Expert Report

In the Matter of *Delaware v. Arkansas, et al.,*

U.S. Supreme Court Case Nos. 220145 & 220146 (consolidated)

September 24, 2018

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Qualifications of Barkley Clark

Based upon my credentials and experience in the area of negotiable instruments, banking and check law, I have been engaged by Kleinbard LLC as an expert on behalf of the state of Pennsylvania in the above-captioned litigation. My hourly rate for this engagement is $715.

My Credentials

My vita is attached as Exhibit A. I am a partner in the law firm of Stinson Leonard Street LLP, Denver, Colorado. I am a member of the firm's Banking and Financial Services Practice Group. I have consulted with banks and other depository institutions for 53 years regarding commercial and banking law issues, with an emphasis on bank deposits, payment systems and negotiable instruments law. My consultations with financial institution clients have included review of: demand deposit account issues, account opening and closing, check fraud, check fraud detection systems, wire transfer litigation, remittance instruments such as cashier's checks, teller's checks and money orders, check fraud litigation, a drawee bank's "strict accountability" for late return of checks, check kiting issues including all-funds holds, check rules under the Uniform Commercial Code ("UCC") and Federal Reserve Board Regulation CC, Federal Reserve Board Operating Circulars, cash management products, bank setoff, expedited funds availability, automated deposit-taking and check payment, and credit and compliance issues. I have also drafted deposit account agreements, wire transfer agreements and account-opening documents for bank clients. I have been involved in the litigation of a number of payment-system issues under the UCC and related federal law and have advised banks regarding the handling of both commercial and consumer deposit accounts.

My career has also included a strong academic component. From 2003 to 2006, I served as an Adjunct Professor at the University of Virginia School of Law, where I taught courses on secured transactions, negotiable instruments, bank deposits and payments under the UCC, and

federal banking law. Prior to my appointment at the University of Virginia, I taught banking law as an Adjunct Professor at the Georgetown Law Center in Washington. Before that, I held an endowed chair in commercial and banking law at the University of Kansas School of Law. For four years, I served as Professor of Law at the National Law Center, George Washington University, where I taught courses on the UCC and Federal Regulation of Banking. I have also taught banking and commercial law courses at the University of Colorado, the University of Oregon, and the University of Michigan.

I regularly lecture throughout the country on banking, and other commercial law topics. I have taught special seminars on bank deposit issues, issues including check collection, setoff and holds, wire transfers, ACH, negotiable instruments, and various payment systems. I have given lectures on deposit account issues for the Southwest Legal Foundation at SMU in Dallas; the School of Banking of the South in Baton Rouge; the Louisiana Bankers Association in New Orleans; in-house personnel at the twelve Federal Reserve Banks; the Banking Law Institute; the UCC Institute; the American Bankers Association; the American Bar Association; ALI/ABA; the Practicing Law Institute; and the Bank Administration Institute.

I have co-authored three treatises that are widely used by bankers and their counsel around the country, by academicians, and by attorneys who practice banking and commercial Law. These treatises are regularly cited by federal and state courts around the country. They are published by Lexis/Nexis, and are titled: (1) *The Law of Bank Deposits, Collections and Credit Cards* (with Barbara Clark, supplemented three times a year), which discusses a variety of deposit account issues including various negotiable instruments, check collections and wire transfers; (2) *The Law of Secured Transactions under the UCC* (with Barbara Clark, also supplemented three times a year); and (3) *Compliance Guide to Payment Systems* (with Mark

Hargrave and Barbara Clark, supplemented semi-annually), which discusses a wide range of payment systems and negotiable instrument issues. I also co-edit a monthly newsletter entitled *Clarks' Bank Deposits and Payments Monthly*, which has subscribers around the country and has often included articles on topics such as various types of check fraud, bank deposit agreements, and payment finality. These treatises include discussion of negotiable instruments relevant to the present case. Chapter 24 of my Bank Deposits treatise, as well as Chapter 7 of the *Compliance Guide*, deal specifically with remittance instruments such as cashier's checks, teller's checks and money orders.

I have served as a special consultant to the Federal Reserve Board, the American Bankers Association, the Uniform Law Commission, and the American Law Institute, as well as a number of state legislatures regarding banking, commercial law, and consumer protection legislation. I have been active in banking law reform, serving on the original Study Committee that established the guidelines for Revised Article 9 of the UCC dealing with secured transactions. I have given in-house seminars on check and negotiable instruments issues for bank officers and employees. I serve on the Board of Editors of the Banking Law Journal and The UCC Law Journal. In 2012, I was awarded the Senator William Proxmire Lifetime Achievement Award from the American College of Consumer Financial Services Lawyers.

I have served as a director of a national bank and as an employee in the back office of another national bank. In my capacities as a bank director and employee, I have dealt with a variety of deposit and payment system issues, including suspected kites, "state of the art" deposit account provisions, security procedures, remittance instruments, automated check collection, and the duty of customers to review monthly bank statements.

During the past 30 years, I have testified often as an expert witness--by affidavit, deposition or at trial, including before federal and state courts and arbitration panels. List pursuant to Fed. R. Civ. P. 26(a)(2)(b)(v) is attached at Exhibit B.

Materials Reviewed For This Report (Exhibit C)

Pleadings:

* Original Complaint and other pleadings in *Pennsylvania v. Delaware and MoneyGram Payment Systems Inc.*, filed on Feb. 26, 2016, in Federal District Court, Middle District of Pennsylvania

* Delaware Motion for leave to file Bill of Complaint in State of *Delaware v. Commonwealth of Pennsylvania and State of Wisconsin*, in U.S. Supreme Court seeking original jurisdiction, with Hon. Pierre N. Leval, as Special Master

* Contents of pdf attachment docket files 1-66, beginning May 26, 2016

* Bills of Complaint and related motions and briefs of Pennsylvania, Delaware, Wisconsin and Arkansas in connection with the granting of original Supreme Court jurisdiction

Hearing Transcripts

* Transcript of the deposition of Eva Yingst, dated May 23, 2018, including exhibits

* Transcript of the deposition of Kate Petrick, dated June 5, 2018, including exhibits

* Transcript of hearing before Judge Leval on June 5, 2017

Documents

* Exemplars of certain negotiable instruments issued by MoneyGram, which are exhibits to the Yingst deposition transcript

* MoneyGram marketing materials for money orders and Official Checks, which are exhibits to the Yingst deposition

* Delaware Escheator David Gregor's letter dated September 29, 2015, with exhibits

* The Report of the President's Commission on Financial Structure & Regulation (December 1971, revised September 1973), commonly called "The Hunt Commission Report"

* U.S. Treasury Department, Recommendations for Change in the U.S. Financial System (1973)

* Newspaper reports regarding the potential impact of the Hunt Commission Report: (1) Robert E. Knight, *The Hunt Commission: An Appraisal,* Wall Street Journal, July 3, 1972, at 4 and (2) James L. Rowe, Washington Post, January 13, 1973, at G2

* Affidavit of Jennifer Whitlock, with exhibits including check templates and marketing materials dated October 3, 2017

* Senate Report No. 93-505, to accompany S. 2705

Statutory Materials

* The Federal Disposition Act (now codified at 12 U.S.C. §§ 2501-2503)

* Edward Schmults' commentary on Senator Scott's original bill (S. 1895), in response to inquiry from the Senate Committee on Banking, Housing and Urban Affairs in 1973

* The Uniform Commercial Code, including Section 3-104 defining types of negotiable instruments and the Official Comments to that UCC provision

* Regulation CC, including 12 CFR § 229 defining various negotiable instruments

* 1983 statute from the State of Washington (Wash. Rev. Code § 63.29.020(17)), defining "third party bank check"

* Draft Model Unclaimed Property Act, 73 Bus. Law. 763 (2018)

* Pennsylvania Disposition of Abandoned and Unclaimed Property Act, Section 1301.1 et. seq.

* Chapter 177 Wisconsin Code, Uniform Unclaimed Property Act (1981)

* Uniform Law Commission, Revised Uniform Disposition of Unclaimed Property Act (1966)

Judicial Materials

* *Pennsylvania v. New York*, 407 U.S. 206 (1972) (leading to enactment of FDA)

* *Texas v. New Jersey,* 379 U.S. 674 (1965)

* *MoneyGram International v. Commissioner of Internal Revenue*, 2014 WL7795630 (U.S. Tax Court (2014) (describing MoneyGram's business model)

Secondary Source Materials

* *Personal money orders and Teller's Checks: Mavericks under the UCC*, 67 Colum. L. Rev. 524 (1967)

* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947)

* Chapter 24 of Clark & Clark, *The Law of Bank Deposits, Collections and Credit Cards*

* Chapter 7 of Clark, Clark & Hargrave, *Compliance Guide to Payment Systems*

* Millar, Heyman and Noel, *Building a Better Unclaimed Property Act*, 73 Bus. Law. 711 (2018)

I. INTRODUCTION

I have been retained to opine on the characteristics of certain prepaid instruments marketed and sold by MoneyGram Payment Systems, Inc. ("MoneyGram") as "Official Checks" and to opine on whether such instruments are money orders—or written instruments similar to money orders and traveler's checks—subject to the priority rules established under the Disposition of Abandoned Money Orders and Traveler's Checks Act, 12 U.S.C. §§ 2501-03 (the "Federal Disposition Act" or "FDA"). I have been further asked to opine on what is a "third party bank check" as set forth under the FDA.

