

SUPREME COURT OF THE UNITED STATES

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DELAWARE,

Plaintiff,

-vs-

Nos. 220145 & 220146 (Consolidated)

ARKANSAS, ET AL.,

Defendants.

* * * * *

TRANSCRIPT OF VIDEO CONFERENCE PROCEEDINGS

Wednesday, March 10, 2021

1:30 p.m.

Presiding: HONORABLE PIERRE N. LEVAL,
Special Master

Reported by: SANDRA L. McDONALD

1 TRANSCRIPT OF VIDEO CONFERENCE PROCEEDINGS,
2 taken in the above-entitled action, before SANDRA L.
3 McDONALD, a Notary Public in and for the State of
4 Wisconsin, from various remote locations, on the 10th
5 day of March, 2021, commencing at 1:30 p.m.

6 * A P P E A R A N C E S *

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1 MR. MEDJUCK: Good afternoon, counsel.
2 Please come to order. We are here for oral argument
3 this afternoon in the case of Delaware versus
4 Arkansas, et al, and we are ready to begin with oral
5 argument whenever counsel and Judge Pierre N. Leval,
6 Special Master are prepared to begin.

7 THE COURT: Everybody ready? Good
8 morning. So we'll hear first -- is it correct that
9 Delaware will be arguing first?

10 MS. MOSELEY: Yes, your Honor.

11 THE COURT: All right. You may
12 proceed.

13 MS. MOSELEY: Great, wonderful. Thank
14 you, your Honor. Good afternoon or morning, as the
15 case may be. May it please the Court, my name is
16 Tiff Moseley of Loeb & Loeb, and I appear today on
17 behalf of the Plaintiff State of Delaware. With me
18 but not on camera, for the record, your Honor, are my
19 colleagues Steve Rosenthal and J.D. Taliaferro also
20 of Loeb & Loeb.

21 This is not the first time the States presently
22 before your Honor have filed suits against each other
23 over the right to escheat abandoned unclaimed
24 intangible property. And while escheat is normally
25 the province of state law, it's as a result of these

1 prior disputes that the Supreme Court has established
2 in a line of cases known as the Texas Trilogy rules
3 that govern the allocation of abandoned unclaimed
4 intangible property among the states.

5 Under those rules, the primary right to escheat
6 unclaimed intangible property goes to the state of
7 the creditor's last known address as shown on the
8 holder's books and records. If the books and records
9 disclose no address or the state does not provide for
10 the escheat of that property, under the secondary
11 rule this unaddressed unclaimed property escheats to
12 the state of the domicile of the holder.

13 I start with this background, your Honor,
14 because the Supreme Court's priority rules govern the
15 escheat of all abandoned intangible property unless
16 and until Congress alters those rules. Thus, in the
17 absence of any federal statute to the contrary,
18 unaddressed abandoned unclaimed sums payable on all
19 financial products properly escheat to a holder's
20 state of incorporation under the priority rules.

21 This is, in fact, the holding in the second of
22 the Texas Trilogy cases. In that case Pennsylvania
23 sued New York seeking the right to escheat unclaimed
24 funds associated with money orders that were sold by
25 Western Union. The Supreme Court denied

1 Pennsylvania's request and did not alter the priority
2 rules with respect to money orders, and it was in
3 direct response to that decision of the Supreme Court
4 that in 1974 Congress drafted and adopted the
5 Disposition of Abandoned Money Orders and Traveler's
6 Checks Act that's at the heart of the instant
7 dispute.

8 We are going to very briefly put up that
9 statute, your Honor. In the Disposition of Abandoned
10 Money Orders and Traveler's Checks Act, which for
11 ease of reference I'm going to call the FDA going
12 forward, Congress exempted from the priority rules
13 only those unaddressed abandoned unclaimed sums,
14 "Payable on a money order, traveler's check, or other
15 similar written instrument (other than a third party
16 bank check) on which a banking or financial
17 organization or business association is directly
18 liable --"

19 Thus, under the FDA, the sums associated with
20 those three types of intangible property escheat
21 first to the state of purchase of the instrument as
22 shown by the holder's books and records and is not
23 available to the principal place of business of the
24 holder.

25 Consequently, the resolution in this case hinges

1 on a determination of whether MoneyGram official
2 checks, an instrument which was not in existence at
3 the time the FDA was adopted, are considered one of
4 the three types of intangible property that Congress
5 specifically exempted from the Supreme Court's
6 bright-line priority rules. Delaware submits, your
7 Honor, that because MoneyGram official checks are
8 neither a money order nor a traveler's check nor are
9 they a similar written instrument, other than a third
10 party bank check, on which a banking or financial
11 organization or business association is directly
12 liable, the unaddressed unclaimed sums payable on
13 MoneyGram official checks properly escheat to
14 Delaware under the priority rules.

15 THE COURT: So what is a money order?

16 MS. MOSELEY: Yes, your Honor.

17 Turning first to that first category, a money order,
18 I would say that there is -- all the parties have
19 recognized there is no single legal definition of a
20 money order. If you look at the treatise of
21 Pennsylvania's expert, Barkley Clark, as well as
22 Munn's Encyclopedia of Financial Terms, a money order
23 is an instrument for the payment of money that's
24 used by persons largely who do not have bank
25 accounts, or the unbanked population. The UCC

1 recognizes money orders as written instruments that
2 are labeled as such.

3 In this case, your Honor, the record has been
4 limited to MoneyGram instruments, so we have
5 descriptions of what --

6 THE COURT: So you're saying that if I
7 write a -- if I write my personal check to somebody
8 and I write on the top of it, "Money Order," that's a
9 money order?

10 MS. MOSELEY: No, your Honor, we do
11 not believe that that would be a money order. We
12 believe that a money order describes a subset of
13 pre-paid instruments, and a personal check would not
14 be a pre-paid instrument. We don't think that money
15 orders --

16 THE COURT: Well, it could be. It
17 could be a pre-paid instrument. I mean, if I didn't
18 have a bank account myself and I paid you to -- paid
19 you \$55 to write a check to the person I owed money
20 to, to write a \$50 check, if I give you \$55 and you
21 write a \$50 check to X to whom I owe money or from
22 whom I want to buy something, is that a money order?

23 MS. MOSELEY: No, your Honor. No,
24 your Honor, that would be a personal check out of my
25 account that you had given me money for that I would

1 be doing, presumably, a favor for you as a friend in
2 that instance. But a money order, as Defendant
3 States would define it, is a very broad category.
4 They would have a money order be all pre-paid
5 instruments to a named payee in order to bring
6 official checks under the auspices of the FDA.

7 We do not believe that that definition of a
8 money order is consistent with the text of the FDA or
9 with the testimony in record form MoneyGram in this
10 case, your Honor. Rather, we believe a money order
11 is properly understood to define a subset of pre-paid
12 instruments with specific characteristics beyond just
13 being pre-paid or having a named payee that official
14 checks don't share.

15 If we were to look at those characteristics, as
16 the testimony in this record that MoneyGram's
17 30(b)(6) witness provided, which is explained at
18 length on Page 19 of our opening brief, if we look
19 at the characteristics of what makes a MoneyGram
20 money order a money order as opposed to an official
21 check, those characteristics include the fact that,
22 "Money Order," appears prominently on the face of the
23 instrument, that the words or phrase, "Agent of
24 MoneyGram," must also appear prominently on the face
25 of the money order, that all money orders have terms

1 and conditions on the back of the instrument,
2 including the imposition of a service charge, that
3 those money orders are acquired almost exclusively at
4 retail locations and that they are limited to amounts
5 of a thousand dollars. MoneyGram official checks --

6 THE COURT: What -- what is the
7 justification? You have compared the disputed
8 instruments to instruments issued by MoneyGram
9 that you concede to be money orders, but what is
10 the justification for your saying that the or money
11 order, the characteristic money order, is the one
12 that's issued by MoneyGram? You haven't compared --
13 you haven't compared the disputed instruments to
14 money orders issued, things labeled as money orders
15 or accepted as money orders issued by other issuers,
16 such as Western Union was the prominent issuer of
17 money orders at the time that the Act was passed.

18 Why should one accept -- why should one accept a
19 certain MoneyGram money order as the definition of
20 what a money order has to look like and be?

21 MS. MOSELEY: Your Honor, I would
22 respond a couple of different ways to that. First,
23 we do include a Western Union money order, I believe
24 as Exhibit W of Mr. Taliaferro's declaration in this
25 case, a Western Union money order from 1966, so not

1 exactly contemporaneous with the Act but certainly
2 closer in time. And if you were to look at that
3 money order, you would see that it prominently says,
4 "Money Order." They were limited to a thousand
5 dollars. The characteristics that we're describing
6 in the MoneyGram money orders were also common in the
7 other instruments at the time.

8 I think your Honor will recall the Defendant
9 Delaware attempted to amend its Complaint to include
10 instruments from issuers -- from companies other than
11 MoneyGram in this case, and that amendment of our
12 Complaint was denied. This Court determined that
13 they didn't want to expand the scope of this case to
14 instruments beyond the official checks beyond that of
15 MoneyGram.

16 So what we have in this case in this record,
17 your Honor, are the instruments issued by MoneyGram.
18 We have the definitions of, say, Defendant States'
19 expert Barkley Clark, Munn's Encyclopedia, as well as
20 sort of the common understanding and common usage
21 when you look at the Western Union MoneyGram, all of
22 which point to the fact that these were retail
23 instruments, largely used by unbanked populations,
24 that they had MoneyGram on the face of the
25 instrument, that they were limited in amount and that

1 they contained terms and conditions as well as
2 service charges. And that's something that is true
3 of the Western Union example that's in the record as
4 well as consistent with Munn's Encyclopedia and
5 Barkley Clark's treatise and MoneyGram's testimony in
6 this case, your Honor.

7 THE COURT: Is it -- in order for the
8 money order to be covered by the Act, is it necessary
9 that a banking organization or financial organization
10 be directly liable?

11 MS. MOSELEY: No, your Honor, we do
12 not believe so. We believe that the expression or
13 the phrase, "Direct liability," applies to the
14 third category of intangible property identified in
15 the FDA, namely, the, "Similar written instrument
16 (other than a third party bank check)," given that
17 that is the immediate --

18 THE COURT: What's your -- what's the
19 justification for treating it as applicable solely to
20 similar instruments and not to money orders?

21 MS. MOSELEY: Yes, your Honor. We
22 think that there are two things that rely on that,
23 and first is sort of the structure of the text
24 itself in the Federal Disposition Act, that,
25 "Directly liable," applies to its immediate

1 antecedent and not to the entirety of the statute.
2 We would also say that at the time money orders and
3 traveler's checks were what was being discussed, and
4 the Act specifically specifies those instruments and
5 does not require any additional characterization of
6 the liability on those instruments when it used those
7 terms in the Act itself.

8 THE COURT: Well, I mean, that's the
9 question we were just discussing is whether it did
10 add the requirement of the banking organization being
11 directly liable. And while I recognize that there is
12 a good argument for treating the, "Directly liable,"
13 clause as applicable only to the immediately
14 preceding antecedent, the best argument I think for
15 it is that there's no comma separating them. If
16 there were a comma, it would generally indicate, it
17 would be likely to indicate that the subsequent
18 adjectival clause applies to the entire list. But if
19 you proceed and read Clauses 1, 2 and 3, which are
20 the clauses, the numbered clauses that actually
21 provide what the disposition by escheat is to be of
22 the instruments that are covered by the statute,
23 they each depend on the books of such banking
24 organization containing certain information, and,
25 "Such banking organization," can only refer within

1 the text of the statute to the one mentioned that is
2 directly liable in the initial clause.

3 So if we accept your argument that the clause
4 requiring direct liability of a banking organization
5 applies only to similar instruments and not to
6 money orders and traveler's checks, it then means
7 that the Act doesn't ever say anything about the
8 escheat of traveler's checks and money orders,
9 because Clauses 1, 2 and 3 only apply to the one
10 that is previously referenced by the referenced,
11 "Such banking organization." There's no reference to
12 a banking organization with respect to a money order
13 or traveler's check, unless the direct liability
14 clause applies to them. So wouldn't it be rather
15 bizarre that the statute simply doesn't provide for
16 the escheat of money orders and traveler's checks?

17 MS. MOSELEY: Your Honor, I believe,
18 as you indicated, that the best expression of what
19 the statute is trying to accomplish is the text
20 itself. And as you indicated, there is a comma, and
21 based on Barnhart and --

22 THE COURT: No, there isn't a comma.
23 There isn't a comma. There isn't a comma separating,
24 "Similar instruments on which --" One second.

