Nos. 145 & 146, Original (Consolidated)

IN THE

Supreme Court of the United States

DELAWARE,

Plaintiff,

v.

PENNSYLVANIA AND WISCONSIN,

Defendants.

ARKANSAS, *et al.*,

Plaintiffs,

v.

DELAWARE,

Defendant.

ON THE PARTIES' CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

SECOND INTERIM REPORT OF THE SPECIAL MASTER

PIERRE N. LEVAL
Special Master
40 Foley Square, Room 1901
New York, NY 10007
(212) 857-2310

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

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

In the initial Special Master proceedings, Delaware undertook to distinguish the Disputed Instruments[1] from instruments distributed by MoneyGram bearing the legend, "money order," emphasizing differences that related either to marketing strategies (such as selling through banks as opposed to retail stores, so as to reach a different economic class of customers) or to inessential features in the appearance of the instruments. I found that Delaware's arguments suffered from two significant flaws. One was that, while these were differences between the Disputed Instruments and those now distributed by MoneyGram labeled as money orders, Delaware had not shown that the Disputed Instruments differed from money orders of issuers other than MoneyGram, much less from those distributed in the 1970s at the time of the enactment of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Act" or

1. A description of the Disputed Instruments, copied from my First Report, can be found at Appendix B.

"FDA"), 12 U.S.C. §§ 2501–03.[2] Second, the points that Delaware emphasized, pertaining to marketing strategies and appearances, did not involve differences in the rights and obligations that arose from usage of the instruments in commerce. Observing no differences in the rights and obligations arising from use of the Disputed Instruments, as compared with the instruments that Delaware conceded to be money orders, I concluded that they too were either money orders or "other similar . . . instrument[s]."

Upon reading the oral arguments to the Supreme Court, I found that Delaware was now emphasizing a circumstance that, if correct, would distinguish between rights and obligations, at least comparing the Disputed Instruments with those that MoneyGram labels as "money orders." Delaware contends that the banks that sell the Disputed Instruments do so in the role of *drawer* of the checks, so that the selling banks are liable on them. Because the recommendations of my First Interim Report were predicated primarily on the conclusion that the points emphasized by Delaware did not relate to differences in rights or liabilities, I wondered whether my new understanding of Delaware's arguments might require a change in my recommendation, including a rethinking of, inter alia, the effect of the statute's parenthetical exclusion of "third party bank check[s]" as to the Disputed Instruments. In view of the Court having already heard argument and presumably conferenced, I requested expedited briefing and notified the Clerk of the Supreme Court that I might be submitting an amended recommendation. Having reviewed the parties' submissions and heard further argument, I conclude that I am compelled to revise my recommendation to the Court.

2. The full text of the Act is reproduced in Appendix A below.

The changes in my analysis are two: 1) In my First Report, I concluded that the Disputed Instruments are covered by the Act in either of two categories: as a "money order" (in view of the absence of differences in the rights and obligations arising from use of the Disputed Instruments, as compared with money orders), and as an "other similar written instrument" (for the same reasons). I now conclude that the Disputed Instruments come within the statutory category of an "other similar written instrument," but are not included in the statutory category of a "money order." 2) In my First Report, I concluded that the Disputed Instruments did not fall within the Act's parenthetical exclusion of a "third party bank check" from the category of an "other similar written instrument." I now conclude that, to the extent that the Disputed Instruments are drawn by a bank as drawer (or otherwise in a capacity that renders the bank liable), they do fall within the Act's exclusion of "third party bank checks." In all other respects, I stand by my First Interim Report.

I. The Disputed Instruments Are Not "Money Orders," but Are "Similar Written Instruments."

While I was on firm ground in concluding in my First Report that the Disputed Instruments come within the Act's category of "other similar instrument" in view of the very great similarities between them and money orders, I went too far in arguing that the Disputed Instruments should also be deemed to *be* money orders. I now recognize that there are sufficient adjectival, customary differences in the intended purpose and usual manner of treatment as between money orders and the Disputed Instruments, so that the MoneyGram Teller's Checks and Agent Checks

would not be referred to as "money orders" regardless of the absence of differences in the legal rights and obligations inhering in the instruments.

