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SUPREME COURT OF THE UNITED STATES

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DELAWARE,

Plaintiff, NOS.

vs. 220145 & 220146

ARKANSAS, ET AL., (Consolidated)

Defendants.

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\*\* REVISED \*\*

PROCEEDINGS HELD REMOTELY

Wednesday, December 5, 2022

11:59 a.m. (EDT)

BEFORE: JUDGE PIERRE LEVAL

Reported by:

Donna Dratwa, RMR, CSR

Job No. 220350

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REMOTE APPEARANCES:

COUNSEL FOR DELAWARE:

LOEB & LOEB LLP

901 NEW YORK AVENUE NW

WASHINGTON, DC 20001

BY: JESSICA MATTAVI, ESQ.

STEVEN ROSENTHAL, ESQ.

HOGAN LOVELLS US LLP

555 THIRTEENTH STREET NW

WASHINGTON, DC 20004

BY: NEAL KATYAL, ESQ.

NATHANIEL ZELINSKY, ESQ.

COUNSEL FOR ARKANSAS, ET AL.:

ARKANSAS ATTORNEY GENERAL'S OFFICE

323 CENTER STREET

LITTLE ROCK, ARKANSAS 72201

BY: NICHOLAS BRONNI, ESQ.

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REMOTE APPEARANCES: (CONTINUED)

COUNSEL FOR PENNSYLVANIA:

KLEINBARD LLC

1717 ARCH STREET

PHILADELPHIA, PENNSYLVANIA 19103

BY: JOSHUA VOSS, ESQ.

COUNSEL FOR OHIO:

OFFICE OF THE OHIO ATTORNEY GENERAL

30 EAST BROAD STREET

COLUMBUS, OHIO 43215

BY: HILARY DAMASER, ESQ.

(CONTINUED)

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REMOTE APPEARANCES: (CONTINUED)

A L S O P R E S E N T:

BRENDA MAYRACK,  
STATE ESCHEATOR, STATE OF DELAWARE

JD TALIAFERO

DANA RAPHAEL

MICHELLE WHALEN  
DEPUTY ATTORNEY GENERAL, STATE OF DELAWARE

DEPARTMENT OF JUSTICE,

SHAWN CLARK

1 PROCEEDINGS

2 THE COURT: Good morning.

3 MR. BRONNI: Good morning, Your  
4 Honor.

5 MR. ZELINSKY: Good morning, Your  
6 Honor.

7 THE COURT: So who do we have here?

8 MR. ZELINSKY: Judge Leval, my name  
9 is Nathaniel Zelinsky. I'm representing  
10 Delaware --

11 THE COURT: Hang on. I am barely  
12 hearing you. I need to adjust my sound.  
13 Can each of you say a few words just so I  
14 can see my volume?

15 MR. ZELINSKY: Is that better, Judge  
16 Leval?

17 THE COURT: Yeah, that's much better.  
18 Mr. Bronni, can I hear you say a few  
19 words?

20 MR. BRONNI: Yes, Your Honor. Can  
21 you hear me?

22 THE COURT: Yeah, that's good.  
23 And Mr. Voss?

24 MR. VOSS: Good morning, Judge Leval.  
25 Can you hear me?

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2 THE COURT: Yes.

3 MR. VOSS: Thank you.

4 THE COURT: Okay. And you are  
5 representing?

6 MR. VOSS: I am on behalf of  
7 Pennsylvania, but per your order, we have  
8 ceded the entirety of our time to  
9 Mr. Bronni. So unless you require presence  
10 from me, it's not my intent to use the  
11 25 minutes.

12 THE COURT: All right. Okay. So are  
13 you hearing me okay?

14 MR. ZELINSKY: We are, Judge Leval.

15 MR. BRONNI: Yes, Your Honor.

16 THE COURT: All right. Well, I  
17 apologize to you all. This is an odd  
18 position to find myself. I don't think  
19 that Special Masters very often reevaluate  
20 their submission to the Supreme Court.  
21 It's probably better that they didn't.  
22 It's probably better that they got it  
23 right, at least according to them, the  
24 first time. And I'm sorry for that. Maybe  
25 Delaware is more receptive to my apologies

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2 than defendant states. I would understand  
3 that.

4 But in any case I think it's  
5 appropriate for me to apologize most of all  
6 to the Supreme Court, but to all of you as  
7 well. But I am now here, ready to hear  
8 your arguments.

9 You have received my second interim  
10 report, and I will now hear from the  
11 defendant states.

12 Mr. Bronni, you may proceed.

13 MR. BRONNI: Thank you, Your Honor.  
14 Nicholas Bronni, solicitor general of  
15 Arkansas on behalf of the defendant states.

16 Your Honor, as you were just  
17 mentioning a minute ago, the defendant  
18 states certainly understand the Special  
19 Master's desire to get this case right and  
20 to assist the Court. And frankly, we have  
21 every interest in getting this case right  
22 as well.

23 But the proposed report, Your Honor,  
24 is neither procedurally proper nor helpful,  
25 and the Special Master should decline to

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2 file it.

3 Congress told us why it enacted the  
4 FDA and what it cared about. Section 2501  
5 could not be clearer. Because issuers of  
6 certain financial instruments rarely held  
7 purchaser addresses under the Court's  
8 common law rule, that meant a windfall for  
9 an issuer's state of incorporation at the  
10 expense of its fellow states.

11 Congress said that was inequitable,  
12 and enacted the FDA to fix that inequity.

13 THE COURT: Just so I understand. I  
14 thought you were starting out to say that  
15 it was inappropriate of me to file an  
16 amended report changing my recommendation.  
17 But now it sounds like you are just saying  
18 that you are disagreeing with -- on the  
19 merits, with what I'm saying; is that  
20 right? This is a merits argument; it has  
21 nothing to do with whether it's appropriate  
22 for me to file an amended -- a second  
23 report?

24 MR. BRONNI: It's actually both, Your  
25 Honor. We still disagree that the Special



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2 Master should file such a report. But  
3 certainly on the merits, which I think is  
4 the focus here, we disagree with that  
5 report.

6 THE COURT: Okay.

7 MR. BRONNI: And, you know, we think  
8 that the FDA has to be read against the  
9 backdrop of 2501 and what Congress told us,  
10 but the -- the proposed report doesn't do  
11 that. Instead it departs from Congress's  
12 declared purpose and adopts a definition of  
13 third-party bank check that is both at odds  
14 with the purpose and is unadministrable.

15 Indeed, far from adopting an  
16 administrable rule, to apply the proposed  
17 definition of "third-party bank check," a  
18 holder would have to know who purchased an  
19 item. Was it a bank or was it a customer?

20 But that is precisely the kind of  
21 information that we do not know and is  
22 lacking here and leads to the escheatment  
23 problem. So that could not be what  
24 Congress meant.

25 Nor could Congress have meant what it

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2 called a technical, minor, or clarifying  
3 amendment to be an exception so broad that  
4 it would exclude the very kind of  
5 instruments that Congress targeted via the  
6 FDA.

7 I would like to start by briefly  
8 discussing the report's discussion of money  
9 orders. At an earlier conference, Your  
10 Honor proposed to revise the interim report  
11 to say that the disputed instruments were  
12 not money orders or similar written  
13 instruments because they carried some bank  
14 liability.

15 But as even Delaware agreed, that is  
16 not a basis for a distinction because banks  
17 can be liable on money orders and the  
18 statute itself contemplates that the  
19 covered instruments are instruments on  
20 which banks could be liable. Instead, the  
21 report now concludes the disputed  
22 instruments aren't money orders because  
23 they are sold to bank customers in higher  
24 denominations than what MoneyGram chooses  
25 to label a money order.

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2 Well, that distinction fails for  
3 several reasons, but I will highlight two  
4 in particular. First, those  
5 characteristics don't distinguish money  
6 orders from the disputed instruments.  
7 Instead, as the revised report concedes,  
8 banks sell money orders to their customers  
9 without low dollar limits.

10 THE COURT: Without what?

11 MR. BRONNI: Without low dollar  
12 limits, Your Honor.

13 THE COURT: Oh. Yes.

14 MR. BRONNI: Indeed the MoneyGram  
15 agent check money order, which Delaware  
16 concedes is a money order, is a good  
17 example of that.

18 And then second, even if there were  
19 differences --

20 THE COURT: Hang on one second. I am  
21 going to try and see if I -- if I hear you  
22 better if I use earphones. A few words, if  
23 you please.

24 MR. BRONNI: Yes, Your Honor. Can  
25 you hear me now?

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2 THE COURT: No. I am hearing you  
3 through the same way.

4 MR. BRONNI: Your Honor, at least on  
5 my screen, you are showing that your mic is  
6 off.

7 THE COURT: All right. Let's try  
8 that.

9 MR. BRONNI: Is this better, Your  
10 Honor?

11 THE COURT: I think if I try to  
12 increase the volume. -- let me hear a few  
13 more words, please.

14 MR. BRONNI: How about this, can you  
15 hear me now?

16 THE COURT: Yes, that's better.  
17 Okay. Let's proceed with that. Go ahead.

18 MR. BRONNI: So just to briefly recap  
19 to make sure Your Honor heard the first  
20 point, you know, the distinction between  
21 money orders and the disputed instruments  
22 that the report is trying really doesn't  
23 distinguish those items because banks can  
24 be liable on money orders, and as the  
25 revised report concedes, banks do sell

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2 money orders to their own customers without  
3 low dollar limits. And indeed the agent  
4 check money order that MoneyGram sells, and  
5 that Delaware concedes is a money order, is  
6 a good example.