25 MS. MOSELEY: I believe it's,

1 "Money orders, traveler's checks, or similar written
2 instruments (other than a third party bank check)
3 on which a banking or financial --"

4 THE COURT: Yes, that's where there
5 should -- that's where you would want a comma. If,
6 "On which banking or financial organization or
7 business is directly liable," if the intention were
8 that that applied to all three, ordinarily you'd have
9 a comma there.

10 MS. MOSELEY: Yes.

11 THE COURT: So the lack of a comma
12 favors, favors your argument.

13 MS. MOSELEY: Yes.

14 THE COURT: However, Clauses 1, 2
15 and 3, numbered Clauses 1, 2 and 3, which are in
16 fact -- which are the clauses that provide for the
17 disposition of these instruments by escheat, those
18 refer to the books and records of, "Such banking or
19 financial organization," which can only -- the only
20 previous mention of a banking or financial
21 organization is in the clause. So 1, 2 and 3 -- if
22 the clause, "On which a banking or financial
23 organization," applied only to similar instruments,
24 then Clauses 1, 2 and 3, similarly, would apply only
25 to other similar instruments.

1 MS. MOSELEY: I -- I believe, your
2 Honor, what is happening in that analysis is that
3 the, "Directly liable," is dropping out. In that
4 phrase that we're looking at that occurs, it's,
5 "Directly liable," on those organizations. We're not
6 saying that MoneyGram -- that money orders and
7 traveler's checks don't have a banking organization
8 that is liable to pay for them. We're just saying
9 that their liability is not direct, that the
10 conditioning of direct liability applies to the
11 similar written instruments, because that is
12 describing the antecedent.

13 All of these written instruments have somebody
14 which is liable to pay for them, but there is
15 different types of liability on written financial
16 instruments, and it's Delaware's position that the,
17 "Direct liability," the direct liability that's
18 required by that phrase, applies to similar written
19 instruments and is not speaking to traveler's checks
20 or money orders earlier in the statute.

21 And in addition, your Honor, Delaware also
22 believes that the FDA did not govern the escheat of
23 MoneyGram official checks because they're not similar
24 and also because they would be --

25 THE COURT: So you read the statute to

1 say where any sum is payable on a money order or a
2 traveler's check, if the books and records of such
3 banking or financial organization or business
4 association show that the state in which the money
5 order -- that doesn't make any sense. That doesn't
6 make any sense, because there is no antecedent to,
7 "Such." The way you read the statute, there simply
8 isn't an antecedent to, "Such banking or financial
9 organization."

10 MS. MOSELEY: In 1, 2 and 3, the
11 phrases that describe whether it goes to the
12 principal place of business or the place of purchase,
13 they're referencing back to the three types of
14 intangible property that are previously identified.

15 THE COURT: Then what does,
16 "Such banking or financial institution," refer to
17 in the first clause of the statute?

18 MS. MOSELEY: Presumably, the
19 binding --

20 THE COURT: What are the words? What
21 are the words of the statute to which, "Such banking
22 or financial organization," refer to?

23 MS. MOSELEY: Such banking or
24 financial institution that sold the money order or
25 the traveler's check at issue.

1 THE COURT: Where is it? Where does
2 it talk about the banking institution or financial
3 institution that sold the money order?

4 MS. MOSELEY: Your Honor, the money
5 orders and traveler's checks were well understood at
6 the time to be sold by MoneyGram, by -- I believe it
7 was actually American Express or Travelers Express at
8 the time. I don't think it was in dispute that those
9 instruments were being sold by -- I don't have the
10 phrase directly in front of me, but the banking or
11 business association.

12 THE COURT: We're talking about the
13 words Congress used, and you're asking me to read the
14 statute when it says, "Where any sum is payable on a
15 money order or traveler's check," you're saying that
16 the Supreme Court should read those words as if what
17 they said was, "Where any sum is payable on a money
18 order or traveler's check, which money order or
19 traveler's check was sold by a banking or a financial
20 institution, then if the books of such banking..."
21 You're asking that those words be read into the
22 statute, right?

23 MS. MOSELEY: I don't -- I don't
24 believe so, your Honor. And I'm sorry, I'm not
25 trying to not respond, but Paragraph 1 indicates -- I

1 believe that the preface identifies three types of
2 intangible property that the statute covers.

3 THE COURT: Right, right.

4 MS. MOSELEY: And the three subsequent
5 paragraphs deal with if the books and records of the
6 holder, and that could be a bank or a financial
7 organization or business association.

8 THE COURT: No, it doesn't say of the
9 holder. It says --

10 MS. MOSELEY: No, "If the books or
11 records of such banking --

12 THE COURT: Yeah.

13 MS. MOSELEY: -- or financial
14 organization or business association show the State
15 in which such money order, traveler's check or
16 similar written instrument was purchased."

17 THE COURT: Yeah.

18 MS. MOSELEY: Yes. And so --

19 THE COURT: And when a statute says
20 such, "Such banking or financial institution," it
21 normally is referring back to a previous mention of a
22 banking institution; isn't that correct?

23 MS. MOSELEY: Your Honor, in this
24 instance --

25 THE COURT: In this instance it's not,

1 now it's referring to an imagined -- to an imagined
2 reference to a banking organization or financial
3 institution?

4 MS. MOSELEY: I -- I don't believe so,
5 your Honor. The three types of property identified
6 in the FDA end with a double dash, and so those are
7 the listed three properties, the money order, the
8 traveler's check and the similar written instrument,
9 on which there's direct liability. And then it says,
10 "If the books and records of such banking or
11 financial organization or business association show
12 the State in which," that they were purchased, it
13 escheats to that state.

14 THE COURT: Yeah.

15 MS. MOSELEY: And I don't --

16 THE COURT: Saying it fast doesn't
17 make it go -- anyway, okay. Go ahead to your next
18 point. I can understand why you're reluctant to
19 accept my proposition that, "Such financial
20 institution," refers back to a previous mention of a
21 financial institution, but go ahead. You're -- I
22 don't think you're likely to agree with me, so you
23 can proceed.

24 MS. MOSELEY: Yes, your Honor. I
25 just -- I guess I just don't think that, "Such,"

1 refers back only to the prior mention of it. It just
2 refers to all of the organizations that are selling
3 these instruments. I see, your Honor, that I am
4 essentially out of time, so I won't --

5 THE COURT: No, no, no, you've got
6 plenty of time. We're going to continue.

7 MS. MOSELEY: Okay, all right, your
8 Honor. I was -- having discussed the money orders
9 and we don't believe that the definition of money
10 orders offered by Defendant States is consistent with
11 the statute, I had not planned really to spend much
12 time discussing traveler's checks because I don't
13 believe any party is contending that the MoneyGram
14 official checks at issue are traveler's checks by
15 another name.

16 And so looking at the third type of intangible
17 property, we've discussed the liability, and now we
18 would -- I would like to discuss two separate issues
19 that are raised by the third type of identified
20 intangible property, which is, one, the requirement
21 that they be similar, that the written instruments be
22 similar to the two preceding categories of money
23 orders and traveler's checks, and then that they also
24 not be a third party bank check. Your Honor, we do
25 not believe that these instruments are similar.

1 We believe that there are distinguishable legal
2 differences between the MoneyGram official checks
3 and the MoneyGram money orders in the record in this
4 case. We believe that federal regulations and
5 regulatory authorities have in fact defined a money
6 order as a separate legal instrument from a teller's
7 check, which is the form that the vast majority of
8 the MoneyGram official checks take. You'll see that
9 under Federal Reserve regulations which require that
10 teller's checks have certain types of funds
11 availability and require banks to set certain types
12 of reserves, which do not apply to money orders.

13 We would also say that money orders uniquely
14 have the terms and conditions on the back of the
15 check that impose service charges. This is actually
16 not a trivial difference, your Honor. Because of
17 those service charges and that legal difference, the
18 service fees consume the entire value of all money
19 orders in the amount of \$126 or less before the
20 instruments ever become dormant and therefore subject
21 to escheat. In contrast, official checks never have
22 their value depreciated in that way and their entire
23 value becomes subject to escheat.

24 And so it is Delaware's position that in light
25 of these legal differences, we're not sure how a

1 finding of similarity could be made without making
2 factual determinations about how the instruments are
3 used or marketed, for example, about how they could
4 be -- whether or not they're interchangeable in the
5 marketplace or whether they're marketed in the same
6 manner as official checks. We would also note that
7 Defendant States in their reply brief add to their
8 definition apparently of money orders that you would
9 look at characteristics such as whether or not the
10 companies selling those instruments maintain records
11 of money orders or whether or not they're considered
12 cash equivalents in any given circumstances.

13 While we believe that the facts do show that
14 these are in fact very different instruments,
15 namely, that money orders are a retail instrument
16 usually of low value used by unbanked populations in
17 place of a personal check in comparison to official
18 checks, which are bank checks available exclusively
19 at banks to be used for larger amounts, we believe
20 that that resolution would involve disputed issues of
21 material --

22 THE COURT: But isn't it correct that
23 money orders, while they certainly are useful to
24 persons who don't have bank accounts who want to use
25 them to make a payment, that's by no means the only

1 circumstance in which money orders can be useful. I
2 mean, for one thing, if the payee of the money order
3 doesn't have a bank account, it's very useful to use
4 a money order to pay that person even if the
5 purchaser of the money order does have a bank
6 account, because the payee would have difficulty
7 disposing of a personal check that was received
8 without having a bank account.

9 Then there are other circumstances, for example,
10 where the payee simply -- where the payee is owed the
11 money or is in a contract as, for example, selling
12 something, where the payee is not prepared to receive
13 a personal check but insists on having something
14 better than a personal check, to wit, something like
15 a money order or a bank check or something like that,
16 which would not depend on the credit of the payer.
17 So I don't see that -- I don't see that there's much
18 validity to your argument that they're only for or
19 only of a utility for people who don't have bank
20 accounts, unbanked individuals as you call them.

21 MS. MOSELEY: I'm sorry, your Honor.
22 If I said exclusively for use by the unbanked
23 populations, then I misspoke. I was not trying to
24 say that they are only useful in those
25 circumstances.

1 THE COURT: Well, you're arguing the
2 fact that some of these disputed instruments are sold
3 in banks and, presumably, therefore to people who
4 have bank accounts and would be there in the bank
5 buying them and that is one of the things that makes
6 them not a money order.

7 MS. MOSELEY: Yes, your Honor, money
8 orders are a retail instrument. You can walk into
9 Wal-Mart and get a money order. You cannot walk into
10 Wal-Mart and get an official check, and that is -- I
11 mean, official checks are exclusively available at
12 banks, and we do believe that that's a pretty
13 significant difference.

14 Then in connection with the unbanked population,
15 that was, you know, in part and parcel of MoneyGram's
16 testimony and generally commonly understood, even by
17 one of your alternative examples, that the payee
18 would be the person without a bank check, that money
19 orders are very heavily used in the unbanked
20 populations and, generally speaking, official checks
21 are not. This is not exclusive or to say that they
22 are only used in that way, just that that is a
23 characteristic of that type of instrument, and it's a
24 common enough characteristic of that type of
25 instrument that we think that it's one of the

1 characteristics you would look at in trying to come
2 up with a definition of what a money order is.
3 And it is why we believe it was included in
4 Pennsylvania's expert Barkley Clark's treatise, that
5 this was as an alternative to a personal check
6 largely used by the unbanked populations, and it was
7 also part of the definition offered in Munn's
8 Encyclopedia of Finance. So while it is true that
9 they're not exclusively used by the unbanked
10 populations, it does appear in multiple sources that
11 that is part of the definition and what people look
12 to when explaining what a money order is.

13 Your Honor, the last thing I would like to
14 address -- and I appreciate you allowing me to take
15 additional time -- is the exclusion of third party
16 bank checks from the third category of intangible
17 property identified in the FDA. And Delaware would
18 submit, your Honor, that irrespective of any analysis
19 of the similarity of or liability on MoneyGram
20 official checks, because the FDA excludes from its
21 scope third party bank checks, MoneyGram official
22 checks do not escheat under the FDA.

