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## **International Commercial Wire Transfers: The Lack of Standards**

*Jeffrey S. Tallackson\* and Norma Vallejo\*\**

### **I. Introduction**

A wire transfer is a message transmitted by telephone, telegraph, cable, radio, a computer telecommunications network or other electronic means. The message effects a transfer of money from the initiator to the recipient by appropriate adjustments to correspondent accounts of the financial institutions in the chain of transmission. Although the more modern and accurate term for such a transaction is "electronic funds transfer" (EFT), that usage is more evocative of consumer systems involving the use by individuals of debit cards, point-of-sale terminals, automated teller machines, telephone bill-paying and the like. In the corporate and commercial areas, with which this Article is concerned, the term "wire transfer" is still customary and will be used. The term "electronic funds transfer" will be used where it seems appropriate in the consumer context. Wire transfer systems, in the form of wire or cable transfers of money by telegraph companies and banks, have existed since soon after the invention of the telegraph. Recently, such systems have become more sophisticated as telecommunications networks have become increasingly computerized and corporate cash managers have made increasing use of bank-provided cash management programs. These systems may include the capacity for a corporate customer to initiate funds transfers through its bank on a pre-programmed basis through a micro-computer resident in the customer's office.

Wire transfer systems are an integral part of the international financial system. Vast sums of money are transferred every day by wire transfer systems as such transactions are routinely used by banks, their customers and governments to effect time-sensitive transfers of large sums of money.<sup>1</sup> Despite this ubiquity in domestic

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<sup>1</sup> The enormity of those transactions in both absolute numbers and dollar amounts is staggering. During 1983, 38 million funds transfers totalling \$84 trillion were chan-

and international banking as well as the susceptibility of such systems to error and fraud, wire transfer systems have evolved virtually immune from any legislative regulation of the parties' rights and duties. No coherent body of law governs this area. This Article will attempt to describe the most applicable law which does exist in the United States and the United Kingdom.<sup>2</sup>

## II. American Law

### A. Statutory and Regulatory Provisions

#### 1. Federal Law

The federal Electronic Funds Transfer Act<sup>3</sup> and Regulation E of the Board of Governors of the Federal Reserve System (the Fed)<sup>4</sup> (collectively the EFTA) apply to consumer wire transfers. The regulatory approach taken in the EFTA, which is modeled on the federal Truth in Lending Act<sup>5</sup> and Regulation Z of the Fed,<sup>6</sup> is adapted to consumer protection in the context of small dollar transactions involving parties of unequal bargaining power. The EFTA does not apply to commercial wire transfers and is not a useful model for such transactions.

Regulation J of the Federal Reserve System is another potential source of regulation for the wire transfer industry.<sup>7</sup> Subpart A of the regulation is entitled "Collection of Checks and Other Items." This provision "governs the collection of checks and other cash and non-cash items by Federal Reserve Banks balances."<sup>8</sup> Subpart B, entitled "Wire Transfers of Funds," "governs the handling by Federal Reserve Banks . . . of transfer items and transfer requests. Its purpose

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neled through the Federal Reserve Communications System (Fedwire). The Clearing House Interbank Payment System (CHIPS) accounted for 19 million transfers, amounting to \$57 trillion. BankWire processed approximately 1.8 million messages for its 180-bank membership for a total of approximately \$8 trillion. *Bank for International Settlements, Bank Administration Institute, Payment Systems in Eleven Developed Countries* 84 (1985). As of year end 1982, the Society for Worldwide Interbank Financial Telecommunications (S.W.I.F.T.) was averaging a daily volume of 346,300 transactions for its 1,017 member banks. *Society for Worldwide Interbank Financial Telecommunications S.A., General Introductory Brochure* 25 (1983).

<sup>2</sup> In 1980 the UNCITRAL Study Group on International Payments conducted a survey to determine what laws or agreements existed with respect to the finality of payment. Austria, Canada, Kuwait, the Netherlands, New Zealand, Norway and the United Kingdom replied that there were none in those countries. Australia, France, the Federal Republic of Germany and Portugal referred to various inter-bank agreements covering aspects of the problem. The United States cited Regulation J. Czechoslovakia cited a provision in its Economic Code. *U.N. Commission on International Trade Law, Report of the Secretary-General, on Electronics Fund Transfers*, 15 U.N. GAOR at 9 n.20, U.N. Doc. A/CN.9/221 (1982).