7 And then second, even if there were  
8 differences between items, they're simply  
9 not relevant here. Instead, as Congress  
10 told us in 2501, what matters is that, like  
11 other money orders, issuers don't generally  
12 keep addresses for the disputed instrument,  
13 and that's what leads to the windfall  
14 problem.

15 Next, on the similar written  
16 instrument discussion, the proposed  
17 report's, framing of similar written  
18 instrument, or similar written instruments  
19 presents a similar problem. Most  
20 importantly, to give the exclusion -- or to  
21 make the exclusion do more work, the  
22 proposed report appears to give "similar  
23 written instrument" a broader definition  
24 than the parties here have argued that,  
25 frankly, is appropriate in light of 2501.

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2 As the first interim report  
3 explained, we think correctly, we have to  
4 read "similar written instrument" in light  
5 of what's relevant under the statute. And  
6 what's relevant under the statute, as Your  
7 Honor explained in the first report, is the  
8 similarity between money orders and  
9 traveler's checks.

10 And Congress highlighted that the  
11 similarity that was relevant is that they  
12 are prepaid items on which sellers do not  
13 keep address information, and it presents  
14 the windfall problem.

15 So that's the defined similarities  
16 for purposes of the statute. It's not  
17 really what an expert in commercial paper  
18 might choose to focus on when evaluating  
19 liability or that kind of thing. Instead,  
20 that's the relevant characteristic that  
21 Congress told us was important in 2501.

22 And properly read as a result, there  
23 is no need to create a broad exemption from  
24 the catch-all in order to carve out things  
25 like cashier's checks. Indeed, in 1974,

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2 it's undisputed -- and it's undisputed  
3 today, everybody agrees -- with cashier's  
4 checks, banks issue them locally, so  
5 they're issued locally, and they have  
6 purchaser address information. So they  
7 simply didn't present the windfall problem  
8 that Congress targeted. By contrast, the  
9 instruments that are at issue here are a  
10 prime example of what Congress was  
11 targeting.

12 As for the third-party bank check  
13 analysis, the proposed report's analysis is  
14 no less problematic. First, it disregards  
15 Delaware's concession, at oral argument at  
16 the Supreme Court on rebuttal, that the  
17 Hunt Commission report defines third-party  
18 bank checks. And for your Honor's  
19 reference, that's at page 74 of the oral  
20 argument transcript.

21 As a result of Delaware's concession,  
22 assuming Delaware didn't even waive the  
23 ability to argue that the disputed  
24 instruments are covered by the Hunt  
25 Commission report by failing to make that

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2 argument in front of Your Honor, the only  
3 issue before the Court is whether or not  
4 the Hunt Commission report definition  
5 includes teller's checks and whether these  
6 are teller's checks.

7 And the answer to that question is  
8 no. The Hunt Commission report does not  
9 mention teller's checks. One would search  
10 in vain -- and Delaware has it reproduced  
11 in their appendix -- for a reference to  
12 teller's checks. It does not say teller's  
13 checks.

14 And as Your Honor and as frankly  
15 Delaware agreed in oral argument, people  
16 knew what teller's checks were in the  
17 1970s. If banking regulators wanted to --  
18 to cover teller's checks in the definition  
19 of third-party payment services, they would  
20 have mentioned it. And they don't.

21 We also know for another reason why  
22 teller's checks aren't covered. I know  
23 Delaware points to one sentence in the  
24 report, it says its teller's checks, and  
25 the reason we primarily know that's



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2 inaccurate is that teller's checks flunk  
3 the Hunt Commission definition of what a  
4 third-party payment service is.

5 A third-party payment service is a  
6 mechanism by which an intermediary  
7 transfers the depositor's funds upon the  
8 orders of the depositor to a third-party  
9 payee. With a teller's check, the transfer  
10 is not occurring upon the depositor.  
11 Instead, the transfer is occurring on  
12 behalf or is being done by the bank that's  
13 who's giving the order, or even on these  
14 instruments, at the most generous, at  
15 MoneyGram's orders and the bank's orders.  
16 But certainly not at the orders of the  
17 depositor, and that is what really  
18 contrasts it with an ordinary check because  
19 the transfer does occur on the orders of  
20 the depositor who's also the drawer on  
21 these instruments.

22 So the Hunt Commission report doesn't  
23 cover teller's checks. But even if you  
24 disagreed with that and you thought that  
25 the Hunt Commission report defined teller's

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2 checks, they're -- these instruments are  
3 not teller's checks. All of the  
4 contemporaneous sources that Your Honor has  
5 seen that have been cited by any of the  
6 parties, here, that anybody has cited,  
7 describes teller's check as an instrument  
8 drawn by a bank on an account at another  
9 bank. That does not describe these  
10 instruments.

11 So instead what's happening here is  
12 there is no relationship whatsoever between  
13 the drawer and the drawee bank. So there  
14 is no drawing being done by what's listed  
15 as the nominal drawer on these instruments.  
16 They simply don't qualify.

17 And that's also in contemporaneous  
18 sources cited in Delaware's own briefing in  
19 response to Your Honor's request for  
20 comments, and then also in Delaware's  
21 exceptions at page 37 where it defines bank  
22 check -- using a definition of bank draft  
23 that was contemporaneous from Black's Law  
24 Dictionary -- also uses that definition.

25 And in ordinary speech, obviously a

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2 drawer must be drawing on something, and  
3 that's simply not happening here.

4 So the drawing -- the selling  
5 financial institution that is listed as the  
6 drawer doesn't have any account to draw on.  
7 Instead, as MoneyGram's own witnesses  
8 describe, their role -- the selling  
9 financial institution's role on any of  
10 these instruments is very simple. It is to  
11 sell the instrument, forward the money to  
12 MoneyGram the next day, which it holds in  
13 trust until it does that, along with four  
14 pieces of information that do not include  
15 any identifying information.

16 So these simply are not teller's  
17 checks. The proposed report's definition  
18 gives "third party" a meaning that's  
19 totally ungrounded in the ordinary,  
20 understood usage either in 1974 or,  
21 frankly, today. All of the parties here,  
22 all of the experts, all of the sources  
23 cited make very clear that "third party,"  
24 as used in the financial context, as used  
25 on an instrument like this, is commonly

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2 understood to refer to the party that  
3 ultimately gets paid on the instrument.  
4 That's how "third party" gets used in the  
5 third-party check definition from Black's  
6 Law Dictionary, which was true at the time,  
7 still common enough that it is true today.  
8 That's how third-party payment services,  
9 which Delaware said was the controlling  
10 definition, uses that terminology.

11 Now, I understand that in ordinary  
12 speech, we may refer to various things as a  
13 third party on something. But the simple  
14 fact is that's not the way that it's ever  
15 been used on a financial instrument, and  
16 Delaware doesn't cite any sources that  
17 suggest it was used the way they argue it's  
18 used or the way the proposed report uses  
19 it. So there simply is no source that  
20 supports that.

21 I think that the fundamental problem  
22 here, Your Honor, is that the proposed  
23 report's approach basically takes that  
24 phrase, "third-party bank check," and  
25 breaks that into its constituent parts. It

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2 breaks it into "bank check" and "third  
3 party," and basically gives the definition  
4 based on postenactment sources or frankly,  
5 nothing, in order to say -- putting it back  
6 together again in order to say that these  
7 are third-party bank checks.

8 But that's not the way we read  
9 statutes. Instead we read the language  
10 that Congress wrote, we read the context  
11 that Congress wrote. Congress did not say  
12 bank checks that are purchased by a third  
13 party. It says third-party bank checks.  
14 So what that means is we have to look at  
15 that phrase as Congress actually used it  
16 and look for sources that use similar  
17 language.

18 And as Delaware conceded at oral  
19 argument, the best source for that is the  
20 Hunt Commission report, which uses the  
21 phrase "third-party payment services" to  
22 describe things like ordinary checks. And  
23 certainly the phrase that the Treasury  
24 suggested -- nobody disagrees that this was  
25 all at the Treasury's suggestion -- the

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2 phrase that the Treasury used, "third-party  
3 payment bank checks," is even closer to the  
4 Hunt Commission terminology that gets used.

5 There are a couple of other reasons  
6 why we think that definition also makes  
7 sense. And because, for instance, I -- I  
8 know Delaware makes an argument about how  
9 ordinary checks aren't purchased because  
10 they couldn't be covered.

11 But the problem, Your Honor, is that  
12 at the time Treasury made its suggestion,  
13 that it was suggesting these changes,  
14 Treasury was commenting -- to add the  
15 third-party bank check exclusion, Treasury  
16 was commenting on a version of the bill  
17 that did not require that the items be  
18 purchased. Instead, the language used in  
19 the proposed statute at the time referred  
20 to checks that were issued, not checks that  
21 were purchased.

22 Now, as a result of a letter that  
23 came from the Federal Reserve Board on the  
24 exact same day as Treasury's letter,  
25 November 1, 1973, that language was changed

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2 from "issued" to "purchased."

3 Now, Congress adopted both of those  
4 changes simultaneously, it didn't give us  
5 an explanation beyond clarifying minor  
6 technical amendments. But I think at the  
7 end of the day what we got here was a  
8 statute that just makes it extraordinarily  
9 clear that ordinary checks aren't covered,  
10 a belt and suspenders approach.

