



No. **146** Original

Supreme Court, U.S.
FILED

JUN - 9 2016

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF FLORIDA,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF KANSAS, COMMONWEALTH OF
KENTUCKY, STATE OF LOUISIANA, STATE
OF MICHIGAN, STATE OF MONTANA, STATE
OF NEBRASKA, STATE OF NEVADA, STATE
OF NORTH DAKOTA, STATE OF OHIO,
STATE OF OKLAHOMA, STATE OF
SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

**MOTION FOR LEAVE TO FILE BILL
OF COMPLAINT, BILL OF COMPLAINT,
AND BRIEF IN SUPPORT**

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STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

**MOTION FOR LEAVE TO
FILE BILL OF COMPLAINT**

The States of Arkansas, Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia, move this Court for leave to file the Bill of Complaint submitted herewith. The grounds for this Motion are set forth in an accompanying brief.

Respectfully submitted,

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June 9, 2016

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In The
Supreme Court of the United States

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
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OF KANSAS, COMMONWEALTH OF KENTUCKY,
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STATE OF NEVADA, STATE OF NORTH DAKOTA,
STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

BILL OF COMPLAINT

The States of Arkansas, Texas, Alabama, Arizona,
Colorado, Florida, Idaho, Indiana, Kansas, Kentucky,

Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia (“Plaintiff States”) bring this action against the Defendant the State of Delaware, and for their cause of action assert as follows:

1. This Court has original jurisdiction over this suit under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

2. It is undisputed that “States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.” *Delaware v. New York*, 507 U.S. 490, 497 (1993). It is equally beyond contention that tangible, real, or personal property escheats to the State where it is located. *See Texas v. New Jersey*, 379 U.S. 674, 677 (1965). But what State has a superior claim to *intangible* property has been a matter of frequent dispute before this Court. *E.g.*, *Delaware*, 507 U.S. 490; *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas*, 379 U.S. 674.

3. This matter similarly concerns State claims to intangible property, namely sums payable on unclaimed and abandoned “official checks” sold by MoneyGram Payment Systems, Inc. (“MoneyGram”) in the Plaintiff States. Under the laws of the Plaintiff States, MoneyGram is required to remit those sums to the Plaintiff States. But at the State of Delaware’s direction, MoneyGram has remitted – and continues to

remit – those sums to Delaware, as its State of corporate domicile. Delaware grounds that directive on its view that Delaware law requires those sums be reported and remitted to Delaware. And under that view, Delaware has accepted, continues to accept, and maintains custody of sums payable on unclaimed and abandoned MoneyGram official checks sold in the Plaintiff States.

4. Delaware’s view that Delaware law – and not the laws of the States of purchase – determines remittance conflicts with the Disposition of Abandoned Money Orders and Traveler’s Checks Act (“Federal Disposition Act”), 12 U.S.C. 2501 *et seq.*, which requires sums payable on unclaimed and abandoned MoneyGram official checks sold in the Plaintiff States to be remitted to the Plaintiff States as the States of purchase. The Federal Disposition Act was enacted in 1974. But Delaware has refused to remit those sums to the Plaintiff States and to revoke its directive to MoneyGram. As with the cases above, this Court should resolve the dispute over which State laws control.

5. In resolving “disputes among States” over intangible property, this Court established two priority rules. *Delaware*, 507 U.S. at 499. First, “because the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the State of ‘the creditor’s last known address as shown by the debtor’s books and records.’” *Id.* at 499-500 (quoting *Texas*, 379 U.S. at 680-81). “[I]f the primary rule fails because the debtor’s

records disclose no address for a creditor or because the creditor's last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated." *Id.* at 500. And under that framework, *Pennsylvania v. New York* held that in the absence of evidence of the address of the owner of an uncashed money order, the State of the holder's corporate domicile had the right to receive the sums owed on the money order. 407 U.S. at 214-15. But Congress "may reallocate abandoned property among the States without regard to this Court's interstate escheat rules." *Delaware*, 507 U.S. at 510.

6. Congress exercised its power to establish priority rules for unclaimed intangible property – and overrode this Court's decision in *Pennsylvania* – by enacting the Federal Disposition Act. *See Delaware*, 507 U.S. at 510. Under the Federal Disposition Act, the State where an unclaimed and abandoned "money order, traveler's check, and other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable" was purchased is "entitled exclusively to escheat or take custody of the sum payable on such instrument to the extent of that State's power under its own laws to escheat or take custody of such sum." 12 U.S.C. 2503.

7. Further, although the term "other similar written instruments (other than a third party bank check)" is not explicitly defined, that term is informed

by the company it keeps and legislative history. To obtain a money order or a traveler's check, a customer generally pays a transaction fee and the value that the customer seeks to have reflected on the money order or traveler's check. The customer generally receives an instrument that is pre-printed with the value of the payment remitted by the customer, and the issuer is generally directly liable for that amount. The issuer's records generally do not reflect the purchaser's identity or the instrument's ultimate recipient. Thus, consistent with those terms, "other similar written instruments (other than a third party bank check)" must be read to mean instruments where a customer pays the value reflected, the issuer is directly liable, and the issuer does not generally know the ultimate recipient. That reading is also consistent with the purposes behind the Federal Disposition Act, which was intended to prevent one State – where many corporations maintain their domicile – from enjoying an inequitable windfall at the expense of "the other 49 states where the purchasers of travelers [sic] checks and money orders actually reside." 119 CONG. REC. S9749-9750 (daily ed. May 29, 1973).

8. The laws of Arkansas and Texas provide for the reporting of unclaimed and abandoned intangible property and the remittance of sums payable on unclaimed or abandoned money orders, traveler's checks, and similar instruments after a specified period of time. *See* Ark. Code Ann. 18-28-202(a); *id.* at 18-28-204(7); Tex. Prop. Code 72.001; *id.* at 72.102. The laws of those States also provide that an officer of the State

may bring an action for failure to properly report and remit funds. *See* Ark. Code Ann. 18-28-222; *id.* at 18-28-201 (auditor); Tex. Prop. Code 74.709 (attorney general on behalf of comptroller). Ultimately, under relevant State laws, “the state assumes custody and responsibility” for remitted property. Ark. Code Ann. 18-28-210(b); *see id.* at 18-28-214 (similar); Tex. Prop. Code 72.001; *id.* at 72.102. The laws of the other Plaintiff States are substantially similar. *See, e.g.,* Ky. Const. 91; Ky. Rev. Stat. Ann. 15.020; Utah Code Ann. 67-4A-301(1); *id.* at 67-4A-302(1); *id.* at 67-4A-303(2); *id.* at 67-4A-702. Disputes over where property should be remitted, therefore, are disputes between States *qua* States. *See Delaware*, 507 U.S. at 499.

9. Complying with relevant State laws and consistent with the Federal Disposition Act, issuers generally report and remit sums payable on unclaimed and abandoned money orders, traveler’s checks, and other similar written instruments to the State of purchase. That is true whether the abandoned or unclaimed instrument is captioned as a money order, traveler’s check, or other instrument that operates the same way.