The instruments are designed to be of value to different customers and to serve different purposes. Money orders are designed to serve persons who do not have bank accounts. One of the principal utilities of a money order is that it "provides a safe and convenient means of remitting funds by persons not having checking accounts." Del. App. 373 (Glenn G. Munn's Encyclopedia of Banking and Finance, 7th ed. 1973);[3] *see id.* at 379–80 (Compton's Encyclopedia and Fact Index, Vol. 14 (1972)) ("Money orders are especially helpful to persons who do not have checking accounts."); *id.* at 491 (Barkley Clark & Alphonse M. Squillante, *The Law Of Bank Deposits, Collections And Credit Cards* (1970)) (noting that money orders are "often used as a checking account substitute by the purchaser-remitter"). Both an unbanked purchaser and an unbanked payee would benefit from the use of a money order. The former cannot write a check; the latter may be unable to cash a check. There is evidence in the record that customers of MoneyGram use money orders in lieu of a personal checking account. "[M]any have a regular habit of using money orders to pay their bills instead of checks." Del. App. 247 (Yingst Dep.). In contrast, the Disputed Instruments are sold primarily to the selling bank's customers, *i.e.*, persons who have bank accounts, who draw the funds from their checking accounts to pay for the instruments. *See* Del. App. 260, 274–75.

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3. Citations to "Del. App." and "Defs. App." are to the appendices filed in the Supreme Court.

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

While these differences are not in the rights or liabilities arising from the use of the instruments, and the similarities between the Disputed Instruments and money orders are easily sufficient to make them "similar . . . instrument[s]," these differences in customary usage are sufficient that the Disputed Instruments should not be deemed to fall within the category of "money orders," within the meaning of the Act.[4]

4. Should the Supreme Court conclude, contrary to my recommendation, that similarities between the Disputed Instruments and money orders are insufficient to render them either "money order[s]" or "similar written instrument[s]" within the meaning of the Act, that conclusion alone would be sufficient to require granting partial summary judgment to Delaware. The Disputed Instruments would then clearly escheat pursuant to the common law of *Texas v. New Jersey*, 379 U.S. 674 (1965), and not pursuant to the Act. The only remaining question in the case would then be whether Pennsylvania should prevail on its claim to reform the common law rule.

II. The Disputed Instruments, When Issued by a Bank as Drawer, Fall Under the Act's Exclusion of a "Third Party Bank Check."

An instrument that would qualify for escheatment under the Act as an "other similar . . . instrument" would nonetheless be excluded from the Act's coverage if found to fall within the Act's obscure and little-understood parenthetical exclusion of a "third party bank check," which was added to the bill at the suggestion of the Department of the Treasury.[5] The determinative question, as to each of the Disputed Instruments, is whether the Instrument is a "third party bank check." I now conclude that Disputed Instruments, if issued by a bank *as drawer* (or otherwise in a capacity that renders the bank liable), fall under the Act's parenthetical clause that excludes "third party bank check[s]."

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5. The parenthetical exclusion is best read as applying only to the immediately preceding clause, "other similar written instrument," and not to the entire preceding list. Grammatically, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (ellipsis in original) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). This is especially so when the limiting or modifying clause is not separated from the last item in the list by a comma that might indicate an intention to apply to the entire list. *See Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013). Additionally, applying the parenthetical exclusion to the full list would likely exclude bank-issued money orders. There is no reason to think Congress would have wished to exclude bank money orders from escheating pursuant to the Act intended to govern escheatment of money orders, and the parties agree bank money orders are covered by the Act. *See* Del. Sur-Reply at 8; Defs. Cmts. in Response to Special Master's Oct. 26 Order at 9–10 (Dkt. 131).

To summarize the legislative history,[6] Congress requested comments on its bill from the Treasury Department. The bill applied its escheatment priorities to "a money order, travelers check, or similar written instrument on which a banking or financial organization or a business association is directly liable." Del. App. 587 (119 Cong. Rec. 17,046 (1973)). Treasury responded that the language of the bill seemed "broader *than intended by the drafters*," as the bill "could be interpreted to cover *third party payment bank checks*," S. Rep. 93-505, at 5 (1973) (Letter from Edward C. Schmults) (emphases added). Treasury offered no further explanation but suggested that the bill be amended to exclude "third party payment bank checks." *Id.* In response, the bill was amended by inserting a slightly differently worded parenthetical exclusion: "or other similar written instrument (other than a third party bank check)." 12 U.S.C. § 2503. The Senate Report described the exclusion as merely a "technical" amendment and offered no explanation as to any reason for it, S. Rep. 93-505, at 6, and it was described in Senator Sparkman's floor statement as a "minor change[]," Del. App. 579 (120 Cong. Rec. 4528–4529 (1974)). In addition to failing to explain the purpose of the exclusion, Congress gave no explanation why it had deviated from the language suggested by Treasury.

As a result of the amendment, the Act provided the sequence of priorities for the escheatment of the following abandoned instruments: "a money order, traveler's check, or other similar written instrument *(other than a third party bank check)* on which a banking or financial

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

organization or a business association is directly liable." 12 U.S.C. § 2503 (emphasis added). The principal question for this case under my analysis is whether the Disputed Instruments fall within those parameters, so as to escheat pursuant to the statute's priorities.

