SUPREME COURT OF THE UNITED STATES

DELAWARE, Plaintiff, v. ARKANSAS, et al., Defendants.	Nos. 22O145 & 22O146 (Consolidated)

EXPERT REPORT OF RONALD MANN

September 19, 2018

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I. INTRODUCTION AND SUMMARY OF REPORT

1. I have been asked to prepare an opinion regarding various aspects of the MoneyGram products at issue in this matter.

2. In general, subject to the assumptions described below, and as explained in more detail below, my opinion is as follows:

(a) Neither a bank nor MoneyGram is directly liable on the MoneyGram official checks evaluated in this report.

(b) Official checks differ from money orders in the indirect liability of banks to pay them and the terms and conditions that they bear on their face.

(c) The statutory reference to "third party bank checks" is obscure, and would not naturally be used to describe personal checks indorsed to third parties, but it could describe the checks that banks issue to pay bills for their customers.

II. BACKGROUND AND QUALIFICATIONS

3. Before explaining my opinion and the basis for it, I start with a brief discussion of my background and of the research that puts me in a position to offer the opinion below. In general, I am a law professor who specializes in the study of commercial law, with a focal emphasis on payment systems. At Appendix 2, I attach a resumé that includes a complete list of my academic publications and an abbreviated description of my employment history. I am being compensated at an hourly rate of $900 per hour. My compensation in this matter does not depend upon either the substance of my opinions or the outcome of this dispute.

4. I have provided expert reports, depositions, or testimony in litigation related to various aspects of business and consumer payment systems in numerous previous cases.[1] The attached resumé identifies all of my trial and deposition testimony in the last four years.

[1] District of Columbia v. Bank of America, N.A., Civil Division No. 2008 CA 007763 (D.C. Superior Ct. 2016); Heartland Payment Systems, Inc. v. Mercury Payment Systems, LLC, No. C 14-0437 (N.D. Cal. 2015); DB NPI Century City, LLC v. Legendary Investors Group No. 1, No. BC494921 (Super. Ct. Los Angeles County (Central) 2015); NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ 6978 (S.D.N.Y. 2014); Rosewood Cancer Care, Inc. v. PNC Financial Services Group, Court of Common Pleas, No. 11944 CD 2010 (Indiana County, PA 2014); Saint Bernard School of Montville, Inc. v. Bank of America, Superior Court, No. CV-08-5006676-S (New London, CT 2012) (result affirmed on appeal at 312 Conn. 811 (2014)); Merrill Lynch v. Choy, FINRA Arbitration No. 09-06111 (Honolulu, HI 2011); Walker Digital v. Capital One Services, LLC, No. 1:10cv212 (JFA) (E.D. Va. 2010); Emmett v. Wachovia Securities, LLC, Court of Common Pleas, No. GD05-25678 (Allegheny County, PA 2008); FTC v. Neovi, Inc., Civil No. 06 CV 1952 (S.D. Cal. 2008) (result reported at 598 F. Supp,. 2d 1104 (S.D. Cal. 2008)); ACLU v. Gonzales, No. 98-CV-5591 (E.D. Pa. 2006) (result reported at 478 F. Supp. 2d 775 (E.D. Pa. 2007)); Wachtell v. Capitol One Financial Corp., 4th Judicial Dist. Ct., No. CV 0C 0304972D

5. I hold a B.A. (1978) from Rice University in History (Magna Cum Laude) and a J.D. (1985) from the University of Texas, where I was first in my class and managing editor of the *Texas Law Review*. I subsequently clerked for Joseph T. Sneed on the United States Court of Appeals for the Ninth Circuit and Lewis F. Powell, Jr. on the United States Supreme Court. I also served for three years as an Assistant to the Solicitor General in the United States Department of Justice.

6. I currently am the Albert E. Cinelli Enterprise Professor of Law at Columbia Law School, where I am the Co-Director of the Charles E. Gerber Program in Transactional Studies. I previously have held tenured positions at the law schools at the University of Texas, the University of Michigan, and Washington University in St. Louis. I also have taught courses in various aspects of commercial law as a visitor at Harvard Law School and at the Faculty of Law at Tokyo University.

7. Of relevance to this matter, the study of payment systems has been a focal point of my research and teaching for the last twenty years. I regularly have taught courses in payment systems and am the author of a widely adopted casebook on that subject (*Payment Systems and Other Financial Transactions* (6th ed. WoltersKluwer 2016)). Those materials are distinctive (as compared to most law school materials) for their relatively heavy emphasis on commercial practice, as opposed to statutory doctrine. The methodology for preparing (and updating) the course and casebook involves ongoing interviews with industry participants about their ordinary operating procedures and the reasoning that supports them.

8. I have published frequently in law reviews on subjects related to various aspects of modern payment systems. Papers in that line of work have appeared, among other places, in the *Michigan Law Review*, the *Texas Law Review*, the *Georgetown Law Journal*, the *UCLA Law Review*, and the *Lewis & Clark Law Review*. Details of those publications appear on the resumé attached to this report.

9. I served as Reporter for the Drafting Committee that prepared the two most recent sets of amendments to UCC Articles 3, 4, and 4A and presently serve as an ALI adviser to the committee considering further revisions to UCC Articles 3, 4, 8, and 9. I am a member of the American Law Institute and a conferee of the National Bankruptcy Conference. In recent years, I have been invited on three different occasions to serve as the moderator for the three-day annual meeting of the Financial Lawyers Conference in Ojai.

10. The analysis in my report reflects general familiarity with the customs and practices involved in the use and design of payment instruments, resulting from the academic studies and teaching activities summarized above.