<sup>3</sup> 15 U.S.C. §§ 1693-1693r (1982).

<sup>4</sup> 12 C.F.R. § 205.1-.14 (1985).

<sup>5</sup> 15 U.S.C. §§ 1601-1667e (1982).

<sup>6</sup> 12 C.F.R. § 226.1-.29 (1985).

<sup>7</sup> *Id.* § 210.1-.38.

<sup>8</sup> *Id.* § 210.1.

is to provide rules for the wire transfer of funds."<sup>9</sup> Subpart A defines "item" as "an instrument for the payment of money, whether negotiable or not" which is payable in a Federal Reserve District and meets certain other specifications.<sup>10</sup> As that definition and the caption and purpose clause of subpart A would suggest, subpart A does not apply to wire transfers.

Subpart B was adopted by the Fed "in order to define the rights and responsibilities of member banks using the Federal Reserve Communications System for what is known as 'wire transfers of funds.' [It] does not govern other electronic payments, such as point-of-sale transactions and payments processed through automated clearing houses."<sup>11</sup> Although subpart B does expressly apply to wire transfers, its coverage is limited. First, it applies only to transfers effected through the Federal Reserve Communications System, "Fedwire." Although very important, this is not the only medium for effecting wire transfers. Second, the substance of subpart B does not address in a comprehensive fashion the rights and obligations of the parties to a wire transfer. It is fundamentally a procedural regulation directed to defining the rights and obligations of the various Federal Reserve Banks.

Although subpart B is "binding on transferors, transferees, beneficiaries, and other parties interested in any item,"<sup>12</sup> its substantive provisions are relatively limited. Under subpart B, a transferor who transmits an item authorizes its Reserve Bank to debit its account for the amount of the item and process the item. The transferor also authorizes the transferee's Reserve Bank to credit the transferee's account accordingly.<sup>13</sup> In addition, the transferor agrees to maintain a balance in its account sufficient to cover any debits. The Reserve Bank has a security interest in the transferor's assets held by or for the account of the Reserve Bank if the balance is insufficient.<sup>14</sup> By maintaining or using an account at a Reserve Bank, a transferee authorizes its Reserve Bank to credit the amount of a transfer item to its account. The transferee agrees either to credit promptly the amount of the transfer item to the beneficiary's account, or to make

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<sup>9</sup> *Id.* § 210.25.

<sup>10</sup> *Id.* § 210.2(g).

<sup>11</sup> *Background and Summary of Regulation J*, [1986] Fed. Res. Reg. Serv. § 7-059.

<sup>12</sup> 12 C.F.R. § 210.27(b) (1985). A "transferor" is a "member bank, a Reserve Bank, or other institution that maintains or uses an account at a Reserve Bank and that is authorized by that Reserve Bank to send a transfer item or request to it." *Id.* § 210.26(g). A "transferee" is a "member bank, a Reserve Bank, or other institution that (1) maintains or, if authorized by the Reserve Bank, uses an account at a Reserve Bank and (2) is designated in a transfer item or request to receive the amount of the item or request." *Id.* § 210.26(f). A "beneficiary" is "a person or organization, other than the transferee, designated in a transfer item or request to receive the amount of the item or request from the transferee." *Id.* § 210.26(a).

<sup>13</sup> *Id.* § 210.29.