10. This matter concerns instruments captioned “official checks” sold by MoneyGram, a company incorporated in Delaware, but which does business in all 50 States. Like a money order and a traveler’s check, a customer obtains an official check by paying a transaction fee and the value that the customer seeks to have reflected on the official check. The customer then receives an instrument that is pre-printed with the value of the payment remitted by the customer.

MoneyGram is directly liable for that amount, and its records do not reflect the purchaser's identity or the instrument's ultimate recipient, but MoneyGram does know where the instrument was purchased. Indeed, the only substantive difference between money orders issued by MoneyGram and its official checks is that the money orders – unlike the official checks – are generally subject to low face-value limits. MoneyGram money orders are also generally sold in traditional retail locations, while the official checks are generally sold at financial institutions.

11. Like money orders and traveler's checks, many MoneyGram official checks are not cashed or otherwise redeemed. In fact, between May 2011 and March 2015 at least \$162,127,480 worth of official checks went uncashed or otherwise not redeemed.

12. Because a MoneyGram official check operates like a money order and a traveler's check, under the Federal Disposition Act, the State where a MoneyGram official check was purchased is "entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum." 12 U.S.C. 2503(1).

13. Consistent with the statutory framework set forth above, the laws of the Plaintiff States provide for the reporting and remittance of sums payable on unclaimed or abandoned MoneyGram official checks to those States. *See, e.g.*, Ark. Code Ann. 18-28-202(a); *id.* at 18-28-204(7); Tex. Prop. Code 72.001; *id.* at 72.102.

14. Therefore, MoneyGram was and is required by State and federal law to report and remit to the Plaintiff States sums payable on unclaimed or abandoned MoneyGram official checks purchased in or through the Plaintiff States.

15. MoneyGram has not reported and remitted – and does not report and remit – to the Plaintiff States sums payable on unclaimed or abandoned MoneyGram official checks purchased in the Plaintiff States.

16. Rather, MoneyGram has reported and remitted – and continues to report and remit – sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States to Delaware.

17. MoneyGram is, therefore, in violation of the laws of the Plaintiff States, and the Plaintiff States are entitled to bring an action to enforce their laws.

18. At the specific direction of Delaware, MoneyGram has and continues to report and remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States to Delaware.

19. In April 2011, in response to inquiries by multiple States concerning MoneyGram's practices, attorneys acting on behalf of MoneyGram sought Delaware's "guidance and confirmation as to whether" an unclaimed and abandoned official check "is properly escheatable to Delaware." Exhibit A. Although the letter did not identify MoneyGram as the entity on whose behalf the letter was sent, it described MoneyGram's official checks and noted that MoneyGram's practice

was to remit unclaimed and abandoned official checks “to Delaware because it is [MoneyGram’s] understanding that, pursuant to *Texas v. New Jersey*, unclaimed property for which [MoneyGram] lacks last-known address information is generally escheatable to [MoneyGram’s] state of incorporation (here, Delaware).” *Id.* The letter neither mentioned nor discussed the Federal Disposition Act, which has controlled these matters since its enactment in 1974.

20. In May 2011, Delaware confirmed MoneyGram’s flawed analysis, similarly failed to acknowledge or consider the decades-old Federal Disposition Act and directed MoneyGram to continue sending *all* unclaimed and abandoned official checks to Delaware. *See* Exhibit B. Indeed, although Delaware replied that it “does not render advisory opinions, nor does it respond to hypothetical fact situations . . . in the case of the facts present in [MoneyGram’s] letter, the position of the State of Delaware is abundantly clear.” *Id.* And on the substantive issue, Delaware made clear that, “in accordance with the strict rules established by” this Court in *Pennsylvania v. New York*, MoneyGram is required to report and remit *all* sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States to Delaware. *Id.* As in MoneyGram’s request for guidance, Delaware neither acknowledged nor discussed the controlling Federal Disposition Act. *Id.*

21. Not until other States, and an outside auditor hired by other States, brought the Federal Disposition Act to Delaware’s and MoneyGram’s attention, *see*

infra at ¶¶ 28-30, did Delaware or MoneyGram address whether the Federal Disposition Act might govern the remittance of sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States.

22. MoneyGram acted in accordance with the “abundantly clear” position of Delaware discussed in paragraph 20, and it continued to remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States to Delaware.

23. As of the date of the filing of this action, following Delaware’s directive, MoneyGram has improperly, in violation of the laws of the Plaintiff States and in contradiction of the Federal Disposition Act, remitted to Delaware an amount greater than: 1) \$858,862 payable on unclaimed and abandoned official checks purchased in Arkansas; 2) \$10,212,059 payable on unclaimed and abandoned official checks purchased in Texas; 3) \$15,699,917 payable on unclaimed and abandoned official checks purchased in Alabama; and 4) \$8,859,239 payable on unclaimed and abandoned official checks purchased in Michigan. Substantial additional sums payable on unclaimed and abandoned official checks purchased in the other Plaintiff States have also been remitted to Delaware.

24. Delaware unlawfully took custody of those sums listed in paragraphs 11 and 23, and Delaware currently unlawfully maintains possession of those sums.

25. Without direction from Delaware, MoneyGram would not have reported and remitted the sums listed in paragraphs 11 and 23 to Delaware. Instead, MoneyGram would have reported and remitted those sums to the Plaintiff States, and those States would enjoy custody of those sums.

26. At Delaware's direction, MoneyGram continues to remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States to Delaware. And MoneyGram has indicated that at Delaware's direction it will continue to report and remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States to Delaware.

27. As the ultimate proper recipient of sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States, the Plaintiff States are entitled to bring this action to enforce their laws and recover property unlawfully remitted to – and currently in the custody of – Delaware. For that same reason, the Plaintiff States are also entitled to bring this action to cause Delaware to cease-and-desist from employing its regulatory and enforcement powers to direct MoneyGram to violate the laws of the Plaintiff States and unlawfully remit that property to Delaware.

28. In May 2014, Arkansas, Texas, and other States learned that MoneyGram had been improperly reporting and remitting sums payable on unclaimed and abandoned MoneyGram official checks purchased

in Arkansas, Texas, and the other States to Delaware and that Delaware had taken possession of those sums. That discovery occurred as a result of an outside audit that identified those sums as having been improperly remitted to Delaware.

29. Subsequently, several States and an outside auditor hired by those States brought the Federal Disposition Act to MoneyGram's attention and notified MoneyGram that, under relevant State laws and consistent with the Federal Disposition Act, MoneyGram is required to report and remit to the appropriate State of purchase the sums that MoneyGram had improperly remitted to Delaware. In response to those demands, MoneyGram has indicated that: 1) it "lacks the authority or ability to 'initiate delivery' of funds held by the Delaware Division of Revenue"; 2) it remitted the sums at issue to Delaware "in accordance with instructions from the Delaware Attorney General's Office"; 3) it "does not have possession, custody, or control over" those sums; 4) it cannot be required to remit the same sums twice; and 5) the dispute over those sums is a dispute between the States and not a dispute between MoneyGram and the other States. Exhibit C.