(Idaho 2006); LaBarge Pipe & Steel Co. v. First Bank, No. 03CV382-C-M3 (M.D. La. 2005) (result reported at 550 F.3d 442 (5th Cir. 2008)); Shinitzky v. Boston Securities N.A., 15th Jud. Circuit Court, No. CL 00-2328 AJ (Palm Beach County, FL 2004).

III. FACTUAL BACKGROUND AND ASSUMPTIONS

11. In general, I have been asked to opine about the legal and practical attributes of a variety of instruments marketed by MoneyGram Payment Systems, Inc. ("MoneyGram") and distributed through various channels at financial institutions and retailers. My opinion rests on my review of samples of those instruments that appear in the record in this matter, viewed through the expertise and experience summarized above. The opinion that I provide below assumes that the samples I have reviewed accurately portray and represent the instruments in question; I have no reason to doubt the accuracy or representativeness of the samples I have reviewed.

12. Although the record includes quite a few samples, most seem to differ only in irrelevant details. For practical purposes, it is useful to discuss four distinct categories: agent checks, teller's checks, retail money orders, and agent check money orders.

13. In describing the basic features of those instruments, I identify the role of the various parties by the way in which they are described on the face of the instrument itself; applicable legal rules generally rely on indications apparent from the face of the instrument because those indications are the only information available to those that acquire the instrument.

A. AGENT CHECKS

14. The first product is the agent check; a representative example appears at MG0000004. The check would be purchased by a consumer from a bank selling the product, the so-called "agent" bank. The instrument states in small type just to the left of the top center of the instrument that the drawer of the instrument is MoneyGram. When purchased, an authorized officer of the agent bank signs at the bottom right-hand corner of the instrument. The agent bank (or the purchaser) would fill in the name of the party to be paid in the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type just to the left of the top center of the instrument as First Interstate Bank in Montana.[2]

15. There apparently is some variation in this category in the delineation of the relation between the bank signing the check and MoneyGram. In at least one example in the documents that have been provided to me for review, there is no evidence on the face of the check that the bank signing the check acts as an agent of MoneyGram. Specifically, the item appearing at MG0002396 is captioned "OFFICIAL CHECK," lists Independent Bank at the top center of the item, and apparently bears an "authorized signature" from a responsible officer of Independent Bank affixed when the item is purchased. In contrast to the template discussed in the preceding paragraph (and other samples apparent in the record, such as the item appearing at DE0000220 (discussed in detail below)), nothing on the face of MG0002396 identifies Independent Bank as an agent of MoneyGram.

[2] As with any instrument, it would be up to the payee to decide whether it would seek payment by taking the instrument directly to the party on or through whom it is to be paid or instead by depositing it at the payee's own bank and allowing that bank to seek collection through ordinary banking channels.

B. TELLER'S CHECKS

16. The second product is the teller's check; a representative example appears at MG0000008. The check would be purchased by a consumer from a bank selling the product. The drawer of the instrument is the selling bank, as indicated just above the signature line in the bottom right-hand corner; it is apparent from the record that when this template is completed the full name of the selling bank is filled in above the signature line. *See* MG0002395 (instrument identifying "Elizabethton Federal Savings Bank" as the "drawer"). The instrument, though, also indicates that it is issued by MoneyGram. When purchased, an authorized officer of the agent bank (the drawer) signs at the bottom right-hand corner of the instrument. The agent bank (or the purchaser) fills in the name of the party to be paid in the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type near the bottom left-hand corner of the instrument as a branch of the Bank of New York Mellon located in Massachusetts.[3]

C. RETAIL MONEY ORDERS

17. The third product is the retail money order; a representative example appears at MG002690. Its designation as a money order is apparent from the title in large-and-small capital letters to the right of center near the top of the image ("MONEY ORDER"). The issuer or drawer of the instrument is MoneyGram, indicated in small type near the lower left-hand corner of the instrument. The retail customer purchasing the money order signs for the drawer on the signature line on the lower right-hand corner. The purchaser identifies the name of the party being paid by filling in (or having the seller fill in) the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to Wells Fargo Bank, N.A., through whom the instrument is payable, as indicated in small type near the lower left-hand corner of the instrument.

D. AGENT CHECK MONEY ORDERS

18. The second group of documents are agent check money orders; a representative example appears at MG002704. Its designation as a money order is apparent from the title in capital letters near the top right-hand corner of the image ("AGENT CHECK MONEY ORDER"). The money order would be purchased from a bank selling the product – the so-called "agent" bank. The issuer or drawer of the instrument is MoneyGram, indicated in small type near the lower left-hand corner of the instrument. The retail customer purchasing the money order signs for MoneyGram on the signature line on the lower right-hand corner. The purchaser identifies the name of the party being paid by filling in (or having the seller fill in) the blank marked "pay to the order of." Finally, to obtain payment, the named payee presents the instrument to the drawee, indicated in small type near the bottom left-hand corner of the instrument as a branch of the Bank of New York Mellon located in Massachusetts.

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[3] The Declaration of Jennifer Whitlock accompanying MG0000004 and MG0000008 refers to both the agent check and the teller's check as a "MoneyGram Official Check." MG0000001. Following that usage, I use the term "official check" to refer to both MoneyGram agent checks and MoneyGram teller's checks.

IV. OPINION

19. In general, subject to the assumptions explained above and as explained in more detail below, my opinions are as follows:

(a) Neither a bank nor MoneyGram is directly liable on the MoneyGram official checks or MoneyGram money orders evaluated in this report.

(b) Official checks differ from money orders in the indirect liability of banks to pay them and in the terms and conditions that they bear on their face.

(c) The statutory reference to "third party bank checks" is obscure, and would not naturally be used to describe personal checks indorsed to third parties, but it could describe the checks that banks issue to pay bills for their customers.

