No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS,
Intervening Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

On Exceptions to the Special Master's Report

EXCEPTIONS AND BRIEF IN SUPPORT FOR PLAINTIFF, STATE OF DELAWARE

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EXCEPTIONS

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EXCEPTIONS OF PLAINTIFF, STATE OF DELAWARE, TO THE REPORT OF THE SPECIAL MASTER

Delaware commenced this action in 1988 to recover money and other intangible property wrongfully escheated by the State of New York; Delaware's claims are based on this Court's decisions in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972).

In *Texas* v. *New Jersey*, this Court established a "clear" rule designed to settle "once and for all" the competing claims of states to escheat intangible property. 379 U.S. at 678. The Court held that unclaimed intangible property is subject to escheat "only by the state of the last known address of the creditor, as shown by the debtor's books and records." 379 U.S. at 681-82. Where there is

no record of an owner or address ("owner/address unknown"), or where the last known address is in a state that does not provide for escheat of the property, the Court held that a "backup rule" applies: the state of the debtor's corporate domicile (determined by its state of incorporation) was to have the right to escheat. 379 U.S. at 682; Decree, 380 U.S. at 518. In *Pennsylvania* v. *New York*, the Court declined to depart from the rule of *Texas* v. *New Jersey*, 407 U.S. at 210, 213-16.

The property at issue in this case consists of dividends, interest, and other distributions in respect of securities (generally, "distributions") held by securities brokers and other recordholders holding securities for the accounts of beneficial owners after those distributions have been paid by the issuers of the securities to the holders of record. Under universally-accepted doctrines of corporation and commercial law—identical in all material respects in every state in the Union—once these distributions are paid to the record owners, the issuers no longer have any right, title or interest in them and are discharged from liability with respect to them.

For many years, New York has collected these distributions from brokers and other similar parties having offices in New York. Delaware disputes New York's right to do so in certain cases, saying that where the property is "owner/address unknown" and is held by brokers that are Delaware corporations, it should be escheated to Delaware under the rule of *Texas* v. *New Jersey*. New York's position—rejected by the Special Master—is that property that appears to be "owner/address unknown" actually is not, since all the unknown owners are "statistically" presumed by New York to be "other brokers" with "trading addresses" in New York.

Starting in January 1989, and through March 1992, forty-eight additional states and the District of Columbia appeared in this action and moved to intervene. Most of the intervening plaintiffs argued for an inter-

pretation of "debtor" that viewed the recordholders of the securities—and thus the parties holding the unclaimed funds—as "transparent" and without legal relevance, so that the *issuer*, rather than the recordholder and holder of the funds—should always be deemed to be the "debtor" under *Texas* v. *New Jersey*. Those intervening states did not seek to overturn the rule that in "owner/address unknown" cases, the state of incorporation of the "debtor" (as they construed "debtor") was to be considered the debtor's domicile. A smaller group of states, led by California, argued for a more radical "interpretation"—actually, an overruling—of *Texas* v. *New Jersey*.

All these theories were directed to the "backup rule." The intervening plaintiffs sought to expand the scope of the case beyond the property sought by Delaware in its complaint—to all of the distributions seized by New York other than those which had flowed from New York-incorporated issuers, apart from "owner/address *known*" abandoned distributions. But no state sought to argue that the case be expanded to cover "owner/address *known*" unclaimed or abandoned distributions or securities or that the "primary rule" applicable to them should be changed.

Motions for judgment on the pleadings were referred to the Master, who has filed a report (the "Report") recommending that: (1) the term "debtor" should be interpreted to mean the issuer of the particular security on which distributions have been paid, rather than the holder of the distributions in question; and (2) the backup rule should be changed, so that a corporation's "principal executive office," rather than its state of incorporation, will be considered its domicile.

Delaware excepts to the Report as follows:

1. *Equation of "Issuer" with "Debtor."*—The Report misinterprets *Texas* v. *New Jersey* and *Pennsylvania* v. *New York* by asserting that in formulating its rules of priority the Court used the terms "debtor" and "creditor"

merely as "an attempt to identify the relevant parties" rather than as a "prescriptive legal command[]." Report 29. Delaware submits that the Report's recommendation in this regard does not comport with the ordinary meaning of the words "debtor" and "creditor," is inconsistent with universally-accepted state and common law and with the principles underlying the *Texas* rule, and changes the law in an area where the law should be settled.

All parties agree that under relevant state law (in all 50 states and the District of Columbia), once an issuer has made a distribution to a nominee (or other) record owner of the security, the *issuer* no longer has any right or interest in the distribution; and that by paying the recordholder the issuer has discharged its obligation and is no longer a "debtor" as that term is commonly understood (one who owes something to another). All parties agree that since the non-record beneficial owner may not look to the issuer for payment, such an owner is not a "creditor" of the issuer, only of the nominee. In the ordinary meaning of the words, the nominee in whose hands the funds have become "owner/address unknown" is a "debtor"—it owes the distribution to the beneficial owner, who either is unknown or unlocatable. The Master, however, recommended that the word "debtor" be construed in accordance with "federal common law" and discovered that under "federal common law" the issuer was the "debtor," although it did not have that status under the law of any of the 50 states. To this finding and conclusion, Delaware excepts.

2. *Substitution of "State of Principal Executive Office" for "State of Incorporation."*—The Report also errs in recommending that the rule adopted in *Texas* v. *New Jersey* and adhered to in *Pennsylvania* v. *New York* be "modified" so that the debtor's domicile is no longer considered its state of incorporation, but instead the state of location of its principal executive office.

Delaware excepts to this recommendation. Departing from the rule of corporate domicile here would be in-

consistent not only with this Court's precedents, but with fundamental principles of jurisprudence defining the relationship between the sovereign and its corporate citizens and the power of the sovereign over unclaimed property—principles that have retained their vitality for hundreds of years. At bottom, the Report recommends that these historical and legal principles be cast away in favor of a system that—in the Master's view—is more "fair" because it spreads moneys among more parties.

Both recommendations violate the rule of *stare decisis*. This Court has explained that "[a] litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980). While a "compelling justification" must always be presented for that reconsideration, *stare decisis* has "added force" where Congress has had many years to correct a decision and where public and private parties have relied on the unmodified rule. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 564 (1991).

3. *Erroneous Findings of Fact or Failures to Find.*—Delaware excepts to the Report's findings of fact as erroneous in the following respects:

First, a fundamental factual error permeates the Report: it misleadingly suggests that all so-called "intermediaries" are legally alike; it therefore treats recordholders as if they were paying agents, and ascribes no legal relevance to their status as record security holders. Indeed, the Report seeks to make "the intermediaries as 'transparent' as possible." Report 36.

Paying and transfer agents are agents of the issuer, and their relationship with the issuer is contractual; the issuer, by contract or common law principles of agency, has a claim to the funds in the hands of its paying agent that cannot be paid to their owner. In contrast, the recordholder is not the issuer's agent, and it has legal title to

the distributions. Moreover, its claims are superior to all but those of the beneficial owner; brokerage houses are not the agents of issuers, and the issuers may not look to them for recovery of distributions unclaimed by their beneficial owners.

Many of the Findings of Fact are contaminated by a glossing over of these important legal distinctions and by a failure to recognize the legal status and property rights of the recordholders. Delaware therefore takes exception to Findings 4, 7, 9, 13, 14, 15, 16, 17, 24, 25, 28, 34, 35, 36, 48, 49, 58, 69, and 72, and to "Metafacts" A, B, C, and D.

Moreover, the record establishes that stockbrokers keep the interest they earn on unclaimed intangible property and account for such property as an asset (with a concomitant liability to the unknown beneficial owner). *See* Brief, *infra* pp. 29-30 & n.34. The Report erroneously fails to make a finding to this effect.

Second, the Report erroneously concludes that the "location of the principal executive offices of an issuer is, in almost all cases, ascertainable from standard sources." Report B-24 ("Metafact" G). As demonstrated in Delaware's submissions to the Master,[1] the location of a "principal executive office" is a factual question that requires a careful review of the relevant facts (often including the testimony of witnesses) and must be determined case by case. In its submissions to the Special Master, Delaware identified 94 companies that—according to two computer databases with data taken directly from SEC disclosure statements—had more than one principal executive office reported during the same period of time; that number more than doubled when other standard reference sources were also compared; and Delaware identified 785

[1] Letter from Richard L. Sutton to Thomas H. Jackson (Aug. 13, 1991) at 6-11; Supplemental Brief of Delaware (Nov. 4, 1991) at 5-21 and Appendix thereto; Affidavit of Jeffrey Bossert Clark (Nov. 4, 1991) and Exhibits thereto.

companies that changed principal executive offices in the years 1988 to 1991, according to public reference sources. If the "state of principal executive office" test is to be substituted for the "state of incorporation" test with respect to corporations that are not issuers of securities, the Master's finding, of course, breaks down even more seriously. In any event, Delaware excepts to this finding.

4. *Denial of Discovery.*—The Report erred in concluding that no discovery was needed to determine the consequences of the new rule substituting the "state of incorporation." Delaware excepts to the Master's failure to grant its request for discovery, made after the Master circulated a "Draft Report" indicating his disposition to recommend this rule change. The Master considered such discovery "pointless." Discovery Order No. 15 (Jan. 28, 1992) at 1. The Master did not pause to consider whether evidence should be received on the subjects of: how the listing of a "principal executive office" with the SEC bears any rational relationship to the commercial activity of the issuer and its subsidiaries; the proper treatment of unregistered issuers (such as federally-chartered organizations); the comparative practical burdens of and justifications for a "state of incorporation" and for a "principal executive office" test; the reliance of the states on the existing rule and the dislocation that would be caused by changing it; or how his recommendation to overturn *Texas* v. *New Jersey* would affect cases where the entity holding unclaimed intangible property does not list *any* principal executive office with the SEC, including the feasibility of applying the "principal executive office" test outside of the context of issuers of securities.

5. *Retroactivity.*—The Report errs in apparently applying all aspects of its recommendations retroactively. In his Draft Report, the Master stated:

> If the backup rule is modified, such as by substituting a chief executive office test for the existing state of incorporation test, I believe that the rule could be applied without difficulty, in this case, to the funds held by intermediaries, not yet possessed by any state. On the other hand, such a change in a rule should not upset funds already escheated, in other cases (or circumstances), in reliance on the backup rule as it currently exists, with a jurisdiction of incorporation test. Thus, I would have any change in the backup rule be non-retroactive to that extent.

Draft Report 57 n.64.[2] Yet the final report contains no language comparable to that quoted from the Draft Report and appears to contemplate a complete retroactivity of the new rules (whether admittedly new or unadmittedly so) that it recommends. Retroactivity would unjustly fall on Delaware which has relied on the backup rule to escheat unclaimed property in the hands of its corporate citizens. Were the Court to agree that the rules are to be changed as recommended by the Master, Delaware takes exception to any such retroactivity.

6. *Failure to Recommend Alternative Conclusion.*— The Report errs in failing to conclude expressly that, if (contrary to the Master's recommendation) the brokers are held to be "debtors" and the traditional rule of corporate domicile under *Texas* v. *New Jersey* is applied, Delaware is entitled to recovery from New York in accordance with its Complaint. This conclusion is implicit in the Report's correct rejection of New York's position, and Delaware excepts to the failure of the Report to recommend a specific conclusion to this effect and asks this Court so to conclude.

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[2] Indeed, all but the Texas subgroup agreed. Supplemental Submission of Alabama, *et al.* (Nov. 4, 1991) at 29 n.19; Supplemental Reply Submission of California, *et al.* (Nov. 21, 1991) at 18-19.

In support of the foregoing exceptions, Delaware submits the attached Brief.

Respectfully submitted,

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May 1992

BRIEF IN SUPPORT OF EXCEPTIONS
FOR PLAINTIFF, STATE OF DELAWARE

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BRIEF IN SUPPORT OF EXCEPTIONS FOR PLAINTIFF, STATE OF DELAWARE

JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The texts of the following provisions are found in Appendix A to this Brief: United States Constitution, art. I, § 8, cl. 3, art. IV § 1, and amend. XIV, § 5; 12 U.S.C.

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* All of the other states and the District of Columbia have also sought intervention.

§§ 2501 to 2503; Uniform Unclaimed Property Act (1981) §§ 1, 2, 3, 11, 12, 17, 19, 20, 25, 26, 33; Uniform Disposition of Unclaimed Property Act (1966 revision) §§ 1, 5, 7, 9, 10, 11, 13, 14; Uniform Commercial Code §§ 8-207, 9-103; Model Business Corporation Act, §§ 1.40 (21), 7.07, 7.23; New York Abandoned Property Law Articles V and V-A; Securities and Exchange Commission Rules 14a-7, 14a-13, 14b-1, 14b-2, 14c-7, 15c3-2, 15c3-3(e), and 15c3-3 (Exhibit A).

STATEMENT

1. *The Rule of Texas* v. *New Jersey*.—This Court has long recognized the power of the sovereign to take title to abandoned personal property (*bona vacantia*), a power with deep roots in the common law. *See, e.g., Late Corp. of the Church* v. *United States*, 136 U.S. 1, 56-57 (1890); *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464, 487-88 (1823).

Because this power, now called "escheat,"[1] rests on historical traditions of territorial jurisdictional power—power that may be exercised by multiple sovereigns when a single entity holding intangibles is found in multiple states—conflict among states over the escheat of intangibles became acute. *See Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (1951); *id.* at 443-45 (Frankfurter, J., dissenting); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 552 (1948).

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[1] Rightly or wrongly so-called; early in the common law's development, the term "escheat" referred to the return of land to the feudal lord upon conviction of felony, or upon death without heirs, and *bona vacantia* was the name given to the sovereign's acquisition of personalty. *See infra* p. 34 n.39. In addition, most, but not all, states' unclaimed property statutes do not provide for "escheat" in the sense of cutting off title but are merely "custodial" in nature; a few cut off the former owners' title. Ky. Rev. Stat. Ann. § 393.020 (Michie 1984); Mich. Comp. Laws Ann. § 567.14 (West 1967); N.C. Gen. Stat. 116B-2 (1991); Wyo. Stat. 9-5-202 (1977).

In *Connecticut Mutual Life*, the Court held, over three dissents, that New York might, consistent with the Due Process Clause, escheat unclaimed life insurance proceeds on policies issued on the lives of New Yorkers by insurance companies incorporated outside New York. The Court noted that the claims of other states were not before the Court. 333 U.S. at 548. Justice Frankfurter dissented, arguing that "[w]e ought not to decide any of these interrelated issues until they are duly pressed here by the affected States." 333 U.S. at 555. Justice Jackson put the matter even more forcefully. First, he noted that "[e]scheat survives only as an 'incident of sovereignty,'" 333 U.S. at 560 (dissenting opinion) (quoting *In re Melrose Ave.*, 136 N.E. 235, 237 (N.Y. 1922) (Cardozo, J.)), and discussed why the "two usual examples of escheat" (sovereign power over property and over persons) did not apply to New York's efforts to escheat in that case. 333 U.S. at 560-63. He concluded that the Court should fashion a general rule: "[w]hile we may evade it for a time, the competition and conflict between states for 'escheats' will force us to some lawyerlike definition of state power over this subject." 333 U.S. at 563.

In *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (1951), the converse situation was presented, and the Court held that New Jersey's escheat of intangible property held by Standard Oil, a New Jersey corporation, comported with the requirements of the Due Process Clause and the Full Faith and Credit Clause: "stock certificates and undelivered dividends thereon may . . . be abandoned property subject to the disposition of the domiciliary state of the corporation." 341 U.S. at 442. Four justices dissented on the ground that other states' competing claims should be considered. *Id.* at 443-45.

In *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court again confronted (for the third time in thirteen years) a dispute over unclaimed intangible property potentially subject to competing states' escheat claims—this time, unclaimed Western

Union money orders. The Court held that Pennsylvania could not exercise dominion over unclaimed money orders purchased in that state unless other states would also be bound by the judgment. The Court recognized the need for a uniform and binding set of rules governing competing claims to escheat intangible property and invited the states to invoke the Court's original jurisdiction to resolve the issue, observing that it was "imperative that controversies between different States over their right to escheat intangibles be settled." 368 U.S. at 79.[2]

Soon after, several states accepted the Court's invitation and filed such actions. In *Texas* v. *New Jersey*, 379 U.S. 674 (1965), the Court was squarely presented with competing claims of more than one state to abandoned intangible property—"a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678.

At issue were, nominally, "various small debts" of Sun Oil Company that "small creditors" had not shown up

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[2] This line of cases came to the Court in the appellate jurisdiction from state courts in cases in which the parties were (a) the state seeking escheat and (b) the holder of the property sought to be escheated (generally a corporation). The opinions discuss several due process considerations—the power of the state seeking escheat to exercise dominion over the intangibles in question, the adequacy of notice provided to the creditors, and the substantive due process rights that protect the holder from having to pay twice, if someone with a better claim later turned up. This claimant was generally envisioned to be the "real owner" of the property, that is, the private party who would assert that she had not abandoned the intangibles in question. The theory was that unless the escheat process protected the holder from having to pay twice, the Due Process Clause was violated. *See Security Sav. Bank* v. *California*, 263 U.S. 282, 284 (1923); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 242-43 (1944). The 1961 *Western Union* case applied this principle to competing claims by more than one state to escheat the same property, by refusing to permit escheat at the instance of one state until other states' claims could be considered.

to collect or had not cashed checks for. They were of many varieties: uncashed checks payable to third-party creditors, uncashed wage checks, uncashed royalty payments to lessors of oil- and gas-producing land, unclaimed fractional mineral interests, uncashed dividend checks, and undelivered fractional stock certificates resulting from stock dividends. 379 U.S. at 675-76 & n.4. The case itself involved only $27,000, even in the money of that day hardly enough to justify resort in economic terms to this Court's processes. But the case was obviously a test case, and the Court treated it as such, disposing of the issues in broad and clear terms, intended to be applied generally.

The Court began by recognizing that a number of rules for determining the priority of the states' claims to intangible property—various types of debts—might be permissible, and it considered four of them.

It declined the invitation of the State of Texas to evaluate which state had the "most significant 'contacts' with the debt." 379 U.S. at 678. Indeed, the Court rejected "*any* test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." 379 U.S. at 679 (emphasis supplied).

The Court also declined to adopt a rule looking always to the "domicile of the debtor" (*i.e.*, its state of incorporation), notwithstanding "the obvious virtues of clarity and ease of application." 379 U.S. at 679-80. And the Court declined to adopt a "principal office," "main office," or "principal place of business" of the debtor test: "[a]ny rule leaving so much for decision on a case-by-case basis should not be adopted unless *none* is available which is more certain and yet still fair." 379 U.S. at 680 (emphasis supplied).

Instead, the Court concluded that "since a debt is property of the creditor, not the debtor, fairness among

the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81.

The Court also adopted a "backup rule." Where there is no record of an owner or address ("owner/address unknown"), or where the last known address is in a state that does not provide for escheat of the property, the state of the debtor's corporate domicile was to have the right to escheat. 379 U.S. at 682. The decree entered afterwards, upon consideration of the positions of the respective parties as to its terms, made it plain that "corporate domicile" meant the corporation's state of incorporation. Decree, ¶ 2, 380 U.S. at 518.

2. *Pennsylvania* v. *New York (Western Union).*—In *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), Pennsylvania, through an original action, renewed its efforts to escheat part of Western Union's unclaimed money order proceeds in situations where neither the payee nor the sender could be located (or in situations where drafts issued in payment or refunded were not negotiated). *Pennsylvania* v. *New York*, 407 U.S. at 207-08. Special Master John F. Davis[3] recommended that the *Texas* v. *New Jersey* rule be applied to all the items involved in the case. 407 U.S. at 212. "He found that '[a]s in the case of the obligations in [*Texas* v. *New Jersey*], [the *Texas*] rule presents an easily-administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely.'" 407 U.S. at 213. Because of the apparent infrequency with which creditors' names and addresses appeared on Western Union's books and records, this recommendation contemplated that significant portions of the unclaimed money orders would escheat to New York, Western Union's state of incorporation.

Pennsylvania took exception, objecting to the likelihood that "the corporate domicile will receive a much larger

[3] Davis had served as the Clerk of this Court from 1961 to 1969.

share of the unclaimed funds here than in the case of other obligations." 407 U.S. at 214. The Court, in an opinion by Justice Brennan, stressed the importance of *stare decisis* and of fixed rules in this area, and rejected the exception:

> we do not regard the likelihood of a "windfall" for New York as a sufficient reason for carving out this exception to the *Texas* rule. . . . [T]he only arguable basis for distinguishing [this case from *Texas* v. *New Jersey*] is that [it involves] a higher percentage of unknown addresses. . . . [T]o vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided —that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 214-15 (quoting *Texas* v. *New Jersey*, 379 U.S. at 679).

The Court thus reaffirmed the "backup rule" of *Texas* v. *New Jersey*, which it articulated as follows: "if [the creditor's last known] address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds 'until some other State comes forward with proof that it has a superior right to escheat.'" 407 U.S. at 210-11 (quoting *Texas* v. *New Jersey*, 379 U.S. at 682).[4]

Three Justices dissented because, in their view, "fairness" required "a relatively minor but logical deviation in the manner in which [the *Texas* rule] is implemented in this case." 407 U.S. at 219. The dissenters considered a strict application of the *Texas* rule to be "inflexible and

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[4] *See* Decree, 407 U.S. at 223-24 (superior right shown by "proof that the last known address was within that other State's borders"; or "if and when the law of the State of the last known address makes provisions for escheat or custodial taking of such property").

inequitable," 407 U.S. at 222, and thought that the rule should be "modified" for purposes of the case at hand. 407 U.S. at 220.

Two years after the Court's decision in *Pennsylvania* v. *New York*, Congress enacted legislation governing the disposition of money orders and traveler's checks. (Congress expressly excluded third-party bank checks and implicitly excluded all other intangibles.) Congress made an express finding of fact that "a substantial majority" of purchasers of money orders and traveler's checks reside in the states where such instruments are purchased, and also concluded that the cost of maintaining and retrieving addresses in the context of these instruments was a burden on interstate commerce. Pub. L. No. 93-495, Title VI, § 601, 88 Stat. 1500, 1525 (1974) (codified at 12 U.S.C. § 2501) (reprinted at App. A pp. 1a-3a). Congress therefore altered the holding of *Pennsylvania* v. *New York*—but only as applied to money orders and traveler's checks. Congress did not alter the fundamental *Texas* rule.[5] That Congress has the power to do so—whether under the Commerce Clause, the Full Faith and Credit Clause, or its authority to enforce the Due Process Clause of the Fourteenth Amendment under its Section 5—is beyond cavil. Indeed, the Court in *Texas* v. *New Jersey* appears to have contemplated that there might one day be an "applicable federal statute" that would broadly "settle this interstate controversy." 379 U.S. at 677. But no such general statute has been enacted in the nearly three decades since *Texas* v. *New Jersey* was decided.

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[5] Indeed, Federal Reserve Board Chairman Arthur F. Burns' letter to the Senate Banking Committee (made a part of the Committee Report) acknowledges the general applicability of *Texas* v. *New Jersey*; and the Committee adopted an amendment to the bill designed to insure that its reach would be limited to money orders and traveler's check *only*. S. Rep. No. 505, 93d Cong., 1st Sess. 2-3, 5-6 (1973) (bill should not be interpreted to cover third-party bank checks).

3. *Delaware* v. *New York*.—The rule of these two cases proved abiding—almost two decades passed before this case. During that time Congress has not disturbed the fundamental rules governing escheat of all types of intangible property—with the one exception for unclaimed money orders and uncashed traveler's checks. The rule has been applied to a variety of intangibles—uncashed checks,[6] unclaimed proceeds of class action recoveries,[7] unclaimed health and welfare benefits,[8] unclaimed insurance proceeds of all kinds,[9] trading stamps,[10] gambling winnings,[11] unclaimed refunds,[12] and of course unclaimed securities and dividends and interest on securities.[13]

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[6] *E.g.*, *Riggs Nat'l Bank* v. *District of Columbia*, 581 A.2d 1229, 1234-35 (D.C. 1990).

[7] *E.g.*, *Friar* v. *Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (N.Y. App. Div. 1986).

[8] *E.g.*, *Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142, 147-48 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

[9] *E.g.*, *Employers Ins.* v. *Smith*, 453 N.W.2d 856, 863-64 (Wis. 1990) (workers compensation); *Louisiana Health Serv. & Indem. Co.* v. *McNamara*, 561 So. 2d 712, 717-18 (La. 1990) (health insurance); *Revenue Cabinet* v. *Blue Cross & Blue Shield of Ky.*, 702 S.W.2d 433, 434-35 (Ky. 1986) (same); *Treasurer & Receiver General* v. *John Hancock Mut. Life Ins. Co.*, 446 N.E.2d 1376, 1382-83 (Mass. 1983) (life insurance); *South Carolina Tax Comm'n* v. *Metropolitan Life Ins. Co.*, 221 S.E.2d 522, 523-24 (S.C. 1975) (same).

[10] *O'Connor* v. *Sperry & Hutchinson Co.*, 379 A.2d 1378, 1381 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980).

[11] *E.g.*, *State ex rel. Marsh* v. *Nebraska State Bd. of Agriculture*, 350 N.W.2d 535, 540 (Neb. 1984); *State* v. *Elsinore Shore Assocs.*, 592 A.2d 604, 605-07 (N.J. Super. Ct. App. Div. 1991).

[12] *E.g.*, *Arkansas Dep't of Fin. & Admin.* v. *City of N. Little Rock*, 659 S.W.2d 937, 937-38 (Ark. 1983) (utility company deposits); *Cory* v. *Public Utils. Comm'n*, 658 P.2d 749, 751-53 (Cal. 1983) (utility overcharges); *South Carolina Tax Comm'n* v. *York Elec. Coop.*, 270 S.E.2d 626, 627-28 (S.C. 1980) (coop reimbursements); *Presley* v. *City of Memphis*, 769 S.W.2d 221, 224 (Tenn. Ct. App. 1988) (concert tickets).

[13] *Seierstad* v. *Serwold*, 716 P.2d 885, 888-89 (Wash. 1986); *State Dep't of Revenue* v. *Puget Sound Power & Light Co.*, 694

Most states have now amended their laws to conform to the *Texas* rule, and for some states the rule has resulted in a reliable source of revenue. Delaware, for instance, relies on a stream of escheated property currently totalling approximately $20 million annually.

Thus, after the decision in *Texas* v. *New Jersey*, more than twenty states adopted the 1966 revision of the Uniform Disposition of Unclaimed Property Act, 8A Uniform Laws Ann. 135 (1983) (App. A pp. 17a-26a). That uniform act generally allows the state of the owner's last known address to escheat (§ 10); otherwise, it requires persons *holding* unclaimed property to report and deliver it to the state (§§ 11, 13). The more recent 1981 Uniform Unclaimed Property Act (now adopted by twenty-seven states), 8A Uniform Laws Ann. 617 (1983) (App. A pp. 4a-17a) evidences a similar focus on the "holder"—the person indebted to another or in possession of property belonging to another (§ 1(8)). It looks to "the records of the holder" to determine the last-known address (§ 3(1)) and provides that the enacting state takes under the backup rule if "the holder is a domiciliary or a government or governmental subdivision or agency of this State" (§§ 3(3)(ii)), 3(4), 3(5)). "Domicile" as to a corporation means "the state of incorporation" (§ 1(6)).

In reliance on the *Texas* rule and these uniform statutes complying with it, forty-four states and the District of Columbia have joined together to participate in the Unclaimed Property Clearing House, a "multi-state cooperative effort to simplify the reporting and collection of abandoned securities and associated cash." Unclaimed Property Clearing House, *Voluntary Compliance Manual* 1 (1991). Of the most populous states, only New York is

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P.2d 7, 12 (Wash. 1985); *State* v. *Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311, 313-15 (Tex. 1974); *State* v. *New Jersey Nat'l Bank & Trust*, 298 A.2d 65, 66-67 (N.J. 1972); *State ex rel. Mallicoat* v. *Coe*, 460 P.2d 357, 358-59 (Or. 1969); *In re Northeast Utils.*, 479 F. Supp. 194, 198-99 (D. Conn. 1979).

not a member.[14] Each member state signs a form of agreement providing in pertinent part:

> 1. The holdings of the U.S. Supreme Court in *Texas v. New Jersey* (85 S. Ct. 1136) and *Pennsylvania v. New York* (92 S. Ct. 2880) regarding which state has the right to escheat property shall be followed:
>
> (a) Where the name and last known address of the apparent owner according to the books and records of the holder is in [State], it shall be deemed reportable to [State].
>
> (b) If the *holder* has no records whatsoever setting forth the name and last known address of the apparent owner, the property shall be deemed reportable to the *state of incorporation of the holder.*

Clearing House Agreement (Special Consultant's Contract) Ex. 1 ¶ 1 (App. B p. 80a) (emphasis supplied).[15]

This case is about a particular class of intangibles subject to the backup rule of *Texas* v. *New Jersey* and described in paragraph 1(b) of the forty-four-state Clearing House Agreement. The unclaimed intangibles at issue in this case arise because securities are often held by persons other than the beneficial owner, for a variety of reasons described below. *See infra* pp. 13-15 & n.19. In

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[14] Besides New York, the following states were *not* members at the time of the cited publication: Georgia, Hawaii, Maryland, Minnesota, Oklahoma, Rhode Island, South Carolina, and Wyoming. We understand that Hawaii, Minnesota and Oklahoma have since joined, making forty-four state members, plus the District of Columbia.

[15] We do not mean to suggest that their execution of the Special Consultant's Agreement bars the signatory states as a matter of contract from taking their present position. A reservation of rights provision in the Agreement (Ex. 1 ¶ 2, see App. B p. 81a) appears to provide that they are not so barred. But the forty-four states' execution of the Agreement with ¶ 1 in it speaks powerfully as to what the general understanding of the states was as to the meaning of the *Texas* case.

many cases, these holders are listed as holders of record on the issuer's books and receive the property directly from the issuer; in other instances, the holder of the unclaimed property has, instead, received the property from a "depository" that is the holder of record on the issuer's books. (Depositories generally hold securities *only* for the accounts of "participant" brokers and banks. DeCesare Dep. 14-15.) The largest and best-known depository is the Depository Trust Company ("DTC"). In addition to the depositories, the holder entities involved in this case are stockbrokers and banks acting as custodians.

