In the Supreme Court of the United States

Nos. 145 & 146, Original (Consolidated)

Delaware,

Plaintiff,

v.

Pennsylvania and Wisconsin,

Defendants.

****

Arkansas, et al.

Plaintiffs,

v.

Delaware,

Defendant.

On the Parties' Cross Motions for Partial Summary Judgment

[DRAFT] Second Interim Report of the Special Master

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INTRODUCTION

With apologies to the Supreme Court, I have concluded that I can no longer stand by the recommendations that I made to the Court in my First Interim Special Master's Report. Because a Special Master's responsibility to the Court does not terminate with the submission of a report but is exercised "at all times and in many ways." *Guide for Special Masters in Original Cases Before the Supreme Court* 3, I believe it is my obligation to so advise the Court. I therefore respectfully submit this Second Interim Report of the Special Master.

In the Special Master proceedings, Delaware undertook to distinguish the Disputed Instruments from instruments distributed by MoneyGram bearing the legend, "money order," emphasizing differences that related either to marketing strategies (such as selling through banks as opposed to retail stores, so as to reach a different economic class of customers) or to superficial features in the appearance of the instruments. I found that Delaware's arguments suffered from two significant flaws. One was that, while these were differences between the Disputed Instruments and those now distributed by MoneyGram labeled as money orders, Delaware had not shown that the Disputed Instruments differed from money orders of issuers other than MoneyGram, much less from those distributed in the 1970s at the time of the enactment of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Federal Disposition Act" or "FDA"), 12 U.S.C. §§ 2501–03. Second, the points that Delaware emphasized, pertaining to marketing strategies and appearances, did not

involve differences in the rights and obligations that arose from usage of the instruments in commerce. Observing no differences in the rights and obligations arising from use of the Disputed Instruments, as compared with the instruments that Delaware conceded to be money orders, I concluded that they too were either money orders or "other similar instruments."

Upon reading the oral arguments to the Supreme Court, I found that Delaware was now emphasizing a fact that *does* distinguish between rights and obligations, at least comparing the Disputed Instruments with those that MoneyGram labels as "money orders" – the fact that the banks that sell (at least some of) the Disputed Instruments do so in the role of *drawer*, so that the selling banks are liable on the instruments so sold. Because the recommendations of my First Interim Report was predicated primarily on the conclusion that the points emphasized by Delaware did not relate to differences in rights or liabilities, I wondered whether my new understanding of Delaware's arguments might require a change in my recommendation. In view of the Court having already heard argument and presumably conferenced, I requested expedited briefing and notified the Clerk of the Supreme Court that I might be submitting an amended Report. Having reviewed the parties' submissions, I conclude that I am compelled to revise my recommendation to the Court.

The changes in my analysis are two: 1) In my First Report, I concluded that the Disputed Instruments are covered by the Act in either of two categories: as a "money order" (in view of the absence of differences in the rights and

obligations arising from use of the Disputed Instruments, as compared with money orders), and as an "other similar written instrument"[1] (for the same reason). I now conclude that the Disputed Instruments come within the statutory category of an "other similar written instrument," but are not included in the statutory category of a "money order." 2) In my First Report, I concluded that the Disputed Instruments did not fall within the Act's parenthetical exclusion of a "third party bank check" from the category of an "other similar written instrument." I now conclude that, to the extent that the Disputed Instruments are drawn by a bank as drawer (or otherwise in a capacity that renders the bank liable), the Disputed Instruments do fall within the Act's exclusion of "third party bank checks."

I. The Disputed Instruments Fall under the Statutory Category of an "Other Similar Written Instrument," But Not Under the Category of a "Money Order."

