No. 220145, Original

IN THE

Supreme Court of the United States

STATE OF DELAWARE,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA AND
STATE OF WISCONSIN,

Defendants.

BRIEF OF *AMICUS CURIAE* THE UNCLAIMED PROPERTY PROFESSIONALS ORGANIZATION IN SUPPORT OF THE MOVANT

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INTEREST OF *AMICUS CURIAE*[1]

The Unclaimed Property Professionals Organization ("UPPO"), which was established in 1992, is the premier national organization concentrating on all aspects of unclaimed property compliance and education, and advocating for the interests of both the holders and owners of unclaimed property. UPPO is a nonprofit organization currently composed of over 370 member businesses who represent nearly all segments of the U.S. economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

As a result, UPPO is in a unique position to provide the perspective of the holder community with respect to the important issues presented by this dispute between Delaware, MoneyGram's state of corporate domicile, and various other states in which MoneyGram conducts business. While UPPO concurs with the arguments offered by the parties to support this Court's exercise of jurisdiction over this interstate

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[1] In satisfaction of Supreme Court Rule 37.6, UPPO represents that no portion of this brief was written by counsel for any party to this appeal, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by *amicus curiae* and its counsel. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

dispute, we submit this brief to call the Court's attention to drastic developments in states' application of their unclaimed property laws since this Court's seminal decision in *Delaware v. New York,* 507 U.S. 490 (1993).

In particular, UPPO urges the Court to clarify that the federal common law rules governing states' rights to take custody of unclaimed or abandoned intangible property are applicable not only to cases involving conflicting claims among the states, but also to cases involving a dispute between a holder and a single state. UPPO also urges the Court to clarify the application of the federal common law rules, and the secondary rule in particular, to protect the rights of holders against unconstitutional overreaching by states.

STATEMENT OF THE CASE

This case presents an example of an "interstate tug-of-war" that implicates the rights of all holders of unclaimed property. *See* MoneyGram Br. 2. The issue in this case—the applicability of the federal common law rules to certain Official Checks—is not the only question presented to this Court. Rather, any decision by this Court addressing these facts will impact holders across the nation in interpreting the varied state unclaimed property laws.

The dispute between Delaware and the other states in this litigation involves which state is entitled to escheat MoneyGram's Official Checks. Delaware has pointed to the federal common law rules established in *Texas v. New Jersey* and affirmed in *Delaware v. New York*, as "binding precedent" that requires MoneyGram to continue to escheat its Official Checks to Delaware. *See* Brief in Support of Bill of Complaint,

Exhibit A at A-8, *Arkansas v. Delaware*, No. 220146 ORG (June 9, 2016). Pennsylvania and Wisconsin, however, argue that MoneyGram should escheat its Official Checks to the state of purchase pursuant to 12 U.S.C. § 2501, *et seq.* (the "Federal Disposition Act"). *See* Penn. Br. 4; Wisc. Br. 9. MoneyGram thus has been caught between multiple states claiming funds that it has already escheated to one. As MoneyGram states, Delaware added "insult to injury" by refusing to indemnify it. See MoneyGram Br. 2.

This paradigm—whereby a holder is caught in the middle between varied state interpretations—is neither novel nor unique. Its frequency highlights the states' growing dependence on revenue from unclaimed property, and how that dependence influences unclaimed property law. Therefore, irrespective of which state this Court determines has the right to escheat the Official Checks, the Court's decision, implicitly or explicitly, will bear on the tension between competing and conflicting state claims and how holders may seek relief.

SUMMARY OF ARGUMENT

The field of unclaimed property has experienced seismic shifts since this Court announced its federal common law rules governing the states' rights to claim unclaimed property in 1965. The largest change by far has been the amount of funds collected by the states, and the states' use of such funds for general revenue purposes. The increase itself is not problematic—but the states' dependence on such property for revenue has impacted the development of the law.