11 Another reason that we think that  
12 that's probably the case is because the  
13 time that the bill that became the FDA was  
14 introduced, the sponsor of the bill  
15 included it alongside a memo that described  
16 the statute as covering money orders,  
17 traveler's checks, and similar instruments  
18 for transmission of money.

19 Now, I think we can all agree that's  
20 certainly broader than the statutory phrase  
21 that gets used. But I think, given the  
22 gloss on that language given to it by the  
23 sponsor, Treasury could have been  
24 legitimately concerned that the scope of  
25 that statute would cover things like

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2 ordinary checks. And I think the fact the  
3 Treasury in fact repeats that language in  
4 its letter suggesting its change reinforces  
5 that fact.

6 It also makes more sense that  
7 Congress would have been and Treasury would  
8 have been more concerned about ordinary  
9 checks because, contrary to what the  
10 proposed report says, ordinary checks do in  
11 fact escheat.

12 In fact, in Texas versus New Jersey,  
13 one of the seminal Texas trilogy cases,  
14 that is a case about ordinary business  
15 checks. And at Footnote 4 of the Court's  
16 opinion there, it describes at length the  
17 ordinary checks that were at issue in that  
18 case. So that really illustrates Treasury,  
19 in fact, could have been very concerned  
20 about preserving that common law rule.

21 In addition to that, I know that the  
22 proposed report relies on the Uniform Law  
23 Committee's suggestion, I believe it's from  
24 1995. I would start with we think it's  
25 inappropriate to rely on



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2 decades-postenactment sources.

3 But I also highlight that that  
4 report, that recommendation, Section 2 also  
5 discusses various things that would escheat  
6 that are normally -- things like ordinary  
7 checks, things like utility refunds or  
8 those kinds of things. So it's simply not  
9 accurate to say that ordinary checks don't  
10 escheat.

11 And certainly given that the language  
12 of the statute covers business  
13 associations, things that they're directly  
14 liable on, you know, I think that makes  
15 sense, that Congress and Treasury could  
16 have been concerned about that.

17 Next, to the extent that we are  
18 relying on components of the phrase  
19 "third-party bank check" as opposed to the  
20 phrase itself that, the -- the definition  
21 of -- and we are breaking it into  
22 constituent parts. The definition of bank  
23 check that the report gives, as I alluded  
24 to earlier, is not the definition that any  
25 source that's been cited to Your Honor

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2 contemporaneous from the 1970s would have  
3 used for "bank check." Instead, the  
4 definition that Delaware itself gave, at  
5 page 37 of its exceptions, is the Black's  
6 Law Dictionary definition of bank draft.  
7 And that definition of bank draft describes  
8 a bank draft as a check drawn by a bank  
9 officer drawing on -- or signed by a bank  
10 officer and Delaware -- and its definition  
11 stops reading at that point -- but signed  
12 by a bank officer drawing on funds at his  
13 own bank -- that would be a classic  
14 cashier's check -- or drawing on the funds  
15 of his bank at another bank. And that  
16 would be a classic teller's check. Again,  
17 it doesn't describe these items. So to the  
18 extent we're relying on postenactment  
19 sources, that defeats Delaware's  
20 definition.

21 Third, as I mentioned at the outset,  
22 the proposed report's definition is  
23 unadministrable. Under the proposed  
24 definition, whether an instrument is a  
25 third-party bank check turns on the

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2 purchaser's identity. If the bank is the  
3 purchaser, then it's not a third-party bank  
4 check. If the bank's customer is the  
5 purchaser, it apparently is a third-party  
6 bank check. But by definition, that's that  
7 information, the purchaser's name and  
8 address, its identity, it's lacking and  
9 leads to the application of the FDA in the  
10 first place.

11 Indeed and for the disputed  
12 instruments here, it's undisputed,  
13 MoneyGram does not have that information  
14 and could never apply this rule. So, you  
15 know, aside from the fact that the rule  
16 would require us to go instrument by  
17 instrument, making determinations, as  
18 opposed to an easily administrable rule, it  
19 couldn't be administered in this case.  
20 MoneyGram does not have that information.  
21 So that cannot be what Congress meant, to  
22 create a rule that could never be applied.

23 Fourth, to the extent that the  
24 proposed report reads the third-party bank  
25 check exclusion to be a -- or excuse me,

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2 the proposed report hardly reads the  
3 third-party bank check exclusion to be a  
4 minor, clarifying, or technical change.  
5 Instead, what I think the proposed report  
6 does, is it basically reads the exclusion  
7 in a way that would basically eat the  
8 catch-all and, you know, exclude  
9 instruments that are precisely the kind of  
10 instruments that Congress told us it was  
11 targeting in 2501. And that's not normally  
12 how you read an exclusion or a catch-all.  
13 We don't normally read it to swallow the  
14 rule, which is precisely what -- what the  
15 report concludes.

16 And then next -- on the discussion of  
17 agent checks, one of the -- the larger  
18 issues for the discussion of agent checks  
19 when Your Honor is describing the so-called  
20 unlabelled agent checks, the proposed  
21 report focuses on the authorized signature  
22 is somehow transmitting them into bank  
23 checks that are covered by the rule.

24 But one of the problems with that,  
25 Your Honor, is if the authorized signature

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2 isn't on behalf of the drawer or issuer,  
3 both of which are MondyGram here. I am not  
4 sure who that authorized signature would be  
5 on behalf of. So it's simply a rule  
6 that -- that doesn't make sense.

7 And if I could -- there are a couple  
8 of more broad points. I have stopped to  
9 see if Your Honor has any questions about  
10 that and then I can answer those. If not,  
11 a couple of more minor points. My time is  
12 -- although we had some exchange with the  
13 microphone, if I could have a couple more  
14 seconds.

15 THE COURT: Yes, take another five  
16 minutes. I will do the same for the other  
17 one.

18 MR. BRONNI: Thank you, Your Honor.  
19 Did Your Honor have any questions? I want  
20 to make sure -- you know, we are here for  
21 you. I want to make sure we answer your  
22 questions.

23 THE COURT: No, I will ask if I have  
24 questions.

25 MR. BRONNI: Okay. So one of the

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2 overarching problems of the report, I  
3 think, Your Honor, is that at the end of  
4 the day, it appears to focus on things  
5 that, like I said earlier, aren't really  
6 relevant to the statute here. Things about  
7 rights and obligations between, you know,  
8 the various parties and the liability on  
9 it.

10 And I think that, you know, that's  
11 not what Congress was focused on here. I  
12 think this isn't a case about a commercial  
13 expert classifying commercial paper into  
14 various buckets, and deciding based on  
15 those things who's liable if somebody sues  
16 over nonpayment of an instrument. This  
17 simply is not that kind of case and it's  
18 not that kind of statute.

19 Instead what Congress told us to  
20 focus on in the statute is the windfall and  
21 the equity problem. And I think it's -- we  
22 lose focus when we focus instead on things  
23 that aren't really relevant under the  
24 statute itself.

25 And another point I would add is

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1  
2 that, with respect to both the teller's  
3 check point, you know, Delaware's own  
4 expert said that these things -- that these  
5 particular instruments that they labeled as  
6 teller's checks do not qualify under any  
7 understanding of a third-party bank check.

8 And, you know, I think the fact that  
9 Delaware's own expert didn't agree with its  
10 conclusion there, and with all three  
11 experts -- yes, they weren't familiar with  
12 the term, it's a term that, as I said to  
13 the chief justice, that doesn't really have  
14 an obvious meaning. That's why, again, we  
15 go -- we look for sources that are similar.

16 But I think that the fact that  
17 Delaware's own expert said that under any  
18 ordinary understanding of that term would  
19 not describe any of the instruments in this  
20 case really means that all the experts here  
21 are in agreement.

22 Another -- I guess there are a couple  
23 of other points relating to the rights and  
24 obligations points. I think another  
25 problem with the proposed report is that it

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2 gives very little weight to the language on  
3 which a bank, a financial institution is  
4 directly liable. You know, the report  
5 almost treats that as a justification.

6 I think that this is a result of  
7 looking at -- when we talked about with  
8 money orders earlier -- almost a  
9 justification for excluding things. But it  
10 really can't be a justification for  
11 excluding things if Congress included that  
12 language in the statute in order to ensure  
13 that they were covered. That simply  
14 wouldn't make sense. And it's undisputed  
15 here at the end of the day, anyway, that  
16 MoneyGram is the party that is ultimately  
17 liable.

18 I -- I don't think that I have any  
19 more direct points. I will reserve for  
20 rebuttal unless Your Honor has questions.

21 THE COURT: All right. I will hear  
22 from Delaware, Mr. Zelinsky.

23 MR. ZELINSKY: Judge Leval, can you  
24 hear me right now?

25 THE COURT: Yes, I can.



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2 MR. ZELINSKY: All right. My name is  
3 Nathaniel Zelinsky. And I am joined in  
4 this room, Judge, by my colleague Neal  
5 Katyal, my colleague Jo-Ann Sagar, as well  
6 as the escheator for Delaware, Brenda  
7 Mayrack.

8 We have four broad points that I'd  
9 like to get across at the beginning. I  
10 think it will take about three minutes, and  
11 then I would be eager to answer any  
12 questions you might have and respond to a  
13 few points from my friend on the other  
14 side.

