No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

and

STATE OF TEXAS,
Intervening Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

On Exceptions to the Special Master's Report

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS AND BRIEFS OF PUTATIVE INTERVENORS, STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA, AND OF DEFENDANT, STATE OF NEW YORK

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Plaintiff,
State of Delaware

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

July 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS AND BRIEFS OF PUTATIVE INTERVENORS, STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA, AND OF DEFENDANT, STATE OF NEW YORK

Plaintiff, State of Delaware ("Delaware"), respectfully submits this brief in response to the exceptions and briefs of: (1) Putative Intervenors Michigan, Maryland, Nebraska and the District of Columbia (the "Michigan group"); and (2) Defendant, the State of New York ("New York").[1]

---

[1] Aside from Delaware and New York, all states and the District of Columbia have moved to intervene. Texas' motion was granted; the other states are putative intervenors, having been full par-

In additon to Delaware's, two sets of exceptions to the Master's Report (the "Report") were filed, one by the Michigan group, the other by New York. The remaining group of states (the "Texas group") has not taken any exception to the Report, although one subgroup (the "Alabama subgroup") has filed a short "Statement" supporting the Report. We understand that the two Texas subgroups (the Alabama subgroup and the Arizona subgroup) will file their briefs supporting the Report simultaneously with this Brief.

INTRODUCTION AND SUMMARY

The Michigan group's position is that the Court should abandon the rule of law laid down in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), in favor of some kind of yet-to-be-determined "equitable allocation" among the states.[2] This group's claim that its approach is grounded in "fairness" is disingenuous. Its real agenda is pure opportunism: according to its counsel, the ordinary rules should not be applied here because this case "controls a very large amount of funds" (Tr. of Oral Argument before the Master 73-74 (Feb. 14, 1991)). For the Michigan group, the only question to be answered is whether the amount of money at issue "looms extremely large in comparison to the costs of litigating." *Id.* at 75. The Michigan group's "exception" to the Report is in fact only marginally an exception at all—it is "satisfied with the Master's

---

ticipants in the proceedings before the Master and either having expressed, or having proposed to express, their views on the Report to the Court.

[2] This argument was made by a larger group of putative Intervenors led earlier in the case by California; California and some of the others have abandoned this position and joined the Texas group, leaving only Michigan, Maryland, Nebraska, and the District of Columbia to assert it. We earlier referred to the "California group" (*see* Del. Opening Br. 21, 23); in its place we now refer to the smaller "Michigan group." *See* our scorecard, Appendix A, *infra.*

result" (Mich. Br. 3, 29)—a result which is the distribution of a "large pool" of money to as many states as possible (*id.* at 3). *See* Part I, pp. 4-19, *infra.*

While they are less blatant (or possibly less candid), the other Intervenors have been driven by opportunism as well: their behavior in this litigation may be characterized as participation in an informal one-issue constitutional convention, with positions changing in the winds of expediency, and with the production and enactment of revisions of state statutes to reflect each successive litigating theory. *See* Part II, pp. 19-22, *infra.*

Finally, New York is as opportunistic as the Intervenors. It embraces adherence to *some* rules. It and several *amici* industry organizations make a convincing demonstration that changing the present rule that the holder of the unclaimed property is the "debtor" under the *Texas* rule would create an administrative nightmare. But New York expressly declines (without explanation) to take exception to the Master's recommendation that the Court abandon the "state of incorporation" rule in favor of a new "state of principal executive office" rule. N.Y. Br. 73. No explanation is needed: with a substantial part of the securities industry's executive headquarters centered in New York City, New York stands to gain much in this case from a change in the state of incorporation rule.[3]

---

[3] New York contends for a unique permutation of the rule changes recommended by the Master: it urges retention of the "holder as debtor" rule (quite properly), but embraces the change from the "state of incorporation" rule to the "state of principal executive office" rule. New York apparently intends the latter as an alternative to its "factual" contention that the "overages" in the hands of the brokerage firms (most of which are incorporated in Delaware) are to pass under the primary rule as "owner/address known" property. If they pass under the backup rule instead, and that rule is modified as New York suggests, then the overages will be escheatable to New York whenever the brokerage firms have their principal executive offices in New York. *See generally* Part III A & B, pp. 22-28, *infra.*

New York's primary position—that *brokers'* overages are actually "owner/address *known*"—is based on a series of erroneous or unprovable assertions; most critically, it suffers from a "central inconsistency" (Report 61 n.53): New York cannot support its assertion that the brokers' overages differ from those of the DTC and of the bank custodians, which it admits are "owner/address unknown." The reason why New York insists that they do differ also requires little explanation: New York wants to have its cake and eat it too—it would keep the owner/address unknown funds in the hands of the DTC and the New York bank custodians (to which Delaware makes no claim because they are not Delaware corporations) as well as the owner/address unknown funds that New York has improperly taken from those brokers that *are* Delaware corporations. The Master found there could be no reasonable dispute over this factual issue, and he was correct. *See* Part III, pp. 22-38, *infra*.

ARGUMENT

I. THE MICHIGAN GROUP'S CANDID PLEA TO ABANDON THE *TEXAS* RULE AND ADOPT A SPECIAL SCHEME FOR THIS CASE SHOULD BE REJECTED, AS SHOULD THE INDIRECT APPROACH OF THE MASTER'S REPORT TO THE SAME END

The Michigan group is commendably honest about its agenda: it would have the Court sweep away the established rules. It views the Report as having done so.

The Michigan group's approach begins from a fundamental misunderstanding of the doctrine of *stare decisis* and the respective roles of the Court and Congress in an area like this one, where Congress remains free to alter what the Court has done. Next, it urges the Court to announce that it will abandon the old rule and then command the parties to negotiate a settlement. That is inconsistent with the Court's duty to "say what the law is." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). Finally, its approach is impractical to boot.

A. The Michigan Group's Candor About the Intervenors' Agenda

The Michigan group makes a candid plea that the Court abandon the settled rules established in *Texas* v. *New Jersey,* 379 U.S. 674 (1965), and *Pennsylvania* v. *New York,* 407 U.S. 206 (1972). That this plea is nothing more than a naked grab for money is apparent from the first line of its brief—the states "endorse the Master's result," but "think it is possible to improve upon it"—if the Court would only drop the Master's pretense of abiding (at least in part) by the rule of *stare decisis.* Mich. Br. 2; *see id.* at 2 ("result" should be avoidance of "diversion" of funds to Delaware); 3 (arguing for more straightforward way to "achieve the Master's result"); 10 (same); 14-15 ("Master's result" preferable).

The Michigan group says that it believes that the Master was "hesitant to adopt it [his approach] (or ours) directly on that basis," that is, the basis of giving a "large pool" of money to lots of states. *Id.* at 2. The reason for the Master's reluctance given by the Michigan group is that

> he feels that the *stare decisis* impact of *Pennsylvania* v. *New York,* 407 U.S. 206 (1972), and "institutional" concerns for Congressional prerogatives,[4] preclude the Court from doing so without dealing with the "backup rule" applied in that case. He therefore reaches his result indirectly. First he "teases out", Mas. Rep. at 50, and resolves an ambiguity as to the identity of the "debtor" in the *Texas* v. *New Jersey,* 379 U.S. 674 (1965) "backup" rule, as applied here. He decides that the debtor should be [*sic*] the "issuer" of the underlying securities rather than the "holder" of the unclaimed funds. Next he modi-

---

4 Presumably the law-making function of Congress.

> fies the locational presumption for that debtor, looking to its principal executive office rather than its state of incorporation.

Mich. Br. 2-3.

In this spirit of candor as to what the Master was doing, the Michigan group continues:

> We believe that the Court may not wish to be so begrudging of its own authority, and may prefer to achieve the Master's result—or another at least as equitable—by proceeding directly from the basic principles it enunciated in *Texas* v. *New Jersey* to achieve a fair and efficient allocation of the funds at issue here.

Mich. Br. 3.

The Michigan group's evaluation may be misguided, but its frankness is to be commended. The Michigan group acknowledges that the Report was driven by inductive reasoning leading to a preconceived result, rather than by a neutral application of the rule of law; it acknowledges that the Report engaged in "dissecting and reconstructing the old backup rule" (Mich. Br. 14) to reach its result; and it acknowledges that the Master thought he had to "dress his result in the raiment of the old formula." Mich. Br. 3. Indeed, describing the Report as having engaged in a "semantic exercise," the Michigan group goes so far as to concede that the Report is not "congruent with the holding in *Pennsylvania* v. *New York* [and is] more than a 'minor change' in the prior 'backup' rule." Mich. Br. 16 (quoting Report 49). But because the Michigan group concludes that the backup rule of *Texas* and *Pennsylvania* has no "*stare decisis* effect," it urges this Court to do "directly and forthrightly" what the Master did by "circumnavigations": "overtly depart from the old rule." Mich. Br. 14.

B. The Michigan Group's Misunderstanding of *Stare Decisis* and the Role of Court and Congress

The Michigan group makes only a begrudging reference to the doctrine of *stare decisis.* Mich. Br. 12 & n.13. It fails to come to grips with the central importance of *stare decisis* in this Court's jurisprudence and the several factors that give it special force in this case—the heavy burden a litigant bears in persuading the Court to depart from a rule announced not once but twice, the undesirability of departing from precedent where Congress may modify the rules, Congress' acceptance of the *Texas* rule, and the settled expectations of the states and private actors who have come to rely on this Court's rules. *See* Del. Opening Br. 70-79; *see also Quill Corp.* v. *North Dakota,* 112 S. Ct. 1904 (1992) (discussed *infra* through p. 9); *Allied-Signal, Inc.* v. *Director, Division of Taxation,* 112 S. Ct. 2251 (1992) (discussed *infra* at pp. 10-13). The Michigan group's plea to overturn the *Texas* rule does not even hint at whether this case presents one of the traditional justifications for departure from precedent—namely, that the rule is unsound in principle, unworkable in practice, or inconsistent with the Court's sense of justice. The rules here are not. *See* Del. Opening Br. 74-76.