A. NO RELEVANT ENTITY IS DIRECTLY LIABLE ON THE INSTRUMENTS IN QUESTION

20. 12 U.S.C. § 2503 establishes rules that determine which State is entitled to escheat the funds payable on 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." Of the four types of instruments discussed in Part III, I understand the retail money orders (discussed in subpart III(c)) and agent check money orders (discussed in subpart III(D)) to be money orders within the language of the statute and thus not a matter of dispute in this litigation. Application of Section 2503 to the remaining types of instruments (the agent checks discussed in subpart III(A) and the teller's checks discussed in subpart III(B)) depends in part upon whether "a banking or financial organization or a business association is directly liable" on the instrument in question. It is my opinion that no banking or financial organization or business association is liable on those instruments; the most common payment instrument on which such an entity is directly liable is a cashier's check.

21. As an introductory matter, I note that 12 U.S.C. § 2502 provides definitions of "banking organization," "financial organization," and "business association." A "banking organization" is "any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States," and a "business association" is "any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals." I see no reason to doubt that MoneyGram is a business association and that the various banks that market the products and on which they are drawn qualify as banking organization. The only question, then, is whether any of those entities are directly liable on the instruments in question. I explain below why they are not.

i. General Principles of Liability on Instruments

22. Although the framework of obligations that the Uniform Commercial Code (the "UCC") prescribes for various types of checks might seem arcane at first glance, it reflects longstanding tradition and the need for those obligations to support practical use of the instruments to which they apply. Because that framework is central to the application of Section 2503, it is useful to summarize the general system before turning to the specific products that MoneyGram has marketed.

23. The starting point is an ordinary check written by a party with no connection to a bank. For such a check, the bank on which the check is drawn – the bank at which the check-writer has an account – has no obligation to pay the check. A moment's consideration shows why this should be so: if the bank on which the check was written was obligated to pay any check written by its depositor, then it would be exposed to losses whenever the depositor wrote checks that exceeded the balance of funds available in the depositor's account. Accordingly, UCC §§ 3-408 & 3-409 provide that the bank on which a check is drawn is not liable on any check until it agrees in writing to accept liability.[4]

24. To be sure, the bank would be liable to its customer for wrongful dishonor if it declined to pay a properly payable instrument presented in a timely manner without a stop-payment order against an account including sufficient funds. *See* UCC § 4-402. But that does not give the payee any rights to enforce the instrument against the check-writer's bank; as between the payee and the bank, the bank is free to decline payment for any reason or indeed for no reason at all.

25. Those rules were the same under the 1972 version of the UCC, in effect when Congress adopted Section 2503. *See* UCC § 3-409(1) (1972) ("A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee * * * , and the drawee is not liable on the instrument until he accepts it."); UCC § 4-402 (1972) ("A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item.").

26. In just the same way, the person that wrote the check – the "drawer" – has no direct liability on the instrument. That makes sense as a practical matter, because the drawer's intent in giving the check is that the person to which the check is given (the payee) will obtain payment by presenting the check to the check writer's bank. It is reasonable for the drawer to expect the payee to look first to the drawee bank, because in the ordinary course of business drawee banks honor far more than 99% of all checks presented to them. It is only in the rare case, when a drawee bank refuses to pay a check, that a drawer would expect the payee to seek recourse against the drawer. Again, the UCC implements that rule by providing in UCC § 3-414 that the drawer is liable only indirectly, contingent on the refusal of the drawee bank to honor the check.

27. That rule was the same under the 1972 version of the UCC. *See* UCC § 3-413(2) (1972) ("The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up.").

28. To put those rules in context, there is one common banking product on which a banking organization is directly liable – a cashier's check. The point of a cashier's check is to give the payee an enforceable assurance that a bank is directly obligated on the instrument, and the UCC's rules for cashier's checks illustrate what direct liability would mean in this context: "The

[4] I refer for convenience to the official text of the Uniform Commercial Code as currently promulgated by the American Law Institute and the Uniform Law Commission. The numbering and, in some cases, the phrasing of the provisions differ in some respects from State to State, but so far as I know all of the rules that I discuss in this report are substantively identical in all United States jurisdictions.

issuer of a * * * cashier's check * * * is obliged to pay the instrument * * * according to its terms."[5] UCC § 3-412.[6] The distinction between that rule and the liability of drawers on ordinary checks is the difference between the direct and unconditional liability of the issuer of a cashier's check and the indirect and conditional liability of the drawer of an ordinary check.

ii. Application to MoneyGram Products

29. Against that background, I turn now to the MoneyGram products described in Part III.

a. *Agent Checks*

30. The business entities involved in the agent check are the drawer (MoneyGram), the drawee (First Interstate Bank in the principal sample to which I refer for convenience), and the so-called "agent bank" that sells the instrument to the consumer. None of those entities is directly liable on the instrument.

31. First, the drawee is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument); *see also* UCC § 3-410(1) (1972) (defining acceptance as "the drawee's signed engagement to honor the draft as presented" and explaining that "[i]t must be written on the draft").

32. The status of the selling bank on those instruments is unclear, though the seller would not be directly liable in any of the relevant formats. In both the principal sample ('0004) and the variant ('2396), the seller signs the instrument in the lower right-hand corner, an action that ordinarily would justify treating the seller as the drawer. *See* UCC § 3-204 cmt. 1 ("[B]y long-established custom and usage, a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft."); *see also* UCC § 3-402 cmt. (1972) (same). Yet both variants indicate in the fine print that MoneyGram is the drawer, a fact that could suggest that the seller should not be liable as the drawer. In any event, that question is irrelevant for present purposes because it is plain that the seller could be liable ***at most*** as a drawer. For the reasons explained above, the liability of the drawer under UCC § 3-414(b) is indirect, not

[5] The full text of § 3-412 reads:

> The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 3-115 and 3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under Section 3-415.