While I was on firm ground in concluding in my First Report that the Disputed Instruments come within the Act's category of "other similar instrument" in view of the very great similarities between them and money orders, I went too far in arguing that the Disputed Instruments should also be deemed to *be* money orders. Notwithstanding that that the same rights and obligations arise from the use of the two classes of instruments, I now recognize

[1] Hereinafter, I will often abbreviate the statutory reference to "other similar written instrument" as "other similar instrument," eliding the word "written" which seems to add nothing of value for these purposes.

that there are sufficient adjectival, customary differences between them that an expert in the field of negotiable instruments is unlikely, in employing the usages of the industry, to refer to a teller's check as a "money order." It is not that a teller's check cannot be a money order, or vice versa. There is no necessary incompatibility that would prevent an instrument from being both a money order and a teller's check. Nonetheless, there exist sufficient differences in the intended purpose and usual manner of treatment between money orders and the Disputed Instruments to make it more consistent with the Act's structure to class them as "similar instruments" rather than as "money orders."

First, money orders are designed to be of value to persons who do not have bank accounts. One of the principal utilities of a money order is that it "provides a safe and convenient means of remitting funds by persons not having checking accounts." Del. App. 373 (Glenn G. Munn's Encyclopedia of Banking and Finance, 7th ed. 1973);[2] *see id.* at 379–80 (Compton's Encyclopedia and Fact Index, Vol. 14 (1972)) ("Money orders are especially helpful to persons who do not have checking accounts."); *id.* at 491 (noting that money orders are "often used as a checking account substitute by the purchaser-remitter"). Either an unbanked purchaser or an unbanked payee would benefit from the use of a money order. The former cannot write a check; the latter may be unable to cash a check. Indeed, a witness on behalf of MoneyGram testified that some

[2] All citations are to the appendices filed in the Supreme Court.

customers use money orders in lieu of a personal checking account and that "many have a regular habit of using money orders to pay their bills instead of checks." Del. App. 247 (Yingst Dep.). In contrast, the Disputed Instruments are sold primarily to the selling bank's customers, who draw the funds from their checking accounts. *See* Del. App. 260, 274–75.

Money orders are also typically used for smaller amounts. They are typically used to pay a bill or send a small amount of money. Del. App. 247. Some issuers of money orders have placed limits on the dollar value of a money order. For instance, in the 1970's, postal money orders could not be issued for more than a hundred dollars. Del. App. 374 (Munn's). In contrast, MoneyGram does not set limits on the dollar value of the Disputed Instruments, which therefore can be used for larger purchases. MoneyGram's Disputed Instruments are commonly used to make a deposit on a car or a house. *See* Del. App. 259–60 (Yingst Dep.).

While these differences are not in the rights or liabilities arising from the use of the instruments, and the similarities between the Disputed Instruments and money orders are easily sufficient to make them "similar . . . instrument[s]," these differences in customary usage are sufficient that the Disputed Instruments should not be deemed to fall within the category of "money orders," within the meaning of the Act.

Additionally, it seems highly unlikely that Congress intended that prepaid checks drawn by banks (such as cashier's checks, teller's checks, and

certified checks), within which category Delaware contends the Disputed Instruments fall, would escheat under the terms directed by the statute. Those forms of making payments are (and were) so well known that Congress would in all likelihood have included them by name if it intended their inclusion.

Furthermore, as explained below, it appears that Congress inserted the parenthetical exclusion of "third party bank checks" from the scope of "other similar instrument[s]" for the express purpose of ensuring that such checks drawn by banks not be governed by the statute. Treating such checks as money orders would defeat Congress's apparent intention to exclude them.

II. The Disputed Instruments, to the Extent Issued by a Bank as Drawer, Fall under the Act's Exclusion of a "Third Party Bank Check" from the Category of an "Other Similar Written Instrument."

An instrument that would qualify for escheatment pursuant to the priorities established by the Act under the "other similar instruments" clause by virtue of its similarity to a money order would nonetheless then be excluded from the Act's coverage if found to fall within the Act's obscure and little

understood parenthetical exclusion of a "third party bank check."[3] I now conclude that the Disputed Instruments, to the extent issued by a bank *as drawer* (or otherwise in a capacity that renders the bank liable) fall under the Act's exclusion of a "third party bank check" from the category of "other similar written instrument." The Court should find, for reasons discussed below, that the Disputed Instruments are "other similar written instrument[s]," and as such, may be excluded from the category of covered instruments by the parenthetical exclusion of "third party bank check[s]" that was added to the text of the statute at the suggestion of Treasury. The determinative question is thus whether the Disputed Instrument is a "third party bank check."