The meaning of the parenthetical exclusion of a "third party bank check" is not clearly apparent. Neither the enacted phrase, nor the slightly different phrase suggested by Treasury, has a defined or well-understood meaning. That fact, together with the absence of explanation from Congress as to why it believed the exclusion desirable, leaves the Court with little guidance as to what was intended. The parties have offered very different interpretations.

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

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

Delaware interprets "bank check" to mean a check effective upon the signature of a bank officer (which I take to mean when the officer's signature for the bank renders the bank liable, either as a drawer of the check or otherwise).[7] Del. S. Ct. Br. at 36–38. As for the significance of the "third party " component of the exclusion, Delaware contends that this means that the bank check is payable through a third party, such as another bank—thus matching the definition of a teller's check: a check drawn by a bank on another bank. UCC § 3-104(h).

The task for the Court is to decide, with the help of the parties' proposals, what is the meaning of the statutory exclusion. The question should be examined both as a matter of linguistic usage within the industry, as well as in terms of the likely motivation of Treasury and Congress to amend the bill in this fashion, and the consequences of the competing interpretations for the functioning of the Act. I

7. In contrast, taking Delaware's proposed definition literally (to mean that an instrument qualifies as a "bank check" whenever the check becomes effective on the signature of a bank officer) would mean that a check sold by a bank on behalf of MoneyGram would be a "bank check," even if the check stated on its face that the bank bore no liability. That position, if intended by Delaware, is not supported by any of the expert opinions, and in my view, has no merit. The term "bank check" implies the liability of the bank. *See* Defs. App. 135.

now conclude that, for all of these aspects of the question, Delaware has decidedly better arguments (although I do not agree with all aspects of Delaware's interpretation).

A. Defendant States' Proposed Definition of "Bank Check" Is Unsupported.

The Defendant States have scant authoritative precedent for reading "bank check" to mean an ordinary personal or business check drawn on a bank. They rely largely on a review conducted by federal regulators shortly before the FDA was enacted of the "existing financial and regulatory structure" related to the private financial system. *See* Defs. App. 174 (Clark Expert Report) (quoting Robert E. Knight, *The Hunt Commission: An Appraisal*, Wall St. J., July 3, 1972, at 4). In 1970, President Nixon organized the so-called Hunt Commission (officially the Commission on Financial Structure and Regulation), tasked with making recommendations to improve the nation's financial institutions. Knight, *The Hunt Commission*, at 4. Treasury was familiar with and participated in the Commission's work. *See The Report of the President's Commission on Financial Structure and Regulation*, Foreword at 1 (Dec. 1972). The Hunt Commission's final report (published in December 1972) used the term "third party payment services" to describe "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor." *Id.* at 23 n.1. The report noted that "[c]hecking accounts are one type of third party payment service." *Id.* The Defendant States contend that this history provides precedent for the use of "third party bank check" as meaning an ordinary personal check drawn on a bank account.

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

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

And as for the usage in the Bailey 1969 treatise of "bank check" to mean a "check," the value of this precedent to the Defendant States is substantially undermined by their own expert, Clayton P. Gillette. He explained that, while "'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank," it was

"plausible that the author retained this usage [as meaning simply a check] because the treatise he was editing had wide acceptance [since 1916] and retaining the existing title [which used 'bank check' in that sense] may have had value, even if the term 'bank check' to refer to any check drawn on a bank had become redundant." Defs. App. 212–13. Gillette added that the editor's footnote explaining the use of the term would have been "unnecessary unless the term 'bank check' would otherwise have been understood to refer only to checks on which a bank was directly liable." *Id.* at 213. Thus, the Defendant States' expert tells us that, at the time of the passage of the Act, "bank check" was understood to mean a check drawn by a bank, and not an ordinary check drawn on a bank account. *Id.* at 212.

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

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

Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 Minn. L. Rev. 275, 278 (1980); *see also* George Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 Ind. L.

Rev. 579, 579 (1978) ("At the other extreme [from personal checks] is the bank check, a check on which a bank is liable as either a drawer or acceptor. This class of instruments includes cashier's checks and certified checks.").

The fact that "'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank," Defs. App. 212, makes it highly unlikely that Treasury and Congress would have used that term in a statute (without explanation) to mean "a check"—something so different from its commonly understood meaning.

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

funds on deposit. The bank to which the payee presents a personal check for payment is highly unlikely to cash it without having first collected on the check through the clearing system. Because a personal check is not similar to a money order, such a check was not likely to be deemed an "other similar . . . instrument." Congress would have perceived no need to add a clause excluding it from the scope of the "other similar . . . instrument" clause.