[6] That rule was the same under the 1972 version of the UCC. UCC §§ 3-118(a) (1972) ("A draft drawn on the drawer is effective as a note."), 3-413(a) (1972) ("The maker * * * engages that he will pay the instrument according to its tenor at the time of his engagement * * * ."); *see* UCC § 3-412 cmt. 1 (comparing the 1972 provisions to current law).

direct. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means in either case is that the drawer would be obligated to pay the instrument only if it were first presented to the drawee and the drawee declined to pay it in a timely manner.

33. For similar reasons, the status of MoneyGram on the agent checks is unclear. On the one hand, both variants include marginal notations identifying MoneyGram as the drawer of the instrument. MoneyGram does not, though, sign either instrument, unless we regard the agent bank as signing as the agent of MoneyGram, a circumstance that would leave MoneyGram liable as the drawer of the instrument. *See* UCC § 3-402(a). That might make sense on the principal sample ('0004) but it would be harder to justify on a variant like '2396, which does not indicate any agency capacity for Independent Bank. In any event, in either case, MoneyGram is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer would be obligated to pay the instrument only if it were first presented to the drawee and the drawee declined to pay it in a timely manner.

b. *Teller's Checks*

34. The business entities involved in the teller's check are the drawer (the institution selling the check), the issuer (MoneyGram), and the drawee (the Bank of New York Mellon). For reasons similar to those detailed above, none of those entities is directly liable on the instrument.

35. As with the agent checks, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer would be obligated to pay the instrument only if it were first presented to the drawee (the Bank of New York Mellon) and that bank declined to pay it in a timely manner.

36. The status of MoneyGram on the teller's check is unclear for reasons quite similar to those described in the discussion of agent checks. On the one hand, the instrument in its lower left-hand corner indicates that the instrument is "issued by" MoneyGram. On the other hand, the lower right-hand corner of the instrument indicates that the institution is the drawer of the instrument. Ordinarily, under UCC § 3-105, the issuer of a check is the drawer: "Issuer * * * means a * * * drawer of an instrument."[7] Because MoneyGram has not signed the instrument, it cannot be the drawer. In any event, even if MoneyGram were the issuer of the draft, it would at most have the liability of a drawer of the draft. For the reasons explained repeatedly in the preceding paragraphs, that would not make MoneyGram directly liable; it would have at most the indirect liability of a drawer.

37. As with the instruments discussed above, the drawee (Bank of New York Mellon in this case) is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the

[7] The omitted text in UCC § 3-105 states that an issuer in some cases is the "maker" of an instrument, but that is irrelevant to any of the instruments discussed here, because "maker" is a term that applies only to notes. *See* UCC § 3-103(a)(7) ("'Maker' means a person who signs or is identified in a note as a person undertaking to pay").

instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument).

c. *Retail Money Orders*

38. The business entities involved in the retail money order are the drawer (MoneyGram), the agent that sells it, and the bank through which it is payable (Wells Fargo). For reasons quite similar to those repeated above, none of those entities is directly liable on those instruments.

39. As explained several times above, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer (MoneyGram) would be obligated to pay the instrument only if it were first presented to the drawee through Wells Fargo and the drawee declined to pay it in a timely manner.[8]

40. The agent is not directly liable because it is not a party to the instrument. Because the agent does not sign the instrument in any capacity, it can have no liability on it. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument.").[9]

41. The party through which the item is payable has no liability because it has not signed it in any capacity. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument."). Indeed, because the item is only "payable through" that bank, the entity is not even authorized to pay the instrument. *See* UCC § 4-106 ("If an item states that it is "payable through" a bank identified in the item, * * * the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item."); *see also* UCC § 3-120 (1972) ("An instrument which states that it is 'payable through' a bank * * * designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.").

[8] The retail money order template does not explicitly identify the drawee. Under UCC § 3-501 & -502, dishonor occurs only if the instrument is presented to the drawee. I note the requirement under Regulation CC that a bank arranging for checks on which it is the drawee to be payable through another bank must identify itself by name and location on the instrument. *See* 12 C.F.R. § 229.36(e). The only routing number that appears on the retail money order template is a routing number for Wells Fargo (the bank through which the money order is payable). That arrangement leaves open the possibility that MoneyGram is the intended drawee of the item, though the face of the item does not make that status explicit.

[9] That rule was the same under the 1972 version of the UCC. UCC §§ 3-118(a) (1972) ("No person is liable on an instrument unless his signature appears thereon.").

d. *Agent Check Money Orders*

42. The business entities involved in the agent check money order are the drawer (MoneyGram), the drawee (Bank of New York Mellon), and the agent. Again, as with the instruments discussed above, none of those entities is directly liable on those instruments.

43. First, the drawer is not directly liable because under UCC § 3-414(b), the liability of the drawer is contingent or indirect. Specifically, the drawer is liable only "[i]f an unaccepted draft is dishonored." In context, what that means is that the drawer (MoneyGram) would be obligated to pay the instrument only if it were first presented to the drawee (Bank of New York Mellon) and that bank declined to pay it in a timely manner.

44. Second, the agent is not directly liable because it is not a party to the instrument. Because the agent does not sign the instrument in any capacity, it can have no liability on it. *See* UCC § 3-401(a) ("A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument."). Indeed, because the instrument identifies the agent explicitly as an agent, it would have no liability on the instrument even if it had signed it; the signature of an agent for a disclosed principal creates liability only for the principal. *See* UCC § 3-402(b).[10]

45. Finally, the drawee (Bank of New York Mellon) is not directly liable because under UCC § 3-408 the drawee has no obligation to pay an instrument until it has accepted it. *See* UCC §§ 3-408 ("[T]he drawee is not liable on the instrument until the drawee accepts it.") & 3-409 (explaining that a drawee accepts an instrument by a signed agreement in which the drawee agrees to pay the instrument); *see also* UCC § 3-410(1) (1972) (defining acceptance as "the drawee's signed engagement to honor the draft as presented" and explaining that "[i]t must be written on the draft").