15 THE COURT: Well, I think it would be  
16 good if you planned to respond to the  
17 points that the defendant states made,  
18 particularly with respect to the  
19 unadministrability of the analysis that I  
20 have in my report.

21 MR. ZELINSKY: I will be sure to  
22 address that immediately after we get  
23 through some, I think, peremptory concerns.  
24 We wholeheartedly agree with you, Your  
25 Honor, about your topline conclusion. So

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2 we agree that these are teller's checks,  
3 they are bank checks. They fall outside  
4 the FDA, they are not subject to the FDA,  
5 and they're subject to the common law.

6 And we also think that you are  
7 entirely correct when you say that  
8 cashier's checks, teller's checks, and  
9 certified checks were so well known that  
10 Congress would have included them by name  
11 if it intended to do so in the FDA. And I  
12 think that's our core textual argument in  
13 front of the Court, and we wholeheartedly  
14 agree with you there.

15 I just want to be very careful, and  
16 that's why I wanted to get -- bring it out  
17 at the beginning, which is I know that my  
18 friend on the other side has at times  
19 looked to what's been said in oral argument  
20 as evidence of waiver, as he just did a  
21 moment ago.

22 So I want to state for the record --  
23 I think we need to make a very clear record  
24 that we don't forfeit or waive any  
25 arguments that we have made before the

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2 Supreme Court or here. I think the Special  
3 Master knows our position, I think he has  
4 at times noted where he disagrees with us,  
5 and I don't think that it's particularly  
6 productive in this conversation for me to  
7 rehash all of that.

8 And so what I will try to do for the  
9 purposes of this conversation is take the  
10 terms as you define them and reserve our  
11 own approach and interpretation of the  
12 statute where we have some slight  
13 divergence. That's point one.

14 Point two, we remain very grateful to  
15 you for revisiting your initial report. We  
16 think that it's really important to get  
17 this case right. We agree with Defendant  
18 states in that regard, and so we appreciate  
19 your attention.

20 Our third point, and I think this  
21 provides context for answering the question  
22 about administrability, which I'd like to  
23 approach in a moment, is that right now, I  
24 think only Delaware has provided you a  
25 coherent theory of the FDA.

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2 In 1974, the Congress had a very  
3 targeted goal. It was worried that  
4 addresses weren't collected for low-dollar,  
5 low-cost money orders, and it was worried  
6 that state address collection laws might  
7 raise the cost of low-dollar money orders  
8 for low-income consumers.

9 None of those policy concerns apply  
10 to bank checks. They don't apply to bank  
11 checks generally, and they don't apply to  
12 these bank checks. In fact, we know that  
13 MoneyGram's selling bank collects the  
14 addresses on bank checks.

15 And that means Defendants have all  
16 the ability in the world to escheat these  
17 products in the common law. All they need  
18 to do is pass a simple law that moves the  
19 information already being collected by the  
20 selling bank and gives it to MoneyGram.  
21 Once they do that, the common law primary  
22 will apply, and they are able to escheat  
23 these funds respectively.

24 My fourth point before turning to the  
25 question you just asked: For the very same

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2 reason, we would request that you deny  
3 outright, or recommend denying outright,  
4 Pennsylvania's request to change the common  
5 law.

6 We think the common law actually  
7 works in this case. And Defendants can  
8 escheat these funds if they want to, and  
9 all they need to do is pass very simple  
10 address collection laws. And the Court has  
11 rejected Pennsylvania's suggestion at every  
12 single turn. We think you and the Court  
13 can do that again without the need for a  
14 remand proceeding.

15 So turning to the question that you  
16 asked me to address initially on  
17 administrability, I think the easiest way  
18 to handle that is you actually can just  
19 read the term "similar written instrument"  
20 to not even include bank checks that are  
21 used to pay a bank's own bills.

22 So we actually largely agree with my  
23 friend on the other side; they are not  
24 similar to money orders and traveler's  
25 checks. They are not similar because they

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2 are not sold to a customer at point of  
3 sale. When a bank check is used by banks  
4 to pay the bank's own bill, it is used in  
5 the part of the bank's ability to pay its  
6 vendor, it's not sold to a customer or  
7 remitter who is showing up at a counter.  
8 Additionally you have the textual concern,  
9 if they're not purchased when they're used  
10 to pay their own bills.

11 And I could go --

12 THE COURT: You are talking about a  
13 bank's -- a bank's use of a MoneyGram  
14 teller's check?

15 MR. ZELINSKY: No, Judge Leval. I am  
16 talking about the general use -- and I  
17 apologize if I misspoke. I am talking  
18 about the general use of a cashier's check.

19 THE COURT: Okay.

20 MR. ZELINSKY: In the classic case  
21 when a bank cuts its own cashier's check,  
22 which I think is the classic example of a  
23 bank that is using a bank check to pay its  
24 own bills.

25 And so I think the easiest way to get

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2 around the administrability problem that my  
3 friends on the other side are raising is  
4 just to say that those instruments didn't  
5 apply at all to the FDA, just fall outside  
6 the FDA, they are not a similar instrument  
7 because they are not similar to money  
8 orders and traveler's checks.

9 And I think that that makes a lot of  
10 sense. I think the main topline point that  
11 you have reached in your report and that we  
12 wholeheartedly embrace is the notion that  
13 if Congress had wanted to apply the FDA to  
14 cashier's checks, teller's checks, and  
15 certified checks, Congress would have done  
16 so by name. Congress didn't do that.

17 THE COURT: Are you saying that  
18 cashier's checks and teller's checks are  
19 not similar? Why?

20 MR. ZELINSKY: So Judge Leval, I  
21 think that they are not similar. And  
22 you've identified two separate  
23 circumstances.

24 So the one circumstance you've  
25 identified is when the check is being used

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2 to pay the bank's own bill. And I think  
3 that's the easiest one to say they are not  
4 similar, and so they are not similar  
5 because they are not being sold to a  
6 remitter at a point of sale.

7 So when you look at a money order and  
8 a traveler's check, both of those are  
9 instruments sold to a retail customer.  
10 Somebody shows up, they need to pay their  
11 utility bill, they go to the CVS and they  
12 buy a money order.

13 When a bank uses a cashier's check to  
14 pay its own bill, there is no remitter  
15 showing up at a point of sale who is a  
16 retail customer. And that is a real good  
17 reason why the Treasury wouldn't have  
18 looked at this and said, Oh, we think you  
19 are getting in bank checks used to pay the  
20 bank's own bills.

21 They are nothing like a money order.  
22 They are nothing like a traveler's check.  
23 They just fall outside of the scope of the  
24 statute entirely. And it would be very  
25 strange indeed, Judge Leval, if Treasury



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2 thought that if FDA was encompassing bank  
3 checks accidentally under the similar  
4 written instrument category, for Treasury  
5 to only carve out those bank checks sold to  
6 retail customers.

7 The far better answer, we think,  
8 based on all of the principles you've  
9 articulated in your report, is that  
10 Treasury looked at this under the analysis  
11 you've given, said, You may accidentally be  
12 including bank checks sold to customers at  
13 a point of sale.

14 And it crossed nobody's mind that  
15 these were ever going to apply that, this  
16 statute would ever apply to a bank's own  
17 check used to pay the bank's own bills,  
18 which happened to be a cashier's check or a  
19 teller's check that the bank was cutting to  
20 pay its vendor.

21 So I think that's the easiest way to  
22 deal with the administrability problem.  
23 And I would add, Judge Leval, that you can  
24 make that very minor modification -- which  
25 we think is actually more faithful to

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2 everything else put forward, that you have  
3 in the report. We think it flows directly  
4 from your analysis, which we wholeheartedly  
5 embrace, that if Congress had wanted to  
6 include any form of cashier's check,  
7 teller's check, or certified check, it  
8 would have done so by name.

9 So we think you can make that very  
10 minor modification to your analysis, "a  
11 similar written instrument," and in doing  
12 so, Judge Leval, keep everything else the  
13 same, we think that you would ultimately  
14 recommend that teller's checks are not  
15 subject to the FDA because they are  
16 third-party bank checks.

17 We think you would recommend that the  
18 agent checks that are so labeled would be  
19 similar instruments. We obviously disagree  
20 with that, that's why I had the colloquy  
21 earlier on so our friend on the other side  
22 doesn't cite our argument as some evidence  
23 of waiver on that point.

24 And then you could also recommend, as  
25 you have, that the agent checks that are

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2 unlabeled are unclear as to their status  
3 and you need further proceedings. All of  
4 that, you can do, and simply say, where  
5 there is a bank check being used to pay the  
6 bank's own bills, that just falls outside  
7 of the FDA.

8 So I think that's the easiest answer  
9 to the administrability problem, Judge  
10 Leval, and that's the answer that I would  
11 give you. If I could, there are a few  
12 points -- do you have any more questions?  
13 We would be happy and eager to answer them.

14 THE COURT: Well, are -- are you  
15 agreeing that it's not administrable in the  
16 manner in which -- in which I have analyzed  
17 it?

18 MR. ZELINSKY: So Judge Leval, I  
19 think what we're -- when my friend says  
20 "administrable," I don't quite know exactly  
21 what he means. If he means it's not  
22 administrable in the sense that --

23 THE COURT: I understand him to be  
24 saying that MoneyGram doesn't have the  
25 information.

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2 MR. ZELINSKY: And Judge Leval, the  
3 core point I want to make here -- and this  
4 is maybe where there is a lot of daylight  
5 between me and my friend on the other side.  
6 We think that selling banks, at the point  
7 of sale, collect creditor information. And  
8 as the ABA brief points out, selling banks  
9 know who their creditor is when they use  
10 cashier's checks to pay their own bills.