MoneyGram refers to the following instruments as "Official Checks": (a) teller's checks; (b) agent checks; (c) cashier's checks; and (d) agent check money orders.[1] See deposition transcript of Eva Yingst, at p. 36:15-37:15. This report largely concerns the characteristics of these MoneyGram teller's checks and agent checks and whether they are subject to the priority rules of the FDA.

A. Section 2503 of the FDA

Section 2503 of the FDA establishes priority rules for the escheatment of certain prepaid negotiable instruments, stating in relevant part:

> Where any sum is payable on a 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—
>
> (1) if the books and records of such banking or financial organization or business association show the State in which such money order, traveler's check, or similar written instrument was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum[.]

12 U.S.C. § 2503(1) [Emphasis Added].

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[1] MoneyGram also markets and sells another money order product it refers to as a "retail money orders," which are generally purchased at retail establishment, such as 7-Elevens and check cashing agencies. These retail money orders do not fall under MoneyGram's "Official Check" umbrella.

To determine whether MoneyGram Official Checks, specifically its "teller's checks" and "agent checks," are subject to the above priority rules, it is necessary to determine what is a "similar written instrument," as well as a "third party bank check" excluded from these priority rules.

B. Summary Opinion

This case is about what I call "remittance instruments," which are negotiable instruments that share common core characteristics (particularly prepayment and the obligation of a financial or business entity) that set them apart from ordinary bank checks. A money order is one type of remittance instrument; a teller's check is another. In my opinion, all of the MoneyGram Official Checks at issue in this case are money orders or are "similar to" money orders. Therefore, they are subject to the priority rules of the Federal Disposition Act, 12 U.S.C. § 2503. This conclusion is strongly supported by the plain language of the statute, read in light of its clear and unmistakable purpose—to avoid a **windfall** in application of federal escheatment priority rules. As remedial legislation, the scope of the FDA should be construed broadly. Most important, Delaware should not be able to exclude itself from the priority rules of the FDA on the ground that, contrary to banking industry understanding, MoneyGram teller's checks are "third-party bank checks." 12 U.S.C. §§ 2501-2503. If Congress had wanted to exempt teller's checks from the statute, it would have said so, but it did not. Under a proper construction of the statute, the term "third-party bank checks" means ordinary checks drawn out of ordinary checking accounts that are not prepaid; it does not mean teller's checks, or what MoneyGram refers to as Official Checks.

II. BACKGROUND ANALYSIS

A. The Commercial Function of Remittance Instruments and Their Common Characteristics

The present case is at bottom about the nature and scope of remittance instruments, particularly money orders and teller's checks, as well as the contrast between bank checks used as remittance instruments and ordinary bank checks. The following addresses the characteristics of remittance instruments versus that of ordinary bank checks.

1. Conditionality of the Ordinary Bank Check

Ordinary bank checks are highly conditional. They are issued by an individual or entity to the order of the payee. The words "to the order of" are the "magic words" of negotiability. There are at least three parties to an ordinary check—the drawer, the drawee bank and the payee. As negotiable instruments, ordinary bank checks can be negotiated by the payee (by endorsement) to a third party "holder," who may be able to qualify as a holder in due course of the check, with power to enforce the check free of the drawer's personal claims and defenses. In either case, the check is deposited into the bank collection process, cleared through the interbank clearing system, and presented to the drawee bank for payment or return.

The problem with ordinary checks signed by an individual or business is that payment upon presentment is subject to a number of conditions. Because there is no direct bank liability, enforcement by the payee/holder as against the drawer or prior endorser is always a risk. The holder of the check relies on the obligation of the drawer to pay by debit of its deposit account at the drawee bank. If the drawee bank wrongfully dishonors the check, the drawer may have a cause of action against the bank, but the payee does not. Dishonor of the check can occur for a number of reasons. Examples of conditionality include the drawer's stop payment order,

insolvency of the drawer, insufficient funds (NSF), bank setoff, garnishment, account closed, or simply "refer to maker."

The Uniform Commercial Code ("UCC") is central to the present case because Article 3 of that statute has, since the 1950s, codified banking industry practice and understanding with respect to the rules defining and governing all negotiable instruments, including not only ordinary checks but also money orders, cashier's checks, teller's checks, certified checks and traveler's checks. Once negotiable checks enter the bank collection system, headed toward the drawee bank to be paid or returned, Article 4 of the UCC provides the legal framework. The present case is governed more by Article 3 than Article 4. Closely related to the uniform state rules of the UCC are the federal rules of Regulation CC, which were authorized by the Expedited Funds Availability Act, effective in 1988. Definitions found in Reg. CC generally follow the UCC.

The term "check" is defined in UCC 3-104(f) as an order from the drawer to its bank to pay to the payee or third-party holder a specified amount out of the drawer's deposit account. It is a negotiable instrument, governed by the UCC, a draft payable on demand and drawn on the drawer's account. With an ordinary check, there is no prepayment of the drawer's obligation to the payee; the only direct obligor is the nonbank drawer, whose obligation to pay arises following dishonor of the check by the drawee bank upon presentment. Because a check is not an assignment of funds in the drawer's deposit account (UCC 3-408), the drawee bank has no obligation to pay the holder, even though the drawer might be able to sue its bank for wrongful dishonor. In short, an ordinary check is highly conditional and could bounce. If the payee of an ordinary check negotiates the item to a third party holder, the instrument is known in the banking industry as a "third-party check" or "twice-endorsed" check. The term "check" as defined in the

UCC 3-104(f) includes cashier's checks and teller's checks, and the UCC states that "[a]n instrument may be a check even though it is described on its face by another term, such as 'money order.'"

2. **Overcoming the Conditionality of an Ordinary Check by Using a Remittance Instrument**

To overcome the conditionality of an ordinary check, and to encourage commercial transactions between creditors and debtors, over the past century the financial services industry has developed a number of payment instruments where the underlying obligor is a bank or a regulated business organization.[2] The debtor in the underlying transaction prepays in cash (or by the immediate debiting of its deposit account) and in return receives a "remittance instrument" on which a bank or regulated business organization is primarily obligated, and on which the payee's name and amount are indicated by the seller of the instrument.

These instruments take a number of forms and names, but they all have four core characteristics: (1) prepayment by the debtor/remitter; (2) the direct obligation of a bank or other regulated business entity on the new instrument, to replace the original obligation of the debtor/remitter to the payee; (3) the form of a written negotiable instrument, governed by the UCC, that is collected and paid through the interbank clearing system; and (4) treatment of the instrument as a "cash-equivalent" in order to encourage transactions where the creditor would otherwise balk because of the conditional nature of ordinary checks. In my opinion, prepayment is the most important core characteristic.

As a group, these instruments can be referred to as "remittance" instruments. The debtor who pays the bank for the instruments is called the "remitter," as a matter of industry practice

[2] In Pennsylvania, a non-bank issuer of such payment instruments is generally required to obtain a license and satisfy minimum net worth and bonding requirements. Pennsylvania Money Transmitter Act of 2016, P.L. 1002, No. 129.

and understanding. Under UCC 3-103(11), the term "remitter" means "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser." Although the term "remittance instrument" is not defined in the UCC, Chapter 24 of my treatise, *The Law of Bank Deposits, Collections and Credit Cards*, discusses these instruments as a group and is titled "Remittance Instruments." Similarly, I have co-authored Chapter 7 of another treatise, *Compliance Guide to Payment Systems*, which deals specifically with remittance instruments. Set forth below is a brief description of seven key remittance instruments, with a focus on the common denominators that characterize them all, and more importantly, distinguish them from ordinary bank checks. Throughout this report, I use the term "remittance instruments" as a convenient umbrella term to describe a variety of negotiable instruments with common core characteristics.

3. <u>Cashier's Check</u>

One of the most popular remittance instruments is the cashier's check, which is defined in UCC 3-104(g) as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." Reg. CC (12 CFR § 229.2(i)) defines a cashier's check as "a check that is (1) drawn on a bank; (2) signed by an officer or employee on behalf of the bank as drawer; (3) a direct obligation of the bank; and is (4) "provided to the customer of the bank or acquired from the bank **for remittance purposes**." [Emphasis added.] Following prepayment to a seller, the cashier's check is used by the remitter to satisfy a debt that the remitter owes to a creditor, who is normally the payee of the instrument. Cashier's checks are granted next-day availability under Reg. CC.