After the first round of briefing in this case, this Court has taken several occasions to confirm its commitment to the doctrine of *stare decisis. See Quill Corp.* v. *North Dakota,* 112 S. Ct. 1904, 1914-16 (1992); *Eastman Kodak Co.* v. *Image Technical Servs.,* 112 S. Ct. 2072, 2089 n.29 (1992); *Ankenbrandt* v. *Richards,* 112 S. Ct. 2206, 2213 (1992); *Allied-Signal, Inc.* v. *Director, Division of Taxation,* 112 S. Ct. 2251, 2261-62 (1992); *Lee* v. *Weisman,* No. 90-1014, slip op. at 7-8 (U.S. June 24, 1992) (to be reported at 112 S. Ct. 2649).

In *Quill Corp.* v. *North Dakota,* 112 S. Ct. 1904 (1992), the Court rejected a request to overrule its decision in *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753, 758 (1967), which had held that states may not tax out-of-state mail-order sellers whose only connection with customers in the state is by common carrier or mail. The parallels between *Quill* and this case are instructive. Here, a bright-line test fashioned by the Court (state of incorporation of the holder) has been relied upon by private and state actors. Now, that test is being challenged as arbitrary. The Court in *Quill* rejected just such a challenge. "Like other bright-line tests," the Court explained, "the *Bellas Hess* rule appears artificial at its edges . . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority. . . . [A] bright-line rule . . . encourages settled expectations." 112 S. Ct. at 1914-15 (citations omitted).

The decision in *Quill* not to renounce the *Bellas Hess* bright-line rule was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. . . . Congress remains free to disagree with our conclusions." 112 S. Ct. at 1916 (footnote omitted). Although arguments were made denouncing the fairness of the existing rule, the Court concluded that " 'the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.' " 112 S. Ct. at 1916 (quoting *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 638 (1981) (White, J., concurring)). This analysis was expanded upon by Justice Scalia, concurring:

> I would not revisit the merits of [the *Bellas Hess*] holding, but would adhere to it on the basis of *stare decisis.* Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has special force where Congress remains free to alter what we have done.

112 S. Ct. at 1923 (citations and quotation marks omitted). These principles apply as strongly in this case

as they did in *Quill*, which also involved an area (the "negative" implications of the Commerce Clause) where the Court has laid down rules effective only in the absence of congressional action. Like *Quill*, this case can best be resolved by deference to Congress, which has not altered the *Texas* rule.

This case involves an area where Congress undeniably has the authority to establish the rules, but has not done so. In *Texas*, this Court fulfilled its obligation to step in and fill the gap. 379 U.S. at 677. And Congress has declined to disturb the rules established by the Court, although it has visited the subject matter of escheat and unclaimed property many times since *Texas* was decided. *See* Del. Opening Br. 8 & n.5, 71-73 & n.85. The question presented by the various requests to overturn the *Texas* rule is not, as the Michigan group suggests, the raw *power* of the Court to "revise its own rules" (Mich. Br. 24); the question is whether doing so comports with the "profoundly important purposes" served by the doctrine of *stare decisis*, *California* v. *Acevedo*, 111 S. Ct. 1982, 1991 (1991), in the context of a subject matter controlled by Congress. *Quill* answers that question in the negative.[5]

---

[5] So does *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206 (1992), also decided since the first round of briefing in this case. In that case, the Court again confirmed that "[c]onsiderations of *stare decisis* have particular strength . . . where 'the legislative power is implicated, and Congress remains free to alter what we have done.'" 112 S. Ct. at 2213 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). The Court was "unwilling to cast aside" its long-standing interpretation of the diversity statute as containing a domestic relations exception. It did not revisit the earlier debate over the statutory language, but was "content to rest [its] conclusion . . . on Congress' apparent acceptance of this construction." 112 S. Ct. at 2210, 2213. The Court explained that *stare decisis* combined with its respect for the role of Congress to preclude a change in the rule: "[g]iven the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it

In *Allied-Signal, Inc.* v. *Director, Division of Taxation*, 112 S. Ct. 2251 (1992), also decided after the first round of briefing in this case, the Court rejected New Jersey's request that the Court "depart from the doctrine of *stare decisis* by overruling our cases which announce and follow the unitary business standard" for evaluating a state taxing scheme's compliance with the Due Process Clause. 112 S. Ct. at 2261.[6] The Court's discussion of the traditional justifications for a departure from *stare decisis* provides additional support for Delaware's view that no departure should be made here.

The *Allied-Signal* Court first evaluated whether the unitary business standard was "unsound in principle." 112 S. Ct. at 2261. In preserving the standard's traditional focus on the taxpayer's activities within the taxing state, the Court held that the inquiry whether the taxpayer's unitary business has some connection with the taxing state "is necessary if the limits of the Due Process and Commerce Clauses are to have substance in a modern economy." 112 S. Ct. at 2262. The *Allied-Signal* decision's reaffirmation of the need to preserve the Due Process Clause's limits on the exercise of state sovereignty provides particular guidance here. Here, ironically, the Michigan group's proposal—and the Report's—would vitiate the Due Process Clause's requirement of a nexus with the state exercising sovereignty over the holder of funds. *See National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 554 (1977); *Miller Bros.* v. *Maryland*, 347 U.S. 340, 344-45 (1954) (discussed in Del. Opening Br. 34-35 & n.40). Whatever the rules are, it is the *holder*, of course, who must pay the money to the

pertains to divorce and alimony decrees and child custody orders." 112 S. Ct. at 2215; *see also Eastman Kodak Co.* v. *Image Technical Servs.*, 112 S. Ct. 2072, 2089 n.29 (1992).

[6] The Court was unanimous in concluding that no departure from *stare decisis* was warranted. 112 S. Ct. at 2264-65 (O'Connor, J., dissenting).

state or risk the state's imposition of penalties and interest. Yet under both the Master's proposal and the Michigan group's, a state with no connection at all to the holder may subject the holder to its laws and penalize the holder for noncompliance. It is hardly evident that these proposals comport with the limits imposed on the states by the Due Process Clause. The *Texas* rule, in contrast, grew out of this Court's holdings defining the limits of state power to escheat imposed by the Due Process Clause—indeed, it gives content to those limitations by implementing a system that protects holders' rights and, at the same time, allows states to exercise their escheat powers without conflict among themselves. *See* Del. Opening Br. 2-6 & n.2, 33-37. Proposals like those of the Michigan group and the Master, we submit, are the ones that are "unsound in principle."

The *Allied-Signal* Court also considered whether the present standard was "unworkable in practice." 112 S. Ct. at 2262. In this case, of course, no one has argued that the present rule is actually "unworkable." Irrelevantly, all that is contended is that the replacement rules themselves might also be "workable." Mich. Br. 27-28; Report 39, 42-45.[7]

The Court's opinion in *Allied-Signal* points up another serious flaw in the proposals to abandon the *Texas* rule. Here, as in *Allied-Signal*, abandoning the Court's "settled jurisprudence defining the limits of state power" (112

[7] The Report's proposals have been strongly shown to be unworkable. *See* Securities Industry Ass'n, *et al.* ("SIA"), *Amici* Br. 13-16, 18-20; N.Y. Br. 66-69 (each explaining why "issuer as debtor" rule would be disastrous); Del. Opening Br. 31-33 (ease of application of current "holder as debtor" rule); *id.* at 56-61 (difficulties to be encountered by disregarding rule of corporate domicile); SIA *Amici* Br. 16-20 (same). This Court recently observed that it is reasonable to conclude that "the location of a [corporation's] principal place of business would *not* be as readily verifiable as its State of incorporation." *Burlington N. R.R.* v. *Ford,* 112 S. Ct. 2184, 2187 (1992) (emphasis added).

S. Ct. at 2262) would itself be unworkable. In *Allied-Signal,* the Court explained, "[s]tate legislatures have relied upon our precedents by enacting tax codes" that abide by the current rules. 112 S. Ct. at 2262. Adopting New Jersey's theory in *Allied-Signal* would have required invalidation of those statutes or authorization of double taxation, thereby defeating "the reliance interest of those corporations which have structured their activities and paid their taxes based upon the well-established rules we here confirm." 112 S. Ct. at 2262. Here, too, states and private actors have relied on the well-established *Texas* rule in enacting statutes and establishing compliance mechanisms, such as the Unclaimed Property Clearinghouse. The uniform acts also reflect the states' reliance on the *Texas* rule. *See* Del. Opening Br. 10-11.[8] And private actors have expressed their reliance on the *Texas* rule: *amici*—the Securities Industry Association, the New York Clearing House Association, the American Bankers Association, and the Depository Trust Company—have sought leave to inform the Court of the "immediate, adverse impact on their future reporting obligations, as well as upon their day-to-day operations" that adopting the Master's Report would have. Motion for Leave to file Brief of SIA *Amici Curiae* vi; Brief 4; *see* Brief 13-20. As in *Allied-Signal,* the "unworkability" of the changes proposed by the Intervenors and the Master stems not only from the inherent infirmities of the proposed alternatives (*see* materials cited at p. 11 n.7, *supra*), but also from the strong reliance interests and settled expectations of the states and the private persons.