To summarize the legislative history,[4] Congress requested comments on its bill from the Treasury Department. Treasury responded that the language of the bill seemed "broader *than intended by the drafters*," as the bill "could be

[3] The parenthetical exclusion is best read as applying only to the immediately preceding clause, "other similar written instrument," and not to the entire preceding list. Grammatically, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (ellipsis in original). This is especially so when the limiting or modifying clause is not separated from the last by a comma. *See Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). Additionally, applying the parenthetical exclusion to the full list would likely exclude bank-issued money orders. There is no reason to think Congress would have wished to exclude bank money orders, and the parties agree bank money orders are covered by the Act. *See* Del. Sur-Reply at 8; Defs. Cmts. in Response to Special Master's Oct. 26 Order at 9–10 (Dkt. 131).

[4] For a more complete exploration of the legislative history, see First Interim Report 17–21.

interpreted to cover *third party payment bank checks*," S. Rep. 93-505, at 5 (1973) (Letter from Edward C. Schmults) (emphases added). Treasury offered no further explanation but suggested that the bill be amended to exclude "third party payment bank checks." *Id.* In response, the bill was amended by inserting a slightly differently worded parenthetical exclusion: "(other than a third party bank check)." 12 U.S.C. § 2503. The Senate Report described the exclusion as merely a "technical" amendment and offered no explanation as to any reason for it, S. Rep. 93-505, at 6, and it was described in Senator Sparkman's floor statement as a "minor change[]," Del. App. 579 (120 Cong. Rec. 4528–4529 (1974)). In addition to failing to explain the purpose of the exclusion, Congress gave no explanation why it had deviated from the language suggested by Treasury.

As a result of the amendment, the Act provided the sequence of priorities for the escheatment of the following abandoned instruments: "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." 12 U.S.C. § 2503 (emphasis added). The principal question for this case under my analysis is whether the Disputed Instruments fall within those parameters, so as to escheat pursuant to the statute's priorities.

Discerning the meaning of the parenthetical exclusion of a "third party bank check" has been bewildering. Neither the enacted phrase, nor the slightly different phrase suggested by Treasury, has a defined or well-understood

meaning. That fact, together with the absence of explanation from Congress, as to why it believed the exclusion desirable, leaves the Court with little guidance as to what was intended. The parties have offered very different interpretations.

The Defendant States offered two definitions. First, they argued that the most natural meaning of "third party bank check" is "a check drawn by a bank on a bank that has been indorsed over to a new (or 'third party') payee." Defs.' Br. Supp. Mot. Summ. J. at 41 (Dkt. 89). This was not a compelling suggestion because the exclusion, if so understood, would be virtually useless in operation. Once a check is in the marketplace, it is impossible to determine whether it has been "indorsed to a third party" without seeing the instrument. Because this litigation concerns abandoned checks—checks that have not been presented for payment, the institution (here MoneyGram) that is responsible for paying the proceeds of the abandoned instrument to the correct State, would rarely know whether the instrument had been indorsed to a third party. Accordingly, that wholly impractical definition can be discarded out of hand.

As a fallback position, the Defendant States proposed that a "bank check" means an ordinary personal or business check drawn on a checking account at a bank. *Id.* at 42–43; Defs.' S. Ct. Br. at 45–47. As for the "third party" component of the exclusion clause, the Defendant States interpret it to refer to the account holder's use of the check to make a payment to a third party.

Delaware interprets "bank check" to mean a check effective upon the signature of a bank officer, which I take to mean when the officer's signature for

the bank renders the bank liable as a drawer of the check or otherwise.[5] Del. S. Ct. Br. at 36–38. As for the significance of the "third party " component, Delaware contends that this means that the bank check is payable through a third party, such as another bank—thus matching the definition of a teller's check: a check drawn by a bank on another bank. U.C.C. § 3-104(h).