In particular, legislative developments, administrative interpretations, and enforcement efforts all reflect the states' incentive to interpret the law in ways that

will siphon more property to each state's own coffers. This has led to novel and expansive interpretations of the federal common law rules governing state jurisdiction over such property, and an increase in disagreements among the states.

The instant action is but one example of an ongoing tug-of-war over unclaimed property, with American businesses bearing the brunt of the conflict. Due to various procedural impediments, holders have no direct recourse to obtain clarity in this fast-changing landscape.

For those reasons, the UPPO respectfully requests that the Court take jurisdiction of this case and consider the far-reaching impact that any decision that it renders concerning the federal common law rules of priority will have on holders.

ARGUMENT

I. The Landscape Has Changed Since This Court Announced the Common Law Rules in *Texas v. New Jersey*

In 1965, the Supreme Court announced two federal common law rules to govern interstate disputes over unclaimed property. *Texas v. New Jersey*, 379 U.S. 674, 681–82 (1965). The primary rule is that property with a "last known address" of the owner is escheated to the state where that address is located. *Texas*, 379 U.S. at 681–82. If there is no last known address, then the property is escheated to the holder's corporate domicile under the secondary rule. *Id.* at 682.

The field of unclaimed property law has transformed since 1965. While significant change is to be expected over a half-century, the revolution in unclaimed property is ground-breaking. Major developments in

the last fifty years include: (i) massive increases in unclaimed property collected and retained by the states; (ii) legislative trends increasing state unclaimed property collections; and (iii) aggressive interpretations of the secondary rule.

A. Increase in Unclaimed Property Revenue Collected and Used for State Revenue Purposes

Without doubt, the most visible change in the unclaimed property landscape is the increase in unclaimed property collected by the states and used for state funding purposes.[2]

Delaware, as the state of incorporation for many large businesses, is a prime example of increased collections. Delaware has approximately 950,000 residents,[3] yet collects a disproportionate amount of unclaimed property under its interpretation of the secondary rule. Twenty years ago, unclaimed property was just 2.4% of Delaware's total state revenue, behind inheritance taxes and hospital board and treatment fees. Counsel On State Taxation, *The Best and Worst of State Unclaimed Property Laws: COST Scorecard on State Unclaimed Property Statutes* at 2 (2013) (internal citations omitted) (hereinafter "COST Scorecard"). "By 2004, proceeds from unclaimed property exceeded monies collected by Delaware from

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[2] Nationwide, as of 2013, "state coffers include over $40 billion in unclaimed property—nearly double the $22.8 billion states held just a decade ago." Counsel On State Taxation, *The Best and Worst of State Unclaimed Property Laws: COST Scorecard on State Unclaimed Property Statutes* 2 (2013).

[3] United States Census Bureau, *QuickFacts Delaware*, https://www.census.gov/quickfacts/table/PST045215/10 (last visited July 25, 2016).

the State Lottery, bank franchise taxes, and business and occupation taxes." *Id.* By 2013, unclaimed property provided 16% of Delaware's total general fund revenue, the third-largest source of revenue to the State. *Id.*

Other states also collect significant unclaimed property. For example, from April 2015 through March 2016, New York received $741 million while repaying $452 million in claims.[4] In fiscal year 2015, Texas received $548 million of unclaimed property while repaying $249 million in claims.[5] During the fiscal year ending in 2013, Illinois took in $187 million.[6]

Indeed, unclaimed property is reviewed by credit rating agencies in determining a state's financial stability,[7] and some states, like Louisiana, use unclaimed property revenue as the sole source for issuing new bonds.[8]

In sum, the financial environment surrounding unclaimed property has undertaken a sea change since this Court first announced its common law rules.

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[4] Office of New York State Comptroller, *Fact Sheet* (June 2016).

[5] Texas Comptroller of Public Accounts, *Texas Annual Financial Report for Year Ended August 31, 2015* at 61 (Nov. 20, 2015).

[6] State of Illinois, *Comprehensive Annual Financial Report for Fiscal Year ended June 30, 2013* at 183 (Feb. 28, 2014).