Another "workability" problem may be averted by adherence to precedent in this case—the problem of retroactivity. This, too, was a factor against the workability of the new rules proposed in *Allied-Signal.* 112 S. Ct. at

---

[8] Since this case began, a number of the intervening states have modified their statutes to reflect their litigating position in this Court. *See* pp. 20-22, *infra.*

2262 ("Difficult questions respecting the retroactive effect of our decision would also be presented."); *accord Quill Corp.* v. *North Dakota,* 112 S. Ct. at 1916 n.10 (Overruling precedent "might raise thorny questions concerning the retroactive application of [use] taxes and might trigger unanticipated liability . . . . The precise allocation of such burdens is better resolved by Congress than this Court.").

Finally, it is significant that in *Allied-Signal,* the Court did not consider the third "traditional justification"—that the rule be inconsistent with "the sense of justice." The Court has expressed reservations about the availability of this justification where the subject matter is controlled by Congress. *See Patterson* v. *McLean Credit Union,* 491 U.S. 164, 174-75 (1989). Here, as in *Allied-Signal* and *Quill,* the proper body to consider whether the present rule comports with "the sense of justice" is Congress.

The Michigan group's failure to confront the doctrine of *stare decisis* is compounded by its misdescription of the precedents it recommends be overruled. According to the Michigan group, the Court in *Texas* did no more than provide broad-brush "guidelines" (Mich. Br. 6) to be developed on a case-by-case basis in the future. Mich. Br. 4-5. The *Texas* Court did nothing of the kind. The case presented "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. That the Court provided such a rule has never before been disputed. Indeed, the entire question to be resolved in *Pennsylvania* v. *New York* was whether the litigants had provided "a sufficient reason for carving out [an] exception to the *Texas* rule" because one state stood to collect more than the others under the backup rule when the subject matter "involve[d] a higher percentage of unknown addresses." 407 U.S. at 214. The Court adhered to the *Texas* rule, so that it would not have " '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 215 (quoting *Texas* v. *New Jersey*, 379 U.S. at 679).

The Michigan group ignores this holding, too, actually purporting to distinguish *Pennsylvania* v. *New York* on the ground that there is a larger quantity of money at issue here than there was in that case. Mich. Br. 11. That has never been a basis for departing from precedent, as *Pennsylvania* itself makes clear. And while the record on this point is inconclusive, the information in the public domain suggests that by far the larger proportion of escheatable property traceable to securities investment and distributions is escheatable under the *primary* rule of the *Texas* case, which no one, not even the Michigan group, has suggested be overruled. *See* Del. Opening Br. 12-14 n.17.[9] In other words, this case is not shown to disclose a category of economic activity where more is escheatable

---

[9] Finally, the Michigan group asserts that if the present "facts are indistinguishable from the 1972 facts," *Pennsylvania* has been "legislatively reversed." Mich. Br. 13 n.16. The Michigan group fails to differentiate between the general rule—set out in *Texas* and adhered to in *Pennsylvania*—and the specific area—money orders and traveler's checks—dealt with by Congress. Congress has never expressed any disapproval of the general rule. Indeed, just the opposite is true. *See* Del. Opening Br. 8 & n.5, 71-73. Instead, Congress made an express finding of fact that "a substantial majority" of the purchasers of money orders and traveler's checks reside in states where such instruments are purchased and that the cost of keeping track of addresses in this context was a burden on interstate commerce. Pub. L. No. 93-495, Title VI, § 601, 88 Stat. 1500, 1525-26 (1974) (codified at 12 U.S.C. § 2501 (1988)) (reprinted in Del. Opening Br. at App. A pp. 1a-3a). Congress expressly declined to go even as far as regular bank checks in the statute: they were expressly excluded and only money orders and traveler's checks were included. 12 U.S.C. § 2503; *see* S. Rep. No. 505, 93d Cong., 1st Sess. 5-6. Congress therefore modified the *Texas* rule only in one limited respect, leaving it to stand as a rule of general application. This Court's precedents suggest that it should do the same.

under the backup rule than the primary rule. In any event, the lesson of *Pennsylvania* is that one should *not* look to see how much money is involved and engage in semantic gamesmanship to achieve a result that spreads money evenly where there is a lot of it at stake; instead, *Pennsylvania* confirms that one should apply the *Texas* rule to all kinds of property in accordance with settled precedent. The Michigan group has demonstrated nothing unfair about doing so in this case under the lawyer-like rules articulated in *Texas* and adhered to in *Pennsylvania.*

C. The Michigan Group's Proposal That the Court Try to Make the Parties Settle

Essentially, the Michigan group asks not so much for the promulgation of a rule of law as that the Court try to make the states enter into a negotiated settlement. As the Michigan group explains it, it has presented an "example" (in the form of a computer program) of an "allocation formula" based on retail brokerage activity. But the Michigan group does not "want to prescribe a particular formula without input, and [it hopes], agreement, from the other states," by way of a "negotiated resolution[]." Mich. Br. 19 & n.24. This Court's role is to apply rules of law to the facts of a case, not to provide a structure for settlements among the litigants. *See Vermont* v. *New York*, 417 U.S. 270, 277 (1974). Moreover, the record contains no indication at all that the touchstone of the Michigan group's proposal—retail brokerage activity—has anything to do with this case. And the record suggests that settlement would hardly be achieved in the way suggested by the Michigan group.

1. The Michigan group asserts that this Court should engage in "judicial supervision of the division of a fixed fund among competing claimants." Mich. Br. 21. That is not this Court's duty. It cites no case—and we are aware of none—in which this Court has done so. Instead, it cites a mix of trial court cases that contain kind words about

the use of statistics, mainly in the context of trial court approval of voluntarily-negotiated settlements of large consumer class actions. Mich Br. 21-23.[10] A court's authority to approve a settlement that "provides broader relief than the court could have awarded after a trial" in a contested litigation, *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 525 (1986), is irrelevant where no such settlement is proposed. And the authority of a trial court to apply creative formulae devised by the parties to *settlement funds,*[11] does not provide any basis for this Court to abdicate its Article III function—to exercise the " 'judicial power' . . . which embraces the application of principles of law or equity to facts, distilled by hearings or stipulations." *Vermont* v. *New York,* 417 U.S. at 277.

The Michigan group also cites this Court's finding constitutional an income apportionment method enacted by

---

[10] These include *Prudential Insurance Co.* v. *Alabama,* No. C-4937-83E (N.J. Super. Ct. Ch. Div.) (Complaint filed Nov. 23, 1983); *In re Dep't of Energy Stripper Well Exemption Litig.,* 653 F. Supp. 108, 117 (D. Kan. 1986), *aff'd,* 855 F.2d 865 (Temp. Emer. Ct. App. 1988); *West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710, 729 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); *In re Agent Orange Prod. Liab. Litig.,* 597 F. Supp. 740, 841 (E.D.N.Y. 1984), *aff'd,* 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied sub nom. Pinkney* v. *Dow Chem. Co.,* 484 U.S. 1004 (1988). One case, *United States* v. *Exxon Corp.,* 561 F. Supp. 816, 855-56 (D.D.C. 1983), *aff'd,* 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied,* 474 U.S. 1105 (1986), involved disposition of a court-ordered restitution fund along lines set out in an Act of Congress that was intended to give the states money owed to consumers who could not be identified. *See United States* v. *Exxon Corp.,* 773 F.2d at 1312-13 (Becker, J., concurring in part and dissenting in part). The remainder of the cases cited by the Michigan group repeat the rule that a plaintiff who has proven liability may, in appropriate circumstances, rely upon statistical sampling methods to prove the *amount* of damages.

[11] *See, e.g., In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied sub nom. Krupkin* v. *Dow Chem. Co.,* 487 U.S. 1234 (1988).

a state legislature in *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159, 180-84 (1983); and it adverts to this Court's observation, in *Nebraska* v. *Wyoming*, 325 U.S. 589, 617 (1945), that the Court must often undertake the "delicate" and "extremely complex" problem of equitably apportioning water rights. These cases involved the application of principles of law to the facts presented. Neither of them even remotely suggests that it would be appropriate for this Court to overturn the *Texas* back-up rule, decline to announce a replacement rule of law, announce a broad principle of "equitable allocation" in delphic fashion, and then await negotiation of some yet-to-be-agreed-upon allocation formula to resolve the subject matter of this case.

2. The Michigan group's proposal also fails to contain any rational basis from which a "formula" of one kind or another could be derived. It proposes a formula based on retail brokerage activities. But its breezy assumption that such activities bear a relationship to the commercial activities giving rise to the property at issue in this case (Mich. Br. 18 n.22) is pure speculation. The record evidence is that the majority of overages (but by no means all) are caused by demands for certificates on extremely short notice, which are satisfied by providing certificates issued in the name of the nominee and endorsed by the nominee's signature so that they can be passed from hand to hand (close cousins to bearer certificates; but so long as record ownership is unchanged, dividends will be paid to the registered owner). *See* pp. 24-27, *infra*. The record evidence, however, does not support the notion that retail customers' transactions, or their wants and needs, are what lead to what is called the "float" problem. The record instances given of the "float" problem appear to involve not retail customers but institutions—participants in the DTC or large institutional customers of banks or brokers. Indeed, the record reflects that two of the three broker deponents testified that their firms' practice was to deliver en-

dorsed street name certificates only to institutional customers and not to retail customers. Said one: "Unless it's an institutional customer, it shouldn't happen. A retail customer, that should not happen . . . . Institutional customers you deliver street name stock to." Principe Dep. 63-64. "I just flat out would never" deliver such certificates to retail customers. *Id.* at 66.[12] Thus, even if there were some lawyerlike basis on which a "formula" could be imposed—and there is not—*no* evidence supporting a formula based on retail brokerage activity has been presented.