23 Your Honor, all parties have conceded, as they
24 must, that there is scant indication of what was
25 originally meant by the phrase, "Third party bank

1 check." So what we are left with is the plain
2 meaning of the words in the text of the FDA, and
3 Delaware begins in recognition that the words
4 should be interpreted as taking their ordinary
5 meaning at the time Congress adopted the statute.
6 This was Congress' recent ruling in the New Prime
7 versus Oliveira case. And we would submit that
8 under an ordinary understanding of the phrase,
9 "Third party bank check," that phrase describes a
10 bank check processed by a third party or, precisely,
11 the MoneyGram official checks at issue in this case.
12 And we would --

13 THE COURT: Say it again. Say it
14 again. That phrase describes what?

15 MS. MOSELEY: A bank check that is
16 processed by a third party. And it is a -- it is a
17 bank check which you would purchase at a bank, it is
18 a bank product that has a bank check, but it is
19 processed by a third party, and in this instance that
20 third party is MoneyGram. And we would say that this
21 interpretation of a third-party bank check is
22 consistent with the ordinary meaning of the text of
23 the FDA.

24 We recognize the Defendant States have proposed
25 alternate interpretations of, "Third party bank

1 check." They propose it's either an ordinary
2 personal check or a check endorsed to a third party,
3 and we don't believe that either of those proposed
4 interpretations of, "Third party bank check," are
5 consistent with the text of the FDA. We don't
6 believe that suggesting that it is merely an ordinary
7 personal check is consistent with the expression that
8 requires that it be a bank check. We would also note
9 that the Defendants' proposed interpretation of the
10 phrase a, "Third party bank check," would purport to
11 exclude from the scope of the FDA a category of
12 instruments that, by definition, can never be
13 abandoned unclaimed property and therefore never
14 subject to escheat in the first instance.

15 To simply understand the problem, your Honor,
16 it's one of execution. The holder has no way of
17 knowing when a check has been endorsed over to a
18 third party until that check is presented for
19 payment, at which point that check is no longer
20 unclaimed property. So Defendant States' definition
21 of a third party bank check defines a null set for
22 the purpose of escheating property, and therefore
23 Delaware would submit that the phrase third party
24 bank check is best understood to reference, as I said
25 before, bank checks processed by a third party. And

1 as a result, because MoneyGram official checks are
2 understood to be bank checks processed by MoneyGram,
3 a third party, MoneyGram official checks are
4 specifically excluded from the FDA and should
5 continue to escheat as they have for decades to
6 MoneyGram's state of incorporation under the priority
7 rules.

8 THE COURT: You've made an argument
9 about surplusage. Do you want to address that?

10 MS. MOSELEY: Yes, your Honor. We did
11 talk about, in terms of understanding Defendant
12 States' proposed definition of a money order, that we
13 believe that the definition that they proposed,
14 namely, "All pre-paid instruments to a named payee,"
15 is not consistent with the text of the FDA, that to
16 interpret money order that broadly would render the
17 subsequent identified types of intangible property,
18 namely, the traveler's checks and similar written
19 instruments, to be superfluous, and we believe that
20 the Supreme Court has indicated that a statute should
21 be construed so that effect is given to all of its
22 provisions so that no part will be inoperative or
23 superfluous, void or insignificant. And so --

24 THE COURT: But why is it -- why is it
25 superfluous?

1 MS. MOSELEY: Because if all -- if you
2 understand all money orders to include, to be a
3 category or type of property that includes all
4 pre-paid instruments to a named payee, there's no
5 need for the FDA to separately specify traveler's
6 checks or similar written instruments. Traveler's
7 checks are pre-paid instruments to a named payee, and
8 similar written instruments, by definition, would
9 also have to have that, that characteristic.

10 So to read, "Money orders," as all pre-paid
11 instruments would be essentially to rewrite the
12 statute, the FDA, to say sums payable on all pre-paid
13 instruments to a named payee and then move on to
14 Paragraphs 1, 2 and 3. And we believe that that's
15 inconsistent and that it's needless and that you
16 would be needlessly interpreting a term in a manner
17 that would cause it to duplicate other provisions or
18 to have no consequence. And we would --

19 THE COURT: Well, wouldn't it be --
20 wouldn't it be a reasonable thing for Congress to do
21 if they -- if Congress doesn't perceive, if Congress
22 isn't aware at present of any other similar
23 instruments, sufficiently similar -- when you say
24 similar, there's inherently necessarily ambiguity in
25 it because you need to know how similar. There are,

1 of course, endless degrees of similarity, greater or
2 lesser, and presumably they mean things that are
3 very similar or at least similar in essential
4 characteristics as opposed to inessential
5 characteristics.

6 But when Congress isn't aware at present of any
7 other instruments that are sufficiently similar that
8 they should be included in the same legislative
9 command but envisions the possibility that things may
10 change in the future and such business practices may
11 change and new instruments may be developed that are
12 sufficiently similar, we want them to be covered as
13 well if they're sufficiently similar, so we say,
14 "Other similar instruments," but we can't know about
15 them now because they don't yet exist to our
16 knowledge, but they might.

17 Or if somebody comes and later makes an argument
18 that something is not a traveler's check or a money
19 order because of some trivial distinction, lest the
20 Court buy that, Congress will say, well, yes, but
21 other similar instruments if they're sufficiently
22 similar or similar in sufficiently important
23 respects, as opposed to trivial respects, they will
24 be covered. It seems to me that's a logical
25 appropriate thing to do when Congress isn't aware of

1 the present existence of something sufficiently
2 similar to be covered but anticipates that it may,
3 may later become the case.

4 MS. MOSELEY: Yes, your Honor. I --
5 I agree, but if we were to define money order as
6 Defendant States have proposed, namely, "All pre-paid
7 instruments to a named payee," there would be no need
8 to list traveler's checks, and all pre-paid
9 instruments to a named payee would include, I
10 believe, all drafts but a draft drawn on a personal
11 check or a business account. That category is so
12 broad, your Honor, that it sweeps in everything but
13 your personal check and a payroll check from a
14 company, and to adopt that definition really almost
15 sort of denies the fact that there would be this idea
16 of something similar, because it already includes
17 everything other than a personal check or a check
18 from a business account.

19 THE COURT: Well, the statute, as I
20 was thinking and in our earlier discussion it reads,
21 would limit them, would limit the applicability.
22 Even if money order had the broader definition, the
23 statute would only apply to those on which a banking
24 or financial institution is directly liable. I know
25 you disagree with that, but I think your reading is

1 very difficult to square with the words of the
2 statute. So that would knock out from covered money
3 orders, covered by the escheat rules, ones that were
4 personal instruments or personal checks or whatever.

5 MS. MOSELEY: Your Honor, in that
6 instance I believe the understanding of direct
7 liability that you're using is not the definition of
8 direct liability that Delaware has proposed is the
9 proper understanding of direct liability in the
10 context of the FDA, namely, the unconditional
11 liability set forth in Article 3 of the UCC. Money
12 orders are not an instrument on which there is that
13 direct liability, and therefore, I'm not sure how,
14 "Directly liable," would apply to money order in that
15 instance.

16 THE COURT: Okay. Let me see if I
17 have anything else I want to ask you about.

18 MS. MOSELEY: Yes, your Honor. I'd be
19 happy to answer any questions, and I would -- I would
20 like, your Honor, just to note for the Court that on
21 the direct liability discussion that Delaware put
22 forward in terms of its understanding of direct
23 liability as being the equivalent of unconditional
24 liability as established in the UCC, that that is
25 something that we believe distinguishes and narrows

1 that third category of intangible property identified
2 in the FDA.

3 THE COURT: So you're arguing that
4 when Congress used the term directly liable what they
5 meant was unconditionally liable?

6 MS. MOSELEY: Yes, your Honor. We're
7 arguing that, "Directly," needs to be included in the
8 statute. To interpret directly liable the way
9 Defendant States propose would have direct liability
10 be no different than regular old liability, and we
11 believe, given the prevalence of the UCC at the time
12 and the common understanding of the word direct, that
13 when you use, "Directly liable," to describe a
14 written negotiable instrument you're identifying a
15 type of liability on that instrument that is
16 unconditional, as understood by the general
17 background principals in Article 3. And in that way,
18 your Honor, it would limit the third category of
19 intangible property identified in the FDA to
20 instruments on which there is this unconditional
21 liability, and because there is no unconditional
22 liability on the official checks, that would exclude
23 them from that category.

24 THE COURT: You have argued that
25 certain states' escheat laws don't cover other

1 similar instruments because they explicitly refer to
2 money orders and traveler's checks, but they don't
3 refer to similar instruments.

4 MS. MOSELEY: Yes, your Honor. The
5 FDA gives the power of the states to escheat under
6 the FDA to the extent that the states have the power
7 to take those instruments under their own unclaimed
8 property laws.

9 THE COURT: But is there any reason
10 why those states' laws need to be interpreted as
11 using exactly the same terminology as the AFDA? I
12 mean, is there any reason why those states might not
13 interpret their reference to money orders and
14 traveler's checks as broad enough to cover something
15 that might fall under, under the federal statute,
16 other similar instruments?

17 MS. MOSELEY: Yeah, well, your Honor,
18 the FDA is an issue of federal law, and specifically
19 with respect to the state law that you are
20 referencing, the Defendant States have relied on what
21 they call their catch-all provision in a portion of
22 their state laws that establish the dormancy period,
23 and that is one part of state escheat law, the
24 statute part that defines when certain instruments
25 become dormant. And in that catch-all provision,

1 they provide a dormancy period for similar written
2 instruments, but then when you turn to the portion of
3 their statute that gives the power to the state to
4 actually take that property, they don't identify
5 similar written instruments, they only list money
6 orders and traveler's checks.

7 And we would say, your Honor, that the right to
8 escheat includes the right not to escheat, and while
9 some states may provide for the dormancy of these
10 items, they have not provided for the power to
11 escheat those items.

12 THE COURT: Another question about
13 those states' laws. Let's say that you're correct
14 that those states' laws don't provide the power to
15 escheat similar instruments. What happens then to
16 the similar instruments?

17 MS. MOSELEY: Well, at that point --

18 THE COURT: Who escheats them? Who do
19 they go to?

20 MS. MOSELEY: Because they don't have
21 the power to take that property under their own law,
22 which is a requirement under the federal law --

23 THE COURT: Right, right, yeah, yes.

24 MS. MOSELEY: -- the federal FDA, then
25 they would escheat pursuant to the priority rules to

1 the state of incorporation of the holder.

2 THE COURT: Well, what about Clause 3
3 of the FDA?

4 MS. MOSELEY: It says that if they
5 disclose no books or records, it would go to the --
6 if there's no address in the books or records, it
7 would go to the principal place of business. But the
8 requirement under the FDA is that the states have the
9 power to escheat the property at issue in order for
10 the property to escheat under the FDA in the first
11 instance, and if you lack the power to escheat the
12 property under the FDA in the first instance because
13 of that requirement of federal law, then that
14 property falls outside the ambit of the FDA and would
15 escheat pursuant to the federal common law and the
16 priority rules.

17 THE COURT: So under Clause 3,
18 Clause 3 says, "If the books and records of such
19 banking or financial organization or business
20 association show the State in which the money order,
21 traveler's check, or instrument was purchased and the
22 laws of the State of purchase do not provide for the
23 escheat or custodial taking of the sum payable on
24 such instrument..." That's the circumstance we're
25 talking about, right?

1 MS. MOSELEY: Right.

2 THE COURT: We're talking about one
3 where if you are correct that certain of the other
4 states here -- if you are correct that certain of the
5 other states here have escheat laws that don't cover
6 other similar instruments, they do cover money orders
7 and traveler's checks but not other similar
8 instruments, then it's true that, "...the laws of the
9 State of purchase do not provide for the escheat or
10 custodial taking of the sum payable of such
11 instrument."

12 Then the statute goes on to say, "The State in
13 which the banking or financial organization or
14 business has its principal place of business shall be
15 entitled to escheat or take custody..." That's the
16 argument as I understand it.

17 MS. MOSELEY: Subject --

18 THE COURT: Go ahead.

19 MS. MOSELEY: Subject to, "The extent
20 of that State's power under its own laws to escheat
21 or take custody of such sum."

22 THE COURT: Right, right.

23 MS. MOSELEY: So I was speaking to the
24 situation in which there were states that neither the
25 state or the place of purchase or the state --

1 THE COURT: Oh, oh, I see, I see.

2 You're saying --

3 MS. MOSELEY: Yes.

4 THE COURT: You're saying not only the
5 states that are parties to this dispute that are
6 claiming the right to escheat that other similar
7 instrument, but you're saying also if the state of
8 principal place of business of MoneyGram, which I
9 understand is Minnesota, if it doesn't have the
10 power, then you're next in line after, after the
11 principal place of business.