30. Several States and an outside auditor hired by the States also brought the Federal Disposition Act to Delaware's attention and advised Delaware that, under relevant State laws and consistent with the Federal Disposition Act, MoneyGram is required to report and remit sums payable on unclaimed and abandoned MoneyGram official checks to the State of purchase. In their correspondence with Delaware, Arkansas and

Texas, for instance, further demanded that Delaware remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States and improperly remitted to Delaware. In response, Delaware has acknowledged that the dispute over sums improperly remitted to it – and at its direction – is a dispute between the States. *See* Exhibit D. But Delaware has refused to remit those sums. *See id.*; Exhibit E. Although its May 2011 letter to MoneyGram failed to even acknowledge the Federal Disposition Act, Delaware now maintains that sums payable on unclaimed and abandoned MoneyGram official checks are exempt from the Federal Disposition Act based on a strained and convoluted reading of that Act’s legislative history. *See* Exhibit D. Therefore, Delaware contends that sums payable from unclaimed and abandoned official checks purchased in other States were, under Delaware law, properly remitted to Delaware. *See* Exhibit D.

31. Employing its regulatory and enforcement powers, Delaware has also directed MoneyGram to continue to report and remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States to Delaware, as its State of corporate domicile. *See* Exhibit F.

32. On February 26, 2016, the State of Pennsylvania filed a separate complaint against Delaware and MoneyGram. *See* Complaint, *Pennsylvania Treasury Dep’t v. Gregor et al.*, No. 1:16-cv-00351 (M.D. Pa.) (Feb. 26, 2016). Both Delaware and MoneyGram filed motions to dismiss. In its motion, MoneyGram did not take a substantive position on federal law; instead, it

contends that the dispute over sums improperly remitted to Delaware is “a fight between states over property over which MoneyGram has no control, and in which MoneyGram has no interest, other than not wanting to be required to escheat the same property twice.” Memorandum of Law in Support of Motion to Dismiss, *Pennsylvania Treasury Dep’t v. Gregor et al.*, No. 1:16-cv-00351 (M.D. Pa. April 25, 2016) (Doc. No. 30), at p. 5.

33. Other entities – including Integrated Payment Systems, Inc., and PNC Bank N.A. – also issue official checks. Unlike MoneyGram, Delaware has not directed those entities to remit sums payable on unclaimed and abandoned official checks to Delaware and they do not remit those sums to Delaware. Instead, under relevant State laws and consistent with the Federal Disposition Act, those entities report and remit sums payable on unclaimed and abandoned official checks to the State of purchase.

34. Prior to becoming a Delaware domiciliary, MoneyGram was incorporated in the State of Minnesota. During that period, it reported and remitted sums payable on unclaimed and abandoned MoneyGram official checks to Minnesota. Under applicable State laws and consistent with the Federal Disposition Act, Minnesota has since remitted those sums to the States where the MoneyGram official checks were purchased.

35. Delaware’s aforementioned actions have unlawfully deprived – and continue to deprive – the

Plaintiff States of sums payable on unclaimed and abandoned MoneyGram official checks. Under the laws of the Plaintiff States and consistent with the Federal Disposition Act, those sums should have been remitted to the Plaintiff States.

36. The acts and conduct of Delaware, its officers, citizens, and subdivisions in directing MoneyGram to report and remit sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States have caused injury and damages to the Plaintiff States by depriving the Plaintiff States of sums of which they are the rightful custodians under State and federal law.

37. Injury and damages will be suffered in the future by the Plaintiff States unless relief is afforded by this Court to prevent Delaware, its officers, citizens, and subdivisions from depriving the Plaintiff States of sums that the Plaintiff States are entitled to receive pursuant to State and federal law.

38. Delaware refuses to comply with the laws of the Plaintiff States or act consistently with its obligations under the Federal Disposition Act with respect to its obligation to remit to the Plaintiff States sums payable on unclaimed and abandoned MoneyGram official checks that it improperly directed MoneyGram to report and remit to Delaware.

39. Delaware refuses to comply with the laws of the Plaintiff States or act consistently with its duties under the Federal Disposition Act with respect to its obligation not to use its regulatory and enforcement

powers to direct MoneyGram to unlawfully remit to Delaware sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States.

40. The Plaintiff States have sustained damages arising from Delaware's directive to MoneyGram to violate the laws of the Plaintiff States and the Federal Disposition Act. The Plaintiff States have also sustained damages arising from Delaware's violation of the laws of the Plaintiff States and the Federal Disposition Act. Such damages include sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States and unlawfully remitted to – and currently in the custody of – Delaware and interest on those sums in an amount to be proven at trial.

41. Pursuant to 28 U.S.C. 2201, the Plaintiff States are entitled to a decree declaring their rights to the sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States and unlawfully remitted to the State of Delaware.

42. MoneyGram conducts business throughout the country, and Delaware's direction to MoneyGram to remit to Delaware sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States can only effectively be resolved by this Court.

WHEREFORE, the Plaintiff States pray that the Court:

1. Declare the rights of the Plaintiff States to the sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States and unlawfully remitted to the State of Delaware;

2. Declare the rights of the Plaintiff States to future sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States;

3. Issue its decree commanding the State of Delaware, its officers, citizens, and subdivisions, to: (a) deliver to the Plaintiff States sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States and unlawfully remitted to Delaware; (b) cease-and-desist all actions which interfere with and impede the authority of the Plaintiff States to take custody of sums payable on unclaimed and abandoned MoneyGram official checks purchased in those States;

4. Award to the Plaintiff States all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the Plaintiff States as a result of the State of Delaware's past and continuing violation of the laws of the Plaintiff States, the Federal Disposition Act, and this Court's prior decisions, as well as Delaware's directive to MoneyGram to violate the same;

5. Award to the Plaintiff States all attorney's fees incurred in connection with bringing and prosecuting this action; and

6. Grant all such other costs and relief, in law or equity, that the Court deems just and proper.

Respectfully submitted,

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June 9, 2016

EXHIBIT A

A-1

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**CONFIDENTIAL TREATMENT
REQUESTED**

April 20, 2011

Via Electronic Mail & Federal Express

Mr. Mark Udinski
Delaware State Escheator
Bureau of Unclaimed Property, Division of Revenue
820 North French Street, 8th Floor
Wilmington, Delaware 19801

**RE: Request for Guidance Regarding Con-
flicting Escheat Claims**

Dear Mr. Udinski:

This firm represents a company (the "Holder") that reports and remits unclaimed property to the several states pursuant to those states' unclaimed property/escheat/abandoned property laws. Recently, a few states have informed Holder that certain property historically escheated to Delaware should instead be escheated to those other states. The purpose of this letter is to seek your guidance and confirmation as to

whether the subject property is properly escheatable to Delaware.¹

A Description of the Holder and the Property at Issue

The Holder is a Delaware incorporated company that is involved in payment processing, electronic commerce, and prepaid services. The Holder is not a national bank or state-chartered financial institution, though some of its products require it to be licensed under state money transmitter licensing statutes. Among other businesses, the Holder issues payment instruments that are sold by (but not drawn on) client financial institutions so as to allow those clients to out-source their traditional cashier's check/teller's check functions.

While the features of these check-like items vary depending upon the needs of the client, all such items have the same relevant characteristics:

- All of the items are issued by the Holder (which is not a financial institution);

¹ Since the identity of the Holder would not seem relevant to the inquiry, as well as the fact that the Holder is understandably reluctant to get involved in what may amount to a conflict among multiple states (all of which exercise some regulatory and administrative authority over the Holder), we are presenting this inquiry on a "no names" basis. Should you determine that disclosure of the Holder's identity is necessary, please contact me.