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

B. Delaware's Definition of "Bank Check" Is More Convincing.

Delaware is on far firmer ground in arguing that the use of the term "bank check" in the exclusion clause was intended to mean checks signed by banks so as to carry bank liability. In the first place, Delaware's and the Defendant States' experts were in agreement that "bank check" is commonly understood to mean a check drawn by a bank in the capacity of drawer, so that the bank is liable on the check. *See* Defs. App. at 135 (Mann Expert Report) ("[T]he idea of a 'bank check' logically suggests a check on which a bank is directly or indirectly liable."); *id.* at 212 (Gillette Expert Report) ("A 'bank check' is commonly understood to mean a check that is both drawn on a bank and by a bank. If the drawer and drawee are the same bank, the bank check is a cashier's check. If the drawer and the drawee are different banks, then the bank check is a teller's check.").

Delaware's arguments are even more persuasive with respect to the reasoning likely to have led Treasury to recommend the exclusion and Congress to adopt it. The bill on which Congress sought Treasury's comments proposed escheatment priorities for instruments in the categories of "a money order, travelers check, *or similar written instrument* on which a banking or financial organization or a business association is directly liable." Del. App. 587 (119 Cong. Rec. 17,046 (1973)) (emphasis added). It would have been apparent to Treasury that prepaid cashier's checks and teller's checks bear great similarity to money orders. Like money orders and traveler's checks, they are prepaid checks purchased from banks or financial institutions, which act in the role of drawers thus incurring liability, enabling the purchasers to make payments by instruments that will be accepted in the marketplace by the financial institutions to which they are presented.[8] Especially given the imprecision of the term "similar," entities (such as MoneyGram) responsible for making escheat payments might reasonably deem cashier's and teller's checks to be "similar" instruments, covered by the Act. Furthermore, the bill's broadening of the covered categories beyond *money orders* and *traveler's checks* to include also "similar written instrument[s]" would encourage competing States, upon observing similarities of cashier's checks and teller's checks to money orders and traveler's checks, to claim escheatment with respect

8. Although certified checks function slightly differently in that the check is drawn by the account owner on her account, the bank's affixing its certification (upon drawing funds from the depositor's account) renders the bank liable on the check, as with the issuance of a prepaid cashier's check, so that the certified check is also very similar to a money order, regardless of whether the certifying bank is technically deemed a "drawer."

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

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

It appears that Treasury's concern was an accurate prediction of this very litigation. Similarity is a highly flexible concept. The language of the bill gave no clue *how similar* an instrument needed to be to money orders and traveler's checks in order to come within the Act's prescriptions. It was clear (and remains so) that cashier's checks, teller's checks, and certified checks, the instruments commonly known as bank checks, bear substantial similarities to money orders and traveler's checks.

Treasury was absolutely correct, furthermore, in its perception that the language of the bill seemed "broader then intended by the drafters." The bill focused on the escheat of money orders and traveler's checks. In listing the instruments to which it applied, it made no mention of the well-known categories of bank checks. The principle of "expressio unius est exclusio alterius" has strong application here. These categories of bank checks were so well known that it can be assumed with confidence that if Congress had intended to include them within the scope of the bill, it would have mentioned them by name. The fact that the bill focused on money orders and traveler's checks without mention of cashier's checks or teller's checks (or certified checks) gives strong assurance that Congress did not intend that they be covered, regardless of their similarities to money order and traveler's checks. Congress's essential adoption into the terms of the Act of the exclusion recommended by Treasury should be construed as Congress's confirmation that Treasury was correct in expressing its concern that the terms of the bill risked to go further than Congress intended. The open-ended "similar . . . instrument[s]" clause posed a risk that the Act would be interpreted as including "bank checks"—that is to say cashier's checks, teller's checks, and certified checks—which Congress had no intention to include.

Delaware makes a powerful case that the parenthetical exclusion of "a third party bank check" was precisely intended to exclude from the Act's coverage checks drawn (or certified) by banks, thus rendering the bank liable (other than money orders and traveler's checks issued by banks).[9]

9. Interpretation of the parenthetical exclusion clause as targeting checks on which a bank is liable would not result in

C. "Third Party Bank Check" Means a Bank Check Designed for Making Payments to Third Parties.

The further question arises as to the meaning of the term "third party" in the statutory exclusion of a "third party bank check." There are several possible meanings. As noted above, the Defendant States, as a part of their argument that "third party bank check" refers to any check drawn on a bank account, argued that the "third party" component refers simply to the account holder's use of the instrument *to pay a third party*. Delaware argues that "third party" means a bank check paid *through a third party*, as is the case with a teller's check, which is drawn by a bank (as drawer) on another bank (as drawee). The term could also mean a check drawn by a bank *at the instance of a third party* (who furnishes the funds for payment). The particular definition of "third party" offered by Delaware seems tailor-made to match the Disputed Instruments, each of which (according to Delaware's contention) is a teller's check—one drawn by one bank on another bank. This definition, however, suffers from a flaw. It would exclude from the scope of the Act teller's checks (those drawn by one bank on another bank), but would not exclude cashier's checks (which are drawn by a bank on itself). Delaware suggests no reason, and I can think of none, why Congress would have wished to exclude only teller's checks and not cashier's checks or certified checks.