3. The Michigan group is unduly optimistic in assuming that if this Court announces in general terms that it desires an "equitable allocation" formula to be adopted, the states will generally agree on one. The Court's experience in this area demonstrates that, without the specific rules that were finally provided in *Texas* v. *New Jersey*, the states' rules were in frequent conflict. *See Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75-80 (1961); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 435-42 (1951); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 548-51 (1948). It was only *after* the Court propounded a "clear rule" in *Texas* and adhered to it in *Pennsylvania* that the states were able to apply this lawyerlike definition without interstate conflict, a state of affairs that lasted for over two decades, until, having become putative intervenors in this case, a number of states decided to adopt new statutes agreeing with their current contentions. The Michigan group

---

[12] Principe was Internal Control Director of an affiliate of the Tucker Anthony brokerage firm. Merrill Lynch's practice appears the same—to give out such certificates to institutional customers but not individuals. Shearer Dep. 95-97. The practice of Prudential-Bache, the third brokerage, was apparently not as hard-edged as that of the other two houses, but its representative's testimony was that it was more usual for potentially "floating" securities to be delivered to institutions than to "retail customers." Cirrito Dep. 129; *see id.* at 226-27.

offers no reason why such conflict would be avoided under its proposal.

II. THE ALABAMA INTERVENORS' "STATEMENT" SUPPORTING THE MASTER'S REPORT DEMONSTRATES A DEVOTION TO OPPORTUNITY, NOT PRINCIPLE

A group of putative intervenors led by Alabama (and including former members of the Michigan group, California, Ohio, and Rhode Island) has filed a three-page "Statement" that supports the Report "fully."

The "Statement," read against the history of this suit, shows the odyssey of the Intervenors in this action. Before moving to intervene, several states in this group appeared as *amici* supporting Delaware and the "salutary" rule of *Texas* v. *New Jersey*, which they described —twice—as follows: "[i]f no record is available . . . then the state of the *holder's incorporation* [is] entitled to escheat the property." [13] These states now take a different position. They now assert that the "holder" is not the "debtor." Moreover, these states and the entire membership of the Alabama subgroup of the Texas group (and we believe, based on the positions last taken by them before the Master, the Arizona subgroup of that group) now assert that the "domiciliary state" or "location" of a corporate debtor is not its state of incorporation but the state of its principal executive offices. But none of the states in either of these subgroups ever argued that the definition of corporate domicile in the backup rule should be anything other than the state of incorporation, until the Master thought up the idea and circulated it in his draft report in June 1991. All the states in these two subgroups, having originally supported the "state of incorporation" rule, now fully em-

[13] Brief of *Amici* Pennsylvania, Florida, Rhode Island, New Jersey, Arizona, Utah, and Arkansas (May 9, 1988) at 5; *see id.* at 9 (emphasis added).

brace the "state of principal executive offices" rule—as does New York. (For the Court's reference, we have included a scorecard (Appendix A, *infra*) providing the various positions of each state on the central legal issues in the case over the course of the litigation.)

Following their motions to intervene in this action, a large number of states have even gone so far as to modify their statutes to reflect their litigating position in this Court.[14] First, in 1990 and 1991, several states (each of which had already moved to intervene) added provisions that purported to require a holder—wherever located—to turn over funds if they "originated" from an issuer incorporated in the state.[15] Next came circulation

[14] We advised the Court in our opening brief that all of the state legislation on escheats adopted subsequent to the *Texas* and *Pennsylvania* cases embodied the "holder as debtor" and "state of incorporation" rules. Del. Opening Br. 10. In so stating, we overlooked these recent statutes adopted by the putative intervenors after the initiation of their intervention in this lawsuit, for which oversight we apologize to the Court. Our statement holds true as to the Uniform Acts promulgated by the Commissioners on Uniform State Laws. The similarities among the new statutes which seek to advance the litigating positions of the states adopting them cause one to see some unifying hand at work, but that hand is not that of the Commissioners on Uniform State Laws. See the statutes referred to in notes 15 and 16, *infra*, and in Appendices B and C.

[15] 1991 Ala. Act No. 577 (codified at Ala. Code § 35-12-50 (Michie 1991)); 1991 Ark. Act No. 1245 (codified at Ark. Code Ann. § 18-28-208(b) (Michie Supp. 1991)); 1990 Fla. Laws ch. 113 (codified at Fla. Stat. Ann. § 717.1035 (West Supp. 1992)); 1990 Haw. Sess. Laws ch. 31 (codified at Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)); 1991 Ill. Law No. 206, § 4 (codified at Ill. Ann. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992)); 1991 Ind. Act No. 204 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)); 1990 Iowa Acts ch. 1095 (codified at Iowa Code Ann. § 556.9A (West Supp. 1992)); 1990 Kan. Sess. Laws ch. 196 (codified at Kan. Stat. Ann. § 58-3933 (Supp. 1991)); 1991 La. Act No. 209 (codified at La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)); 1991 Miss. Laws ch. 451, § 7 (codified at Miss. Code Ann. § 89-12-14 (1991)); 1990 Mo. Laws, H.B. No. 1052 (codified at Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992)); 1991 Mont. Laws

of the Master's draft report with his spontaneous abandonment of the "state of incorporation" principle, and its opportunistic embrace by the Texas group. There followed a 1992 legislative effort which modified the earlier form of revisionist statute so as to purport to cover funds that "originated" from an "issuer" incorporated "*or otherwise located*" in the state.[16] This, presumably

---

ch. 654 (codified at Mont. Code Ann. § 70-9-210 (1991)); 1991 Nev. Stat. ch. 149, § 1, p. 287 (codified at Nev. Rev. Stat. Ann. § 120A.225 (Michie Supp. 1991)); 1990 N.H. Laws ch. 105, § 13 (codified at N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991)); 1991 N.D. Laws ch. 492 (codified at N.D. Cent. Code § 47-30.1-03.1 (Michie Supp. 1991)); 1991 Okla. Sess. Laws ch. 331, § 19 (codified at Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992)); 1990 S.D. Laws ch. 352 (codified at S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990)); 1990 Utah Laws ch. 179 (codified at Utah Code Ann. § 78-44-4.5 (1992)); 1990 W. Va. Acts ch. 184 (codified at W. Va. Code Ann. § 36-8-8a (Michie Supp. 1992)); *see also* 1991 Alaska H.B. No. 240, 17th Legis., 2d Reg. Sess. (introduced March 27, 1991; not enacted). For the text of a sample statute and additional details, including dates of each state's motion to intervene and of enactment of each statute, see Appendix B.

[16] 1992 Ark. Act No. 7, enacted Feb. 27, 1992 (amending Ark. Code Ann. § 18-28-208 (Michie Supp. 1991)); 1992 Fla. Acts ch. 169, § 2, 1992 Fla. Sess. Law Serv. 1371, 1372 (West), enacted April 9, 1992 (amending Fla. Stat. Ann. § 717.1035 (West Supp. 1992)); 1992 Ga. Law No. 979, § 7, enacted April 13, 1992 (adding Ga. Code Ann. § 44-12-201); 1992 Haw. Sess. Law No. 133, enacted June 3, 1992 (amending Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)); 1992 Ind. Act No. 135, enacted Feb. 21, 1992 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)); 1992 Iowa Acts ch. 1038 (S.F. No. 2174), 1992 Iowa Legis. Serv. 76, 77 (West), enacted April 9, 1992 (amending Iowa Code Ann. § 556.9A (West Supp. 1992)); 1992 Kan. Sess. Laws ch. 36, enacted April 16, 1992 (amending Kan. Stat. Ann. § 58-3933 (Supp. 1991)); 1992 La. Act No. 73, enacted June 5, 1992 (amending La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)); 1992 Me. Acts ch. 756, enacted March 27, 1992 (adding Me. Rev. Stat. Ann. tit. 33, § 1811-A); 1992 Miss. Laws ch. 408, enacted April 27, 1992 (amending Miss. Code Ann. § 89-12-14 (1991)); 1992 N.H. Laws ch. 289, § 51, enacted June 17, 1992 (amending N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991)); 1992 Okla. Sess. Laws ch. 295, § 27, enacted May 26, 1992 (adding Okla. Stat. Ann. tit. 60, § 657.4); 1992 S.D. Laws ch. 312, § 11A, enacted March 10, 1992 (replacing S.D. Codi-

to capture the Master's June 1991 proposal to change the "state of incorporation" rule. These "litigating-position" statutes are localized in one particular subgroup of Intervenors—the Alabama subgroup. The statutes demonstrate in a quite dramatic way the Intervenors' understanding that—prior to this case—the "holder" was the debtor under the *Texas* rule. Their departure from that understanding has no effect: no state "should be permitted to improve its legal position" in this Court by altering its behavior after the Court's "jurisdiction has been invoked." *See Colorado* v. *New Mexico,* 467 U.S. 310, 327 (1984) (Stevens, J., dissenting).