- All such items are drawn on the Holder's bank account (which is, in most cases, not maintained at the client financial institution);
- The Holder does not have payee address information for these items; and
- The payee of the item is generally not the same as the purchaser.

Holder's Current Unclaimed Property Practice

The Holder currently escheats these items to the State of Delaware using the NAUPA property type code CK15 "Other Outstanding Official Checks." Such items are escheated to Delaware because it is the Holder's understanding that, pursuant to *Texas v. New Jersey*, unclaimed property for which the Holder lacks last-known address information is generally escheatable to the Holder's state of incorporation (here, Delaware).

Instructions From Other States

In connection with a recent mutli-state review of the Holder's money transfer licenses multiple states indicated that these items should not be escheated to Delaware in its capacity as the Holder's state of incorporation. Instead, these states contend that such items are escheatable to the state of purchase as in accordance with applicable state law. As support for that position these states have relied upon their own statutory provisions that are similar, but not identical, to

Section 4(d) of the 1981 Uniform Unclaimed Property Act.

In light of this conflict between the Holder's practice of escheating such items to Delaware, and instructions to the contrary from other states, we respectfully request written guidance from the State Escheator's office as to whether such items are properly escheatable to Delaware.

Very truly yours,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

/s/ Michael Rato
Michael Rato

EXHIBIT B

A-5

[SEAL]

STATE OF DELAWARE
DEPARTMENT OF FINANCE
DIVISION OF REVENUE
UNCLAIMED PROPERTY
CARVEL STATE BUILDING
820 N. FRENCH STREET
P.O. BOX 8749
WILMINGTON, DELAWARE 19899-8749

May 2, 2011

Michael Rato, Esq.
McElroy, Deutsch, Mulvaney
& Carpenter, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075

CONFIDENTIAL

***Re: Your Request for Guidance Regarding
Conflicting Escheat Claims***

Dear Mr. Rato:

I received your letter dated April 20, 2011, regarding an issue facing a client of your firm that you have not identified. As a general matter the Office of Unclaimed Property does not render advisory opinions, nor does it respond to hypothetical fact situations; however, in the case of the facts presented in your letter, the position of the State of Delaware is abundantly clear.

Our position is that your client has been properly reporting and delivering unclaimed property in accordance with the strict rules established by the Supreme Court of the United States (the "Court") in *Texas v.*

New Jersey, 379 U.S. 674 (1965), and clarified in *Delaware v. New York*, 507 U.S. 490 (1993). As summarized by the Court in *Delaware*, the Court's opinion in *Texas* created two priority rules:

- (1) where the last known address of the creditor (*i.e.*, owner of the intangible personal property) is known, the State in which that address is located has the right to escheat ("primary rule"); and

- (2) where the last known address of the owner is unknown, or in a state that "does not provide for escheat of the property owed," the State in which the debtor is incorporated is awarded the right to escheat subject to the "superior" right of the creditor's state should the creditor's state submit proof of the owner's address ("secondary rule").

507 U.S. at 499. According to the Court, these two rules are "the fairest, . . . easy to apply, and in the long run . . . the most generally acceptable to all the States." *Texas*, 379 U.S. at 683.

The Court applied the *Texas* priority rules in *Pennsylvania v. New York*, 407 U.S. 206 (1972), a suit brought by the Western Union Company ("Western Union"). The fact situation presented in that case appears to be "on all fours" with the facts presented in your letter. In that case, Western Union had not retained the last known address of purchasers of its money orders. Several states "perceived injustice" because the primary rule would rarely apply in light of

Western Union's failure to maintain last known addresses, and the secondary rule would often apply, resulting in the abandoned money orders most often escheating to the state of Western Union's domicile. *Id.* at 214. Rejecting the states' argument that an alternate rule should be established, the Court upheld the two-rule priority scheme, reasoning "the resulting likelihood of a windfall for the debtor's State of incorporation would [not] justify the carving out of an exception to the *Texas* rule[s]." *Id.* at 214.

The plaintiffs in *Pennsylvania* urged the Court to "define the creditor's residence according to a presumption based on the *place of purchase*," *id.* (emphasis added), because there were numerous money order transactions for which no last known address was kept. The Court explicitly rejected this proposal, reasoning:

Texas v. New Jersey was not grounded on the assumption that all creditors' addresses are known. Indeed, as to four of the eight classes of debt involved in that case, the Court expressly found that some of the creditors 'had no last address indicated.' Thus, the only arguable basis for distinguishing money orders is that they involve a higher percentage of unknown addresses. But . . . to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided – that is, 'to decide each escheat case on the basis of its particular facts or

to devise new rules of law to apply to ever-developing new categories of facts.’

Id. at 214-15 (internal citations omitted); see also *Delaware*, 507 U.S. at 509.

The two priority rules established by the Supreme Court could not be clearer. There is no “third priority rule.” To the extent any state claims to have established any other priority scheme by state statute, that statute is unenforceable as a matter of well-established law and binding precedent of the Court. Whatever doubt may have arisen from the language of Section 4(d) of the 1981 Uniform Unclaimed Property Act was erased by *Delaware v. New York*, 507 U.S. 490 (1993).

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Edward K. Black
Edward K. Black
Deputy Attorney General

cc: Mark Udinski, State Escheator and Audit Manager

EXHIBIT C

A-9

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
ATTORNEYS AT LAW

1300 MOUNT KEMBLE AVENUE
P.O. BOX 2075
MORRISTOWN, NEW JERSEY 07962-2075
(973) 993-8100
FACSIMILE (973) 425-0161

MICHAEL RATO
Direct dial: (973) 425-8661
mrato@mdmc-law.com

April 8, 2015

Via Federal Express

Mr. Josh R. Wood
Compliance Officer
Office of the Auditor of State Andrea Lea
230 State Capitol
Little Rock, Arkansas 72201

RE: Demand for Property Escheated to Delaware

Dear Mr. Wood:

As you know, this Firm represents MoneyGram International ("MoneyGram") in connection with the multi-state unclaimed property audit conducted by Treasury Services Group ("TSG") on behalf of a number of states, including Arkansas (the "Audit"). MoneyGram is in receipt of your April 2, 2015 letter requesting that MoneyGram work with TSG to reconcile and "initiate delivery" of certain escheated Official Checks that you contend were "improperly" escheated to the State of Delaware. MoneyGram stands ready and willing to provide reasonable assistance to TSG in connection

with its efforts to review and analyze escheated Official Check data, and has done so for the past several months. For the reasons explained below, however, MoneyGram lacks the authority or the ability to “initiate delivery” of funds held by the Delaware Division of Revenue.