11 So in that respect, Judge Leval, even  
12 if the information is today being collected  
13 by someone, it doesn't make its way to  
14 MoneyGram.

15 Now, there's a second  
16 administrability point, which is could you  
17 on the back end go and reconstruct this  
18 20 years later? And on that, I think it  
19 would be pretty difficult. So I don't want  
20 to suggest it would be easy to do this 20  
21 years later.

22 But to the extent it's a prospective  
23 rule, all of this creditor information is  
24 being collected by the selling bank, and I  
25 think that it's really, really, really

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2 important to recognize that fact because  
3 that's why these are not like the typical  
4 money order, traveler's check, that is  
5 being addressed in the FDA.

6 My friend has put forward a narrative  
7 of the FDA to do one thing, which is  
8 basically eliminate the common law. And  
9 that runs against every single piece of  
10 textual interpretation. It also ignores  
11 the legislative history from Mr. Sparkman.  
12 He made very clear, Chairman Sparkman was  
13 concerned about raising the cost of money  
14 orders for low-income consumers. And the  
15 concern is just not present with bank  
16 checks, and it's not present with these  
17 bank checks.

18 And that's a -- if I can get one  
19 point across factually, it's that  
20 MoneyGram -- my friend on the other side  
21 has not disputed this. MoneyGram may not  
22 have this information, but the record shows  
23 the information is being collected by the  
24 selling bank. And I think that's a crucial  
25 point, and it shows why they have the power

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2 to solve their own complaint.

3 That's why the common law works.  
4 That's why we ask that you rule that the  
5 Court can just reject Pennsylvania's  
6 argument to change the common law.

7 So did that answer the question,  
8 Judge, about administrability?

9 THE COURT: Well, I'm not sure that  
10 it does. I -- it sounds to me as if you  
11 were conceding -- that you were agreeing  
12 with the defendant states that -- that the  
13 report as written presently is not  
14 administrable with respect to the funds  
15 that are in dispute as to the past.

16 MR. ZELINSKY: So Judge Leval --

17 THE COURT: And by "as to the past,"  
18 I mean prior to this date.

19 MR. ZELINSKY: Sure. Judge Leval, I  
20 want to be very clear: I don't know.  
21 Because I don't have an insight that those  
22 records. So I can't tell you -- I can't go  
23 and tell you how -- whether it's possible  
24 to reconstruct those records.

25 I will point out that to the extent

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2 there is an uncertainty, I think the  
3 Supreme Court's Delaware v. New York  
4 decision is very clear that it stays with  
5 the initial holder.

6 We also have -- I would note, Judge  
7 Level -- additional arguments about  
8 limiting retrospective relief that Justice  
9 Gorsuch acknowledged at oral argument and  
10 my friend on the other side acknowledged.  
11 So I think it may be that the question of  
12 retrospective relief may be entirely moot.

13 We have argued, for instance, that  
14 the FDA --

15 THE COURT: So we have -- we have all  
16 of the escheats since the bringing of this  
17 lawsuit.

18 MR. ZELINSKY: Yeah. The funds that  
19 are in escrow. And -- and I -- I confess  
20 the funds that are in escrow -- I don't  
21 know how those would be handled. I think  
22 one answer is that because, for instance,  
23 the teller's checks are checks sold to  
24 customers, those would escheat to Delaware.  
25 I think the states might be able to

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2 negotiate among themselves potentially.

3 I -- I don't have a great answer about the  
4 escrow right now, so -- I haven't thought  
5 about that.

6 But I want to point out that for the  
7 general point about administrability, I  
8 think your recommendation is administrable  
9 going forward. And that's important. I  
10 also think, Judge Leval, that you could --  
11 and I want to stress this -- modify, make a  
12 very, very, very, very minor modification,  
13 and be consistent with everything else that  
14 you said in the report.

15 And so, I mean, I think that you got  
16 it exactly right when you said if Congress  
17 had intended to include these instruments,  
18 it would have done so by name. And I think  
19 that's just as true about a bank check  
20 that's being used to pay a bank's own bill.

21 THE COURT: So the modification that  
22 you are suggesting should be made is  
23 exactly what?

24 MR. ZELINSKY: Judge Leval, I think  
25 you should say that if an instrument is a



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2 bank check used to pay a bank's own bill,  
3 it falls outside of the FDA altogether, and  
4 so it's not subject to the FDA. It's not a  
5 similar written instrument because it's not  
6 similar, in that context, to a traveler's  
7 check or to a money order. It is not sold  
8 to that remitter.

9 And then I think the next thing that  
10 you could say, which is consistent with  
11 what you said in the report already, is  
12 where the bank check is being sold to a  
13 retail customer, not being used by a bank  
14 to pay its own bill, that bank check is a  
15 third-party bank check.

16 The result of those two pieces of  
17 interpretation -- which I think is more  
18 faithful to everything that you've laid out  
19 in the report, so I am arguing, I think,  
20 from your perspective -- that would have  
21 the net result of saying bank checks either  
22 fall outside the scope of the FDA because  
23 they are not similar written instruments  
24 when they are used to pay a bank's own bill  
25 or a bank check falls outside the FDA

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2 because it's a third-party bank check,  
3 where it is sold to a remitter at a point  
4 of sale, like one might sell a cashier's  
5 check or a teller's check to somebody who  
6 needs a good funds check to buy a boat or a  
7 car or a house.

8 And I would just note, Judge Leval,  
9 there's a big dog that didn't bark here,  
10 which is the banking association is not  
11 shy. And in 1974, there's no indication  
12 that we thought any bank checks of any kind  
13 were falling within the FDA. So I think  
14 that that's a really good sign that this  
15 was not intended to include -- the FDA was  
16 not intended to include bank checks.

17 What the FDA has told you -- or I'm  
18 sorry, what the ABA has told you, Judge  
19 Leval, in its brief in front of the Supreme  
20 Court, is that banks tend to escheat. They  
21 have, since 1974, escheated bank checks  
22 when they pay their own bills according --  
23 and when they sell them to retail  
24 customers -- according to the common law.  
25 So I do think, in terms of

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2 administrability, your report could have  
3 the unintended consequence of throwing into  
4 doubt all escheated bank checks used to pay  
5 banks' own bills from 1974 onward.

6 And so I think for all of those  
7 reasons, the simpler way of handling this,  
8 and the one that is, again, consistent with  
9 your topline point -- that checks -- that  
10 if Congress had intended to include  
11 cashier's checks, teller's checks, and  
12 certified checks it would have done so by  
13 name -- the easier way to handle this is to  
14 say all of these checks fall outside the  
15 FDA. They are either not similar  
16 instruments when they are used to pay a  
17 bank's own bills, and they are third-party  
18 bank checks when they are sold to a  
19 customer at a point of sale.

20 And I would stress, Judge Leval, that  
21 you would be able to do this and keep  
22 everything else in your recommendation the  
23 same. So the recommendation about agent  
24 checks would remain the same; the  
25 recommendation about teller checks would

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2 remain the same.

3 And then I would also add, Judge  
4 Leval, that administrability, to the extent  
5 it's a problem for retrospective relief,  
6 should not cut against us. And that's  
7 because my friends on the other side waited  
8 to bring this lawsuit. They brought this  
9 lawsuit in 2015 or 2016, and they did so  
10 after they hired some creative consultants.

11 So I want to be very clear, Judge  
12 Leval, that, you know, it would be  
13 particularly unfair to say that we are  
14 somehow harmed in the interpretation, the  
15 correct interpretation of the statute,  
16 because my friends on the other side waited  
17 too long to bring their lawsuits.

18 If I could, I might just address one  
19 or two points. Unless -- do you have any  
20 questions, Judge Leval, on what I  
21 understand is a key point for you?

22 THE COURT: Go ahead.

23 MR. ZELINSKY: There are one or two  
24 points from my friend on the other side I  
25 think it's important just to respond to.

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2 My friend says that the term "bank check"  
3 means a check drawn on by a bank that's  
4 on -- in control of another bank.

5 I would just point out that page 49  
6 of their reply, they said, quote, a bank  
7 check is a check drawn by a bank on a bank,  
8 period. My friend on the other side  
9 pointed out that the term -- that these  
10 can't be teller's checks, he said, because  
11 there's no relationship between the selling  
12 bank and the drawee bank.

13 I think it's important to remember  
14 what these are, Judge Leval. These are  
15 good funds checks. They receive Reg CC  
16 treatment. Everyone thinks these are  
17 teller's checks. All that's happening --  
18 and these are not Frankenstein bizarre  
19 instruments.

20 All that's happening is there are  
21 small banks out there, and they contract  
22 with MoneyGram to help them do some  
23 back-end administrative services. These  
24 are the bank's teller's checks, Judge  
25 Leval, and it happens to be at small credit

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2 unions and institutions like that. They  
3 are teller's checks, and everyone treats  
4 them as teller's checks.

5 The record is very clear that the  
6 bank is the drawer. It's not a nominal  
7 relationship. MoneyGram's witness says  
8 unequivocally the bank is the drawer. Now,  
9 it's the case that they have a second  
10 issuer on there, but there's no reason to  
11 think -- and in fact, the expert that my  
12 friend from Pennsylvania put forward made  
13 it very clear that he thought --  
14 Mr. Clark -- that a teller's check could in  
15 fact have both a drawer, and a second  
16 person's liable on it as an issuer.