The task for the Court is to decide, with the help of the parties' proposals, what is the meaning of the statutory term. The question should be examined both as a matter of linguistic usage within the industry, as well as in terms of the likely motivation of Treasury and Congress to amend the bill in this fashion, and the consequences of the competing interpretations for the functioning of the Act. I now conclude that, for all of these aspects of the question, Delaware has decidedly better arguments.

The Defendant States have scant authoritative precedent for reading "bank check" to mean an ordinary personal or business check drawn on a bank. They rely largely on a review conducted by federal regulators shortly before the FDA was enacted of the "existing financial and regulatory structure" related to the private financial system. *See* Defs. App. 174 (Clark Expert Report) (quoting Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972,

[5] Taking Delaware's proposed definition literally would mean that a check drawn by a bank on behalf of MoneyGram would be a "bank check" because it is signed by a bank officer, even if the check stated on its face that the bank bore no liability. I find that position has no merit.

at 4). In 1970, President Nixon organized the so-called Hunt Commission (officially the Commission on Financial Structure and Regulation), tasked with making recommendations to improve the nation's financial institutions. Knight, *The Hunt Commission*, at 4. Treasury was familiar with the Commission's work. See *The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972). The Hunt Commission's final report (published in December 1972) used the term "third party payment services" to describe "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." *Id.* at 23 n.1. The report noted that "[c]hecking accounts are one type of third party payment service." *Id.* The Defendant States contend that this history provides precedent for the use of "third party bank check" as meaning an ordinary check drawn on a bank account.

The Defendant States also claim precedent for their interpretation in a 1969 reissuance of an esteemed 1916 treatise on the payments system, entitled *The Law of Bank Checks*. The 1969 Henry J. Bailey edition expressly notes in a footnote, that the term 'bank check,' is used "in this volume" to mean simply a "check," and "does not necessarily denote a direct bank obligation, such as a cashier's check, certified check, or bank draft." *See* Del. App. 483 n.1 (Henry J. Bailey, *The Law of Bank Checks*, 4th ed. 1969) ("The term 'bank check' as used in this volume is, unless the context specifies otherwise, interchangeable with

the term 'check' and does not necessarily denote a direct bank obligation, such as a cashier's check, certified check, or bank draft.").

As a matter of linguistic usage, the Defendant States' contention that "bank check" more likely meant an ordinary personal or business check, than a check drawn by a bank, is strained. Their reliance on the Hunt Commission Report, is shaky at best. That report did not use the term "third party payment bank check" or the term "third party bank check." It spoke of various types of "third party payment services," mentioning a bank account as one such service. If this is deemed any precedent for use of "third party payment bank check" or "third party bank check" as meaning a check drawn on an ordinary bank account, it is a weak precedent at best.

And as for the usage in the Bailey 1969 treatise of "bank check" to mean "check," the value of this precedent to the Defendant States is substantially undermined by their own expert, Clayton P. Gillette. He explained that, while "'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank," it was "plausible that the author retained this usage [as meaning simply a check] because the treatise he was editing had wide acceptance [since 1916] and retaining the existing title [which used 'bank check' in that sense] may have had value, even if the term 'bank check' to refer to any check drawn on a bank had become redundant." Defs. App 212–13. Gillette added that the editor's footnote explaining the use of the term would have been "unnecessary unless the term 'bank check' would otherwise have been

understood to refer only to checks on which a bank was directly liable." *Id.* at 213.

The contention of the Defendant States is further undermined by academic sources roughly contemporary to the passage of the Act, which outline "two classes of checks in general use":

> The first consists of ordinary personal checks, which are those drawn upon a bank by a person or entity other than a bank. Banks are not liable on these checks unless they accept or pay them. The second class is comprised of cashier's, certified, and teller's checks, which collectively are known as bank checks.

Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 Minn. L. Rev. 275, 278 (1980); *see also* George Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 Ind. L. Rev. 579, 579 (1978) ("At the other extreme [from personal checks] is the bank check, a check on which a bank is liable as either a drawer or acceptor. This class of instruments includes cashier's checks and certified checks.").