[7] See Fitch Ratings, *Fitch Rates Delaware's $301MM GO Bonds 'AAA'; Outlook Stable*, https://www.fitchratings.com/site/pressrelease?id=999170 (Feb. 10, 2016).

[8] Moody's Investors Service, *Moody's assigns Aa3 to $85M Louisiana Unclaimed Property Special Revenue bonds Series 2013, Outlook Stable*, https://www.moodys.com/research/Moodys-assigns-Aa3-to-85M-Louisiana-Unclaimed-Property-Special-Revenue—PR_288088 (Dec. 3, 2013).

B. States Change the Rules to Increase Unclaimed Property Collections

As a result of their dependence on unclaimed property for revenue, states have taken steps to increase or accelerate collections. For example, states have repeatedly shortened the dormancy periods for various types of unclaimed property. *Taylor v. Yee*, 577 U.S. ___, 139 S. Ct. 929 (2015) (Alito, J., concurring in denial of certiorari); *see generally* Hollis L. Hyans & Amy F. Nogid, *Honey, I Shrunk the Dormancy Periods*, 59 State Tax Notes 559 (2011). States also have narrowed the ways in which the dormancy periods can be tolled. For example, states have enacted rules indicating that certain shareholders must proactively contact the holder about an account to avoid abandonment. *See, e.g.,* 72 P.S. §§ 1301.1, 1301.6(2) (as amended effective July 10, 2014). Finally, states have decreased the period of time before liquidating securities turned over as unclaimed. *See, e.g.*, Conn. Gen. Stat. § 3-68a(d) (permitting state to immediately liquidate securities in custody as of May 6, 2004); *accord* Connecticut OLR Research Report, Summary of Unclaimed Property Law and Recent Amendments (Aug. 28, 2006).

C. States Assert Expansive Interpretations of the Secondary Rule

In addition to these mechanisms, states have interpreted and applied this Court's secondary rule expansively in an effort to maximize their own unclaimed property collections.

1. The States Estimate Unclaimed Property

Perhaps the most drastic example is how states have interpreted the federal common law rules for the

authority to estimate unclaimed property purportedly held by a holder during years in which no records exist.[9] Delaware and other states have calculated an estimated amount of purported unclaimed property using a formula—including unclaimed property owed to persons in other states or foreign countries—for years in which the holder has no records. The states assert that the purported property is reportable pursuant to the secondary rule, as such property by nature has no last known address.

For example, in *Temple-Inland v. Cook*, Delaware conducted an audit on a holder that reached back more than twenty years. No. 1:14-cv-00654 (D. Del. June 28, 2016). For years where the holder did not have records, Delaware estimated the amount of unclaimed property owed to Delaware under the secondary rule by projecting the total amount of unclaimed property from years in which the holder did have records. *Id.* at 32. Delaware's theory was that all property from a period where a holder does not have records does not have a last known address, so it is secondary rule property. *Id.* at 32.

This estimation method can result in multiple escheat, since the primary rule states may also estimate the holder's liability using the same property. *Id.* at 31. Indeed, this is precisely what happened to Temple-Inland, which had previously been audited by Texas and had been required to remit to that state estimated liability for years for which records were

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[9] Some states claim to have few or no statutory limits on the number of prior years that can be subject to an audit and estimate unclaimed property "liability" arising from transactions conducted decades earlier. *See* Brief in Support of Defendants' Motion to Dismiss at 11–12, *Select Medical Corporation v. Cook*, C.A. No. 1:13-CV-00694 (D. Del. May 8, 2013).

no longer available based on unclaimed property due to owners with last known addresses in Texas in years for which records were available. As a result, Delaware's estimation based on an aggressive interpretation and application of the secondary rule resulted in an assessment against Temple-Inland for property Temple-Inland had already escheated to Texas under Texas' estimation based on the primary rule.