17 My friends on the other side make a  
18 lot of hay over a single sentence in oral  
19 argument from my cocounsel, Mr. Katyal.  
20 Judge Leval, if you go to read the entire  
21 argument. I don't think that it says what  
22 my friend from Arkansas says. We have long  
23 thought that a third-party bank check means  
24 a bank check sold -- paid through a third  
25 party.

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2 We then included another definition:  
3 a bank check that was sold to a third  
4 party. That's in the footnotes of our  
5 exceptions brief and our sur-reply and note  
6 that's very similar actually, to the  
7 definition that you put forward. And I  
8 think what we were trying to argue in the  
9 Supreme Court, and did argue, is that if  
10 one were to look to the Hunt Commission, it  
11 supports us. And it does.

12 It has an extremely broad definition,  
13 as you have noted, of third-party payment  
14 systems. And in addition, the fact that  
15 it's changed to "third-party bank check" in  
16 the statute is particularly telling.

17 Judge Leval, my friend on the other  
18 side also makes a -- a lot of issues over  
19 the fact that what matters, according to  
20 what Congress says, is that issuers don't  
21 keep addresses.

22 And I just want to be very clear.  
23 Congress actually said that the sellers  
24 don't keep addresses. That's the language  
25 in the statute. And 2501 makes that very

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1  
2 clear. It says, The books and records of  
3 banking and financial organizations and  
4 business associations engaged in -- engaged  
5 in issuing and selling money orders.

6 But what's very clear here is that  
7 the selling banks retain the information.  
8 That means -- and then I return to my  
9 earlier point at the beginning. That means  
10 the defendants have all the ability in the  
11 world to escheat these instruments  
12 prospectively. All they need to do, Judge  
13 Leval, are pass simple address collection  
14 laws, that move the addresses already being  
15 recorded from the banks to MoneyGram.

16 And so that's why we respectfully  
17 request that you also modify your report  
18 simply to deny Pennsylvania's  
19 recommendation to change the common law.  
20 Because as the Court said, it's not in the  
21 business of modifying or creating rules for  
22 every escheat scenario.

23 Is -- does the Court have -- Judge  
24 Leval, do you have any other questions?  
25 I'd be happy to answer them.



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2 THE COURT: No. For the moment, no,  
3 that's fine. Thank you.

4 MR. ZELINSKY: Then we respectfully  
5 request that you file your interim report.  
6 We are deeply grateful for your care and  
7 your attention in this matter, and we  
8 agree, again, wholeheartedly -- and I would  
9 stress that as much as I can -- with that  
10 topline conclusion: If Congress had  
11 intended to include well known bank  
12 products in the FDA, it would have done so  
13 by name. Thank you.

14 THE COURT: Thank you.

15 Mr. Bronni.

16 MR. BRONNI: Thank you, Your Honor.  
17 I guess maybe four or five points, a couple  
18 of which are very simple, just to -- to  
19 emphasize again.

20 On the waiver point, I agree with my  
21 friend on the other side. I think it's  
22 clear what -- what was said in oral  
23 argument and, you know, there was an  
24 exchange between the chief justice and I  
25 about what "third-party bank check" meant.

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2 And I said, it is true, as Your Honor said,  
3 it is bewildering what it -- it could mean,  
4 but I think that we have to look to the  
5 contemporaneous sources that used similar  
6 terminology to define it.

7 But that is not what Delaware said on  
8 rebuttal. Delaware said, and I quote, we  
9 actually think that the Hunt Commission  
10 does know what it means, and they told you  
11 what it means in that report. That was  
12 what Delaware said, that was the argument  
13 on rebuttal. It was -- so it's stuck with  
14 that concession. I understand it doesn't  
15 like that concession now, but it's stuck  
16 with that concession.

17 And to the extent that Your Honor  
18 thinks that it's not concession, that's  
19 really up to the Court. What was argued in  
20 front of the Court about what was conceded  
21 or what wasn't, that's really more  
22 appropriate, we think, for the Court to  
23 address.

24 On the common law point, just  
25 briefly, you know, I don't really think

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2 it's fair that my friends from the  
3 Commonwealth of Pennsylvania, that they're  
4 not allowed to except to something denying  
5 their claim that they don't have an  
6 opportunity to address. I frankly don't  
7 understand Delaware's argument on that  
8 point.

9 And then third, on the money order  
10 point, sort of briefly, you know, they keep  
11 emphasizing that Congress was concerned  
12 particularly about low-dollar instruments  
13 and recordkeeping with those.

14 As I said to the Supreme Court,  
15 that's not in the findings that Congress  
16 actually passed. Instead, what my friends  
17 on the other side are to referring to have  
18 been vague floor statements by individual  
19 members of Congress. What Congress  
20 actually said in 2501 is that it didn't  
21 think it was appropriate to require keeping  
22 that kind of information because people buy  
23 these in their home states anyway.

24 In other words, again, Learned  
25 Hang's, it's again the phrase, the game is

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2 not worth the candle. That's what Congress  
3 actually said. Now, they do rely on a  
4 floor statement that they choose. But what  
5 all of Congress actually agreed on was that  
6 finding that's in 2501, and I think that's  
7 where instead we should focus.

8 I would also emphasize, on the money  
9 order point, that today, these things are  
10 structured precisely like ordinary money  
11 orders. In fact, MoneyGram here is playing  
12 precisely the role that it does on its  
13 ordinary money order products, in precisely  
14 the same role that Western Union played on  
15 classic money order products going back to  
16 the 1970s.

17 Fourth, on the administrability  
18 point, I frankly did not understand what my  
19 friend on the other side was putting forth  
20 as a way to solve this problem. Maybe  
21 there's an underlying assumption there that  
22 somehow teller's checks are never used, the  
23 MoneyGram teller's checks are never used by  
24 the banks.

25 If that's the underlying assumption

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2 that therefore excludes them entirely,  
3 that's not accurate. Arkansas' appendix,  
4 this is from Ms. Yingst, at 381, 382  
5 mentions that in fact banks do use the  
6 teller's checks to pay their own bills.

7 I think the fundamental disconnect  
8 here that my friend on the other side has  
9 sort of ignored is that MoneyGram doesn't  
10 have this information. It doesn't know if  
11 the bank is purchasing this item to use it  
12 for itself to pay its own obligations or if  
13 its customer is buying it. That  
14 information is unknown.

15 But what they are now suggesting, I  
16 guess, as a solution is that in order to  
17 make the statute that Congress passed  
18 effective, a statute that was designed to  
19 prevent recordkeeping requirements, its  
20 solution is that we must pass another  
21 statute to forward on information so that  
22 MoneyGram has that information.

23 That simply doesn't make sense. In  
24 order to make Congress's statute effective,  
25 we have to pass more statutes than what

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2 Congress told us it doesn't want.

3 And it simply hasn't addressed the  
4 administrability question. Even if you  
5 could do that going forward, if that's what  
6 Congress meant with foresight, to require  
7 us to do going forward, it doesn't solve  
8 the -- the problem on the back end.

9 Now, he says we waited so long to  
10 sue, we engaged creative consultants; I  
11 frankly don't know what that's a reference  
12 to. You know, Arkansas came up with this  
13 on its own and then forwarded it to its  
14 fellow states. I frankly don't know what  
15 he is referring to there.

16 But again, the important point is  
17 that MoneyGram doesn't know. There's no  
18 way to apply the rule Your Honor has  
19 proposed because it doesn't know who's  
20 using these instruments, whether it's the  
21 bank itself or it's a customer who walks in  
22 off the street and buys it.

23 The only information that MoneyGram  
24 receives is date, serial number, seller  
25 ID -- which is just the selling

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2 institution, who it is -- and the value.  
3 They do not get the identity. Your rule,  
4 Your Honor, is simply not applicable in  
5 practice.

6 And then lastly, on the recordkeeping  
7 point, I know that they keep mentioning  
8 that sometimes the selling institutions  
9 would keep this information, and it was  
10 discussed in oral argument in front of the  
11 Supreme Court.

12 There is a federal regulation that if  
13 you sell more than \$3,000 worth of certain  
14 products, which in fact includes regular  
15 money orders, you have to keep that  
16 information for so long. And so that  
17 distinction doesn't even distinguish these  
18 from money orders. But in addition to  
19 that, it's still undisputed that MoneyGram  
20 doesn't get that information, it doesn't  
21 have it, it won't take it.

22 So again, my friend's solution is  
23 that we have to pass more laws that  
24 Congress said it didn't want in order to  
25 make the statute effective.

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2 As an ending point, Your Honor,  
3 unless there are questions -- again, we  
4 understand Your Honor's desire, we  
5 appreciate Your Honor's desire to get this  
6 right. We have a real interest in getting  
7 this right too. This law applies to us as  
8 well as our friends in Delaware. It  
9 applies to all of our states. And we are  
10 just as interested in getting this right.

11 But frankly, Your Honor, the shifting  
12 rationales in the proposed report, even  
13 versus the original report, has focused on  
14 things that are simply not relevant under  
15 the statute, and for that reason we don't  
16 think that the proposed report would be  
17 helpful to the Court, and we think that the  
18 Special Master should decline to file it.  
19 Thank you.