A typical example of how a cashier's check is used in commerce is the requirement that it be prepaid and then tendered by a prospective buyer of real estate to satisfy the down payment on a home in a real estate contract. As another example, many state statutes require that a

cashier's check be posted as a bond to secure a contractual obligation. In both cases, the creditor wants to avoid the conditionality of an ordinary bank check. When used as remittance instruments, cashier's checks satisfy all four criteria listed above. (Cashier's checks can also be used by the issuing bank to pay its own debts.) As with many other remittance instruments, the remitter's giving of a cashier's check to its creditor will immediately discharge the remitter's underlying obligation to the creditor. By contrast, if a debtor tenders an ordinary check, its obligation to pay the underlying debt is suspended until the check is paid by the drawee bank; if the check is dishonored, the drawer's obligation ripens. UCC 3-310. As a general matter, the remitter has no right to stop payment on a cashier's check based on a dispute with the payee, though the issuing bank can stop payment based on its own defenses (such as nonpayment), so long as the instrument has not gotten into the hands of a holder in due course.

4. <u>Teller's Check</u>

Teller's checks are defined in UCC 3-104(h) as "drafts" that are "drawn by a bank (1) on another bank, or (2) payable at or through a bank." The Reg. CC definition (12 CFR § 229.2(gg)) generally tracks that of the UCC, and puts great emphasis on the use of teller's checks "for remittance purposes." Like cashier's checks, teller's checks are considered standard remittance instruments, they involve prepayment, they are the direct obligation of a bank, they are used by the remitter to pay an underlying obligation, the remitter prepays with cash or by having his/her account debited for the face amount of the instrument (plus a fee), and teller's checks get their commercial utility because of their cash-equivalence. They also get next-day funds availability under Reg. CC. Teller's checks, like cashier's checks, are collected through the interbank clearing system and they both came into the UCC together, as defined terms, in the 1990 Revision of Article 3. A teller's check is always signed by a bank as "drawer" of the instrument even though another financial company such as MoneyGram can be liable as "issuer."

5. Certified Check

One remittance instrument that has lost some popularity in recent years to the cashier's check and the teller's check is the certified check. The term is defined in UCC 3-409(d) as an ordinary check that is "accepted" in writing by the bank on which it is drawn. The term "accepted" means the drawee bank's signed engagement to pay the draft as presented. The acceptance must be written on the face of the check and signed by an authorized agent for the bank. The nonbank drawer of the check also remains secondarily liable, but the bank's written acceptance on the face of the check is what gives the certified check its market value/cash-equivalence. Reg. CC makes it clear that the bank certifies not only the genuineness of the drawer's signature, but also that the bank has obtained prepayment from the remitter, normally through a debiting of the remitter's deposit account. 12 CFR § 229.2(j). As with all remittance instruments, the issuer/drawer's contemporaneous receipt of value from the remitter is critical. Although certified checks remain an important remittance instrument, I understand they were not a product sold by MoneyGram.

6. Money Order

The term "money order" is not defined in either the UCC or Reg. CC. A "money order" is defined by Black's Law Dictionary (10th ed. 2014) as "a negotiable draft issued by an authorized entity (such as a bank, telegraph company, post office, etc.) to a purchaser, in lieu of a check, to be used to pay a debt or otherwise transmit funds on the credit of the issuer." Retail money orders are typically purchased at nonbank retail locations such as convenience stores, by individuals in relatively small amounts. The issuer/drawer of a retail money order may be either a bank or a nonbank such as MoneyGram in the present case. A bank money order is a teller's check under another name. With respect to money orders, the instrument has long been characterized as a "one-check checking account" for use by the remitter in paying his/her

creditor. In most cases, the money order is prepaid by the remitter in cash, and thus becomes a prefunded cash-equivalent in the remitter's hands, with an indicated payee and amount imprinted on the instrument. Unlike cashier's checks and teller's checks, retail money orders do not get next-day funds availability under Reg. CC, although retail money orders are still considered by the banking industry as cash-equivalents because they are prefunded.

Although the term "money order" is not separately defined in the UCC, the drafters of the statute explain the instrument in Comment 4 to UCC 3-104:

> "Money orders'' are sold both by banks and nonbanks. They vary in form and their form determines how they are treated in Article 3. The most common form of money order sold by banks is that of an ordinary check drawn by the purchaser, except that the amount is machine impressed. That kind of money order is a check under Article 3 and is subject to a stop order by the purchaser-drawer as in the case of ordinary checks. The seller bank is the drawee and has no obligation to a holder to pay the money order. **If the money order falls within the definition of a teller's check, the rules applicable to teller's checks apply**. Postal money orders are subject to federal law. [Emphasis added.].

In short, under the UCC, money orders can be many things, including teller's checks.

7. <u>**Traveler's Check**</u>

The term "traveler's check" is defined in UCC 3-104(i) as "an instrument that (1) is payable on demand, (2) is drawn on or payable at or through a bank, (3) is designated by the term 'traveler's check' or by a substantially similar term and (4) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument." A traveler's check is a cash-equivalent, based on prepayment by the remitter/traveler. The obligor/issuer of traveler's checks may be a bank or a nonbank financial services company such as Western Union. The remitter is protected from loss of the instrument where it has not been countersigned. The unique aspect of the traveler's check is the countersignature requirement at the time it is cashed. It gets next-day availability under Reg. CC.

8. Agent Check

As a matter of industry practice, some remittance instruments are labeled as "agent checks" to designate that a particular bank is serving as agent for a nonbank issuer/drawer of the instrument. These "agent checks" are typically in the form of money orders, with prepayment by the remitter indicated. The term "agent checks" is not defined in either the UCC or Reg. CC, but in my opinion they clearly qualify as remittance instruments because they share their core characteristics, including prepayment.

9. Postal Money Order

Postal money orders are like bank money orders except that the issuer is the U.S. Postal Service rather than a bank. They are subject to special federal regulations. Like other remittance instruments, postal money orders are sometimes designated as two types: domestic and international. They get expedited funds availability under Reg. CC.

B. The Official Checks at Issue in This Matter are Remittance Instruments

Based upon review of the pleadings and documents I received, it is my opinion that both "money orders" and MoneyGram "Official Checks" at issue in this case fit the definition of "remittance instruments" like a glove. Both products are prepaid by a remitter, which makes them cash-equivalents. In both cases, no funds are "pulled" from the remitter's checking account when the instruments are presented for payment, as is the case with standard bank checks. In both cases, after receiving payment in cash or by debiting the remitter's deposit account, the seller of the instrument issues the money order or official check that reflects the value of the payment that is remitted by the customer. In both cases, MoneyGram is directly liable, as issuer/drawer, for the value that has been prepaid. The only substantive difference between retail money orders and Official Checks is the larger size of official check transactions (as a matter of company policy, MoneyGram retail money orders are generally limited to $1,000), and the fact

that retail money orders are sold at retail nonbank establishments while Official Checks are outsourced and sold at financial institution locations. Otherwise, they are similar instruments.

Conversely, it is my opinion that ordinary, non-prepaid bank checks are **not** remittance instruments. (Under standard banking industry practice and understanding, the term "bank checks" is synonymous with "checks." A leading treatise, *Brady on Bank Checks,* uses the terms interchangeably.) With respect to such instruments, in a typical transaction the drawer is a nonbank debtor who is liable on the instrument if it is dishonored, but the drawee bank has no direct obligation on the check. The payee (or a third-party holder) deposits the check, which is then collected through the interbank collection system. Upon presentment, funds are "pulled" from the drawer's deposit account. There is no prepayment of ordinary, uncertified checks, nor is there any remitter. Since payment of ordinary bank checks is highly conditioned at presentment, they are the antithesis of "cash-equivalents." In short, standard bank checks are drawn on a bank and collected through the interbank check collection system, but they are not "remittance instruments."

C. The FDA is Remedial Legislation that Should be Construed Broadly to Include all Remittance Instruments, in order to Promote its Underlying Purposes

The Federal Disposition of Abandoned Money Orders and Traveler's Checks Act (FDA), enacted in 1974 and codified at 12 U.S.C. §§ 2501-2503, establishes escheat priority rules for **all** remittance instruments. It covers "any sum [that is] payable on a money order, traveler's check, or similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable...." If the books and records of such an organization show the state in which an instrument was purchased, "that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;...."

The immediate purpose of the FDA was to overturn *Pennsylvania v. New York*, 407 U.S. 206, decided in 1972, with respect to remittance instruments such as money orders. The Supreme Court decision gave New York priority over Pennsylvania to abandoned Western Union money orders. Under federal common law prior to enactment of the FDA in 1974, New York had priority because it was the state of Western Union's incorporation, even though Pennsylvania was the state where the purchase of the money orders took place. In direct response to the 1972 decision, in 1973 Senator Hugh Scott of Pennsylvania introduced S. 1895, which was the escheat legislation that was to become the FDA. He inserted into the Congressional Record the overarching rationale of the legislation:

> The difficulty with the Supreme Court's decision is that in the case of traveler checks and commercial money orders where addresses do not generally exist large amounts of money will, if the decision applies to such instruments, escheat as a windfall to the state of corporate domicile and not to the other 49 states where purchasers of travelers checks and money orders actually reside . . . Finally, Congress should note that the problem to which this bill is directed is a matter of important public concern in that the bill would, in effect, free for distribution among the states several million dollars in proceeds from abandoned property now being claimed by one state. The bill is eminently fair and equitable because it would permit the state where a traveler's check or money order was purchased and which is the state of the purchasers' actual residence in over 90% of the transactions to escheat the proceeds of such instruments…." 119 Cong. Rec. at S9750.