This case concerns only moneys that come into the hands of these holders and are owed by them to persons that they cannot identify, generally because of errors, transfer delays, or imperfections in the systems maintained by the depositories, brokers, and banks.[16] This case, then, does not involve *Texas* v. *New Jersey*'s "primary rule," which governs the property of "lost shareholders" (or bondholders) listed on the books and records of the issuer company—or "lost customers" listed on the books and records of a stockbroker—but no longer in touch with the company or broker. The incidence of these "lost stockholders," "lost bondholders," and "lost customers" and of their escheatable property is apparently very substantial. However, no evidence of its size or relationship to the size of the unclaimed property involved in this case is in the record.[17]

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[16] These amounts were called "overages" or "overs" by some of the witnesses. *E.g.*, DeCesare Dep. 119; Cirrito Dep. 86-87. There was testimony in the record that systemic improvements were in the process of being worked on, which were intended to have the effect of reducing the occurrence of these overages. DeCesare Dep. 79-83; Cirrito Dep. 150-53. To the extent that these systemic revisions are implemented and have the anticipated result, the amounts involved in the subject matter of this case would be reduced in the future.

[17] Such information as exists from publicly-available sources strongly suggests that the universe of securities and distributions escheatable under the primary rule far exceeds that involved in the present case and escheatable under the backup rule. SEC Commis-

Holders such as these, holding stock for beneficial owners or other such holders, serve a number of well-established functions in the securities industry: they allow beneficial owners the privacy that anonymity pro-

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sioner Grundfest, giving comments on an early version of the Delaware takeover legislation being considered in 1988 (*see infra* pp. 63-64), referred to studies indicating that approximately 5% of stockholders never responded to tender offers, regardless of how favorable they were. *Delaware's Proposed Antitakeover Legislation: Hearings Before the House Judiciary Committee of the Delaware State Legislature* 13-14 (Statement of SEC Commissioner Grundfest) (Jan. 20, 1988). Presumably a substantial number of these silent stockholders were "lost"; the issuer no longer was in contact with them, although it had their last-known addresses. Published materials indicate that a search firm devoted to attempting to find lost stockholder estimates that in publicly-held companies, between one-half of one percent and two percent of the stockholders on the companies' records of stockholders' names and addresses are "lost." Thomas Derr, *In Search of Missing Heirs: From Serpico to Senators and Steelworkers*, Focus—Metropolitan Philadelphia's Business Newsweekly, May 14, 1986, at 147 (quoting a spokesperson for Keane Tracers, Inc.).

The total approximate market value of all publicly-held corporate stock actively traded in the United States is $4.367 trillion. Board of Governors of Federal Reserve Sys., *Flow of Funds Accounts, Financial Assets and Liabilities, Fourth Quarter 1991*, at 44 (March 12, 1992) (hereinafter, "*Flow of Funds*"). If one were to take the conservative figure of one percent of the stock being held by "lost" stockholders, the value of their stock would be $43.7 billion. A "haircut" on this number might well be appropriate because one could assume that "lost" stockholders are more likely to be on average smaller stockholders than those who are not lost, and that those stockholders who keep their stock with stockbrokers or bank custodians are, arguably, less likely to become "lost" than those holding it on the company's books. However, even if one assumes a very radical haircut of 80%, a figure of $8.7 billion escheatable under the primary rule is produced. This figure is much in excess of the several hundred million dollars presumed to be involved under the backup rule in this case. *See* New York's Response to First Set of Interrogatories Propounded by Alabama, *et al.* at 5-6 (Answer to Interrogatory 5(d)) (Apr. 27, 1990) (showing annual totals of $40 million to $210 million remitted to New York by DTC, Broker/Dealers and Financial Institutions between 1985 and 1989, with

vides (within certain limitations established by law);[18] they allow beneficial owners to have, and the stock brokerage community to provide, "cash management accounts" in which dividends and interest paid on the customer's securities do not go directly to the customer, but are held by the broker for his account, at interest, usually subject to withdrawal by a check-like negotiable instrument; they facilitate brokerage margin accounts, where the customer's securities are held by the broker as collateral and the dividends and other distributions can reduce the customer's margin debt to the broker; they facilitate the operation of trusts in which the distribution of current income may not be mandatory, but discretionary; they allow for dividend reinvestment programs, where a nominee holds fractional shares purchased with dividends; they allow the efficient transfer of securities by taking certificated securities out of the names and safe deposit boxes of individual investors and putting them in the name and custody of a stockbroker, and, with the growth of depositories, even taking them out of the individual brokers' names and vaults and putting them in the name

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five-year total of approximately $450 million); New York's Response to Delaware's First Interrogatories, Schedule I (March 6, 1989) (showing total of approximately $139 million escheated by New York from Delaware brokerage firms between 1972 and 1988). Moreover, the figures just given for the amount escheatable under the primary rule do not include debt securities, while debt securities are included in the backup rule situation involved in the present case. The total dollar volume of debt securities publicly-traded (excluding U.S. government securities and mortgage pools) in the United States is $2.84 trillion ($1.082 trillion of tax-exempt securities, and $1.758 trillion of corporate and foreign bonds). *Flow of Funds*, at 44. Publicly-traded mortgage pools are another $1.168 trillion. *Id.* at 46.

[18] For example, when a beneficial owner or group of beneficial owners beneficially owns more than 5% of a class of equity securities of an SEC-registered company, it or they must file a "Schedule 13D" disclosure statement. Securities Exchange Act § 13(d), 15 U.S.C. § 78m(d); *see also* Securities Exchange Act § 16(a), 15 U.S.C. § 78p(a) (directors, officers and 10% stockholders).

of the depository, where they can be transferred to other depository participants simply by entry on the depository's books.[19]

This last function has now largely been fulfilled by DTC, which "immobilizes" securities certificates. DTC was created by securities brokers and dealers, stock exchanges and banks in order to "immobilize" certificates, so as to alleviate the paperwork crisis that had developed as a result of the physical deliveries of certificates in connection with trading. DTC Statement (filed with the Master March 16, 1990, and marked as DTC Ex. 13) at 1; DeCesare Dep. 377. In responding to that crisis, the interindustry committee responsible for the creation of DTC considered and rejected a proposal that would have made the depository a *"transfer agent* for the issuer." DTC Statement 3 (emphasis by DTC). DTC has no contractual relationship with issuers, except in cases of DTC "book-entry-only" securities, which do not give rise to abandoned property under the backup rule. *Id.* at 4 n.*.[20]

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[19] *See generally* J. Robert Brown, Jr., *The Shareholder Communication Rules & the SEC,* 13 J. Corp. L. 683, 687-93, 695 n.59 (1988) (discussing advantages of nominee ownership); Egon Guttman, *Modern Securities Transfers* ¶ 4.04[1][d][i] at 4-16 to 4-17 (1987) (discussing use of street name to facilitate transfer of securities); Ira L. Sorkin & Carman J. Lawrence, *An Overview of Stock Loan/Stock Borrowing,* 501 PLI/Corp. 275, 279 (1985) (role of DTC in pledging securities); 7 William D. Hawkland, *et al., UCC Series* § 8-303:02 at 210 (1990) (use of securities as collateral in margin accounts); Simon M. Lorne, *Acquisitions & Mergers: Negotiated & Contested Transactions,* § 3.09[2][b] at 3-56 to 3-57 (1989) (same); Richard S. Rothberg, *Registration of Fiduciary Securities in 'Street Name': a Look at EPTL § 11-1.10,* 57 N.Y. St. B.J. 34, 35 (1985) (benefits of street name registration for fiduciary and trust accounts); DeCesare Dep. 202 (dividend reinvestment plans must allow for nominee participation), 377 (depository system facilitates transfer of securities), 430-32 (depository facilitates pledging of securities); Wellener Dep. 36-37 (dividend reinvestment plans).

[20] Even in this situation, DTC is the holder of record of the entire issue, but does not purport to act as agent for the issuer.

[Footnote continued]

DTC's "core service" is to provide for "the efficient settlement of securities transactions with physical certificates immobilized in a central location." *Id.* at 6-7. The immobilization requires DTC to provide what it considers "ancillary services," as well—including the "collection and payment of dividend and interest distributions." *Id.* at 7.

The practice by stockbrokers, bank trust departments and custodians, and, lately, depositories, of holding securities in their own names rather than the beneficial owners holding them in theirs, is sometimes called holding securities in "street name" or in "nominee name." [21] These intermediate holders serve numerous functions and their role in the securities industry predates even the first federal securities legislation.[22] One function they do not serve well, however, is the efficient distribution of dividends, interest and other distributions. Obviously, in terms of pure efficiency in getting the moneys from the issuer to the beneficial owners, it would be best if all the beneficial owners appeared on the issuer's record.

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[20] [Continued]

DeCesare Dep. 156 ("we hold 100 percent of what's outstanding in a single certificate"), 209-10 (statement of DTC's counsel that DTC holds a certificate as recordholder under U.C.C.).

[21] While the stockbrokers, bank custodians and depositories are sometimes called "nominees," strictly speaking, "nominee" refers to an entity, generally a partnership composed of officers of the bank or depository, which adopts a short name and holds securities for the account of the depository, bank trust department or other holder, in order to avoid, through the use of a partnership name, the onerous stock transfer requirements that may attend transfers by a corporation and particularly by a corporate fiduciary. Probably the best known nominee in this sense is the nominee of the DTC, "Cede & Co."

[22] *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *North Eur. Oil Royalty Trust*, 490 A.2d 558 (Del. 1985); S. Rep. No. 1455, 73d Cong., 2d Sess. 76 (1934); *Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities* (Dec. 3, 1976) (hereinafter "*SEC Street Name Study*") at 1-3.

DeCesare Dep. 405-07. But for the various reasons just outlined, they do not. Moreover, in many situations—as, for example, margin accounts that are not fully collateralized, margin accounts with sweep features but negative cash balances (Principe Dep. 53), or certain trust accounts—there may be an intent *not* to distribute cash dividends to the beneficial owner of the underlying security.

By 1965, when the Court decided *Texas* v. *New Jersey*, 23.7 percent of the equity securities of publicly-owned companies was held in nominee and street name. *SEC Street Name Study* 78. By 1975, shortly after the Court decided *Pennsylvania* v. *New York*, the proportion had risen to 28.6 percent. *Id.* The trend toward securities certificate immobilization has continued. During the 1980s, it passed the 50 percent mark.[23]

As these figures indicate, the practice of "street name" or "nominee" registration is far from universal. Many investors, large and small, prefer to be stockholders of record. There are only a handful of depositories and probably no more than a few thousand stockbrokers and bank trust departments/custodians actively engaged in holding securities for the accounts of participants or customers. Yet annual SEC filings for 1991 indicate that, for example, American Telephone & Telegraph Company had 2,426,354 common stockholders of record; General Motors had 1,774,420 stockholders of record of its various classes of common stock; General Electric had 490,000 common stockholders of record; IBM had 772,047 common stockholders of record; and BellSouth had 1,355,908 stockholders of record.[24] Thus the vast majority in number of their recordholders were also beneficial owners.

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[23] Division of Market Regulation, SEC, *Progress & Prospects: Depository Immobilization of Securities & Use of Book-Entry Systems* 4 (June 14, 1985).

[24] AT&T 1991 Annual Report to Stockholders, inside back cover; GM 1991 10-K Report, p. II-45; GE 1991 10-K Report, pp. 21-22;

New York's practice with respect to all unclaimed stock and distributions held by these intermediate holders has been particularly aggressive. New York does not participate in the cooperative efforts of the Unclaimed Property Clearing House. It has an overbroad statute, calling for the delivery to New York of all abandoned securities held by brokers doing business in New York—without regard to whether the holder's records indicate that the owner's last known address is in New York, or (if there is no known owner or address) whether the broker is incorporated in New York.[25] To make matters worse, New York's three-year dormancy period is the shortest in the nation. *See* Egon Guttman, *Modern Securities Transfers* at S16-2 to S16-32 (3d ed. Cum. Supp. 1991).[26] New York's aggressiveness—and the reliance of other states on the *Texas* rule—is illustrated by a letter on the letterhead of Texas' then Treasurer (now Governor), Ann Richards, to E.F. Hutton, a brokerage firm that did business in New York (but was incorporated in Delaware). Ms. Richards' representative wrote to express her department's frustration with the broker's practice of submitting *all* unclaimed intangibles to New York: "the rule adopted [in *Texas* v. *New Jersey*] requires reporting to the state of last-known address of the creditor (or owner) as shown by the debtor's (holder's) books and records; and if there is no last-known address, then to the state of incorporation of the debtor." [27]

IBM 1991 Annual Report to Stockholders, p. 53; BellSouth 1991 Annual Report to Stockholders, p. 62.

[25] N.Y. Abandoned Property Law § 511 (McKinney 1991) (App. A pp. 38a-48a). New York has not amended its statute to comport with the requirements of *Texas* v. *New Jersey*.

[26] Some other states also have a three-year period. *See, e.g.*, Cal. Civ. Proc. Code § 1513 (West Supp. 1992).

[27] Letter of October 16, 1986 (Appended to N.Y. Supp. Reply Br. (Nov. 20, 1991)) (App. C hereto at p. 82a). Unlike its current position, Texas there made no suggestion that E.F. Hutton should be

New York takes possession of unclaimed "owner/address unknown" cash and other intangibles held by DTC (a New York banking corporation) without question from Delaware; the same is true with such property held by New York banks. But a large number of brokerage houses are incorporated in Delaware.

Delaware therefore commenced this action in this Court to collect the "owner/address unknown" funds that were taken by New York from "Delaware Brokerage Corporations." Delaware's suit was a narrowly drawn one, entirely dependent on the application of the settled rules of this Court's prior decisions to the facts of what New York was doing. Because the exclusive forum for suits between states is this Court, Delaware's case, although having elements of a "collection" suit, had to be brought here; indeed, New York, urging that the case did not involve substantial questions of law but only factual issues, contended that this Court should exercise its discretion not to hear it. Brief of N.Y. in Opp. to Motion for Leave to File Complaint 24 (May 9, 1988). New York's substantive position was that the property in question, which appears to be "owner/address unknown," actually is not; New York claims that all the unknown owners whose funds are held by stockbrokers may be "statistically" presumed themselves to be stockbrokers, with "trading addresses" in New York. *See* Report 58-59 & n.50.

Early on, Delaware found allies in several states who appeared as *amici curiae* in its support and asserted that "New York is not entitled to escheat unclaimed intangible property held by brokers conducting business in New York but incorporated elsewhere."[28] They expressed a "sig-

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looking to the state of principal executive office of each issuer of owner unknown property, or that the *issuer* was somehow the "debtor." On the contrary, the "holder" is described by Texas as the "debtor." The debtor's domicile was its "state of incorporation."

[28] Brief of *Amici Curiae* Pennsylvania, Florida, Rhode Island, New Jersey, Arizona, Utah, and Arkansas (May 9, 1988) at 2.

nificant interest in this matter because they rely upon the rules of priority established by the Court . . . . Adherence to these equitable standards enables *amici* States to avoid litigation resulting from inconsistent claims to the same property. The relief sought by Delaware is compatible with the rules followed by *amici* States." *Id.* Again, *amici* reiterated: "[i]f no record is available, or if the state with priority had no escheat law, then the state of the *holder's* incorporation [is] entitled to escheat the property." *Id.* at 5, 9 (emphasis supplied).

4. *Reference to the Master.*—After granting Delaware's motion to file its complaint, the Court appointed a Special Master. 488 U.S. 990 (1988). There followed massive interventions in what resembled a feeding frenzy. Delaware's early *amici*, who had viewed Delaware's position as consistent with the "salutary holding of *Texas* v. *New Jersey*" (Brief of *Amici* at 10), came to see an opportunity to modify the rules and collect a windfall. Starting in 1989, they sought intervention, as did every state in the Union (and the District of Columbia),[29] advocating one or another theory that would allow them to recover the money at issue under the backup rule.[30] Unclaimed intangibles held by DTC and the New York bank nominees were added to the scope of the case when the Court granted Texas' motion to intervene, greatly increasing the case's scope.[31]

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[29] The last of these applications to intervene, that of Massachusetts, came only in March 1992, two months after the Master's Report.

[30] The Court has not passed on any of the applications for intervention other than that of Texas, but the Master has favorably recommended all of the motions to intervene that he received prior to January 28, 1992 (Report 5), and the states seeking leave to intervene have been permitted to participate before the Master as fully as if this Court had approved their intervention.

[31] In comparison to the roughly $450 million remitted by DTC, Broker/Dealers and Financial Institutions during the period 1985 to 1989, New York received only $139 million of funds remitted

Two new theories emerged. A group led by Texas urged a modification of the rule previously called "salutary"—they argued that the state of incorporation of the *issuer* should be entitled to escheat the unclaimed funds, rather than the state of incorporation of the *holder* (as per the Texas letter, the practice of forty-five jurisdictions through the Unclaimed Property Clearinghouse, and the brief for the seven early *amici* states). This, although the funds were no longer held by the issuer (who indeed had no claim whatsoever to them). Among the Texas group are former *amici* Florida, New Jersey, Pennsylvania, Utah, Arkansas, and Arizona.

A group with a more radical agenda was led by California. This group's theory called for an outright overruling (at least in the present situation) of the backup rule, and its replacement with a test to be determined by the states in a process of negotiation or binding arbitration once the Court overruled *Texas* v. *New Jersey*. That test has not been articulated with any precision by this group but it seems to be related to the incidence of investor activities throughout the United States. Among this group is former *amicus* Rhode Island.

Various motions for judgment on the pleadings and for partial summary judgment were filed. The Master allowed limited discovery, only on the subject of how

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from *Delaware* Brokerage Firms for a much longer time period (1972 to 1988). *See supra* pp. 13-14 n.17. Because the DTC and the New York banks were New York-domiciled, Delaware's complaint did not seek "owner/address unknown" property in their hands (or in the hands of brokers not incorporated in Delaware). By seeking a revision or reinterpretation of the *Texas* v. *New Jersey* "backup" rule to refer to the corporate domicile of the "issuer" of the securities on which the distributions had been paid, rather than the holders who owed them to an unknown creditor, the Intervenors attempted to get a share of the larger pie ($450 million), which includes that held by the Delaware brokerage firms that were the original object of the suit. (The figures for the "larger pie" may be swollen by New York's proper or improper escheats of dormant broker customer accounts, for which of course there are names and addresses. *See* Principe Dep. 110.)

the present nominee dividend and interest distribution system works; he permitted no discovery on any other matter, such as the consequences of changing or reinterpreting the escheat rules.[32]

5. *The Master's Report and Recommendation.*—The Master's Report recommends two changes to the *Texas* rule—one acknowledged, the other not. *First,* the Report recommends that the terms "debtor" and "creditor" used in *Texas* v. *New Jersey* and *Pennsylvania* v. *New York* should be viewed merely "as an attempt to identify the relevant parties" rather than as a description of legal relationships. The Report purports to have discovered a federal common law definition of the term "debtor" that bears no relation whatever to the state property laws giving rise to the unclaimed property in this case. Under this federal common law, the state laws that govern the establishment of and rights—both private and public—in the property at issue are to be ignored; instead, according to the Report, the "relevant attributes" of the parties to each type of transaction must be evaluated in order to determine which ones are *most like* the parties in *Texas* v. *New Jersey* and *Pennsylvania* v. *New York.* The Report goes on to conclude that the task is impossible in this case. Report 32-34. Therefore the Report resorts to a "tie-breaker" by intuiting which interpretation would be more "fair." Report 35. Under this approach—which ignores the ordinary meaning of the words debtor and creditor—the Report concludes that the *issuer,* rather than the *holder,* should be viewed as the "debtor."

Second, the Report recommends that the Court abandon the part of the backup rule that views the state of incorporation of a corporate "debtor" as its "domicile" and thus entitled to escheat; instead, the Report recommends that the state of the "principal executive office" of

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[32] Indeed, the Master denied an application by Delaware, following the Master's exposure of a draft report reaching substantially the same conclusions that his Final Report did, that discovery be permitted before the Master's Report was made final. Discovery Order No. 15 (Jan. 28, 1992).

the corporate "debtor" (of course, as redefined) should be entitled to escheat. This modification was proposed by the Master *sua sponte*—no one (not even the California group) suggested that the backup rule thus be modified until after the Master circulated a draft of his Report containing such a recommendation for comment. The Report contains no definition of how far this recommendation applies. Is it just for this case? Or is it supposed to operate as an overall replacement for the "state of incorporation" in the backup rule of *Texas* v. *New Jersey?* Other than (1) what may be gleaned from a somewhat cryptic footnote in the Report (p. 35 n.32) suggesting that the abandonment of the "state of incorporation" rule would assist in making the "debtor is the issuer" rule "fair" and (2) the Report's discussion of the pertinence of securities issuers' SEC reports (Report 44-48),[33] no limiting principle is apparent in the Report.

The Report did not undertake to say what its recommendation was as to who should prevail between the plaintiff Delaware and the defendant New York if the Master's recommendation about the "issuer as debtor" theory of the Texas Intervenors and his spontaneous substitution of "principal executive office" for "state of incorporation" were not accepted by the Court. However, the Master's discussion of New York's arguments concerning the backup rule (Report 67-68) clearly indicated that Delaware was to prevail in such case.

SUMMARY OF ARGUMENT

I. Neither of the two rule changes recommended in the Report, one acknowledged as a change by the Master and the other not, should be adopted.

A. 1. Contrary to the Master's conclusion, there is no reason to believe that this Court used the word "debtor"

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[33] But looking the other way, see the Draft Report's consciousness that the new rule might be applied "in other cases (or circumstances)." Draft Report 57 n.64, quoted in our Exceptions at E-8.

in the *Texas* and *Pennsylvania* cases in other than its usual and conventional meaning—one who owes something to another. The Master's construction, indeed, requires one to assume that the Court used that word in two different senses on the same pages in those decisions. Under the law of all 50 states, the "issuer" of securities is not a debtor of anyone with respect to a dividend or interest distribution once the issuer has paid it to the security holders shown on its record. Construing "debtor" to mean what state law considers to be a debtor is rooted in the tradition of escheat cases prior to the *Texas* case; the Master's recommendation goes beyond the traditional limits of substantive due process taught by those earlier decisions. *In personam* jurisdiction due process questions join to suggest that the Master's recommendation is so extraordinary as to be suspect.

2. Under state law, the issuer is not a "creditor" of the nominee holder, nor a debtor of the beneficial owner; and the record establishes that the nominee holders are not agents of the issuer. The Uniform Commercial Code in all 50 states and state corporation law confirm that the issuer discharges its indebtedness with respect to a distribution by properly paying the holder of record. Commercial practice also confirms this. The reasons given by the Master and the Intervenors for ignoring these uniform rules are without merit. The Master's approach is metaphoric rather than legal and the Intervenors cite either state statutes that provide options which issuers never use or SEC rules that are inapplicable to dividends and do not mean what the Intervenors contend.

3. The Master's recommendation on this score is in essence that the state law as to who is a debtor should be ignored. But in this case, the federal law with respect to the permissibility of escheat necessarily builds on state law. It is property created by state law that is the subject of escheat. There is no federal reason to displace state law in this situation. It would compound the error

not only to displace state law, but to displace state law which happens to be uniform in all 50 states.

4. The Master's suggestion that "fairness" demands that the money in question be "sent back where it came from," to the issuer, as a sort of "tie-breaker," is based on the Master's personal notions of fairness which hardly seem necessary ones; the "send it back where it came from" rule has been rejected by this Court before, and making a rule change purely for the sake of alleged "fairness," in the terms conceived by the Master, appears to be a choice for the legislative branch.

B. The Master's *sua sponte* change in the definition of corporate domicile from "state of incorporation" to "state of principal executive office" is likewise unjustified.

1. No developments in the law since 1965 indicate that the choice made by the Court in the *Texas* case and reaffirmed in the *Pennsylvania* case should be abandoned. This Court has, indeed, in the intervening period, repeatedly stressed the important role of the incorporating state in corporate matters.

2. The present rule works well administratively. The replacement rule suggested by the Master is unworkable and will be a source of litigation and conflict; even the provisions of the U.C.C. that the Master finds establish workability demonstrate exactly the contrary. Moreover, even the prop the Master has suggested be used—the principal executive office address given in SEC filings —is unavailing if the rule is applied beyond the narrow context of the present case and to the extent of the backup rule generally, since it will involve corporations that are not SEC filers. The Master suggests no limiting principles why the rule change as to the determination of corporate domicile should be limited to the specific situations involved in this case.

3. Fairness demands retention, not rejection, of the present rule as to corporate domicile. A properly chosen

state of incorporation can provide significant benefits to shareholders, as recent academic analyses and studies indicate. Given recent developments in real-world corporate sociology, the same cannot be said with any confidence as to the state of "principal executive office." The location of principal executive offices has over the decades ceased to have any relevance to the productive activities of corporations and has become more and more a personal choice by a small cadre of top corporate executives.

4. Here again, the Master's notions of "fairness" are misconceived. The Master also ignores the public-sector efforts that a state, like Delaware, must make in order to provide its corporations with a properly functioning statute and a judiciary attuned to sophisticated issues of corporate law; it would be unfair to disregard those efforts.

C. Both with respect to the corporate domicile rule change and as to his recommendation that the issuer is to be considered the "debtor," the Master ignores the principles of *stare decisis* that have been taught by the decisions of this Court, and violates the expectations of the states expressed by their adoption of the uniform escheat acts.

II. Should the Court, contrary to our contentions, accept one or both of the Master's recommendations for rule changes, the ruling should not be made retroactive as the Master suggests. Retroactivity would cause the states that relied on the plain language of the *Texas* and *Pennsylvania* cases and adopted the uniform acts implementing them to be divested of property escheated in reliance on them. The very purpose of the *Texas* rule was to have a clear, certain and simple rule "once and for all" to resolve conflicting state claims for escheat. Retroactivity here would disturb Delaware's justifiable reliance on the rules laid down in the *Texas* case and would be inconsistent with this Court's precedents concerning retroactive application of changes in judge-made

legal rules, particularly in the context of asserting retroactivity against a state.

III. The Master rejected New York's theories underlying its factual assertions about the moneys originally at issue in this case. New York's contention that the moneys in the hands of brokers owed to persons unknown should, on a statistical basis, be deemed to be owed generically to "other brokers," and that all those other brokers should be deemed to have "trading addresses" in New York, was rejected by the Master, and properly so. The record amply confirms the Master's findings on this point.

But because the Master proceeded on his theory of "the issuer as debtor" and on his rule change concerning the test of corporate domicile, the Master never drew the conclusions that necessarily would flow from those findings, should this Court not follow his recommendations that the "issuer" was the "debtor" and that the corporate domicile rule should be changed. However, it follows necessarily from the Master's correct findings about New York's theory that Delaware should have judgment against New York, and this Court should so rule.

ARGUMENT

I. THE COURT SHOULD ACCEPT NEITHER THE MASTER'S UNACKNOWLEDGED CHANGE TO THE BACKUP RULE—THAT "ISSUER" BE SUBSTITUTED FOR "DEBTOR"—NOR HIS ACKNOWLEDGED CHANGE—THAT "STATE OF PRINCIPAL EXECUTIVE OFFICE" BE SUBSTITUTED FOR "STATE OF INCORPORATION"

The Master's Report, if followed by this Court, would destroy the stability that the Court's earlier decisions have brought into this field and would unsettle the law in an area where litigation involves the exclusive original jurisdiction of this Court. The Master proposed two

rule changes: the first rule change, not acknowledged as such, applies a theory of "federal common law" to set aside the definition of who is a debtor under the laws of all 50 states. The second overrules a prescription of corporate domicile for escheat purposes followed in the two original cases and having its roots in the prior escheat jurisprudence. The alternative rule proposed is arbitrary, amounts to change for change's sake, and particularly if applied beyond the scope of this case—as well it may, since it is without limiting principle—will be the source of great administrative difficulties. Following the Master's recommendation would involve a departure from this Court's decisions on the proper application of the rules of *stare decisis*. The Master's notions of "fairness," which prompted the rule changes, seem hardly persuasive; but if they are, presumably the matter of changing the rules can be left to the attention of Congress.

A. In the Circumstances Involved in This Case, the "Issuer" Is Not a "Debtor" with Respect to the Dividends and Interest Under State Law, and Should Not Be Regarded as a "Debtor" by This Court for Purposes of Escheat

Following a circuitous path, the Report accepts the position of the Texas group and recommends that the "issuer" (rather than the holder of the unclaimed property) be deemed the "debtor" under the *Texas* rule. The Report begins with a fundamental misapprehension about the nominee system: that it was designed for the purpose of speeding the *distribution of dividends* and therefore "the distribution system's use of intermediaries may have originated as a matter of convenience." Report 25. There is absolutely no evidence in the record, and no party contended, that nominee holders exist in the chain of title between the issuer and the ultimate beneficial owners of securities for the purpose of "convenience" in getting dividends into the hands of the beneficial owners. As we explained above (*see supra* pp. 13-15 & n.19), the nominee

system was designed to perform a number of functions *other* than the distribution of dividends; efficient distribution of dividends is accomplished largely *in spite of* the presence of nominee holders.

The Report then appears simultaneously (1) to reject the relevance of state law to the determination of the identity of the "debtor" and (2) to suggest that under state law the recordholders may not be debtors of the persons for which they are nominees (suggesting that possibly the issuer is). This latter suggestion appears to proceed from a misconception that the recordholders do not consider themselves as possessing an "asset" in the form of the moneys in turn owed to the unknown creditor. Report 25-26.

