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A NOTE ON CERTAINTY AND POLICY IN ELECTRONIC FUNDS TRANSFERS: MAY WE HAVE A CODE FOR THE NEW MONEY SERVICES?

*Stephen M. Ege**

There is a good deal of legal work to be done in establishing a law of electronic funds transfers (EFT). Through the use of communications media—principally telephone lines with terminals and data processing facilities at either end—it is becoming possible to transmit and process financial information on a scale and of a character heretofore unknown. Retail application of these developments has been foreshadowed for at least the last decade and a half through various experimental efforts by financial institutions and others but is only now beginning to materialize on any significant scale.¹

At the federal government level, the Department of the Treasury has begun its direct deposit program under which social security and other government payments are deposited directly into financial institutions using magnetic tapes in place of paper checks. This program should be a major stimulant to the development of electronic funds transfer services. The millions of payments that will be run through this system will have implications for the development of hardware systems and procedures which will make electronic, nonpaper payment possible.² Similarly, the activities of Fedwire, an in-place and operating electronic funds transfer system of major proportions transferring trillions of dollars per year, have influenced systems and procedures for electronic funds transfer developments and will continue to do so in the future.³ In addition, bank run automated clearing houses (ACH's) are

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1. See G. SPOFFORD & R. GRANT, *A HISTORY OF BANK CREDIT CARDS* (Federal Home Loan Bank Board, 1975).

2. See DEPARTMENT OF THE TREASURY, *DIRECT DEPOSIT OF FEDERAL RECURRING PAYMENTS* (Jan. 1975).

3. See *Federal Reserve Operations in Payment Mechanisms: A Summary*, 62 *FED. RES. BULL.* 481 (1976).

beginning to process a significant volume of transactions,⁴ currently numbering about a half-million per month. These systems process both government and private payments. The story is a simple one: systems which work provide a model for those which follow.

Additionally, there are other private sector developments. For example, the major bank credit card systems operate authorization systems on a 24-hour a day, 7-day a week basis. Prior to a credit card purchase, these systems ensure that an authorized party is using the card and that a credit limit has not been exceeded. This is the credit side of the EFT ledger. On the debit side, several concerns are operating check validation services. These services give the merchant an indication of the likelihood that the check will be honored by the bank on which it is drawn at the time the purchase is made. The check has become a less negotiable instrument in our metropolitan centers, and the check validation service helps to make the check more acceptable to merchants—more negotiable, as it were. Both of these validation systems are a part of the developing electronic funds transfer technology; that is, hardware systems and procedures for handling money transactions. They are presently in place and operating on a major scale.

In a development which may be even more significant than the issuance of credit cards by banks in the 1960's,⁵ financial institutions are now beginning to experiment with new user procedures which have come to be called electronic funds transfer systems. These systems are in their infancy and are of unproven utility. At this time, they are performing only one primary function: providing an additional type of equivalency between account balances and cash for users.

At present, account balances at financial institutions serve at least two functions. First, an account balance may serve as a vehicle for payment transactions when used in conjunction with the check. The account balance along with the paper check and institutional clearing arrangements amount to a payment mechanism. Second, the account may be made liquid by trading a balance for cash, a process which, until recent developments in technology, could only be performed at the business location of the financial institution. This is simply a technical way of describing deposits and withdrawals at the teller's window.

There are other functions which account balances perform for users besides the two described above. For example, the account balance, as a compensat-

4. See, e.g., NATIONAL AUTOMATED CLEARING HOUSE ASSOCIATION, NACHA QUARTERLY UPDATE (Apr. 1976).

5. See SPOFFORD & GRANT, *supra* note 1.

ing balance, may be a prerequisite to the availability of a line of credit to the accountholder. The systems and procedures which have been denominated electronic funds transfer services have given the account balance a fourth major function: cash equivalency at points of cash use. Through the use of terminals and accounting arrangements between merchants and financial institutions, cash may be taken in or disbursed by the merchant and counted, respectively, as a deposit to or withdrawal from the account balance. Machines may also provide these services, operating as sophisticated vending machines. It is because of this deposit-withdrawal function at points of cash use that the electronic funds transfer services are causing so great a stir, especially among competing financial institutions.