III. JUDGMENT SHOULD BE ENTERED AGAINST NEW YORK AS TO THE DELAWARE BROKERAGE CORPORATIONS UNDER THE BACKUP RULE

A. New York's Position

New York's position, at this stage of the proceedings, is as follows. First, New York takes exception to the Master's departure from the rule that under *Texas* the holder is the debtor. It agrees with us that the holders of the unclaimed property in this case fit the ordinary meaning of the word "debtor," that the state-law "debtor" should continue to be the "debtor" for purposes of the *Texas* rule,

---

fied Laws Ann. § 43-41A-53 (Michie Supp. 1990) and adding S.D. Codified Laws Ann. § 43-41B-12); 1992 Utah Laws ch. 74, enacted March 12, 1992 (codified at Utah Code Ann. § 78-44-4.5 (Supp. 1992)); 1992 Wash. Laws ch. 48, enacted March 26, 1992 (to be codified between Wash. Rev. Code §§ 63.29.030 and 63.29.040); *see also* 1991 Alaska Sen. Concurrent Res. No. 40, 17th Legis., 2d Reg. Sess., introduced May 10, 1992 (proposing new Alaska Stat. § 34.45.130); 1991 Ill. H.B. No. 3126, 87th Gen. Assem., 1991-92 Reg. Sess., introduced March 31, 1992 (proposing to amend Ill. Rev. Stat. ch. 141, para. 108.2); 1991 Mo. H.B. No. 935, 86th Gen. Assem., 2d Reg. Sess., introduced Jan. 8, 1992 (proposing to amend Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992)); 1991 Pa. H.B. No. 2308, 175th Gen. Assem., 1991-92 Reg. Sess., introduced Jan. 21, 1992 (proposing new Pa. Stat. tit. 72, § 1301.2(a)(2)). For additional details, see Appendix C.

that the Master's rejection of state-law rules will create unnecessary hardship on businesses that have relied on the rule, and that *stare decisis* counsels against the Master's recommendation that the "issuer" be deemed the debtor. N.Y. Br. 49-71. Second, New York supports the Master's departure from the state of incorporation rule, without explanation and without acknowledgment of any *stare decisis* issues. N.Y. Br. 73. Third, New York asserts that it is entitled to all property at issue in this case, on the theory that (1) the entire dividend and interest "overage" escheat situation is caused by "floating" securities and (2) there is no way to know the owner of "floating" securities delivered out by the DTC or by New York bank custodians (thereby implicating the backup rule in New York's favor),[17] but (3) the identity of similar owners of similar "floating" securities delivered out by *brokers* [18] is ascertainable and leads—in every instance—to a New York address under the primary rule.

New York's position on the legal issues, like that of every state other than Delaware, has shifted. Where it originally supported the present rules, it now supports a change—but only one of the two changes proposed by the Master. Where it sees administrative difficulties and the unsettling of settled expectations in one rule change (the "state-law debtor as debtor" element of the *Texas* rule), it is mute as to the same problems in the other change (the "state of incorporation" element of the rule).[19] New York's position on these legal issues seems to be an alternative argument, designed as a fall-back position if its factual argument is rejected—as it should be. But New York offers the Court no reason why its particular per-

[17] The DTC and the banks are New York corporations (or national banks there headquartered) *and* apparently have their principal executive offices in New York.

[18] Many of which are incorporated in Delaware.

[19] Both rule changes raise administrative problems. *See* p. 11 n.7, *supra*.

mutation of these legal changes should be adopted. Instead of some basis in principle, its legal position seems to be based solely on the favorable outcome it would bestow on New York.

New York's primary defense is its factual assertion that brokers' overages (but not those of the DTC or the New York bank custodians) should pass to it under the primary rule because they are (it says) the property of known owners having last-known addresses in New York. This argument depends on a series of incorrect assumptions and leaps of faith, which the Master properly rejected.

B. New York's Factual Theory—The Problem of "Nominee Float"

New York's theory begins from the premise that there is only one source for unclaimed property in the hands of brokers—a phenomenon known as "nominee float." N.Y. Br. 30, 77. The "floating" security certificate is delivered out by Cede & Co. (the DTC's nominee), by a broker, or by a bank custodian, registered in its name (or the name of its nominee), and endorsed in blank. It thus functions as a bearer security, except that distributions on it will be paid to the record owner until some bearer presents it to the transfer agent for reregistration into its name.[20]

How this happens may be illustrated by an example. A broker ("Brokerage A") delivers out, either to customers or to counterparties to settle trades, ten certificates for 100 shares each of Ajax common stock during May

[20] In contrast to registered securities, bearer securities entitle the bearer to distributions based on presentment of a coupon or, sometimes, of the certificate itself. *See South Carolina* v. *Baker*, 485 U.S. 505, 508-09 (1988) (upholding Congress' limitations on the availability of favorable tax treatment for state-issued bearer bonds; Congress' action was based on the difficulties of identifying bearers); *see also* 7 William D. Hawkland, *et al.*, *UCC Series* § 8-102:03 at 29-30 (1990).

1992. The stock certificates are registered in Brokerage A's name and the certificates are endorsed in blank—that is, without the names of the transferees filled in—by Brokerage A.[21] Brokerage A has thus launched ten "floating" 100-share certificates of Ajax. The certificates, upon this delivery, belong to the persons or firms to which they were delivered or to whomever those persons or firms redeliver them to. The certificates can thus pass by delivery from hand to hand.[22] Because the security remains a registered security, as far as Ajax and its agents—the transfer agent and the dividend disbursing agent—are concerned, Brokerage A, which delivered the certificates out in May, remains the owner until reregistration has occurred. On June 15, 1992, the board of directors of Ajax declares a dividend of 33¢ a share to holders of record on June 30, 1992, payable on August 1, 1992. Unless whoever happens to be the bearer of one of the "floating" certificates submits it to Ajax's transfer agent for reregistration prior to June 30, 1992, the dividend payable on August 1, 1992, will be paid to Broker-

[21] A variant can be that the certificate is endorsed by Brokerage A not in blank but in favor of the party to whom it is delivered. However, that party will not necessarily submit it to the transfer agent for reregistration. It may cause the certificate to be redelivered to another party by attaching to it a "stock power" (instrument of transfer) signed by itself and with the assignee's name either left blank or inserted (in which case the assignee could repeat the process itself without reregistering the stock by redelivery with another stock power attached if necessary). *See, e.g.,* DeCesare Dep. 76-77; Shearer Dep. 96-97; *see generally* Egon Guttman, *Modern Securities Transfers* ¶ 7.01 (3d ed. 1987); 7 William D. Hawkland, *et al., UCC Series,* § 8-308 (1990).

[22] The record discloses that brokerage houses often make delivery of securities by taking a certificate which they have received that is registered in the name of another broker and endorsed in blank by that broker and delivering it out in "good delivery" form, by delivering it "as is" if endorsed in blank or, if it is endorsed to them, by attaching their own stock power to it. *See* Principe Dep. 64-65; Shearer Dep. 96, 230-31; DeCesare Dep. 76-77; *see generally* materials cited at n.21, *supra.*

age A. However, according to the customs of the trade, whoever was the bearer-owner of the certificate on June 30, 1992, is entitled to the dividend. Shearer Dep. 182, 228-31, 425; DeCesare Dep. 445-47; Cirrito Dep. 133-34, 201-02.

Let us assume that seven of the ten Ajax certificates are reregistered by their bearers in their own names on or before June 30, 1992, and that three are not. The $99 dividend applicable to the three 100-share certificates not reregistered by June 30, 1992, will be paid to Brokerage A on August 1, 1992. If everything else is equal, this $99 will be an "overage" in the hands of Brokerage A. Cirrito Dep. 128-29, 133, 224-25; Principe Dep. 95-105; Shearer Dep. 94, 193-98. While Brokerage A will have a record of the entities that it delivered the ten Ajax certificates to in May 1992, it will have no knowledge of, and no way to learn from its own records, which of the ten certificates were still registered in Brokerage A's own name on June 30, 1992, or who happened to be the bearer-owner of those certificates on June 30, 1992.

In the case of Cede & Co. (the DTC's nominee) and the custodian banks, New York agrees that there is no way of DTC/Cede's knowing the identity of the bearer of a "floating" security at the time of a record date for a distribution of dividends or interest. New York admits that in the case of DTC (and presumably the banks) this is because the DTC "cannot track the movements" of the certificates once they have been launched upon the stream of commerce. N.Y. Br. 19. New York puts brokers in a different category, however. They, it claims, must be evaluated *not* on the basis of whether they have the ability to know who is the bearer of the "floating" security on a particular date, but whether they can ascertain from their records the identity of the counterparty to the trade that New York assumes caused the certificate to be launched. N.Y. Br. 81. New York asserts that DTC/Cede and the banks do not have that information, but brokers do.

While it is not possible to associate particular overages with particular deliveries of the security, New York says that all, or close to all, of the parties to whom Brokerage A delivered the "floating" certificates are other brokers. Since the launching broker does not know which brokers that it made delivery to were responsible for the overage, New York's theory is not that a particular broker can be identified, but that "brokers in general" statistically can be identified as the "owners" as of the record date. But how do we go about finding the address of "brokers in general?" New York has an easy answer. "Brokers in general" all have a "trading address" in New York, it says. N.Y. Br. 80. To be sure, a number of large brokerage houses have their headquarters in New York; but others have their headquarters elsewhere (Tucker Anthony, for example, has its headquarters in Boston); [23] and some regional brokerage houses do not even maintain branches in New York. However, New York's theory is that "virtually all" brokers have "trading addresses" not just in New York State but *in New York City*. N.Y. Br. 80. It implies that membership in the National Securities Clearing Corporation ("NSCC") somehow requires a New York trading address for "delivery of physical certificates." N.Y. Br. 80 n.59. Thus, says New York, "brokers in general" are the owners; and they all have addresses in New York!

This line of reasoning, New York says, justifies the supposed distinction that the "broker nominee float" overages are "owner/address *known*," while DTC and bank custodian "float" overages are not. N.Y. Br. 81. And, finally, New York claims to take the brokers' overages under the primary rule, which covers property of "known" but "lost" persons—even though brokers rarely become "lost" the way individuals do—because these hypothetical record-date bearer-owners of the certificates are part of a group, none of whose individual members are "lost" at

[23] *See* Principe Dep. 24, 27.

all, but all of whom have "trading addresses" in New York. N.Y. Br. 81.