The fact that "'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank," Defs. App. 212, makes it highly unlikely that Treasury and Congress would have used that term in a statute (without explanation) to mean something so different from its commonly understood meaning. Furthermore, Treasury's use of its recommended term, "third party payment bank check" to mean simply a "check" would have been improbably verbose and redundant as "check" normally means "a draft drawn

upon a bank," Del. App. 364 (Black's Law Dictionary, 5th ed. 1979); *see also, e.g.*, *id.* at 361 (Black's Law Dictionary, 4th ed. 1968), 369 (Munn's), and checks are nearly always used to make a payment to a third party.[6]

Nor do the Defendant States suggest a persuasive reason why Congress, or Treasury, would have wanted to insert the exclusionary clause into the bill so as to exclude ordinary checks from the category of instruments are "similar" to money orders. In the first place, there is little similarity between an ordinary check and a money order. A money order is a prepaid check drawn by a financial institution, which assumes liability; its purpose is to enable the purchaser to make a payment; its utility is particularly high when either the purchaser or the payee has no bank account. The expectation that the instrument will be paid by a responsible financial institution (the issuer) is essential to its effectiveness as a means of payment among persons who do not have bank accounts because otherwise the payee would not be easily able to realize the proceeds on presenting the check to a bank or financial institution. These attributes make a money order very different from an ordinary check. An ordinary check is not prepaid; there is no assurance that it will be honored by the drawee bank, which depends, inter alia, on whether the account holder has sufficient funds on deposit. The bank to which the payee presents an ordinary check for payment is

[6] A very rare exception may be a depositor's use of a check made out to herself as a device for transferring funds from one depositary institution to another.

highly unlikely to pay it without having first collected on the check through the clearing system. Because an ordinary check has little similarity to a money order, such a check was not likely to be deemed an "other similar instrument." Congress would have perceived no need to add a clause excluding it from the scope of the "other similar instrument" clause.

Even more important for these purposes is the fact that exclusion of ordinary checks from the Act's coverage would have no consequences for the functioning of the Act. When a check written by an ordinary account owner is lost or abandoned, neither the account owner nor the drawee bank is called upon to escheat the amount of the uncashed check to a State. The obligation to pay money to a State pursuant to state escheatment statutes falls on a "holder of abandoned property," which is defined by the Uniform Unclaimed Property Act to mean "a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this [Act]." Unif. Unclaimed Prop. Act (Nat'l Conf. Comm'rs Unif. State Laws 1995) § 1(6) (brackets in original); *see id.* §§ 7(a), 8(a).[7] The owner of a checking account who writes a check in favor of a payee does not fall in that category when the check is lost. Nor does the bank on which the check was drawn, which would not even know that the check had been written and then lost or abandoned. Unless there has been prepayment to the

[7] The escheatment statutes of States that have not adopted the 1995 Uniform Unclaimed Property Act define "holder" in similar terms. *See, e.g.*, Iowa Code Ann. § 556.1(5); Texas Prop. Code § 72.001(6)(B)(e).

bank causing the bank to issue its check (or certify the depositor's check) the bank has no obligation "to hold [funds] for the account of, or deliver or pay [them] to" the payee of the check. The funds would remain on deposit among the funds owed to the depositor, just as if the check had never been written. Thus, interpreting the exclusion clause to apply to ordinary bank accounts would have no consequences for the distribution of escheats among the States. There would have been no reason for Treasury or Congress to exclude checks drawn by depositors on ordinary bank accounts.

The Defendant States have failed to put forth a reason why Congress (or Treasury) would have wished to exclude ordinary checks of bank depositors from the Act's coverage.

Delaware is on far firmer ground in arguing that the use of the term "bank check" in the exclusion clause was intended to mean checks signed by banks so as to carry bank liability. In the first place, there is no disagreement between Delaware's and the Defendant States' experts that "bank check" is commonly understood to mean a check drawn by a bank in the capacity of drawer, so that the bank is liable on the check. *See* Defs. App. 212 (Gillette Expert Report) ("A 'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank. If the drawer and drawee are the same bank, the bank check is a cashier's check. If the drawer and the drawee are different banks, then the bank check is a teller's check."); *id.* at 135 (Mann

Expert Report) ("[T]he idea of a 'bank check' logically suggests a check on which a bank is directly or indirectly liable.").