As your letter acknowledges, MoneyGram previously escheated the subject property to the State of Delaware, well before the commencement of the Audit, in accordance with instructions from the Delaware Attorney General’s Office. Accordingly, MoneyGram does not have possession, custody, or control over the amounts sought in your letter. As a result of the turnover of this property to Delaware – and as further explained in a recent letter from the Delaware Attorney General’s Office provided to TSG¹ – MoneyGram is entitled to indemnification by the State of Delaware for any subsequent demands on this property, and any such demands are more properly addressed to Delaware for resolution. As noted above, to the extent that Arkansas or TSG requires assistance in reconciling information or data, MoneyGram will comply with all reasonable requests for assistance. However, to the extent that your letter can be construed as a demand that MoneyGram pay or deliver these already-escheated funds (or duplicate funds) to the State of Arkansas, please be advised that the Supreme Court has repeatedly held that such a requirement is a deprivation of a holder’s right to due process of law. *See Texas v. New*

¹ Copy attached as Exhibit A.

Jersey, 379 U.S. 674, 676 (1965) (holding that “the Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property”); *Western Union Co. v. Pennsylvania*, 368 U.S. 71, 77 (1961) (acknowledging that requiring a holder “to pay a single debt more than once” results in a violation of the Due Process Clause). Indeed, in your April 30, 2014 e-mail to Mr. Les Korsh of MoneyGram, you acknowledged that “if our office chooses at a later date to bring suit against MoneyGram, your due process objection does apply” but that the objection did not prevent you from “call[ing] an audit and request[ing] that every state join” if MoneyGram did not agree to stop escheating certain Official Checks to Delaware.

I hope that you find this information helpful. Please do not hesitate to contact me if you have any comments or questions. Please note that MoneyGram reserves all of its rights and remedies with regard to this matter.

Very truly yours,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

/s/ Michael Rato
Michael Rato

cc: Cory Feinberg, Esq. – MoneyGram International
(via e-mail)
John Ahlen, Esq. – Legal Counsel, Office of
Auditor of State Andrea Lea (via FedEx)
Caroline Cross, Esq. – Deputy Attorney General,
Delaware Dept. of Justice (via e-mail)
Mr. Alex Kauffman – Treasury Services Group, LLC
(via e-mail)

ATTACHMENT OMITTED

EXHIBIT D

[SEAL]

**STATE OF DELAWARE
DEPARTMENT OF FINANCE
OFFICE OF THE SECRETARY**

**CARVEL STATE BUILDING
820 N. FRENCH ST.,
8TH FLR.
WILMINGTON, DELAWARE
19801**

**TELEPHONE:
(302) 577-8979
FAX: (302) 577-8982**

**HASLEY ARMORY
122 WILLIAM PENN
STREET
DOVER, DELAWARE
19901**

**TELEPHONE:
(302) 744-1100
FAX: (302) 739-1139**

September 29, 2015

Sent via E-Mail and U.S. Mail

Mr. Josh Wood
Holder Liaison/Compliance Officer
State Auditor's Office
P.O. Box 251906
Little Rock, AR 72225-1906

*RE: Claims to the State of Delaware Related to
MoneyGram Payment Systems, Inc.*

Dear Josh Wood,

Your state is among a group of states that have contacted the State of Delaware, Department of Finance's Office of Unclaimed Property ("Delaware"), seeking payment of uncashed check funds previously reported to Delaware by the holder MoneyGram Payment Systems, Inc. ("MoneyGram"). It has been asserted that the uncashed check funds were "erroneously" reported to Delaware, and that certain of these funds are in fact due your state.

Delaware takes these contentions very seriously, and we have been researching both the law and underlying facts regarding your claim since we started to receive supporting documentation from various states in April and from your contract auditor in late May of 2015.

While it would have been our preference to share our findings and determinations with your state once our review and research was completed, some states have been adamant in their demands that Delaware immediately either satisfy their claims or provide the basis for rejection. Delaware will undertake neither action at this time, but by this letter, we are sharing our preliminary analysis of your contract auditor's basis for demand that Delaware immediately pay over the MoneyGram uncashed check funds. A substantial amount of review is still required on our part, but we believe the work we have completed to date casts serious doubt on the theory of liability proposed by your contract auditor. We encourage you to review the following analysis and materials with your Attorney General's Office or other legal counsel.

In considering whether or not the uncashed MoneyGram checks are subject to reporting protocols of Public Law 93-495, codified at 12 U.S.C. § 2501-2503 (the "Federal Statute"), we considered it important to first review the statute's legislative history. Because the legislative history was not provided by your contract auditor, we performed our own analysis. What we ultimately found was very significant.

The law as ultimately enacted by Congress (and included in the Federal Statute) differed from the legislation that was initially proposed. On May 29, 1973, unclaimed money order and travelers check legislation was first introduced, in the form of S. 1895. That bill, a copy of which is attached as Exhibit 1, addressed sums "payable on a money order, traveler's check, or similar written instrument," but provided no exemption for "third party bank checks." S. 1895 was referred to the Senate Committee on Banking and Urban Affairs (the "Senate Committee"), which sought views from various federal regulators on the proposed legislation.

The findings of the Senate Committee were compiled in a report (S. Rep. No 93-505), which is attached as Exhibit 2. The report, at page 5, includes a written statement from Edward C. Schmults, General Counsel to the U.S. Department of the Treasury that reads:

The Department has no objection to legislation clarifying the escheat law with regard to traveler's checks, money orders or similar instruments but we believe the language of the bill is broader than intended by the drafters. The introductory language of section 2 could be interpreted to cover third party payment bank checks since it refers to a "money order, traveler's check, or similar written instrument on which a bank or financial organization or business association is directly liable." It is recommended that this ambiguity be cured by defining these terms to exclude third party payment bank checks.

The Senate Committee adopted the “technical suggestions” of Treasury, and included an exemption for “third party bank checks” in a revised bill, S. 2705, which is attached as Exhibit 3. The revised bill was ultimately incorporated in its totality into H.R. 11221, which was in turn became the Federal Statute.

As we understand it, the basis for your state’s claim, as asserted by your contract auditor, is that “. . . unless Official Checks are third party bank checks, there is no reasonable interpretation that would exclude Official Checks from being covered” by the federal statute, and because “Official Checks are very different from, and cannot be considered, third party bank checks” MoneyGram’s checks are in fact subject to the federal statute. The conclusion that MoneyGram checks cannot be considered third party bank checks apparently rests on the premise that “third party bank checks” are legally synonymous with “third party checks.” We believe this premise to be incorrect.

Your state’s contract auditor has provided a definition of “third party checks” (“a check endorsed by the payee to a new party who then becomes the holder of the check”), and we have no issue with that definition – with *respect to third party checks*. However, logic dictates that a “third party bank (payment) check” is something entirely different. As an initial matter, disregarding the word “bank” in “third party bank checks” ignores a fundamental rule of statutory construction: all words of a statute are to be taken into consideration, so that none are considered insignificant or superfluous. Congress could have exempted “third party

checks" from the federal statute; however, it exempted third party *bank* checks, which were referenced in the legislative history as third party *bank payment* checks.

Additionally, third party checks operate differently. The payee of a check assigns (through signing-over, or "endorsing" the instrument) his or her rights of payment to another person. The records of the bank issuing the check do not reflect the assignment; the bank's records either reflect the original payee, or no payee. The bank only becomes aware of the third party assignment upon presentment and payment of the check, at which time the obligation is satisfied, and there is no longer a liability to "become" unclaimed, because a third party check properly presented for payment will be honored, and thus will not become unclaimed; the bank ultimately responsible for payment cannot deny payment on a third party check, where the third party to whom the check was endorsed is a holder in due course. It is unclear under what scenario a bank would be aware that it was holding funds representing an "*unclaimed* third party check," because the third party endorsement would be entirely independent of the creation of the payment obligation, and not reflected in the records of the bank.