B. AGENT CHECKS AND TELLER'S CHECKS DIFFER FROM MONEY ORDERS IN IMPORTANT WAYS.

46. The previous section of the opinion discussed the extent to which a listed entity "is directly liable" on any of the MoneyGram products. This section discusses the extent to which agent checks and teller's checks are "similar" to money orders. I express no opinion on the legal question of precisely what degree of "similar[ity]" would be relevant under Section 2503. Rather, my purpose is to analyze practical ways in which the various products do and do not resemble each other.

i. Bank Liability

47. One notable difference between agent checks and tellers checks on the one hand and money orders on the other is that a bank ordinarily is indirectly liable on an agent check or a teller's check; ordinarily no bank is directly or indirectly liable on a money order. Having said

[10] That rule was the same under the 1972 version of the UCC. UCC § 3-403 & cmt. 3 (1972).

that, I discuss below the possibility that some of the MoneyGram agent checks do not involve even indirect liability on the part of a bank.

48. The commonplace distinction between the two groups of instruments follows directly from the discussion above regarding the liability of a drawer, which explained that the drawer is only indirectly liable for payment of an instrument. The corollary of that rule, though, is that the drawer can be called upon to pay in any case in which the drawee dishonors the instrument. What that means is that the payee that accepts a teller's check or an agent check ordinarily can be sure that it will be able to obtain payment from the bank that is the drawer of the instrument unless that bank fails before the instrument can be processed.

49. In the case of money orders, by contrast, no bank is directly or indirectly liable on the instrument, because the drawer of the instrument is MoneyGram, which is not a bank. As the discussion above illustrates, that is true for both retail money orders and agent check money orders. Given MoneyGram's substantial and longstanding financial position, the distinction between an instrument on which a bank is liable and an instrument on which MoneyGram is liable might seem irrelevant or technical at first glance. In the context of payments, though, that distinction is quite important, generally reflecting the reality that as a class the likelihood that a bank liable on an instrument will become insolvent before it is paid is quite remote, both because of the supervision of bank solvency by responsible regulators and because of the reality of bank liquidity. Because the solvency of entities that are not banks is much less regularized and reliably evident to the market, instruments on which banks are liable are treated in the marketplace quite differently than those on which no bank is directly or indirectly liable.

50. The distinction between instruments on which a bank is liable and those on which no bank is liable is important in a variety of contexts. For example, the UCC includes rules that govern the relationship between an instrument and the obligation for which the instrument is taken. Ordinarily, those rules provide that the obligation is suspended when the payee accepts the instrument and discharged only when the instrument is honored. So, for example, if a tenant gives its landlord a check to pay the rent, the obligation to pay that month's rent is suspended when the landlord receives the check and discharged only when the check is honored. The same rule would apply if the tenant paid the landlord with a money order. *See* UCC § 3-310(b).

51. The rule is different, however, for cashier's checks and teller's checks, on which a bank is directly or indirectly liable. If a party accepts one of those instruments, the obligation is discharged immediately. *See* UCC § 3-310(a). That rule by its terms applies to teller's checks and also applies to many of the agent checks at issue in this litigation,[11] because a bank signs those

[11] That rule is broader than it was in 1972. Like the current version of UCC § 3-310, UCC § 3-802 (1972) drew a distinction between instruments on which a bank is directly or indirectly liable and those on which a bank is not liable. The category of instruments that would produce an immediate discharge, though, was effectively limited to certified checks. *See* UCC § 3-802(1)(a) (1972) ("Unless otherwise agreed where an instrument is taken for an underlying obligation (a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor"); *see also* UCC § 3-802 cmt. 2 (suggesting that the purpose of the provision was to discharge the obligation owed by the drawer of a certified check). The provision was broadened to its current range of coverage in 1990. *See*

checks as the drawer (which makes them qualify as teller's checks for purposes of the UCC). *See* UCC § 3-104(h) (defining "teller's check" to include any item drawn by one bank on another bank). The only exception applies to the agent check templates completed in a way that designates the bank on the face of the instrument as the agent of MoneyGram. *E.g.*, DE0000220 (designating the institution signing as drawer ("Pennstar, Division of NBI Bank") as an "agent for MoneyGram"). For instruments of that type, the bank (signing as agent for a disclosed principal) would not be directly or indirectly liable on the instrument. *See* UCC § 3-402(a); *see also* UCC § 3-403 & cmt. 3 (1972) (same outcome under 1972 UCC).

52. A similar distinction appears in the rules that govern when an institution must make funds available against an item that a customer deposits. The low-risk rules in 12 U.S.C. § 4002(a)(2) (implemented in Regulation CC 12 C.F.R. § 229.10(c)), apply when customers deposit specific "low-risk" items in their account. The "low-risk" rules obligate banks to provide available funds sooner than they must provide available funds based on the deposit of ordinary personal checks. As relevant here, low-risk rules for cashier's and teller's checks obligate the bank at which the item is deposited to provide funds on the next business day, an obligation the depositary bank would not have if a customer deposited a personal check. With one narrow exception, though, those rules do not apply to money orders. *See* 12 U.S.C. § 4002(a)(2)(F) (low-risk exception for cashier's and teller's checks); 12 C.F.R. § 229.10(c)(1)(ii) (low-risk exception for Postal money orders), (v) (low-risk rule for cashier's and teller's checks). Thus, when a customer deposits a conventional money order like the MoneyGram products involved here, the customer is not entitled to available funds the next day; the customer would have that entitlement, though, if the customer deposited a cashier's check or a teller's check.