12 MS. MOSELEY: Yes, your Honor. And
13 our point really was to raise the issue that before
14 any money would be allocated we would have to look at
15 all of these states and their state laws and the
16 state power, because the federal statute, the ability
17 to escheat under the federal statute is conditioned
18 on the states' ability to escheat under their own
19 laws.

20 THE COURT: I thought you were -- I
21 thought you were arguing that if the state of
22 purchase doesn't have escheat laws that cover similar
23 instruments, then you get it under the common law
24 rule, but you're not arguing that.

25 MS. MOSELEY: We are arguing, your

1 Honor, that if no -- if there is no state that has
2 the power to escheat this property under their own
3 laws, it would fall back under the bright-line
4 priority rules, your Honor.

5 THE COURT: Okay, all right, okay, all
6 right. Thank you.

7 MS. MOSELEY: I'm not sure -- have I
8 left anything unaddressed that you would like for me
9 to touch on, your Honor?

10 THE COURT: I'm just going to check
11 that. I have a question for you also about
12 Pennsylvania's, Pennsylvania's contention in its
13 counterclaim that the secondary rule established in
14 the Texas case should be overturned so that the
15 abandoned instruments would escheat to the state of
16 purchase rather than the state of incorporation. And
17 you have argued that that would disrupt established
18 expectations; is that correct?

19 MS. MOSELEY: Yes, your Honor. We
20 think that that is, one, not necessary to resolve the
21 interpretation of the FDA. Two, the Supreme Court
22 has looked at this. You know, they established this
23 rule in Texas and twice reaffirmed it, as recently as
24 1993. It's pretty well-established Supreme Court
25 precedent, and there does not appear to be a reason

1 why that precedent would not be followed in this
2 case, your Honor, as it's not necessary to be
3 questioned in terms of the FDA.

4 We would also note that Pennsylvania seems to be
5 asking that the rule be overruled with respect to all
6 forms of intangible property, and they're basing this
7 request on assertions about ease of administration
8 and fairness, and we just haven't looked at all forms
9 of intangible property in this case, your Honor. We
10 haven't performed an analysis on the ease of
11 administration or fairness or any of those issues.
12 They just haven't been before your Honor, so we
13 really don't believe that Pennsylvania's request is
14 properly dealt with in this, in this litigation, your
15 Honor.

16 THE COURT: But in your -- in making
17 your argument that it would -- that this change of
18 law should be disfavored because it would upset
19 established expectations and the like, you haven't
20 really offered any evidence to that effect.

21 MS. MOSELEY: To the effect that
22 holders --

23 THE COURT: That it would upset
24 expectations and that's the --

25 MS. MOSELEY: Well, your Honor --

1 THE COURT: You put that forth as kind
2 of an abstract argument but without substantiation.
3 You haven't done any discovery on that issue.

4 MS. MOSELEY: No, your Honor, but I
5 would say the priority rules have been in place since
6 1965 and that holders have been operating under those
7 priority rules for about 60 years now, and to change
8 those priority rules would require then to change a
9 60-year long practice of where this unaddressed
10 property would go. And in that instance, your Honor,
11 I do believe that one of the Supreme Court's
12 consistent themes in all of its Texas trilogy cases
13 is that the bright-line priority rules are necessary
14 to protect holders.

15 In that instance they were dealing with Western
16 Union, who had faced an issue, a potential issue of
17 double liability, in that having holders -- that
18 holders having a bright-line rule knowing where the
19 property goes protects them from any possible due
20 process violation. And it was this Constitutional
21 violation of holders and ease of administration that
22 the Supreme Court focused on when it established
23 these bright-line rules and has upheld every time
24 since then.

25 THE COURT: Okay. Thank you very

1 much.

2 MS. MOSELEY: Thank you, your Honor.

3 THE COURT: So I'll hear now from the
4 States. That will be Mr. Wagner; is that right?

5 MR. WAGNER: Yes, your Honor.

6 THE COURT: Okay. You may proceed,
7 and you're free to take time similar to the time
8 taken by Delaware.

9 MR. WAGNER: Thank you, your Honor,
10 and may it please the Court --

11 THE COURT: You don't need to, but you
12 may.

13 MR. WAGNER: I'll take as much time as
14 you'd like me to, your Honor. Vincent Wagner, Deputy
15 Solicitor General of Arkansas, as you said, here for
16 the Defendant States.

17 MoneyGram has designed its proprietary official
18 check program so that although it receives the funds
19 payable on the pre-paid drafts that it issues, it
20 leaves no information about the purchasers of those
21 drafts; thus, MoneyGram and the purchasers are
22 disconnected. This same disconnect led Congress
23 in 1974 to statutorily abrogate the holding of
24 Pennsylvania versus New York. Despite the
25 45 year-old statute that Congress enacted, MoneyGram

1 has remitted to Delaware, its state of incorporation,
2 around 250 million dollars payable in unclaimed
3 official checks. More than 99 percent were purchased
4 elsewhere.

5 The Defendant States are entitled to partial
6 summary judgment for three reasons. First is that
7 MoneyGram official checks are money orders. Everyone
8 agrees that agent check money orders, one category of
9 MoneyGram official checks, are money orders, and
10 there are no material differences between agent check
11 money orders on the one hand and agent checks and
12 teller's checks on the other hand.

13 Second, MoneyGram is the business association
14 that is directly liable on its official checks and is
15 ultimately liable for paying the funds due on those
16 checks, and it holds those funds until they're
17 presented for payment. And third and finally, all
18 three experts on the law of payment systems that
19 testified in this case agreed that MoneyGram official
20 checks were not third party bank checks, and that
21 includes Delaware's own retained expert, Professor
22 Ron Mann, who didn't support Delaware's contrary
23 interpretation of the term.

24 So back to my first point, which is that
25 MoneyGram official checks are money orders. And

1 first I'd like to push back on Delaware's
2 characterization of our definition of money order
3 here, because it's not -- a money order is not simply
4 a pre-paid instrument. We have defined it a pre-paid
5 draft issued by a bank, a post office or a similar
6 entity that the purchaser uses to transmit money to a
7 named payee, and so that would not render the term
8 traveler's checks superfluous in the statute because
9 the UCC makes clear in its comments to Section 3-104
10 that traveler's checks are not necessarily in the
11 form of a draft. Traveler's checks can also take the
12 form of a note, so they wouldn't necessarily fit our
13 definition of money order.

14 All the MoneyGram official check instruments at
15 issue in this case do fit our definition. That's why
16 MoneyGram already treats agent check money orders as
17 money orders, and Delaware has conceded that agent
18 check money orders, which are part of MoneyGram's
19 official check program, are covered.

20 There are no operational differences between
21 agent check money orders on the one hand and agent
22 checks and teller's checks on the other hand, which
23 are the disputed instruments in this case. All three
24 categories are pre-paid drafts. They're sold by
25 financial institutions. By 11 a.m. the morning after

1 they're sold, the selling institution wires the funds
2 to MoneyGram, and MoneyGram holds those funds in its
3 own investment accounts, where they're commingled
4 with the funds payable on all of MoneyGram's paper
5 instruments until the instrument is presented for
6 payment. And despite handling all of this back-end
7 processing on these official checks, MoneyGram
8 receives no information about the purchasers.

9 So they're operationally identical, and
10 MoneyGram and Delaware have not justified why agent
11 check money orders are covered by the FDA, which they
12 both concede, yet agent checks and teller's checks
13 should not be covered by the FDA. All are pre-paid
14 drafts that MoneyGram issues to purchasers so they
15 can transmit money to named payees. They are money
16 orders and are covered by the FDA.

17 They are also covered by the other similar
18 written instrument provision, and the analysis here
19 is to look at the specifically enumerated terms in
20 the statute, which are money order and traveler's
21 check, and determine the common characteristics that
22 led to their inclusion and then look for other items
23 that share those characteristics in common with
24 money orders and traveler's checks. And so Congress
25 made clear in the purpose section of the FDA,

1 Section 25.01, the key characteristic that it saw
2 that money orders and traveler's checks shared was
3 that the issuers of these instruments do not, as a
4 matter of business practice, maintain records about
5 the purchaser's address.

6 Additionally, both money orders and traveler's
7 checks are pre-paid, which is what creates the
8 escheatment problem here. So the issuer holds the
9 funds payable on a money order or a traveler's check,
10 but has no information about the purchaser of the
11 instrument. The issuer and the purchaser are
12 disconnected, and Congress found that this disconnect
13 led to an inequitable result under Pennsylvania
14 versus New York, an inequitable windfall to the state
15 of incorporation.

16 The same inequitable windfall arises in the case
17 of MoneyGram official checks, the same disconnect
18 between the purchaser of the check and MoneyGram.
19 The day after the check is purchased the selling
20 financial institution wires the funds to MoneyGram
21 but transmits no information about the purchaser, so
22 MoneyGram holds the funds due on the instrument but
23 has no information about the purchaser, and therefore
24 official checks share the characteristics that led
25 Congress to enumerate money orders and traveler's

1 checks in the statute, which Delaware's attempt to
2 distinguish MoneyGram official checks from these
3 other items fails for two primary reasons. The first
4 is --

5 THE COURT: Let me interrupt you.
6 Before you get to addressing Delaware's arguments,
7 why they're different, what is your position -- I
8 mean, you have not contested Delaware's argument that
9 the, "Directly liable," clause applies only to the
10 third category, other similar instruments. Is that
11 the position you take on the meaning of the statute?

12 MR. WAGNER: Your Honor, we didn't
13 stake out a very clear position on that in our
14 briefing. And I take your Honor's point in the
15 argument today about kind of the confusion between
16 the lack of a comma in the first clause versus the,
17 "Such," reference in the three clauses, but it's a
18 feature of our definition of direct liability that it
19 does not depend on, "Directly liable," not applying
20 to money orders and traveler's checks, as Delaware
21 acknowledges that its definition -- that if its
22 definition, which is to import the UCC concept of
23 unconditional liability into the statute, if that
24 applies, then it would knock money orders and
25 traveler's checks out of the statute, because if

1 direct liability is required for money orders and
2 traveler's checks, Delaware and Professor Mann both
3 say that in all money orders and most traveler's
4 checks, there is no institution that's directly
5 liable on them.

6 So that is an internal tension with Delaware's
7 interpretation of directly liable that's not there
8 with our interpretation, because if you understand
9 directly liable to mean the entity that's ultimately
10 liable for paying funds due on an instrument that is
11 also in custody of the funds due on the instrument,
12 that would describe a money order and a traveler's
13 check as well. So our definition of directly liable
14 does not hinge on that phrase not applying to money
15 orders and traveler's checks

16 THE COURT: So you simply are neutral
17 to the question of whether the, "Directly liable,"
18 clause applies only to the immediately precedent
19 antecedent, the antecedent, the immediate antecedent
20 or all three. No part of your argument depends on
21 one interpretation or the other?

22 MR. WAGNER: That's correct, your
23 Honor.

24 THE COURT: But does the statute
25 make any sense if it applies only to the -- if it

1 applies only to the latter, then it seems to me
2 that Clauses 1, 2 and 3 simply don't address the
3 disposition by escheat of money orders and traveler's
4 checks, because they only talk about the circumstance
5 where such financial institution's books and records
6 don't disclose certain things. And, "Such financial
7 institution," could only be referring -- the only
8 previous mention of banking or financial institutions
9 is in that clause. So how would you read the statute
10 to direct the disposition by escheat of money orders
11 and traveler's checks as opposed to similar
12 instruments if there's no reference to banking or
13 financial organizations that refers to money orders
14 and traveler's checks?

15 MR. WAGNER: Your Honor, I think
16 you're right that that is a tension there if you
17 don't read the, "Such organization," as the
18 antecedent being the organization that's directly
19 liable in an instrument. And again, I'd just
20 reiterate that our definition of directly liable
21 doesn't depend on it not --

22 THE COURT: Okay.

23 MR. WAGNER: -- it not being the
24 antecedent there.

25 THE COURT: Okay. You were proceeding

1 to talk about Delaware's distinction of certain
2 instruments from others.