We do not believe the General Counsel of the U.S. Treasury would have gone to the trouble of recommending to Congress that it modify legislation to take into account a nonexistent issue. To accept that "third party bank checks" are the equivalent of "third party checks" would result in a construction of the federal statute inconsistent with basic principles of statutory

interpretation, because it would imply that Congress and the U.S. Treasury were ignorant of the meaning of the language that was employed. It would also overlook the fact that the U.S. Treasury supervises national banks and thrifts; that the agency routinely reviews and comments on proposed legislation from the standpoint of how new laws might impact banking operations; and that there was a very logical explanation as to why it would have recommended the exemption of "third party checks" from the federal statute.

The Uniform Commercial Code (UCC), which has been adopted by your state and all other states participating in the MoneyGram audit, recognizes third party bank checks, i.e., a check that is issued by one bank, but drawn on the funds of a second, or "third party" bank. The UCC describes a "teller's check" as a check "drawn by a bank (i) on another bank, or (ii) payable at or through a bank." Regulation CC, enacted by the Federal Reserve, includes a similar definition. MoneyGram's unclaimed property reports filed with Delaware primarily consist of "teller's checks." The MoneyGram teller check specimen provided by your contract auditor to Delaware represents a check issued by a bank, but drawn on the funds of another (third party) bank.

In a third party bank check scenario, information relative to the issuance of the check is bifurcated from the underlying check funds. In the case of an uncashed third party bank check, the details of where and by whom the check was purchased would be recorded by the issuing bank, but the unclaimed funds would be

maintained by a different bank. In order to compile a report of unclaimed property under the revised federal reporting protocols, it would be necessary for the two banks to exchange information and collaborate on the compilation of the report.

In contrast, a cashier's check represents a far more straightforward proposition, because the funds are drawn on the account of the bank issuing the check. Note that in 1973, at the time the federal statute was being drafted, the availability and utilization of information technology systems in the clearing of checks would have been minimal, and there would be limited ability to store and retrieve data electronically. Treasury could have, and likely did determine that mandating this information exchange would be overly burdensome on national banks and thrifts, and thus the treatment of unclaimed third party bank checks should remain subject to the federal common law. While information technology has changed tremendously in the last 40 years, Congress enacted legislation based on the capacities of the banking system that were in place at the time, not what they might become in the future.

While the issue of what constitutes a "third party bank check" is a very important one, it is not the only issue that arises in the context of your state's claim. As noted above, Delaware will continue to examine both the factual and legal aspects of this matter. The work yet to be performed is extensive, and we cannot at this time provide a date by which a final determination will be reached. We hope that given the sums involved, your

state will appreciate the need for Delaware to be thorough in its review, and to perform the work itself.

We sincerely hope that the materials provided herein are useful, and demonstrate that this matter is not as cut-and-dried as your state's contract auditor has suggested. Going forward, Delaware would like to share additional findings and discuss the issues that arise; however, it would be difficult for our state to engage in active dialogues with some 20 other states. We respectfully suggest that your state confer with other states participating in the MoneyGram audit, and appoint a "lead state" to interact with Delaware. Because the resolution of this matter will be optimally achieved "state-to-state," we believe there will be efficiency in this approach. Further, while Delaware has no preference as to which state is selected as a liaison, we need to emphasize that the liaison must be another state, and not your contract auditor. We are cognizant of our duty to respond to the asserted claims, but Delaware is under no obligation to interact with a non-party.

Please be assured: *this matter is important to the State of Delaware*. We will continue to devote resources to addressing MoneyGram's unclaimed property reporting and the claim filed by your state. We would appreciate your patience while we research the various

issues, and we will provide you with periodic updates as we uncover additional information.

Very truly yours,

/s/ David M. Gregor
David M. Gregor
State Escheator

Enclosure (3 Exhibits)

cc: Michelle Whitaker, Assistant Director of
Unclaimed Property and Audit Manager
Caroline Lee Cross, Deputy Attorney General

ATTACHMENTS OMITTED

EXHIBIT E

A-22

[SEAL]

STATE OF DELAWARE
DEPARTMENT OF FINANCE
UNCLAIMED PROPERTY
CARVEL STATE BUILDING
820 N. FRENCH STREET
P.O. Box 8749
WILMINGTON, DELAWARE 19899-8749

ATTN: MICHELLE M. WHITAKER, ASSISTANT DIRECTOR

July 7, 2015

Joani Bishop, Director
Texas Comptroller of Public Accounts
Unclaimed Property Division
P.O. Box 12046
Austin, TX 78711-2046

Dear Ms. Bishop,

David Gregor forwarded to me your letter and claim form of July 1, 2015 regarding the State of Texas' claim for "unclaimed property erroneously submitted to the State of Delaware" by MoneyGram. As you may know, I am the Assistant Director for the State of Delaware's Office of Unclaimed Property ("Delaware" or the "OUP"). I report directly to the Secretary of Finance, Thomas J. Cook, and to the State Escheator, David Gregor. My responsibilities include supervising and managing the examinations conducted pursuant to 12 *Del. C.* §1155, which authorizes the State to examine businesses to determine compliance with the Delaware Escheats Law. I am very explicit to all auditors under my direction that Delaware will not accept property to which another state has a superior right to escheat.

I am aware that on February 10, 2015, a third-party auditing firm, Treasury Services Group ("TSG"), sent a letter to the Vice President and Associate General Counsel of MoneyGram International ("MoneyGram"), asserting that MoneyGram had improperly escheated its unclaimed "Official Checks" to the State of Delaware, and that various amounts related to that property type were past-due for reporting to certain states, including Texas.

I appreciate that Texas has directed its claim to Delaware, rather than to MoneyGram, as it is uncontested that MoneyGram is no longer the holder of the property in question. Delaware law provides that, if property delivered to Delaware in good faith is claimed by another jurisdiction, the OUP "shall defend the holder against the claim and indemnify the holder against any liability on the claim." In other words, Delaware's statute and established practice contemplates that any jurisdiction which believes it has a superior claim to any property reported to Delaware would present Delaware's OUP with a claim and the necessary documentation, so that Delaware may review and satisfy the claim, if appropriate.

Please be assured that Delaware will transfer directly to Texas any property that is determined to have been improperly escheated to us. However, you stated that Delaware "is aware that MoneyGram's records show that the [requested] funds should have been remitted to Texas and not Delaware"; this is not the case. Delaware cannot consider a claim without reviewing supporting documentation, and we are in the process of

doing so. In late May, TSG provided what they indicated was the necessary support for the claims of the various states, including Texas. That information is being reviewed.

I assure you that Delaware is taking your claim, and the claims of the other involved states, very seriously. Delaware goes to great lengths to avoid accepting any property to which another state has a superior right to escheat. Please feel free to call me with any questions. I sincerely hope we will be able to work cooperatively through these issues, and that your claim will be resolved amicably.