This statement is controverted by the record and other evidence. It is clear that the cash in the hands of the recordholders is viewed as an asset and that there is a corresponding liability. *See* American Institute of CPAs, *Audits of Brokers & Dealers in Securities* 34-36 (1973) (listing "Failed to Deliver" accounts and customer accounts as assets, with corresponding liability for "unclaimed dividends") (Lodged with the Clerk by New York (May 9, 1988), Tab C); Cirrito Dep. 84. The DTC uses the excess cash from the "overages" in its hands at issue in this case to pay its expenses in attempting to find the creditors and distributes the surplus annually to its participants. DeCesare Dep. 152-53, 317, 475. The brokerage houses are free to use these funds in their business, subject only to certain limitations, not applied on an individual basis, similar to those applicable to any customer's funds in a broker's hands. *See infra* pp. 44-45 & n.57. Subject to those limitations, the brokers and banks put the moneys in their general bank accounts; in whatever account, they appear to earn and retain the interest on these funds. Shearer Dep. 261-65; Wellener Dep. 66; Cirrito Dep. 95-96. If the funds are unclaimed during the statutory waiting period and

are escheated to New York, no interest is due New York if the funds are remitted promptly. N.Y. Abandoned Prop. L. § 511.2. All of the witnesses testified that their firms escheated the "overages" to New York. Cirrito Dep. 93; DeCesare Dep. 152; Principe Dep. 109; Scott Dep. 175; Shearer Dep. 185-86; Wellener Dep. 59-61. Thus, any interest earned during the waiting period inured to the benefit of the holder.[34]

These fairly obvious factual errors in the Report are then compounded by its failure to give the words used in the *Texas* rule their ordinary meaning; the Report instead concludes that the Court's use of the terms "debtor" and "creditor" was "descriptive—an attempt to identify the relevant parties."[35] The Report therefore concludes that

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[34] The Report also exhibits a confusion between assets and net worth. It is claimed that the intermediaries do not possess an asset "that would properly be reflected on a balance sheet in the sense of being a positive factor in establishing the intermediary's corporate worth." Report 26. But an asset is no less an asset because its acquisition is accompanied by a countervailing liability and does not increase net worth. The existence of a countervailing liability does not mean that the asset is not an asset. If one deposits $100 in cash in a bank, the bank's cash assets increase by $100 and its deposit liabilities increase by the same amount, so that there is no increase in its net worth. But after the deposit the cash is an asset of the bank, and conducting such matching transactions is a principal part of a bank's business.

[35] Report 29. This reasoning is peculiar. Clarity in identifying the relevant parties is promoted by using their actual names—"Sun Oil"; "Western Union," etc. (*see* Fed. R. App. P. 28(d)); words describing the parties' legal relationships tend to be more useful in setting down generally applicable rules, so that those who must apply the rules need not search for other relevant attributes. Indeed, in *Texas* v. *New Jersey*, the Court described the parties in just that way—identifying them by name until it came time to evaluate the four "different possible rules" to be applied to "intangible property, such as a debt," 379 U.S. at 677-78, at which point the Court switched from the parties' names to the general words "debtor," "creditor," and "state." In stating the generally applicable rule, the Court used the words that described the parties' legal relationships—not their "relevant attributes"; unless one views the "relevant attributes" as that of being a "debtor" and a "creditor."

the Court did not intend the words to have their ordinary meanings, but instead "intended . . . to ask future courts (and Special Masters) to search for parties with relevant *attributes* . . . of the parties denominated 'creditors' and 'debtors' in these two opinions." Report 30 (emphasis in original). By declining to give the word "debtor" its ordinary meaning, the Report creates an unnecessary ambiguity; it then asserts that the ambiguity may only be resolved with resort to a so-called "tie-breaker"; and it concludes by intuiting which interpretation of the word would be more "fair." Report 35.

This approach suffers from a number of flaws. First, and most simply, it violates the letter and spirit of the *Texas* rule and the fundamental legal principles that gave rise to it. Second, it improperly ignores state law. Finally, the various technical justifications given by the Master and others for this departure from precedent are unavailing.

1. *The "Issuer as Debtor" Recommendation Violates the Rule of* Texas v. New Jersey *and Contravenes the Legal Underpinnings of the Doctrine of Escheat*

(a) *Texas* v. *New Jersey* demands two elements: a known "debtor," who owes the money or property; and a "creditor"—who is either "known" but "lost" (under the primary rule) or "unknown" (under the backup rule)—to whom the debtor owes the money or property but cannot pay it. The backup rule provides a simple, clear, black-letter rule for governments and businesses to live by: "if [the creditor's last known] address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210. Based on this clear, black-letter rule, 45 jurisdictions have joined together in the Unclaimed Property Clearing House, with an agreement interpreting "debtor" as "holder" in the

context of the backup rule, and have organized computer programs and other systems to carry the rule into practice.

The Report makes a simple inquiry complicated. Rather than looking to the current debtor, the Report "interprets" the rule by purporting to discover that the "debtor" under the *Texas* rule actually means "*former* debtor." But the usual definition of a "debtor," in both ordinary and legal usage, is someone who—in the present tense—owes something to another. *See* Webster's Third New International Dictionary 583 (1986) (defining "debtor" as "one owing money to another"); Black's Law Dictionary 404 (6th ed. 1990) (defining "debtor" as "[o]ne who owes a debt to another who is called the creditor; one who may be compelled to pay a claim or demand; anyone liable on a claim, whether due or to become due," and quoting the definition in U.C.C. § 9-105(1)(d), "the person who owes payment or other performance").

The holders in this case meet the usual definition of a "debtor"—they owe the distribution in their hands to the creditor, whose identity is not known. It is not surprising that the widely adopted uniform acts recognize that the "holder" of the unclaimed property (the one with the obligation to hand it over to the escheating state) is the "debtor" under the *Texas* rule. *See supra* p. 10. Indeed, the official commentary to Section 3 of the 1981 Uniform Act states that in *Texas* v. *New Jersey* "[t]he Supreme Court ruled that, when property is owed to persons for whom there are no addresses, the property will be subject to escheat by the state of the holder's domicile." 8A Uniform Laws Ann. 634 (1983). And all agree that under relevant state commercial and corporation law and practice (adopted and recognized by all 50 states and the District of Columbia), the issuer is neither a "creditor" nor a "debtor" at the time of escheat regarding the dividends and interest that, as here, have found their way into the hands of a recordholder (or a participant in a depository recordholder): once an issuer has made a

distribution to the recordholder of the security, the *issuer* no longer has any right or interest at all in the distribution; and having discharged its obligation by paying the recordholder, it is certainly not a "debtor." *See infra* pp. 37-39.

The Report's recommendation actually requires the word "debtor" to carry different meanings for purposes of the primary and backup rules in the context of the situation involved in this case. To implement the primary rule, which is that property is subject to escheat "only by the State of the last known address of the creditor, as shown by the debtor's books and records," *Texas* v. *New Jersey*, 379 U.S. at 682,[36] one must look to the "holder's" books and records for a lost creditor with a last-known address. The person to whom the *holder* may be owing the funds would not be shown by the *issuer's* books and records; the issuer's records in these situations would show only a depository, broker or bank which has been paid. But once it is determined that the "primary rule debtor" (here, the holder) shows *no* last-known address for the creditor, the Master then stops viewing the holder as "debtor" and the issuer then becomes the "debtor" for the purposes of determining the application of the backup rule. Thus, one must read the *Texas* and *Pennsylvania* cases as using the word "debtor" in different senses in the same opinion[37] or in the same paragraph,[38] if one follows the Master.

(b) The *Texas* rule was not drawn out of thin air. It was the culmination of a long line of cases defining the limits of a state's power to escheat. *See supra* pp. 2-6. By failing to consider these cases, the Report's recommendation exceeds those limits.

In his call for a "lawyerlike definition of state power over this subject," Justice Jackson summarized "[t]he

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[36] For almost identical language, see *Pennsylvania* v. *New York*, 407 U.S. at 210.

[37] *Texas* v. *New Jersey*, 379 U.S. at 677, 679, 681.

[38] *Pennsylvania* v. *New York*, 407 U.S. at 210.

two usual examples of escheat [that are] properly incidents of sovereignty":

> First, sovereignty in the sense of actual dominion over the property escheated. . . . The right to appropriate intangible property constructively within the state . . . has been upheld by this Court . . . . Second, sovereignty over the person, as a resident or citizen, will justify the state in stepping into his shoes as claimant of abandoned property.

Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. at 560-61 (Jackson, J., dissenting).[39]

Justice Jackson thus synthesized the two sources of a state's power to escheat: power to step into its citizen's shoes as a claimant, and power to seize funds from a person subject to its jurisdiction. The *Texas* rule does not supplant these principles; it builds on them, providing a framework for the states to exercise their escheat power within the limits imposed by their status in our federal system as coequal sovereigns and by the Due Process Clause. The primary rule allows the last known sovereign to step into the creditor's shoes and claim the funds for her. The backup rule allows the state where the intangible property is constructively located to claim it if no appropriate sovereign can be identified under the primary rule.

Under the Report's recommendation, however, neither the primary rule's state—which steps into the shoes of the *creditor*—nor the backup rule's state—which exercises constructive dominion over the *debt*—is allowed to escheat. Instead, a third state—with no relationship whatever to the holder of the funds or to the lost claim-

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[39] For background, see Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319-23 (1961); Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 Ky. L.J. 302, 302-04 (1947); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. at 240; *Late Corp. of the Church* v. *United States*, 136 U.S. at 56-57.

ant—has priority. Thus, as long as the rule under state law is that the issuer is not a "debtor," it would appear to go beyond the traditional limits of the Due Process Clause to permit the state in which the issuer is located, but where the state-law debtor is not, to escheat in an "owner/address unknown" situation. Where a state, under its own laws, is not a place where the "debt" (that is, the "debtor") is located, or a state where the creditor (as per her last-known address) is located (since the identity of the creditor or her address is unknown) there might be no connection at all between the escheating state and the holder of the funds.[40] To be sure, the states might amend their corporation laws to provide that payment by an issuer to the record owners does *not* discharge the issuer's obligations, and the due process limitations thus might be overcome (assuming that the corporate domicile rule remains intact); but that is not the law today, and surely the disastrous effect of such a rule on corporations and municipal issuers would dissuade most legislatures from adopting it. Accordingly, serious substantive due process concerns are implicit in the Master's recommendation on this score—concerns that appear insurmountable if both rule changes are adopted.

In personam jurisdictional due process issues also suggest that the rule recommended by the Master is so extraordinary as to be suspect. Under the Report's recommendation, a state making claim to the property at issue might have no contacts whatever with the holder.

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[40] *National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 554 (1977) (Due Process Clause requires some "nexus" between out of state seller of goods and state imposing sales and use taxes); *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753, 756 (1967) ("'some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax'") (quoting *Miller Bros.* v. *Maryland*, 347 U.S. 340, 344-45 (1954)); *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451, 455 (1962) (Due Process Clause precluded Texas' taxation of insurance premiums where "only connection between Texas and the insurance transaction is the fact that the property covered by the insurance is physically located in Texas").

In such a situation, the Master conceded that the holder would be protected from being sued in the courts of the state claiming the right to escheat under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).[41] The Report, however, observes that "nothing in those [recommended] rules would prohibit the state of incorporation from suing in the courts of the state where the unclaimed property was located." Report 69.

That response reveals just how dramatically this proposal would cut the doctrine of escheat away from its roots and impair the ability of states to enforce their escheat laws. Creating a regime in which states were required to resort to the courts of sister states would be an unseemly derogation from the independence afforded to coordinate sovereigns in our federal system. *See Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) ("no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not reality, of partiality"). It would also unduly burden escheat collection. It is no answer to say that—*with permission*—a state might be able to collect escheatables in a sister state's courts.[42] In order to ensure compliance with their escheat

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[41] Report 69; *see also* Report of John F. Davis, Special Master, *Pennsylvania* v. *New York* (November 1971) at 18-19 (confronting the "serious question as to the legality of cutting off or impairing an individual's property rights by an *in rem* proceeding" in a "forum having no continuing relationship to any of the parties to the proceeding"). The Court did not need to resolve the Master's "doubts as to the constitutionality of the alternative formulas for escheat" (*id.* at 20) because it was presented with no good reason to "carv[e] out an exception to the *Texas* rule." 407 U.S. at 214.

[42] We may pass over, for these purposes, whether states would be *required* to open their courts to the enforcement authorities of sister states. *See* Restatement (Second) of Conflict of Laws § 89(b) & Reporter's Note, Taxes (1967) ("it is an 'open question' whether a State is under constitutional compulsion to enforce the revenue laws of a sister State") (citing *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 275 (1935)).

regimes, most states also impose penalties for failure to comply.[43] And no state is required to enforce another's penal laws. *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892); Restatement (Second) of Conflict of Laws § 89 (1967). Under the Master's proposal, the states would thus be left with the prospect of sending attorneys throughout the nation to pursue recalcitrant holders of escheatables without the incentive of penalties for noncompliance.

2. *The Report's Justifications for Its Departure from Ordinary Law and Practice Are Without Substance*

(a) Under well-established and universally-accepted state law and practice, the issuer is neither a creditor nor a debtor once it has paid dividends or interest to the recordholders. Instead, the holder of the unclaimed property, with no obligation to return it to the issuer, is the "debtor."

First, the issuer is not the nominee holder's "creditor." The brokers, banks and depositories here involved are not in any way agents of the issuer acting on its behalf. Rather, the issuer makes distributions to them as record owners, who are fully entitled to the distributions.[44] Once a distribution is made, the issuer has no contractual or legal right to its return.[45] The evidence in this case confirms that these institutions do not act as agents for issuers. Indeed, DTC, the largest depository, stated that it acts "for the benefit of its users or Participants, *not*

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[43] *See* Egon Guttman, *Modern Securities Transfers* ¶ 16.06, S16-2 to S16-29, col. 10 (3d ed. Cum. Supp. 1991).

[44] Alternatively, another holder—a depository—makes a distribution, based on its record, to its participants.

[45] At oral argument before the Master, no counsel disputed this point, though the Master asked it of all. Transcript at 12, 37, 44-47, 87, 95-96 (Feb. 14, 1991). The only exception, of course, is the case of errors by the issuer's paying agent. *See* DeCesare Dep. 140-41, 270.

a depository acting as an agent for issuers." DTC Statement (emphasis in original); *see* DeCesare Dep. 263-64 (issuers do not reimburse DTC for expenses). Its contracts with issuers confirm that it is acting in behalf of its Participants rather than issuers. *See* DTC Ex. 4. Similarly, the stockholders' and banks' contracts with their customers confirm that it is the customers—not the issuers—who are their principals. *See, e.g.*, Tucker Exs. 2, 3; Merrill Lynch Ex. 2; Prudential-Bache Ex. 6; Citibank Ex. 6. No nominee record owner ever returns properly-paid distributions to an issuer.

Second, the issuer is not a "debtor" of the beneficial owner or anyone else once it has paid the record owner. The use of record ownership—as distinct from beneficial ownership—is "universally accepted in the United States." 2 Model Business Corp. Act Ann. § 7.07, at 568 (3d ed. 1991). References to "shareholder" in the corporation laws of substantially all the states are defined as references to the recordholders.[46]

The Uniform Commercial Code, effective in every state and the District of Columbia, allows the issuer to "treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner." U.C.C. § 8-207(1) (App. A pp. 23a-24a). This right extends to the payment of dividends and other distributions. The debt created by the declaration of a dividend is discharged by payment to the record owner, and the issuer will not be liable to the beneficial owner on account of such payment. The Report acknowledges this. Report 25 (quoting 1990 Com-

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[46] The relevant statutes are listed in Appendix D at pp. 86a-89a. *See, e.g.*, Tex. Bus. Corp. Act Ann. art. 1.02(A)(15) (West 1980) (shareholder means "the person in whose name shares issued by a corporation are registered at the relevant time in the share transfer records maintained by the corporation"); Ala. Code § 10-2A-2(13) (1987) (shareholder means holder of record); Cal. Corp. Code § 185 (1990) (same). Only Massachusetts does not define shareholder.

mentaries of the Permanent Editorial Board to the Uniform Commercial Code, PEB Commentary No. 4).[47]

Finally, commercial practice is fully in accord with these principles. Thus, for instance, debt securities routinely include provisions confirmatory of the issuer's rights in U.C.C. § 8-207. One authoritative source suggests a provision reading:

> The Company, the Trustee and any agent of the Company may treat the person in whose name this Debenture is registered as the absolute owner hereof for all purposes whether or not this Debenture be overdue, and neither the Company, the Trustee nor any such agent shall be affected by notice to the contrary.

American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* § 2.2 at 134 (1986).

(b) The Master (and the Intervenors) do not deny any of this. They do, however, offer several technical and metaphorical reasons for ignoring it:

First, the Report contends that the role of record owners and other nominee holders should "mirror the (undiscussed) handling of the agents or intermediaries in *Texas* v. *New Jersey*—they become (almost) transparent." Report 37. The Report thus makes a fundamental error: it treats the paying agents and banks holding funds on behalf of Sun Oil in *Texas* v. *New Jersey* as if they were the same as recordholders. *See also id.* at 18 n.15.

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[47] *See, e.g., De Anda* v. *De Anda*, 662 S.W.2d 107, 109 (Tex. Ct. App. 1983); *Cooper* v. *Citizens Nat'l Bank*, 267 S.W.2d 848, 853 (Tex. Ct. App. 1954); *In re DePew's Estate*, 41 N.Y.S.2d 19, 27 (Surr. Ct. 1943); *Garvy* v. *Blatchford Calf Meal Co.*, 119 F.2d 973, 975 (7th Cir. 1941); *see also* 12 Charles R.P. Keating & Gail O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations* § 5504 (1985 rev. ed.); 7 E.F. White, *Thompson on Corporations* § 5323 (2d ed. 1927). The notion that this provision is merely an "affirmative defense" is completely irrelevant. It is true that, in *any* action on a debt, a defense of "payment" must be pleaded affirmatively. *See, e.g.*, Fed. R. Civ. P. 8(c). But "payment" is a substantive discharge of the liability.

Wherever located, paying agents and banks are required to return unpaid money to their principals, either by contract or common law principles of agency. *See, e.g.*, Wellener Dep. 57-64, 92-94, 145-48; Citibank Ex. 3 at C156 (describing typical contractual provision). Paying and transfer agents are, in corporate practice, agents of the company; they keep the company's stock records; they disburse, on behalf of the company, the cash or shares to which the holders of record of the company's securities are entitled. The cash is provided them by the company, and, as to stock dividends, the company gives the transfer agent and registrar an order to authenticate, countersign and distribute new issues of stock by way of a stock dividend. Wellener Dep. 17-18, 55-57, 69-72; Citibank Exs. 2, 3; *see generally* Egon Guttman, *Modern Securities Transfers*, Chapter 9 (Issuer and Its Agents) (3d ed. 1987). DTC is not a paying agent. The discovery in this case confirms that *paying agents* (unlike nominees) return unclaimed distributions *to the issuer*. Wellener Dep. 58, 93, 130.

That is the reason why Sun Oil's paying agents were ignored in *Texas* v. *New Jersey*.[48] The brokers and other holders here, in contrast, do not act for the issuer. It is not the issuer's money that they hold; indeed, their claims to the money are good against the whole world, save the beneficial owner [49] or the escheating state.

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[48] If the paying agents in the *Texas* case had any creditor, it was Sun Oil itself; but Sun Oil in turn was a "debtor" of the "lost" or "unknown" persons to whom it owed the funds. It was this as certainly as if it had kept the funds it owed these people in currency in its office desk drawers. The fact that Sun Oil, in a normal fashion, kept the money in banks does not affect the fact that it was the "debtor." It did not discharge its debts by putting money for them into its bank account. By contrast here, by paying the recordholders, the issuers discharge their debts.

[49] Good against the beneficial owner also if the holder is owed margin debt by the beneficial owner.

Second, the Report substitutes metaphors for legal reasoning. The process is said to be a "continuum"; the holders are mere "intermediaries" or "conduits" of the money. But all holders of cash are "conduits." That is the nature of money—it passes from one hand to another. The nominee system's purpose is *not* to promote the distribution of dividends, *see supra* pp. 13-17, but nominees still must make distributions; and they do so as obligors to their participants or customers. The Report also considers nominees "bailees" as to the distributions. Report 28. The term "bailee" might be descriptive of someone holding a sheaf of currency in his briefcase, but what is involved here is money which is kept in bank accounts and, indeed, used in the business of the depositories and brokers holding it. What is involved is a set of relationships between "creditors" and "debtors."

If they demonstrate anything, these metaphors demonstrate only the Report's inconsistency with *Pennsylvania* v. *New York*. Indeed, the Report acknowledges that Western Union was *more* of an "intermediary" than the holders are in this case. Report 36 & n.34. Yet, in that case, when the backup rule applied, it was the "intermediary's" state that was permitted to escheat. If the Master's reasoning in this case had been applied to *Pennsylvania* v. *New York*, then the "debtor" would have been the *sender*, or "originator" of the money. It was not. Senders—like payees—were "creditors" of Western Union; their states were entitled to claim where there were addresses and the *primary* rule could apply.

(c) The Intervenors also made several technical arguments in support of their "interpretation," although even the Master does not embrace these. *First*, they pointed to Section 7.23 of the Model Business Corporation Act ("MBCA"), which was introduced into the text of the MBCA as part of the overall 1984 revision of the Act, as a successor to an amendment to the 1969 version of

the MBCA, promulgated in 1973.[50] Like its predecessor, Section 7.23 allows (but does not require) a corporation to "establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder." [51] This provision is irrelevant here. It is wholly optional upon the issuer (*and* the beneficial owner, who must "opt in"). Despite the fact that these provisions have been on the books in at least some states for close to twenty years, there is no evidence in the record that any of them have been used at all by *any* publicly-held corporation in connection with the distribution of dividends or interest. The reason is obvious: the issuers wish to discharge their obligations of payment of dividends and interest in a way which is convenient and certain and which minimizes the chance that they will have to pay twice. By employing the historic system, reflected in U.C.C. § 8-207(1) and in the statutes to which Section 7.23 is a permissive exception,[52] issuers can discharge their obligations by paying the record owners. Having done so, they are free of any claims except such as may arise from the issuer's fault, or its transfer agent's fault, in not properly posting transfers to its record.

Second, the Intervenors pointed to SEC information and proxy rules designed to allow communications between issuers and beneficial owners. SEC Regulations 14A and 14C, 17 C.F.R. §§ 240.14a-1 to 240.14c-101. But

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[50] *See* Section 2(f) of the 1969 MBCA, revised provision, published in *Changes in the Model Business Corporation Act*, 29 Bus. Law. 947 (1974). Between statutes based on old Section 2(f), as revised, and those based on Section 7.23 of the 1984 MBCA, thirty jurisdictions authorize such a procedure. 2 Model Business Corp. Act Ann. § 7.23 at 619-21 (3d ed. 1991). Section 7.23 is at App. A p. 28a.

[51] The Official Comment notes that "[t]raditionally, a corporation recognizes *only* the registered owner as the owner of shares." 2 Model Business Corp. Act Ann. § 7.23 at 617 (3d ed. 1991) (Official Comment). (Emphasis supplied.)

[52] *See supra* p. 38 n.46; Appendix D at pp. 86a-89a.

these rules have nothing to do with dividends. Under these rules, banks and brokers: (1) on request, for a fee, must provide issuers lists of beneficial owners who do not object to disclosure of their identities and positions, 17 C.F.R. §§ 240.14b-1(b)(3)(i), 14b-2(b)(1)(i), 14b-2(b)(4)(ii), 14c-7(b); and (2) must transmit shareholder communications such as annual reports and proxy materials to beneficial owners. 17 C.F.R. §§ 240.14a-7, 14a-13, 14b-1(b), 14b-2(b)(3), 14c-7.[53] App. A pp. 53a-75a.

The first identified portion of these rules, under which issuers may request lists of "non-objecting beneficial owners" ("NOBO's"—not objecting, that is, to disclosure of their identities), is designed to let issuers communicate directly with beneficial owners. The record indicates that actual use of that portion of the rules for issuers to communicate directly with owners who are not of record is highly limited; in most cases the issuers simply send a requested quantity of shareholder communications to the banks and brokers who redistribute it to their customers.[54] But even if one is to assume that there is substantial direct communication from issuers to beneficial owners under these rules, the rules' silence as to *dividends* speaks volumes. The incremental cost of bulk transmission of shareholder communications is nominal, and "overages" in

[53] Similarly, in the context of such communications, DTC's procedures "preserve the depository's transparency as an element in the chain of communication between corporate issuers and their beneficial owners of their securities." DTC Ex. 17 at 3. On the other hand, the depositories are completely untransparent with respect to the payment of distributions. *See* DeCesare Dep. 470-74.

[54] The Senior Vice President for operations of Prudential-Bache characterized direct mailings by issuers to brokerage-house customers as "rare." Cirrito Dep. 52. An operations officer for Citibank, the only bank custodian whose deposition was taken, also characterized it as "rare" as to Citibank's custodial customers, did not realize that the bank was under any obligation to provide the customers' identities, and apparently had never heard of the term "NOBO." Scott Dep. 123-24.

such communications—the result of double mailings—do not result in escheatable property. If the issuer sends a few hundred too many proxy statements or annual reports to the nominees on its "position list," [55] or if it happens to use the NOBO rules and directly sends mailing pieces to stockholders who are also receiving them from their brokers, it has lost very little. Extra annual reports are "publicity" and may be distributed on a complimentary basis; dividends are not. No provision of the present legal system, state or federal, requires issuers to distribute dividends or interest directly to beneficial owners whose securities are registered in someone else's name, and the record does not reflect that any issuer does.[56] The reasons are obvious. No issuer is willing to accept "overage" in the distribution of money, as it might be with copies of an annual report or of a message to its stockholders recommending against a hostile tender offer.

Third, the Intervenors say that the funds at issue are not the brokers' funds in any sense, because the brokers must keep them in a special segregated account for the benefit of the unknown owners pursuant to Rule 15c3-3 under the Securities Exchange Act. 17 C.F.R. § 240.15c3-3.

The rule means nothing of the kind. In the first place, Rule 15c3-2 allows brokers and dealers to use their customers' "free credit balances" "in connection with the operation of the business of such broker or dealer," so long as the broker or dealer periodically informs each of its customers that it does so. App. A pp. 75a-76a. Even if the broker does not know the identity of the customer to

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[55] Depositories are required by the SEC to provide issuers with a list of the holdings of their participants in the issuer's securities, upon payment of a fee by the issuer. SEC Rule 17Ad-8(b), 17 C.F.R. § 240.17Ad-8(b).

[56] Indeed, Vice President DeCesare of the DTC insisted that "the industry would have a serious problem" with bypassing the record-holders and distributing dividends directly to beneficial owners, and that DTC would not be operationally able to accommodate an issuer who wished to do so. DeCesare Dep. 470-74.

whom it owes the money, it can "use the money in its business" (subject to any other pertinent rules), so long as it sends out the periodic notices to all its customers.

The Intervenors seem to rely on Rule 15c3-3(e), the requirement for a "Special Reserve Bank Account for the Exclusive Benefit of Customers." App. A pp. 76a-78a. However, the calculation of the moneys to be kept in the special reserve account (pursuant to the Rule's Exhibit A) (App. A pp. 78a-79a) is not made on a customer-by-customer basis but is made on an overall basis. Moreover, the account need only be maintained to the extent that total credits (such as customers' free credit balances) exceed total debits (such as margin debt owed by customers).[57] Where brokers maintain substantial debits, they are thus free to use much (and, depending on the circumstances, sometimes all) of the customers' "free credit balances" in the general operation of their businesses.

3. *The "Issuer as Debtor" Recommendation Improperly Ignores State Law*

The relationships giving rise to the property at issue here are created by state law, as is the state's power to escheat. Federal law, which operates "on top" of the state-created system, serves two federal purposes here: it protects persons from deprivation of their property without due process; and it minimizes interstate disputes by providing a stable and predictable means of resolving conflict between states. As in any other property regime, it does so best by minimizing any disruption of the underlying state law and by maximizing predictability for those who must rely on it.

One would think that the *Texas* rule, which has proved abiding for nearly thirty years, would be easily applied

[57] *Cf.* Cirrito Dep. 78-81. Thus, if a stockbroker had $1 billion in cash credit balances owing by it to wealthy retired persons in the Hamptons, and had extended $1.1 billion in margin credit to traders in Manhattan, there would be no balance whatsoever required in the Special Reserve Account for anybody, even the people in the Hamptons.

to this case. No analysis of "relevant attributes," no "teasing out" of "ambiguities," no "tie-breaker" is needed; well-established, uniformly-applied and easily-understood principles of state commercial, contract and escheat law provide straightforward answers to the questions posed by *Texas* v. *New Jersey*: who is the debtor?; do the debtor's books and records show a last known address?; and, if not, what is the debtor's state of incorporation?

The Report rejects this straightforward approach, insisting that "federal common law" must be different from state law because "[t]here was no reason to believe that the Supreme Court was using these terms ['debtor' and 'creditor'] in any specific state-law sense in its prior escheat opinions." Report 28.

Although the Report acknowledges that federal common law should not "ignor[e] all state law rules,"[58] it proceeds to do just that. Indeed, its conclusion that the state of the *issuer*, rather than that of the *holder*, is entitled to escheat unclaimed funds owed by the holder to unknown creditors ultimately rests on its determination that the federal common law rule need not "track one [*i.e.* the one adopted by all 50 states!] particular manifestation of a state law rule." Report 26. But this case is the classic one for the application of state law to determine who is the "debtor" and who is the "creditor"; it is uniform, it defines the legal rights of the state and private actors involved, and federal policy would be enhanced by its application.

That state law should ordinarily provide the basis for the federal rule is apparent from what Professors Hart and Wechsler have called the "interstitial character of federal law." Henry M. Hart & Herbert Wechsler, *The*

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[58] Report 25-26; *see Connecticut* v. *Massachusetts*, 282 U.S. 660, 670 (1931) ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require.").

Federal Courts & The Federal System 435-36 (1953).[59] Federal law "builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. . . . [F]ederal law often embodies concepts that derive their content . . . from the states." *Id.* at 436.

In a number of situations, federal law protects rights only to the extent that they exist under state law. Indeed, while the Due Process Clause protects "property" interests, those interests "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul* v. *Davis*, 424 U.S. 693, 710 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

Thus state law does not merely "inform" federal law for purposes of the Due Process Clause, but "defines" it. So it is in this case. It is only where private property interests are recognized by a state, and, at the same time, more than one state claims the right to escheat or take custody of the property, that the states face a conflict among themselves over which one may claim intangibles. The inquiry thus begins with and is defined by state law. In light of the nature of the federal interests at stake here (which are fully complementary to and derivative from state law), state law appropriately defines the "debtor" and "creditor" relationships—as it defines "property" interests in other cases where a federal right protects or acts upon such interests.[60]

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[59] This famous passage is now reprinted in the third edition (1988) at page 533.

[60] A myriad of other federal rights are, of course, entirely defined by state law. *See, e.g., Appleby* v. *City of New York*, 271 U.S.

Where federal purposes are best achieved by incorporation of state law, this Court does not hesitate to do so—even in situations where state law is *not* the source of rights under federal law, as it is here. *See, e.g., Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-52 (1939) (per Justice Frankfurter).