2. States Seek to Implement a Tertiary, Transaction-Based Rule to Claim Property Exempted by the Secondary State

More than thirty states have enacted statutes permitting the state to take custody of unclaimed property where the primary and secondary rules do not result in escheat, a so-called "tertiary rule." This scenario often arises in the context of gift cards, where the holder has no record of the owner's address (and hence the primary rule does not apply) and the holder is domiciled in a state that does not require the escheat of unredeemed gift card balances (which includes a majority of states). *See generally* Phillip W. Bohl et al., Prepaid Cards & State Unclaimed Property Laws, 27-Sum Franchise L.J. 23 (2007).

In *Texas v. New Jersey*, this Court indicated that the secondary rule may apply in circumstances where the law of the state with first priority "does not provide for escheat." 379 U.S. at 682. However, in *Delaware v. New York,* the Court recognized that a domiciliary state's secondary power to escheat is derived from the principle of sovereignty. 507 U.S. at 503. Were the federal common law rules extended to include a tertiary rule where the law of the holder's state of domicile provides for escheat but exempts certain

property, it would improperly permit the tertiary state to infringe on the sovereign authority of the domiciliary state. *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 374 (3d. Cir. 2012). Specifically, the tertiary rule "would give states the right to override other states' sovereign decisions regarding the exercise of custodial escheat." *Id.* at 395. "The ability to escheat necessarily entails the ability not to escheat," and "[t]o say otherwise could force a state to escheat against its will, leading to a result inconsistent with the basic principle of sovereignty." *Id.*

Furthermore, the power to create federal common law does not lie with the states. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–42 (1981) (in instances of "conflicting rights of States . . . our federal system does not permit the controversy to be resolved under state law"). Therefore, the states should not have the power to create tertiary rules.

3. States Require the Escheat of Foreign-Owned Property

Many states have adopted provisions in their unclaimed property laws permitting the holder's state of domicile to escheat unclaimed property if the last known address of the owner is in a foreign country.[10] The escheat of foreign-owned property raises serious constitutional concerns. For example, the escheat of foreign-owned property interferes with the federal government's exclusive right to regulate foreign affairs, and raises complex issues such as the scope and application of foreign escheat laws, which states are not qualified to resolve. *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *accord Japan Line, Ltd. v.*

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[10] *See, e.g.*, Unif. Unclaimed Prop. Act (1981) § 3(5); Unif. Unclaimed Prop. Act (1995) § 4(5).

County of Los Angeles, 441 U.S. 434 (1979) ("[f]oreign commerce is preeminently a matter of national concern."). In those cases, this Court was concerned with avoiding international disputes and potential retaliation by foreign countries, a concern that is particularly relevant when states are seizing and liquidating property of foreign nationals under state unclaimed property laws.[11]

These are just some examples of how states attempt to push the boundaries of this Court's federal common law rules in order to siphon increasing amounts of unclaimed property to their own coffers, at the expense of holders and owners.

II. Holders Are Caught Between Conflicting and Competing State Laws

As discussed above, the states' dependence on unclaimed property for revenue has impacted their interpretations of this Court's federal common law rules. Where states rely on a constant stream of unclaimed property revenue, such reliance becomes apparent in the states' substantive policies. *See e.g.*, *American Express Prepaid Card Management Corp. v.*

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[11] Some states immediately liquidate property upon escheat, which implicates the owner's right to due process. *See Taylor v. Westly*, 488 F.3d 1197, 1201–02 (9th Cir. 2007); Complaint ¶ 98, *JLI Invest S.A. v. Cook*, C.A. 11274-VCN, (Del. Ch. Ct. July 9, 2015) (alleging that Delaware liquidated securities only three days after they were escheated). Immediate liquidation is especially troubling for foreign-owned property since the foreign owner may not have sufficient contacts with the holder's state of domicile for that state's laws to determine the owner's rights. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (holding that a state's law cannot apply when there is "no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction").