In one way these systems are not as revolutionary as they appear to be. Even without electronic funds transfer services, a consumer may cash a check at a retail establishment. This turns his account balance into the more spendable cash commodity. Merchants may, of course, be reluctant to take checks for fear that they may be dishonored. There is, however, no close analogy to the deposit function; certainly funds cannot be deposited in an account by simply endorsing a check over to the merchant. The check merely becomes the endorsee's,⁶ and the customer gets cash or goods in return.

There are reasons why existing check payment practices provide an alternative to the withdrawal function but not to the deposit function. We may view the check cashing function as a cash withdrawal system which piggy-backs those accounting arrangements between merchants and financial institutions necessary to accomplish a withdrawal on the existing payment function system of check clearing. Check cashing has heretofore been viewed as a hybrid payment transaction. However, check cashing may, with equal facility, be viewed as a hybrid withdrawal transaction. A deposit system cannot similarly be piggy-backed on the check payment system, however, since there is no accounting relationship between merchants and financial institutions whereby a credit to the customer's account at his or her financial institution and a debit to the merchant's account at its financial institution can be accomplished. Check clearing is a withdrawal clearing network and not a deposit clearing network or credit transfer network as it is sometimes called.⁷ If the United States had in place a giro or credit transfer network as used in other parts of the world, the proper accounting relationships would

6. See UNIFORM COMMERCIAL CODE §§ 1-201(20), 3-202, 3-301.

7. Article 4 of the Uniform Commercial Code, with its definition of banks in the collection chain, assignment of responsibilities, and final payment, presupposes such a debit culminating transfer network. See UNIFORM COMMERCIAL CODE § 4-213, Comment 1.

exist to make deposits possible.⁸ Check clearing is like a wave that culminates in a withdrawal from the drawer's account; the giro system culminates in a credit to the payee's account.

It is equally important to observe that our analysis of the functional similarities between the new electronic funds transfer systems and that part of the check system which provides for withdrawals through check cashing confuses fundamental legal distinctions between a deposit or withdrawal on the one side and check payment on the other. The check system is well governed by the law of negotiable instruments as well as by federal legislation limiting money creation by banks through the imposition of fractional reserve requirements.⁹ In contrast, the deposit-withdrawal functions have been left to private agreement and to the general superintendence of the bank regulatory agencies; there is no Uniform Commercial Code (UCC) of deposits and withdrawals, although fractional reserves are required even for accounts not used in conjunction with checks.¹⁰ On this analysis, the draftsmen of the UCC committed a major blunder in titling article 4 "Bank Deposits and Collections." Fundamentally, article 4 deals with check collections alone. Only in minor respects does article 4 reach the accountholder-financial institution relationship apart from the check collection function.¹¹ Problems of nomenclature aside, it seems clear that in fashioning rules for electronic funds transfer transactions, the legal system may wish to consider distinguishing deposit and withdrawal functions from payment functions.

There is only one private institution in the country¹² that has taken the step of substituting a terminal-based transaction for check payment—that is, checkless payment at the point of sale. A plastic card is inserted into an electronic terminal at a checkout counter, a button is pushed, and goods are paid for without cash or check. The Treasury Department program is a payment system on a grander scale; millions of recipients will be "paid" by a direct deposit of their monthly benefits.

One more element of confusion may be added to the picture before turning to a discussion of the codification of these developments. Assume a financial institution starts to offer the new deposit-withdrawal service as well as a paperless payment service, but, for reasons of economy,

8. See G. DAVIES, NATIONAL GIRO, MODERN MONEY TRANSFER (1973); Baxter, *The Simple Payment of Money*, 24 U. TORONTO L.J. 63 (1974).