Senator Scott's views were also incorporated into the recitals in the final legislation, which are now codified in section 1 of the FDA, at 12 U.S.C. § 2501:

> The Congress finds and declares that—
>
> (1) 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;

> (2) a substantial majority of such purchasers reside in the States where such instruments are purchased;
>
> (3) 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;
>
> (4) it is a burden on interstate commerce that the proceeds of such; instruments are not being distributed to the States entitled thereto; and
>
> (5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

In short, while the *immediate* purpose of the FDA was to overturn the 1972 Supreme Court decision, the *overarching* purpose was to eliminate a windfall that unfairly benefitted corporate domicile states, to the detriment of states where the abandoned money orders, traveler's checks and similar instruments had been sold. Eliminating a windfall is a public policy goal of the law of escheat, just as is its consumer protection goal. The FDA was intended to bring certainty to an issue that had given rise to much escheat litigation over the years.

The principle of *ejusdem generis* (*i.e.*, of the same kind) is a staple of statutory construction. That principle is directly applicable to the present case. The statute begins by stating its scope: "Where any sum is payable on a money order, traveler's check or other similar written instrument…." Unless the plain language of the statute otherwise prohibits it (which is not the case here), the catchall word "similar" at the end of the series should be broadly construed to effectuate the underlying purpose of the statute, *i.e.*, the elimination of an abandoned property windfall. As discussed above, all remittance instruments have core common characteristics such as prepayment, financial entity liability, and cash-equivalence. Money orders and traveler's checks fit comfortably under the umbrella of "remittance instruments."

These common denominators are shared by money orders and traveler's checks as "similar instruments." If Congress identified money orders and traveler's checks for coverage under the FDA, it follows that other members of the family of remittance instruments such as cashier's checks and teller's checks should also be covered under the FDA as "similar written instruments." They are all negotiable instruments covered by the UCC. Traveler's checks have a unique characteristic of required countersignatures at the time of encashment, yet the statute expressly includes traveler's checks because, in spite of the countersignature requirement, they still share the core characteristics—particularly prepayment—of all remittance instruments. The umbrella is wide, given the basic purpose of the statute.

III. CONCLUSIONS CONCERNING MONEYGRAM OFFICIAL CHECKS AT ISSUE IN THIS CASE

A. All of the Official Checks at Issue in This Case are Money Orders or "Similar to" Money Orders and Traveler's Checks Under Generally Accepted Usage of Those Terms in Banking Practice.

For escheat purposes, MoneyGram reports its "money order" product to Pennsylvania, the state of sale. Petrick 36:18-20. Presumably, it does this because of the mandate imposed by the plain language of the FDA. By contrast, MoneyGram's product manager, Eva Yingst, describes in her deposition the "official check umbrella" under which MoneyGram markets four specific types of instruments: "agent checks," "agent check money orders," "teller's checks" and "cashier's checks." Yingst 36:15-21; 92:22-93:7; 101:6-14; 188:10-189:2; and exhibit Yingst-11. At page 183 of her deposition, Ms. Yingst concedes that there are no specific instruments designated as "Official Checks," instead, the "official check umbrella" includes specific instruments called agent checks, money orders, teller's checks and cashier's checks. The "umbrella" term "Official Checks," therefore, is simply a marketing label. Yingst 101:6-14.

In my opinion, the Official Checks marketed by MoneyGram as "agent checks" or "agent checks money orders" are literally "money orders" such that they are subject to the FDA disposition rules by the plain language of the statute. By way of support, in one sample contract, MoneyGram's predecessor, Travelers Express Company, even expressly stated that agent checks "may be used as money order" at the agent's choosing. See Exhibit Yingst-14. Next, even assuming that the other Official Checks, including teller's checks, do not qualify literally as money orders, they are "similar to" money orders because they share the same core characteristics of money orders, travelers checks and other remittance instruments: (1) the teller's checks, like the other Official Checks, are prepaid or "prefunded" by the remitter; (2) upon sale of the instrument, the obligation to the creditor shifts from the remitter to an institutional obligor; (3) the instrument is widely accepted by creditors as "near cash;" (4) the instrument is collected through the interbank clearing system; and (5) having the instrument paid from MoneyGram's account increases the risk of abandonment. Another point of similarity is that all remittance instruments replace the conditionality of the ordinary bank check.

A further strong similarity between Official Checks and money orders is reflected in the way the instruments are sold. For example, in the case of MoneyGram's "retail money orders," which are purchased from a participating MoneyGram location (usually a retail store), the customer/remitter pays a transaction fee and prepays the value in cash required to be sent to the creditor. MoneyGram becomes liable for the preprinted value of this retail money order, with the remitter now out of the picture after delivering the retail money order to the indicated payee. Money orders are collected through the interbank collection system. They are ultimately presented to MoneyGram's drawee bank, and paid. On pages 156-157 of her deposition

transcript, Ms. Yingst concedes that the remitter's prepayment of the instrument in cash is the same or "similar" for both MoneyGram money orders and teller's checks.

The sales transaction is structured the same way for instruments under the Official Check umbrella, which are purchased by the remitter from a financial institution that has contracted with MoneyGram. As with a retail money order, the customer buying an Official Check from a financial institution pays a transaction fee and pays the preprinted value of the official check. After receiving payment, the seller of the Official Check issues an instrument that is preprinted with the value of the payment remitted by the customer. MoneyGram is liable for the preprinted value of the Official Check. Finally, like retail money orders, Official Checks are collected through the interbank collection system.

There are some operational, marketing and nomenclature differences between Official Checks and retail money orders: (1) retail money orders are sold at retail outlets like 7-Eleven, while Official Checks are sold at financial institutions that use MoneyGram as a vehicle for outsourcing these products; (2) MoneyGram retail money orders are generally limited to $1,000 per transaction while official check products have no such ceilings; (3) a retail money order is considered a "one-shot checking account" by an unbanked consumer who pays with cash, while an official check is usually drawn on a bank account established by MoneyGram out of which the purchase price can be debited; and (4) the labeling/nomenclature are different. In my opinion, the similarities between retail money orders and Official Check far outweigh the differences.

The most notable outcome in the Yingst deposition is her admission that the term "official check" is nothing more than a marketing label. Yingst 181:16-182:2 and 183:1-7. MoneyGram and its financial institution customers seem to prefer the label of "Official Checks"

to "money orders," "teller's checks" or "cashier's checks" because it sounds more "official." Yingst 181:16-182:2. Whatever label is put on a check issued by a bank (according to Ms. Yingst in her deposition the physical labeling of an instrument can be done by the seller of the instrument, Yingst 413:6-14), however, the underlying instrument still carries the legal status of a cashier's or teller's check under the UCC and Reg. CC, where the statutory definitions focus upon who is the drawer and who is the drawee of the instrument.

In its Bill of Complaint against Pennsylvania and Wisconsin, filed in May 2016, Delaware tries to avoid the impact of the FDA, a statute it apparently had ignored.[3] It argues that Official Checks were "known and recognized monetary instruments" in 1974 when the FDA was enacted, yet Official Checks were not included in the scope of the federal statute like money orders and travelers checks. But it is not surprising that the FDA does not explicitly describe Official Checks as covered instruments. Nor does it describe cashier's checks. The statute only mentions money orders and traveler's checks, then uses the catchall phrase "similar written instruments" under the *ejusdem generis* principle. Moreover, Official Checks were not included in the statutory language since the term "Official Check" is not a recognized UCC instrument but rather is simply an umbrella term, a convenient label, used by MoneyGram for marketing purposes. The way the federal statute is structured, the issue is whether the recognized negotiable instruments covered by the marketing umbrella—agent checks, cashier's checks and teller's checks—are in fact money orders or "similar to" money orders and traveler's checks. Based on their shared core characteristics, they are indeed money orders or "similar" instruments.

[3] This is not surprising, given that noted commentators in the area downplay the significance of the FDA. See Millar, Heyman and Noel, "*Building a Better Unclaimed Property Act*," The Business Lawyer, Summer, 2018)(minimizing the federal statute in footnote 14 as "the **only** exception that has been adopted to the jurisdictional rules established by the [Supreme Court]" (emphasis the authors'). Tellingly, the authors don't mention the "similar written instruments" language found in the FDA.