20 THE COURT: All right. Thank you.

21 We will take a ten-minute recess and  
22 reconvene in ten minutes. I am going to  
23 look over my notes and thoughts and see  
24 whether I have further questions to ask  
25 you.



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2 So it's now five minutes before 1:00,  
3 we will reconvene at five minutes after  
4 1:00, and I may or may not have questions  
5 for you at that time. Thank you.

6 (Recess.)

7 THE COURT: All right. Can you hear  
8 me?

9 MR. ZELINSKY: Yes, Your Honor.

10 MR. BRONNI: Yes, Your Honor.

11 THE COURT: All right. I thank you  
12 very much for your very --

13 MR. ZELINSKY: Judge.

14 THE COURT: Yes.

15 MR. ZELINSKY: If it's helpful, we do  
16 have a few extra points that we can  
17 provide, and we would be happy to go back  
18 and forth with Mr. Bronni, if that would be  
19 helpful to you. But there are a few points  
20 we think may be helpful just to note to  
21 assist you in revising the report.

22 So we would be eager to offer those  
23 to you now. I promise you, it wouldn't  
24 take more than 90 seconds. And of course,  
25 if Mr. Bronni wants to respond to those, I

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2 would be more than happy to allow him to.  
3 But I think it might be helpful just to  
4 clarify one or two points.

5 MR. BRONNI: Your Honor, I'll agree  
6 with my friend on the other side. If you  
7 want to give us both 90 seconds, I think we  
8 would both appreciate it.

9 THE COURT: All right. What are you  
10 asking for in terms of time?

11 MR. ZELINSKY: Your Honor, we can do  
12 it in -- in five minutes. We can also --  
13 I'm happy to have a conversation here with  
14 you and Mr. Bronni. I don't think we are  
15 particularly focused -- either of you are  
16 focused on the first time limits --

17 THE COURT: Why don't you start off  
18 with the objective of taking eight minutes,  
19 and the defense will have the same.

20 MR. ZELINSKY: Thank you, Your Honor.  
21 I appreciate that. And I would add that we  
22 remain very grateful to you seeking to  
23 pursue the right answer in this case.

24 THE COURT: It's what I am supposed  
25 to do.

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2 MR. ZELINSKY: And that's why I think  
3 that it's very helpful for us to have this  
4 conversation because these are complicated  
5 questions.

6 I want to make two points right at  
7 the start. The first is my friend on the  
8 other side said the only evidence that we  
9 have that these records are being kept by  
10 the selling bank -- that is, the records of  
11 the creditor's address -- is the fact that  
12 sometimes federal law on instruments over  
13 \$3,000 require the items to be collected.

14 That is not true. That is not our  
15 only evidence. In fact, if you look at the  
16 sealed appendix, from Delaware's sealed  
17 appendix, record page 599 -- and if you  
18 don't have the sealed appendix, Judge  
19 Leval, I believe that we submitted a copy  
20 to you electronically. If you don't,  
21 please let us know, and we can provide a  
22 copy of that sealed appendix.

23 But it's sealed appendix, record  
24 page 599 of the Supreme Court. The -- the  
25 record is extraordinarily clear: The

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2 selling bank collects creditor addresses.

3 Additionally, Ms. Yingst is very  
4 clear that the selling bank knows the  
5 creditors' addresses because the purchaser  
6 is a customer, just as a practical matter,  
7 of the selling bank. Someone doesn't show  
8 up to buy a teller's check, a \$20,000  
9 teller's check, that have cash in a bag,  
10 without a bank account at that bank.

11 So those are the reasons why the  
12 addresses are known, why the bank has those  
13 records. And that is all very clear at  
14 record page 599. So that's point one that  
15 I think it's important to respond to.

16 Point two that I would like to get  
17 across -- and I would be happy to answer  
18 any questions you have. We are very -- we  
19 firmly believe that you should not reach an  
20 incorrect potential result, a result you  
21 think that is wrong textually in the  
22 statute, because of concerns about  
23 administrability in this particular case.

24 And I know of no instance when a  
25 statute is interpreted differently because

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2 a plaintiff waited to bring a lawsuit and  
3 then that caused complications. And my  
4 friends on the other side did wait. They  
5 hired a group called TSG which did some  
6 creative accounting, and they waited a long  
7 period of time to bring this lawsuit.

8 I think you should reach what you  
9 think is the correct interpretation of the  
10 statute. We think the best interpretation  
11 of the statute is the one I proposed, which  
12 is that all bank checks fall outside of the  
13 FDA, either because they are not similar  
14 written instruments or because they are  
15 third-party bank checks. But we don't  
16 think you should reach a wrong  
17 interpretation of the statute.

18 I would also emphasize, strongly,  
19 Judge Leval, that in this area Congress  
20 prefers and the Court prefers simple rules,  
21 it requires rules that work and are  
22 administrable. And we agree on that point.

23 But you shouldn't focus purely on the  
24 facts of this case. Instead, you should  
25 focus on the fact of how bank checks

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2 generally are sold, and we know that bank  
3 checks as a general matter -- and the  
4 record and the ABA brief have made this  
5 very clear -- the records for the creditor  
6 on that bank check is kept, so whether it's  
7 being used to pay its own bill or whether  
8 it's being used to -- to be sold to a  
9 remitter.

10 And that leads me to my third and I  
11 think final point. My friend from the  
12 other side --

13 THE COURT: So I am sorry, so the  
14 relevance of the fact that the banks know  
15 the purchaser information with respect to  
16 bank checks.

17 MR. ZELINSKY: First -- it's two  
18 pieces of relevance -- it's three pieces of  
19 relevance, Judge.

20 The first piece of relevance is it  
21 confirms that these are bank checks. The  
22 bank is collecting the address of the  
23 selling bank.

24 The second point is that these are  
25 not the things Congress was worried about.

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2 These bank checks, and all bank checks, are  
3 not the thing Congress was worried about.  
4 Congress was worried about driving up the  
5 cost of money orders because addresses  
6 weren't collected.

7 My friend on the other side focuses  
8 on the fact that addresses weren't  
9 collected on money orders. He ignores that  
10 second part, and the response from the  
11 other side it's not just a floor statement,  
12 it's a floor statement by the chairman of  
13 the committee, Mr. Sparkman, who says this  
14 is why we're doing this. They are worried  
15 about raising the cost of money orders for  
16 low-income consumers.

17 Those policy concerns do not apply --  
18 and I think that Mr. Bronni acknowledged  
19 that, actually, in his opening statement to  
20 you. He said -- I think if you go back and  
21 read this transcript, I think he said,  
22 yeah, we agree that for the vast majority  
23 of situations, the bank actually maintains  
24 creditor addresses on bank checks.

25 This case is not the sum total

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2 universe of bank checks. It is one species  
3 of bank checks because banks use MoneyGram  
4 to do some back-end administrative  
5 functions, small banks that need a little  
6 bit of help on the administrative  
7 functions.

8 So that's why you have this  
9 particular fact pattern where there's an  
10 informational gap between the addresses  
11 being collected by the selling bank and the  
12 addresses going -- not going to MoneyGram.  
13 The states have all the ability in the  
14 world to solve that problem, Judge Leval.  
15 It's free money to them.

16 They can pass a statute tomorrow and  
17 escheat these funds prospectively. So the  
18 common law works. You can't do that -- in  
19 1974, you couldn't do that with money  
20 orders. And you couldn't do that with  
21 money orders because they were low-cost  
22 instruments and you would radically  
23 increase their price. No statute pursues  
24 its purpose at the expense of everything.

25 Congress targeted two instruments



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2 that were typically low dollar that were  
3 predominated and controlled largely by two  
4 entities at that time. One entity was  
5 Western Union, the other was American  
6 Express. And so there were windfall  
7 concerns. But Congress targeted those  
8 instruments because those were the ones  
9 where states self-help -- the state passing  
10 its own law might raise the cost of these  
11 products to consumers.

12 Judge, do you have any other  
13 questions that we can answer for you at  
14 this stage?

15 THE COURT: No. Is that it?

16 MR. ZELINSKY: I would add, just as  
17 well, as well two other small points.

18 Point one is that the question of  
19 putting aside the money in escrow, the  
20 question of prospective versus  
21 retrospective liability, it is very clear  
22 that Congress did not intend the FDA to  
23 have retrospective, backward-looking  
24 liability.

25 Congress actually enacted the FDA --

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2 and this is in the note following the  
3 enactment. It doesn't appear in the U.S.  
4 Code, it appears in the note. But it says  
5 it is only applicable on funds escheated  
6 after 1974. So Congress is very clear it  
7 doesn't want to create retrospective  
8 liability. It didn't seek to harm states  
9 like Delaware. It seeks to create a pretty  
10 simple bright-line rule.

11 The other thing is in Texas, the  
12 Court is very clear that it doesn't want to  
13 make the cost of litigation so harmful and  
14 open up retrospective liability for states  
15 and increase their costs.

16 So we think all of those points,  
17 strongly counsel in favor of you --  
18 using -- sorry, I should say maintaining  
19 the recommendations you've made in this  
20 report, which follow the settled  
21 expectations of the American Banking  
22 Association and others.