The "appropriate[ness]" of giving "due regard for local institutions and local interests"[61] is at its apex where traditional state interests—such as property rights or the regulation of corporations—are at issue. The Court is, in fact, reluctant to "federalize" the common law in areas traditionally regulated by the states, like corporation law and property law. Rather, the Court will incorporate state law into the federal rule, even if state law does not operate *ex proprio vigore*. *See, e.g., Kamen* v. *Kemper Fin. Servs.*, 111 S. Ct. 1711, 1717 (1991) ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.").[62]

Most recently, this Court confirmed that "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." The Court therefore looked to the Uniform Commercial Code for determination of whether and when transfers of "property" occurred for purposes of federal bankruptcy law. *Barnhill* v. *Johnson*, 112 S. Ct. 1386, 1389 (1992).

364, 380 (1926) (Contract Clause); *Ford* v. *Ford*, 371 U.S. 187 (1962) (Full Faith and Credit Clause).

[61] *Board of County Comm'rs*, 308 U.S. at 361.

[62] *Accord Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of

Here, no federal interest calls for the creation of new federal rules as to who is a debtor to be developed on a "case-by-case" basis; indeed, the opposite is true. *Texas* v. *New Jersey*, 379 U.S. at 679. Even if state laws were not uniform (as they are here) we submit that the federal law of escheat should still build upon the laws of the various states and apply to whoever was a debtor or creditor under those laws. But here the pertinent state law is exactly the same in all 50 states. To propose a federal common law that varies from *uniform* state law would appear to add a "big brother" element to analytical error.

4. *"Fairness" as a "Tie-Breaker"*

With the technical rationale of the Master's recommendation put aside, as we submit it must be, the Master's recommendation amounts to an intuition that the rule contended for by Texas is "as a matter of fairness" preferable. Report 35.

The "fairness" conclusion is reached essentially in populist terms—that it would be best to send the money back where it came from. Doing this was said to be

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property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' ") (quoting *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944)); *Callaway* v. *Benton*, 336 U.S. 132, 138-39 (1949) (state law, not federal law, determines rights of shareholders to vote on corporation's reorganization plan); *see also Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting) (arguing for limits on powers of Congress and emphasizing the "need to protect traditional [state] governmental functions").

Even where rights traditionally regulated by the states are not at issue, "the municipal law relating to like questions between individuals is to be taken into acount, [although] it is not deemed to have controlling weight." *Connecticut* v. *Massachusetts*, 282 U.S. at 670 (water rights between states). Here, the Report gives no weight at all to state law.

"particularly appealing in the case of unclaimed payments on municipal obligations." Report 35. In essence, even though the state has, for example, borrowed $10 million and owes a three percent semiannual payment on its bonds, once it pays its recordholders the $300,000 in question, it is entitled to a discount should some of the money not find its way into the pockets of the beneficiaries, or should some person receive more than his share. The fairness of giving the money back to the issuing state or to the state in which an issuing municipality is located in such a situation is hardly evident.[63] It hardly seems fair to reverse some of a debtor's obligations simply because a breakdown has occurred in the distribution chain after the debtor has discharged its debt by paying the recordholders. It could be argued with some force that the case where the issuer is the state is, from a legal standpoint as opposed to a populist one, the least appealing case for the application of the Master's rule.

The argument of "send it back where it came from" has been heard in this Court before. The Report claims that its recommendation

> is more consistent with the precedent to support escheat (or custodial taking) by the jurisdiction that was connected with the entity that was the originator of the transaction (or the original owner of the funds) over the jurisdiction that was connected with the entity that simply holds the funds at the time no further distributions are possible.

Report 38. This very premise was put forward by the State of Texas in *Texas* v. *New Jersey*: "Texas argues in particular that at least the part of the intangible obligations here which are royalties, rents, and mineral pro-

[63] The Report's more frank recommendation for a change in the applicable law, to determine, as to corporations, the domiciliary state by reference to a test other than the state of incorporation, seems to be based on an effort to apply the Master's same notions of "fairness." *See* Report 35 n.32; Part B, *infra* pp. 61-69.

ceeds derived from land located in Texas should be escheatable only by that State." 379 U.S. at 679 n.9. The Court rejected Texas' proposed "exception to [the] general rule concerning escheat of intangibles." *Id.* Here, the Report has taken an "exception," not then permitted by the Court, and turned it into the general rule—since the intangibles originate from a state unconnected with the holder, the Report posits that the "originating" state is entitled to escheat.[64]

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[64] In addition, this "policy" operates from a false premise—that the issuer is necessarily the "originator of the transaction." Often the issuer is, itself, a "conduit." Mutual funds are the most obvious example. The dividends (as opposed to capital gains distributions) that they pay are derived entirely from the dividends and interest they receive on their portfolio securities. The same is the case with "closed-end" investment companies, whose stock is often listed on securities exchanges. Almost 10 percent of U.S. corporate stock is held by mutual funds. *See Flow of Funds* at 44. Since, under the Investment Company Act, mutual funds and closed-end investment companies generally use bank custodians, Investment Company Act of 1940, § 17(a)(1), 15 U.S.C. § 80a-17 (a)(1), their portfolio holdings are included in the overall figures as to the percentage of corporate stocks held by nominee intermediate holders.

Other examples of the "issuer as conduit" abound. One of the leading securities phenomena of the 1980s was the growth of Collateralized Mortgage Obligations ("CMO's"). *See* Michael Lewis, *Liar's Poker*, at 103-51 (1989). The current volume of these obligations outstanding is $1.1 trillion, *Flow of Funds* at 46. These obligations consist of undivided interests in pools of residential mortgages. The underwriters for these obligations frequently seek geographic diversification of the pools to make them more marketable. *See* Kenneth G. Lore, *Mortgage Backed Securities* at 3-14, 9-22 (1991 ed.). The trust in which the mortgage obligations are placed is the "issuer." To treat the issuer trust as the "debtor" and to send the escheated funds to the state of the trustee on the theory that one is "sending the funds back where they came from" is ludicrous in the CMO situation. In addition to CMO's, issues of other securitized receivables are now common, including pass-through securities involving car loan receivables, general credit card receivables, and the like. *See* William W. Bartlett, *Mortgage Backed Securities* 44 (1989). The Master's theory completely ignores and breaks down on securities such as these.

At bottom, the Master's recommendation appears to be for an alteration, not an application, of the rules established by this Court. It is one that proceeds from principles that, even if meritorious, ought, institutionally, to be implemented by Congress in making an exception to the rules—as it did in the money order situation—rather than by this Court.

B. The Master's Recommended "Modification" of the Backup Rule to Replace the State of Incorporation with the State of Principal Executive Office Must Be Rejected

The backup rule provides that if the creditor is unknown or its last known address cannot be found, "the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210-11. The Report urges the Court to discard this rule and substitute "the jurisdiction of the entity's principal domestic executive offices." Report 49. No party sought this departure from the *Texas* and *Pennsylvania* backup rule until the Master, *sua sponte*, suggested it in his draft report.[65] Although the Texas group of Intervenors did not suggest the change, opportunism soon prevailed, and they now embrace the Master's desire to leave by the wayside the "salutary rule of *Texas* v. *New Jersey*" (Brief of *Amici* at 10).

The Report recommends that this Court, in a way which the Report claims is "minor," depart from the doctrine of *stare decisis*. We discuss later the constraints of *stare decisis*, which are involved both on this point and in the Master's unacknowledged change in the backup rule—declaring the "issuer" to be the "debtor." For the moment, we note that the Report does not suggest, within

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[65] The Master also denied Delaware's request for discovery and an opportunity to demonstrate the detrimental effects of the proposed change; he considered such inquiry to be "pointless." Discovery Order No. 15 (Jan. 28, 1992) at 1.

the framework of this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989), that there has been any intervening development in the law or any confusion created by an unworkable decision. Instead it seems to rest solely on an implicit suggestion that the holding in the *Texas* and *Pennsylvania* cases has become "outdated and after being tested by experience, has been found to be inconsistent with the sense of justice or with social welfare." *Patterson* v. *McLean Credit Union*, 491 U.S. at 174 (internal quotations omitted).[66] But even here the Master's discussion does not establish that continued application of the "state of incorporation" rule is inconsistent with the sense of "justice" or with "social welfare."

1. *Intervening Developments in the Law Fully Comport with* Texas v. New Jersey's *Corporate Domicile Rule*

In *Texas* v. *New Jersey*, the Court rejected the rule the Master now recommends (albeit in a slightly different permutation). 379 U.S. at 680. The Report points to no development in the law that has "removed or weakened the conceptual underpinnings" of the corporate domicile rule, or that has rendered it "irreconcilable with competing legal doctrines." *Patterson* v. *McLean Credit Union*, 491 U.S. at 173. In fact, the conceptual underpinnings of the rule retain complete vitality.

Even if the Report were correct that the Court's choice of the state of incorporation rule was essentially arbitrary in 1965 (Report 41), it points to no intervening legal developments rendering that choice invalid today. But, like the Report's deconstruction of the word "debtor," its recommendation that this time-honored rule be dis-

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[66] Whether this is a valid basis for the overruling of a precedent at any time where the matter is one capable of correction by Congress was treated as questionable by the Court in *Patterson* v. *McLean Credit Union*, 491 U.S. at 174.

carded proceeds from a fundamental misunderstanding of the source of the *Texas* rule. The Report erroneously assumes that the backup rule was merely a *"proxy for location"* (Report 41 (emphasis by the Master)). That is not the case. The *Texas* rule developed out of the traditional relationship between a corporation and the state which gave rise to its existence.

The Court's early escheat decisions recognized that a state has power over its corporate citizens holding unclaimed funds to require them to turn such funds over to the state, *Security Sav. Bank* v. *California*, 263 U.S. 282, 285 (1923), and that the power of a corporation's state of incorporation—"jurisdiction over the debtor"—"provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor." *Standard Oil Co.* v. *New Jersey*, 341 U.S. at 439. Such funds are, in Justice Jackson's words, "constructively within the state" (*Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. at 560) precisely because they are possessed by its corporate citizen.

The *Texas* backup rule built on these decisions, allowing the state of corporate domicile to take possession of the funds in situations where the primary rule could not be applied. Since the *Texas* decision, this Court has aptly summarized the state's historical power over its corporate citizens, and the reasons for such power:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (quoting *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

And, fundamentally, the *CTS* decision underlined the role of the incorporating state in our corporation-law system: "It thus is an accepted part of the business landscape in this country for the States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters . . . ." 481 U.S. at 91. The *CTS* decision recognized the incorporating state's unique power to regulate corporate governance in the face of federal legislation claimed to be preclusive of the exercise of that power. *CTS* does not stand alone: other cases decided by this Court and the courts of appeals in the years since the *Texas* case have upheld the powers of the incorporating state, and its legislation, against suggestions that a "federalized" rule should supersede them. *See Burks* v. *Lasker*, 441 U.S. 471, 478 (1979); *Santa Fe Indus.* v. *Green*, 430 U.S. 462, 478-79 (1977); *Cort* v. *Ash*, 422 U.S. 66, 84 (1975); *Sadler* v. *NCR Corp.*, 928 F.2d 48, 53-54 (2d Cir. 1991); *Business Roundtable* v. *SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990) (invalidating SEC's one share/one vote rule because it would "impinge severely on the tradition of state regulation of corporate law"); *Amanda Acquisition Corp.* v. *Universal Foods Corp.*, 877 F.2d 496, 506-07 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989); *Tyson Foods, Inc.* v. *McReynolds*, 865 F.2d 99, 101-02 (6th Cir. 1989).

While it is true that states *also* have personal and legislative jurisdiction over foreign corporations doing business in the state, the well-recognized and firmly-established relationship between the corporation and its chartering state was, for purposes of the backup rule, chosen by this Court in *Texas* as superior, and nothing has changed to undermine that choice. The escheat of unclaimed funds in the hands of the state's corporate citizens is a natural and well-established function of its sovereign power.

2. *Discarding the Rule of Corporate Domicile Would Be an Administrative Disaster*

The Report's primary justification for its recommendation to jettison the rule of corporate domicile is the "substantial experience with rules that look to the debtor's chief (or principal) executive office." Report 42. The Report in no way suggests that the traditional rule is "unworkable," but mistakenly asserts that its alternative would cause very little disruption to a system that has worked exceptionally well. The Report relies primarily on Section 9-103(3) of the Uniform Commercial Code. App. A pp. 24a-26a. Section 9-103 is a "choice of law" section catch-lined "Perfection of Security Interest in Multiple State Transactions." The particular subsection on which the Master places such great emphasis is § 9-103(3), dealing with "accounts, general intangibles and mobile goods." Other subsections deal with documents, instruments and ordinary goods; certificates of title; chattel paper;[67] minerals; and uncertificated securities. Subsection (3) says that the law of the jurisdiction in which the debtor is "located" governs the perfection of security interests in "accounts, general intangibles and mobile goods," and subparagraph (d) of that subsection says that a debtor is located at "his place of business if he has one, [and] at his chief executive office if he has more than one place of business."

If the Master is attempting to find support by way of legal analogy in this section of the Uniform Commercial Code, it is hard to find much analogy to the securities business in "accounts, general intangibles and mobile goods"; securities are not included in any of these categories. If anyone were to look into Section 9-103 for legal analogies pertinent here, the subsection about "uncertificated securities" might be thought to be more germane. But that subsection (§ 9-103(6)) says that one

[67] This is the only subsection that applies the same rules as subsection (3), and that only in certain cases.

looks to the law "of the jurisdiction of organization of the issuer" to determine the perfection of a security interest in such a case. It is surprising that the Master did not refer to this subsection.

We suppose the Master cited U.C.C. § 9-103(3) simply in an effort to demonstrate that the test of "chief executive office" is not unworkable. One might have hoped that there was a better reason for changing a rule than that the new one was not unworkable, particularly since reference to the state of incorporation produces a very workable rule. But the fact of the matter is that § 9-103(3)(d) is hardly an example of "precision and ease of determination." Report 43. The reason that U.C.C. § 9-103(3)(d) has not resulted in tremendous uncertainty has nothing to do with whether it is easy to determine a corporation's "chief executive office." Instead, the uncertainty created by the test under this statute (and acknowledged in the Official Comments to it) is avoided by an option that is simply not available in the escheat context—the expedient of filing duplicate financing statements in more than one state.[68] As Official Comment 5(c) explains:

> The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multistate enterprise, but it would be rare that there could be more than two possibilities. *A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place.* (Emphasis supplied.)

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[68] "The easy answer, according to the Official Comment, is for the lender to file in all relevant states. . . . [W]henever there is doubt, the lender should file in every relevant jurisdiction." C.A. Schipani, *The Lender's Dilemma: National and International Automated Data Complications in Perfecting a Security Interest in Accounts*, 22 New Eng. L. Rev. 273, 282-83 (1987) (footnotes omitted); *see In re Peregrine Entertainment, Ltd.*, 116 B.R. 194, 198 n.4 (C.D. Cal. 1990) (creditor filed in two places).

Cases and commentary confirm the fact-based and subject-to-litigation nature of the "chief executive office" test, which of course may easily be avoided with multiple filings in the U.C.C. context. "The question of where the debtor['s] . . . chief executive office is, will be a factual one, determined by the trier of fact." 8 William D. Hawkland, *et al.*, *UCC Series* § 9-103:09 at 165 (1990). Thus, the courts have employed a multifactor test to determine which office is the "chief executive office." [69] The analogy to multiple filings under the U.C.C., when we move to the interstate escheat situation, is multiple claims and litigation.

In recommending this rule change, the Master may have been tempted by the "principal place of business" test adopted in the 1974 "Western Union" statute, 12 U.S.C. § 2503, and introduced into the Judicial Code in 1958 as one of the two bases of determining corporate citizenship for purposes of the diversity jurisdiction. 28 U.S.C. § 1332.[70] But the "principal place of business" test is a notorious breeder of litigation. In the Section 1332 context, a *Westlaw* search indicates that there are approximately 200 decisions in the district courts and approximately 60 in the courts of appeals construing the language in question. While it may be the case that a "principal executive office" test might engender somewhat

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[69] *E.g.*, *Mellon Bank, N.A.* v. *Metro Communications*, 945 F.2d 635, 642 (3d Cir. 1991) (factual test not to be applied rigidly), *cert. denied*, 112 S. Ct. 1476 (1992); *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1171 (10th Cir. 1985) (applying various factual criteria); *In re J.A. Thompson & Son*, 665 F.2d 941, 950 (9th Cir. 1982) (same); *Westinghouse Credit Corp.* v. *Rovi Prop. & Mgt. Corp.*, 607 S.W.2d 682, 683 (Ky. Ct. App. 1980); *In re Ericson*, 6 B.R. 1002, 1009 (D. Minn. 1980) (approving settlement because "trier of fact would have some difficult decisions to make"); *In re Astrocade, Inc.*, 31 B.R. 245, 250-51 (Bankr. S.D. Ohio 1983) (listing nineteen factors).

[70] It will be recalled that "principal place of business," used by the Court interchangeably with "main office" and "principal offices," was one of the primary-rule alternatives considered and rejected in the *Texas* case. *See* 379 U.S. at 680.

less controversy than "principal place of business," controversy would remain. Controversies under Section 1332 occur, by definition, where there is already a lawsuit. But in formulating the rules in the *Texas* case, the Court stressed that its choice was motivated by a desire to *avoid* uncertainty and litigation.

The Report acknowledges the uncertainties its test would create, but erroneously asserts that they may be overcome by resort to SEC filings such as Form 10-K, in which the issuer lists a "principal executive office." Report 44. The Report also acknowledges that SEC filings are not an "all-encompassing" solution to the uncertainty created by its recommended test. Report 48. But it considers "a general inquiry [into a corporation's principal executive office] . . . neither burdensome nor complex." Report 49. Of course, one of the bases for rejecting the "principal place of business," "main office" or "principal offices" test in *Texas* v. *New Jersey* was not the *degree* of burden or complexity imposed by the inquiry, but the fact that the inquiry need be made (and litigated in this Court) at all. *Texas* v. *New Jersey*, 379 U.S. at 680.

Even in the context of public corporations filing 10-K reports, administration of a "principal executive office" rule would not be easy. In submissions to the Master, Delaware identified 94 companies that—according to two computer databases with data taken directly from SEC disclosure statements—had more than one principal executive office reported during the same period of time; that number more than doubled when other standard reference sources were included; and we identified 785 companies that changed principal executive offices in the years 1988 to 1991, according to these same standard reference sources. The Report discounted the "judgment calls" that would be made in these cases as not diminishing the "substantial certainty" it asserted would be created. Report 48. But the result of adopting the "principal executive office test"—even in the case of issuers of pub-

licly-traded securities and especially in the case of holders that do not issue such securities—would be hundreds of factual resolutions that would have to be made each year. Referring these cases to Special Masters or District Judges would be a waste of resources.

But the difficulty does not stop there. The Master appears to have confused the contours of this case—which extended only to the confines of the securities business—with the general issues posed by the backup rule. The Master never asks, let alone answers, the question whether his change in the backup rule is to be a general one, applicable in all circumstances, or one limited to the distribution of dividends and interest on publicly-traded securities. There are few, if any, limiting principles in the Master's recommendation on this subject (*see supra* pp. 22-23), but perhaps the Master was planning to leave the question for further litigation in other contexts.

If, however, we assume that the change in the backup rule is to be generally applicable, we will quickly be drawn into waters where 10-K reports, whatever help they may be in any event, will not even be available. Those reports are only filed by issuers of publicly-traded securities. The states collect roughly a billion dollars annually from the holders of *all* kinds of unclaimed property. *See* National Association of Unclaimed Property Administrators, *NAUPA News*, Aug. 1988, 4-5 (fiscal year 1986-87); National Association of Unclaimed Property Administrators, *NAUPA Unclaimed Property Brochure* (fiscal 1989-90). Often these moneys will be held by privately-held corporations or other private business entities. Moreover, a very substantial portion of the states' escheat revenues comes from banks and insurance companies—which are generally structured as subsidiaries of holding companies.[71] Even when these holders are subsidiaries of

[71] Again, the Master did not permit Delaware to make a general record on this point; Delaware, though, receives more than 10% of its escheat revenues from banks and insurance companies.

public companies, they may well have different principal executive offices from their publicly-held parents. *See, e.g., Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) ("[a]scertaining the location of the headquarters of a wholly-owned subsidiary necessarily differs from determining the location of the chief executive office of a single corporation"), *cert. denied*, 112 S. Ct. 1476 (1992). Banks do not need to file 10-K reports if they are simply subsidiaries of public companies and have not issued securities themselves; neither do insurance companies. In none of these contexts will any 10-K report be available to assist us.

3. *Fairness Demands Retention, Not Rejection, of the Corporate Domicile Rule*

Again, at bottom, the Master's recommendation stems from his particular notions of "fairness," Report 46, and his apparent disapproval of the amount of escheat revenue sought or received by Delaware in this context. This "policy" justification is highly questionable: there is no relationship between the place of a corporation's principal executive office and the benefits derived by its shareholders from the state's laws; and Delaware's preeminence in attracting corporations is not an accident. If a policy change is to be made here, it should be left to Congress.

The Report argues that its "chief executive office" test will be "much more fair" because it "seems calculated to identify the jurisdiction where the benefits are created" and "is more likely to distribute the funds, in this and other cases, fairly among the various jurisdictions." Report 50. Neither policy justification is correct. A state's corporation laws contribute substantially more to the benefits created for shareholders than the Report suggests and the jurisdiction where the "chief executive office" is located contributes much less than the Report contends. Moreover, "fairness" does not mean "spread revenue equally."

(a) *The State of Incorporation Provides Significant Benefits to Shareholders.*—To begin, the Report fails to recognize the tangible benefits provided to shareholders by a state's corporation laws.

Delaware's preeminence in attracting corporations is not based on mere happenstance. It is based on choice—the choice of management *and* shareholders.[72] The benefits of incorporating in Delaware have been the subject of scholarly debate and inquiry. Until about 20 years ago it was fashionable in academic circles to suggest that state corporation laws were involved in a "race to the bottom" and that Delaware's corporation law won that race by favoring management at the expense of shareholders.[73] More penetrating academic analysis followed. It emphasized the cost savings permitted by incorporation in Delaware, which inures to the benefit of shareholders. Thus, then-professor (now Judge) Winter concluded that "[t]he chartering decision, therefore, so far as the capital market is concerned, will favor those states which offer the optimal yield to both shareholders and management." Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 275 (1976). *Accord* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913, 919-20 (1982) (Delaware's "permissive corporation law maximizes, rather than minimizes, shareholders' welfare").

In a comprehensive empirical study of corporations that have reincorporated in other jurisdictions, Professor Romano sought to solve the "peculiar puzzle that one state, Delaware, has consistently been the leading choice for reincorporating firms for over fifty years." Roberta Romano, *Law as a Product: Some Pieces of the Incor-*

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[72] Changing the place of a chief executive office—unlike changing a state of incorporation—does not require a shareholder vote.

[73] *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974).

poration Puzzle, 1 J.L., Econ. & Organization 225, 226 (1985). She concluded that the states compete for corporate charters, and that Delaware is, "with extraordinary consistency, the most sensitive to new ideas," *id.* at 240.[74] Moreover, the choice by corporations to move to Delaware is no coincidence: "the advantages commonly enumerated in the proxy boilerplate of reincorporating firms, such as the ready availability of legal opinions and a well-developed case law, are, in fact, critical, for they can reduce the cost of doing business." *Id.* at 250. *Accord* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 484 (1987) ("Probably the greatest benefit that Delaware offers corporations is a highly developed case law that provides not only a useful set of precedents, but also a substantial degree of certainty about legal outcomes.").

For a case study of the balanced nature of the Delaware General Corporation Law, one may look to the 1988 amendment to section 203, known as the Delaware Takeover Statute. The legislative deliberative process took into consideration the views of a broad range of interests, in an effort to achieve a balanced statute. *See generally The New Delaware Takeover Statute* (Practicing Law Institute No. 598, 1988) (containing testimony and commentary on the new statute). The courts have concluded that "[s]ection 203 is an exquisitely crafted legislative response to a variety of perceived problems," and "both promotes stable corporate relationships and protects shareholders." *BNS Inc.* v. *Koppers Co.*, 683 F. Supp. 458, 473 (D. Del. 1988); *accord RP Acquisition Corp.* v.

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[74] She also observed that "Delaware has an additional mechanism that provides assurance to firms that it will not radically revamp its corporation laws. The state constitution requires that any revision of the corporation code be supported by a supermajority vote (two-thirds) of both houses of the state legislature." *Id.* at 241 (citing Del. Const. art. IX, § 1).

Staley Continental, Inc., 686 F. Supp. 476, 485 (D. Del. 1988).[75]

In short, a state of incorporation can play a significant role in providing value to the shareholders of its corporations, and Delaware does so. That corporations choose it and investors find it an appropriate choice speak volumes.

(b) *The State of "Principal Executive Office" Bears No Particular Relationship in Law or Economics to Stockholder Welfare.*—If the Master had recommended that the "state where the principal business operations of a corporation were located" replace the "state of incorpora-

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[75] Where a state ignores a balanced approach, it does so at its peril. An interesting case study is the Pennsylvania Takeover Act of 1990, Pa. Sen. Bill No. 1310 (codified in scattered sections of 15 Pa. Cons. Stat.). *See* Robert D. Rosenbaum & L. Stevenson Parker, *The Pennsylvania Takeover Act of 1990: Summary and Analysis* (1990); Letter to the Governor and Members of the General Assembly of the Commonwealth of Pennsylvania from Forty-Two Professors (Jan. 26, 1990) (the Act "represents an unusually troubling development that could inflict significant harm on Pennsylvania corporations and damage the national economic interest") (on file with counsel of record); John Pound, *Shut Up, Shareholders —This is Pennsylvania*, Wall Street Journal, Dec. 13, 1989, at A14, col. 3.

The effort to enact the statute led to institutional investors threatening to vote with their feet. The California Public Employees' Retirement System (CALPERS) threatened to divest itself of all Pennsylvania corporations. Gregory A. Robb, *S.E.C. Chief Criticizes Bill to Thwart Takeovers*, N.Y. Times, Apr. 3, 1990, at D3, col. 1 (" 'We will require the fiduciaries to review the wisdom of further investments in' " Pennsylvania corporations) (quoting Dale M. Hanson, Chief Executive Officer of CALPERS). Enactment of the statute proved an embarrassment to a number of Pennsylvania corporations in the light of this attitude on the part of investors. Ultimately, more than 50 Pennsylvania corporations—including some of the largest ones (Westinghouse, Conrail, H.J. Heinz, PNC Financial, PPG Industries, and Sun Oil)—opted out of either all or a portion of the statute's coverage. Justin P. Klein & Jeffrey P. Greenbaum, *Many Pa. Companies Opt Out*, National Law Journal (Mergers & Acquisitions), Sept. 10, 1990, at 15; *Westinghouse Spurns Statute*, N.Y. Times, June 1, 1991, at D2, col. 3.

tion" rule, it might have been thought to have some relation to the economic, governmental and social climate which created the corporation's products or services and hence its wealth. It also would, of course, have been a departure from *stare decisis*, and would have produced an unadministrable rule, breeding as much litigation as that under Section 1332 of the Judicial Code. The Master decided not to do this, and thinking erroneously that the "principal executive offices" rule might be almost as easily administrable as the "state of incorporation" rule, chose it instead. Perhaps he thought that in economic terms the "state of principal executive offices" was like the "state of principal business operations."

But the "principal executive offices" and "principal place of business operations" of a corporation are two entirely different things. The Master may have an antiquated view of corporate life in which the corporation's managers and executives live close to its plants or factory—perhaps in an upscale part of town, but in the same town nonetheless—and work in top floor offices at the plant, looking out the windows at the smokestacks. That image may have been correct decades ago, but it is not correct now. With the increasingly far-flung nature of business operations; with multiple plants and mines for the traditional extractive and manufacturing sorts of business; with physical production often taking place in a variety of nations; with even service businesses employing large, decentralized clerical staffs wherever they can be hired the most cheaply; and with the great improvements in communications and data transmission, the modern executive suite is increasingly located nowhere near what one might find to be the principal center of the corporation's productive work. Indeed, it increasingly is in a free-standing executive office completely detached from the places where the corporation's productive work is done. The Master perceived a connection between the executive offices and productive activity, and he related that connection to "fairness"; but the connection continually grows more attenuated.

Improved communication technologies have resulted in shrinkage of the top executive group and in frequent relocations of its offices "off-site" from productive plants or facilities. *See* Alan Farnham, *Migratory Habits of the 500*, Fortune, Apr. 24, 1989, at 400 ("Technology makes relocation to remote locations more feasible. With the latest advances in telecommunications, a CEO can run his company from the moon"). This technology has also led to widespread decentralization of the corporate decisionmaking process. As David A. Heenan has observed,

> By the 1960s, several factors began to signal the demise of the bigger-than-life head office. . . . For a decade, U.S. firms slashed away at their headquarters staffs and cut deeply into middle management, at times eliminating entire levels. . . .
>
> The recent wave of mergers and acquisitions, takeovers and leveraged buy-outs (called "LBOs") further stimulated the minimalist movement. Breakup prices of a diversified conglomerate were directly tied to the autonomy of its operating companies. Since stand-alone subsidiaries tended to enhance the value of the parent, there was added incentive to shift power and staff away from the head office to the business units.

David A. Heenan, *The New Corporate Frontier: The Big Move to Small Town, USA* 10-11 (1991).[76]

Moreover, there is no sure connection between a corporation's "designated headquarters" and the place where its actual business occurs or even where its actual decisionmaking takes place. "[O]ne's headquarters can be anything one says it is." Alan Farnham, *Migratory Habits*

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[76] *See also* Robert E. Levinson, *The Decentralized Company* 17 (1983) (describing central features of "radically decentralized" company, including "parent company's role is primarily that of a banker for its operating divisions," and "[d]ecisions are made by hands-on managers ('experts') at the scene rather than by headquarters numbers men ('specialists') far removed from the actual operation.").

of the 500, Fortune, Apr. 24, 1989, at 401.[77] Increasingly, "the single-most important factor in the decision [to relocate the top group's offices] is the arbitrary wishes of the company's chief executive officer." W. John Moore, *Corporate Kidnapping*, National Law Journal, June 13, 1987, at 2. These wishes can be driven by the chief executive officers' personal income tax considerations[78] or "lifestyle" considerations.[79]

Even where executive sybaritism is not the guiding principle, the location of the "principal executive offices" no longer bears any fixed relationship to where the company's operations and productive activities occur. Decisions as to site selection for "principal executive offices" have nothing to do with a determination of whether the

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[77] Illustrative examples include Borden (1,200 employees in Columbus, Ohio; 25 in New York, where "executive office" is designated); W.R. Grace (bulk of former headquarters staff moved to Boca Raton, Florida; "corporate headquarters" in Manhattan with staff of 20 to 50); Louisiana Pacific (corporate headquarters in Portland, Oregon; most operations located in south and south-west); Grumman Corporation (will maintain New York headquarters even though "major operations [located] elsewhere"); Medi-Mail Inc. (bulk of operations moved from San Diego to Las Vegas; six employees at corporate headquarters in San Diego). *See* Del. Supp. Br. (Nov. 5, 1991) at 10-11.