Delaware alleges that "Official Checks differ from money orders in a number of respects, including: (i) Official Checks are not labeled as money orders, (ii) Official Checks are generally issued by financial institutions and not convenience stores and similar small businesses, (iii) Official Checks are capable of being issued in substantially larger dollar amounts than money orders, and (iv) Official Checks are treated differently under various [unnamed] federal regulations relating to monetary instruments." It is notable that first on Delaware's "dissimilar" list is MoneyGram's use of the label "Official Checks" on the negotiable instruments that it issues. What Delaware is seeking to do is to reify the label, in order to make the underlying instruments "dissimilar" to money orders. In my opinion, that reification does not work. In spite of the "Official Check" label, the MoneyGram "Agent Checks" are in fact money orders, while the cashier's checks and teller's checks are, **at a minimum**, "similar to" money orders and traveler's checks because of their common core characteristics—particularly prepayment, institutional obligor, and acceptance in the market as cash-equivalents.

B. As a Matter of Banking Industry Practice and Understanding, the Term "Third Party Bank Check" Does Not Mean a Teller's Check

The FDA covers "any sum [that] is payable on a 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--...." Delaware asserts that most of MoneyGram's Official Checks are in fact teller's checks under Section 3-104(h) of the UCC, and that teller's checks are excluded from the priority rules of the FDA because they qualify as third party bank checks. I disagree.

Teller's checks had become a well-recognized form of remittance instrument by the 1960's and early 1970s, when the FDA was drafted. The issue that generated most litigation at the time was whether remitters of money orders and teller's checks could stop payment on those

instruments. The leading case dealing with teller's checks is *Malphrus v. Home Sav. Bank,* 44 Misc.2d 705, 254 NYS2d 980 (Albany County Ct.), a 1965 New York decision which held that the remitter could not stop payment on a teller's check because, as with certified checks, the teller's check was a cash-equivalent. The leading law review commentary analyzed the case law in "*Personal Money Orders and Teller's Checks: Mavericks under the UCC*," 67 Colum. L. Rev. 524 (1967). Teller's checks had substantial visibility during that era, as they still do. In September 1974, the Federal Reserve Board reported that remittance instruments (referred to as "certified and officers' checks, etc.") totaled $9.637 billion in aggregate value. Like certified and cashier's checks, teller's checks were well-established negotiable remittance instruments.

If Congress had intended to exempt a single type of remittance instrument from the FDA priority rules, as Delaware contends, surely the parenthetical phrase would have identified the specific remittance instrument category that was to be excluded so that the phrase would read "(other than a teller's check)" instead of "(other than a third party bank check)." When Congress wanted to refer to a specific type of remittance instrument, it did so in the statute, i.e., "money order" and "traveler's check." Yet neither the statute as written nor the legislative record includes any reference at all to teller's checks. One searches in vain for a rationale that would support exclusion of a single type of remittance instrument, continuing the "windfall" that Senator Scott was seeking to eliminate. That is the way that Delaware reads the statute, but that is not the way the parenthetical phrase was written by Congress. In short, it is my opinion that the FDA covers all remittance instruments, with no stand-alone exception for teller's checks.

This is a case where a number of principles of statutory construction converge. The first is that remedial legislation should be broadly construed to effectuate the purpose of the statute. If ever there was remedial legislation, the escheat bill introduced by Senator Scott in 1973 is it.

The perceived mischief was a priority rule that escheated abandoned remittance instruments to the favored few states of incorporation instead of the state where the purchase of the instruments took place. Following the 1972 decision of the Supreme Court in *Pennsylvania v. New York,* which affirmed the "federal common law" priority rule, the Scott bill was introduced to curtail the mischief by reversing the priority rule. The plain language of the Scott bill sought to give the benefit of the new rule to all remittance instruments by including money orders, traveler's checks and "other similar written instruments." Use of the catchall word "similar" allowed all other remittance instruments to fill the gap. The goal was to avoid the kind of "windfall" enjoyed by a few states like Delaware. The same principle that invites a great variety of remittance instruments to be considered "similar" to money orders and traveler's checks, requires a narrow construction of the parenthetical term "third party bank checks," which is an exception to the general rule.

Reading the parenthetical exception to mean teller's checks, thus lopping off an entire subset of remittance instruments from the scope of the statute, is a **drastic change** in the statute that would require some explanation from the drafters. It is hardly a mere "technical" change, as assumed by the Senate Committee on Banking, Housing, and Urban Affairs. Such a reading totally undercuts the remedial purpose of the FDA.

A closely related principle of statutory construction is that, in some cases, statutory silence can be just as strong as affirmative language. In his seminal law review article entitled *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947), Justice Felix Frankfurter offers a warning: "One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say." This principle applies directly to the present case, where there is no mention of teller's checks in the

text of the statute or anywhere in the legislative history. The silence is deafening. Teller's checks were (and are) an important remittance instrument. If Congress had wanted to suddenly remove teller's checks from the scope of the FDA, it would have said so plainly in the parenthetical text, *i.e.*, by referring to the well-understood term "(teller's checks)" and not "(third-party bank checks)."

Another principle of statutory construction is that, if the language is clear enough, the analysis ends there. For example, if the FDA stated that remittance instruments "(other than teller's checks)" were covered by the escheat priority rule, it would make no difference that the purpose of the statute conflicted with the plain language. Teller's checks would be excluded. But the FDA legislation does not exclude teller's checks, only "third party bank checks." Moreover, if Congress intended to exclude teller's checks from the FDA, presumably it would have used the accepted commercial law term "teller's checks."

A final principle of statutory construction is that, if possible, a statute should not be construed to yield an absurd result. In the present case, neither the text nor the legislative history of the FDA mentions any exclusion of teller's checks from the scope of the FDA. There is no statutory plain language that would require teller's checks to be excluded. There is no mention in the text or legislative history of any operational problems that would require teller's checks to be excluded. The exclusion of teller's checks as "third-party bank checks" is **drastic legislation** that severely undercuts the "windfall" purpose of the Scott bill, yet there is no warning of this conflict in the text or legislative record. In my opinion, that is an absurd result.

In his letter dated September 29, 2015, Delaware Escheator David Gregor contends that teller's checks issued by MoneyGram are exempt from the priority rules of the FDA because they qualify as "third party bank checks." He asserts that this conclusion is supported by the

definition of teller's checks in the UCC and Reg. CC as checks drawn by one bank on the funds of a second bank—the drawee bank. Under his analysis, the drawee bank is the "third party" referred to in the statutory phrase "third party bank check."

In my opinion, however, the "third party" in the parenthetical is not the drawee bank in a teller's check as Delaware contends, but is the payee of an ordinary check who receives a transfer of funds from the drawer. As discussed below, this conclusion is supported by the United States Treasury Department's own definition of "third party payment services": "Any mechanism whereby a deposit institution **transfers a depositor's funds to a third party** upon the negotiable or non-negotiable order of the depositor may be called a third-party payment service. Checking accounts are the most common type of third-party payment services." [Emphasis added.] It is the transmission of funds, through a checking account, from the drawer of an ordinary check to a payee, that gives rise to the "third party." In short, the "third party" is the transferee of the funds in an ordinary check transaction, not the drawee bank in a teller's check transaction. Mr. Gregor's drastic construction not only focuses on the wrong "third party", but completely undercuts the purpose of the FDA—to eliminate a windfall. In my opinion, the term "third party bank check" means an ordinary check, as set forth in detail below.

C. As Used in the Federal Disposition Act, the Term "Third Party Bank Checks" Means Ordinary Checks That Are Not Prepaid

At the same time that Senator Scott was introducing his FDA to deal with escheatment priorities and to eliminate the "windfall" enjoyed by corporate domicile states, Congress was also working on a significant "checking account deregulation" project that had an entirely different focus. In 1970 President Nixon organized the Commission on Financial Structure and Regulation, popularly known as the Hunt Commission. In December 1971, a first draft of the Hunt Commission report was completed. The final report, titled *The Report of the President's*

Commission on Financial Structure and Regulation, was filed in July 1972. In its appraisal of the report on July 23, 1972, the Wall Street Journal stated that the charge of the Commission was to review the "existing financial and regulatory structure."

The December 1971 version of the Hunt Commission report included recommendations on a variety of regulatory issues:

* Regulation of interest rate ceilings on deposits, including demand deposits, *i.e.*, checking accounts;
* Regulation of the functions of depositor financial institutions, covering savings and loan associations, mutual savings banks, commercial banks and credit unions;
* Chartering and branching of depository financial institutions;
* Deposit reserve requirements for thrifts and credit unions;
* Taxation of financial institutions; and
* Deposit insurance.

A critical aspect of the 1971 report is its emphasis on "third party payment services." On page 8, the drafters of the report state:

> It is essential, for example, that *all institutions offering third party payment services* have the same reserve requirements, tax treatment, interest rate regulation, and supervisory burdens. The critical need for competition on equal terms causes the Commission to emphasize the interdependence of the recommendations and warn against the potential harm of taking piece-meal legislative action. [Emphasis added, here and below.]