53. The exclusion of money orders from the low-risk rules (leaving them to the same treatment as personal checks) is not accidental. Commenters during the notice-and-comment development of Regulation CC requested an express exclusion of money orders from the low-risk rules, but the Federal Reserve declined, concluding that money orders differed so substantially from the covered instruments that their exclusion was clear even without an explicit mention in the regulation. Among other things, the Federal Reserve explained that money orders "are generally signed by the purchasing customer, not by an officer of the issuing bank and therefore are not cashier's checks subject to the [low-risk rules]." 53 Fed. Reg. 19372, 19396.

54. A similar distinction also has been implemented in the operation of Regulation D (12 C.F.R. Part 204), which governs the reserve requirements for depositary institutions. The regulation requires covered institutions to maintain reserves against any "deposit," a term that 12 C.F.R. § 204.2(a)(1) defines in detail. The concept is that the deposits a bank holds for its customers are effectively liabilities of the bank, against which the bank must maintain a reserve of assets adequate to satisfy the requests for withdrawal a bank might face on any particular day. Among other things, that definition includes any "outstanding teller's check, or an outstanding draft, certified check, cashier's check, money order, or officer's check drawn on the depository institution." The premise of that provision is that once a bank has issued an item of that nature, drawn on itself, the item effectively becomes a liability of the institution, against which it must

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UCC § 3-310(a) (1990); UCC § 3-310 cmt. 2 (1990) (comparing the 1990 revisions to the earlier statute).

maintain reserves. Importantly, it applies only to items on which the bank is directly or indirectly liable. Thus, it would include the teller's checks and official checks at issue here, but it would not include the MoneyGram money orders discussed above, because those items are not drawn by (or signed by) any depository institution.

55. As discussed above, MoneyGram also has an "agent check money order" product, on which a bank signs as an agent of MoneyGram. On such a product, as with the more conventional money orders discussed above, no bank would be directly or indirectly liable; rather, by signing as an agent of MoneyGram, the bank would sign only to create for MoneyGram the indirect liability as a drawer.

56. In sum, a variety of legal and practical considerations make an important distinction between instruments that a bank has signed on its own behalf (such as cashier's checks, teller's checks, and agent checks that do not indicate the bank's status as an agent), and those that no bank has signed (such as the money orders marketed by MoneyGram and the agent checks signed by the bank only as an agent).

ii. Contractual Conditions

57. Another distinction between teller's checks and agent checks on the one hand and money orders on the other appears in the terms and conditions printed on the back of a standard MoneyGram money order. Two important terms describe the limited recourse and the service charge.

58. The "Limited Recourse" term emphasizes the inability of the holder to force any financial institution to pay the instrument. Specifically, that term states in large bold-face type that the only "recourse" on the money order is "against the presenter. This means that persons receiving this money order should accept it only from those known to them and against whom they have effective recourse." That term appears to mirror the discussion above of the effect of the absence of any bank signature under the UCC. Apparently, MoneyGram thought it important to emphasize those attributes in writing on the instrument to ensure that disappointed purchasers would have little basis for claiming that they had been misled into thinking that the instruments were more robustly enforceable than they were.

59. The second term of relevance is the "Service Charge" term, which describes a service charge of one dollar and fifty cents per month if the money order is not used within one year of the purchase date. That has the effect of steadily absorbing the value of the money order if it is not promptly used. So far as I can tell from the instruments that I have seen, banks ordinarily do not impose such charges on the bank-signed MoneyGram instruments (the official checks), which instead retain their value until they escheat to the relevant jurisdiction. Thus, the MoneyGram official checks contain no such "Service Charge" term.

C. "THIRD PARTY BANK CHECK[S]" IS AN OBSCURE TERM, WHICH COULD REFER TO CHECKS THAT BANKS ISSUE TO PAY BILLS FOR THEIR CUSTOMERS.

60. Section 2503 excludes from the group of "other similar written instrument[s]" a category of instruments that the statute describes as "third party bank check[s]."

61. As a matter of history, of course, the source of the term seems clear. First, a November 1, 1973 letter from Edward Schmults, General Counsel of the Department of the Treasury, commenting on the bill that would become Section 2503, suggested that the legislation should exclude "third party payment bank checks." S. Rep. 93-505, 93rd Cong., 1st Sess. 5 (Nov. 15, 1973). Then, apparently in an imprecise response to the letter, the bill was amended to exclude "third party bank checks." *Compare* S. 1895 § 2, 93rd Cong., 1st Sess. (May 29, 1973) (no exclusion, predating the Schmults letter), *with* S. 2705 § 3, 93rd Cong., 1st Sess. (Nov. 15, 1973) (draft after the Schmults letter including exclusion for "third party bank check[s]"); S. 2705 § 3, 93rd Cong., 2nd Sess. (House version dated Mar. 4, 1974) (same). Neither the Schmults letter nor any other provision of the report or legislative history of which I am aware offers any guidance as to the product intended to be excluded.