Kind regards,

/s/ Michelle Whitaker
Assistant Director

cc: Phillip Ashley, Associate Deputy Comptroller
Lita Gonzalez, General Counsel
David Gregor, State Escheator
Caroline Lee Cross, Deputy Attorney General

EXHIBIT F

A-25

[SEAL]

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

MATTHEW P. DENN CIVIL DIVISION (302) 577-8400
ATTORNEY GENERAL FAX (302) 577-6630
 CRIMINAL DIVISION
 (302) 577-8500
 FAX (302) 577-2496
 FRAUD DIVISION (302) 577-8600
 FAX (302) 577-6499

February 24, 2015

Michael Rato, Esquire
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
PO Box 2075
Morristown, New Jersey, 07962-2075

*Re: Escheatment of Official Checks to Delaware
by MoneyGram International*

Dear Mr. Rato,

As you know, I am the Deputy Attorney General for the State of Delaware assigned to represent the Delaware State Escheator and the Office of Unclaimed Property (the "OUP"). We spoke last week about concerns your client, MoneyGram International ("MoneyGram"), has regarding a demand letter dated February 10, 2015 it received from Treasury Services Group ("TSG").

Let me first allay your client's concerns by assuring you that the OUP is bound by 12 *Del. C.* § 1203(c). That statute provides as follows:

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

"Good faith" is further defined in section (d) of the statute, which states as follows:

For the purposes of this section, "good faith" means that:

- (1) Payment or delivery was made in a reasonable attempt to comply with this subchapter;
- (2) The person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to the person, that the property was abandoned for the purposes of this subchapter; and
- (3) There is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

12 *Del. C.* § 1203(d). Based on the information known at this time, the OUP accepts that MoneyGram has been escheating property to Delaware in “good faith,” as contemplated by the statute. Therefore, Delaware will satisfy any claim made on the property by the lawful owner or a jurisdiction with a superior claim to escheat.

Under the priority rules articulated by the United States Supreme Court, because Delaware is the state of incorporation, Delaware is entitled to escheat abandoned and unclaimed property with a last known address in any jurisdiction, subject to a claim by another jurisdiction with a superior claim. *See Texas v. New Jersey*, 379 U.S. 674 (1965); *Texas v. New Jersey*, 380 U.S. 518 (1965); *Pennsylvania v. New York*, 407 U.S. 206, 210-211 (1972), and *Delaware v. New York*, 507 U.S. 490, 509 (1993). Unclaimed property is, by definition, not “owned” by the holder, MoneyGram. The above-cited cases have made it abundantly clear that once MoneyGram reports unclaimed property to a state claiming the right to escheat (in this case, Delaware), MoneyGram’s obligation with regard to that property is satisfied, and no other state has standing to request said property from MoneyGram. Rather, the state must present a claim to the state which has escheated the property and establish that it has a superior right to escheat.

I am frankly shocked that TSG, purporting to act under color of authority of twenty other states, would issue a demand to MoneyGram while acknowledging that the property in question had previously been

reported to Delaware. The U.S. Supreme Court has consistently held that “the same property cannot constitutionally be escheated” more than once. *See Texas*, 379 U.S. at 679, citing *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961). TSG’s undocumented assertion that the escheatment to Delaware was “improper[.]” raises an issue that must, as a matter of law, be resolved between the states involved.

If the states referenced in TSG’s letter believe that they have a superior claim to any of the property reported to Delaware by MoneyGram, those states are well aware that U.S. Supreme Court jurisprudence, established practice, efficiency, and common sense dictate that said states should present Delaware’s OUP with a claim and the necessary documentation to support it.

You are authorized to share this letter with representatives of any states who attempt to enforce a demand for payment based on TSG’s letter dated February 10, 2015.

Sincerely yours,

/s/ Caroline Lee Cross

Caroline Lee Cross

Deputy Attorney General

cc: David M. Gregor, State Escheator
Michelle Whitaker, Audit Manager

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No. _____, Original

In The
Supreme Court of the United States

STATE OF ARKANSAS, STATE OF TEXAS,
STATE OF ALABAMA, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF FLORIDA,
STATE OF IDAHO, STATE OF INDIANA, STATE
OF KANSAS, COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA, STATE OF MICHIGAN,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF NEVADA, STATE OF NORTH DAKOTA,
STATE OF OHIO, STATE OF OKLAHOMA,
STATE OF SOUTH CAROLINA, STATE OF UTAH,
AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

STATE OF DELAWARE,

Defendant.

**BRIEF IN SUPPORT OF
MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT**

INTRODUCTION

This matter concerns competing State claims to intangible property. “States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.” *Delaware v. New York*, 507 U.S. 490, 497 (1993). Although it is undisputed that tangible, real, or personal property escheats to the State where it is located, which State has a superior claim to *intangible* property has been a matter of frequent dispute before this Court. See *Delaware*, 507 U.S. at 497; *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. 674, 677 (1965).

This Court has established priority rules for resolving such “disputes among States,” but Congress may alter those rules. *Delaware*, 507 U.S. at 499, 510. Congress did so – overruling the priority rules established by this Court’s decision in *Pennsylvania v. New York* – by adopting the Disposition of Abandoned Money Orders and Traveler’s Checks Act (“Federal Disposition Act”), 12 U.S.C. 2501 *et seq.* Under that provision, the State where an unclaimed and abandoned “money order, traveler’s check, and other similar written instrument (other than a third party bank check)” was purchased is “entitled exclusively to escheat or take custody of the sum payable on such instrument to the extent of that State’s power under its own laws.” 12 U.S.C. 2503.

Delaware has violated that provision and interfered with the sovereignty of 21 Plaintiff States¹ by taking possession of unclaimed and abandoned official checks sold in the Plaintiff States by MoneyGram Payment Systems, Inc. (“MoneyGram”), a Delaware company. In fact, at its core, this matter concerns Delaware’s seizure of property that rightfully belongs to the Plaintiff States, Delaware’s employment of its regulatory and police powers to direct MoneyGram to violate the laws of the Plaintiff States, and Delaware’s deliberate interference with the ability of the Plaintiff States to enforce their laws governing the remittance of unclaimed and abandoned property.

Only this Court may effectively resolve this dispute. Indeed, as this Court has previously held, in exercising jurisdiction to resolve disputes over intangible property, “controversies among different States over their right to escheat intangibles could be settled only in a forum where all the States that want to do so can present their claims for consideration and final authoritative determination.” *Pennsylvania*, 407 U.S. at 209-10 (internal quotation marks omitted).



¹ As set forth in the accompanying motion, the Plaintiff States in this matter are the States of Arkansas, Texas, Alabama, Arizona, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and West Virginia.

STATEMENT

1. This matter concerns the competing claims of Delaware and the Plaintiff States to sums payable on unclaimed and abandoned MoneyGram official checks sold in the Plaintiff States. MoneyGram's official checks function like a money order and a traveler's check. Compl. ¶ 10. As fully detailed in the Plaintiff States' complaint, to obtain an official check – just like a money order or a traveler's check – a customer generally pays a transaction fee and the value that the customer seeks to have reflected on the official check. *Id.* The customer generally receives an instrument that is pre-printed with the value of the payment remitted by the customer. *Id.* Also as with a money order or a traveler's check, although MoneyGram knows where an official check was purchased, it does not generally know the purchaser's identity or the official check's ultimate recipient. *Id.* And like a money order or a traveler's check, many official checks are not cashed and are subject to remittance under the laws of the various States. Compl. ¶ 11.