23 THE COURT: Well, I'm a little  
24 puzzled. It seems to me part of what you  
25 are saying confuses apples and oranges. To

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2 say that the report was not intended to  
3 give rise to retrospective liability, in  
4 the sense that Congress didn't intend any  
5 state to be able to sue to -- to get  
6 escheats from pre 1974, prior to the  
7 passage of the act, that seems to me to  
8 address a different proposition from what  
9 would be addressed if -- if 10, 15, 20,  
10 how -- 40 years later, states said, well,  
11 for the last five years, MoneyGram or  
12 Western Union or some other -- American  
13 Express or some company has been sending  
14 money to the wrong state, and we want to  
15 get at least the last -- you know, within  
16 some limitations, statute of limitation or  
17 concept of limitation, we want to get the  
18 money we should have been getting for these  
19 last few years, when the act was in effect.

20 MR. ZELINSKY: So Judge Leval, I  
21 think it goes to the fact -- and I have two  
22 responses. The first response is -- well,  
23 three responses.

24 One, I think that this is something  
25 that we would need further briefing in

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2 front of you on. My friend, Mr. Bronni, I  
3 think suggested to the Supreme Court when  
4 Justice Gorsuch raised this, that this was  
5 actually an issue for damages. So we would  
6 preserve this for a longer conversation if  
7 necessary in front of you on the  
8 retrospectiveness of the damages.

9 But as to your question, I think that  
10 what it goes to is the fact that Congress  
11 thought that it was writing a pretty simple  
12 and clear statute. Congress wanted to not  
13 harm states when it passed the FDA. That's  
14 why it didn't create retrospective  
15 liability. And it thought that it was  
16 passing a statute that targeted two well  
17 known things. As Justice Kagan said in  
18 argument, they have used money orders, they  
19 have used traveler's checks, they knew what  
20 they were. So Congress thought, I think,  
21 with that limitation on retrospective  
22 liability, that it was basically saying,  
23 okay, we're carving out these two  
24 instruments.

25 And I think that's a very good

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2 indication that if there were ambiguity,  
3 that Congress would not have wanted to then  
4 harm the state that took this money in good  
5 faith. I mean, I think it's important to  
6 remember, the evidence is MoneyGram  
7 independently incorporated in Delaware.  
8 And Delaware then took this money in good  
9 faith.

10 I think it would be incredibly  
11 damaging to require Delaware to pay out all  
12 this money at once.

13 And just one more small point, Your  
14 Honor. There are tie-breaking principles.  
15 If there is any ambiguity here, it all cuts  
16 in our direction. So for instance,  
17 statutes are read narrowly to avoid  
18 derogation of the common law. And U.S. v.  
19 Texas case makes it very clear, even where  
20 a statute modifies the common law, it's  
21 still read narrowly.

22 And so I think all of those concerns  
23 mean that you should limit the scope of the  
24 statute, we agree on that score with my  
25 friend on the other side. But we think

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2 that also counsel's in favor of  
3 interpreting the statute correctly in a way  
4 that doesn't cause retrospective liability  
5 to Delaware.

6 THE COURT: Thank you.

7 All right. Mr. Bronni.

8 MR. BRONNI: Thank you, Your Honor.  
9 I guess maybe about four or five points,  
10 some of which are very simple.

11 I will start with, you know, my  
12 friend on the other side spent a lot of  
13 time, and Delaware has spent -- spilled a  
14 lot of ink in this case talking about  
15 cashier's checks. So, you know, I think  
16 that it's worth noting this case does not  
17 involve cashier's checks, nobody claims  
18 that it involves cashier's check. So we  
19 can set that aside.

20 And the point about waiting to sue  
21 and somehow that entitles Delaware, when it  
22 gets its hand caught in the cookie jar, to  
23 keep all the cookies -- you know, we have  
24 to bear in mind, as my friend just pointed  
25 out, MoneyGram reincorporated in Delaware

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2 in 2005, so we are only talking about going  
3 back to 2005. In fact, Minnesota, the  
4 previous state of incorporation, followed  
5 the rule that we are proposing. So we are  
6 only talking about going back to 2005.

7 And there's a lag time obviously with  
8 these instruments. You know, it's not like  
9 they suddenly escheat the day after they  
10 are purchased. Instead, they have  
11 different periods for reporting that  
12 information, so it's not instantaneous.

13 So, you know, I don't really  
14 understand the argument that somehow we  
15 waited to sue, especially when we engaged  
16 in -- we attempted to engage in good faith  
17 negotiations with Delaware.

18 And, you know, I think that it's also  
19 worth noting on this point that, you know,  
20 as soon as Delaware -- or as soon as  
21 MoneyGram reincorporated in Delaware, it  
22 suddenly changed its reporting policies.  
23 Read into that what you want, but that's  
24 just a simple fact.

25 Third, you know, my friend on the

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2 other side acts like MoneyGram just  
3 performs back-office functions here, it  
4 doesn't do anything else, these are the  
5 bank's own instruments.

6 The problem with that is that is just  
7 simply not true. MoneyGram's own SEC  
8 filings describe these instruments as  
9 MoneyGram instruments with the bank's  
10 branding. Sort of like if I have a credit  
11 card from the University of Michigan, it  
12 may be branded University of Michigan, but  
13 my account is not with the University of  
14 Michigan. It's a whole different product.

15 It's not some simple back-office  
16 function. Instead, these, at the end of  
17 the day, are MoneyGram instruments that may  
18 happen to be sold by a financial  
19 institution, but everything makes very  
20 clear these are MoneyGram instruments. And  
21 that they're outsourcing -- that banks are  
22 outsourcing the entire operation.

23 And then FOURTH ^ ck, and I think  
24 this is probably the most important point.  
25 My friend on the other side, again, like we



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2 just talked about earlier, talks about,  
3 well, you can pass all these statutes to  
4 require all this information to be  
5 forwarded on.

6 But at the end of the day, his rule  
7 still has the same problem. The rule for  
8 solving the question about what's known or  
9 not known, if I understand the rule that  
10 he's put forward, it's basically heads,  
11 Delaware wins; tails, Arkansas and  
12 Pennsylvania lose.

13 Because under their view, you know,  
14 if it's a MoneyGram instrument, if it's  
15 used by the bank -- and let's assume they  
16 knew that. They don't, but let's assume  
17 they somehow -- that MoneyGram knew that --  
18 it doesn't -- and if it's used by a bank,  
19 it's not similar so it's not covered by the  
20 FDA.

21 On the other hand, if it's a  
22 MoneyGram instrument and it's not used by a  
23 bank, then it's a third-party bank check,  
24 so it's not covered by the FDA.

25 What's left in the catch-all?

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2 Apparently nothing. Again, it's heads,  
3 Delaware wins; tails, Arkansas and  
4 Pennsylvania lose. And I think, you know,  
5 this is the first time we have heard their  
6 new theory of how you would interpret  
7 third-party bank checks, which again, I  
8 would underscore, has been changed so many  
9 times that we are now dealing with another  
10 theory here.

11 You know, at this point, we  
12 practically need law professors and a field  
13 of experts to interpret this instrument by  
14 instrument. That's hardly an easily  
15 administrable rule. And that's even if we  
16 can get over the problem that MoneyGram  
17 doesn't have the information.

18 And as I said before, they apparently  
19 want us to pass statutes in order to make  
20 Congress's statute effective. And then we  
21 would still not be covered by the statute.

22 So unless Your Honor has any  
23 questions, I think that's -- that's the  
24 point where I am done.

25 THE COURT: All right. Thank you.

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2 I appreciate your arguments. Very  
3 well delivered. And I will wrestle with  
4 them. Thank you.

5 MR. ZELINSKY: Thank you, Judge  
6 Leval. And we will make sure you receive  
7 the recording copy, and I believe the court  
8 reporter is on right now. But we will  
9 coordinate to ensure that the transcript is  
10 delivered promptly to you today.

11 THE COURT: And you made reference to  
12 a Supreme Court sealed appendix?

13 MR. ZELINSKY: We had sent a copy of  
14 our filings of the Court to you by CD last  
15 November, but we will ensure that the  
16 sealed appendix is also e-mailed to that  
17 Special Master account, including  
18 Mr. Bronni and Mr. Voss on that e-mail as  
19 well.

20 THE COURT: Good. Thank you.

21 MR. BRONNI: Your Honor, I have one  
22 clarifying thing before -- if I could.  
23 There was an earlier e-mail exchange  
24 between, I believe it was a clerk and  
25 myself and cocounsel, asking about money

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2 orders on which banks are liable.

3 Given that exchange contained  
4 substantive argument, we would ask you to  
5 include that on the Special Master docket  
6 because we think that's relevant to these  
7 proceedings.

8 THE COURT: I am sorry, I am not sure  
9 I understood what you are asking for. To  
10 include what on the docket?

11 MR. BRONNI: As Your Honor may  
12 recall, after our initial conference I  
13 guess about a month ago, I had made  
14 reference to the fact that banks issue  
15 money orders and they are liable on those.  
16 And Your Honor asked for citations, and  
17 then, I believe it was the clerk followed  
18 up by e-mail, and both Mr. Katyal and I  
19 provided -- gave responses to that.

20 And because that's really substantive  
21 briefing, we would ask that that be  
22 included on the -- the Special Master  
23 docket, as well as the comments that we  
24 filed.

25 THE COURT: Okay. All right. We'll

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do that. Okay. Thank you very much. We  
will adjourn.

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C E R T I F I C A T E

STATE OF NEW YORK )  
: ss.  
COUNTY OF NEW YORK )

I, DONNA DRATWA, CSR, do hereby certify that the within is a true and accurate transcript of the remote proceedings taken on December 5, 2022.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this December 5, 2022.

*Donna Dratwa*

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DONNA DRATWA