3 MR. WAGNER: Yes, your Honor. And as
4 far as distinguishing MoneyGram official checks from
5 the instruments listed in the FDA, the first problem
6 with Delaware's distinction is that it focuses solely
7 on money orders. And the argument here, as Delaware
8 points out, is not that MoneyGram official checks are
9 traveler's checks, but that in order to determine
10 what instruments are similar written instruments in
11 this statute, we need to determine what are the
12 characteristics that are common to money orders and
13 traveler's checks. Because Delaware doesn't analyze
14 traveler's checks at all, it can't determine the
15 similarities that are common to those instruments and
16 therefore can't determine the scope of the
17 similarities relevant to bringing an instrument
18 within the, "Other similar written instrument,"
19 provision.

20 And then as your Honor identified in Delaware's
21 opening arguments, there's a focus on the instruments
22 that MoneyGram currently chooses to label money
23 order. There's no attempt to connect MoneyGram's
24 current decision to sell these instruments with this
25 label to what Congress meant 45 years ago when it

1 used the term money order in the statute.

2 And maybe more fundamentally, with these
3 features of MoneyGram's money orders, it's not
4 explained how these features are relevant to the
5 inequitable windfall under Pennsylvania versus New
6 York that Congress identified and expressly set about
7 abrogating. The features that are relevant to that
8 windfall are the ones I've identified, which are that
9 the instrument is pre-paid and that the issuer of the
10 instrument has no record of the purchaser's last
11 known address. And that describes MoneyGram official
12 checks, so the FDA covers MoneyGram official checks
13 as money orders or other similar instruments.

14 THE COURT: Well, are you saying that
15 if MoneyGram did have a record of the purchaser's
16 address that that would change the escheat rule?

17 MR. WAGNER: On a particular
18 instrument, I'm not saying that, your Honor. The
19 issue is whether as a general matter -- the statutory
20 language is whether it is a matter of business
21 practice, I think is the statutory language.

22 THE COURT: Well, if MoneyGram's
23 business practice were to keep a reference to the
24 address of the purchaser, would that -- would its
25 money -- would its instruments no longer be money

1 orders?

2 MR. WAGNER: Not money orders, your
3 Honor. The issue is not whether that makes them
4 money orders, your Honor, but whether that makes them
5 similar to money orders and traveler's checks for
6 purposes of the FDA, and that is a key feature of the
7 instruments that Congress enumerated in the FDA. So
8 if MoneyGram as a matter of business practice kept
9 records of the purchaser's last known address, that
10 would be -- that would determine whether or not they
11 fit within the statute. But it's undisputed in this
12 case that they do not. That was the testimony of
13 MoneyGram's representatives, and that is that the
14 purchaser's last known address is not among the
15 information that the selling financial institution
16 sends to MoneyGram.

17 THE COURT: Well, does the statute
18 include a requirement, include any reference to
19 whether the -- I mean, I know that the preamble
20 clauses do, but does the part of the statute that
21 tells who gets to escheat the different instruments
22 include a reference to whether the issuing
23 organization maintains records of the address of the
24 purchaser?

25 MR. WAGNER: Your Honor, it's

1 encapsulated in the term similar in this case, that
2 we're interpreting the term similar of the expressed
3 purposes in Section 25.01, which relates to
4 recordkeeping of the purchaser's address, and also
5 the underlying purpose of the statute, which it's
6 clear that Congress thought where there are no
7 records of the purchaser's address as a matter of
8 business practice, the result of Pennsylvania versus
9 New York, which is the background common law rule, is
10 an inequitable result. So --

11 THE COURT: Am I not correct that that
12 provision explaining the reasons for this statute
13 talks about that as a general practice? Doesn't it
14 say that as a general practice the issuers of money
15 orders do not maintain records of the address of the
16 purchaser?

17 MR. WAGNER: Yes, your Honor, it says
18 that, and the focus there is why we think that it's
19 relevant to determining the scope of the similar
20 instruments that Congress intended --

21 THE COURT: Okay.

22 MR. WAGNER: -- to bring within the
23 FDA's coverage, that this was Congress' focus here,
24 which is the inequity caused by these sorts of
25 instruments. So because MoneyGram official checks

1 fall within the FDA, fall within some part of the
2 first clause, whether they're money orders or similar
3 instruments, the next question is whether MoneyGram
4 is directly liable on them. And under the
5 established definition of the term, MoneyGram is
6 directly liable on them. And it doesn't -- the
7 historical definition of this term is that it's the
8 entity that's holding the funds payable on an
9 instrument that is ultimately liable for paying the
10 funds due on it, and it requires no speculation to
11 take this historical definition into the statute.

12 Congress drew the relevant phrase word for word
13 from Section 2(C) of the 1966 Revised Uniform
14 Disposition of Unclaimed Property Act. And in
15 addition to that drawing, drawing the text of this
16 provision, Congress drew the definitions in
17 Section 25.02 directly from the definitions section
18 of the 1966 Revised Uniform Act. This led the Court
19 in Travelers Express versus Minnesota, which was one
20 of the few courts to discuss the FDA in any
21 substance, to conclude that Congress had plainly
22 designed the FDA to interact with the Uniform Act.

23 So Congress drew terms from antecedent laws, and
24 they had established meanings. Both the 1966 Revised
25 Uniform Act and its 1954 predecessor drew expressly

1 on New York's pre-existing unclaimed property law as
2 a key source. Both of those Uniform Acts identified
3 New York's law as a source in the comments to
4 Section 2, which I reproduced in our appendix. And
5 New York used the term, "Directly liable," since at
6 least 1943, and the New York attorney general since
7 then has interpreted it as being an entity that holds
8 the funds due on an instrument and is ultimately
9 liable for paying those funds once the instrument is
10 presented for payment.

11 That's true of MoneyGram here. MoneyGram
12 receives the funds from the selling financial
13 institution by 11 a.m. the day after the instrument
14 is sold, and then MoneyGram deposits the funds in its
15 own commingled investment accounts where it deposits
16 the funds on all of its paper products, and MoneyGram
17 holds those funds until the instrument is presented
18 for payment via a clearing bank, and it's MoneyGram
19 that's ultimately responsible for paying the funds
20 due on the instrument. Under the historical
21 definition of directly liable, MoneyGram is directly
22 liable on its official checks.

23 Delaware's contrary interpretation, we've
24 already discussed some, which is to import the UCC
25 concept, creates internal tensions within the statute

1 that your Honor has already identified, and beyond
2 that, there's no textural link between the UCC and
3 the FDA. Delaware and Professor Mann have both
4 acknowledged that the UCC never uses the term
5 directly liable to discuss the concept of
6 unconditional liability that they've outlined, and
7 Professor Mann went so far as to say he had never
8 used the term directly liable to teach the concept of
9 unconditional liability as a professor.

10 Beyond these textual issues with Delaware's
11 interpretation, it fails to account for the purposes
12 of the FDA. Section 25.01 focuses on what
13 information the seller of an abandoned instrument
14 has, and the Senate Report explains this focus on the
15 seller of the instrument. On Page 1 of the Senate
16 Report it identifies the seller as directly liable
17 for having sold the instrument, and with money orders
18 and traveler's checks it says the funds due from the
19 seller on these instruments remain in its hands.
20 Congress was concerned with the entity that's holding
21 the funds for an instrument and ultimately
22 responsible for paying them.

23 The historical understanding of the term
24 directly liable reflects that same focus on the
25 entity holding the funds due on an instrument. The

1 UCC concept, however, is focused on conditions
2 precedent to a successful lawsuit. And as far back
3 as 1946, the New York attorney general had issued an
4 opinion explaining why conditions precedent to a
5 successful lawsuit are not relevant to the purposes
6 of unclaimed property law. Whether or not an
7 entity's ultimate liability is conditional, the
8 entity is holding funds in its custody that do not
9 belong to it and that are due on an abandoned
10 instrument. That's why unclaimed property law has
11 interpreted the term directly liable to refer to the
12 entity holding the funds due on an instrument that's
13 ultimately responsible for paying them.

14 Now, that applies to MoneyGram in this case, so
15 MoneyGram is directly liable on the agent checks and
16 teller's checks at issue here. All of this means the
17 FDA governs the escheat of MoneyGram's instruments
18 unless they are third party bank checks. Three
19 prominent experts testified in this case that they
20 did not think MoneyGram official checks fit any
21 normal definition of the term third party bank check,
22 and this does include Professor Mann, who testified
23 that the ones he -- the MoneyGram instruments he had
24 studied did not fit in the ordinary sense of what the
25 term would mean. It also didn't support Delaware's

1 interpretation of the term, which is that essentially
2 MoneyGram's involvement as an issuer of these,
3 handling the back-end processing, renders them third
4 party bank checks.

5 This is supported again by the Senate Report.
6 On Pages 3 and 4 of the Senate Report there's a
7 letter from the then chairman of the Federal Reserve.
8 He was concerned about how the first draft of the FDA
9 would apply to certain instruments that were sold by
10 banks but issued by third parties. He suggested
11 amendments to the text of the FDA to address his
12 concerns and make sure that the FDA applied correctly
13 to these instruments. Congress adopted his
14 amendments in its final version of the law, which
15 suggests that Congress was comfortable with and
16 expected the FDA to govern instruments that are sold
17 by banks but issued by third parties.

18 THE COURT: I'm sorry. The sound, we
19 lost you for a second there. Repeat that sentence.
20 It would apply to?

21 MR. WAGNER: Instruments that --

22 THE COURT: Yeah, go ahead.

23 MR. WAGNER: -- are sold by banks, but
24 issues by third parties, which Delaware's argument is
25 that because that describes these checks, they are

1 third party bank checks, but that's inconsistent with
2 this back and forth between Congress and the chairman
3 of the Federal Reserve that I've described on Pages 3
4 and 4 of the Senate report. So Delaware's
5 interpretation is contrary to this, and it's not
6 supported by the any of the experts in this case, and
7 no reasonable interpretation of the term third party
8 bank check applies to MoneyGram official checks.

9 There are two reasonable alternative definitions
10 of the term. One is based on the plain text and
11 rooted in the term third party check, which has a
12 well-established definition. All throughout the case
13 law a third-party check is a check that has been
14 endorsed by the original payee to a third party.
15 This is even Black's Law Dictionary's definition of
16 third party check. A bank check, Professor Gillette
17 explained, is often understood as a check that is
18 drawn on a bank and drawn by a bank.

19 MoneyGram official checks are not third party
20 bank checks because they are not bank checks.
21 MoneyGram is a drawer of all MoneyGram official
22 checks. Even on teller's checks, MoneyGram is
23 identified as the issuer of the check, but the UCC is
24 very clear that an issuer on an instrument is also a
25 drawer of the instrument. So because MoneyGram is a

1 drawer of all the official checks at issue here, they
2 are not bank checks, they are third party bank
3 checks.

4 The alternative reasonable definition that's
5 been presented is that a third party bank check is a
6 check that's drawn on a checking account, and this
7 comes from the history of the term third party
8 payment services the Treasury Department and others
9 were using in the early 1970s. A common example of a
10 third party payment service was a consumer checking
11 account. It was described as a third party payment
12 service because it allowed a bank's customer to pay a
13 third party from the customer's bank account. So
14 when the Treasury Department, again as reflected in
15 the Senate Report, asked Congress to exclude third
16 party payment bank checks, it likely was asking
17 Congress to exclude checks that were drawn on
18 checking accounts.

19 That doesn't describe MoneyGram official checks
20 here because Congress adopted a truncated version of
21 what the Treasury Department had asked Congress to
22 adopt. And because MoneyGram official checks are
23 not third party bank checks, the FDA does cover
24 their escheatment, and we ask that Special Master
25 recommend partial summary judgment in favor of the

1 Defendant States.

2 THE COURT: I have a question for you
3 about Minnesota. So Delaware is arguing that certain
4 states lack laws that authorize the escheat of
5 similar instruments, and if Delaware is correct under
6 that clause, then under Clause 3, Michigan, the
7 principal place of business, is the -- gets the
8 escheat rather than the place of purchase.

9 Now, is it a problem that Minnesota is not in
10 this lawsuit? Because one of the issues that is
11 being raised by Delaware is whether the laws of those
12 states, of certain states that it specifies, do
13 successfully escheat similar instruments or only
14 money orders and traveler's checks but not similar
15 instruments. I take it Minnesota would not be bound
16 by that ruling? Because Minnesota might make the
17 same claim in order to get priority for itself over
18 the state of purchase, but does it matter for our
19 purposes? For getting this wrapped up for the
20 Supreme Court, does it matter that we don't have
21 Minnesota here being bound by whatever the Supreme
22 Court determines to be the right answer?