Sidamon-Eristoff, 669 F.3d 377, 398 (3d. Cir. 2012) (acknowledging that raising revenue may be the primary purpose of New Jersey unclaimed property legislation setting a "place of purchase" presumption for stored value cards); *Morris v. Chiang*, 163 Cal.App.4th 753 (2008) (holding one purpose of California's unclaimed property law is to give the state the benefit of the use of unclaimed property "most of which experience shows will never be claimed"). Naturally, the legislation and regulatory guidance a state develops leans toward sourcing property toward the state's own coffers. The result is conflicting state positions concerning where unclaimed property should escheat.

This type of tension led to the dispute in this case over MoneyGram's Official Checks. But this particular controversy is but one example of a more pervasive problem—the ongoing tug-of-war between various states. Though the parties to this action have now directed the MoneyGram conflict to one another, they initially asserted (and have not withdrawn) their conflicting and duplicative claims against MoneyGram. More often, similar conflicting state claims are left solely to the holder to defend, often in multiple forums.

When this Court created the federal common law rules for unclaimed property, it articulated its goal of resolving conflicting claims of different states with "clarity and ease of application." *Texas v. New Jersey*, 379 U.S. at 680 (1965).[12] The rules were designed to

[12] However, the Court cautioned against "too greatly exhalt[ing] a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Id.* at 680

promote "efficiency[] and equity" and prevent "decision[s] on a case-by-case basis." *Delaware v. New York*, 507 U.S. at 506–07 (1993). But state legislation and litigation have revealed how states can promulgate a variety of self-serving interpretations of the Court's straight-forward rules.

By way of example, states have adopted conflicting interpretations of the term "last known address." Under the primary rule, property with a "last known address" of the owner is escheated to the state where that address is located. *Texas*, 379 U.S. at 681–82. If there is no last known address, then the property is escheated to the holder's corporate domicile under the secondary rule. *Id.* at 682.

Though the term "last known address" appears self-evident on its face, the states have not adopted a uniform definition. For example, New Jersey regulation states that a zip code is a last known address. N.J.A.C. 17:18-1.2. Connecticut and Michigan define last known address as an address sufficient for mailing. Conn. Gen. Stat. § 3-56a(8) (2016); Mich. Comp. Laws § 567.222(l) (2016).

To illustrate the problem, consider a holder that is incorporated in Michigan and maintains records that only contain owners' zip codes. New Jersey would claim property with a New Jersey zip code under the primary rule, while Michigan would claim the same property under the secondary rule.[13]

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[13] MoneyGram has stated that "[g]enerally, the financial institution sellers of Official Checks do not record the address of the purchaser of the instruments." MoneyGram Br. 3 (internal quotations omitted). This implies that some financial institutions do record address information about purchasers, so the question of what constitutes an address may arise in this case.

Similarly, states differ in their interpretations of the term "corporate domicile" under the secondary rule. The cases in which this Court articulated the federal common law rules involved incorporated holders. Thus, the Court did not address what the term "corporate domicile" means in the context of unincorporated associations.

New Jersey, Michigan, and Rhode Island interpret the "domicile" of an unincorporated entity, such as a limited liability company or partnership, to be the "principal place of business" of the entity. N.J. Stat. 46:30B-6.e; Mich. Comp. Laws 567.222(f); R.I. Prob. 33-21.1-1(5). In contrast, Florida and Delaware interpret corporate domicile as the state of legal organization of the unincorporated entity. Fla. Stat. § 717.101(8);[14] 12 Del. C. § 1198(7).

These interpretations are in direct conflict. For example, if an unincorporated entity with a principal place of business in New Jersey is organized in Florida, both states would claim priority over property without a last known address.

These are just a few examples of states' conflicting interpretations of the federal common law rules.[15]

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[14] Through June 30, 2016, Florida used the principal place of business rule.