[78] *See* Katherine Barrett & Richard Greene, *Snow White and the 50 Dwarves*, Financial World, Apr. 17, 1990, at 1 ("more often than anyone wants to admit, the decision to move headquarters involves a $5,000 hit in personal taxes on the part of some CEO").

[79] *See* Alan Farnham, *Migratory Habits of the 500*, Fortune, Apr. 24, 1989, at 400 ("golf in January" is the "clincher" in persuading CEOs to move their offices to Georgia); Arthur M. Johnson, *The Challenge of Change: The Sun Oil Company 1925-1977* 242 n.* (1983) (Sun, with operations centered in Oklahoma, maintained Philadelphia headquarters so that executives could eat lunch at the Racquet Club); William H. Whyte, *CITY: Rediscovering the Center* 287-88 (1988) (of thirty-eight corporations that moved headquarters "during the height of the exodus" from New York, "thirty-one moved to a place close to the top man's home," dropping the average CEO commute to about eight miles).

benefits of the state's economy and laws will inure to the shareholders.[80]

(c) *The Master's View of "Fairness" Is Misguided.*— The Master's distaste for the Court's backup rule seems founded not on the assertion that the incorporating state's corporation law does not contribute to the "creation of benefits" (for surely it does), but rather on a notion that the wealth should be shared among the states in a kind of "from each according to his means, to each according to his needs" analysis. The supposed unfairness thus derives from Delaware's preeminence in attracting corporations.

The benefits Delaware provides to shareholders of its Delaware corporations are the direct result of great effort by its public servants. Delaware's corporation laws are "under constant scrutiny and review" in an annual amendatory process,[81] and the Chancery Court serves as a *de facto* national forum for corporation law issues, constituting "the nation's most experienced corporate law tri-

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[80] When we move into the area of mutual funds, closed-end investment companies, CMO's and other pass-through issuers which are themselves conduits (*see supra* p. 51 n.64), the notion of a "principal executive office" having some substantive significance is even more attenuated. In practical terms, the decisions as to buying and selling portfolio securities in mutual funds and other investment companies are generally made by a single portfolio manager. *See* Burton G. Malkiel, *A Random Walk Down Wall Street* 376-84 (5th ed. 1990). The productive activities of the portfolio companies—and indeed, even *their* principal executive offices—are often located somewhere else from where the portfolio manager is. In the case of pass-through debt securities, the centralized functions are essentially clerical—keeping track of incoming payments and distributing them. Here again, the Report is adrift about securities representing enormous portions of the present-day securities market. *See supra* pp. 13-14 n.17.

[81] R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* at H-18 (2d ed. 1991); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 Del. J. Corp. L. 1, 17-21 (1976).

bunal." [82] The state devotes significant resources to provide these benefits. Over the past three years, roughly 65 percent of the trial days spent by the Delaware Court of Chancery were devoted to trials involving corporations incorporated in Delaware. Approximately 57 percent of the opinions written by the Court during the same period resolved issues arising under the Delaware General Corporation Law.[83] And Delaware now spends more than $4 million per year maintaining its Division of Corporations. Delaware works hard to provide a valuable service to its corporations, which to a large extent are the nation's corporations. There is nothing "unfair" about Delaware's requiring them to turn over the unclaimed property of unknowns which they hold.

At bottom, the Report's recommendation is not at all based on the "lawyerlike definition of state power over this subject" that Justice Jackson called for in *Connecticut Mutual Life* and that the Court provided "once and for all" in *Texas* v. *New Jersey*. It is, instead, based on a leveling view of "fairness." Whether that is a wise policy is not for this Court to decide. Indeed, revision now as a result of the Master's variation from the *Texas* rule will lead only to further cases brought in an effort to revise the rule in other ways perceived by other states to be more fair to them. The remedy, if one is needed, lies with Congress.

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[82] Ronald Gilson, An evaluation of Pennsylvania Senate Bill 1310 at 7 (issued to the Pennsylvania General Assembly in connection with the Pennsylvania Takeover Act of 1990) (on file with counsel of record). *Accord* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 589 (1990); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. at 488.

[83] Statement of Richard Kiger, App. E hereto at p. 91a. The opinions in these cases tend to be more elaborate and thus more demanding of the Court's time than non-corporation law opinions. *Id.* ¶ 5.

C. The Master's Recommendations, Both as to the "State of Incorporation" and the "Debtor as Issuer" Points, Violate This Court's Teachings on the Principles of *Stare Decisis*

The Master's recommendations on the two points just discussed include one acknowledged departure from the rule of *Texas* v. *New Jersey*, the rejection of the "state of incorporation" rule, and one unacknowledged departure, the "issuer as debtor" recommendation. There is no occasion presented in this case, however, for this Court to depart from the doctrine of *stare decisis*.

In making its recommendations, the Report does not even acknowledge the "central importance of *stare decisis* in this Court's jurisprudence." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991). "Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Id.* (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)); *see also Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

While departure from the doctrine of *stare decisis* always requires "some compelling justification," *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564, several factors—none of which are acknowledged in the Report—give *stare decisis* special force in this case. First, this Court has already rejected an attempt to "modify" the *Texas* rule based on the same factors that motivated the Master's recommendation here, when it declined to carve out an exception to the backup rule for situations that "involve a higher percentage of unknown addresses." *Pennsylvania* v. *New York*, 407 U.S. at 214. As the Court has explained, "[a] litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

Substituting references, the *Walker* Court's rejection of such a request applies with equal force here: "the reasons [Intervenors] assert[] for overruling [*Texas*] are the same factors which we concluded in [*Pennsylvania* v. *New York*] did not undermine the validity of [*Texas*]." *Walker*, 446 U.S. at 749; *accord Flood* v. *Kuhn*, 407 U.S. 258, 282 (1972) (declining to overturn "aberration" of antitrust exemption for major league baseball granted in *Federal Base Ball Club* v. *National League*, 259 U.S. 200 (1922), and adhered to in *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953)).

Second, "Congress remains free to alter what [the Court has] done." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. at 172-73).[84] Although this principle is generally applied in matters of statutory construction, it surely applies here, where the Court's rules operate only in the absence of an "applicable federal statute." *Texas* v. *New Jersey*, 379 U.S. at 677.

The *Texas* rule has been the subject of "something other than mere congressional silence and passivity." *Flood* v. *Kuhn*, 407 U.S. at 283. Congress has modified the *Texas* rule in one limited respect and, in doing so, has acknowledged its general applicability. (This 1974 revision is discussed above at p. 8 & n.5.) Aside from the 1974 statute, Congress has not modified the *Texas* rule and no efforts have been made to do so, notwithstanding Congress' frequent attention to the area of escheat of unclaimed property, which has resulted in myriad instances of congressional displacement of the states' traditional authority where federal interests demanded it.[85] Congress has, of course, acknowledged the

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[84] *Accord, e.g., Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 671 n.14 (1974).

[85] *E.g.*, Pub. L. No. 101-510, Div. A, Title XV, § 1520(e), 104 Stat. 1485, 1732 (1990) (codified at 24 U.S.C. § 420(e)) (property

authority of the states to escheat under the state statutes passed in the wake of *Texas* v. *New Jersey* (*e.g.*, Pub. L. No. 97-320, Title IV, Pt. A. § 412, 96 Stat. 1469, 1521

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of intestate residents of Armed Forces Retirement Home); Pub. L. No. 100-203, Title X, § 10621(a), 101 Stat. 1330, 1330-452 (1987) (codified at 26 U.S.C. § 6408) (unclaimed federal income tax refunds); Pub. L. No. 98-359, § 2, 98 Stat. 402 (1984) (codified at 31 U.S.C. § 1322) (unclaimed property held by the old postal saving system); Pub. L. No. 98-25, §§ 2, 3, 97 Stat. 185 (1983) (codified at 25 U.S.C. § 373b) (estates of Indians dying intestate without heirs); Pub. L. No. 97-459, Title II, § 206, 96 Stat. 2515, 2518-19 (1983) (codified at 25 U.S.C. §§ 2205, 2206) (enabling Indian tribes to escheat members' property); Pub. L. No. 97-320, Title IV, § 408, 96 Stat. 1469, 1513-15 (1982) (codified at 12 U.S.C. §§ 216 to 216d) (unclaimed property of closed national banks); Pub. L. No. 97-306, Title IV, § 401(a), 96 Stat. 1429, 1442 (1982) (codified at 38 U.S.C. § 1970(h)) (veterans' benefits); Pub. L. No. 93-445, Title I, § 6, 88 Stat. 1305, 1334-38 (1974) (codified at 45 U.S.C. § 231e(a)(5)) (railroad employees' benefits); Pub. L. No. 92-203, § 7, 85 Stat. 688, 691-94 (1974) (codified at 43 U.S.C. § 1606(h)(2)(A)) (stock in Alaska Native Regional Corporations); Pub. L. No. 92-117, 85 Stat. 337 (1971) (formerly codified at 31 U.S.C. § 1322) (unclaimed property held by the old postal saving system); Pub. L. No. 91-240, 84 Stat. 203 (1970) (codified at 25 U.S.C. § 375d) (property of intestate members of certain Indian nations); Pub. L. No. 90-114, § 3, 81 Stat. 335 (1967) (codified at 25 U.S.C. § 1153) (same); Pub. L. No. 90-76, § 3, 81 Stat. 177 (1967) (codified at 25 U.S.C. § 788) (same); Pub. L. No. 89-700, Title II, § 202(b), 80 Stat. 1079, 1087 (1966) (codified at 45 U.S.C. § 352(g)) (railroad employees' benefits); Pub. L. No. 89-717, § 2, 80 Stat. 1114, 1115 (1966) (codified at 25 U.S.C. § 967b) (property of intestate members of certain Indian nations); Pub. L. No. 89-660, § 3, 80 Stat. 910 (1966) (codified at 25 U.S.C. § 1133) (same); Pub. L. No. 89-656, § 3, 80 Stat. 906 (1966) (codified at 25 U.S.C. § 1103) (same); Pub. L. No. 89-554, 80 Stat. 378, 595 (1966) (codified at 5 U.S.C. § 8705(d)) (government employees' life insurance); *see also* Pub. L. No. 85-857, §§ 717, 750, 3202(e), 5204-5205, 72 Stat. 1105, 1152, 1160, 1232, 1258 (1958) (codified at 38 U.S.C. §§ 1917(d)), 1950, 5502(e), 8504-8505) (veterans' benefits and unclaimed property on Veterans Administration premises); Pub. L. No. 84-1028, c. 1041, §§ 2571-2575, 70A Stat. 1, 143-44 (1956) (codified as amended at 10 U.S.C. §§ 2571-2577) (property in custody of United States Military); Pub. L. No. 77-774, c. 640, 56 Stat. 1021, 1021-22 (1942) (codified at 25 U.S.C. § 373a) (estates of Indians dying intestate without heirs).

(1982) (codified at 12 U.S.C. § 484(b)) (allowing state examination of national banks for purpose of assuring compliance with state escheat laws)).

In light of this activity, which has not given rise to any statutory disapproval of the general *Texas* rule, Congress—not the Court—is the appropriate body to revise the *Texas* rule, if revision be needed. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564 ("Congress has had almost 30 years in which it could have corrected our decision . . . if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding."); *Flood* v. *Kuhn*, 407 U.S. at 283-84 ("we continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively"); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. at 357 (declining to depart from precedent where "Congress has had the ruling under consideration but has not seen fit" to overturn it for 30 years).[86]

Third, the Report's recommendation would disturb settled expectations that have now grown into a multistate cooperative effort and are reflected on the states' statute books. Every state unclaimed property statute that treats the issue defines the debtor's domicile as its state of incorporation, and every such state has acted in reliance on the

[86] Congress' general acceptance of the *Texas* rule makes the Intervenors' reliance on *Morgane* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *United States* v. *Hutcheson*, 312 U.S. 219 (1941), inapposite. In those cases, the Court developed an evolving body of common law in light of sweeping policy changes wrought, in part, by a "series of enactments" (*Hutcheson*, 312 U.S. at 235 (antitrust and labor relations); *Morgane*, 398 U.S. at 388-90 (admiralty)) that bore on the common law's development. This case, in contrast, concerns a simple, comprehensive rule that has sufficed for close to thirty years, with no doctrinal development needed and no congressional disapproval expressed.

Texas rule in this regard. Those statutes refer, also, to *holders*. *See supra* pp. 10, 32. These considerations weigh heavily against the Report's recommendations and were not discussed by the Master. As the Court explained in *Hilton* v. *South Carolina Pub. Rys. Comm'n*, "*stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." 112 S. Ct. at 564; *accord United States* v. *Maine*, 420 U.S. 515, 527 (1975) ("in the almost 30 years since *California*, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the 'interminable litigation' arising over [this] controversy").

The recommended changes would force almost every state to amend its statutes and would require an evaluation of every issuer's principal executive office, going back as far as records permit. The burden of this change would fall hard on Delaware, which has for nearly thirty years relied on the *Texas* rule for a substantial portion of its revenue, and might now face the prospect of the other states looking to it (and thus to its taxpayers) for "recovery" of hundreds upon hundreds of millions of dollars: "if the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on [this Court's] decisions and not be needlessly penalized for such reliance." *United States* v. *Mason*, 412 U.S. 391, 399-400 (1973) (citing *Flood* v. *Kuhn*, 407 U.S. at 283, and *Wallace* v. *McConnell*, 38 U.S. (13 Pet.) 136, 150 (1839)). The Report does nothing if it does not penalize the taxpayers of Delaware—a penalty supported by no "compelling justification."

These factors give *stare decisis* added force and make the Intervenors' burden a particularly heavy one. They

do not meet it. In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), the Court laid out the traditional justifications for overruling a prior case. It first explained that the "primary reason" for a departure from *stare decisis* "has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress, [w]here such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." 491 U.S. at 173 (citations omitted). Here, intervening legal developments support continued adherence to the corporate domicile rule, and do not suggest that a "debtor" is other than a "debtor." *See supra* pp. 53-55.

A second traditional justification exists where the precedent is a "positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson* v. *McLean Credit Union*, 491 U.S. at 173 (citations omitted). No party makes any assertion that the corporate domicile rule is "unworkable" or poses any obstacle to any objectives embodied in other laws; indeed, no one can point to a more "workable" rule than the state of incorporation rule; and retention of the *Texas* rule *furthers* the federal policies that gave rise to it (*see supra* pp. 3-7, 55). The same can be said of the "issuer as debtor" point. *See supra* pp. 45-49.

Finally, the *Patterson* Court observed that sometimes "a precedent becomes more vulnerable as it becomes outdated and after being ' "tested by experience, has been found to be inconsistent with the sense of justice or with social welfare." ' "[87] The Court had reservations about

[87] 491 U.S. at 174 (quoting *Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), quoting, in turn, Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

the availability of this ground in cases where Congress might act. 491 U.S. at 174-75. Yet this ground—rightly or wrongly invoked—appears to be the sole basis for the Master's recommendation that the *Texas* rule be overturned. Of course, the Court's reluctance to change a rule within the control of Congress on grounds of "justice" and "social welfare" is fully warranted. *See supra* pp. 71-73. And, as we showed in Parts A and B, the Master has made out no case under this heading, if it is to be considered at all. *See supra* pp. 49-52, 61-69.

Adjustments in this area are matters for Congress. The Court has laid down, and reaffirmed, the fundamental principles. The present case involves an application of them to a particular industry and to particular conditions in that industry. If the Court modifies the principles to deal with this case, it will be called upon to do so in other cases. There is no demonstration that the application of the rules in this case produces a shocking or unexpected result, particularly given the fact that any rule that might be established on this subject admittedly has arbitrary elements. *See Texas* v. *New Jersey*, 379 U.S. at 683. The rules and their application here are well-grounded in the historical jurisprudence of this Court. If an alteration in those rules is to be made because of a contention that it would be more "fair," in some sense, to have another rule for the situation involved in this case, Congress, which provided such a forum after this Court's decision in the *Pennsylvania* case, is available.

II. IF CHANGES TO THE *TEXAS* RULE ARE TO BE MADE, THEY SHOULD NOT BE APPLIED RETROACTIVELY AGAINST DELAWARE

The Master dealt with what he called issues of "reach-back" and "retroactivity." Report 70-77. Discussing both the "issuer as debtor" and "corporate domicile" points, he recommended full retroactive application as to both. Report 72. "Retroactivity" meant not simply that the rule that would govern property that had theretofore become escheatable but had not been taken by one of the

states; it also extended to sums already collected by the states, and this went back without limitation as to time. Although Delaware is a plaintiff here, not a defendant, the Report's recommendations seem aimed at Delaware, as well as New York; the Draft Report had contained a recommendation that Delaware's reliance on the existing rule of corporate domicile be acknowledged,[88] but this was eliminated from the final Report. If the rules are to be changed at all—and they should not be—Delaware should not be subjected to retroactive application of the new rules.

That the Master wrestled at all with the issue of "retroactivity" demonstrates the departure he would have the Court make from the *Texas* rule. "In the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to the bar." *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2442 (1991) (plurality opinion). It is only "[i]n those relatively rare circumstances where established precedent is overruled [that] the doctrine of nonretroactivity" is even considered, "in order to avoid 'jolting the expectations of parties to a transaction.'" *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 196 (1990) (plurality opinion) (quoting *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring)); *accord American Trucking*, 496 U.S. at 222 (dissenting opinion) ("'[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision'") (quoting *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608 (1987)).

Of course, the most obvious and appropriate way to avoid jolting the expectations of the parties in this case is to adhere to the *Texas* rule: "[c]onsiderations of finality and the justifiable expectations that have grown up surrounding a rule are ordinarily and properly given

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[88] Draft Report 57 n.64, quoted in our Exceptions, *supra* at E-8.

expression in our rules of res judicata and *stare decisis.*" *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 212 (dissenting opinion); *see James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2450 (Blackmun, J., concurring in the judgment) ("retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself"). These reasons fully explain why the Court in *Pennsylvania* v. *New York* applied the *Texas* rule to all the property at issue in the case, rejecting New York's assertion that the *Texas* rule was "not retroactive." 407 U.S. at 212-13. Prior to the *Texas* case, there was *no* rule governing conflicting state claims to escheat, and hence no expectations about the subject. The Court thus strictly applied the *Texas* rule.[89] Strict application of the *Texas* rule, until it is changed, is fully consistent with the parties' expectations, as is evident from the widespread adoption of the uniform acts providing that the "holder" of unclaimed, "owner/address unknown" property is to deliver that property to the holder's state of incorporation. *See supra* pp. 10-11, 32. Thus, all the parties except one part of the Texas group agreed with the Master's initial Draft Report that a state's prior reliance on the traditional corporate domicile rule should preclude any retroactive application of the

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[89] One subgroup of the Intervenors suggested that this routine application of law to fact somehow establishes that "nonretroactivity is unsuited to this very unique area of the law . . . due to the very considerations of fairness that propelled the Court's ruling" in *Texas*. Tx. Supp. Br. (Nov. 4, 1991) at 12. That is absurd. The Court in *Pennsylvania* did not evaluate "retroactivity" issues because it was simply adhering to the only precedent that existed; it had no occasion to consider whether this area of the law is so "unique" that ordinary legal doctrines once established should be retroactively displaced in favor of the shifting sands of what appeals as "fair" in a particular case. In addition, the Intervenors' suggestion (*id.* at 11-12) that all states acquire unclaimed property under custodial taking statutes as "conservators" is flat wrong. Several states have true escheat statutes, cutting off the claims of all others. *See supra* p. 2 n.1.

Master's recommendation to depart from that rule.[90] *See* our Exceptions, *supra* at E-8 (quoting Draft Report 57 n.64).

Should the Court depart from the *Texas* rule by adopting either of the changes, acknowledged or unacknowledged, recommended by the Master, the circumstances of the case call for nonretroactivity for Delaware and any state similarly situated. The proper scope of the Court's leading decision on the subject, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-10 (1971), has generated substantial recent debate. But whether *Chevron* is properly viewed as authorizing the prospective application of a new *rule of law* to litigants before the Court,[91] or only as announcing an equitable discretion as to the *relief* that a federal court should award when applying the new law,[92] it should be applied here to protect Delaware from a departure from the *Texas* rule, if a departure is made.

Under *Chevron*, a three-factor analysis is made:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression

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[90] Ala. Supp. Br. (Nov. 4, 1991) at 29 n.19; Cal. Supp. Reply Br. (Nov. 21, 1991) at 18-19. The Texas group made the frivolous assertion that the change is "merely a refinement rather than a reversal." Tex. Supp. Br. (Nov. 4, 1991) at 14. No support is given for this view, and we are hard pressed to imagine what could possibly constitute a new rule if not one that would render invalid every state statute concerning the backup rule written after the *Texas* decision.

[91] *See James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448-49 (White, J., concurring in the judgment); *id.* at 2453-56 (O'Connor, J., dissenting).

[92] *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448 (opinion of Souter, J.); *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 222-24 (Stevens, J., dissenting).

> whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron Oil Co. v. *Huson*, 404 U.S. at 106-07 (citations and internal quotations omitted).

First, both recommendations are to overrule clear precedent. As we have demonstrated above, the alleged "ambiguity" leading to the "issuer as debtor" recommendation is one created by the Report, not the *Texas* rule. The plain meaning of the word "debtor" was applied by the drafters of two uniform acts and the legislatures of the states that have adopted those statutes to mean "holder," and that application comports with this Court's long-standing precedents. *See supra* pp. 2-6, 32-34. And it is difficult to imagine a clearer precedent than the backup rule's provision that "the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210-11. That rule (and the uniform acts incorporating it) would no longer be the law if the Master's recommendation is accepted.

Second, the "purpose and effect" of the *Texas* rule was to provide certainty to states and private persons faced with conflicting escheat claims. *See supra* pp. 2-6, 45-46. Indeed, from the time the Court first confronted the need for a rule of priority among states in *Connecticut Mutual Life* to the time it fashioned a rule "once and for all" in *Texas* v. *New Jersey* (and adhered to it in *Pennsylvania* v. *New York*), if one thing was recognized, it was the need for a clear, certain and simple rule. Surely that purpose would not be served by providing incentives to the states to urge revisions to that rule in litigation

before this Court, by permitting them to make retroactive claims on property which had already been escheated to another state, no matter how many years before.[93]

Third, retroactive application of the Master's proposed change of the backup rule against Delaware and states similarly situated would be harshly inequitable. The Court is sensitive in this context to the special needs of state governments: "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon* v. *Kurtzman*, 411 U.S. 192, 209 (1973) (plurality opinion). "To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions." *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 185 (plurality opinion); *see James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448 (opinion of Souter, J.) ("[n]othing we say here deprives respondent of [its] opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided"); *cf. Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) ("Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect.").

Delaware and the other states have promulgated and implemented their escheat statutes in reliance on this

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[93] In no way can the Court's caveat in *Pennsylvania* v. *New York* that a state may escheat unclaimed property " 'until some other State comes forward with proof that it has a superior right to escheat' " 407 U.S. at 210-11 (quoting *Texas* v. *New Jersey*, 379 U.S. at 682), be read to contemplate that such "proof" would be found in an overruling of the *Texas* rule itself. The Decree in *Pennsylvania* makes clear that the "proof" required had to do with moving property out of the category of the "backup rule" into the category of the "primary rule"—by reason of either the identification of a last-known address or the intervening passage of an escheat statute by the state of last-known address. *See supra* p. 7 n.4.

Court's precedents in *Texas* and *Pennsylvania*. Because they could not "be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 182. As in *American Trucking*, "the invalidation" of Delaware's escheat law "would have potentially disruptive consequences for the State and its citizens." *Id.; see supra* pp. 73-74. In contrast, the Intervenors seek retroactivity in order to collect a windfall from Delaware—a windfall they had no reason to expect and no justification for receiving.

The Report does not deny that Delaware has relied on the *Texas* rule, nor the substantial hardship that would befall Delaware if the rule of corporate domicile were overturned. Instead, it focuses on the rule that laches and statutes of limitation do not apply to actions by states, apparently in the belief that the rule has something to do with remedies and therefore should bar any assertion of nonretroactivity here. Report 75 (citing *Illinois* v. *Kentucky*, 111 S. Ct. 1877, 1883 (1991)). But retroactivity of doctrinal change is one thing, and laches and limitations are another. In any event, the doctrine of no limitations against the sovereign is based on "[t]he public interest in preserving public rights and property from injury and loss, [which] justifie[s] a special rule for the sovereign." *Block* v. *North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting). The doctrine is thus questionable in actions *between* states.[94] We fail to understand what "public rights and property" would be preserved by transferring money properly collected by Delaware under the backup rule to other states which, until they intervened in this case and jumped on the band-

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[94] In actions concerning boundary disputes, for example, the policy is of lesser force, and "the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitation" is achieved through the application of other doctrines. *Illinois* v. *Kentucky*, 111 S. Ct. at 1883.

wagon of the Master's *sua sponte* rule change, had not even the slightest expectation of ever receiving it.[95]

III. JUDGMENT SHOULD BE ENTERED IN FAVOR OF DELAWARE AND AGAINST NEW YORK

The Report resoundingly rejects New York's theories (purporting to be factual assertions) about the moneys at issue in this case. New York argues that unclaimed property involved in this case determined by the brokers to be "owner/address unknown" should nonetheless be "deemed" to be owed to other brokers, all of whom should be deemed to have "trading addresses" in New York, and therefore that New York is entitled to "a presumption of location based on aggregate statistics." Report 58-59 & n.50; *see supra* p. 19. In short, says New York, these items of cash dividends and interest and share dividends in the brokers' hands are really "owner/address known" and should pass to New York under the primary rule. The Report rejects this position as "inconsistent with *Pennsylvania* v. *New York*, where the Court refused to allow an equally-apt presumption—that the state in which the money orders were purchased was the state of the sender's domicile—to govern. To the extent this is New York's position, judgment against it is entirely appropriate." Report 59 n.50.

Similarly, the Master rejects the entire notion of "trading addresses," noting that "this is not a concept

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[95] Of course, none of this is to say that the *current* rules should not apply to property that New York has wrongfully taken custody of—that is nothing more than the routine application of settled law to the facts of the case. Perhaps the greatest irony of all in the Report is that its recommendations might well result in New York *keeping* what it has taken, in contravention of both the old and the new rules. As a sort of tertiary backup rule, the Report recommends that the state of principal executive office of the *holder* take priority where there is no record that identifies the *issuer*. Report 57, A-3 ¶ 4. The Master did not permit discovery into whether New York has retained records revealing issuer identities, but New York has had no reason to do so under the current rules; to the extent it has not, New York—as the state of principal executive office of many of the brokers and the DTC—will retain the funds at issue in the case.

used in securities law, the Uniform Commercial Code, debtor-creditor law, or the law of personal jurisdiction, venue, or subject matter jurisdiction of the courts. From all that I have been shown, this 'trading address' approach seems to be a conception created out of whole cloth by New York, to favor itself in the instant case—or, perhaps more accurately, to rationalize post-hoc what it has been doing for years." Report 67 n.59.

It was undisputed on the record that brokers and banks cannot identify the creditor who is owed the unclaimed distributions involved in this case. Cirrito Dep. 73 ("any kind of research would really be fruitless"), 128 ("you don't know to whom the monies are due. If you did, you would pay them"), 93-94, 222-23; Shearer Dep. 103, 108-09, 192-93, 198, 213-15, 348-49; Scott Dep. 207-08; Principe Dep. 102-05, 222.

New York's "factual" argument to the contrary does not withstand scrutiny. It asserts that *most* unclaimed distributions are caused by a phenomenon known as "nominee float," where a certificate registered in the name of a broker is endorsed and delivered to a customer in bearer form, is traded from hand to hand in the stream of commerce, and is not submitted to the transfer agent for re-registration for some time. In the meantime, dividends are paid to the broker as the recordholder. *See* N.Y. Motion for Judgment (Oct. 30, 1990) at 56-57 & n.101; Report B-16 to B-17, ¶ 57. New York ignores errors, missed transfers, and out-of-balance record conditions, which are also causes of "owner/address unknown" distributions.[96] But even leaving aside those other causes for "owner/address unknown" distributions, New York's analysis of "nominee float" is unavailing. New York states only that the *first* bearer holder of the certificate could be identified. Griffin Aff. ¶ 2. But it concedes that

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[96] *See* Report B-10 to B-15, ¶¶ 36-51 (describing "Cede float" and other causes of unclaimed distributions), B-16 to B-19, ¶¶ 57-67 (same, for brokers), B-20 to B-22, ¶¶ 73-77 (same, for banks); Cirrito Dep. 223-27; Shearer Dep. 193-96; Principe Dep. 102-03; Scott Dep. 163-67.

the owner of the certificate on the dividend record date or dates cannot be ascertained, N.Y. Motion for Judgment (Oct. 30, 1990) at 30, 56, and that *that* person's identity is the relevant inquiry. *Id.* at 56-57. Moreover, New York argues that the very same "float" problems when encountered at DTC ("Cede float") and at New York banks result in "true" "owner/address *unknown*" funds that may be rightfully claimed by New York *under the backup rule*, since DTC and the banks are New York corporations (N.Y. Motion for Judgment (Oct. 30, 1990) at 30). New York offers no reason why brokers are any different.

The Master's finding of fact on this issue was clearly correct. The funds are "owner/address unknown." Although the Report proceeds to devote considerable attention to demonstrating why New York's "factual contentions are actually beside the point" under the Master's proposed new rules, the Report nonetheless clearly, and correctly, rejects New York's position on the facts.[97]

However, the Report fails to make an alternative recommendation that judgment be entered against New York on the basis of those findings in the event that the Court retains the *Texas* rule as Delaware interprets it. Since Delaware brought this lawsuit to recover the "owner/address unknown" funds that New York has improperly escheated from Delaware brokers under the *Texas* rule, this oversight is more than a semantic one. Delaware is, at this juncture, entitled to judgment against New York, because the Master has correctly concluded that there is no genuine issue of material fact presented by New York's theory. *Cf.* Fed. R. Civ. P. 56(e) (New York has not

[97] At one point, the Report states that—under its proposed rules—New York should have an opportunity to pursue its factual contentions if it is so advised. Report 67. But the Report is discussing efforts to trace payments "on a transaction-by-transaction basis" to beneficial owners (*not* brokers) who might have last-known addresses in New York, rather than expressing any doubt about the Report's findings of the unacceptability of New York's contentions about "trading addresses" and "statistical showing[s]." *Id.* at 58-59 & n.50; 67 n.59.