9. See 12 U.S.C. § 461 (1970).

10. Reserve requirements apply both to demand and time deposits. *Id.*

11. An example might be the article 4 rule that a depository bank permitting a withdrawal against uncollected funds is given a security interest in the item sent for collection. UNIFORM COMMERCIAL CODE § 4-208.

12. Glendale Federal Savings and Loan Association, Glendale, California.

decides to issue just one plastic card. This card would also serve as the familiar credit card. Accountholders could make purchases either on credit or by payment from their account balance. Under existing procedures, a purchaser makes a similar choice when deciding whether to pay by check or credit card. It can be argued, however, that a single card serving both functions is not easily classified under current legal categories. For some purposes at least, payment by the accountholder after the receipt of goods and services will not be credit, while payment before receipt will, precisely the reverse of one's expectations.¹³ Even checks involve some degree of credit since collection procedure necessarily involve delays, as checking account customers are well aware. Moreover, a dishonored check creates a payment obligation, although the procedure is regarded as an unorthodox manner of creating a credit sale. Curiously, simple failure to make timely installment credit payments is not accompanied by the severe sanctions, including criminal liability, that are attached to writing a dishonored check.¹⁴ Critical points in contractual understandings and in accounting entries require identification in the new systems in order to serve payment and credit policies and to fall within their associated legal structures. At all events, classification difficulties demonstrate how the new systems and procedures are blurring traditional distinctions in financial services. Electronic funds transfer systems can destroy the convenient emblems, both paper and plastic, which distinguished previously established contractual and other legal relationships.

The developments which have been described, particularly the new service developments called electronic funds transfer systems, have raised a number of other troublesome issues. These include the money service powers of the financial institutions establishing the new systems, the regulation *vel non* of financial institutions as communications common carriers, the proper application of antitrust constraints, and the collection and dissemination of high powered information, that is, of private information relating to financial transactions.¹⁵

It is an interesting measure of the success of the UCC that few commentators on the subject of electronic funds transfers have questioned the need to address these new systems in terms of their impact on that body of law, with a view toward appropriate revision. In point of fact, a principal purpose of

13. Ege, *Electronic Funds Transfer: A Survey of Problems and Prospects in 1975*, 35 MD. L. REV. 3, 34-39 (1975).

14. See 1A MICHIE, BANKS AND BANKING §§ 75-79 (1973). See generally W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 92 (1972).

15. See Ege, *supra* note 13.

the Uniform Commercial Code was to introduce a contractual structure which would take account of and incorporate existing commercial or business practices largely to the exclusion of other considerations. The Code vindicated Lord Mansfield by enacting into positive law his willingness to consult the commercial practices of his time when resolving commercial disputes.¹⁶

It may also be asserted that the legal task presented by developments in the electronic funds transfer field is similar to that presented to the drafters of the UCC. Certainly the body of rules contained in the Code, and especially articles 3 and 4 having to do with "Negotiable Instruments" and "Bank Deposits and Collections," has been pressed into use to provide some legal framework for these new transactions. However, as previously discussed, the analogies to existing commercial practices and law are not as compelling as they at first seem. Equally as important, there are significant differences between the codification effort which produced the Code and our present search for the legal status of electronic funds transfer transactions.

The UCC was first and foremost a drive to add the element of certainty to a variety of commercial transactions. Both the transactions in need of clarification and the legal rules applicable to those transactions were taken as given. The drafters' task was to clear away the judicial and statutory precedent which cast a cloud of uncertainty over well established modes of doing business. In some cases the application of pre-Code rules was uneven, with consequent uncertainty in legal result. In others, different bodies of law could apply to one transaction, again with uncertainty of result. For example, article 2, "Sales," sought to disembowel the notion of "title," a concept more conclusory than evidentiary and one which had little efficacy as a factor in determining the outcome of disputes between buyer and seller.¹⁷ The term title remains, but now is merely a vestigial remnant of the law of buyer and seller.¹⁸ In place of title, article 2 lists a variety of operative facts, albeit

16. As Professor Gilmore has explained, a general codifying principle of the article 9 provisions was "whatever is[,] is right . . ." 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 12.7, at 388 (1965). Professor Gilmore was overstating the case for purposes of emphasis, but the point of his assertion remains true: the foremost principle of the Uniform Commercial Code was to make more certain the legal environment of existing business practices.