[15] An additional example involves which entity is the "holder" to which the common law rules apply. *See, e.g.*, *State* ex rel. *French v. Card Compliant LLC*, C.A. No. N13C-06-289 FSS (CCLD), 2015 WL 11051006 (Del. Super. 2015) (whether third-party gift card vendor is the proper holder); *State* ex. rel. *Higgins v. SourceGas LLC*, No. N11C-07-193 MMJ CCLD, 2012 WL 1721783 (Del. Super. 2012) (whether predecessor or successor corporation was applicable "holder" for purposes of applying secondary rule); *Metromedia Restaurant Services, Inc. v. Strayhorn*,

III. Holders Face Significant Burdens In Light of these Conflicting and Expansive State Rules

These conflicting interpretations place real burdens on holders attempting to comply with the rapidly-changing unclaimed property laws of fifty states (not to mention territories). Often this burden takes the form of software costs and consulting fees. In some cases, such as the one MoneyGram faces here, holders are forced to obtain confirmation from a state that they are indeed required to remit disputed property to that state. *See* Brief in Support of Bill of Complaint, Exhibit A at A-8, *Arkansas v. Delaware*, No. 220146 ORG (June 9, 2016).

But much more imposing is the holder's burden to defend its choices to the multiple other states claiming the property, especially in light of the states' practice of outsourcing audits. Numerous states have engaged the services of third-party auditors to conduct multi-state audits, sometimes on behalf of more than a dozen states at a single time. The audit that led to this particular case involved a single auditor, TSG, representing approximately twenty states. Del. Br. 5–6.

The breadth of the audits are exacerbated by the profit opportunity that they offer to the auditors. Auditors are often compensated with a percentage of the funds that they identify as reportable to the states. *See* COST Scorecard at 4. As such auditors do not pose any cost to the states that hire them. In fact, "[i]n recent years . . . there has been a heightened reliance on private audit firms to collect purportedly unclaimed property on behalf of the state in exchange for a

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188 S.W.3d 282 (Tex. App. Austin, 2006) (which member of affiliated corporate group was the holder of unclaimed wages).

contingency fee." U.S. Chamber Institute for Legal Reform, *Unclaimed Property: Best Practices for State Administrators and the Use of Private Audit Firms* 1 (April 2014). Due to their compensation model, "these private auditors have taken an increasingly aggressive approach to the interpretation and enforcement of unclaimed property laws." *Id.* "These arrangements inject a private profit motive into the enforcement of state laws and therefore carry a significant risk of abuse." *Id.* at 3.

The use of third-party auditors paid on a contingent fee basis has led to an expansion of the very scope of what was historically considered unclaimed property. *Id.*[16]

Because of the controversy over what is unclaimed property, the shear scope of the audits, and the time period covered (frequently 15–20 years), these audits are an expensive undertaking by the targeted holder. The Council On State Taxation surveyed its members and found that 61% spent more than $1 million dollars in staff time, legal fees and other expenses (excluding

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[16] For example, life insurance companies have historically been consistent and compliant reporters of unclaimed property. Nevertheless, in 2009, a private auditing firm "adopted the novel practice of requiring life insurance companies to cross-reference their policy records against the Social Security Administration's . . . Death Master File—a partial and unverified database of deaths recorded in the United States—in order to identify policyholder deaths that had not yet been reported." *Id. See also* Complaint ¶¶87–103, *McKesson Corp. v. Cook*, C.A. No. 4920-CC (Del. Ch. Ct. Jan. 25, 2009) (challenging an auditor's assessment of general ledger "goods received/invoices received" differences as unclaimed property, and leading to state enactment of Senate Bill 272 that expressly excluded GR/IR from the definition of unclaimed property).

the actual assessment). COST Comments to Delaware Unclaimed Property Task Force (Oct. 2014).

IV. Holders Have Minimal Recourse

In the face of competing claims from multiple states for the same property, holders do not always have an effective recourse. As the parties have acknowledged, under existing law only this Court has the ability to resolve disputes involving interstate escheat.

In this case, the states ultimately decided to petition this Court for relief rather than continuing to pursue claims initially asserted against MoneyGram. Other holders are not as fortunate and face the problems described below.