"set forth specific facts showing that there is a genuine issue for trial").

CONCLUSION

For the reasons stated, Delaware's Exceptions to the Report of the Special Master should be sustained. The Court should reject the Master's recommendation that the "issuer" should be viewed as the "debtor" even though it has properly paid the dividends and interest to the recordholders, and should reject the Master's recommendation for a change in the definition of corporate domicile. There should accordingly be judgment against the Intervenors. The Court should reject New York's contentions that the property in the brokers' hands owed to unknowns should be "statistically" deemed to be owed generically to "other brokers," and that those brokers should be deemed to have "trading addresses" in New York, and should render judgment in favor of Delaware against New York.

A proposed form of Decree is respectfully attached as Appendix F hereto.

Respectfully submitted,

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APPENDICES

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

I. UNITED STATES CONSTITUTION

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The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States . . . .

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ARTICLE IV, Section 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be provided, and the Effect thereof.

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AMENDMENT XIV, Section 5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

II. ACTS OF CONGRESS

The "Western Union" statute:

12 U.S.C. § 2501. Congressional findings and declaration of purpose

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.

§ 2502. Definitions

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.

§ 2503. State entitlement to escheat or custody

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.

III. UNIFORM ACTS—SELECTED PROVISIONS

A. UNIFORM UNCLAIMED PROPERTY ACT (1981 ACT)

§ 1. [Definitions and Use of Terms]

As used in this Act, unless the context otherwise requires:

(1) "Administrator" means [ ].

(2) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

(3) "Attorney general" means the chief legal officer of this State.

(4) "Banking organization" means a bank, trust company, savings bank, [industrial bank, land bank, safe deposit company,] private banker, or any organization defined by other law as a bank or banking organization.

(5) "Business association" means a non-public corporation, joint stock company, investment company, business trust, partnership, or association for business purposes of 2 or more individuals, whether or not for profit, including a banking organization, financial organization, insurance company, or utility.

(6) "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of a unincorporated person.

(7) "Financial organization" means a savings and loan association, [cooperative bank,] building and loan association, or credit union.

(8) "Holder" means a person, wherever organized or domiciled, who is:

(i) in possession of property belonging to another,

(ii) a trustee, or

(iii) indebted to another on an obligation.

(9) "Insurance company" means an association, corporation, fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life (including endowments and annuities), malpractice, marine, mortgage, surety, and wage protection insurance.

(10) "Intangible property" includes:

(i) monies, checks, drafts, deposits, interest, dividends, and income;

(ii) credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;

(iii) stocks and other intangible ownership interests in business associations;

(iv) monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(v) amounts due and payable under the terms of insurance policies; and

(vi) amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

(11) "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(12) "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of

other intangible property, or a person having a legal or equitable interest in property subject to this Act or his legal representative.

(13) "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity.

(14) "State" means any state, district, commonwealth, territory, insular possession, or any other area subject to the legislative authority of the United States.

(15) "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

§ 2. [Property Presumed Abandoned; General Rule]

(a) Except as otherwise provided by this Act, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than 5 years after it became payable or distributable is presumed abandoned.

(b) Property is payable or distributable for the purpose of this Act notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

§ 3. [General Rules for Taking Custody of Intangible Unclaimed Property]

Unless otherwise provided in this Act or by other statute of this State, intangible property is subject to the custody of this State as unclaimed property if the conditions rais-

ing a presumption of abandonment under Sections 2 and 5 through 16 are satisfied and:

(1) the last known address, as shown on the records of the holder, of the apparent owner is in this State;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;

(3) the records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(i) the last known address of the person entitled to the property is in this State, or

(ii) the holder is a domiciliary or a government or governmental subdivision or agency of this State and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this State;

(5) the last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this State; or

(6) the transaction out of which the property arose occurred in this State, and

(i) (A) the last known address of the apparent owner or other person entitled to the property is unknown, or

(B) the last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property, and

(ii) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

* * * *

§ 11. [Property of Business Associations Held in Course of Dissolution]

Intangible property distributable in the course of a dissolution of a business association which remains unclaimed by the owner for more than one year after the date specified for final distribution is presumed abandoned.

§ 12. [Property Held By Agents and Fiduciaries]

(a) Intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within 5 years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by the fiduciary.

(b) Funds in an individual retirement account or a retirement plan for self-employed individuals or similar account or plan established pursuant to the Internal Revenue laws of the United States are not payable or distributable within the meaning of subsection (a) unless, under

the terms of the account or plan, distribution of all or part of the funds would then be mandatory.

(c) For the purpose of this section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for that business association alone, unless the agreement between him and the business association provides otherwise.

(d) For the purposes of this Act, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned.

* * * *

§ 17. [Report of Abandoned Property]

(a) A person holding property tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this Act shall report to the administrator concerning the property as provided in this section.

(b) The report must be verified and must include:

(1) except with respect to travelers checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property of the value of $25 or more presumed abandoned under this Act;

(2) in the case of unclaimed funds of $25 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(3) in the case of the contents of a safe deposit box or other safekeeping repository or of other tan-

gible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(4) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items of value under $25 each may be reported in the aggregate;

(5) the date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(6) other information the administrator prescribes by rule as necessary for the administration of this Act.

(c) If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

(d) The report must be filed before November 1 of each year as of June 30, next preceding, but the report of any life insurance company must be filed before May 1 of each year as of December 31 next preceding. On written request by any person required to file a report, the administrator may postpone the reporting date.

(e) Not more than 120 days before filing the report required by this section, the holder in possession of property presumed abandoned and subject to custody as unclaimed property under this Act shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this Act if:

(i) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate,

(ii) the claim of the apparent owner is not barred by the statute of limitations, and

(iii) the property has a value of $50 or more.

* * * *

§ 19. [Payment or Delivery of Abandoned Property]

(a) Except as otherwise provided in subsections (b) and (c), a person who is required to file a report under Section 17, within 6 months after the final date for filing the report as required by Section 17, shall pay or deliver to the administrator all abandoned property required to be reported.

(b) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the administrator, and the property will no longer be presumed abandoned. In that case, the holder shall file with the administrator a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(c) Property reported under Section 17 for which the holder is not required to report the name of the apparent owner must be delivered to the administrator at the time of filing the report.

(d) The holder of an interest under Section 10 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the administrator. Upon delivery of a duplicate certificate to the administrator, the holder and any transfer agent, registrar, or other person acting for or on behalf

of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provision of Section 20 to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the administrator, for any losses or damages resulting to any person by the issuance and delivery to the administrator of the duplicate certificate.

§ 20. [Custody by State; Holder Relieved from Liability; Reimbursement of Holder Paying Claim; Reclaiming for Owner; Defense of Holder; Payment of Safe Deposit Box or Repository Charges]

(a) Upon the payment or delivery of property to the administrator, the state assumes custody and responsibility for the safe-keeping of the property. A person who pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

(b) A holder who has paid money to the administrator pursuant to this Act may make payment to any person appearing to the holder to be entitled to payment and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a travelers check or money order, the holder must be reimbursed under this subsection upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder must be reimbursed for payment made under this subsection even if the payment was made to a person whose claim was barred under Section 29(a).

(c) A holder who has delivered property (including a certificate of any interest in a business association) other than money to the administrator pursuant to this Act may reclaim the property if still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the owner has claimed the property from the holder.

(d) The administrator may accept the holder's affidavit as sufficient proof of the facts that entitle the holder to recover money and property under this section.

(e) If the holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(f) For the purposes of this section, "good faith" means that

(1) payment or delivery was made in a reasonable attempt to comply with this Act;

(2) the person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this Act; and

(3) there is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(g) Property removed from a safe deposit box or other safe-keeping repository is received by the administrator subject to the holder's right under this subsection to be reimbursed for the actual cost of the opening and to any valid lien or contract providing for the holder to be re-

imbursed for unpaid rent or storage charges. The administrator shall reimburse or pay the holder out of the proceeds remaining after deducting the administrator's selling cost.

* * * *

§ 25. [Claim of Another State to Recover Property; Procedure]

(a) At any time after property has been paid or delivered to the administrator under this Act another state may recover the property if:

(1) the property was subjected to custody by this State because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this Act, and the other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(2) the last known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder, is in the other state and under the laws of that state the property has escheated to or become subject to a claim of abandonment by that state;

(3) the records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last known address of the actual owner is in the other state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(4) the property was subjected to custody by this State under Section 3(b) and under the laws of the state of domicile of the holder the property has

escheated to or become subject to a claim of abandonment by that state; or

(5) the property is the sum payable on a travelers check, money order, or other similar instrument that was subjected to custody by this State under Section 4, and the instrument was purchased in the other state, and under the laws of that state the property escheated to or became subject to a claim of abandonment by that state.

(b) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within 90 days after it is presented. The administrator shall allow the claim if he determines that the other state is entitled to the abandoned property under subsection (a).

(c) The administrator shall require a state, before recovering property under this section, to agree to indemnity this State and its officers and employees against any liability on a claim for the property.

§ 26. [Action to Establish Claim]

A person aggrieved by a decision of the administrator or whose claim has not been acted upon within 90 days after its filing may bring an action to establish the claim in the [ ] court, naming the administrator as a defendant. The action must be brought within [90] days after the decision of the administrator or within [180] days after the filing of the claim if he has failed to act on it. [If the aggrieved person establishes the claim in an action against the administrator, the court shall award him costs and reasonable attorney's fees.]

* * * *

§ 33. [Interstate Agreements and Cooperation; Joint and Reciprocal Actions With Other States]

(a) The administrator may enter into agreements with other states to exchange information needed to enable this or another state to audit or otherwise determine unclaimed property that it or another state may be entitled to subject to a claim of custody. The administrator by rule may require the reporting of information needed to enable compliance with agreements made pursuant to this section and prescribe the form.

(b) To avoid conflicts between the administrator's procedures and the procedures of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act, the administrator, so far as is consistent with the purposes, policies, and provisions of this Act, before adopting, amending or repealing rules, shall advise and consult with administrators in other jurisdictions that enact substantially the Uniform Unclaimed Property Act and take into consideration the rules of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act.

(c) The administrator may join with other states to seek enforcement of this Act against any person who is or may be holding property reportable under this Act.

(d) At the request of another state, the attorney general of this State may bring an action in the name of the administrator of the other state in any court of competent jurisdiction to enforce the unclaimed property laws of the other state against a holder in this State of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the attorney general in bringing the action.

(e) The administrator may request that the attorney general of another state or any other person bring an action in the name of the administrator in the other state. This State shall pay all expenses including attor-

ney's fees in any action under this subsection. [The administrator may agree to pay the person bringing the action attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action.] Any expenses paid pursuant to this subsection may not be deducted from the amount that is subject to the claim by the owner under this Act.

* * * *

B. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT—REVISED 1966 ACT

§ 1. [Definitions and Use of Terms]

As used in this Act, unless the context otherwise requires:

(a) "Banking organization" means any bank, trust company, savings bank [industrial bank, land bank, safe deposit company], or a private banker engaged in business in this state.

(b) "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.

(c) "Financial organization" means any savings and loan association, building and loan association, credit union, [cooperative bank] or investment company, engaged in business in this state.

(d) "Holder" means any person in possession of property subject to this Act belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this Act.

(e) "Life insurance corporation" means any association or corporation transacting within this state the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities.

(f) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this Act, or his legal representative.

(g) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(h) "Utility" means any person who owns or operates within this state, for public use, any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

* * * *

§ 5. [Undistributed Dividends and Distributions of Business Associations]

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within 7 years after the date prescribed for payment or delivery, is presumed abandoned if:

(a) It is held or owing by a business association organized under the laws of or created in this state; or

(b) It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

* * * *

§ 7. [Property Held by Fiduciaries]

All intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within 7 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary:

(a) If the property is held by a banking organization or a financial organization, or by a business association organized under the laws of or created in this state; or

(b) If it is held by a business association, doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state; or

(c) If it is held in this state by any other person.

* * * *

§ 9. [Miscellaneous Personal Property Held for Another Person]

All intangible personal property, not otherwise covered by this Act, including any income or increment thereon and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 7 years after it became payable or distributable is presumed abandoned.

§ 10. [Reciprocity for Property Presumed Abandoned or Escheated Under the Laws of Another State]

If specific property which is subject to the provisions of sections 2, 5, 6, 7, and 9 is held for or owed or distributable to an owner whose last known address is in

another state by a holder who is subjected to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to this act if:

(a) It may be claimed as abandoned or escheated under the laws of such other state; and

(b) The laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

§ 11. [Report of Abandoned Property]

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this Act shall report to the [State Treasurer] with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of [$3.00] or more presumed abandoned under this Act;

(2) in case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under [$3.00] each may be reported in aggregate;

(4) the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) other information which the [State Treasurer] prescribes by rule as necessary for the administration of this Act.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before November 1 of each year as of June 30 next preceding, but the report of life insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. The [State Treasurer] may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this Act knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The initial report filed under this Act shall include all items of property that would have been presumed abandoned if this Act had been in effect during the 10 year period preceding its effective date.

* * * *

§ 13. [Payment or Delivery of Abandoned Property]

Every person who has filed a report under section 11, within [20] days after the time specified in section 12

for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under section 2 within [20] days after the filing of the report, shall pay or deliver to the [State Treasurer] all abandoned property specified in this report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section 12, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the [State Treasurer], but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

§ 14. [Relief from Liability by Payment or Delivery]

Upon the payment or delivery of abandoned property to the [State Treasurer], the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who pays or delivers abandoned property to the [State Treasurer] under this Act is relived of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. Any holder who has paid moneys to the [State Treasurer] pursuant to this Act may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the [State Treasurer] shall forthwith reimburse the holder for the payment.

C. UNIFORM COMMERCIAL CODE

§ 8-207. Rights and Duties of Issuer With Respect to Registered Owners and Registered Pledgees.

(1) Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

(2) Subject to the provisions of subsections (3), (4), and (6), the issuer or indenture trustee may treat the registered owner of an uncertificated security as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

(3) The registered owner of an uncertificated security that is subject to a registered pledge is not entitled to registration of transfer prior to the due presentment to the issuer of a release instruction. The exercise of conversion rights with respect to a convertible uncertificated security is a transfer within the meaning of this section.

(4) Upon due presentment of a transfer instruction from the registered pledgee of an uncertificated security, the issuer shall:

(a) register the transfer of the security to the new owner free of pledge, if the instruction specifies a new owner (who may be the registered pledgee) and does not specify a pledgee;

(b) register the transfer of the security to the new owner subject to the interest of the existing pledgee, if the instruction specifies a new owner and the existing pledgee; or

(c) register the release of the security from the existing pledge and register the pledge of the

security to the other pledgee, if the instruction specifies the existing owner and another pledgee.

(5) Continuity of perfection of a security interest is not broken by registration of transfer under subsection (4) (b) or by registration of release and pledge under subsection (4) (c), if the security interest is assigned.

(6) If an uncertificated security is subject to a registered pledge:

(a) any uncertificated securities issued in exchange for or distributed with respect to the pledged security shall be registered subject to the pledge;

(b) any certificated securities issued in exchange for or distributed with respect to the pledged security shall be delivered to the registered pledgee; and

(c) any money paid in exchange for or in redemption of part or all of the security shall be paid to the registered pledgee.

(7) Nothing in this Article shall be construed to affect the liability of the registered owner of a security for calls, assessments, or the like.

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§ 9-103. Perfection of Security Interest in Multiple State Transactions.

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(3) Accounts, general intangibles and mobile goods.

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting

machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction,

or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel paper.

The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

* * * *

(6) Uncertificated securities.

The law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities.

D. MODEL BUSINESS CORPORATION ACT (1984 Version)

§ 1.40. DEFINITIONS

(21) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

§ 7.07. RECORD DATE

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than 70 days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

§ 7.23. SHARES HELD BY NOMINEES

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) the types of nominees to which it applies;

(2) the rights or privileges that the corporation recognizes in a beneficial owner;

(3) the manner in which the procedure is selected by the nominee;

(4) the information that must be provided when the procedure is selected;

(5) the period for which selection of the procedure is effective; and

(6) other aspects of the rights and duties created.

IV. NEW YORK ABANDONED PROPERTY LAW

ARTICLE V—UNCLAIMED PROPERTY HELD OR OWING FOR PAYMENT TO SECURITY HOLDERS

§ 500. Definitions

When used in this article, the following terms shall have the following meanings:

1. (a) "Corporation" shall mean any corporation (other than a public corporation as defined in paragraph (b) of this subdivision), joint stock company, association of two or more individuals, committee, partnership, investment company (as defined by, and which is registered under, an act of Congress of the United States entitled the "Investment Company Act of 1940", as amended), unit investment trust or business trust, whether or not for profit.

(b) "Public corporation" shall mean any state and a public corporation as defined in section sixty-six of the general construction law, but shall not mean an agency or political subdivision of the United States or of a foreign nation.

2. "Security" shall mean:

(a) Any instrument issued by a corporation or public corporation or any entry on the books and records of such corporation or public corporation evidencing an obligation to make any payment of the principal amount of a debt or of any increment due or to become due thereon; or

(b) Any instrument issued by a corporation to evidence a proprietary interest therein or any intangible interest in a corporation as evidenced by the books and records of the corporation except:

(i) A policy of insurance issued by a mutual insurance corporation, or

(ii) A share issued by a savings and loan association, a building and loan association, or a credit union.

For the purposes of this article, an industrial development bond or an industrial revenue bond shall be deemed a security issued by a public corporation.

3. "Domestic corporation" shall mean any corporation organized under the laws of this state or under the laws of this state and one or more other states or foreign countries, but shall not mean a banking organization as defined in this chapter.

4. "Foreign corporation" shall mean any corporation organized under the laws of a state other than New York or under the laws of a foreign country and doing business in this state or authorized to do business in this state, but shall not mean a banking organization as defined in this chapter. "Non-authorized foreign corporation" shall mean any corporation organized under the laws of a state other than New York which is neither doing business nor authorized to do business in this state.

5. "Fiduciary" shall mean any individual or any domestic or foreign corporation holding a security for a resident or receiving, as agent of a corporation or as holder of a security, any amount due or to become due a resident as the holder or owner of a security but shall not mean any individual or corporation so acting by direction of a court in any case where such court has not directed a distribution of such amount or security.

6. "Resident" shall mean:

(a) An individual domiciled in this state;

(b) A domestic corporation;

(c) A banking organization, as defined in section one hundred three of this chapter; and

(d) This state and any public corporation organized under its laws.

7. (a) "Amount" shall include, but is not limited to, any dividend, profit or other distribution, whether in cash

or securities, and any interest or other payment on or of principal, including the cash value of any security which has matured or has been called for full or partial redemption or is payable to security owners or former security owners entitled to payments as the result of a merger, consolidation, acquisition or conversion of any type.

(b) An amount is deemed to be "distributable" or "payable" for the purposes of this article notwithstanding any requirement that a security or other instrument must be presented, exchanged or surrendered, or that an owner must affirmatively make any claim for payment, before actual payment of such amount may be effected.

8. "Wages" shall include moneys payable, under contract or otherwise, for services rendered to a domestic or foreign corporation or fiduciary, including but not limited to payment of salaries, commissions, royalties, expenses, employee benefits, and insurance benefits payable by a corporation pursuant to a self-insurance plan, less lawful deductions.

§ 501. Unclaimed property; when deemed abandoned

1. (a) Any amount which, on or after January first, nineteen hundred forty-seven, shall have become payable or distributable by a domestic, foreign or public corporation or by a fiduciary to a resident as the owner or former owner of a security as defined in paragraph (a) of subdivision two of section five hundred of this article, shall be deemed abandoned when the security with respect to which such amount is payable or distributable has been deemed abandoned, or when such amount:

(i) is payable or distributable to such resident as the owner or former owner of such security; and

(ii) has, on the thirty-first day of December in any year, remained unpaid to or unclaimed by such resident for a period of three years. For the purposes of this article, a security as defined in paragraph (a) of sub-

division two of section five hundred of this article shall not be deemed abandoned until a period of three years has elapsed from the earlier of the maturity date of such security or the date such security has been called for redemption.

(b) Any amount which, on or after January first, nineteen hundred forty-seven shall have become payable or distributable by a domestic or foreign corporation or a fiduciary to a resident as the owner or former owner of a security as defined in paragraph (b) of subdivision two of section five hundred of this article, shall be deemed abandoned when the security with respect to which such amount is payable or distributable has been deemed abandoned or when such amount:

(i) is payable or distributable to such resident as the owner or former owner of such security; and

(ii) has, on the thirty-first day of December in any year, remained unpaid to or unclaimed by such resident for a period of five years.

2. (a) Except as provided in paragraph (b) of this subdivision, any security, as defined in paragraph (b) of subdivision two of section five hundred of this article, of any domestic corporation or foreign corporation owned by or formerly owned by a resident shall be deemed abandoned where, for five successive years:

(i) all amounts, if any, payable or distributable thereon or with respect thereto have remained unpaid to or unclaimed by such resident, and

(ii) no written communication has been received from such resident by the holder.

(b) (i) Any security, as defined in paragraph (b) of subdivision two of section five hundred of this article, of any domestic or foreign corporation in which a resident has an ownership interest and which is enrolled in a plan that provides for the automatic reinvestment of dividends,

distributions, or other sums payable as the result of such interest shall be deemed abandoned when any security owned by such resident which is not enrolled in the plan has been deemed abandoned pursuant to paragraph (a) of this subdivision or when, for five successive years:

(1) all amounts, if any, payable thereon or with respect thereto have remained unpaid to or unclaimed by such resident, and

(2) no written communication has been received from such resident by the holder, and

(3) the holder does not know the location of such resident at the end of such five year period.

(ii) For purposes of this paragraph, the reinvestment of any dividend, distribution or other sum payable shall not be considered as payment of an amount for the purpose of extending the statutory period of inactivity after the expiration of which securities enrolled in a reinvestment plan are deemed abandoned.

(iii) Any corporation or fiduciary holding or evidencing on its books and records securities enrolled in a reinvestment plan shall notify the apparent owner by certified mail that such securities will be delivered to the state comptroller as abandoned property, pursuant to the provisions of section five hundred two of this article, unless such corporation or fiduciary receives written communication from the apparent owner of such securities indicating knowledge of such securities prior to the date that such securities are required to be delivered to the state comptroller. Such letter by certified mail shall be sent during the calendar year prior to the year in which such property would be required to be delivered to the state comptroller, but no later than the thirty-first day of December of such year. For purposes of this subdivision, a signed return receipt shall constitute written communication received by the holder from the apparent owner.

(iv) All corporations or fiducaries holding or evidencing on its books and records securities enrolled in a reinvestment plan shall retain, for a period of five years following the thirty-first day of December of the year for which a report of abandoned property has been filed, a list of (1) the dates and nature of any and all corporate notices which have been sent via first class mail to owners of such securities during the period to which such report relates, and (2) the names and addresses of all owners of such securities for whom postal authorities have returned any first class mail sent by the holder during the period to which such report relates, and the dates on which such mail was returned for each such owner. Nothing contained herein or in any other provision of this chapter shall preclude the state comptroller, in the performance of his duties under this chapter, from verifying that all such notices have been sent and whether or not such notices have been returned to the holder by the postal authorities.

3. Any wages payable on or after July first, nineteen hundred sixty-three by a domestic or foreign corporation and held for a resident by such issuing corporation or held and payable by a fiduciary other than a broker or dealer as defined in section five hundred ten of this chapter for a resident shall be deemed to be abandoned property, where for three successive years:

(a) All such wages have remained unpaid to such resident, and

(b) No written communication has been received from such resident by the holder, and

(c) Notice regarding such wages has been sent by the corporation or fiduciary, via first class mail, to such resident at his last known address and such notice has been returned to the corporation or fiduciary by the postal authorities for inability to locate such resident.

4. For the purposes of this section the holder or owner of a security or payee of an amount or a payee of wages

shall be deemed to be a resident when the records of the corporation or fiduciary indicate that the last known address of such holder, owner or payee is located within this state or, if the security was issued or the amount or wages were payable by a domestic corporation or a public corporation organized under the laws of this state, when such records do not indicate a last known address outside this state or when the address of such holder, owner or payee is unknown to such corporation or public corporation or fiduciary; or when the address of such holder, owner or payee is in a state not having a law relating to the disposition of abandoned property; or when the address of such holder, owner or payee is in a foreign country.

5. Any amount, wages or security with respect to which such domestic or foreign corporation or public corporation or fiduciary has on file written evidence received within the period specified for determining abandonment of such property that the person entitled to such amount or wages or for whom such security is held had knowledge thereof shall not be deemed abandoned property.

§ 502. Payment or delivery of abandoned property

1. In the month of March in each year, and on or before the tenth day thereof, every domestic or foreign corporation or public corporation or fiduciary shall pay or deliver to the state comptroller all property which on the preceding thirty-first day of December was deemed abandoned pursuant to section five hundred one excepting such property as since that date has ceased to be abandoned.

2. Where any security delivered to the state comptroller pursuant to subdivision one hereof, is delivered by him to the issuing corporation, the security shall be transferred to him on the books of the corporation and a certificate registered in the name of the state comptroller shall be delivered to him or, if so requested by the comp-

troller, such corporation shall register such securities in book entry form in the name of the comptroller. The corporation and its transfer agent, registrar or other person acting for or on behalf of the corporation in executing or delivering any such certificate or registering such securities shall be relieved from liability to any person for any losses or damages resulting from the issuance and delivery to the state comptroller of such certificate or registration of such securities.

§ 503. Report of abandoned property

Each payment or delivery of abandoned property pursuant to section five hundred two shall be accompanied by a verified written report, in such form as the state comptroller shall prescribe, setting forth:

(a) The name and last known address, if any, of the person appearing to be entitled to such abandoned property;

(b) A description of such abandoned property;

(c) The number of shares represented or the face amount of the security;

(d) The amount of any principal, dividend, interest or other increment due thereon;

(e) The date such amount was demandable or payable; and

(f) Such other identifying information as the state comptroller may require.

§ 504. Reimbursement for property paid or delivered

A domestic or foreign corporation or public corporation or a fiduciary which has paid or delivered to the state comptroller abandoned property pursuant to section five hundred two may make payment to the person entitled thereto, and may file claim for reimbursement for such payment by the state comptroller, who shall, upon

satisfactory proof of such payment and after audit, reimburse such domestic or foreign corporation or public corporation or fiduciary. In no event, however, shall such reimbursement exceed the amount to which the claimant is entitled pursuant to subdivision two of section fourteen hundred three of this chapter.

ARTICLE V-A—UNCLAIMED PROPERTY HELD BY BROKERS

§ 510. Definitions

When used in this article, the following items shall have the following meanings:

1. "Corporation" shall include any joint stock company, corporation, association of two or more individuals, committee, public authority, or business trust.

2. "Public issuer" shall include the United States, the several states and territories thereof, political subdivisions and municipal corporations within such states and territories, foreign countries and political subdivisions and municipal corporations within such foreign countries.

3. "Security" shall include:

(a) Any instrument issued by a corporation or public issuer to evidence an obligation to make any payment of the principal amount of a debt or of any increment due or to become due thereon, or

(b) Any instrument issued by a corporation to evidence a proprietary interest therein except:

(i) A policy of insurance issued by a mutual insurance corporation, or

(ii) A share issued by a savings and loan association, a building and loan association, or a credit union.

4. "Broker" shall include any individual or corporation engaging in the purchase, sale or exchange of securities for or on behalf of any customer.

5. "Dealer" shall include any individual or corporation engaging in any state as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise.

6. (a) "Customer" shall include any individual or corporation entering into a contract with a broker or dealer by which such broker or dealer agrees to effect the purchase, sale, or exchange, or to keep custody of any security for or on behalf of such individual or corporation. The term "customer" shall also include any individual or corporation entering into a contract with a broker or dealer whereby such broker or dealer for his own account buys from or sells to such individual or corporation, any security.

(b) If on the books of account located at an office in this state of a broker or dealer there is indicated a balance to the credit of an individual or corporation with a last-known address in a state other than this state, such individual or corporation shall not be deemed a "customer".

7. "Amount" shall mean that term as defined in subdivision seven of section five hundred of this chapter.

8. "Wages" shall include moneys payable, under contract or otherwise, for services rendered to a broker or dealer, less lawful deductions.

§ 511. Unclaimed property; when deemed abandoned

The following unclaimed property shall be deemed abandoned property:

1. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six by a broker or dealer or nominee of such broker or dealer as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

1-a. Any amount (a) received in this state on or after July first, nineteen hundred seventy-four by a broker or dealer or nominee of such broker or dealer other than as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

2. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six due from a broker or dealer or nominee of such broker or dealer to a customer which has remained unpaid to the customer for three years after the date of the last entry, other than the receipt of dividends or interest in the account of such broker, dealer or nominee with such customer, or (b) payable on or with respect to a security which has been deemed abandoned.

3. Any security held in this state by a broker or dealer, or nominee of such broker or dealer, as the holder of record of a security for a customer or for a person or persons unknown to such broker or dealer or nominee where, for three successive years, all amounts paid thereon or with respect thereto and received after June thirtieth, nineteen hundred forty-six by such broker or dealer or nominee have remained unclaimed.

Provided, however, that if any amount or security specified in subdivision one, two or three of this section is reflected, recorded or included in an account with respect to which such broker or dealer has on file evidence in writing received within the three years immediately preceding the thirty-first day of December preceding the date such amount or security would otherwise be payable or deliverable pursuant to section five hundred twelve that the person entitled thereto had knowledge of such account, then such amount or security shall not be deemed abandoned property.

4. Any security held by a broker or dealer or nominee of such broker or dealer reflected, recorded, or included in an account with respect to which, for three successive years, all statements of account or other communications which have been sent, via first class mail, to the customer at his last known address have been returned to such broker, dealer or nominee by the postal authorities for inability to locate the customer, and no written communication has been received from the customer by such broker, dealer or nominee, provided such security was received or is held in this state by such broker, dealer or nominee or the last known address of the customer is located in this state.