62. As a matter of commercial law, the term is obscure. The modern UCC does not use the terms "bank check" or "third party check," much less the more specific terms "third party bank check" or "third party payment bank check." Nor am I familiar with either of those specific terms in the common parlance of industry professionals or literature. Similarly, the designation of the MoneyGram products as "official" checks is not a designation with a source in the modern UCC; thus it seems to me to bear only the general trade connotation of a check that is more reliable than a check that is not "official."[12]

63. Attempting to make some sense out of the term itself, the idea of a "bank check" logically suggests a check on which a bank is directly or indirectly liable. All checks are drawn on banks. *See* UCC § 3-104(f) (defining "check" as "(i) a draft * * * payable on demand and drawn on a bank or (ii) a cashier's check or teller's check"). So if the reference to "bank check" is to convey anything different from an unadorned reference to a "check," the most likely connotation would be a reference to a check issued by a bank as opposed to a garden-variety "check" issued by a person other than a bank.

64. Strong support for that idea comes from the text of the UCC at the time that Section 2503 was adopted, which used the terms "bank check" and "non-bank check" to distinguish between checks on which some bank is liable and those on which no bank is liable. *Compare* UCC § 4-211(1)(d) (1972) (requiring banks to accept as settlement "a cashier's check, certified check

[12] The term "official bank check" did appear in an early draft of what eventually became the 1990 revisions to UCC Article 3 and amendments to Article 4 (discussed in the next footnote). In that draft, the term was defined to include what are now known as teller's checks and cashier's checks. *See* UCC § 3-104(d) (1987 Exploratory Draft) (defining "official bank check" as "(i) a draft payable on demand drawn by a bank on another bank, or (ii) a draft payable on demand with respect to which the drawer and the drawee are the same bank or branches of the same bank"). That draft used the term in UCC § 3-310 in the same way that the current UCC refers to teller's checks and cashier's checks – to describe the instruments that discharge an obligation as soon as they are "taken" by the payee "as payment of an obligation." *Compare* UCC § 3-310(1) (1987 Exploratory Draft) *with* UCC § 3-310(a).

or other bank check or obligation") *with* UCC § 4-211(3)(b) (1972) (describing process for a bank that voluntarily has agreed to accept "a non-bank check or obligation").[13]

65. It is less clear what to make of the additional qualification that the exclusion refers to "third party" bank checks (or, in the phrasing of the Schmults letter, "third party payment" bank checks). The overwhelming majority of checks are written to "third parties," in the sense that they are written to a party distinct both from the party that writes the check and from the party on which the check is drawn. Similarly, the overwhelming majority of checks are written to make "payment" to that third party. To make sense of the reference to "third parties," logically there should be an additional party to the transaction beyond the payor, payee, and the payor's bank.

66. The statutory context also suggests an additional qualification in making sense of the term. Because "third party bank checks" (or "third party payment bank checks") are to be excluded from the category of "similar written instruments * * * on which a [listed entity] is directly liable," the relevant product should be a product on which some listed entity is directly liable. Because the excluded category is third party ***bank*** checks, logically it should be a product on which a bank is liable.

67. One possibility that is easy to discard is that the designation refers to a personal check (that is, a check drawn by an individual) that the payee has indorsed to a third party.[14] The discussion above suggests one obvious problem with application of that term to the scenario – why would anybody use the term "third party bank check" as opposed to the term "third party check" to refer to a check on which a bank has no cognizable role. More specifically, though, that application would make no sense in the context of Section 2503. The problem is that the escheating party has no way of telling if an instrument has been indorsed to a third party until the indorsed item is presented for payment. Section 2503, though, applies only to instruments that are not ever presented for payment. Thus, to read the statutory reference to "third party bank checks" as excluding only indorsed checks is to read it as excluding checks to which Section 2503 would not apply in any event.

68. Another possibility, mentioned in a September 29, 2015 letter from David Gregor, the Delaware State Escheator (ALF00002365), is that the term refers to teller's checks. That makes sense of the "bank check" part of the term – because a teller's check is a check that is drawn by a bank. It treats the "third party" portion of the term as reflecting the difference between the bank that draws a check and the bank on which the check is drawn, which means that the instrument involves three parties. That is a possible interpretation, though the use of "third party" to indicate a difference between the identity of the issuer and the drawee seems a little odd; that term usually refers to checks that end up being paid to a party distinct from the original parties to the check transaction. Moreover, as explained above, a teller's check is not a check on which a

[13] The references to "bank checks" and "non-bank checks" were removed in the 1990 version of Article 4, which substituted references to cashier's checks and teller's checks, terms added at the same time to UCC Article 3. *See* UCC §§ 3-104(g) & (h) (1990) (definitions of cashier's check and teller's check), 4-213 (1990) (replacing UCC § 4-211 (1978)).

[14] Pennsylvania suggested that possibility in its May 30, 2017 "Bench Memorandum on the Disposition of Abandoned Money Orders and Traveler's Checks Act."

bank is directly liable; it is a bit odd, then, to include a phrase excluding teller's checks from a group of instruments on which a financial institution "is directly liable."

69. Recognizing the reality that it may be difficult to understand precisely what Schmults (or Congress) intended by the term at the time, another possibility is that the term refers to the checks that banks write at the direction of their customers through their bill-payment services. For several decades, banks have offered bill-payment services, under which banks pay bills to identified payees at the request of their customers. Traditionally, banks made those payments either by making ACH transfers (which are quite inexpensive) to the identified payees if possible, or by issuing paper checks (which are much more expensive) to payees for which it is not practical to complete an ACH transfer. In recent years, banks complete an increasing share of those payments by ACH transfers.

70. In the early years of those products, however, the banks of customers commonly effected a large share of the payments by issuing paper checks. Conventionally, those checks were signed (and thus issued by) the customer's bank, and drawn on the same bank. Thus, though in my experience they have not been issued on the common forms for cashier's checks (which state prominently that the instrument is a cashier's check), they are cashier's checks in legal contemplation (in the same way that the agent checks described above are teller's checks in legal contemplation even if they do not bear that designation on their face). *See* UCC § 3-104(g) (defining "cashier's check" as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank"). Because those checks are checks on which a bank is directly liable, and because they involve an additional party not present at the issuance of the check, they meet the basic requirements of a sensible interpretation of the reference in Section 2503 to a "third party bank check."