17. UNIFORM COMMERCIAL CODE § 2-101, Comment 1, states in part:

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

18. See UNIFORM COMMERCIAL CODE § 2-401, Comment 1.

generalized, which are to be applied to particular types of disputes in sales transactions. Article 9, "Secured Transactions," justly celebrated as the most ambitious of the articles, molded a body of secured transactions out of a variety of preexisting statutory and common law principles which were known to Code insiders as the independent security devices. Article 9 rests one leg on a uniform security device and the other on the type of collateral taken by the secured party in order to cover the variety of transactions and settings with which it must deal.¹⁹ The objective was to root out the possibility of conflicting views of the same transactions. Prior to the Code, good faith compliance with one statutory scheme, such as the Uniform Conditional Sales Act,²⁰ could result in an invalid security interest if a court viewed the transaction as creating a chattel mortgage, which entailed different formal requisites as a condition to validity against competing interests in the same collateral.²¹ The other six substantive articles, although less dramatic in their reformulation of existing law, similarly sought to introduce certainty within a defined field of commercial transactions. It is clear in some cases that the Code has removed a good deal of uncertainty in prior law which served no apparent purpose. Similarly, the recent 1972 amendments show that the draftsmen are capable of continuing that task. There is now still greater certainty in some areas which had been left vague under the 1962 Code. For example, the 1962 Code did not deal effectively with the problem of debtors who change their names and subsequently acquire secured financing. The later secured party found the existing notice filing scheme unhelpful, but the 1972 amendments have improved the situation.²²

Thus, the codification effort of the UCC may be viewed as essentially an effort to remove uncertainty in the eight areas which are the subjects of substantive articles under the Code. Indeed, in the decade or so of campaigning for adoption engaged in by the draftsmen, their central theme was simplicity, certainty and conformity to existing business practices.²³ It is quite a leap, however, from the pursuit of those goals to the conclusion that the Code has actually achieved them.

There has been a good deal of condensation and clarification under the Code. Perhaps one unintended result of this legal fastidiousness is that these

19. This approach, which emphasizes the narrow question of classification of collateral rather than the broader business setting, is troublesome although relatively neat. See Ege, *An Essay on Real and Personal Property, Or, Fixtures Unmasked*, 7 VALPARAISO U.L. REV. 345, 356-58 (1973).

20. Superseded by UNIFORM COMMERCIAL CODE, art. 9.

21. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 3.3 (1965).

22. UNIFORM COMMERCIAL CODE § 9-402 (1972 Amendments).

23. Coogan, *The Lazy Lawyer's Guide to Secured Transactions Under the Code*, 60 MICH. L. REV. 685 (1962).

clear and certain commercial transactions have had quite definite and perceptible social effects. Thus, holders in due course, standing behind the wall of negotiability, could extract sums from seemingly hapless buyers of shoddy goods. Clear and certain secured transactions could result in excessive use of foreclosure proceedings. As the UCC showed that business practices were amenable to conception, definition and codification in comprehensive fashion, so it showed that business practices were now permissible under a specific, identifiable legal rule rather than by virtue of a complex and elusive patchwork of statutes and case law.