New York does not contend that it has proven this factual theory of its case on the record. New York instead asks for a remand to the Master for further discovery. N.Y. Br. 81. But New York was warned that the Master's recommendation would "conclude consideration" of its theory and could result in "striking" its "defenses," and it was invited to make whatever kind of submission it deemed appropriate. Litigation Management Order No. 3, at 2 (Nov. 15, 1990). The existing record fully supports judgment against New York. And no further discovery could avail New York because, as we demonstrate below, New York's factual theory is not only contrary to the evidence, but it involves the proof of an impossibility. It is impossible for "Brokerage A" to know from its own books and records the identity of the bearer-owner of a "floating" security on the date that governs entitlement to a dividend or interest payment—the record date. Brokerage A will not know that identity unless and until the bearer-owner later comes forward and makes and supports a claim to Brokerage A, the record holder.[24]

---

[24] This is not to say that we agree with the Master that the *beneficial owner's* name and address must be shown in order for the primary rule to be invoked. The person who would properly make a claim to the record owner would be the *bearer-owner*, which might be an institutional or individual beneficial owner or might be a nominee, and hence not a beneficial owner. *See* Shearer Dep. 182, 228-31, 425; DeCesare Dep. 445-46; Cirrito Dep. 133-34, 201-03. But the Master's factual finding (Report 61 n.53) that a broker in the position of "Brokerage A" cannot identify the bearer-owner of a "floating" certificate on the record date of the distribution is supported by the record. *See* pp. 31-35, *infra*. New York has not come forward with evidence setting forth a genuine issue of material fact. *Cf.* Fed. R. Civ. P. 56(e).

Indeed, since it is irrational to assume that "Brokerage A" could have records showing who the bearer-owner was on the record date subsequent to its delivery of the certificate, or indeed which of the certificates it delivered out remained outstanding on

C. The Breaks in New York's Chain of Logic

New York's theory is wrong for five reasons. Those five reasons are all breaks in the chain of "logic" that New York must show in order to support its theory. A break in *any* of the five links would be enough to cause judgment to be entered against New York. On *all* five of them, New York's theory is not supported by the record; on all five, the evidence is contrary to New York's theory and supports the Master's finding. Indeed, on at least one of the five links, New York's theory is irrational—that is, there is no prospect that further discovery could establish New York's contention, since it is as irrational as a claim that the sun could be seen shining in the tropics at midnight.

1. *"Float" is not the only source of unclaimed property in this case.*—New York admits the existence of sources of overages other than "float," but asserts—without citation to evidence—that "automated accounting procedures and other control mechanisms detect these differences and correct them long before they become a meaningful source of escheatable funds." N.Y. Br. 20. New York was more candid with the Master, admitting that "there are a number of possible reasons for an overpayment" to a broker resulting in unclaimed property. New York's Renewed Motion for Judgment on the Pleadings, 44 (Oct. 30, 1990). New York's concession is confirmed by the record. For

---

that record date, it is impossible to say who was the bearer-owner of the particular certificate(s) that caused the overage. Indeed, one cannot say in what category of business, profession or humanity in general the bearer-owner on that day was; a stockbroker, a substantial individual investor, a pension fund, a foreigner, a mutual fund, or some other investor. To be sure, there are other entities' records which if carefully pieced together might enable one to trace this information (just as, presumably, no human being is ever really "lost"); but the books and records of the record owner—who has received the "overage"—will not yield the answer.

example, Senior Vice President Cirrito of Prudential-Bache Securities, Inc., testified that overages

> could result from a number of different reasons, one of which and the most clearly understood is from the perspective of a certificate being outstanding in your name. But there are processing errors, there are transactions that might not be posted on the exact date on which they occurred, and those errors can occur at Prudential-Bache. They could occur at counter-party organizations. They could occur at transfer agents.
>
> Transfer agents have been known, even though they give you a certificate on a particular day, to adjust their records in different time frames. So there are any number of reasons why you would wind up receiving monies that you really don't know what to do with.
>
> Q. I understand, and my point was it could be some combination of any one or all of those reasons, correct?
>
> A. Certainly.

Cirrito Dep. 224-25; *accord* Shearer Dep. 193-98, 423-24, 528-29; *see also* DeCesare Dep. 195-97. Indeed, the record reference cited by New York (N.Y. Br. 20) does not purport to say that the other causes for overages are correctable "long before they become a meaningful source of escheatable funds"; it simply says that "float" causes overpayments "to a large extent" or in "most" cases. DeCesare Dep. 353.

2. *"Floating" certificates are delivered by brokers to nonbrokers.*—New York's argument assumes that brokers deliver out "street name" endorsed securities only to their trading counterparties. The contention is, upon the record, false. All of the brokers whose representatives testified deliver out endorsed securities in street name to their institutional customers on the customers' request. *See* Principe Dep. 63-64, 66; Shearer Dep. 95-97; Cirrito Dep. 128-29. See page 18, *supra*, for a quotation of Principe's testimony. New York (N.Y. Br. 30 n.33) purports to cite

page 61 of the Principe deposition to the contrary. An examination of page 61 of the Principe deposition will show nothing at all relating to the subject.

Indeed, the proposition in New York's footnote 33—that "[t]he brokers also testified that they do not permit their customers to take possession of physical certificates registered in the broker's nominee name"—is supported by *none* of its record references and is affirmatively contrary to the record as to all three of the brokerages whose representatives testified. In addition to New York's miscitation of page 61 of the Principe deposition, the passages in the Shearer and Cirrito depositions cited by New York all discuss an entirely different subject: the occasions on which the brokers will hold in their own vaults physical certificates registered in their customers' names. Thus none of the passages cited in support of the proposition quoted supports it. Indeed, all three of the brokerage house witnesses testified that they did deliver out street name negotiable certificates registered in their firms' names to customers, though, to be sure, in the cases of Tucker Anthony and Merrill Lynch this was strictly confined to institutional customers, and in the case of Prudential-Bache, apparently largely so confined.[25] Since the assertion that the brokers deliver street name bearer securities only to their counterparties is an essential link in New York's argument—claimed to distinguish the brokers from DTC/Cede and the bank custodians—this triple, and universal, miscitation of the record is particularly striking.

3. *Particular "floating" certificates cannot be matched to overages.*—New York's argument, in order to be serious, must assume not only that broker's street name certificates are delivered only to other brokers but also that there will be a particular broker to whom certificates have been delivered who can be identified with each overage.

---

[25] *See* Shearer Dep. 95-97 (Merrill Lynch); Cirrito Dep. 128-29 (Prudential-Bache); Principe Dep. 63-64, 66 (Tucker Anthony) (quoted at p. 18, *supra*).

That, too, is not so. Even if "nominee float" were the only cause of unclaimed distributions—and the record shows it is not—there still may be any number of "floating" certificates that "Brokerage A" has launched for each issuer, as the example we have given above (pp. 24-26) illustrates. As Cirrito confirmed, an overpayment —even one based solely on the "float" problem—could reflect "a combination of 10 or 12 different certificates outstanding still registered in [Brokerage A's] name." Cirrito Dep. 225. And Brokerage A's records will not show which of the certificates that it launched were still "floating" on the record date and which had been reregistered.

4. *The bearer-owner's identity as of the record date cannot be ascertained from the delivering broker's records.*—Most critically, even if the launching broker, Brokerage A, could ascertain the precise certificate or certificates that caused the overage—and it cannot—there would still be no way for Brokerage A to ascertain the identity of the bearer-owner of the certificate on the record date for the distribution. As Director of Internal Control Principe of John Hancock Clearing Corporation [26] explained,

> [I]f I deliver the [endorsed certificate] out and it stays out, and the person I delivered it to doesn't bother reregistering it and maybe passes it along to somebody else . . . . I would be at a loss to explain who the beneficial owner of the security is at that point. If I got that cash dividend, I wouldn't know what to do with it.
>
> Q. Let us say that some time transpired and you escheated that overage. Tucker at that time does not have the name and address of the person entitled to the overage.
>
> A. That is correct.

Principe Dep. 102-03; *accord* Cirrito Dep. 221-22; Shearer Dep. 103, 108-09, 192-93; *see also* DeCesare Dep. 72-78, 116-19. Thus, all that is knowable, even assuming all

[26] An affiliate of the Tucker Anthony brokerage firm.

overages were caused by "float," is that at some point in time one or more certificates were delivered in negotiable form to someone, but that one or more of these certificates —which ones are unknown—had not been reregistered. Who owned them on the record date is unknowable from Brokerage A's records.

New York asserts that brokers are somehow different from the DTC and the bank custodians in this respect. N.Y. Br. 81. But the "floating" certificates are bearer instruments and pass from hand to hand whether they are launched by a bank, a broker or the DTC. New York admits that once DTC/Cede withdraws a certificate from DTC's vault and gives it to the participant registered in Cede's name and endorsed, "DTC has no control over these Cede certificates and no way of knowing who owns them on a record date." N.Y. Br. 25. New York gives no explanation of how a strockbroker would be any more able to identify the bearer-owner on the record date than is the DTC. Each knows of the *original* bearer; the records of all the launchers show the entity to whom they made delivery; but what that entity did with the certificate, or what its transferees did, and where that certificate was on the record date, are matters foreign to their knowledge.

New York claims that a broker (unlike a bank or the DTC) can ascertain from its books the identity of its counterparty to the *first* trade. N.Y. Br. 34, 81. This may not be so, since the delivery in question (if it could be identified) may have been made by the brokerage house to an institutional customer rather than to a counterparty, as indicated in point 2, above (pp. 30-31). But in any event, this merely shows that the broker can identify the *first* bearer. The fact that a certificate is delivered to a broker does not imply that it remains in that broker's, or any broker's, hands on the record date.

In order to deal with the breaks in its chain discussed in point 3 and in this point, New York develops a statistical or generalized argument: it may not be known to Brokerage A which floating certificates among the many certificates it has launched are still outstanding, and not reregistered, on the record date. But, says New York, since the certificates were all delivered to brokers (a false premise, but let us continue) we know that the outstanding certificates, which caused the overage, are held by "brokers in general." The address of "brokers in general" is in New York City. Thus, the property is "owner/address known"—it is owned by "brokers in general" and the address of "brokers in general" is in New York City. (*See* point 5, below.)