2. To resolve competing claims to such intangible property, this Court established two priority rules. *Delaware*, 507 U.S. at 499. First, "because the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the State of 'the creditor's last known address as shown by the debtor's books and records.'" *Id.* at 499-500 (quoting *Texas*, 379 U.S. at 680-81). "[I]f the primary rule fails because the debtor's records disclose no address for a creditor or because the creditor's

last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated.” *Id.* at 500. And under that framework, *Pennsylvania v. New York* held that in the absence of the address of the owner of an uncashed money order, the State of the holder’s corporate domicile had the right to receive the sums owed on the money order. 407 U.S. at 214-15; *see also Delaware*, 507 U.S. at 499-500.

But Congress overrode those rules with respect to unclaimed and abandoned “money order[s], traveler’s check[s], and other similar written instrument[s]” and provided that those items remit to the State of purchase to the extent that State’s laws allow it to take custody of those items. 12 U.S.C. 2503; *Delaware*, 507 U.S. at 499, 510. That legislation, moreover, was intended to prevent one State – where many corporations maintain their domicile – from enjoying an inequitable windfall at the expense of “the other 49 states where the purchasers of travelers [sic] checks and money orders actually reside.” 119 CONG. REC. S9749-9750 (daily ed. May 29, 1973).

3. The laws of the Plaintiff States require MoneyGram to remit sums payable on unclaimed and abandoned MoneyGram official checks sold in the Plaintiff States to the Plaintiff States. Compl. ¶¶ 8, 13-14. But at Delaware’s direction, MoneyGram currently remits those sums to Delaware and Delaware has taken custody of those sums. Compl. ¶¶ 3, 18-20. MoneyGram remits those sums as a result of a May 2011 letter from Delaware – responding to an inquiry

by MoneyGram – that failed to acknowledge or consider the decades-old Federal Disposition Act. Compl. ¶¶ 18-20, 22. Instead, relying on this Court’s holding in *Pennsylvania v. New York*, that letter directed MoneyGram to report and remit *all* sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States to Delaware. Compl. ¶ 20.

In fact, not until other States and an outside auditor hired by other States brought the Federal Disposition Act to Delaware’s and MoneyGram’s attention did Delaware address whether the Federal Disposition Act might govern the remittance of sums payable on unclaimed and abandoned MoneyGram official checks purchased in other States. Compl. ¶¶ 21, 30. Rather than acknowledge its mistake, Delaware now maintains that sums payable on unclaimed and abandoned MoneyGram official checks are exempt from the Federal Disposition Act based on a strained and convoluted reading of that Act’s legislative history. Compl. ¶ 30.

4. The Plaintiff States have determined that Delaware has taken custody of at least \$162,127,480 payable on unclaimed and abandoned official checks purchased in other States. Compl. ¶ 11. Despite repeated requests from other States that it remit those sums to the appropriate State of purchase, Delaware has refused. Compl. ¶ 30.

5. On May 26, 2016, Delaware filed a Motion for Leave to File Bill of Complaint regarding a similar dispute with Wisconsin and Pennsylvania. Wisconsin has since moved for Leave to File a Counterclaim.

ARGUMENT

This Court has original jurisdiction over this suit pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code. In deciding whether to grant leave to file a complaint pursuant to those provisions, this Court considers two factors: 1) “the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim” and 2) “the availability of an alternative forum in which the issue tendered can be resolved.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Applying that standard, this Court should grant the Motion for Leave to File Bill of Complaint and exercise its jurisdiction over this dispute between States.

I. Delaware’s Actions Impinge the Sovereignty of 21 Plaintiff States.

Delaware has taken custody of at least \$162,127,480 that belongs to other States. Compl. ¶ 11. In so doing, as fully set forth in the complaint, Delaware has violated – and directed MoneyGram to violate – the laws of the Plaintiff States and the Federal Disposition Act. Those actions seriously undermine the Plaintiff

States' sovereignty, impair the ability of the Plaintiff States to control their own finances, and interfere with the right of the Plaintiff States to enforce their own laws.

It is as sovereigns that States take custody of or assume title to unclaimed and abandoned property. *Delaware*, 507 U.S. at 497. That is why disputes between States over the right to take custody of or assume title to unclaimed and abandoned property have occurred so frequently in this Court. *See supra* at p. 2 (citing cases). Therefore, by seizing intangible property that should have remitted to the Plaintiff States – under the laws of those States – Delaware has interfered with their rights as sovereigns to take custody of or assume title to that property.

Delaware's continued seizure of sums payable on unclaimed and abandoned MoneyGram official checks purchased in the Plaintiff States also meddles with the Plaintiff States' "sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959); *accord Leigh v. Green*, 193 U.S. 79, 89 (1904).

Further, Delaware's actions have hampered the Plaintiff States' ability to enforce their laws. For instance, as explained in the Plaintiff States' complaint, in its May 2011 letter to MoneyGram, Delaware directed that company to violate the laws of the Plaintiff States by remitting sums payable on unclaimed and abandoned MoneyGram official checks sold in the Plaintiff States to Delaware. Compl. ¶ 20. In February

2015, after multiple States objected to MoneyGram's practice of remitting sums payable on unclaimed and abandoned official checks, employing its regulatory and police powers, Delaware directed MoneyGram to continue violating the laws of the Plaintiff States. Compl. ¶¶ 29-31.

There is a significant risk, moreover, that the Plaintiff States may not be able to order MoneyGram to abide by their laws and remit the substantial sums that MoneyGram has already remitted to Delaware. This Court has held that the Due Process Clause prevents an entity from being required to remit the same property more than once. *See Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961). Delaware's actions would thus have deprived the Plaintiff States of their sovereign right to enforce their unclaimed and abandoned property laws. And for those reasons, this dispute should be resolved by this Court.

II. No Alternative Forum Exists for Vindicating the Rights of 21 Plaintiff States.

There is also no alternative forum capable of fully resolving this dispute between Delaware and 21 Plaintiff States. *See Mississippi*, 506 U.S. at 77; *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). This is true for multiple reasons.

First, there is no State court capable of resolving this dispute. At the most basic level, that is true because State courts do not have jurisdiction over other States.

Second, lower federal courts likewise do not provide an appropriate forum because local interests might appear to affect the resolution of a dispute that could shift hundreds of millions of dollars from one State treasury to another.

Third, like previous cases involving intangible property that were resolved by this Court, only this Court presents “a forum where all the States that want to do so can present their claims for consideration and final authoritative determination.” *Pennsylvania*, 407 U.S. at 209-10. Indeed, that is particularly true in a case like this where 21 Plaintiff States assert claims to intangible property currently in the possession of Delaware.

Finally, Delaware’s filings before this Court in *Delaware v. Pennsylvania*, No. 22O145, indicate that Delaware agrees that only this Court may effectively resolve this dispute.



CONCLUSION

For the foregoing reasons, the Plaintiff States' Motion for Leave to File Bill of Complaint should be granted.

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June 9, 2016