V. CONCLUSION

71. Because discovery is continuing as of the date of this report, I expect that I will continue to review documents and testimony related to the topics discussed in this report. Accordingly, I reserve the right to supplement my report based on materials not available at the time I prepared it, including any reports that other experts might submit.

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APPENDIX – CURRICULUM VITAE

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ACADEMIC APPOINTMENTS:

Albert E. Cinelli Enterprise Professor of Law (2011-date)

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Ben H. & Kitty King Powell Chair in Business & Commercial Law, University of Texas School of Law (2004-2007)

William Stamps Farish Professor in Law, University of Texas School of Law (2002-2004)

Professor of Law, The University of Michigan Law School (1999-2002)

Assistant Professor of Law, The University of Michigan Law School (1997-1999)

Professor of Law, Washington University School of Law (1997)

Associate Professor, Washington University School of Law (1994-1997)

OTHER LEGAL EMPLOYMENT

Law Clerk to Judge Joseph T. Sneed, United States Court of Appeals for the Ninth Circuit, San Francisco, California (1985-1986)

Law Clerk to Justice Lewis F. Powell, Jr., United States Supreme Court, Washington, D.C. (1986-1987)

Assistant to the Solicitor General, United States Department of Justice, Washington, D.C. (1991-1994) (argued eight Supreme Court cases and wrote briefs on the merits in forty Supreme Court cases)

Office of the Independent Counsel (1998-2000) (appellate litigation of various matters, including *United States v. Hubbell*, 530 U.S. 27 (2000))

Dow, Cogburn & Friedman (1987-1991) (real estate and commercial law)

SCHOLARLY WORKS:

Books:

BANKRUPTCY AND THE U.S. SUPREME COURT (Cambridge U. Press 2017)

CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD ***"Winner of 2006 annual book prize from the American College of Consumer Financial Services Lawyers"*** (Cambridge U. Press 2006)

COMMERCIAL FINANCE (Foundation 2017)

PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS (6th ed. Wolters Kluwer 2016) (5th ed. 2011; 4th ed. 2008; 3rd ed. 2006; 2nd ed. 2003; 1st ed. 1999)

ELECTRONIC COMMERCE (4th ed. Wolters Kluwer 2011) (3rd ed. 2008; 2nd ed. 2005; 1st ed. 2002) (with Jane K. Winn)

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Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?, 70 N. Y. U. L. REV. 993 (1995)

RECENT INVITED PRESENTATIONS:

Bankruptcy and the Supreme Court: Columbia (March 2015); Michigan (September 2014)

Patents in the Supreme Court: New York State Bar Association Annual Meeting (spring 2015); Supreme Court Intellectual Property Review, Chicago-Kent (fall 2014)

Patent Quality and Policy: Texas Law Review IP Symposium (January 2014); Empirical Patent Law Conference (September 2013)

Consumer Regulatory Policy: Harvard Law School, Program on International Financial Systems (March 2015); Tokyo University Faculty of Law (June 2014); Columbia Business School Conference on Mobile Payments and Virtual Currencies (April 2014); Vanderbilt Law School (February 2014); CFPB (September 2013)

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PROFESSIONAL AFFILIATIONS:

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CONSULTING ACTIVITIES:

Trial and Arbitration Testimony

- Residential Capital, LLC v. UMB Bank, N.A. (In re Residential Capital, LLC), Case No. 12-12020, Adv. Case No. 13-01343 (Bankr. S.D.N.Y. 2013) – interpretation of security agreement and indenture (preceded by expert report and deposition), successful result reported at 501 B.R. 549 (Bankr. S.D.N.Y. 2013)

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- Application of AEP Texas Central Company, Texas PUC Docket No. 31056 (2005) – Regulatory proceeding to set fees following deregulation (preceded by expert report)

- Ann Arbor (ca. 2001) – State court case involving challenge to federal bankruptcy proceeding (preceded by deposition)

- St. Louis (ca. 1996) – State court case involving effect of foreclosure on a hotel (preceded by deposition)

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- Peabody Energy Corp. v. Citibank, N.A. (In re Peabody Energy Corp.), Case No. 16-42529-399, Adv. Proceeding No. 16-04068-399 (Bankr. E.D. Mo. 2016) – common understanding of indenture (preceded by expert report)

- DB NPI Century City, LLC v. Legendary Investors Group No. 1, No. BC494921 (Super. Ct. Los Angeles County (Central) 2015) – dispute over effect of draft on letter of credit

- Walker Digital v. Capital One Services, LLC, No. 1:10cv212 (JFA) (E.D. Va. 2010) – patent infringement action involving patent on credit card customization (preceded and followed by expert report)

- Acosta v. Trans Union, LLC, No. CV06-5060 SJO (C.D. Cal. 2007) – Class action related to practices of credit reporting agencies regarding bankruptcy discharge (preceded by expert report)

- Wachtell v. Capital One Financial Corp., 4th Judicial Dist. Ct., No. CV 0C 0304972D (Idaho 2006) – Contract case related to data-analysis product developed by credit-card issuer (preceded by expert report)

- Shinitzky v. Boston Securities N.A., 15th Jud. Circuit Court, No. CL 00-2328 AJ (Palm Beach County, FL 2004) – Dispute involving error in wire transfer

- St. Louis (ca. 1997) – State court malpractice case (consumer bankruptcy)

Expert Reports

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the District Court of Reykjavík of 3 May 2016 in Case No. E-2742/2012 (relying on my report) and 10 June 2016 in Case No. E-2760/2012

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