In Part II of the report, the first major recommendation involves the deregulation of interest rate ceilings on deposits. One such recommendation, at page 23, is to give standby power to the Federal Reserve Board including the power to "establish for a period of five years ceiling differentials between institutions providing *third party payment services*." The report

then defines the critical term in footnote 1: "Third party payment services, as here defined, include any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor. *Checking accounts are one type of third party payment service.*"

On page 27 of the report, the Hunt Commission recommends that the prohibition against the payment of interest on demand deposit accounts be retained: "Nonetheless, the Commission believes that its recommendation against the removal of the prohibition should be reviewed in the future. There are important trends in *the use of demand deposits and other third party payment services* that should be noted."

Another important recommendation, found at page 33, is that "under specified conditions, savings and loan associations and mutual savings banks be permitted to provide third party payment services, including checking accounts and credit cards, to individuals and non-business entities only....The Commission believes deposit thrift institutions should not be permitted to offer third party payment services for business and professional purposes. Such powers should be obtained and exercised only under a commercial bank charter."

On page 43, the report emphasizes that commercial banks "are now the only type of institution generally *permitted to offer unrestricted third party payment services*. That is, they operate the mechanism for check funds transfer and, in their lending and investing operations, create money. In all other activities, they compete with other financial and non-financial institutions. ... As stated above, the Commission believes that the public would benefit from increased competition within the financial system."

In its recommendations regarding deposit reserve requirements (page 65), the Commission recommends that membership in the Federal Reserve System be made mandatory

for all state chartered commercial banks "and for all savings and loan associations and mutual savings banks that offer *third party payment services*." In short, variations of the phrase "third party payment services" was on the lips of many people working on the Hunt Commission project in the early 1970s. This phrase was consistently and strongly linked to treatment of ordinary checking accounts.

In addition to these multiple and consistent references in the Hunt Commission report equating "third party payment services" with ordinary checking accounts, other contemporary sources make the same point. Good examples include Robert E. Knight, *The Hunt Commission: An Appraisal,* in the Wall Street Journal, July 3, 1972, at 4: "To ensure that financial institutions will be responsive to economic and social needs of the future, the commission generally recommended that regulatory barriers be lowered and that increased reliance be placed on competition. Thus nonbank depository institutions would be permitted to offer *third-party payment privileges (checking accounts, automatic bill payment, credit cards.*" James L. Rowe, in a Washington Post article dated January 13, 1973, at G2, makes the same point: *"'Third party payment' today means essentially a checking account although bank credit cards are rapidly rising in importance*." [Emphasis added.]

On September 24, 1973, the U.S. Department of the Treasury published its own summary of the Hunt Commission report entitled *Recommendations for Change in the U.S. Financial System.* That summary contains a glossary of key terms, including (at page 44) the term "*THIRD-PARTY PAYMENT SERVICES*." The glossary defines that critical term: "Any mechanism whereby a deposit institution transfers a depositor's funds to a third party upon the negotiable or non-negotiable order of the depositor may be called a third-party payment service. *Checking accounts are the most common type of third-party payment services*." [Emphasis

added.] The glossary in which the term "third party payment services" is defined to mean ordinary checking accounts was published by the Treasury Department on September 24, 1973. When it was published, the general counsel of Treasury was Edward P. Schmults, who undoubtedly was familiar with the Treasury document and the recurrent term "third party payment services."

At this very same time, it was none other than Mr. Schmults who was working with the Senate Banking Committee to add Treasury Department language exempting "third party bank checks" from the scope of the FDA. On November 1, 1973, Mr. Schmults wrote the Senate Banking Committee that the language of the Scott bill might be "broader than intended by the drafters." On behalf of the U.S. Treasury Department, he suggested that the bill add a "clarifying" amendment that excluded from its scope "third party payment bank checks." The Senate Banking Committee accepted the Treasury Department's "technical suggestions," although the Committee deleted the word "payment" in the final text adopted—namely, third party bank checks. By these drafting decisions and related text changes, the broader term "third-party payment services" used by Treasury in its glossary morphed into the more narrow term, "third party bank checks" but for good reason, since the U.S. Treasury definition of third party payment services included payment instruments such as credit cards, as well as demand deposits including checking accounts. In the context of the FDA clarification, Treasury's proposed clarifying language was sound. Treasury properly focused on the impact of the FDA's original language and its potential effect solely on ordinary checks, since credit cards would clearly fall outside the scope of the FDA language without needing any additional exemption language. It might be argued that deletion of the word "payment" as well as the substitution of bank checks for the word "services" slightly weakens the linguistic bridge between Treasury's comprehensive

glossary definition of "third-party payment services" (*i.e.*, ordinary checking accounts along with other payment services such as credit cards) and "third party bank checks" (the final language in the FDA, as amended.). Nonetheless, the strong connection remains. Indeed, the legislative record makes it clear that other types of third party payment services, such as credit cards, are not covered by the FDA. The result is that the term "third party bank checks" means ordinary checks drawn on ordinary demand deposit accounts, not remittance instruments like teller's checks.

Another element of legislative history illustrates why Mr. Schmults equated third-party bank checks with ordinary, non-prepaid checks. When Senator Scott introduced S. 1895, he stated in the Senate Record that his bill was intended to provide uniform priority rules governing disposition of the proceeds of "abandoned travelers checks, money orders and *similar instruments for the transmission of money.*" 119 Cong. Rec. at S9750 [Emphasis added]. It seems likely that Mr. Schmults saw that the Scott bill was overbroad because ordinary checks from ordinary checking accounts, just like remittance instruments, are "instruments for the transmission of money." Therefore, it was necessary to explicitly carve out ordinary checks from the scope of the FDA so that his bill would be limited to remittance instruments, i.e. "traveler's checks, money orders and similar instruments" that were prepaid. In Mr. Schmults' view, ordinary checks should remain separate from remittance instruments in the legislative scheme.

None of the many state abandoned property laws define the term "third party bank check" as a teller's check. By contrast, at least one jurisdiction—the State of Washington—has enacted its version of the Uniform Unclaimed Property Act to define the term "third party bank check" to mean an ordinary check drawn on an ordinary checking account: "'Third party bank check'

means 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." Wash. Rev. Code § 63.29.010(17). The drawer of such a check—a business or individual—is the party primarily liable. In my opinion, the drawee bank is "secondarily liable" under the UCC rules if (1) it holds the item beyond its midnight deadline, (2) the item is forged or counterfeit such that it is not "properly payable," (3) the item has been altered or bears a forged endorsement such that the drawee bank has a warranty claim against upstream banks in the collection stream, or (4) the item is wrongfully dishonored.

Reading "third party bank checks" to mean "teller's checks" totally undercuts the purpose of the FDA because it carves out an important type of remittance instrument whose history long predates the early 1970s. It also leaves a large piece of the "windfall" in place. There is nothing "technical" about such a massive carve-out, and there is no indication in the legislative history that the parenthetical phrase was intended to do anything but "clarify" the scope of the FDA. In my opinion, the purpose of the parenthetical was to eliminate any potential confusion between the two legislative "check" projects that were being considered by Congress at the same time.

Delaware contends Congress was concerned that teller's checks posed a particular problem of "bifurcated" recordkeeping obligations, that is, with respect to abandoned teller's checks, the drawer bank and the drawee bank would need to communicate with one another to determine which checks were abandoned. Yet that same operational issue applies to money orders, where the selling agent has no way of comparing records with the drawee bank because of "bifurcated" recordkeeping. My review of the legislative history reveals not one whiff of evidence that Congress or Mr. Schmults intended to single out teller's checks as the only remittance instrument not covered by the FDA. The argument that "third party bank checks"

meant teller's checks did not surface until the Delaware Escheator, Mr. Gregor, advanced this position in a letter dated September 29, 2015.

The legislative record from 1973 never mentions any "bifurcated" recordkeeping problems that had arisen with respect to teller's checks. Mr. Schmults never mentions it. The UCC never mentions it. In fact, it is my opinion that all types of remittance instruments are covered by the FDA, not just teller's checks. Cashier's checks are covered. Money orders are covered. Official Checks are covered. Agent checks are covered. Traveler's checks are covered. Certified checks are covered. If Congress were carving out teller's checks as exempt from the FDA, surely it would have said so. Instead, Congress accepted Mr. Schmults' "scope" amendment because it was described as "technical" in nature, a "clarification" of the law, not a drastic change like the exemption of a large and established class of remittance instruments.

As a matter of banking industry practice and understanding, the term "third party bank checks" also means twice-endorsed checks. An ordinary bank check is payable "to the order of" a payee. In most cases, the payee will deposit the check, run it through bank clearings, and present it to the drawee bank, which will pay the item. Sometimes, however, the payee of a check will endorse the item to a third-party holder who may qualify as a holder in due course under the law of negotiable instruments. In this scenario, it is the third-party holder who will endorse the check a second time and then deposit the check and get the instrument paid (or returned). As a matter of banking industry practice and understanding, such a check is called a "third-party" check and is also known as a "twice-endorsed" check. The "third party" in this scenario is simply the payee's transferee under the law of negotiable instruments. Similarly, the "third party" in the phrase "third party payment services," used by Treasury in its summary of the Hunt Commission report, refers to the scenario where "a deposit institution transfers a

depositor's funds to a third party upon the negotiable or non-negotiable order of the depositor." In both scenarios, the "third party" is a transferee of the check. For a leading case finding that a twice-endorsed check was a "third party bank check", for purposes of posting a bond, see *United States v. Thwaites Place Associates,* 548 F. Supp. 94 (S.D.N.Y. 1982).