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excluding bank-issued money orders and traveler's checks from the scope of the Act. That is because those instruments are included in the terms of the Act as "a money order [or] traveler's check" and not as a "similar written instrument." The parenthetical exclusion of a "third party bank check" applies only to instruments included through the "similar written instrument" clause. See fn. 5 above.

On the question whether the "third party" term means to cover checks drawn at the instance of a third party, distinguishing them from checks issued by a bank on its own behalf to pay its own bills, there is evidence that banks at times issue MoneyGram's Disputed Instruments not by reason of a customer's purchase but for their own purposes to pay their own bills. Del. App. 260, 276 (Yingst Dep.). This distinction would make some sense because the Disputed Instruments are more similar to money orders when issued to a customer who prepays than when the bank issues the check for its own purposes. This proposed definition, however, encounters a different problem. In the context of this dispute involving instruments issued by a financial organization (MoneyGram) and sold by banks on its behalf, MoneyGram would not possess the crucial information that would enable it to determine whether the instruments should escheat pursuant to the Act or under the common law rule. The banks that distribute the Disputed Instruments for the account of MoneyGram do not transmit to MoneyGram the information whether the individual checks issued by the bank were sold to a customer or were issued by the bank for its own account. This definition would accordingly not be administrable.

I conclude that the reading of the "third party" component of "third party bank check" that is most likely to capture Congress's intention is an instrument that is designed to be used for making payments to a third party. This is essentially the reading advocated by the Defendant States, with the exception that, while they read the "bank check" component to mean simply a "check," I read that component to mean "a check on which a bank has assumed

liability."[10] Putting together the "third party" component with the "bank check" component, the phrase means essentially a check (an instrument that is designed for making payments to third parties) on which a bank has assumed liability.[11]

The Hunt Commission report cited by the Defendant States supports this interpretation. As noted above, the Hunt Commission referred to "third party payment services" to describe "any mechanism whereby a deposit intermediary transfers a depositor's funds to a third party or to the account of a third party upon the negotiable or non-negotiable order of the depositor." *The Report of the President's Commission on Financial Structure and Regulation* at 23 n.1 (Dec. 1972). The Hunt Commission included "[c]hecking accounts" as "one type of third party payment service." *Id.* Thus, in the terminology of

10. Counsel for the Defendant States argued during oral argument on an earlier draft of this Report that "[a]ll of the parties here, all of the experts, all of the sources cited make very clear that 'third party,' as used in the financial context, as used on an instrument like this, is commonly understood to refer to the party that ultimately gets paid on the instrument." Tr. December 5, 2022, at 19:21–20:3 (Dkt. 139).

11. This definition arguably results in some surplusage, as the term "bank checks" would mean the same thing as "third party bank checks." However, it is the interpretation most supported by contemporaneous sources, most likely to reflect Congress's (and Treasury's) intent, and most administrable. The canon disfavoring surplusage should not be applied with a rigor that would result in reading a statute in a manner that distorts Congress's purpose. *Cf.* Linda D. Jellum, *Mastering Statutory Interpretation* 104 (2008) ("Legal drafters often include redundant language on purpose to cover any unforeseen gaps or for no good reason at all.").

the Commission, a checking account, which is a service designed to enable the making of payments to third parties, would be considered a "third party payment service" regardless of whether it was actually used to make such third party payments (as opposed to being used as a safe, convenient storage facility for money). In the same manner, a bank check, being an instrument designed for making payments to third parties, may be referred to as a "third party payment bank check" (or a "third party bank check") regardless of whether it was actually used to pay a third party (as opposed to the rare instances in which the drawer made the check payable to herself rather than a third party). Since the identity of the payee on an abandoned instrument is not something that the issuer is likely to know, the term is best read as referring to bank-issued checks, being instruments designed to make payments to third parties, rather than to the subset of bank checks actually made payable to a third-party payee.

This interpretation of "third party" also highlights a key similarity between the excluded instruments and money orders: that they are designed to transfer money to a third party. As the apparent purpose was to exclude certain bank-issued instruments similar to money orders (and traveler's checks) that risk (contrary to Congress's intention) to be swept into the Act's coverage under the "similar . . . instrument[s]" clause by virtue of similarity to money orders, I believe that, among the potential meanings of "third party," the one that best serves Congress's likely intentions would be the one most similar to a money order—an instrument designed to make payments to third parties.

Ultimately, I find that reading "third party bank check" in this fashion is the most compelling definition of the phrase. Thus, I reject Delaware's proposed interpretation of "third party" in favor of this alternate definition that would better serve the purposes of the statute.