5. Any wages held and payable on or after July first, nineteen hundred sixty-six by a broker or dealer, as defined in section five hundred ten of this article, for the benefit of a person or persons, known or unknown, shall be deemed to be abandoned property, where for three successive years:

(a) All such wages have remained unpaid to such person, and

(b) No written communication has been received from such person by the holder, and

(c) Notice regarding such wages, if sent by the broker or dealer, via first class mail, to such person at his last known address has been returned to the broker or dealer by the postal authorities for inability to locate such person.

6. Any broker or dealer who satisfies the requirements of this subdivision may determine the property which on the thirty-first day of December in the years nineteen hundred seventy-two, nineteen hundred seventy-three, nineteen hundred seventy-four and nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine, and nineteen

hundred seventy by the method hereinafter in this subdivision described and the amount so determined as at any such date shall be deemed to be all of such abandoned property held by such broker or dealer pursuant to subdivisions one and three of this section on such date.

The broker or dealer shall compute separately for each of the years nineteen hundred sixty-five and nineteen hundred sixty-six (each of which years is referred to in this subdivision as a "base year") the total value of all stock and cash dividends received by such broker or dealer, or nominee of such broker or dealer, in this state during such year as the holder of record of a security. The value of any dividend paid in stock shall be the mean price of such stock during the calendar month in which the dividend was received as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of all such stock and cash dividends thus determined for each base year shall be the denominator for that base year. The broker or dealer shall then determine the total value of all such dividends received during each base year belonging to unknown owners as reported to the state comptroller, or as required to be so reported pursuant to this article, which continued to be held by such broker or dealer, or nominee of such broker or dealer, unpaid to the person entitled thereto on the December thirty-first occurring five years after the close of such base year. To the extent any such dividends which continued to be so held unpaid on any such December thirty-first consisted of stock, such stock shall be valued at the mean price of such stock during the calendar month ending on such December thirty-first as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of such remaining dividends thus determined for each

base year shall be the numerator for that base year. The sum of the numerators for the base years shall be divided by the sum of the denominators for the base years and the result thus obtained shall be multiplied by two. The product obtained as the result of such multiplication shall be the average factor of such broker or dealer.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-two shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during ninteen hundred sixty-seven as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-seven but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-

seven but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven on the thirty-first day of December nineteen hundred seventy-two.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-three in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-

first day of December, nineteen hundred seventy-three in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight on the thirty-first day of December, nineteen hundred seventy-three.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-four shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in

this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine on the thirty-first day of December nineteen hundred seventy-four.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred seventy the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of

such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred seventy on the thirty-first day of December, nineteen hundred seventy-five.

Each broker or dealer which uses the procedure described above in this subdivision shall maintain for a period of not less than six years commencing January first, nineteen hundred seventy-two, books and records evidencing the receipt of dividends in this state for each of the base years, and the payment thereof over the five years succeeding each base year.

Any broker or dealer who chooses to determine the property which on the thirty-first day of December in the years nineteen hundred seventy-two or nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven or nineteen hundred sixty-eight by the method described in this subdivision shall thereafter determine the property which on the thirty-first day of December in each subsequent year ending not later than December thirty-first, nineteen hundred seventy-five shall be deemed abandoned property

pursuant to subdivisions one and three of this section relating to a year not later than nineteen hundred seventy by the method described in this subdivision. No broker or dealer may choose to determine the property which on the thirty-first day of December in the years nineteen hundred seventy-four or nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-nine or nineteen hundred seventy by the method described in this subdivision unless such broker or dealer shall have used the method described in this subdivision to determine the property which on the thirty-first day of December in the year nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight.

The method of determining abandoned property pursuant to subdivisions one and three of this section as described in this subdivision shall be available only to such brokers or dealers as have made written reports pursuant to section five hundred thirteen in each of the years nineteen hundred seventy-one and nineteen hundred seventy-two covering each of the base years.

In the event that an audit of a broker or dealer by the state comptroller establishes that one or more of the dollar values determined by the broker or dealer for the purpose of computing the average factor of such broker or dealer pursuant to this subdivision was incorrect, the corrected average factor of such broker or dealer established as a result of such audit shall be determined to be the average factor required to be used by such broker or dealer in determining abandoned property pursuant to this subdivision.

Any broker or dealer who does not determine abandoned property pursuant to subdivisions one and three of this section by the method described in this subdivision and who during any of the calendar years nineteen hundred

sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy received in this state any stock dividend as the holder of record of a security for a person or persons unknown to such broker or dealer and who sold any such stock dividend during any such or subsequent calendar year, shall pay the proceeds of such sale to the state comptroller not later than the thirty-first day of December, nineteen hundred seventy-three and such proceeds shall, for all purposes of this chapter be deemed abandoned property on the thirty-first day of December of the calendar year during which such sale takes place.

§ 512. Payment or delivery of abandoned property

1. In the month of March of each year, and on or before the tenth day thereof, every broker or dealer shall pay or deliver to the state comptroller all property which on the preceding thirty-first day of December was deemed abandoned property pursuant to section five hundred eleven excepting such property as since that date has ceased to be abandoned.

2. Where any security delivered to the state comptroller pursuant to subdivision one hereof, is delivered by him to the issuing corporation, the security shall be transferred to him on the books of the corporation and a certificate registered in the name of the state comptroller shall be delivered to him. The corporation and its transfer agent, registrar or other person acting for or on behalf of the corporation in executing or delivering such certificate shall be relieved from liability to any person for any losses or damages resulting from the issuance and delivery to the state comptroller of such certificate.

§ 513. Report to accompany payment or delivery

A payment or delivery pursuant to section five hundred twelve shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, setting forth:

1. With reference to any amount specified in subdivision one of section five hundred eleven,

(a) A description of the security,

(b) The number of shares represented or the face amount of the security,

(c) The date the dividend or interest was payable, and

(d) Such other information as the state comptroller may require.

2. With reference to any amount specified in subdivision two of section five hundred eleven,

(a) The name and last known address, if any, of the customer entitled to such amount,

(b) The date of the last entry, other than the credit of interest or dividends, in the account in which such amount is reflected, recorded or included, and

(c) Such other information as the state comptroller may require.

3. With reference to any security specified in subdivision three or four of section five hundred eleven,

(a) A description of the abandoned security,

(b) The number of shares represented or the face amount of the security,

(c) The name and last known address, if any, of the person appearing to be entitled to such abandoned property, and

(d) Such other information as the state comptroller may require.

4. In case any broker or dealer shall on the thirty-first day of December in any year neither hold nor owe any abandoned property specified in section five hundred eleven, such broker or dealer shall on or before the tenth

day of March next succeeding make a verified written report to the State Comptroller so stating.

5. In case any broker or dealer determines the property which shall be deemed abandoned property pursuant to subdivisions one and three of section five hundred eleven by the method provided in subdivision six of that section, the payment of such abandoned property shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, which, among other things, shall set forth the computation of the average factor of such broker or dealer pursuant to subdivision six of section five hundred eleven. Each verified written report accompanying the payment of abandoned property determined pursuant to subdivision six of section five hundred eleven shall contain an undertaking by the broker or dealer making such payment to honor all claims to the extent herein provided whenever made against such broker or dealer by any person determined by him or proved to be entitled to receive from him a stock or cash dividend received in this state during the calendar year covered by such report as the holder of record of a security or an interest payment on a security received in this state during such year. Such undertaking shall obligate the broker or dealer to honor any such claim provided that the payment of abandoned property relating to the year in question determined pursuant to subdivision six of section five hundred eleven made by such broker or dealer to the state comptroller has been exhausted as a result of reimbursements by the state comptroller to the broker or dealer or to other persons claiming such abandoned property as provided in subdivision two of section five hundred fourteen. To the extent related to any stock dividend, any such claim shall not exceed the fair market value of such stock dividend on the thirty-first day of December of the year in which such stock dividend was deemed abandoned property.

§ 513-a. Retention of books and records

1. Every broker or dealer shall retain the books and records set forth in subdivision two of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine and nineteen hundred seventy for a period of ten years following the end of the year in which created; shall retain all such books and records relating to the year nineteen hundred seventy-one for a period of nine years following the close of nineteen hundred seventy-one; and shall retain all such books and records relating to any subsequent calendar year for a period of ten years following the end of the year in which created. The books and records so retained shall be made available to the state comptroller upon his request in the performance of his duties under this chapter.

2. The following books and records shall be those referred to in subdivision one of this section: general ledgers, customers ledgers; daily and weekly stock position records; dividend sheets; cash blotters; purchase and sales blotters; daily journals; bank reconciliations; cancelled checks; claim letters; independent auditor's reports; trial balances; private ledgers; financial statements and supporting data; chart of accounts; and copies of abandoned property reports.

§ 514. Reimbursement of brokers or dealers

1. A broker or dealer which has paid or delivered to the state comptroller abandoned property pursuant to section five hundred twelve may elect to make payment to the person entitled thereto. A broker or dealer making such payment may file claim for reimbursement by the state comptroller. The state comptroller upon satisfactory proof of such payment shall, after audit, reimburse such broker or dealer. In no event, however, shall such reimbursement exceed the amount to which the claimant is entitled pursuant to subdivision two of section fourteen hundred three of this chapter.

2. A broker or dealer which has paid to the state comptroller abandoned property relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, determined pursuant to subdivision six of section five hundred eleven, may elect thereafter to make payment to a person entitled to receive (i) a stock or cash dividend received in this state during any such year by such broker or dealer, or nominee of such broker or dealer, as the holder of record of a security, or (ii) an interest payment on a security received in this state during any such year by such broker or dealer, or nominee of such broker or dealer. A broker or dealer making any such payment may file claim for reimbursement by the state comptroller. Subject to the provisions of this subdivision, the state comptroller upon satisfactory proof that a broker or dealer has made payment to the person entitled thereto shall, after audit of such claim, reimburse such broker or dealer. In no event shall the amount or amounts reimbursed by the state comptroller to a broker or dealer relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, plus amounts paid by the state comptroller to any person claiming such abandoned property relating to any of such years, exceed the amount paid by the broker or dealer to the state comptroller pursuant to subdivision six of section five hundred eleven relating to such year. In no event shall the amount paid by the state comptroller to any person claiming a stock dividend received by a broker or dealer, or nominee of such broker or dealer, in any of such years, or to a broker or dealer in reimbursement of any such claim paid by such broker or dealer, exceed the value of such stock dividend as most recently reported by any generally recognized statistical service on the thirty-first day of December of the year in which such stock was deemed abandoned property.

V. SEC RULES

A. RULES UNDER SECTION 14, SECURITIES EXCHANGE ACT OF 1934

* * * *

14a-7 Mailing communications for security holders.

If the registrant has made or intends to make any solicitation subject to this regulation, the registrant shall perform such of the following acts as may be duly requested in writing with respect to the same subject matter or meeting by any security holder who is entitled to vote on such matter or to vote at such meeting and who shall defray the reasonable expenses to be incurred by the registrant in the performance of the act or acts requested.

(a) The registrant shall mail or otherwise furnish to such security holder the following information as promptly as practicable after the receipt of such request:

(1) A statement of the approximate number of holders of record of any class of securities, any of the holders of which have been or are to be solicited on behalf of the registrant, or any group of such holders which the security holder shall designate.

(2) If the registrant has made or intends to make, through bankers, brokers or other persons any solicitation of the beneficial owners of securities of any class, a statement of the approximate number of such beneficial owners, or any group of such owners which the security holder shall designate.

(3) An estimate of the cost of mailing a specified proxy statement, form of proxy or other communication to such holders, including insofar as known or reasonably available, the estimated handling and mailing costs of the bankers, brokers or other persons specified in paragraph (a) (2) of this section.

(b) (1) Copies of any proxy statement, form of proxy or other communication furnished by the security holder

shall be mailed by the registrant to such of the holders of record specified in paragraph (a) (1) of this section as the security holder shall designate. The registrant shall also mail to each banker, broker, or other person specified in paragraph (a) (2) of this section a sufficient number of copies of such proxy statement, form of proxy or other communication as will enable the banker, broker, or other person to furnish a copy thereof to each beneficial owner solicited or to be solicited through him.

(2) Any such material which is furnished by the security holder shall be mailed with reasonable promptness by the registrant after receipt of a tender of the material to be mailed, of envelopes or other containers therefor and of postage or payment for postage. The registrant need not, however, mail any such material which relates to any matter to be acted upon at an annual meeting of security holders prior to the earlier of (i) a day corresponding to the first date on which the registrant proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, or (ii) the first day on which solicitation is made on behalf of the registrant. With respect to any such material which relates to any matter to be acted upon by security holders otherwise than at an annual meeting, such material need not be mailed prior to the first day on which solicitation is made on behalf of the registrant.

(3) The registrant shall not be responsible for such proxy statement, form of proxy or other communication.

(c) In lieu of performing the acts specified in paragraphs (a) and (b) of this section, the registrant may at its option, furnish promptly to such security holder a reasonably current list of the names and addresses of such of the holders of record specified in paragraph (a) (1) of this section as the security holder shall designate, and a list of the names and addresses of such of the bankers, brokers or other persons specified in paragraph (a) (2) of this section as the security holder shall

designate together with a statement of the approximate number of beneficial owners solicited or to be solicited through each such banker, broker or other person and a schedule of the handling and mailing costs of each such banker, broker or other person if such schedule has been supplied to the registrant. The foregoing information shall be furnished promptly upon the request of the security holder or at daily or other reasonable intervals as it becomes available to the registrant.

* * * *

14a-13 Obligation of registrants in communicating with beneficial owners.

(a) If the registrant knows that securities of any class entitled to vote at a meeting (or by written consents or authorizations if no meeting is held) with respect to which the registrant intends to solicit proxies, consents or authorizations are held of record by a broker, dealer, voting trustee, bank, association, or other entity that exercises fiduciary powers in nominee name or otherwise, the registrant shall:

(1) By first class mail or other equally prompt means:

(i) Inquire of each such record holder:

(A) Whether other persons are the beneficial owners of such securities and if so, the number of copies of the proxy and other soliciting material necessary to supply such material to such beneficial owners;

(B) In the case of an annual (or special meeting in lieu of the annual) meeting, or written consents in lieu of such meeting, at which directors are to be elected, the number of copies of the annual report to security holders necessary to supply such report to beneficial owners to whom such reports are to be distributed by such record holder or its nominee and not by the registrant;

(C) If the record holder has an obligation under Rule 14b-1(b)(3) or Rule 14b-2(b)(4)(ii) and (iii), whether an agent has been designated to act on its behalf

in fulfilling such obligation and, if so, the name and address of such agent; and

(D) Whether it holds the registrant's securities on behalf of any respondent bank and, if so, the name and address of each such respondent bank; and

(ii) Indicate to each such record holder:

(A) Whether the registrant, pursuant to paragraph (c) of this section, intends to distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii);

(B) The record date; and

(C) At the option of the registrant, any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(2) Upon receipt of a record holder's or respondent bank's response indicating, pursuant to Rule 14b-2(b)(1)(i) the names and addresses of its respondent banks, within one business day after the date such response is received, make an inquiry of and give notification to each such respondent bank in the same manner required by paragraph (a)(1) of this section; *Provided, however*, the inquiry required by paragraphs (a)(1) and (a)(2) of this section shall not cover beneficial owners of exempt employee benefit plan securities;

(3) Make the inquiry required by paragraph (a)(1) of this section at least 20 business days prior to the record date of the meeting of security holders, or

(i) If such inquiry is impracticable 20 business days prior to the record date of a special meeting, as many days before the record date of such meeting as is practicable or,

(ii) If consents or authorizations are solicited, and such inquiry is impracticable 20 business days before the earliest date on which they may be used to effect corporate action, as many days before that date as is practicable, or

(iii) At such later time as the rules of a national securities exchange on which the class of securities in question is listed may permit for good cause shown; *Provided, however*, That if a record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, the inquiry shall be made to such designated office(s) or department(s); and

(4) Supply, in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the proxy, other proxy soliciting material, and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder or respondent bank may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; and

(5) Upon the request of any record holder or respondent bank that is supplied with proxy soliciting material and/or annual reports to security holders pursuant to paragraph (a)(4) of this section, pay its reasonable expenses for completing the mailing of such material to beneficial owners.

NOTE 1: If the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to Section 17A of the Act (e.g., "Cede & Co.," nominee for the Depository Trust Company), the registrant shall make appropriate inquiry of the clearing agency and thereafter of the participants in such clearing agency who may hold securities on behalf of a beneficial owner or respondent

bank, and shall comply with the above paragraph with respect to any such participant (*see* Rule 14a-1(i)).

NOTE 2: The attention of registrants is called to the fact that each broker, dealer, bank, association and other entity that exercises fiduciary powers has an obligation pursuant to Rule 14b-1 and Rule 14b-2 (except as provided therein with respect to exempt employee benefit plan securities held in nominee name) and, with respect to brokers and dealers, applicable self-regulatory organization requirements to obtain and forward, within the time periods prescribed therein, (a) proxies (or in lieu thereof requests for voting instructions) and proxy soliciting materials to beneficial owners on whose behalf it holds securities, and (b) annual reports to security holders to all beneficial owners on whose behalf it holds securities, unless the registrant has notified the record holder or respondent bank that it has assumed responsibility to mail such material to beneficial owners whose names, addresses and securities positions are disclosed pursuant to Rules 14b-1(c) and 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii).

NOTE 3: The attention of registrants is called to the fact that registrants have an obligation, pursuant to paragraph (d) of this section, to cause proxies (or in lieu thereof requests for voting instructions), proxy soliciting material and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

(b) Any registrant requesting pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii) a list of names, addresses and securities positions of beneficial owners of its securities who either have consented or have not objected to disclosure of such information shall:

(1) By first class mail or other equally prompt means, inquire of each record holder and each respondent bank identified to the registrant pursuant to Rule 14b-2(b)(4)(i) whether such record holder or respondent bank

holds the registrant's securities on behalf of any respondent banks and, if so, the name and address of each such respondent bank;

(2) Request such list to be compiled as of a date no earlier than five business days after the date the registrant's request is received by the record holder or respondent bank; *Provided, however,* That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, the request shall be made to such designated office(s) or department(s);

(3) Make such request to the following persons that hold the registrant's securities on behalf of beneficial owners: all brokers, dealers, banks, associations and other entities that exercises fiduciary powers; *Provided however,* such request shall not cover beneficial owners of exempt employee benefit plan securities as defined in Rule 14a-1(d)(1); and, at the option of the registrant, such request may give notice of any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(4) Use the information furnished in response to such request exclusively for purposes of corporate communications; and

(5) Upon the request of any record holder or respondent bank to whom such request is made, pay the reasonable expenses, both direct and indirect, of providing beneficial owner information.

NOTE: A registrant will be deemed to have satisfied its obligations under paragraph (b) of this section by requesting consenting and non-objecting beneficial owner lists from a designated agent acting on behalf of the record holder or respondent bank and paying to that designated agent the reasonable expenses of providing the beneficial owner information.

(c) A registrant, at its option, may mail its annual report to security holders to the beneficial owners whose identifying information is provided by record holders and respondent banks, pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii), provided that such registrant notifies the record holders and respondent banks, at the time it makes the inquiry required by paragraph (a) of this section, that the registrant will mail the annual report to security holders to the beneficial owners so identified.

(d) If a registrant solicits proxies, consents or authorizations from record holders and respondent banks who hold securities on behalf of beneficial owners, the registrant shall cause proxies (or in lieu thereof requests or voting instructions), proxy soliciting material and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

* * * *

14b-1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meanings as in the Act and, with respect to proxy soliciting material, as in Rule 14a-1 thereunder and, with respect to information statements, as in Rule 14c-1 thereunder. In addition, as used in this section, the term "registrant" means:

(1) The issuer of a class of securities registered pursuant to Section 12 of the Act; or

(2) An investment company registered under the Investment Company Act of 1940.

(b) *Dissemination and Beneficial Owner Information Requirements.* A broker or dealer registered under Sec-

tion 15 of the Act shall comply with the following requirements for disseminating certain communications to beneficial owners and providing beneficial owner information to registrants:

(1) The broker or dealer shall respond, by first class mail or other equally prompt means, directly to the registrant no later than seven business days after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating, by means of a search card or otherwise:

(i) The approximate number of its customers who are beneficial owners of the registrant's securities that are held of record by the broker, dealer or its nominee;

(ii) The number of its customers who are beneficial owners of the registrant's securities who have objected to disclosure of their names, addresses and securities positions if the registrant has indicated, pursuant to Rule 14a-13(a)(1)(ii)(A) or Rule 14c-7(a)(1)(ii)(A), that it will distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to paragraph (c) of this section; and

(iii) The identity of its designated agent, if any, acting on its behalf in fulfilling its obligations under paragraph (b)(3) of this section;

Provided, however, That if the broker or dealer has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, receipt for purposes of paragraph (b)(1) of this section shall mean receipt by such designated office(s) or department(s).

(2) The broker or dealer shall, upon receipt of the proxy, other proxy soliciting material, and/or annual reports to security holders, forward such materials to its customers who are beneficial owners of the registrant's

securities no later than five business days after the receipt of the proxy material or annual reports.

(3) The broker or dealer shall, through its agent or directly:

(i) Provide the registrant, upon the registrant's request, with the names, addresses and securities positions, compiled as of a date specified in the registrant's request which is no earlier than five business days after the date the registrant's request is received, of its customers who are beneficial owners of the registrant's securities and who have not objected to disclosure of such information; *Provided, however,* that if the broker or dealer has informed the registrant that a designated office(s) or department(s) is to receive such requests, receipt shall mean receipt by such designated office(s) or department(s); and

(ii) transmit the data specified in paragraph (b)(3)(i) of this section to the registrant no later than five business days after the record date or other date specified by the registrant.

NOTE 1: Where a broker or dealer employs a designated agent to act on its behalf in performing the obligations imposed on the broker or dealer by paragraph (b)(3) of this section, the five business day time period for determining the date as of which the beneficial owner information is to be compiled is calculated from the date the designated agent receives the registrant's request. In complying with the registrant's request for beneficial owner information under paragraph (b)(3) of this section, a broker or dealer need only supply the registrant with the names, addresses and securities positions of non-objecting beneficial owners.

NOTE 2: If a broker or dealer receives a registrant's request less than five business days before the requested compilation date, it must provide a list compiled as of a date that is no more than five business days after receipt and transmit the list within five business days after the compilation date.

(c) *Exceptions to Dissemination and Beneficial Owner Information Requirements.* A broker or dealer registered under Section 15 of the Act shall be subject to the following with respect to its dissemination and beneficial owner information requirements:

(1) With regard to beneficial owners of exempt employee benefit plan securities, the broker or dealer shall:

(i) Not include information in its response pursuant to paragraph (b)(1) of this section or forward proxies (or in lieu thereof requests for voting instructions), proxy soliciting material, or annual reports to security holders pursuant to paragraph (b)(2) of this section to such beneficial owners; and

(ii) Not include in its response pursuant to paragraph (b)(3) of this section data concerning such beneficial owners.

(2) A broker or dealer need not satisfy

(i) its obligations under paragraphs (b)(2) and (b)(3) of this section if a registrant does not provide assurance of reimbursement of the broker's or dealer's reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2) and (b)(3) of this section;

(ii) its obligation under paragraph (b)(2) of this section to forward annual reports to non-objecting beneficial owners identified by the broker or dealer, through its agent or directly, pursuant to paragraph (b)(3) of this section if the registrant notifies the broker or dealer pursuant to Rule 14a-13(c) or 14c-7(c) that the registrant will mail the annual report to such non-objecting beneficial owners, identified by the broker or dealer and delivered in a list to the registrant pursuant to paragraph (b)(3) of this section.

14b-2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meanings as in the Act and, with respect to proxy soliciting material, as in Rule 14a-1 thereunder and, with respect to information statements, as in Rule 14c-1 thereunder. In addition, as used in this section, the following terms shall apply:

(1) The term "bank" means a bank, association, or other entity that exercises fiduciary powers.

(2) The term "beneficial owner" includes any person who has or shares, pursuant to an instrument, agreement, or otherwise, the power to vote, or to direct the voting of a security.

Notes. 1. If more than one person shares voting power, the provisions of the instrument creating that voting power shall govern with respect to whether consent to disclosure of beneficial owner information has been given.

2. If more than one person shares voting power or if the instrument creating that voting power provides that such power shall be exercised by different persons depending on the nature of the corporate action involved, all persons entitled to exercise such power shall be deemed beneficial owners; *provided, however,* that only one such beneficial owner need be designated among the beneficial owners to receive proxies or requests for voting instructions, other proxy soliciting material, information statements, and/or annual reports to security-holders, if the person so designated assumes the obligation to disseminate, in a timely manner, such materials to the other beneficial owners.

(3) The term "registrant" means:

(i) The issuer of a class of securities registered pursuant to Section 12 of the Act; or

(ii) An investment company registered under the Investment Company Act of 1940.

(b) *Dissemination and Beneficial Owner Information Requirements.* A bank shall comply with the following requirements for disseminating certain communications to beneficial owners and providing beneficial owner information to registrants:

(1) The bank shall: (i) respond, by first class mail or other equally prompt means, directly to the registrant no later than one business day after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating the name and address of each of its respondent banks that holds the registrant's securities on behalf of beneficial owners, if any, and

(ii) respond, by first class mail or other equally prompt means, directly to the registrant no later than seven business days after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating, by means of a search card or otherwise:

(A) The approximate number of beneficial owners of the registrant's securities;

(B) If the registrant has indicated, pursuant to Rule 14a-13(a)(1)(ii)(A) or Rule 14c-7(a)(1)(ii)(A), that it will distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to paragraphs (b)(4)(ii) and (iii) of this section:

(*1*) With respect to customer accounts opened on or before December 28, 1986, the number of beneficial owners of the registrant's securities who have affirmatively consented to disclosure of their names, addresses and securities positions; and

(*2*) With respect to customer accounts opened after December 28, 1986, the number of beneficial owners of

the registrant's securities who have not objected to disclosure of their names, addresses and securities positions; and

(C) The identity of its designated agent, if any, acting on its behalf in fulfilling its obligations under paragraphs (b) (4) (ii) and (iii) of this section;

Provided, however, That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, receipt for purposes of paragraphs (b) (1) (i) and (ii) of this section shall mean receipt by such designated office(s) or department(s);

(2) Where proxies are solicited, the bank shall, within five business days after the record date:

(i) Execute an omnibus proxy, including a power of substitution, in favor of its respondent banks and forward such proxy to the registrant; and

(ii) Furnish a notice to each respondent bank in whose favor an omnibus proxy has been executed that it has executed such a proxy, including a power of substitution, in its favor pursuant to paragraph (b) (2) (i) of this section.

(3) Upon receipt of the proxy, other proxy soliciting material, and/or annual reports to security holders shall forward to each beneficial owner on whose behalf it holds securities, no later than five business days after the date it receives such material and, where a proxy is solicited, the bank shall forward, with the other proxy soliciting material and/or the annual report, either:

(i) A properly executed proxy: (A) indicating the number of securities held for such beneficial owner; (B) bearing the beneficial owner's account number or other form of identification, together with instructions as to the procedures to vote the securities; (C) briefly stating which other proxies, if any, are required to permit se-

curities to be voted under the terms of the instrument creating that voting power or applicable state law; and (D) being accompanied by an envelope addressed to the registrant or its agent, if not provided by the registrant; or

(ii) A request for voting instructions (for which registrant's form of proxy may be used and which shall be voted by the record holder or respondent bank in accordance with instructions received), together with an envelope addressed to the record holder or respondent bank.

(d) The bank shall: (i) respond, by first class mail or other equally prompt means, directly to the registrant no later than one business day after the date it receives an inquiry made in accordance with Rule 14a-13(b)(1) or Rule 14c-7(b)(1) by indicating the name and address of each of its respondent banks that holds the registrant's securities on behalf of beneficial owners, if any;

(ii) Through its agent or directly, provide the registrant, upon the registrant's request and within the time specified in paragraph (b)(4)(iii) of this section, with the names, addresses and securities position, compiled as of a date specified in the registrant's request which is no earlier than five business days after the date the registrant's request is received, of:

(A) With respect to customer accounts opened on or before December 28, 1986, beneficial owners of the registrant's securities on whose behalf it holds securities who have consented affirmatively to disclosure of such information, subject to paragraph (b)(5) of this section; and

(B) With respect to customer accounts opened after December 28, 1986, beneficial owners of the registrant's securities on whose behalf it holds securities who have not objected to disclosure of such information; *Provided, however,* that if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, receipt for pur-

poses of paragraphs (b) (4) (i) and (ii) of this section shall mean receipt by such designated office(s) or department(s); and

(iii) Through its agent or directly, transmit the data specified in paragraph (b) (4) (ii) of this section to the registrant no later than five business days after the date specified by the registrant.

NOTE 1: Where a record holder bank or respondent bank employs a designated agent to act on its behalf in performing the obligations imposed on it by paragraphs (b) (4) (ii) and (iii) of this section, the five business day time period for determining the date as of which the beneficial owner information is to be compiled is calculated from the date the designated agent receives the registrant's request. In complying with the registrant's request for beneficial owner information under paragraphs (b) (4) (ii) and (iii) of this section, a record holder bank or respondent bank need only supply the registrant with the names, addresses and securities positions of affirmatively consenting and non-objecting beneficial owners.

NOTE 2: If a record holder bank or respondent bank receives a registrant's request less than five business days before the requested compilation date, it must provide a list compiled as of a date that is no more than five business days after receipt and transmit the list within five business days after the compilation date.

(5) For customer accounts opened on or before December 28, 1986, unless the bank has made a good faith effort to obtain affirmative consent to disclosure of beneficial owner information pursuant to paragraph (b) (4) (ii) of this section, the bank shall provide such information as to beneficial owners who do not object to disclosure of such information. A good faith effort to obtain affirmative consent to disclosure of beneficial owner information shall include, but shall not be limited to, making an inquiry:

(i) Phrased in neutral language, explaining the purpose of the disclosure and the limitations on the registrant's use thereof;

(ii) Either in at least one mailing separate from other account mailings or in repeated mailings; and

(iii) In a mailing that includes a return card, postage paid enclosure.

(c) *Exceptions to Dissemination and Beneficial Owner Information Requirements.* The bank shall be subject to the following with respect to its dissemination and beneficial owner requirements:

(1) With regard to beneficial owners of exempt employee benefit plan securities, the bank shall not:

(i) Include information in its response pursuant to paragraph (b) (i) of this section; forward proxies (or in lieu thereof requests for voting instructions), proxy soliciting material, or annual reports to security holders pursuant to paragraph (b) (3) of this section to such beneficial owners; or

(ii) Include in its response pursuant to paragraphs (b) (4) and (b) (5) of this section data concerning such beneficial owners.