Delaware's arguments are even more persuasive with respect to the reasoning likely to have led Treasury to recommend the exclusion and Congress to adopt it. The bill on which Congress sought Treasury's comments proposed escheatment priorities for instruments in the categories of "a money order, travelers check, or similar written instrument on which a banking or financial organization or a business association is directly liable." 119 Cong. Rec. 17,046 (1973). It would have been apparent to Treasury that prepaid cashier's checks and teller's checks are enormously similar to money orders. They are all prepaid checks purchased from banks, which act in the role of drawers thus incurring liability, which enable the purchaser to make a payment by an instrument that will be cashed for the payee by the financial institution to which they are presented. (Although certified checks function slightly differently in that the check is drawn by the account owner on her account, the bank's affixing its certification upon drawing funds from the depositor' s account renders the bank liable on the check, as with the issuance of a prepaid cashier's check, so that the certified check is also very similar to a money order.) It was also apparent that the bill's broadening of the covered categories beyond *money orders* and *traveler's checks* to include also "similar written instrument[s]" would encourage competing States, upon observing similarities between money orders and traveler's check to cashier's checks, teller's checks and certified checks, to claim

escheatment with respect to these instruments under the terms of the statute. At the same time, it appeared unlikely that Congress had written the bill as it did, with its focus on money orders and traveler's checks, if it intended the bill to apply also to cashier's checks, teller's checks, and certified checks. These bank-issued instruments were so well known that, if Congress had intended them to be covered, it would have included them by name. This apparently led Treasury to conclude that Congress had not intended to include such instruments via the "similar instruments" clause.

Treasury's letter expressed no concern over the desirability of escheating third party payment bank checks to one State as opposed to another. Its only expressed concern was to keep the statute within the boundaries intended by Congress. Treasury questioned whether "the language of the bill is broader than intended by the drafters" and therefore urged Congress to exclude "third party payment bank checks." S. Rep. No. 93-505, at 5. By essentially adopting the exclusionary clause Treasury had suggested, Congress implicitly confirmed that it did not intend to cover "third party bank checks." It appears that Treasury's concern was an accurate prediction of this very litigation.

I believe that Delaware makes a powerful case that the parenthetical exclusion of "a third party bank check" was precisely intended to exclude from the Act's coverage checks drawn, or certified, by banks, thus rendering the bank liable (other than money orders and travelers check).

The further question arises as to the meaning of the term "third party" in the statutory phrase "third party bank check." Delaware argues that it means a bank check paid through a third party, as is the case with a teller's check, which is drawn by a bank (as drawer) on another bank (as drawee). The "third party" component of the term, however, could mean several different things. In addition to Delaware's suggested meaning, it could mean a check drawn by a bank at the instance of a third party, which furnishes the funds for payment, or a check drawn by a bank to make payment to a third party. I see no good reason favoring the interpretation, "payable through a third party," over "payable at the instance of a third party."[8] The particular definition offered by Delaware seems tailor-made with the intention that it fit the Disputed Instruments, which are paid through clearing banks and MoneyGram. As the apparent purpose of the exclusion was to target certain bank-issued instruments similar to money orders (or traveler's checks) that risk to be swept into the Act's coverage under the "similar instrument[s]" clause contrary to Congress's intention by virtue of similarity to money orders, I believe that, among the possible the potential meanings of "third party," the one that best serves Congress's likely intentions would be a check issued by a bank as drawer (or otherwise assuming liability as

[8] I find less compelling the interpretation "payable to a third party," as nearly all checks are written to a third party, a rare exception being the circumstance in which the depositor makes a check payable to herself, as a means to redeposit the proceeds in another bank or financial institution.