* * *

For the reasons explained above, I now conclude that, to the extent that the selling banks sign the Disputed Instruments in the capacity of drawer, thus assuming liability on those instruments, the Supreme Court should rule that those instruments do not escheat pursuant to the Act because they are excluded from the category of "other similar written instrument[s]" by the parenthetical exclusion of "a third party bank check."[12] The question remains whether the selling banks assume liability on the Disputed Instruments.

III. Is a Selling Bank a Drawer of the Disputed Instruments?

Under the interpretation of the Act that I recommend to the Supreme Court, any of the Disputed Instruments that are checks issued by banks as drawers (on which banks are thus liable) are "third party bank checks," which are excluded from the scope of the "other similar written

12. Another advantage of construing Congress's statute in favor of Delaware in this case is that if the present Congress disagrees with the Court's interpretation or finds the outcome inequitable, the Defendant States have sufficient voting power in Congress to overturn or nullify the Court's ruling for future escheats.

instrument" clause and from the dispositions of the Act. On the other hand, any of the Disputed Instruments on which the selling banks have not assumed liability are "other similar . . . instrument[s]" that are not excluded by the "third party bank check" clause, so that they escheat pursuant to the Act.

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

A. Teller's Checks

Delaware is correct that the selling banks have assumed liability on drawing MoneyGram Teller's Checks that they sell.[13] On their face, Teller's Checks designate

13. While MoneyGram remains solvent, the selling banks are unlikely to incur the liability that they assumed in issuing the instruments.

the selling bank as the "drawer" of the instrument and MoneyGram as the issuer. Del. App. 239; Defs. App. 23, 99. Another bank is designed as the drawee. Del. App. 239. Because the "issuer" of an instrument "means a maker or drawer of an instrument," *see* UCC § 3-105(c); *see* Defs. App. 220–21 (Gillette Report), MoneyGram and the selling bank are both properly understood as drawers of the instrument. Because MoneyGram Teller's Checks are indeed teller's checks drawn by the selling banks (which are instruments designed for making payments to a third party), they are excluded by the "other than a third party bank check" clause and do not escheat pursuant to the Act.

B. Agent Checks

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

1. So-Labeled Agent Checks

One form of Agent Check, which might usefully be referred to as "So-Labeled Agent Checks," while showing the name and logo of the selling bank, expressly identifies MoneyGram as the drawer and prints on its face both the legend "Agent Check" and the words, "Agent for MoneyGram." *See* Del. App. 237. While the selling bank's name and logo are printed on the check, it is not listed as a drawer. Defs. App. 25 (Delaware asserted in its Statement of Undisputed Facts that this "variety of MoneyGram Agent Check indicates that the drawer of the instrument is MoneyGram, and that the individual signing the check is signing as 'Agent for MoneyGram.'"). The words "Authorized Signature" appear in conjunction

with the signature of the bank employee, but the check does not indicate whether the "authoriz[ing]" party was MoneyGram or the bank. Delaware's expert noted that "[f]or instruments of that type, the bank (signing as agent for a disclosed principal) would not be directly or indirectly liable on the instrument." Defs. App. 129–30 (Mann Report). I agree and conclude that the selling banks are not drawers of MoneyGram's "So-Labeled Agent Checks" and are not liable on them. Those instruments are therefore "other similar written instrument[s]," by reason of the similarities to money orders explained in my First Report, and are not covered by the "third party bank check" exception. They should therefore escheat pursuant to the Act.

2. Unlabeled Agent Checks

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

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

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

The parties dispute whether the banks that sell these Agent Checks are drawers. Delaware argues that the "authorized signature" of the bank employee "indicates [that the bank had] an intent to sign as the maker of a note or the drawer of a draft," and thus assumed liability. Defs. App. 25–26 (quoting UCC § 3-204 cmt. 1). The Defendant States argue that the explicit identification of MoneyGram as the drawer excludes the selling bank from the role of drawer, Defs. App. 42, an argument supported by MoneyGram's internal documentation. I do not find that either side has persuasively established entitlement to judgment as a matter of law as to whether the selling bank is liable on this second type of Agent Check.

In sum, on the parties' cross motions for partial summary judgment, neither side has conclusively dispelled the existence of a genuine issue of material fact on the question of whether the selling bank is a drawer of, and thus liable on, Unlabeled Agent Checks. The Court should deny both sides' motions for summary judgment as to these instruments and remand to the Special Master for either trial or renewed motions for summary judgment,

with the evidence augmented at least by further expert testimony.

IV. Pennsylvania's Argument for Modification of the Common Law Is Not Moot.

If the Court adopts these recommendations, Pennsylvania's alternative argument for summary judgment—that the common law rule should be modified—would not be moot, at least as to Teller's Checks, which would escheat pursuant to the common law rule. If the Court rules in Delaware's favor as to any of the Disputed Instruments, so that they escheat pursuant to the common law rule, rather than the Act, the Court should remand to the Special Master Pennsylvania's claim for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S. 674 (1965).