23 MR. WAGNER: So, your Honor, I think
24 maybe there's a factual premise in there that I'm not
25 entirely sure is supported by the record, that

1 Minnesota is the principal place of business, because
2 I know MoneyGram has significant offices in Dallas,
3 Texas as well, so I'm not sure that it is clear from
4 the record presented here that Minnesota would be the
5 principal place of business. But beyond that, the
6 question would be --

7 THE COURT: Hasn't -- am I mistaken?
8 I thought that MoneyGram had taken that position.
9 That doesn't necessarily make it conclusively so, but
10 hasn't MoneyGram identified Minnesota as its
11 principal place of business?

12 MR. WAGNER: I'm not sure where that
13 would be, your Honor. I know prior to escheating
14 official checks to Delaware MoneyGram escheated them
15 to Minnesota, but that was because it was then a
16 Minnesota corporation. It reincorporated under
17 Delaware law, and that precipitated the change in
18 escheatment to Delaware is my understanding from the
19 MoneyGram documents.

20 But maybe the more fundamental point you're
21 making about whether or not the -- is it needs to be
22 established for this case where MoneyGram's principal
23 place of business is. So the first point is that
24 that is more to the damages phase of this case, I
25 think, where your Honor has decided to first

1 establish whether or not these instruments are
2 covered by the FDA, and so that's the question that
3 we're discussing now.

4 But beyond that, if the -- if the state -- if
5 the principal place of business is not here, then I
6 think your Honor would be right, that it would be a
7 separate proceeding, that they wouldn't necessarily
8 be bound by a judgment, but that would be a separate
9 issue that we would need to develop that we haven't
10 developed so far.

11 THE COURT: Uh-huh, uh-huh, okay. So
12 you don't see it as -- you don't see any need to
13 somehow bring Minnesota into this proceeding so that
14 it would be bound by the result of whatever the
15 Supreme Court decides on that question?

16 I mean, an issue raised by Delaware is it is
17 Delaware's contention that certain states' escheat
18 laws don't cover similar instruments, and that issue
19 would have an effect. If Minnesota is the principal
20 place of business, it would be affected by that
21 result, and it has a potential interest if it is the
22 principal place of business in making the same
23 contention as Delaware makes, right?

24 MR. WAGNER: The principal place of
25 business would have interests, your Honor, but we

1 haven't developed the question -- a position on the
2 question of whether they'd be a necessary party or
3 anything like that under the law, which, you know, I
4 shouldn't -- I should address the argument here that
5 the 10 Defendant States Delaware has purported to
6 identify as lacking the state law power in fact lack
7 it, which first I would agree with your Honor that
8 there's no reason why those states' laws need to be
9 interpreted as a matter of state law interpretation
10 in the exact same way as the FDA. You're right to
11 identify that point, that the states could well
12 interpret the term money order or traveler's checks
13 in a way broader than the federal interpretation of
14 them under their state escheatment statutes.

15 THE COURT: Well, Ms. Moseley was
16 pointing to some instances in which the state's law
17 makes explicit reference to similar instrument in
18 part of its provisions, but does not refer to similar
19 instruments in the escheat provision. And she argues
20 with particular strength as to those states that
21 where the state has expressly recognized two
22 different categories, money orders and similar
23 instruments, and has provided the escheat only for
24 the money orders and not for the similar instruments,
25 she argues that that state does not qualify for

1 escheat under Paragraph 3, and it then goes to the
2 principal place of business, and if the principal
3 place of business also doesn't have escheat laws that
4 cover it, then to Delaware as the state of
5 incorporation. But --

6 MR. WAGNER: The other -- sorry, your
7 Honor.

8 THE COURT: Go ahead.

9 MR. WAGNER: The other point I would
10 say in response to the point your Honor has just made
11 is that each of these states, the property that each
12 of these states escheats is not exhausted by the
13 single subsection that Delaware cited in their
14 briefing. So for example, in Arkansas the subsection
15 just before the subsection that Delaware cited allows
16 for the escheat of property arising from a
17 transaction within the state. So I bring that up
18 mainly to say that it's not limited, that the scope
19 of each state's state law power to escheat is not
20 limited to the specific provision here, so if they
21 deem similar instruments abandoned in one place, it
22 may be that similar instruments fall within the
23 broader escheat powers of another provision as
24 opposed to the specific provision that Delaware has
25 cited here.

1 THE COURT: Okay. But essentially
2 your answer to what I was asking is that you don't
3 see it as a problem that Minnesota is not a party to
4 this proceeding.

5 MR. WAGNER: That's right, your Honor.

6 THE COURT: Okay.

7 MR. WAGNER: And I'll say that if
8 Minnesota is the state that's at issue here,
9 Minnesota was involved in the pre-litigation back and
10 forth in this case and, as was mentioned, there were
11 payments made from Minnesota to the Defendant States
12 in response to some of the pre-litigation
13 correspondence here. So assuming that it were
14 Minnesota, that implies that they've protected their
15 interests in that way.

16 THE COURT: And was their involvement
17 such that if Minnesota later asserts the position
18 that some of these states' escheat laws do not cover
19 the property so that it should go to Minnesota, would
20 there be a fair basis for arguing that it was
21 Minnesota's obligation to involve itself in this
22 dispute so as to be able to advance that question, as
23 Delaware as has done here, and it cannot raise it
24 again in the future, cannot hang back, allowing the
25 issue to be raised by Delaware and litigated there

1 but in a manner not binding on Minnesota?

2 MR. WAGNER: Your Honor, that seems
3 like a sticky question that would need to be
4 litigated in a case with Minnesota. There are a lot
5 of factors that could -- that could play there,
6 whether it's, you know, various doctrines of
7 preclusion and those sorts of things that are unclear
8 given that the record hasn't been developed on that
9 point thus far in the case here.

10 THE COURT: I mean, I'm just worried
11 that I've been given this assignment by the Supreme
12 Court to work up the case for the Supreme Court and I
13 don't want to be in the position of having worked it
14 up in a manner that is deemed inadequate that needs
15 to be litigated before the Supreme Court all over
16 again on an issue that was raised here but not -- but
17 without Minnesota participating.

18 MR. WAGNER: To that concern, your
19 Honor, I would say that the Court granted the motions
20 for leave to file these complaints, which were
21 between Delaware and the Defendant States here, so
22 that seems like the case that the Court has teed up
23 for your Honor to decide that is currently before you
24 between Delaware and the 30 Defendant States here.

25 THE COURT: Okay, all right. Thank

1 you. So we will now hear from Pennsylvania.

2 MR. VOSS: Good afternoon, your Honor.
3 May it please the Court, my name is Joshua Voss of
4 Kleinbard, LLC. I'm here on behalf of Pennsylvania.

5 Before I get to my prepared remarks, hopefully I
6 can clarify this Minnesota issue. In Paragraph 28 of
7 Pennsylvania's Counterclaims in this case we allege
8 that MoneyGram's principal place of business is
9 Texas, and Delaware, by way of answer to our
10 Counterclaims, admitted that as a fact of record. So
11 it's certainly our position that Texas is and remains
12 the principal place of business for MoneyGram Payment
13 Systems. So if that clarifies the back and forth you
14 just had with Mr. Wagner, hopefully that can allay
15 your concern in that estoppel or equitable
16 consideration.

17 THE COURT: Well, the fact that you
18 and Texas and Delaware have agreed -- that
19 Pennsylvania and Delaware have agreed that Texas is
20 the principal place of business doesn't estop
21 Minnesota from asserting that it is.

22 MR. VOSS: That may well be. I simply
23 proffered it as a fact that was early established in
24 the case, at least as against the litigants who are
25 presently at the bar.

1 THE COURT: Uh-huh, okay. Thank
2 you.

3 MR. VOSS: If I might, these laws, the
4 laws at issue here, escheat and custodial taking, are
5 the oldest form of consumer protection. The idea is
6 simply that we should try to reunite the true owner
7 with their property, but if we can't, in the
8 interests of protecting that owner, the citizen, then
9 we should at least give that citizen the indirect
10 benefit through public services in the state in which
11 they live. Those public services take the form of
12 roads, police and public welfare for what the
13 United States Supreme Court in Standard Oil versus
14 New Jersey described as the general good.

15 So Pennsylvania is here to ensure that this
16 fundamental purpose of the law of escheat or the law
17 of custodial taking -- and I'll just say escheat from
18 here on how out to make it simple -- is restored,
19 that we keep an eye on this fundamental purpose both
20 within the FDA, and we certainly adopt Mr. Wagner's
21 arguments in total, but also within the common law.
22 And we are indeed advocating for a change to the
23 common law but not, as Delaware suggests, for all
24 intangible property.

25 We would advocate a change just on, "This,"

1 intangible property, and I sort of am quoting,
2 "This," rhetorically simply because I don't know what
3 this property is just yet, because it is our position
4 that the property at issue here, the MoneyGram
5 official checks, are simply subject to the FDA and
6 you never get to the common law. But should your
7 Honor recommend to the Supreme Court that they adopt
8 findings of fact and conclusions of law that these
9 are not subject to the FDA, in doing so, I submit you
10 will have to define and the Court will ultimately
11 have to accept some factual description of these
12 instruments that sets them apart. That's the
13 universe we are proposing to be within this modified
14 rule.

15 And the modified rule that we're proposing is
16 simply a place where the debtor/creditor relationship
17 was formed to be the place where the property
18 escheats. That is the law or the rule adopted by
19 Congress in the FDA and certainly recommended by
20 the three justice dissent in Pennsylvania versus
21 New York.

22 So I suppose the question is why, Judge. Well,
23 we think the answer there is really two-fold. One,
24 in the field of pre-paid instruments for the
25 transmission of money, which these are absolutely

1 pre-paid instruments for the transmission of money,
2 that's not in dispute, Congress has, at a minimum
3 puts its thumb on the scale and said that we want the
4 law to be that those funds should go equitably to the
5 state where that debtor/creditor relationship was
6 formed because that's likely a good proxy for where
7 the true owner resides. Again, let's focus on the
8 true owner. And it's important that Congress
9 intervened here because it controls interstate
10 commerce, and it said in Section 25.01 that all the
11 assorted burdens then flow to interstate commerce
12 when you don't have this type of rule.

13 The second reason we think the law should change
14 is simply just to restore this consumer protection
15 focus. We heard Delaware say you should make it easy
16 for the holder, but that ignores the true owners here
17 who also have due process rights and interests. And
18 I submit to you that there is a growing concern in
19 the United States Supreme Court in this day and age,
20 in 2021, when in 2016 in Taylor versus Yee they had
21 the chance to opine on the rights of due process as
22 it concerns owners in a case they ultimately
23 declined, but two justices, Alito and Thomas, clearly
24 set forth their growing concern that due process
25 needs to be better honored in this arena. I see my

1 time is out, your Honor.

2 THE COURT: Go ahead.

3 MR. VOSS: I don't know if it could be
4 extended.

5 THE COURT: You can take -- you can
6 take more time.

7 MR. VOSS: Thank you. I appreciate
8 that. So for those reasons too, because Congress has
9 interceded and because we think it's consumer
10 protection, the fundamental purpose of these laws
11 needs to be restored, and we're advocating for this
12 modest change. But even under the twin aims of Texas
13 versus New Jersey, ease of administration and
14 fairness, we still think there's justification for
15 change.

16 It's important to point out in Paragraph 100 of
17 the Undisputed Statement of Material Facts, we set
18 forth that MoneyGram admits it is just as easy, just
19 as easy to send these monies to all 50 states as it
20 is to send to one. That fact is not disputed --

21 THE COURT: Say it again. Just as
22 easy to what?

23 MR. VOSS: To escheat or send the
24 money to all 50 states as it is to send it to just
25 one. That is an undisputed statement of fact, and

1 Delaware even agrees in its Answer, again at
2 Paragraph 100. MoneyGram is able to do this easily
3 for two reasons. One, its records reflect where
4 these instruments were purchased. Look at
5 Paragraphs 36, 56 and 96 of the Statement of
6 Undisputed Material Facts.

7 But more importantly, technology has changed.
8 These laws were set in 1965, revisited in 1972 and
9 once more in 1993. Well, here we sit in 2021 in
10 eight or more states with countless other states
11 watching us live on the internet. We submit to you
12 that times have changed, and that's exactly what
13 Alito and Thomas suggested in Taylor versus Yee, that
14 the technology has moved, the law needs to move, and
15 that's our position as well.