(2) The bank need not satisfy:

(i) Its obligations under paragraphs (b) (2), (b) (3), and (b) (4) of this section if a registrant does not provide assurance of reimbursement of its reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b) (2), (b) (3), and (b) (4) of this section; or

(ii) Its obligation under paragraph (b) (3) of this section to forward annual reports to consenting and nonobjecting beneficial owners identified pursuant to paragraphs (b) (4) (ii) and (iii) of this section if the registrant notifies the record holder bank or respondent bank,

pursuant to Rule 14a-13(c) or Rule 14c-7(c), that the registrant will mail the annual report to beneficial owners whose names, addresses and securities positions are disclosed pursuant to paragraphs (b)(4)(ii) and (iii) of this section.

(3) For the purposes of determining the fees which may be charged to registrants pursuant to Rule 14a-13(b)(5), Rule 14c-7(a)(5), and paragraph (c)(2) of this section for performing obligations under paragraphs (b)(2), (b)(3), and (b)(4) of this section, an amount no greater than that permitted to be charged by brokers or dealers for reimbursement of their reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2) and (b)(3) of Rule 14b-1, shall be deemed to be reasonable.

* * * *

14c-7 Providing copies of material for certain beneficial owners.

(a) If the registrant knows that securities of any class entitled to vote at a meeting, or by written authorizations or consents if no meeting is held, are held of record by a broker, dealer, voting trustee, or bank, association, or other entity that exercises fiduciary powers in nominee name or otherwise, the registrant shall:

(1) By first class mail or other equally prompt means:

(i) Inquire of each such record holder:

(A) Whether other persons are the beneficial owners of such securities and, if so, the number of copies of the information statement necessary to supply such material to such beneficial owners;

(B) In the case of an annual (or special meeting in lieu of the annual) meeting, or written consents in lieu of such meeting, at which directors are to be elected, the

number of copies of the annual report to security holders, necessary to supply such report to such beneficial owners for whom proxy material has not been and is not to be made available and to whom such reports are to be distributed by such record holder or its nominee and not by the registrant;

(C) If the record holder or respondent bank has an obligation under Rule 14b-1(b)(3) or Rule 14b-2(b)(4)(ii) and (iii), whether an agent has been designated to act on its behalf in fulfilling such obligation, and, if so, the name and address of such agent; and

(D) whether it holds the registrant's securities on behalf of any respondent bank and, if so, the name and address of each such respondent bank; and

(ii) Indicate to each such record holder:

(A) Whether the registrant pursuant to paragraph (c) of this section, intends to distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to Rules 14b-1(b)(3) and 14b-2(b)(4)(ii) and (iii);

(B) The record date; and

(C) At the option of the registrant, any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(2) Upon receipt of a record holder's or respondent bank's response indicating, pursuant to Rule 14b-2(b)(1)(i), the names and addresses of its respondent banks, within one business day after the date such response is received, make an inquiry of and give notification to each such respondent bank in the same manner required by paragraph (a)(1) of this section; *Provided, however*, the inquiry required by paragraphs (a)(1) and (a)(2) of this section shall not cover beneficial owners of exempt employee benefit plan securities;

(3) Make the inquiry required by paragraph (a)(1) of this section on the earlier of:

(i) At least 20 business days prior to the record date of the meeting of security holders or the record date of written consents in lieu of a meeting; or

(ii) At least 20 business days prior to the date the information statement is required to be sent or given pursuant to Rule 14c-2(b); *Provided, however,* That, if a record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, the inquiry shall be made to such designated office(s) or department(s);

(4) Supply, in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the information statement and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder or respondent bank may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; and

(5) Upon the request of any record holder or respondent bank that is supplied with information statements and/or annual reports to security holders pursuant to paragraph (a)(3) of this section, pay its reasonable expenses for completing the mailing of such material to beneficial owners.

NOTE 1: If the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to section 17A of the Act (*e.g.*, "Cede & Co.," nominee for the Depository Trust Company), the registrant shall make appropriate inquiry of the clearing agency and thereafter of the participants in such a clearing agency who may hold on behalf of a beneficial owner or respondent bank,

and shall comply with the above paragraph with respect to any such participant (*see* Rule 14c-1(h)).

NOTE 2: The requirement for sending an annual report to security holders of record having the same address will be satisfied by sending at least one report to a holder of record at that address provided that those holders of record to whom a report is not sent agree thereto in writing. This procedure is not available to registrants, however, where banks, associations, other entities that exercise fiduciary powers, brokers, dealers and other persons hold securities in nominee accounts or "street names" on behalf of beneficial owners, and such persons are not relieved of any obligation to obtain or send such annual report to the beneficial owners.

NOTE 3: The attention of registrants is called to the fact that each broker, dealer, bank, association, and other entity that exercises fiduciary powers has an obligation pursuant to Rule 14b-1 and Rule 14b-2 (except as provided therein with respect to exempt employee benefit plan securities held in nominee name) and with respect to brokers and dealers, applicable self-regulatory organization requirements to obtain and forward, within the time periods prescribed therein, (a) information statements to beneficial owners on whose behalf it holds securities, and (b) annual reports to security holders to beneficial owners on whose behalf it holds securities, unless the registrant has notified the record holder or respondent bank that it has assumed responsibility to mail such material to beneficial owners whose names, addresses and securities positions are disclosed pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii).

NOTE 4: The attention of registrants is called to the fact that registrants have an obligation, pursuant to paragraph (d) of this section, to cause information statements and annual reports to security holders to be furnished, in accordance with Rule 14c-2, to beneficial owners of exempt employee benefit plan securities.

(b) Any registrant requesting pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii) a list of names, addresses and securities positions of beneficial owners of its securities who either have consented or have not objected to disclosure of such information shall:

(1) By first class mail or other equally prompt means, inquire of each record holder and each respondent bank identified to the registrant pursuant to Rule 14b-2(b)(4)(i) whether such record holder or respondent bank holds the registrant's securities on behalf of any respondent banks and, if so, the name and address of each such respondent bank;

(2) Request such list be compiled as of a date no earlier than five business days after the date the registrant's request is received by the record holder or respondent bank; *Provided, however,* That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, the request shall be made to such designated office(s) or department(s);

(3) Make such request to the following persons that hold the registrant's securities on behalf of beneficial owners: all brokers, dealers, banks, associations and other entities that exercise fiduciary powers; *Provided, however,* such request shall not cover beneficial owners of exempt employee benefit plan securities as defined in Rule 14a-1(d)(1); and, at the option of the registrant, such request may give notice of any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(4) Use the information furnished in response to such request exclusively for purposes of corporate communications; and

(5) Upon the request of any record holder or respondent bank to whom such request is made, pay the reason-

able expenses, both direct and indirect, of providing beneficial owner information.

NOTE: A registrant will be deemed to have satisfied its obligations under paragraph (b) of this section by requesting consenting and non-objecting beneficial owner lists from a designated agent acting on behalf of the record holder or respondent bank and paying to that designated agent the reasonable expenses of providing the beneficial owner information.

(c) A registrant, at its option, may mail its annual report to security holders to the beneficial owners whose identifying information is provided by record holders and respondent banks, pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii), provided that such registrant notifies the record holders and respondent banks at the time it makes the inquiry required by paragraph (a) of this section that the registrant will mail the annual report to security holders to the beneficial owners so identified.

(d) If a registrant furnishes information statements to record holders and respondent banks who hold securities on behalf of beneficial owners, the registrant shall cause information statements and annual reports to security holders to be furnished, in accordance with Rule 14c-2, to beneficial owners of exempt employee benefit plan securities.

B. RULES UNDER SECTION 15(c), SECURITIES EXCHANGE ACT OF 1934

* * * *

15c3-2 Customers' free credit balances.

No broker or dealer shall use any funds arising out of any free credit balance carried for the account of any customer in connection with the operation of the business of such broker or dealer unless such broker or dealer has established adequate procedures pursuant to which each

customer for whom a free credit balance is carried will be given or sent, together with or as a part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing such customer of the amount due to the customer by such broker or dealer on the date of such statement, and containing a written notice that (a) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (b) such funds are payable on the demand of the customer: *Provided, however,* That this section shall not apply to a broker or dealer which is also a banking institution supervised and examined by State or Federal authority having supervision over banks. For the purpose of this section the term *customer* shall mean every person other than a broker or dealer.

15c3-3 Customer protection—reserves and custody of securities.

* * * *

(e) *Special reserve bank account for the exclusive benefit of customers.* (1) Every broker or dealer shall maintain with a bank or banks at all times when deposits are required or hereinafter specified a "Special Reserve Bank Account for the Exclusive Benefit of Customers" (hereinafter referred to as the "Reserve Bank Account"), and it shall be separate from any other bank account of the broker or dealer. Such broker or dealer shall at all times maintain in such Reserve Bank Account, through deposits made therein, cash and/or qualified securities in an amount not less than the amount computed in accordance with the formula set forth in Rule 15c3-3a.

(2) It shall be unlawful for any broker or dealer to accept or use any of the amounts under items comprising Total Credits under the formula referred to in paragraph (e) (1) of this section except for the specified purposes indicated under items comprising Total Debits under the

formula, and, to the extent Total Credits exceed Total Debits, at least the net amount thereof shall be maintained in the Reserve Bank Account pursuant to paragraph (e) (1) of this section.

(3) Computations necessary to determine the amount required to be deposited as specified in pargraph (e) (1) of this section shall be made weekly, as of the close of the last business day of the week, and the deposit so computed shall be made no later than 1 hour after the opening of banking business on the second following business day; provided, however, a broker or dealer which has aggregate indebtedness not exceeding 800 percent of net capital (as defined in Rule 15c3-1 or in the capital rules of a national securities exchange of which it is a member and exempt from Rule 15c3-1 by paragraph (b) (2) thereof) and which carries aggregate customer funds (as defined in paragraph (a) (10) of this section), as computed at the last required computation pursuant to this section, not exceeding $1 million, may in the alternative make the computation monthly, as of the close of the last business day of the month, and, in such event, shall deposit not less than 105 percent of the amount so computed no later than 1 hour after the opening of banking business on the second following business day. If a broker or dealer, computing on a monthly basis, has, at the time of any required computation, aggregate indebtedness in excess of 800 percent of net capital, such broker or dealer shall thereafter compute weekly as aforesaid until four successive weekly computations are made, none of which were made at a time when his aggregate indebtedness exceeded 800 percent of his net capital. Computations in addition to the computations required in this paragraph (3), may be made as of the close of any other business day, and the deposits so computed shall be made no later than 1 hour after the opening of banking business on the second following business day. The broker or dealer shall make and maintain a record of each such computation

made pursuant to this paragraph (3) or otherwise and preserve each such record in accordance with Rule 17a-4.

* * * *

15c3-3a Exhibit A—formula for determination of reserve requirement of brokers and dealers under Rule 15c3-3.

	Credits	Debits
1. Free credit balances and other credit balances in customers' security accounts. (See Note A)	$xxx	.....
2. Monies borrowed collateralized by securities carried for the accounts of customers (See Note B.)	xxx	.....
3. Monies payable against customers' securities loaned (See Note C.)	xxx	.....
4. Customers' securities failed to receive (See Note D.)	xxx	.....
5. Credit balances in firm accounts which are attributable to principal sales to customers	xxx	.....
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	xxx	.....
7. Market value of short security count differences over 30 calendar days old..	xxx	.....
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	xxx	.....
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	.....	xxx

		Credits	Debits
10.	Debit balances in customers' cash and margin accounts excluding unsecured accounts and accounts doubtful of collection. (See Note E.)	-------	xxx
11.	Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver	-------	xxx
12.	Failed to deliver of customers' securities not older than 30 calendar days	-------	xxx
13.	Margin required and on deposit with the Options Clearing Corp. for all option contracts written or purchased in customer accounts. (See Note F.)	-------	xxx
	Total credits	-------	------
	Total debits	-------	------
14.	Excess of total credits (sum of items 1-9) over total debits (sum of items 10-13) required to be on deposit in the "Reserve Bank Account" (Rule 15c3-3(e)). If the computation is made monthly as permitted by this section, the deposit shall be not less than 105 percent of the excess of total credits over total debits	-------	xxx

[Notes omitted]

APPENDIX B

EXHIBIT 1 TO SPECIAL CONSULTANT'S AGREEMENT (UNCLAIMED PROPERTY CLEARINGHOUSE)

The examination of the books and records of the holders of abandoned property and the demand for delivery of reportable property shall be made pursuant to the following procedures:

1. The holdings of the U.S. Supreme Court in *Texas v. New Jersey* (85 S.Ct. 1136) and *Pennsylvania v. New York* (92 S.Ct. 2880) regarding which state has the right to escheat property shall be followed:

(a) Where the name and last known address of the apparent owner according to the books and records of the holder is in Delaware, it shall be deemed to be reportable to Delaware.

(b) If the holder has no records whatsoever setting forth the name and last known address of the apparent owner, the property shall be deemed reportable to the state of incorporation of the holder.

(c) An address shall be deemed to mean a description of location sufficient for delivery and receipt of mail.

(d) Where the address of the apparent owner cannot be readily ascertained but in fact exists in the books and records of the holder, sampling techniques will be used to allocate the property among the states participating in the review. In such event, if required, sampling techniques will also be utilized to ascertain the proportion of the total reportable property for which the holder has no names or names but no last known addresses.

(e) If the State's Unclaimed Property Law provides an express cutoff date setting forth when the obligation of a holder to report commenced, it will be used.

(f) If the Unclaimed Property Law does not set forth a cutoff date, the holding in *Douglas v. Cranston* (58

Cal.2d 462) will be followed and the obligations of the holder will be deemed to require the reporting of all unclaimed property in the possession of the holder on which the statute of limitations had not yet run as of the effective date of the adoption of the State's Unclaimed Property Act. However, in those instances where the State advises Special Consultant that state law permits retroactive extension or abolition of the statute of limitations, the longest period otherwise permitted by law will be used (subject to the availability of the records of the holder).

(g) If the amount of reportable unclaimed property cannot be ascertained from the books and records of the holder, statistical estimation techniques may be used for such periods.

2. Notwithstanding the provisions of paragraph 1 hereof, nothing contained therein shall prevent, waive or otherwise affect the right of the State to claim from any other state property reported and delivered to such state according to the provisions of paragraph 1. Special Consultant shall upon request of State provide State with such information as may have been obtained relevant to such claim.

APPENDIX C

ANN W. RICHARDS
TREASURER

[STATE SEAL]

STATE OF TEXAS

October 16, 1986

Treasury Department
P.O. Box 12608 Capitol Station
Austin, Texas 78711

LBJ State Office Building
Congress at 17th St.
(512) 463-6000

Ms. Peggy Maggiacomo
Legal Assistant
E. F. Hutton & Company, Inc.
One Battery Park Plaza
New York, N.Y. 10004

Re: Unclaimed and Abandoned Property

Dear Ms. Maggiacomo:

On December 12, 1985, you notified the Texas Treasury that certain property had been reported to the State of New York for which the last-known mailing address is in Texas. Nine months later, we have received from New York a group of mostly worthless certificates and a promise of a check to be sent within four to six weeks.

In the course of your letter (a copy of which is enclosed), you provided an explanation for the practice of reporting Texas property to New York. Because the explanation is contrary to the decision of *Texas v. New Jersey*, 379 U. S. 674, a United States Supreme Court case decided in 1965; and because of the ensuing history of the claim that the State of Texas has pursued with the State of New York, formal demand for the correct reporting to Texas of unclaimed securities and dividends listed in your December 12 letter is made.

Let me explain. Your letter noted that E. F. Hutton "maintains its principal place of business in the State of New York" and that the New York statute "asserts jurisdiction over abandoned . . . property which may be in our possession within the State due to the centralized nature of our security operations." Both of these arguments were advanced to the Supreme Court in *Texas vs. New Jersey* and rejected in the Court's final decision. The Court said that for reasons of "ease of administration" and "equity," the rule adopted requires reporting to the state of last-known address of the creditor (or owner) as shown by the debtor's (holder's) books and records; and if there is no last-known address, then to the state of incorporation of the debtor. If the state of last-known address does not have an applicable escheat law, then the Court further provided that the state of incorporation could hold the property until such time as the state of last-known address enacted law covering the property.

This case is universally observed as establishing unclaimed property reporting priorities. It applies to New York, Texas and all other states. At no time has Texas made New York its agent in any way to take custody of Texans' property. Thus, demand is made that all property abandoned by Texas owners for the relevant period be reported to Texas under its laws.

The reasons why this is necessary are demonstrated graphically in the claim we filed with New York *nine* months ago.

- The delay in our receiving the property;
- The fact that there is no accounting for dividends from the time contact with the owner was lost until the stock was sold; and
- The stock was sold, without advertising the owner's name and without the concurrence of the State of Texas.

Please note that a quick review of the list of securities shows at least four accounts in which the value of the stock has increased significantly since it was sold. Such market risks are eliminated if E. F. Hutton reports to Texas according to the dictates of *Texas vs. New Jersey.* In addition, reporting properly eliminates the next inquiries you and I must work through: 1) where are the accounts for Texas owners that pre-date 1982; 2) where are the accrued dividends for the shares which were turned over to New York, and 3) what dormancy periods were applied?

If New York indemnified you upon your payment of unclaimed property to it, I hope you will do what you can to expedite the proper discharge of the indemnity duty. Also, demand is hereby expressly made that for future report years you report and remit directly to the State of Texas all property described by the *Texas vs. New Jersey* scheme.

The states are working assiduously to improve unclaimed property reporting in the stock securities area—directly through the Unclaimed Property Clearinghouse, by offering a reporting software package for PC and tape reporting. Reporting instructions and forms for you to complete to comply with the law are enclosed. Please call me if you have any questions,

Sincerely,

PAULA SMITH
Director
Unclaimed Property Division

PS/na
Enclosure

cc: C. T. Corp. System
811 Dallas Avenue
Houston, Texas 77002

cc: President
E. F. Hutton & Company, Inc.
One Battery Park Plaza
New York, N. Y. 10004

Ms. Betty Powell
Director of Services
Office of Unclaimed Funds
Office of State Comptroller
270 Broadway, Room 911
New York, NY 10007

APPENDIX D

STATE CORPORATION LAWS TREATING RECORDHOLDER AS EXCLUSIVE SHAREHOLDER

Ala. Code § 10-2A-2(13) (Supp. 1991) (shareholder means holder of record).

Alaska Stat. § 10.06.990(36) (Supp. 1991) (defines shareholder as the holder of record).

Ariz. Rev. Stat. Ann. § 10-002(16) (Supp. 1991) (same).

Ark. Stat. Ann. § 4-27-140(22) (Michie Supp. 1991) (adopted the 1984 MBCA definition of shareholder).

Cal. Corp. Code § 185 (Supp. 1992) (defines shareholder as the holder of record).

Colo. Rev. Stat. Ann. § 7-1-102(11) (West 1990) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Conn. Gen. Stat. Ann. § 33-334 (West Supp. 1990) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

Del. Code Ann. tit. 8, § 220 (Supp. 1991) (same).

D.C. Code Ann. § 29-302(7) (Supp. 1991) (defines shareholder as the holder of record).

Fla. Stat. Ann. § 607.0140(23) (West Supp. 1991) (1984 MBCA definition).

Ga. Code Ann. § 14-2-140(25) (Supp. 1991) (same).

Haw. Rev. Stat. Ann. § 415-2 (Michie 1988) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Idaho Code § 30-1-2(f) (Supp. 1991) (same).

Ill. Ann. Stat. ch. 32, para. 1.80(g) (Smith-Hurd 1985) (defines shareholder as the holder of record).

Ind. Code Ann. § 23-1-20-21 (Burns Supp. 1991) (1984 MBCA definition).

Iowa Code Ann. § 490.140(22) (West Supp. 1991) (same).

Kan. Stat. Ann. § 17-6510 (Supp. 1990) (defines stockholder as the stockholder of record for purposes of inspecting corporate books and records).

Ky. Rev. Stat. Ann. § 271B. 1-400(22) (Michie Supp. 1989) (1984 MBCA definition).

La. Rev. Stat. Ann. § 12:1(R) (West 1969) (defines shareholder as holder of record).

Me. Rev. Stat. Ann. tit. 13A, § 102(17) (West 1981) (same).

Md. Corps. & Ass'ns Code Ann. § 1-101(t) (1985) (defines stockholder as one who holds shares of stock in a corporation).

Mich. Comp. Laws Ann. § 450.1487(2) (West 1990) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

Minn. Stat. Ann. § 302A.011(29) (West Supp. 1991) (defines shareholder as "a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of whole . . . shares of the corporation").

Miss. Code Ann. § 79-4-1.40(22) (Supp. 1991) (1984 MBCA definition).

Mo. Ann. Stat. § 351.015(15) (Vernon Supp. 1991) (defines shareholder as the holder of record).

Mont. Code Ann. § 35-1-113(22) (Supp. 1991) (1984 MBCA definition).

Neb. Rev. Stat. § 21-2002(7) (Supp. 1990) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Nev. Rev. Stat. § 78.010(f) (Supp. 1991) (defines "stockholder of record" as "a person whose name appears on the stock ledger of the corporation").

N.H. Rev. Stat. Ann. § 293-A: 1 (XVII) (Supp. 1991) (defines shareholder as the holder of record).

N.J. Stat. Ann. § 14A:1-2.1(1) (West Supp. 1991) (same).

N.M. Stat. Ann. § 53-11-2(F) (Michie Supp. 1991) (same).

N.Y. Bus. Corp. Law § 624 (McKinney Supp. 1992) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

N.C. Gen. Stat. § 55-1-40(22) (Supp. 1991) (1984 MBCA definition).

N.D. Cent. Code § 10-19.1-01(27) (Supp. 1991) (defines shareholder as "a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of . . . shares of the corporation").

Ohio Rev. Code Ann. § 1701.01(F) (Anderson Supp. 1991) (defines shareholder as "a person whose name appears on the books of the corporation as the owner of shares of such corporation").

Okla. Stat. Ann. tit. 18, § 1065(a) (West Supp. 1991) (defines shareholder as the shareholder of record for purposes of inspecting corporate books and records).

Or. Rev. Stat. § 60.001(20) (1989) (1984 MBCA definition).

15 Pa. Cons. Stat. Ann. § 1102 (Supp. 1991) (defines shareholder as a "record holder or record owner of shares in a corporation").

R.I. Gen. Laws § 7-1.1-2(6) (Supp. 1991) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a record holder may certify that all or a portion of its shares are held for the account of specified persons).

S.C. Code Ann. § 33-1-400(23) (Law. Co-op. 1990) (1984 MBCA definition).

S.D. Codified Laws Ann. § 47-2-1-(6) (1983) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Tenn. Code Ann. § 48-11-201(24) (Supp. 1991) (1984 MBCA definition).

Tex. Bus. Corp. Act Ann. art. 1.02(A)(15) (West Supp. 1991) (defines shareholder as "the person in whose name shares issued by a corporation are registered at the relevant time in the share transfer records maintained by the corporation").

Utah Code Ann. § 16-10-2 (1987) (defines shareholder as the holder of record).

Vt. Stat. Ann. tit. 11, § 1802(6) (Supp. 1991) (same).

Va. Code Ann. § 13.1-603 (Michie Supp. 1991) (1984 MBCA definition).

Wash. Rev. Code Ann. § 23B.01.400(25) (West Supp. 1992) (same).

W. Va. Code § 31-1-6(o) (Supp. 1991) (defines shareholder as "one who is a holder of record of shares in a corporation").

Wis. Stat. Ann. § 180.0103(14) (West Supp. 1989-1990) (1984 MBCA definition).

Wyo. Stat. § 17-16-140(XX) (Supp. 1991) (same).

APPENDIX E

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 111 Original

STATE OF DELAWARE,

and *Plaintiff*,

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

STATEMENT OF RICHARD KIGER

RICHARD KIGER hereby states as follows:

1. I am Master in Chancery for the Court of Chancery of the State of Delaware. In connection with the above-captioned action, I have prepared statistics on two areas of the Court of Chancery workload during the calendar years 1989 to 1991; the data were compiled from business records customarily prepared by the Court in the course of its work.

2. First, I compiled statistics concerning the total number of trial days spent by the Court of Chancery on trials involving corporations incorporated in the State of Delaware. A trial for purposes of these calculations is a

proceeding in a courtroom during which live testimony and other evidence is presented and following which the Court must determine (1) the facts of the case; (2) the applicable law; and (3) the relief that should be granted to the parties. This definition does not include courtroom proceedings during which lawyers make arguments as to how the case should be conducted or the law should be applied, and in which no live testimony is offered. Hence, the focus is on a specific kind of courtroom activity—the trial as defined above—rather than all occasions on which a courtroom is used to conduct the Court's business.

3. The following table sets forth the information I compiled regarding Chancery Court trial days for cases involving corporations incorporated in Delaware:

	1989	1990	1991	Total
Total number of trial days	109	94	79	282
Number of trial days involving Delaware corporations	75	62	47	184
Percentage	69%	66%	59%	65%

4. Second, I compiled statistics concerning the number of opinions specifically addressing issues arising under Title 8 of the Delaware Code, the Delaware General Corporation Law. The numbers of such opinions written during the 1989 to 1991 period are as follows:

	1989	1990	1991	Total
Total number of written opinions	163	185	156	504
Total number of corporation law opinions	105	98	87	290
Percentage	64.4%	53.0%	55.8%	57.5%

5. It should be noted, however, that corporate cases tend typically to be more complex. As a result, opinions in these cases tend to be more elaborate and more demand-

ing of the Court's time than the Court's non-corporate opinions. *See, e.g., In re RJR Nabisco, Inc. Shareholders Litig.*, Allen, C. [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194 at 91,700 (Del. Ch. 1989) (58 pages); *Paramount Communications, Inc.* v. *Time, Inc.*, Allen, C. [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514 at 93,264 (Del. Ch. 1989) (79 pages); *Cede & Co.* v. *Technicolor, Inc.*, C.A. No. 7129, Allen, C. (Oct. 19, 1990) (85 pages); *In re Appraisal of Shell Oil*, C.A. No. 8080, Hartnett, V.C. (Dec. 11, 1990) (90 pages); *Marceau Investments* v. *Sonitrol Holding Co.*, C.A. No. 12065, Jacobs, V.C. (Oct. 2, 1991) (60 pages). Consequently, the above percentages understate the proportion of the Court's time spent on litigation construing the Delaware General Corporation Law.

Dated: May 1992

/s/ Richard Kiger
RICHARD KIGER
Master in Chancery

APPENDIX F

PROPOSED DECREE

DELAWARE, ET AL. v. *NEW YORK*

No. 111 Original

Decided ————————. — Decree entered ————————.

Decree carrying into effect this Court's opinion of ———, —— U.S. —— (199).

DECREE

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having considered the record of the proceedings herein and having stated its conclusions in its opinion announced on ————————, —— U.S. ——, and having considered the positions of the respective parties as to the terms of the decree,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. All applications for intervention by a State, District, or Territory in this case that were filed prior to the date of this Decree are granted. The motion of Texas for leave to file an Amended Complaint in Intervention is likewise granted.

2. As used in this Decree, the term "Delaware Brokerage Corporation" means a corporation incorporated under the laws of Delaware engaged in the securities brokerage business, and the term "Escheatable Property of Unknowns" means moneys and other intangible property held by a person as a result of distributions (including without limitation dividends, interest, redemption payments and principal payment) made with respect to such person by reason of such person's status as a holder of record of securities (including in the term "record" not only a record maintained by or on behalf of an issuer

of securities but also a record maintained by a depository or other intermediate holder, including records of one depository or other intermediate holder which is shown on the records of another) to which such person asserts no claim of beneficial ownership for his, her, or its own account but as to which such person has no identification of, or last-known address of, the beneficial owner of such property.

3. Judgment is hereby granted in favor of Plaintiff Delaware and Defendant New York and against all of the Intervening Plaintiffs, and the complaints of all of the Intervening Plaintiffs are hereby dismissed with prejudice.

4. Judgment upon its Complaint is hereby granted to Delaware and against New York, for the reasons stated in the opinion of this Court, with respect to the Escheatable Property of Unknowns held, to be held in the future, or previously held (but taken in escheat or custodial taking by New York under purported right of any statute or common law principle of New York), by Delaware Brokerage Corporations. Such judgment in favor of Delaware with respect to such Escheatable Property of Unknowns shall be subject to the right of any other state than Delaware to recover such property from Delaware upon proof that the last-known address of a creditor in respect of a particular portion of such property was within that other state's borders. It shall not, however, constitute such proof to demonstrate (as a matter of probability or otherwise) that such creditor was one of a category of persons or business entities conducting a particular business or standing in a particular relationship to the Delaware Brokerage Corporations; but only proof of the specific identity of a creditor and of his, her or its last-known address, as shown in the books and records of the Delaware Brokerage Corporation, shall suffice.

5. New York shall, within 270 days next following the entry of this Decree, prepare a detailed accounting of the

Escheatable Property of Unknowns held by Delaware Brokerage Corporations and previously taken in escheat or custodial taking at any time by New York under purported right of any statute or common law principle of New York, shall serve the same upon Delaware, and shall therewith pay to Delaware such amounts of money, and deliver to Delaware such other property, as shall be shown upon such accounting, or would have been shown had such accounting been properly prepared; except that in the case of any such money or property which is shown by such acounting not to have been at the time of such accounting abandoned for a period of five years, such money or property shall be paid or delivered only upon the expiration of such five-year period, but then shall be paid forthwith. Such accounting shall be in reasonable detail and shall be made on a year-by-year basis on whatever fiscal year New York customarily employs for the operations of its state government. Delaware and New York may by agreement extend the time for preparing and serving such accounting in whole or in part.

6. From and after the date of this Decree, New York and its officers and agents are enjoined from demanding, collecting or seeking to collect (through the institution of any judicial or administrative proceeding or through formal or informal demand, or in any other manner) from any Delaware Brokerage Corporation any Escheatable Property of Unknowns.

7. Should there be any factual dispute concerning whether property is entitled to be recovered by Delaware from New York under this Decree, or any dispute with respect to paragraph 4 of this Decree or the accounting ordered by paragraph 5 of this Decree, that is not adjusted and settled between the parties to such dispute, either such party may apply at the foot of this Decree for relief from this Court, and this Court may make such order in the premises, including an order of reference, as it shall then deem appropriate.

8. Any relief prayed for by any party to this action inconsistent with the foregoing is denied.