CONCLUSION

I recommend that the Supreme Court:

(a) as to the MoneyGram Teller's Checks, grant partial summary judgment to Delaware and deny partial summary judgment to the Defendant States and Pennsylvania, ruling that these instruments do not escheat pursuant to the Act. Pennsylvania's claim for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S. 674 (1965) should be remanded to the Special Master;

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

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

A proposed decree embodying these recommendations is included below as Appendix C.

Respectfully Submitted,

Pierre N. Leval
Special Master
40 Foley Square, Room 1901
New York, NY 10007
(212) 857-2310

APPENDIX

TABLE OF APPENDICES

APPENDIX A

THE DISPOSITION OF ABANDONED MONEY ORDERS AND TRAVELER'S CHECKS ACT, 12 U.S.C. §§ 2501–03

12 U.S.C. § 2501:

The Congress finds and declares that—

(1) the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments;

(2) a substantial majority of such purchasers reside in the States where such instruments are purchased;

(3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;

(4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and

(5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

Appendix A

12 U.S.C. § 2502:

As used in this chapter—

(1) "banking organization" means any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States;

(2) "business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals; and

(3) "financial organization" means any savings and loan association, building and loan association, credit union, or investment company engaged in business in the United States.

12 U.S.C. § 2503:

Where any sum is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable—

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

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.

APPENDIX B

DESCRIPTION OF THE DISPUTED INSTRUMENTS (REPRODUCED FROM FIRST INTERIM REPORT 26–30)

ii. Moneygram "Agent Checks"

Moneygram's Agent Checks, like Moneygram's instruments labeled as "Money Orders," are prepaid financial instruments. In addition to other usages they may have, they are offered for sale to customers at financial institutions as a means to transmit funds to a named payee.[1] A purchaser pays the selling financial

1. Delaware disputes that Agent Checks are used by retail purchasers, arguing that these instruments are rather "used by banks to pay their own obligations." Dkt. 98 ¶ 70. It cites in support of this contention the deposition testimony of Moneygram's corporate representative, Eva Yingst. *See* Yingst Dep. 169:17–170:8 (Ex. A to Taliaferro Decl., Dkt. No. 86) ("[T]ypically agent checks might be an item that they're offering, but it's definitely not a next day availability item, so they aren't often used to issue checks for customers."). But the Yingst testimony expressly acknowledged that distributing financial institutions might be offering such checks to their customers, and, in any event, the proposition that Agent Checks "aren't often used to issue checks for customers" does not say that they are *not* purchased by consumers. The evidence cited by Delaware does not support the more extreme proposition. In fact, Delaware's own expert's report states that an Agent Check "would be purchased by a consumer from a bank selling the product." Dkt No. 70 ¶ 14 (Expert Report of Ronald Mann) ("Mann Report"). And, at least some of Moneygram's contracts with the distributing financial institutions state that Agent Checks "may be used as money orders" at the financial institution's option. Defs.' Br. 23 (citing Defs.' App'x 219). Delaware's argument on this matter does not create a "genuine dispute as to [a] material fact." Fed. R. Civ. P. 56(a).

institution the face value of the Agent Check, plus any fees. The selling bank transmits the funds (minus its fees) to Moneygram. When the payee of the Agent Check cashes it at a financial institution, that institution forwards the instrument to Moneygram's clearing bank, which reimburses it. Moneygram then reimburses the clearing bank.

Agent Checks come in two varieties. One type of Agent Check indicates that the financial institution signing the check signs the check as "Agent for Moneygram." A second type of Agent Check simply notes "Authorized Signature" next to the signature entered for the selling institution. Both varieties of Agent Check designate Moneygram as the issuer. Moneygram's clearing bank is designated as the drawee. An Agent Check is sometimes labeled simply as an "Official Check."

After an Agent Check is purchased, the same four pieces of information — amount of the Agent Check, date of purchase, serial number, and customer ID number (that is, the ID of the selling institution) — are transmitted to Moneygram. No identifying information relating to the purchaser or the payee is conveyed to Moneygram. Moneygram holds the proceeds of the sale of Agent Checks in the same intermingled account as the other Moneygram products discussed above, until the Agent Check is presented for payment or deemed abandoned. Once an Agent Check is presented for payment, it is cleared in the same manner as Retail Money Orders and Agent Check Money Orders.