A. States Argue that the Federal Common Law Rules Cannot Be Raised by Holders

Some states have attempted to ignore the federal common law rules on the basis that such rules apply only to interstate disputes. These states argue that because the relevant decisions of this Court involved disputes among the states, the federal common law rules only apply to interstate disputes, such that holders cannot raise the federal common law rules in defense. *See, e.g.*, Petition for a Writ of Certiorari at 12, *Sidamonn-Eristoff v. New Jersey Retail Merchants Ass'n*, ___ U.S. ___, 133 S. Ct. 528 (July 23, 2012) ("[T]he Texas priority rules impose no requirements on private holders and these rules were announced only to address multiple disputed claims to unclaimed property . . . ."); *TXO Production Corp. v. Oklahoma Corp. Comm'n*, 829 P.2d 964 (Okla. 1992).[17]

[17] In *TXO Production Corp.*, the Oklahoma Supreme Court said: "In *Texas* the Court was not confronted with, nor did it

decide, the rights to custody of abandoned property *as between a private holder and a State.* The *Texas* guidelines establish priority among multiple states attempting to escheat or take custody of the same property. They are binding only where there are multiple states with claims to the same property. Nothing in *Texas* prohibits a state from claiming temporary custody of unclaimed property until some other state comes forward with proof that it has a superior right to it." 829 P.2d at 971; *see also State v. Elsinore Shore Associates*, 592 A.2d 604 (N.J. Super. Ct. App. Div. 1991); *Riggs Nat'l Bank v. Dist. of Columbia,* 581 A.2d 1229 (D.C. 1990); *State v. Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311 (Tex. 1974); *O'Keefe v. State Dep't of Revenue,* 488 P.2d 754 (Wash. 1971); *Fitzgerald v. Young Am. Corp.*, No. CV 6030 (Iowa Dist. Ct., Polk Cty Aug. 22, 2008); *State v. Chubb Corp.*, 570 A.2d 1313, (N.J. Super. Ct. Ch. Div. 1989). *But see American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 842 (10th Cir. 1988) (finding that this Court "in *Texas v. New Jersey* . . . limited the states' power to take custody of unclaimed intangible property" with the federal common law rules); *American Express Travel Related Servs. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 588 (D. N.J. 2010) (internal quotations omitted) (finding that "no State may supersede [the federal common law rules] by purporting to prescribe a different priority under state law"), *aff'd* sub nom *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 359 (3d. Cir. 2012).

At least one state continues to assert that the federal common law rules do not apply to disputes between states and holders. *See e.g.*, Memorandum of Defendants in Support of Their Motion to Dismiss at 11, *Temple-Inland, Inc. v. Cook*, No. 1:14-cv-00654 (D. Del. July 22, 2014) (arguing that the Court "expressly limited" its holding in *Texas v. New Jersey* "to inter-State disputes, under its Constitutional authority to adjudicate 'Controversies between two or more states'"); State of Delaware and Plaintiff-Relator's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, *State* ex rel. *French v. Card Compliant*, LLC, No. 1:124-cv-00688 (Del. Super. Ct. Sept. 5, 2014) (asserting that original jurisdiction decisions "do not create rights to abandoned property" because they only "create a set of rules whereby states with competing claims to escheat the same property can determine which state's claim is superior").

Taken to its logical extension, this means that a state can require a holder to escheat all unclaimed property until another state raises an objection in this Court.

The dispute in this case is an original jurisdiction case that will inevitably impact disputes between holders and states in the future. If the states are free to disregard the Court's decision in this appeal in their disputes with holders, MoneyGram and other issuers of Official Checks will still be faced with the threat of multiple escheat. Thus, this case provides an opportunity to clarify that original jurisdiction decisions regarding unclaimed property apply to disputes between states and holders, as well as to disputes between states.

B. Indemnification is Not Adequate Protection

States have asserted that holders have no real risk of multiple escheat because the states indemnify holders. *E.g., Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1246 n.27 (D.C. 1990); *State v. Liquidating Trustees of Republic Petroleum Co.*, 510 S.W. 2d 311, 314 (Tex. 1974). In theory, state law indemnification should protect holders against multiple escheat, but in practice it is ineffective for four reasons.