The very clarity and certainty provided by the UCC at least plausibly accounts in part for the outbreak of business reform legislation in the 1960's. One of the most obvious progeny is the Uniform Consumer Credit Code.²⁴ Others are the federal Consumer Credit Protection Act²⁵ and the later Fair Credit Billing Act.²⁶ In addition, the Federal Trade Commission sought and ultimately obtained warranty disclosure legislation for use in consumer sales transactions,²⁷ and the Commission has recently promulgated its holder-in-due course rules.²⁸

The Code effort of the late forties and early fifties and the more recent legislative and administrative commercial reforms have implications for the development of a law of electronic funds transfer systems. There no longer seems to be any compelling case for prolonging uncertainty over liability for such problems as delay, mistake and unauthorized use. The task for the Code draftsmen is a familiar one: based on business practices they must clarify the legal relationships involved when the new systems and procedures are used for money transactions. The rules of articles 3 and 4, which to a significant extent constitute the law of paper handling, check collection, and settlement procedures, are not well suited to the new EFT transactions. Thus, as in pre-Code days, legal rights are now in a state of uncertainty.

Two factors counsel delay, however, in fashioning rules to provide certainty of legal outcome. First, we must recognize that the systems and procedures for electronic funds transfer services are not well established business practices. Only a relatively few financial institutions are presently testing procedures, systems and services in an attempt to seek market hegemony. No model transaction or clear set of business relationships similar to those in

24. UNIFORM CONSUMER CREDIT CODE (as revised, 1974).

25. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified in scattered sections of 15, 18 U.S.C.).

26. 15 U.S.C. § 1601 (Supp. V, 1975).

27. Consumer Products Warranties, 15 U.S.C. § 2301 (Supp. V, 1975).

28. 16 C.F.R. § 433 (1976).

check payment transactions exists. Thus it would seem wise to await further development of these services before proceeding to draft legislation to govern these transactions even with the limited objective of providing certainty. A premature draft could well be based upon business transactions which might later evolve into quite different forms. An early draft could also create legal impediments to a desired evolution of money transactions. To look ahead, employees may insist on continuous payment in preference to the present system under which they essentially finance their employers for periods of one to four weeks. In theory, employees' accounts in an electronic environment could be continuously credited with wages or salaries. The new technology could provide horizons of service undreamed of, going far beyond mere replacement of the paper check.

A second factor counsels delay in producing a code of electronic funds transfer transactions. It should not be assumed that a limited group of draftsmen can develop an analytical structure for a code of electronic money transactions. Certainly the draftsmen of the UCC did not undertake to act alone. The comments are replete with references to case law analysis of the legal structure of the transactions addressed, and the Code language built as well upon preexisting uniform and tested statutory formulations.²⁹ Additionally, the drafters had available to them a substantial body of commentary and analysis on commercial law problems, as well as the benefit of uncounted hours of discussion in law school classrooms. There is no comparable wealth of knowledge to draw upon in the field of electronic funds transfers. The assumption that we have closely analogous transactions upon which to base new rules may prove misplaced if the new systems and procedures reconstruct our conception of money and money services. This they seem likely to do.

There is, moreover, another major dimension to the search for a commercial law for these new systems. It derives from the more recent commercial law reform efforts which indicate that certainty of result in a defined commercial transactions field is not enough. Goals for the EFT codification effort may be in need of redefinition, and, as a result of that redefinition, the policies and purposes of the new statute may be far more complex and diverse.

29. Examples are: the studied rejection of "title" as a determinant of outcomes in sales transactions, *UNIFORM COMMERCIAL CODE* § 2-101, Comment 1; the rejection of the "mirror image" rule articulated in *UCC* § 2-207; the perhaps overly refined or ill-defined threefold approach to warranty liability contained in *UCC* §§ 2-313, 2-314 and 2-315; the extensive flexibility for a law of commercial specialties contained in part I of article 3 concerning formal requisites of negotiability; the modification of *Price v. Neal*, 3 Burr. 1354 (1762), contained in *UCC* § 3-418; and the extensive reworking of legal structures contained in article 9, as documented by Professor Gilmore. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

The results, to the extent possible, must also be right. Thus, EFT law, in an era of more critical examination of commercial law rules, may well assume a broader policy role.