Unlike the products that Moneygram markets under the label "Money Orders," Moneygram remits the proceeds of abandoned Agent Checks to its place of incorporation — currently Delaware — treating them as not covered by the FDA. The Defendants contend in this litigation that Agent Checks are covered by the FDA, so that the proceeds of abandoned Agent Checks should not be sent to Delaware, the State of incorporation (unless they were purchased in Delaware).

iii. Moneygram "Teller's Checks"

Moneygram Teller's Checks[2] ("Teller's Checks") are purchased in a manner substantially similar to the instruments described above, again with the qualification that, unlike Retail Money Orders but like Agent Checks, Teller's Checks and other Official Checks are sold only at financial institutions. The purchaser pays the selling financial institution the face value of the instrument, plus any associated fees, and the seller issues the prepaid written instrument. The net proceeds of the purchase of the Teller's Check are transferred to Moneygram, along with the same four pieces of information that are collected upon the sale of the other Moneygram products at issue. With rare exceptions, no personal information regarding the purchaser or payee is transmitted to Moneygram. Moneygram maintains the proceeds of the sale of Teller's Checks in the same commingled account as those from the sale of the other instruments at issue, until the Teller's

2. "Teller's check" also carries a generic meaning independent of the characteristics of any particular Moneygram product. *See* 2017 UCC § 3-104(h) ("'Teller's Check' means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.").

Check is presented for payment and the instrument is cleared by the clearing bank. Moneygram reimburses the clearing bank for its payment of the Teller's Check. Like Agent Checks, Teller's Checks are sometimes designated only as "Official Checks" on the instrument.

In the case of Teller's Checks, unlike the other instruments at issue, the selling financial institution is designated as the "drawer" of the instrument. Nonetheless, Moneygram's agreements with its selling financial institution customers describe Teller's Checks as "drawn by" both the financial institution and Moneygram. Moneygram is designated as the issuer. The parties dispute the extent to which the selling institution acts as Moneygram's agent for the purpose of selling Teller's Checks. The clearing bank is designated as the drawee. When a Teller's Check is presented for payment, it is cleared in the same manner as the other instruments at issue. Unlike the other Moneygram instruments at issue, however, a Teller's Check is a "good funds" instrument under Federal Reserve Regulation CC, 12 C.F.R. § 229, with the consequence that the depositor of a Teller's Check can withdraw funds represented by the instrument the day after the check is deposited.

As with Agent Checks (but not Retail Money Orders or Agent Check Money Orders), Moneygram remits the proceeds of unclaimed Teller's Checks to Delaware, Moneygram's State of incorporation, treating them as not covered by the FDA. The Defendant States contest the propriety of that action, contending that the Teller's Checks are covered by the FDA and therefore should not be remitted to Moneygram's State of incorporation.

APPENDIX C

PROPOSED ORDER

DELAWARE,

v.

PENNSYLVANIA AND WISCONSIN,

****

ARKANSAS, *et al.*

v.

DELAWARE,

No. 145 & 146, Original (Consolidated)

ORDER

Upon consideration of the briefs of the parties and amici curiae, and the First and Second Interim Reports of Pierre N. Leval, Special Master, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. With regards to MoneyGram Teller's Checks:

    a. The State of Delaware's motion for partial summary judgment ruling that MoneyGram Teller's Checks

escheat pursuant to the common law rule is GRANTED.

b. The Defendant States' and the Commonwealth of Pennsylvania's motions for partial summary judgment ruling that MoneyGram Teller's Checks escheat pursuant to the federal Disposition of Abandoned Money Orders and Traveler's Checks Act (the "Act"), 12 U.S.C. §§ 2501–03, are DENIED.

c. The motion of the Commonwealth of Pennsylvania for modification of the secondary common law rule established in *Texas v. New Jersey*, 379 U.S. 674 (1965) is REMANDED to the Special Master.

2. With regards to MoneyGram Agent Checks bearing the legend "Agent for MoneyGram":

a. The State of Delaware's motion for partial summary judgment ruling that MoneyGram Agent Checks bearing the legend "Agent for MoneyGram" escheat pursuant to the common law rule is DENIED.

b. The Defendant States' and the Commonwealth of Pennsylvania's motions for partial summary judgment ruling that MoneyGram Agent Checks bearing the legend "Agent for MoneyGram" escheat pursuant to the Act are GRANTED.

3. With regards to MoneyGram Agent Checks not bearing the legend "Agent for MoneyGram":

   a. The motions of the State of Delaware, the Defendant States, and the Commonwealth of Pennsylvania for partial summary judgment as to whether MoneyGram Agent Checks not bearing the legend "Agent for MoneyGram" escheat pursuant to the Act are DENIED.

4. The Special Master is hereby directed to address the implementation of this Decree and the resolution of disputes relating to any party's entitlement to damages and/or other relief. The Special Master shall submit further Reports to this Court on such matters as may be raised before him or that he may direct the parties to address if he finds them pertinent to this Court's resolution of the dispute before it.