First, indemnification does not always protect a holder for interest accrued during the time when property is delivered to a state and when another state issues a demand.[18] Interest rates for unclaimed property are often as high as 12% per year, *e.g.* 72 P.S.

[18] Indemnification typically only applies to liability arising after a holder delivers property to the state, *e.g.*, 12 Del. C. § 1144(b)(1), while interest runs from the date property was required to be delivered to the state, *e.g.* 12 Del. C. § 1159 (d).

§ 1301.24, so the interest from a timing difference can be substantial.

Second, if a holder mistakenly delivers property to the wrong state or makes a procedural error in remitting the property, the receiving state can refuse to indemnify the holder. *Azure Limited v. I-Flow Corp.*, 210 P.3d 1110, 1114–15 (Cal. 2009).

Third, indemnification only applies when the holder delivers property to a state "in good faith". *See* Uniform Unclaimed Property Act (1995) § 10(b). The burden of proving good faith is placed on the holder. *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1132–33 (Del. 2009); *State* ex rel. *Perdue v. Nationwide Life Insurance Co.*, Civil Action No. 12-C-287 at 13 (W. Va. Cir. Ct. Dec. 30, 2013). At least one court has held that this means that a holder that has already escheated property to a state cannot have a suit dismissed on indemnity grounds alone, and must introduce evidence of its good faith. *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, No. 07 Civ. 8491(SHS), 2010 WL 3825726 at *6 (S.D.N.Y. Sept. 30, 2010).

Fourth, indemnification only applies to identifiable unclaimed property. As discussed above, many states apply statistical methods to estimate unclaimed property liability. *See* Section I.C, *supra*. An estimate does not identify specific pieces of unclaimed property, so a holder cannot prove to one state that it is being asked to escheat the same property to another state. *Cf. Temple-Inland* at 32–33.

Categorical indemnification for holders would alleviate the due process violation caused by multiple escheat. *See Western Union Tel. Co. v. Commonwealth*, 368 U.S. 71, 75 (1961). To ensure that MoneyGram is

afforded due process, if Official Checks are covered by the Federal Disposition Act, then either MoneyGram should not be liable for interest due to other states or Delaware should be liable to the other states as MoneyGram's indemnitor for interest due under the other states' laws.

V. This Court Should Clarify the Federal Common Law Rules to Protect the Rights of Holders

The last time the Court addressed the federal common law rules governing unclaimed property was in 1993. *See Delaware v. New York*, 507 U.S. 490. Considering the changes and problems detailed above, the time is right for the Court to provide further guidance on the federal common law rules.

A. This Case Provides the Court an Opportunity to Reexamine the Rules

We suggest that this is a proper time to reexamine the federal common law rules. Unlike *Delaware v. New York*, where the Special Master *sua sponte* proposed changing the federal common law rules at a late stage in the proceedings, 507 U.S. at 506–507, Pennsylvania has requested at the outset that the Court reconsider the federal common law rules. Penn. Br. 2.

Delaware's claim to the Official Checks depends on the federal common law rules. Del. Br. 5. But as Pennsylvania observed, if the Official Checks are not covered by the Federal Disposition Act there is a question of whether the federal common law rules should be revisited in the face of changing circumstances. Penn. Br. 2. As the federal common law rules may be dispositive in this case, clarifying the rules is within the Court's jurisdiction. *See United States v.*

Fruehauf, 365 U.S. 146, 157 (1961) (an issue presented with "adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests" is within Article III jurisdiction).

B. The Court Should Take This Opportunity to Protect the Rights of Holders

We urge the Court to take this opportunity to clarify the scope of the federal common law rules governing unclaimed property. Further, we respectfully request that the Court clarify that only this Court can create federal common law rules governing unclaimed property, *see* Section I.C.2, and that the federal common law rules govern disputes between holders and states, *see* Section IV.A *supra*.

CONCLUSION

For all of the reasons described in this brief, UPPO urges the Court to grant Delaware's motion for leave to file a bill of complaint.

Respectfully submitted,

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