In the present case, Delaware seems to be arguing that a teller's check always involves a "third party" simply because two different banks are involved—a drawer bank and a drawee bank. In my opinion, that use of "third party" is very different from the other two defined uses of the term and provides no support for Delaware's argument that teller's checks are "third party bank checks" just because two banks are involved. Instead, the term "third party payment services" was well understood in 1973-1974 to mean a banking service under which ordinary checks were drawn on ordinary checking accounts in order to transfer deposited funds to a third party. Thus, the term "third party bank checks" simply means ordinary checks.

There is a further explanation of Mr. Schmults' exclusion of "third party bank checks" from the scope of the FDA. The escheat statute, with its focus on remittance instruments such as money orders and traveler's checks, occupied a field that had nothing to do with the legislative reforms that Congress was considering in the Hunt report for ordinary checking accounts. He saw the importance of keeping the two legislative efforts in separate compartments because, although both dealt with "checks," the legislative record does not indicate any concern that Senator Scott's efforts had any impact on, or were related to, the separate effort to deregulate ordinary checking accounts so thrift institutions could be on a more even playing field with commercial banks.

With respect to the legislative history of the FDA, Senator Scott's original bill, S.B. 1895, was introduced on May 29, 1973. It is important to note that the original Scott Bill

did not include the "third party bank check" language. Instead, the bill described its scope in unmistakably broad terms to include "any sum payable on a money order, travelers check, or similar written instrument on which a banking or financial organization or a business association is directly liable…."

It may be that even Delaware would concede that the escheat priority rules of the Scott bill, before Mr. Schmults' suggested changes, would cover a classic remittance instrument like a teller's check. The changes suggested by Mr. Schmults were described as "technical" in nature and it seems clear that he had no intent to suggest language that would exclude teller's checks from the priority rules. Instead, the statute as enacted by Congress should be read to keep the escheat priority rules as Senator Scott requested. The language in parentheses should not be read to exclude teller's checks, but to exclude "third party payment bank checks," which was slightly reshaped to be "third party bank checks," *i.e.*, ordinary bank checks that are drawn on ordinary checking accounts with no prepayment. Only in this way could the escheat priority rules cover all remittance instruments, while ordinary checks would be placed outside the scope of the FDA, where they belong.

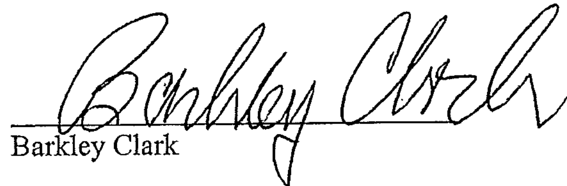
Money orders have long been considered by the banking industry to be "one-check checking accounts." See, e.g., *MoneyGram International, Inc. v. Commissioner of Internal Revenue*, 2014 WL 7795630 (U.S. Tax. Ct. 2014) (Tax Court uses that phrase to describe MoneyGram's retail money order business). Mr. Schmults may well have been concerned that ordinary (not one-shot) checking accounts would inadvertently be brought within the scope of the FDA, with unintended consequences. Because of this concern, he suggested the insertion of the parenthetical language to keep a strong separation between the two legislative efforts. Treasury described these efforts as "technical suggestions," not drastic substantive changes that

would exempt all teller's checks or any other class of remittance instruments from coverage by the FDA.

It is a venerable principle of statutory construction that two intersecting statutes should be construed in a way that harmonizes one with the other. In my opinion, reading the term "third party bank check" to mean ordinary checks from ordinary checking accounts, where funds are transferred to a payee and then perhaps to an additional holder under a second endorsement, is the only way to harmonize the two separate legislative efforts that engaged Congress in the early 1970s. In short, the "third party" in "third party bank checks" means a transferee of the drawer's funds, not a second bank on a MoneyGram teller's check.

Mr. Schmults wanted to keep the two legislative projects dealing with checks in their separate spheres: (1) the deregulation of ordinary checking accounts and (2) the priority rules governing escheatment of remittance instruments. Only in that way could harmony be preserved.

Dated: 9/24/18



Barkley Clark

EXHIBIT A: CURRICULUM VITA OF BARKLEY CLARK

Stinson Leonard Street LLP, Denver, Colorado

Barkley.clark@stinson.com

(303) 376-8418

EDUCATION

Amherst College (B.A. 1962)

Harvard Law School (LL.B. 1965)

CURRENT POSITION

Partner, Stinson Leonard Street LLP, Denver, Colorado; Member, Banking and Financial Services Practice Group

PRIOR POSITIONS

Partner, Shook Hardy & Bacon, LLP, Washington, DC, 1989-2006

Adjunct Professor of Commercial and Banking Law, Georgetown Law Center (2001-2003)

Adjunct Professor of Law, University of Kansas, 1990 – 1998

Adjunct Professor of Law, University of Virginia (2003-2006)

Visiting Professor of Law, University of Michigan, summer 1991

Professor of Law, National Law Center, George Washington University, Washington D.C., 1985-1989

Robert A. Schroeder Distinguished Professor of Law, University of Kansas, 1982-1985

Professor of Law, University of Kansas, 1972-1982

Associate Professor of Law, University of Kansas, 1969-1972

Visiting Professor of Law, University of Oregon, 1972

Visiting Professor of Law, University of Colorado, 1968

Practice of law at Holme Roberts & Owen in Denver, Colorado, from 1965-1969, with emphasis on commercial and banking law

LAW PRACTICE

My law practice has concentrated on various aspects of banking, commercial law and financial services. Subjects include deposit accounts and payment systems; product warranties under Article 2 of the UCC and the Magnuson-Moss Warranty Act; bank deposits, collections and payments under Articles 3 and 4 of the UCC, Regulation CC and Regulation J; negotiable instruments; warranties and disclaimers of consequential damages; check collections and returns; check fraud; check kiting; drafting of bank deposit agreements; documentary drafts; wire transfers under Article 4A of the UCC and FRB Reg. J; letters of credit under Article 5 of the UCC and the UCP; investment securities under Article 8 of the UCC; secured transactions under Article 9 of the UCC and related consumer credit legislation; bank regulatory problems; commercial and consumer compliance issues for financial institutions; deceptive trade practices; alternative payment systems; deposit account issues; check kiting litigation; check forgery issues; bank liability for fraud of customer; consultant to sellers of goods and financial institutions and their counsel around the country; frequent qualification as expert witness in commercial/banking law litigation in federal and state courts and before arbitration panels

TEACHING

My teaching interests have included commercial law, bank deposits, negotiable instruments, payment systems, consumer protection, federal regulation of banking, consumer financial services, creditors' rights and bankruptcy, sales and warranty liability, legislation, and local government; winner of six "best teacher" awards at the University of Kansas School of Law and the National Law Center, George Washington University; winner of "best lecturer" awards for the Colorado and Kansas Bar Review courses; since 1971, frequent speaker at legal seminars throughout the country sponsored by ALI/ABA, the UCC Institute, Practicing Law Institute, School of Banking of the South, Baton Rouge, American Bankers Association, Virginia CLE, the Banking Law Institute, National Association of Bankruptcy Trustees, International Factoring Association and other organizations, on subjects including banking law, deposit accounts and check collection, secured transactions, factoring, product warranties, wire transfers, letters of credit, UCC and bankruptcy; conductor of in-house seminars on commercial law and banking topics at large law firms such as Shearman & Sterling in New York; Akin Gump in Washington; Milbank Tweed in New York; and Mayer Brown in Chicago.

LOCAL GOVERNMENT/ PUBLIC POLICY

Served as member of the City Commission in Lawrence, Kansas for ten years (1973-1983) and served two terms as Mayor of Lawrence. Member of the Board of Directors of the League of Kansas Municipalities. Substantial intergovernmental work with Douglas County Commission. Taught Local Government Law at KU Law School and in the KU MPA program for 16 years. Written several law review articles on Kansas local government Law. Argued cases before the Kansas Supreme Court on local government law issues. Worked with the Kansas legislature on various aspects of local government law, including governmental tort immunity. Served as counsel to the KCK/Wyandotte County Consolidation Commission. Strong interest in the legislative process and public policy.