16 The second Texas twin aim is fairness. Less
17 than one half of one percent, about a million dollars
18 of the 250 millions dollars originally at issue here,
19 was generated in Delaware. Now, Delaware quarrels
20 with that a little bit, so let's move the number.
21 Let's say it's 50 percent, that a full 125 million
22 was generated in Delaware.

23 Why would it be fair that 125 million dollars
24 generated in all 50 states by citizens, citizens, not
25 states, citizens, go to just one state, the very evil

1 that Pennsylvania Senator Hugh Scott stood up in
2 Congress in 1973 and said, "We have to get rid of
3 this. This isn't fair. All this money is going to
4 one state on these pre-paid instruments for the
5 transmission of money." And yet here we are trying
6 to revisit and define what he meant with the FDA, and
7 again, we adopt the arguments set forth, but if we
8 get past that and we get to the common law, we submit
9 that fairness isn't served doing it this way.

10 And I think it's worthwhile to note that in our
11 Counterclaims Delaware admits in Paragraph 96 of the
12 Answer that it receives, quote, "Significant sums,"
13 each year under the secondary rule, significant sums.
14 These sums are indeed so significant that unclaimed
15 property is now Delaware's third largest source of
16 revenue in its state's operating budget. They admit
17 it in Paragraph 97 of their Answer to our
18 Counterclaims. In Temple-Inland versus Cook in the
19 District of Delaware in 2016, the Court observed that
20 it is now a vital element, a vital element in the
21 state's operating budget. And we submit is this
22 fair? Is this fair?

23 I suppose my final point in terms of equity, as
24 Delaware suggested in their opening remarks, is this
25 has been the settled law for 60 years.

1 THE COURT: I'm sorry. Once again,
2 the last thing you said?

3 MR. VOSS: If I jotted it down
4 correctly, I heard that these have been settled
5 expectations since the 1960s. But in fact, as it
6 concerns this type of property, these very
7 instruments, in Paragraph 97 of the Undisputed
8 Statement of Material Facts, which Delaware admitted
9 to, it was in 2005 that MoneyGram changed its
10 practice. This isn't ancient history. This is
11 16 year old, and we're just now getting to the Court
12 because of the lag both in the way that property is
13 escheated because of the dormancy period and also
14 with the procedural machinations that it takes to get
15 into the Supreme Court and get a case before the
16 Court. But we're here now, and we think it's time to
17 change these laws, if needed, if the FDA doesn't
18 resolve it in our favor.

19 But by way of close, unless there's additional
20 questions, we simply think the law here is unfair,
21 the common law. Citizens -- I cannot emphasize this
22 enough. Citizens generate this property, not states.
23 This isn't state money. Certainly if you send it to
24 Pennsylvania, we're a custodian. If you come
25 tomorrow and prove that it's yours, we'll give it

1 right back to you.

2 Citizens own this property. They have an
3 interest. It's not just about the holders, and it's
4 certainly not just about the states. The citizens
5 who generate this should at least get the indirect
6 benefit. That is consumer protection. That is the
7 fundamental purpose of the common law of escheat, to
8 protect consumers, and that's what we submit should
9 be done here by modifying the secondary rule to
10 permit the official checks at issue here to escheat
11 to the place where the debtor/creditor relationship
12 was formed.

13 THE COURT: Now, am I correct that
14 with the exception of those of your arguments that
15 depend on the passage of time and times having
16 changed since the earlier Supreme Court rulings, am I
17 correct that the Supreme Court did consider the very
18 arguments that you're making, that the Supreme Court
19 did consider the contention that it should be the
20 place of purchase rather than the state of
21 incorporation?

22 MR. VOSS: That is correct, your
23 Honor, in Pennsylvania v. New York this very argument
24 was rejected. But I submit to you what's changed in
25 addition to the common law is just two years later

1 Congress weighed in and said, "Supreme Court, that's
2 not what we want here. We share obligations as it
3 concerns interstate commerce with you. You can set
4 the common law. We can adjust it with statutes."
5 And what Congress said and, again, what I've
6 described as putting its finger on the scale is --

7 THE COURT: What Congress said in this
8 very Act, that Congress placed a preference to the
9 state of purchase over the state of incorporation.

10 MR. VOSS: Absolutely. It's
11 certainly our position that it's broader than just
12 the instruments at issue, but pre-paid instruments
13 for the transmission of money. That phrase appears
14 in Senator Scott's memo to Congress which was
15 entered into the record on day one. It's in the
16 Treasury Department's general counsel's letter,
17 Attorney Schmalz, to the Committee. He's talking
18 about instruments for the transmission of money.

19 We submit, yes, this argument was rejected, but
20 some big event happened since then just two years
21 later when Congress said, "Supreme Court, you got it
22 wrong. This is how we want it to be."

23 THE COURT: So how would this affect
24 the motions for summary judgment? What do you
25 envision with respect to them? I mean, if I, as

1 Special Master, were sympathetic to your arguments or
2 thought that the Supreme Court might be sympathetic
3 to your arguments, how would that affect what's now
4 before me right at this moment, which is motions for
5 summary judgment?

6 MR. VOSS: Your Honor, Pennsylvania
7 moved independently for summary judgment on Count 2
8 of its Counterclaims, so we submit to you that this
9 issue is procedurally before your Honor. We
10 certainly interpreted your original order in this
11 case directing us to go find out which state was
12 legally entitled to these instruments, damages to be
13 determined later. We certainly deemed the common law
14 within that, and indeed I submit to you, as we've
15 heard today, that Delaware has said expressly if the
16 FDA doesn't apply, it gets these funds because of the
17 common law. So who gets these funds is very much in
18 the case, and we certainly move procedurally for
19 judgment on that ground.

20 THE COURT: So would this be an
21 appropriate issue for denial of summary judgment to
22 either side with respect to the precise issue, with
23 respect to the issue of the common law rule that
24 would permit the Supreme Court to adjudicate with
25 respect to all questions involving the interpretation

1 of the FDA on the basis of the summary judgment but
2 leave the question of alteration of the secondary
3 common law rule for further trial, for further
4 proceedings that might later be adjudicated by the
5 Supreme Court?

6 MR. VOSS: I'm not quite sure if the
7 answer is yes or no, so I'm not trying to avoid it.
8 Here's how I'll answer it. If you wish to recommend
9 in a report that the FDA provide thus and such as it
10 concerns official checks and the Supreme Court will
11 leave for another day the common law opinion to get
12 there, we're not opposed to that on behalf of the
13 Commonwealth. We would be fine leaving this for
14 another day if that's needed. In our perspective,
15 it's part and parcel of the same thing about who gets
16 the money, and if that's the issue the Court is
17 trying to resolve, it can.

18 I will note, however, in the order appointing
19 you as the Special Master in this case the Court did,
20 as I recall, leave it to you to submit as many
21 reports as you deem necessary. So if it is in your
22 counsel to opine on the FDA at this time and not the
23 common law, that seems reasonable to us, though we do
24 think if the common law is an issue, it should be
25 modified as we've advocated and moved for.

1 THE COURT: And so one of your main
2 arguments is that -- apart from the fairness
3 argument, one of your arguments is that the Supreme
4 Court ought to heed the will of Congress expressed in
5 the FDA on a closely related question, that you say
6 there's not much reason to distinguish between the
7 instruments covered by the FDA and other instruments,
8 or at least to alter the -- to the extent that this
9 case concerns instruments that come within the
10 general scope of the FDA, regardless of whether
11 states have escheat laws that apply to them or not,
12 that the Supreme Court in adjudicating that might be
13 influenced by the fact that Congress found place of
14 purchase preferable to place of incorporation.

15 MR. VOSS: We think that's right, and
16 let me reframe it this way. Why would it be unfair
17 to Congress that money orders and traveler's checks
18 shouldn't go to just one state? Let's assume this.
19 We'll accept Delaware's view for a minute.

20 Just the MoneyGram checks that you go in and buy
21 at your CVS or Walgreen's or what have you and your
22 traditional AmEx traveler's checks, if Congress
23 thought it was unfair that money generated in
24 50 states from those instruments goes to one state
25 and Congress thought that was unfair, what's special

1 or different about these that makes it less unfair?
2 They're purchased instruments generated in 50 states
3 that go to just one. What's the difference?

4 THE COURT: Well, I mean, you know,
5 one possible answer to that is that, you know, when
6 Congress designed its statute it designed it with
7 certain contours, and often those contours are the
8 result of compromise. And sometimes what it takes to
9 get a statute accepted is that it covers certain
10 things and doesn't cover others, and had it been
11 drafted in a manner that covered everything, that is
12 not logically -- everything that is logically
13 indistinguishable, it wouldn't have been passed at
14 all, that it took some compromise to the interests of
15 different states to get the thing passed. And, you
16 know, one might say, well, it was the intention of
17 Congress that it go only so far and not further.

18 MR. VOSS: That may well be, your
19 Honor, but from my take on reading the legislative
20 history here -- and I've reviewed it exhaustively --
21 is the big fight was who gets the money, not which
22 instruments are at issue. And, look, here we are in
23 2021 still having the same debate. But that may well
24 be, but at a minimum, we think this law at least
25 needs to be warmed over or considered again by the

1 Supreme Court. Even just since '93, you know, the
2 times have changed. And maybe they end up at the
3 same outpost as they were in '93, but I'm not so
4 sure.

5 THE COURT: Okay, all right. So,
6 Delaware, you will be heard now in rebuttal.

7 MS. MOSELEY: Yes, your Honor, and
8 thank you. That's quite a lot to respond to, so I'll
9 do my best to move through it. I recognize we have
10 limited time. I would start, your Honor --

11 THE COURT: I haven't blown any
12 whistles yet.

13 MS. MOSELEY: We appreciate that, your
14 Honor. I would start with making sure we just
15 clarify that Mr. Voss' contention that Congress spoke
16 and rechanged the priority rules were only with
17 respect to those instruments in the FDA and that in
18 1993 the Supreme Court again had before it a dispute
19 over intangible property, this time with respect to
20 unclaimed proceeds on certain securities, and the
21 Supreme Court revisited its priority rules for
22 unclaimed intangible property in that context and
23 affirmed them again at that time, fully recognizing
24 that there may be some windfall involved, but despite
25 the fact that there might be some windfall involved,

1 that the ease of administration and that the
2 bright-line priority rule would remain in place
3 because they felt that that was important. And that
4 was, again, over 20 years after the FDA that it was
5 reaffirmed. And I would note, your Honor, that the
6 Supreme Court has consistently in all three of those
7 cases, including the 1993 --

8 THE COURT: Now, that was a -- that
9 case involved what kinds of instruments?

10 MS. MOSELEY: It was unclaimed
11 securities that were being held by intermediary
12 banks. It was a dispute between Delaware and
13 New York. And so certain had become abandoned, there
14 had been no action on them and they were escheating,
15 and the question was whether they escheat to New York
16 or Delaware. And in that dispute the Supreme Court
17 affirmed the priority rules and that the unaddressed
18 intangible unclaimed property would escheat to the
19 state of incorporation of the holder.

20 THE COURT: Now, I wonder -- I mean,
21 one of the arguments that Pennsylvania is making is
22 that it's very easy to tell the place of purchase of
23 a MoneyGram. To what extent was that true in the
24 unclaimed securities case?

25 MS. MOSELEY: Well, that was actually

1 exactly New York's contention, your Honor, and the
2 Supreme Court affirmed its priority rules regardless
3 of the state of the books and records of the holder,
4 so that issue has been looked at. And I would also
5 note, your Honor --

6 THE COURT: Well, when you say that
7 was the contention of New York, what was the
8 contention of New York?

9 MS. MOSELEY: I'm sorry, your Honor.
10 You just cut out, and I missed a little bit of what
11 you said.

12 THE COURT: Well, I was just saying I
13 missed part of what you said.

14 MS. MOSELEY: Oh.

15 THE COURT: Not that I missed what you
16 said, but I didn't understand what you meant. You
17 said, "That was the contention of New York," and I'm
18 saying what was the contention of New York? I had
19 just said Pennsylvania is arguing here that there's
20 no greater ease in determining the state of
21 incorporation than there is ease in determining the
22 state of purchase, because the state of purchase is
23 readily available, doesn't require any litigation or
24 discovery or anything like that, it's right there
25 available, and so there's no greater ease. And then

1 you said, "That was the contention of New York," and
2 I said, "What was the contention of New York?"