with a certified check) at *the instance of a third party* (the customer of the bank who furnishes the funds to the bank as a means to make a payment). That definition targets the instruments that most closely resembles a money order. It would exclude from the Act's dispositions cashier's and teller's checks when these are drawn at the instance of a customer of the bank (a third party) but would not exclude such checks when drawn by the bank for its own account to pay the bank's own liabilities. It could exclude certified checks, as the bank's certification results from purchase by a third party, the account owner whose check is certified by the bank after withdrawing the funds from the account.[9]

For the reasons explained above, I now conclude that, to the extent that the selling banks sign the Disputed Instrument in the capacity of drawer, thus assuming liability on those instruments, at the instance of a customer who furnishes the funds for payment of the check, the Supreme Court should rule that those instruments do not escheat pursuant to the Act because they are excluded by the "other similar written instrument" clause.

[9] As each of the Disputed Instruments is claimed to be a teller's check, and none are claimed to be cashier's checks or certified checks, the Court need not rule in this case on whether cashier's and certified checks fall within the parenthetical exclusion. Nonetheless, what seems to me to be the logic that should control the decision as to teller's checks, which Delaware contends the Disputed Instruments to be, should also control as to cashier's and certified checks.

III. The Status of the Selling Bank as Drawer of the Disputed Instruments.

Under the interpretation of the Act that I recommend to the Supreme Court, the Disputed Instruments issued by banks as drawers (on which banks are thus liable) at the instance of a third party are "third party bank checks" and are thus excluded from the scope of the "other similar written instrument" clause and from the dispositions of the Act. On the other hand, Disputed Instruments on which the selling banks are not liable, or which are drawn by banks to pay their own obligations and not at the instance of a third party, are "other similar instruments" not excluded by the "third party bank check" clause and escheat pursuant to the Act.

I conclude that MoneyGram's so-called Teller's Checks are indeed teller's checks on which the selling banks act in the role of drawer and incur liability on them. MoneyGram's Agent Checks come in two forms, which I refer to as "So-Labeled Agent Checks" and "Unlabeled Agent Checks." I conclude that the selling banks are not drawers of So-Labeled Agent Checks. As for MoneyGram's Unlabeled Agent Checks, I believe neither side has shown entitlement to summary judgment. There is evidence that favors treating the selling banks as drawers, and there is evidence that favors treating the selling banks as having sold the checks in the capacity of agent for MoneyGram and not as a drawer. I believe neither side has shown entitlement to summary judgment and that the issue would require either a trial or renewed cross-motions for summary

judgment, in either case supported by additional expert testimony. I explain these conclusions below.

A. Teller's Checks

Delaware is correct that the selling banks risk to incur liability on MoneyGram Teller's Checks that they sell. On their face, Teller's Checks designate the selling bank as the "drawer" of the instrument and MoneyGram as the issuer. Del. App. 239; Defs. App. 23, 99. Because the "issuer" of an instrument "means a maker or drawer of an instrument," *see* UCC § 3-105(c); *see* Defs. App. 220–21 (Gillette Report), MoneyGram and the selling bank are both properly understood as drawers of the instrument. Because MoneyGram Teller's Checks are checks drawn by banks at the instance of a third party, who prepays the instrument, they are "third party bank checks."

B. Agent Checks

The second form of Disputed Instruments are MoneyGram's Agent Checks, which themselves come in two forms.

1. So-Labeled Agent Checks

One form of Agent Check, which might usefully be referred to as "So-Labeled Agent Checks," while showing the name and logo of the selling bank and placing the legend "Authorized Signature" under the bank employee's signature, expressly identifies MoneyGram as the drawer and prints on its face both the legend "Agent Check" and the words, "Agent for MoneyGram." *See* Del. App. 237. Delaware concedes that the selling bank is not listed as a drawer of

this type of Agent Check. Defs. App. 25 ("One variety of MoneyGram Agent Check indicates that the drawer of the instrument is MoneyGram, and that the individual signing the check is signing as 'Agent for MoneyGram.'"). Delaware's expert likewise noted that "[f]or instruments of that type, the bank (signing as agent for a disclosed principal) would not be directly or indirectly liable on the instrument." Defs. App. 129–30 (Mann Report). I agree and conclude that the selling banks are not drawers of MoneyGram's "So-Labeled Agent Checks" and are not liable on them. Those instruments are therefore "other similar written instrument[s]" for reasons explained in my First Report, but are not covered by the "third party bank check" exception and should escheat pursuant to the Act.