The search for policy leads to other areas of legal consideration, areas which have heretofore been viewed as divorced from the rulemaking function of commercial law statutes. Various institutions may demand that EFT commercial law guarantee them the opportunity to participate, making it unlikely that an EFT law could be limited solely to banks or even to depository institutions. At the same time, federal policy will require a mix of cooperative and competitive development of EFT services; changes in technology and proposed procedures will be measured against their effect on further competitive development of the systems. Regulatory agencies of financial institutions will have an interest in the safety and soundness of EFT practices which develop. Finally, users will have an interest in full disclosure of the costs and benefits of using these new systems. Many consumers, for example, are concerned over the loss of a paper writing which is evidence of payment. Although the UCC nowhere explicitly requires that checks be returned to customers, it does contain a provision which, in effect, requires consumers to examine their bank statements for accuracy.³⁰ Should this system of returned pieces of paper be abandoned in the EFT environment, or should an EFT commercial law system require, either explicitly or effectively, that a system of paper receipts be developed? Is it the proper province of an EFT codification to impose this kind of physical requirement? There are other instances where existing payment law policy may require reexamination.³¹

Existing check processing procedures also have certain implicit privacy dimensions. A check payment, unlike payment through a terminal, poses little threat of disclosure of bank balances. The amount of the purchase is simply inscribed on the check when it is taken in payment. Moreover, while banks may microfilm every check written, although they are not strictly re-

30. UNIFORM COMMERCIAL CODE § 4-406. As if to illustrate and underline the framework of articles 3 and 4 as a law of commercial specialties, UCC § 3-307(1) establishes that each signature on an instrument is admitted unless specifically denied in pleadings.

31. For example, the seldom-used stop payment power, which adds to the delays in processing check payments, is viewed as an essential consumer protection device. It first received uniform statutory treatment in the Code; there was no antecedent in the Uniform Negotiable Instruments Law. Interestingly, the operating rules for automated clearing houses provide an analogous rescission power for payment transactions processed through ACH clearing and routing procedures. *See, e.g.*, National Automated Clearing House Association Rules, Rule VIII(A) at 19 (effective Jan. 1, 1977).

quired to do so by the Bank Secrecy Act of 1970,³² the information contained on the check, such as the identity of the payee, is difficult to retrieve since indexing is done primarily by account number. Electronic funds transfer transactions may be indexed in a variety of ways with a consequent increase in the availability of information packaged in the payment, deposit or withdrawal transaction. The Code, of course, only peripherally touches on these matters.

Establishing a law of electronic funds transfers will be perplexing. Indeed, it will be difficult even to isolate and define a proper field for legislative attention. To assume that electronic funds transfer transactions are essentially a subject for old style commercial law treatment reveals two errors: one a pragmatic assessment and the other a matter of insight.

It is an error to assume that even present treatment of commercial law subjects is the province solely of a commercial code. The recent overlay of federal statutory and regulatory restrictions in such existing fields as sales warranties and holder-in-due course protections in negotiable instrument transactions shows that commercial transactions have already been redefined, although not in a single statutory formulation. If these recent developments are any indication, it is also an error to assume that the new technologies for money services may exist pristine in the setting of commercial law certainty. Forces well underway will not countenance such a result and will require consideration of consumer issues whether or not they are part of a single statutory effort.

Yet there is a distinctly pragmatic assessment in the view that one must, after all, begin somewhere to develop a statutory framework for the new money services. That framework may as well begin, on the basis of established, if numerically limited, transactional patterns to provide a framework of certainty of contractual structures. Indeed, the great lesson that the Uniform Commercial Code has taught, and an insight which it has given us, is that certainty must accompany policymaking. It must not, however, overshadow it. Thus, in structuring a law for electronic funds transfer transactions, taking the lead of the UCC, we should insist upon clarity, certainty and simplicity in the formulation of our policies.

32. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified in scattered sections of 12, 31 U.S.C.).