But even if one ignores the record (including the triple miscitation by New York, *see* pp. 30-31, *supra*) and assumes that every certificate launched on a floating basis by a broker is originally delivered to another broker to settle a trade, it does not follow that those certificates are in the hands of those brokers, or any brokers, later on—on the record date for the dividend or interest distribution. The brokers could, to be sure, have redelivered the certificates to other domestic brokers; but they could have delivered them to foreign brokers, to institutional customers, or indeed to anyone. Not only the bearer-owner's specific identity, but its generalized identity (what class of occupation or other characteristics the bearer-owner has) on the record date are all unknown.[27] To say that the property in question is

---

[27] Brokers are not the only ones who find it impossible to reconstruct the identities of bearer-owners as of the record date. The IRS, too, recognized the impossibility of finding a paper trail to identify income derived from bearer securities (of which "floating" certificates are a close cousin) and therefore asked Congress to enact legislation requiring issuers of long-term bonds to issue them in registered (rather than bearer) form or face severe tax disadvantages. *See South Carolina* v. *Baker*, 485 U.S. 505, 508-09 (1988). Unlike the brokers, the IRS has the advantage of compulsory process. Moreover, the rubric of the back-up rule looks solely to what the debtor's (here, the overpaid broker's) own books and records show.

owned on a "owner known" basis when one does not know who the owner is, who its intermediate bearer predecessors in title were, or even what category of business it is in, is to do violence to language. No amount of additional evidence or proof could change this matter. It is epistemologically impossible for Brokerage A to know, from its own records, who the bearer-owners of the certificates that gave rise to the overage were on the record date.[28]

[28] We could make various arguments that the record affirmatively demonstrates (a) that brokers are *not* likely to be the bearer-owners of securities registered in someone else's name on the dividend or interest record date and (b) that the party to whom the *first* delivery is made is not likely to be the bearer-owner on the subsequent record date for the distribution. The brokerage house witnesses all testified that one could not tell from an examination of the trades in a particular security immediately prior to a record date who the owner of a distribution on that security which was an "overage" might be. Cirrito Dep. 222-23; Principe Dep. 211-12; Shearer Dep. 527-28. The broker witnesses also testified that when their firms received a certificate that they were planning to keep, they caused it to be reregistered in their own names as quickly as possible. Principe Dep. 62-63, 214; Cirrito Dep. 40, 42; Shearer Dep. 68-69, 99-100. This supports an inference that the certificates which "float" are likely to have passed through several hands by a record date. New York asserts (N.Y. Br. 32-34) that with a little extra effort, the delivering broker (Brokerage A) could find the pertinent bearer-owners as of the record date. But the record also reflects that broker creditors were extremely diligent in making claims on other brokers in underage situations. *See* Principe Dep. 117; Cirrito Dep. 76-78; Shearer Dep. 145-46, 221-22 ("[w]e attempt to get every dollar that we're entitled to"), 234-35. If the broker debtors could, with some effort, find the broker creditors, why couldn't the broker creditors find the broker debtors? There would certainly be more incentive for them to do so, and it would be easy; they could do so by looking to see the name in which their bearer certificates were registered, which appears on the certificate's face. This and the practice of immediate reregistration by brokers of securities they plan to keep both suggest probable bearer ownership by *nonbrokers* on the record date in cases where no claim was made in the three-year period.

But none of these points, all of which lead us in the other direction from where New York wants to go, needs be pursued. The short

5. *Many brokers cannot be said to have New York addresses.*—After assuming that the record-date bearer-owners are all "brokers in general," New York must also assume that *every* broker is a "New York broker." [29] New York's position in this respect has evolved: originally, it asserted only that a "significant number" of brokers had "New York trading addresses." N.Y. Br. in Opp. to Motion for Leave to File Complaint, 7 (May 9, 1988). Later, it said that "most, if not all," brokers have New York trading addresses, based on their membership in the NSCC. N.Y. Renewed Motion for Judgment on the Pleadings, 50 & n.92 (Oct. 30, 1990). New York also asserted that it is reasonable to *presume* that "most" brokers deliver certificates to other brokers. N.Y. Motion for Judgment on the Pleadings, 52. New York now recognizes that the presumption it sought is impermissible, and therefore asserts only that it is less expensive to use "statistical samplings," but that it can demonstrate that "virtually all" brokers have "New York addresses." N.Y. Br. 80. Its argument, of course, is contrary to the holding in *Pennsylvania* v. *New York*, 407 U.S. at 214, rejecting a presumption based on the place of purchase of money orders.

An alternative argument by New York appears to be that physical delivery of securities certificates by the NSCC must take place in New York City, and therefore (since "most, if not all" brokers have NSCC New York trading addresses) that a "delivery ticket" will reflect a "New York address." N.Y. Br. 19, 34, 80 n.59. New York has referred to this address as the "trading address," which it suggests is governing as the "last-

---

answer is that the record owners' books and records offer no basis whatsoever from which could be inferred the identiy of the bearer-owner of a street-name negotiable security on a record date subsequent to the security's delivery.

[29] *See* N.Y. Br. 80. New York nowhere defines the term.

known address" under the primary rule. It is true that the NSCC requires its members to specify *some* location where they can receive physical delivery of envelopes containing securities, tickets relating to securities, and other items. *See* NSCC, *Rules & Procedures*, Rule 9 (filed with the SEC as Exhibit E to the NSCC's form CA-1). But the NSCC will deliver such envelopes to its members not only in New York (Rule 9, § 1), but in any city where it has a branch office (Rule 9, § 2). The NSCC has *no* requirement that its members have a "New York" address of any kind. And, as *amici* explained, regional and small brokerage firms make up by far the larger number of brokers. SIA *Amici* Br. 14. But even if such firms *did* take delivery only in New York (and they do not), a New York "trading address" is hardly the "last known address of the creditor, as shown by the debtor's books and records," which the *Texas* case makes part of the primary rule. 379 U.S. at 682. Indeed, generally speaking, brokerage firms do not become "lost," and real addresses, many of them outside of New York, are available for all of them. That the owner is "known" and has a "last-known address" on the debtor's books and records, but is "lost" is the prerequisite for the primary rule. The brokers are not "known" but "lost"; the identity of the bearer-owner is unknown; if it were a broker, the broker would not be "lost"!

Every one of the five links in New York's chain is defective and as to many of the links no further making of a record, even if permissible, could repair the problem. Fundamentally, the identity of the bearer-owner of the securities on the record date is unknown and unknowable as far as the records of the original delivering broker show. A presumption that the bearer certificates giving rise to overages are held by "brokers in general" on the record date is factually insupportable and there is no way that this could be proved even on a statistical basis from the original records of the delivering broker. And even if statistical proof of it were permissible (contrary to the *Pennsylvania* rule) and available, proof that the certificates were bearer-owned by "brokers in general" does not make them "owner known" any more than proof that an insurance company's unidentifiable funds were owned by "policyholders in general" would make them "owner known." It simply proves that the particular owner is unknown, and that the property is escheatable under the backup rule.

In short, New York's factual argument depends on a series of misconstructions of the record and arguments in favor of the impossible. No expansion of the record could result in its proving all of the links in the argument which it must prove to make its case. Judgment should be entered against New York in favor of Delaware.

CONCLUSION

For the reasons stated in Delaware's "Exceptions and Brief in Support" filed May 26, 1992, and herein, Delaware's Exceptions to the Report of the Special Master should be sustained and judgment should be entered against the Intervenors and in favor of Delaware against New York, in the form of decree attached as Appendix F to our brief filed May 26, 1992.[30]

---

[30] We note that the presentations of their cases in support of the Master's Report by the Alabama subgroup and the Arizona subgroup of the Texas group are being filed simultaneously with this Brief, and of course we have not had an opportunity to respond to them herein. Delaware may accordingly seek this Court's indulgence in a reply brief if there are any arguments in those briefs which we did not fully anticipate in our May 26, 1992 brief.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Plaintiff,
State of Delaware

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

July 1992

APPENDICES

APPENDIX A

SCORECARD OF POSITIONS

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Alabama								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase[1]	X			X	X			X
Alaska								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Arizona								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

(1) Includes all Exceptions and Statements filed in Exceptions round.

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Arkansas								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
California								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X
Colorado								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Connecticut								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Delaware								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X	X			X		X
3. Before the Master, Following Draft Report		X	X			X		X
4. Before this Court in "Exceptions" Phase		X	X			X		X
D.C.								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report[(2)]	X	X	X	X		X	X	X
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	

[(2)] D.C. changed position during this Phase, first advocating issuer-as-debtor and state of incorporation as domicile; and then rejecting those positions in favor of free-form "equitable allocation."

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Florida								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Georgia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Hawaii								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Idaho								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Illinois								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Indiana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Iowa								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Kansas								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Kentucky								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Louisiana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Maine								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Maryland								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Massachusetts								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
3. Before the Master, Following Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
4. Before this Court in "Exceptions" Phase		X		X		X		X
Michigan								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	
Minnesota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Mississippi								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Missouri								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Montana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Nebraska								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	
Nevada								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
New Hampshire								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
New Jersey								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
New Mexico								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
New York								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X	X			X		X
3. Before the Master, Following Draft Report		X	X			X		X
4. Before this Court in "Exceptions" Phase		X		X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
North Carolina								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
North Dakota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Ohio								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Oklahoma								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Oregon								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
3. Before the Master, Following Draft Report(3)	X		X	X	X	X		X
4. Before this Court in "Exceptions" Phase								
Pennsylvania								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

(3) Oregon moved to intervene after the Master's Report, and its motion to intervene adopted the original Texas group's position; it changed its position thereafter.