2. Unlabeled Agent Checks

As for the second type of MoneyGram Agent Check, which I will refer to as "Unlabeled Agent Checks," it differs significantly from the So-Labeled Agent Checks. The face of the instrument neither shows the legend "Agent Check," nor states that the selling bank acts as "Agent for MoneyGram." *See* Del. App. 302. On their face, these checks show the name and logo of the selling bank with the legend "Official Check" next to them, and the words "Authorized Signature" under the signature of the selling bank's employee. These factors favor a finding that the selling bank is a drawer of the check and is therefore liable on it.

At the same time, the checks identify MoneyGram, and MoneyGram alone, as drawer. *See* Del. App. 302. Furthermore, MoneyGram's internal records and its contracts with the selling banks, in at least some instances,

characterize the selling banks' role in the sale is as acting as agents for MoneyGram. *See* Defs. App. 484. A chart produced by MoneyGram in the ordinary course of business and incorporated in Delaware's Statement of Undisputed Facts lists MoneyGram as the sole drawer of Agent Checks. Defs. App. 24. It also shows that, while MoneyGram treats its Teller's Checks as requiring next day funds availability under Regulation CC, 12 C.F.R. § 229.10(c), it does not similarly classify Agent Checks, suggesting that MoneyGram does not view them as being bank checks that carry bank liability. Defs. App. 24.

The parties dispute whether the banks that sell these Agent Checks are drawers. Delaware argues that the authorized signature of the bank employee "indicates [that the bank had] an intent to sign as the maker of a note or the drawer of a draft." Defs. App. 25–26. The Defendant States argue that the explicit identification of MoneyGram as the drawer excludes the selling bank from the role of drawer, Defs. App. 42, an argument supported by MoneyGram's internal documentation. I do not find that either side persuasively established entitlement to judgment as a matter of law as to whether the selling bank is liable on this second type of Agent Check.

In sum, on the parties' cross motions for partial summary judgment, neither side has conclusively dispelled the existence of a genuine issue of material fact on the question of whether the selling bank is a drawer of, and thus liable on, Unlabeled Agent Checks. Additionally, even if Unlabeled Agent

Checks are drawn by banks, some banks use Agent Checks to pay their own bills, Del. App. 276, and such instruments, not drawn at the instance of a third party, would not be "*third party* bank checks." The Court should deny both motions for summary judgment as to these instruments and remand to the Special Master for either trial or renewed motions for summary judgment, with the evidence augmented at least by further expert testimony.

IV. Pennsylvania's Argument for Modification of the Common Law Is No Longer Moot.

If the Court adopts these recommendations, Pennsylvania's alternative argument for summary judgment—that the common law rule should be modified—would no longer be moot. If the Court rules in Delaware's favor as to any of the Disputed Instruments, I recommend that the Court remand to the Special Master Pennsylvania's claim for modification of the secondary common law rule established in *Texas v. New Jersey*.

CONCLUSION

I recommend that the Supreme Court:

(a) as to the MoneyGram Teller's Checks, grant summary judgment to Delaware that these instruments do not escheat pursuant to the Act, and deny the motion for summary judgment of the Defendant States as to whether these instruments escheat pursuant to the Act, but remand to the Special Master Pennsylvania's claim for modification of the secondary common law rule established in *Texas*;

(b) as to the So-Labeled Agent Checks, grant the Defendant States' motion for partial summary judgment that the instruments escheat pursuant to the terms of the Act, and deny Delaware's motion for partial summary judgment; and

(c) as to the Unlabeled Agent Checks, deny both motions for partial summary judgment and remand to the Special Master for either trial or renewed motions for summary judgment, with the evidence augmented at least by further expert testimony.

Respectfully Submitted,

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[DATE], 2022