BAR AND OTHER PROFESSIONAL/CONSULTING ACTIVITIES

(Past and Present)

American Bar Association, Co-Chair of Committee on Article 9 of the UCC; American Law Institute and Uniform Law Commission, member of Special Committee to Redraft UCC Article 9; Reporter, The Business Lawyer, in its Annual Review of Secured Transactions; Board of Editors, The Banking Law Journal; Board of Editors, The UCC Law Journal; Board of Editors, Journal of Payment Systems Law, Special Consultant to the Federal Reserve Board (Equal Credit Opportunity and Truth-in-Lending); Special Counsel to the Uniform Law Commission (Uniform Consumer Credit Code); Member, American College of Consumer Financial Services Attorneys and American College of Commercial Finance Lawyers; Special Advisor to the Colorado, Nebraska and Kansas Legislatures on the UCC, the Consumer Credit Code, and deceptive trade practice legislation; Board of Directors, League of Kansas Municipalities; Associate Dean, University of Kansas School of Law; Director, Lawrence National Bank; consultant to major law firms, financial institutions, and the American Bankers Association on various aspects of commercial and banking law; special counsel to the Kansas Bankers Association in dealing with a wide variety of community banks and bank legislation; listed in Best Lawyers in America, from 1994.

PUBLICATIONS: BOOKS

(1) *The Law of Bank Deposits, Collections and Credit Cards* (co-authored by Barbara Clark). This treatise is published by Lexis/Nexis, one of the most important publishers of commercial law books in the country. The treatise is continuously supplemented. The book has become one of the two standard works in the field (along with Brady on Bank Checks), frequently cited by federal courts and state appellate courts. It discusses wire transfers, bank deposits and collections, payment finality, kiting, forged checks and other kinds of check fraud, impact of automation on bank deposits and collections, documentary collections, federal regulatory compliance issues, Regulation CC (in Chapters 7 and 8), electronic fund transfers, and related subjects such as letters of credit and bank setoffs. It also discusses bank liability for customer fraud, identity theft, money laundering, federal preemption, deposit account holds and setoffs, Truth in Savings, the Know Your Customer principle, Federal Reserve Board Operating

Circulars, adverse claims, and other deposit-side compliance issues. Chapter 24 of the treatise is devoted to remittance instruments. This treatise has been cited many times by federal and state courts.

(2) *The Law of Secured Transactions Under the Uniform Commercial Code* (co-authored by Barbara Clark). This treatise, also published by Lexis/Nexis, is supplemented tri-annually. It is also one of the standard works in the field, frequently cited by state and federal courts around the country. This book won the Rice Prize for Scholarship at the University of Kansas in 1981.

(3) *The Law of Product Warranties* (Revised Edition) (with C. Smith and Barbara Clark). This treatise is published by West Publishing Co., and is supplemented annually. It synthesizes the law of consumer and commercial product warranties, drawing on both Article 2 of the UCC and the Federal Magnuson-Moss Warranty Act. The book won the Rice Prize for Scholarship in 1985.

(4) *Cases and Materials on Consumer Protection* (1990) (with F. Miller). This casebook was published by Michie/Bobbs-Merrill as part of its "contemporary legal education" series.

(5) *Handling Consumer Credit Cases* (1972) (with J. Fonseca), published by Lawyers Cooperative Publishing Co.

(6) Volumes 2, 4 and 7 of the Kansas Statutes Annotated, Kansas Comments to the Uniform Consumer Credit Code, the Kansas Consumer Protection Act, and the Uniform Commercial Code (particularly Articles 3, 4, 5 and 9). These Comments, which appear after each section of the relevant statutes, contain comprehensive editorial analysis of the three statutes, written from the point of view of the drafter in the case of the U3C and the KCPA. The Comments, written for the Reviser of Statutes, are frequently relied upon by Kansas courts in construing the three statutes.

(7) PLI, *Warranties in the Sale of Business Equipment and Consumer Products,* 1980-1985.

(8) *Regulation CC: Funds Availability and Check Collection* (1988) (with Barbara Clark).

(9) PLI, *Letters of Credit and Banker's Acceptances.*

(10) *Truth In Savings: Legal Analysis and Compliance Strategies* (1992) (with Barbara Clark and Mark Hargrave).

(11) *Compliance Guide to Payment Systems* (with Mark Hargrave and Barbara Clark); this book, published by Lexis/Nexis, discusses all aspects of payment systems, including checks and electronic fund transfers). Chapter 7 of the book deals with remittance instruments.

(12) *Compliance Guide to Payment Systems for Credit Unions* (with Mark Hargrave and Barbara Clark), published by Sheshunoff/A.S. Pratt.

(13) *Check 21 Manual: A guide to Check Truncation Law and Electronic Payment Systems* (2004) (with Barbara Clark).

(14) *Clarks' Guide to Electronic Check Collection* (2006) (with Barbara Clark).

PUBLICATIONS: LAW REVIEW ARTICLES

(A number of these articles have been cited by a variety of appellate courts, including the United States Supreme Court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 629 (1974) (Justice Powell concurring)).

(1) *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355 (1973) (with J. Landers).

(2) *Preferences Under the Old and New Bankruptcy Act*, 12 Uniform Commercial Code Law Journal 154 (1979).

(3) *Suretyship in the Uniform Commercial Code*, 46 Tex. L. Rev. 453 (1968) (reprinted at 1 UCCLJ 303 (1969)).

(4) *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 Kan. L. Rev. 631 (1972).

(5) *Default, Repossession, Foreclosure and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 Ore. L. Rev. 302 (1972).

(6) *The FTC Holder Rule and UCC Article 2: The Law Is A Seamless Web*, 10 UCCLJ 119 (1977).

(7) *Oil and Gas Financing Under the Uniform Commercial Code*, 43 Denver L.J. 129 (1966).

(8) *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 UCCLJ 105 (1982).

(9) *Bank Exercise of Setoff: Avoiding the Pitfalls*, 98 Banking Law Journal 196 (1981).

(10) *UCC Articles 9 and 10: Some Problems Solved and Some Problems Created*, 38 U. Colo. L. Rev. 99 (1965).

(11) *The Agricultural Transaction: Livestock Financing*, 11 UCCLJ 95 (1978).

(12) *The Agricultural Transaction: Equipment and Crop Financing*, 11 UCCLJ 15 (1978) (reprinted in 1 Ag. L.J. 172 (1979)).

(13) *The Foreclosing Creditor under Article 9: Perilous Pitfalls Aplenty*, 8 UCCLJ 291 (1976).

(14) *Beefing up Product Warranties: A New Dimension in Consumer Protection*, 23 Kan. L. Rev. 567 (1975) (with M. Davis; winner of Rice Prize for Scholarship).

(15) *The Uniform Consumer Credit Code: Assessing Its Impact Upon One State and Plugging its Loopholes*, 18 Kan. L. Rev. 277 (1970).

(16) *The Revolution in Consumer Credit Legislation*, 45 Denver L. J. 679 (1968).

(17) *Lemon Aid for Kansas Consumers*, 46 Journal of the Kansas Bar Association 143 (1977).

(18) *Wyatt Earp and the Winelist: Is a Restaurant an 'Open Saloon'?*, 47 J.K.B.A. 63 (1978).

(19) *Interest Rates in Kansas: The Decline and Fall of Ezekiel*, 49 J.K.B.A. 81 (1980).

(20) *The New Article 9 Amendments*, 44 J.K.B.A. 131 (1975).

(21) Book Review, *Handbook of the Law Under the UCC*, by James W. White and R. Summers, 58 Cornell L.R. 1273 (1973).

(22) Monthly Newsletter, *Clarks' Secured Transactions Monthly*, published by Lexis/Nexis and co-authored with Barbara Clark. This newsletter highlights developments in asset-based lending, both real estate and personal property.

(23) Monthly Newsletter, *Clarks' Bank Deposits and Payments Monthly*, published by Lexis/Nexis and co-authored with Barbara Clark. This newsletter focuses on various aspects of payment systems, including bank deposits and collections.

(24) Survey, *Secured Transactions*, Business Lawyer, August, 1988, and August, 1989.

(25) *Scheduled Debt Payments as Preferences: Paradigm of the Plain Meaning Rule*, 1 Jour. of Bankr. Law and Practice 7 (1991).

<u>EXHIBIT B</u>: EXPERT WITNESS ENGAGEMENTS OF BARKLEY CLARK IN THE LAST FOUR YEARS

(1) *Interaudi Bank v. Harco Industries, Inc. and Bank of America, N.A.*, Docket No. BER-C-338-14 (N.J. Super. Ct 2015) (engaged as an expert, with written report, on behalf of Bank of America regarding bank's alleged violation of standard industry practice in late return of checks).

(2) *Chau v. Capital One, N.A.*, E.D.La. Case No 16-14400, Sect. E (2017) (engaged as expert, with written report, on behalf of Capital One N.A. in case challenging bank's imposition of an "all funds hold" on a customer's deposit account).

(3) *Hemphill Construction Co., Inc. v. Regions Bank*, Civil Action No. 3:15CV239-HTW-LRA (S.D. Miss. 2016)(engaged as expert, with written report, on behalf of Regions Bank in case involving "dual signature" requirement in a corporate checking account).

EXHIBIT C

Documents available for viewing and downloading at:

https://kleinbard.sharefile.com/d-sb5e4038244947d2a