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Rhode Island								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X
South Carolina								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
South Dakota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Tennessee								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Texas								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Utah								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Vermont								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Virginia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Washington								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
West Virginia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Wisconsin								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Wyoming								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

APPENDIX B

FIRST ROUND LITIGATING-POSITION STATUTES

The 1990 and 1991 statutes almost all have nearly identical operative provisions. Arkansas' is provided as an example:

> All intangible property, including, but not limited to, any interest, dividend, or other earnings thereon, less any lawful charges, held by a business association, federal, state, or local government, or governmental subdivision, agency, or entity, or any other person or entity, regardless of where the holder may be found, if the owner has not claimed or corresponded in writing concerning the property within three (3) years after the date prescribed for payment or delivery, is presumed abandoned and subject to the custody of this state as unclaimed property if:
>
> (1) The last known address of the owner is unknown; and
>
> (2) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state, is incorporated, organized, or created in this state.

The following table shows the date each state with one of the 1990 or 1991 statutes moved to intervene in this action, along with the date it enacted the statute in question:

State	Date of Motion	Statutory Information
Alabama	April 21, 1989	1991 Ala. Act No. 577, enacted July 29, 1991 (codified at Ala. Code § 35-12-50 (Michie 1991))
Alaska	October 29, 1990	1991 Alaska H.B. No. 240, 17th Legis., 2d Reg. Sess. (introduced March 27, 1991; not enacted)
Arkansas	November 17, 1989	1991 Ark. Act No. 1245, enacted April 17, 1991 (codified at Ark. Code Ann. § 18-28-208(b) (Michie Supp. 1991))
Florida	November 17, 1989	1990 Fla. Laws ch. 113, enacted June 21, 1990 (codified at Fla. Stat. Ann. § 717.1035 (West Supp. 1992))
Hawaii	April 21, 1989	1990 Haw. Sess. Laws ch. 31, enacted April 23, 1990 (codified at Haw. Rev. Stat. § 523A-2.5 (Supp. 1991))
Illinois	April 21, 1989	1991 Ill. Law No. 206, enacted Sept. 3, 1991 (codified at Ill. Ann. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992))
Indiana	April 21, 1989	1991 Ind. Act No. 204, enacted July 1, 1991 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992))
Iowa	November 17, 1989	1990 Iowa Acts ch. 1095, enacted March 29, 1990 (codified at Iowa Code Ann. § 556.9A (West Supp. 1992))
Kansas	April 21, 1989	1990 Kan. Sess. Laws ch. 196, enacted April 26, 1990 (codified at Kan. Stat. Ann. § 58-3933 (Supp. 1991))
Louisiana	April 21, 1989	1991 La. Act No. 209, enacted July 2, 1991 (codified at La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992))

State	Date of Motion	Statutory Information
Mississippi	November 17, 1989	1991 Miss. Laws ch. 451, § 7, enacted March 26, 1991 (codified at Miss. Code Ann. § 89-12-14 (1991))
Missouri	November 17, 1989	1990 Mo. Laws, H.B. No. 1052, enacted July 9, 1990 (codified at Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992))
Montana	April 21, 1989	1991 Mont. Laws ch. 654, enacted April 26, 1991 (codified at Mont. Code Ann. § 70-9-210 (1991))
Nevada	April 21, 1989	1991 Nev. Stat. ch. 149, § 1, p. 287, enacted May 7, 1991 (codified at Nev. Rev. Stat. Ann. § 120A.225 (Michie Supp. 1991))
New Hampshire	November 17, 1989	1990 N.H. Laws ch. 105, § 13, enacted April 13, 1990 (codified at N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))
North Dakota	July 16, 1990	1991 N.D. Laws ch. 492, enacted March 19, 1991 (codified at N.D. Cent. Code § 47-30.1-03.1 (Michie Supp. 1991))
Oklahoma	April 21, 1989	1991 Okla. Sess. Laws ch. 331, § 19, enacted June 15, 1991 (codified at Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992))
South Dakota	April 21, 1989	1990 S.D. Laws ch. 352, enacted March 12, 1990 (codified at S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990))
Utah	April 21, 1989	1990 Utah Laws ch. 179, enacted March 9, 1990 (codified at Utah Code Ann. § 78-44-4.5 (1992))
West Virginia	November 17, 1989	1990 W. Va. Acts ch. 184, enacted March 14, 1990 (codified at W. Va. Code Ann. § 36-8-8a (Michie Supp. 1992))

APPENDIX C

SECOND ROUND LITIGATING-POSITION STATUTES

The 1992 statutes contain almost the same provisions as the 1990 and 1991 statutes, except that the language "or otherwise located" is generally added to the final operative paragraph. Again, Arkansas' 1992 revision (with new language emphasized) serves as an example:

> All intangible property, including, but not limited to, any interest, dividend, or other earnings thereon, less any lawful charges, held by a business association, federal, state, or local government, or governmental subdivision, agency, or entity, or any other person or entity, regardless of where the holder may be found, if the owner has not claimed or corresponded in writing concerning the property within three (3) years after the date prescribed for payment or delivery, is presumed abandoned and subject to the custody of this state as unclaimed property if:
>
> (1) The last known address of the owner is unknown; and
>
> (2) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state, or is incorporated, organized, created *or otherwise located* in this state.

(Emphasis shows new material.)

The following table shows the date each state with one of the 1992 statutes or bills moved to intervene in this action, along with the date it enacted the statute in question (or the date of the bill's introduction) and whether the statute is amendatory of a 1990 or 1991 statute.[1]

---

[1] Due to the volume of this very recent legislative activity, our table may not be complete.

State	Date of Motion	Statutory Information
Alaska	October 29, 1990	1991 Alaska Sen. Concurrent Res. No. 40, 17th Legis., 2d Reg. Sess., introduced May 10, 1992 (proposing new Alaska Stat. § 34.45.130)
Arkansas	November 17, 1989	1992 Ark. Act No. 7, enacted Feb. 27, 1992 (amending 1991 Act, Ark. Code Ann. § 18-28-208 (Michie Supp. 1991))
Florida	November 17, 1989	1992 Fla. Acts ch. 169, § 2, 1992 Fla. Sess. Law Serv. 1371, 1372 (West), enacted April 9, 1992 (amending 1990 Act, Fla. Stat. Ann. § 717.1035 (West Supp. 1992))
Georgia	June 3, 1990	1992 Ga. Law No. 979, § 7, enacted April 13, 1992 (adding Ga. Code Ann. § 44-12-201)
Hawaii	April 21, 1989	1992 Haw. Sess. Laws ch. 133, enacted June 3, 1992 (amending 1990 Act, Haw. Rev. Stat. § 523A-2.5 (Supp. 1991))
Illinois	April 21, 1989	1991 Ill. H.B. No. 3126, 87th Gen. Assem., 1991-92 Reg. Sess., introduced March 31, 1992 (proposing to amend 1991 Act, Ill. Rev. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992))
Indiana	April 21, 1989	1992 Ind. Act No. 135, enacted Feb. 21, 1992 (amending 1991 Act, Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992) and codified in Burns Supp. 1992))
Iowa	November 17, 1989	1992 Iowa Acts ch. 1038 (S.F. No. 2174), 1992 Iowa Legis. Serv. 76, 77 (West), enacted April 9, 1992 (amending 1990 Act, Iowa Code Ann. § 556.9A (West Supp. 1992))

State	Date of Motion	Statutory Information
Kansas	April 21, 1989	1992 Kan. Sess. Laws ch. 36, enacted April 16, 1992 (amending 1990 Act, Kan. Stat. Ann. § 58-3933 (Supp. 1991))
Louisiana	April 21, 1989	1992 La. Act No. 73, enacted June 5, 1992 (amending 1991 Act, La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992))
Maine	June 3, 1991	1992 Me. Acts ch. 756, enacted March 27, 1992 (adding Me. Rev. Stat. Ann. tit. 33, § 1811-A)
Mississippi	November 17, 1989	1992 Miss. Laws ch. 408, enacted April 27, 1992 (amending 1991 Act, Miss. Code Ann. § 89-12-14)
Missouri	November 17, 1989	1991 Mo. H.B. No. 935, 86th Gen. Assem., 2d Reg. Sess., introduced Jan. 8, 1992 (proposing to amend 1990 Act, Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992))
New Hampshire	November 17, 1989	1992 N.H. Laws ch. 289, § 51, enacted June 17, 1992 (amending 1990 Act, N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))
Oklahoma	April 21, 1989	1992 Okla. Sess. Laws ch. 295, § 27, enacted May 26, 1992 (adding Okla. Stat. Ann. tit. 60, § 657.4, without mentioning 1991 Act, Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992))
Pennsylvania	April 21, 1989	1991 Pa. H.B. No. 2308, 175th Gen. Assem., 1991-92 Reg. Sess., introduced Jan. 21, 1992 (proposing to add new Pa. Stat. § 1301.2(a)(2))

State	Date of Motion	Statutory Information
South Dakota	April 21, 1989	1992 S.D. Laws ch. 312, § 11A, enacted March 10, 1992 (replacing 1990 Act, S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990), with S.D. Codified Laws Ann. § 43-41B-12)
Utah	April 21, 1989	1992 Utah Laws ch. 74, enacted March 12, 1992 (amending 1990 Act, Utah Code Ann. § 78-44-4.5 (1992) and codified in Supp. 1992)
Washington	April 21, 1989	1992 Wash. Laws ch. 48, enacted March 26, 1992 (to be codified between Wash. Rev. Code §§ 63.29.030 and 63.29.040)