 15 clause 19. The financial institution agrees broadly to follow "all of MoneyGram's reasonable instructions relating to this agreement," and MoneyGram "may change the instructions from time to time." Yingst Ex. 15 clause 31 (A).

77. The effect of those provisions is to transform the nominal drawer on a MoneyGram Teller's Check into an agent of MoneyGram that essentially plays no role other than to sell checks on behalf of MoneyGram and send the proceeds to MoneyGram. Thus, as a functional matter, MoneyGram Teller's Checks operate

identically to MoneyGram instruments denominated as Agent Checks and Agent Check Money Orders. The relationships between MoneyGram and its financial institution customers are governed by the same contractual provisions with respect to both Agent Checks and Teller's Checks. In both cases, a customer of the seller of the instrument purchases the instrument from the seller bank, not from MoneyGram. In both cases, the seller remits the proceeds of the sale to MoneyGram and conveys to MoneyGram the information relevant to its purchase. Prior to the time that the funds are transferred to MoneyGram the seller of both instruments holds those funds in trust for MoneyGram. In both cases, the seller of the instrument has no further responsibilities towards the instrument once it has been sold and the proceeds have been remitted to MoneyGram.

78. As I have noted above, MoneyGram Agent Checks cannot be considered to be bank checks or teller's checks, even if the latter qualify for the exclusion in 12 U.S.C. § 2503. In my opinion, the same conclusion should apply to MoneyGram Teller's Checks in which the nominal drawer is the functional equivalent of the designated agent financial institution on a MoneyGram Agent Check.

79. The fact that a bank is the nominal drawer on a MoneyGram Teller's Check may have significance in some settings. For example, I understand that funds represented by a MoneyGram instrument designated as a "Teller's Check" may have next-day availability under Regulation CC of the Federal Reserve Board, while funds represented by a MoneyGram instrument designated as an "Agent Check" may not. Additionally, a bank that is the nominal drawee of a Teller's Check may have to

account for the item under Federal Reserve Board Regulation D. I offer no opinion on those issues. But in my opinion, the fact that a bank is nominally designated as drawer on an instrument drawn on another bank and designated as a teller's check does not necessarily mean that the check qualifies as a "third party bank check" for purposes of 12 U.S.C. § 2503, even if other teller's checks qualify for that term. That is because the purpose of 12 U.S.C. § 2503 is to ensure equitable allocation of the funds attributable to abandoned items in accordance with information about the state of purchase. If, as an operational matter, that information is not held by the seller of the teller's check who is designated as the nominal drawer, but is held by MoneyGram, then excluding the instrument from the allocation rules of 12 U.S.C. § 2503—notwithstanding MoneyGram's possession of the relevant purchase information—defeats the objectives for which Congress enacted the Federal Disposition Act.

80. Nor do MoneyGram Teller's Checks operate like traditional teller's checks from the drawee's perspective. The nominal drawee serves solely as a clearing bank for obligations assumed by MoneyGram. Nor does the nominal drawee of the MoneyGram instrument, the clearing bank, pay a MoneyGram instrument by debiting a nominal drawer's account. *See* Yingst at 53-55. Instead, the clearing bank pays the Federal Reserve or a presenting bank for the item and MoneyGram separately provides funds relating to payment of the Teller's Checks directly to the clearing bank. Yingst at 279. Indeed, in documents generated by MoneyGram to explain its role in Teller's Check and Agent Check transactions to employees and

potential bank customers, MoneyGram holds itself out as the "drawee" on such items and refers to the clearing bank only parenthetically. *See* Yingst Ex. 16; Yingst at 231-233. In other words, although MoneyGram Teller's Checks offered under its official program nominally designate a financial institution drawer and drawee, as a functional matter MoneyGram plays both those roles.

Dated: September 24, 2018

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Appendix A

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Major Publications

Books

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