3 MS. MOSELEY: Yes, I apologize. There
4 isn't a direct corollary, your Honor, because the
5 state of purchase was not at issue. It was whether
6 the addresses should be in the intermediary -- and
7 I'm speaking from memory now, your Honor, but it was
8 they were looking at whose books had to have the
9 addresses in them, because there was no state of
10 purchase issue, so there isn't --

11 THE COURT: Right.

12 MS. MOSELEY: There isn't a direct
13 line-up in the argument. And the question was
14 whether it should go -- and I don't remember -- to
15 the holder or the state of incorporation, which was
16 the priority rule. And New York was arguing to have
17 the Supreme Court depart from that priority rule and
18 have it go, I believe it was to the books and records
19 of the intermediary bank, rather than the actual
20 holder of the debt. I'd have to go back and confirm
21 that, your Honor.

22 What I meant to say was directly in front of the
23 Supreme Court was a dispute over altering the
24 priority rules in terms of who had the information
25 or the addresses available to them.

1 THE COURT: Yeah, but one of the
2 issues that has been important to the Supreme Court
3 throughout the history of the litigation before it
4 has been simplicity in the litigation, not to choose
5 a rule, even if fairness seems to favor it, that will
6 require a great deal of expensive time-consuming
7 litigation distinguishing one instrument from
8 another as opposed to just handling these things in
9 bulk in a manner that makes pretty good sense, even
10 if not the very best sense, for the sake of
11 simplicity and ease and saving money for everybody
12 except the lawyers handling the cases. And I'm
13 wondering whether that same interest -- Pennsylvania
14 is arguing that doesn't make sense here because with
15 respect to the identification of the state of
16 purchase of a money order, that's just as easy to
17 do as identification of the state of incorporation,
18 maybe not quite as easy to do, but almost as easy to
19 do, and there's no substantial saving. And I'm
20 wondering whether that was also true in the New York
21 case that you're referring to, and I suspect it
22 wasn't.

23 MS. MOSELEY: No, your Honor, not
24 exactly in the same way, although if I may, your
25 Honor, reframe that issue slightly, because in the

1 predecessor case, Pennsylvania v. New York from 1972,
2 this whole issue of maintaining records and addresses
3 was actually discussed by the Supreme Court, and the
4 Supreme Court rejected Pennsylvania's argument
5 actually in that case that with unclaimed property
6 that they frequently did not have the addresses, and
7 the Supreme Court noted that a substantial number of
8 creditors, through Western Union, they actually had
9 the addresses for.

10 And so we would note that this factual issue,
11 the idea that we can only know the place of purchase,
12 is actually probably inaccurate. MoneyGram does not
13 keep them. We're not disputing that. But, you know,
14 if Pennsylvania were to pass a law that required all
15 sellers of money orders to maintain the addresses of
16 the creditors, MoneyGram would start to keep them and
17 we'd have to have them.

18 And so it's not that the addresses of the
19 creditors are unknowable, it's just that right now
20 that they're unknown. And I believe, your Honor,
21 that that is actually -- that was actually -- I
22 believe Mr. Voss referenced Taylor v. Yee, which was
23 not a case, it was a denial of cert. And in denying
24 cert, two of the justices observed that there were
25 advances in technology that make it easier and easier

1 to identify and locate property owners. And I would
2 actually suggest, your Honor, that if we're going to
3 do that, you know, that that's not -- that's not an
4 issue of whether or not there's a place of purchase
5 but that this is technology that's becoming
6 available.

7 So, your Honor, when it comes to lack of
8 addresses, we would not think whether MoneyGram's
9 practice for keeping addresses should be a governing
10 indicia of whether or not something is a money order.
11 That would mean that -- I don't think we would
12 suddenly be in the position of saying that because
13 MoneyGram started to keep the addresses that the
14 money orders they were selling were no longer money
15 orders and subject to the FDA because Congress'
16 purpose is no longer at issue because these are no
17 longer -- these are no longer instruments where we
18 know who the creditor is. And so whether addresses
19 are kept or not, that certainly was true, you know,
20 when Congress was looking at the statute, but in
21 terms of defining an instrument or viewing an
22 instrument as similar, I don't think that that should
23 be a governing indicia of similarity or of the
24 instrument itself.

25 And I would reiterate, actually, a point that

1 your Honor was making, that the bright-line rules and
2 ease in administration have been very important and
3 that we would not want to interpret the FDA and to
4 give terms in the FDA definitions that are so broad
5 that it would have the impact of obliterating all of
6 the priority rules when it comes to, say, pre-paid
7 instruments returning to a payee and start to debate
8 about what that may or may not encompass under the
9 FDA.

10 And to be frank, your Honor, the Supreme Court
11 has continued to recognize, even in *Pennsylvania v.*
12 *New York*, that if its priority rules are something
13 with respect to a certain type of property, Congress
14 can always act. They can always act to exempt it,
15 and if the Supreme Court has a decision that's
16 consistent with its precedent in a way that Congress
17 believes is not consistent with the policy that
18 Congress wants enacted, it can always enact to exempt
19 that.

20 And we would agree with your Honor's observation
21 that when it comes to trying to enact the policy of
22 Congress, we can get into a pretty sticky wicket.
23 It was recently in the *New Prime* decision, the
24 *New Prime* decision of the Supreme Court, that the
25 Court made the exact observation that your Honor just

1 made. And if I could quote for one second, "If
2 courts felt free to pave over bumpy statutory texts
3 in the name of more expeditiously advancing a policy
4 goal, we would risk failing to take account of
5 legislative compromises essential to a lost passage
6 and in that way thwart rather than honor the
7 effectuation of congressional intent."

8 That is what Delaware's position is in this
9 case, your Honor. We believe that it is important to
10 view closely the text of the FDA, that the text of
11 the FDA is the best evidence of the intent and will
12 of Congress, and that because Congress was acting to
13 exempt property from a very broad general rule, that
14 exemption should be interpreted narrowly.

15 I would also, your Honor, like, if you would
16 indulge me, to address a few of the specific points
17 raised by Mr. Wagner, which I know is now a while
18 ago. But he made the argument that agent check money
19 orders are the same as the MoneyGram official checks,
20 and we do not agree to that, and we object
21 strenuously. We do admit that the agent check money
22 orders are processed in the back end on a computer
23 system that is the same as MoneyGram official checks,
24 but we don't think that that renders them the same or
25 similar instruments.

1 Teller's checks constitute the vast majority of
2 the MoneyGram official checks at issue in this case,
3 and on these teller checks, your Honor, those checks
4 have a bank as both the drawer and the drawee. It is
5 a check that is drawn on a bank by a bank. And while
6 Mr. Wagner is correct that they have, "Issued by
7 MoneyGram," on the cover and that would make them
8 potentially covered by drawers, they are still bank
9 checks as defined under the UCC because there is a
10 bank that is both the drawer and the drawee on that
11 instrument.

12 And therefore, the teller's checks, which
13 constitute, as I said, the majority of the MoneyGram
14 official checks at issue in this case, are bank
15 checks, which makes them legally very different from
16 a money order. The banks have to account for them
17 differently in their reserves, and the time at which
18 those checks are honored is also different. And so
19 we do not agree and would dispute that agent check
20 money orders are the same as official checks in this
21 case.

22 And to be clear, your Honor, there are retail
23 money orders and the agent check money orders on one
24 side, on one hand, and those are escheated pursuant
25 to the FDA as money orders by MoneyGram. On the

1 other hand there are the other official check
2 products offered by MoneyGram. Those are the
3 official check agent checks and the official check
4 teller's checks, and it is the official check
5 teller's checks that constitutes the majority of the
6 official checks at issue in this case.

7 If I might also, your Honor, briefly address
8 Mr. Wagner's discussion of the New York law and the
9 associated New York attorney general opinions as well
10 as the Model Unclaimed Property Act and how those may
11 or may not be used to give meaning to text of the
12 FDA, we, your Honor, would start with the observation
13 that there is no evidence in the record that Congress
14 was aware of or even considered the Model Act, the
15 New York unclaimed property law or the New York
16 attorney general opinion cited by Defendants, and we
17 would submit that that fact alone is enough to reject
18 the proposition that terms from these sources should
19 in any way be viewed as having been borrowed by
20 Congress in the FDA. Without any evidence in the
21 record that Congress even knew of these other
22 sources, these sources also cannot possibly be viewed
23 as having informed --

24 THE COURT: Isn't there a remarkable
25 similarity of text? Isn't it -- doesn't the Act

1 track, track word for word portions of the New York
2 Act that you're speaking about?

3 MS. MOSELEY: To be clear, your Honor,
4 to make sure I answer your question accurately, the
5 1966 Model Unclaimed Property Act tracks the, you
6 know, I think it was like 20-year earlier New York
7 unclaimed property law from 1943, yes. The language
8 in those two laws is similar and then is similar to
9 the language that we see in the FDA, and we're not --
10 we're not disputing -- we're not disputing that, your
11 Honor. Anybody can look at that on the page. The
12 question is whether or not the --

13 THE COURT: But, I mean, are you
14 saying it's pure coincidence that Congress used
15 exactly the same words? Isn't the degree of
16 similarity of words itself evidence of awareness on
17 Congress' part of the statute that otherwise would be
18 attributed to sheer coincidence that Congress used
19 exactly those words?

20 MS. MOSELEY: Your Honor, I think
21 there's a pretty big gap between sheer coincidence
22 and assuming familiarity. We're not disputing that
23 the words are similar. I doubt that it was sheer
24 coincidence, but I also don't think the fact that the
25 words are similar means that Congress intended to

1 bring in any definition of direct --

2 THE COURT: No, no, that's not --
3 that's going far beyond the argument you were making.
4 What you said is there's no evidence that Congress
5 was even aware of the New York statute. And I was
6 not saying by my answer that one should necessarily
7 assume that Congress intended that all of its words
8 mean exactly the same thing as in the New York
9 statute. I was simply suggesting that when one
10 statute tracks another with that degree of
11 preciseness in exactly the same words, isn't that
12 evidence of awareness? Isn't that -- doesn't it
13 create an advanced likelihood that if Congress used
14 exactly the same words, it probably was aware of the
15 statute and was following its words, rather than that
16 by pure coincidence it chose exactly the same words?

17 MS. MOSELEY: Yes, I take your point,
18 your Honor. I just meant that there was no evidence
19 in the record, there's no mention in legislative
20 history, we don't see it in the Senate report,
21 there's no actual discussion of the Unclaimed --
22 Model Unclaimed Property Act or the New York law
23 or the New York attorney general opinions. You
24 know, unlike, say, the Senate report, which I believe
25 Mr. Wagner mentioned, and its definition, there's no

1 similar type of evidence in the record regarding
2 Congress discussing or referencing these other acts.

3 And, your Honor, I would just very briefly with
4 respect to that Senate report note that it actually
5 itself does not resolve the issue and that in that
6 Senate report they said that the definition of
7 directly liable is through having sold the
8 instrument. And based on the testimony of
9 MoneyGram's witness in the case of official checks
10 teller checks, MoneyGram specifically eschews any
11 relationship for having sold that instrument, and in
12 fact the only relationship is between the drawer and
13 the drawee bank. So if you were to take the
14 definition of directly liable as proposed in the
15 Senate report, even under that scenario MoneyGram
16 isn't the seller under how it's being used in the
17 Senate report based on the official checks at issue
18 in this case.

19 So, your Honor, I know that we've gone on for
20 quite a long time, and we appreciate your indulgence
21 in letting us finish, and if you have no further
22 questions, your Honor, I have nothing else to add.

23 THE COURT: Okay. Well, thank you
24 very much. Thanks to all of you for a very
25 well-argued case and very instructive, and I will

1 take it under consideration. Is there anything else
2 we need to deal with at this moment?

3 MS. MOSELEY: I don't believe so.

4 THE COURT: All right. The proceeding
5 is adjourned. Thank you very much.

6 (Adjourned at 3:30 p.m.)
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DELAWARE,

Plaintiff,

-vs- Nos. 220145 & 220146 (Consolidated)

ARKANSAS, ET AL.,

Defendants.

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C E R T I F I C A T E

I, SANDRA L. McDONALD, do hereby certify that as
the duly-appointed shorthand reporter, I took in shorthand
the video conference proceedings had in the above-entitled
matter on the 10th day of March, 2021, and that the
attached is a true and correct transcription of the
proceedings so taken.

In witness whereof, I have hereunto set my hand
and affixed my seal of office this 24th day of March,
2021.

Notary Public, State of Wisconsin
My Commission Expires 10/18/22