<sup>14</sup> *Id.* § 210.31(a).

it available to the beneficiary, or to notify promptly its Reserve Bank if uncontrollable circumstances prevent the credit or transfer of an item to the beneficiary.<sup>15</sup> A Reserve Bank assumes no liability under subpart B except for its own or another Reserve Bank's failure to credit the amount of a transfer item to a transferee's account. Even in that case, the Bank's liability is limited to its immediate transferor for damages proximately caused by the Bank's lack of good faith or ordinary care. Proximate cause is a question of fact to be determined in each case.<sup>16</sup>

Although subpart B governs substantive rights and obligations among the various parties, its references primarily are limited to the rights and obligations of the Reserve Banks. Therefore, it is neither determinative of the rights between the transferor and transferee nor of the rights and obligations among transferor, transferee and beneficiary. For example, although 12 C.F.R. § 210.30 obligates the transferee to credit the transfer amount to the account of the beneficiary, notification to the Reserve Bank is the only specific obligation in the event of the inability to do so. No comparable provision for Reserve Banks governs a transferor's or transferee's liability, nor is there a clear right of private action under Regulation J.<sup>17</sup>

Similarly, the Fed's operational and statistical safeguards establish voluntary limits for the maximum daylight exposure a bank may sustain in wire transfers.<sup>18</sup> Though potentially significant for safe wire transfer operations, these safeguards do not establish a bank's liability to or rights against a customer, a correspondent bank or a customer of a correspondent bank.

## 2. State Law

### a. Special EFT Legislation

Many states have adopted legislation affecting electronic funds transfers. The state legislation, however, relates to consumer pro-

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<sup>15</sup> *Id.* § 210.30.

<sup>16</sup> *Id.* § 210.38(a), (b). It is interesting to note that in 1985 the Fed proposed an amendment to the proximate cause provision which would provide that:

A Reserve Bank's liability for such a failure to credit is limited to damages that are attributable directly and immediately to the failure to credit, but does not include damages that are attributable to the consequences of the failure to credit, even if such consequences were foreseeable at the time of such failure.

50 Fed. Reg. 12,313 (1985). In this connection, see the discussion of *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820 (N.D. Ill. 1981), *aff'd in part, rev'd in part, and vacated in part*, 673 F.2d 951 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982); see *infra* text accompanying note 30.

<sup>17</sup> See *Central Coordinates, Inc. v. Morgan Guaranty Trust Co.*, 129 Misc. 2d 804, 494 N.Y.S.2d 602, 606 (Sup. Ct. 1985).

<sup>18</sup> 49 Fed. Reg. 13,186-87 (1984); 49 Fed. Reg. 24,595 (1984); 50 Fed. Reg. 21,120 (1985); 50 Fed. Reg. 32,493-94 (1985); 50 Fed. Reg. 35,606 (1985).

tection issues similar to the EFTA<sup>19</sup> and provides little guidance in the wire transfer matters discussed here.

*b. Uniform Commercial Code*

Articles 3 and 4 of the Uniform Commercial Code (U.C.C.) are the obvious starting places for any discussion of the statutory rules which apply to transfers of money under state law. The Articles, which govern negotiable instruments (Article 3) and the bank collection process (Article 4), have been adopted in substantially identical form by all fifty states and the District of Columbia. Since the Articles cover virtually all aspects of negotiable instrument and bank collection law, Articles 3 and 4, if applicable, would leave few wire transactions questions unanswered. Some suggest that Article 4 does in fact apply to wire and electronic transfers.<sup>20</sup>

The difficulty presented by attempts to apply Articles 3 and 4 to wire transfers is that the relevant definitions of the U.C.C. simply do not contemplate such transactions. Article 3 of the U.C.C. is entitled "Commercial Paper" and places primary concern on negotiable instruments. Since section captions are part of the Act<sup>21</sup> and since negotiable instrument is defined as any "writing" which satisfies specific conditions,<sup>22</sup> the obvious inference is that Article 3 is inapplicable to wire transfers.

Similar obstacles occur when examining Article 4, which applies to bank deposits and collections. The operative term in Article 4 is "item," which is defined in section 4-104(g) as "any instrument for the payment of money even though it is not negotiable but does not include money."<sup>23</sup> Here again it is difficult to avoid the inference to

<sup>19</sup> For a useful compilation of state statutory and regulatory materials, see generally R. ZIMMER & T. EINHORN, *THE LAW OF ELECTRONIC FUNDS TRANSFER* (1978).

<sup>20</sup> Clarke, *An Item is an Item is an Item: Article 4 of the U.C.C. and the Electronic Age*, 25 BUS. LAW. 109 (1969).

<sup>21</sup> U.C.C. § 1-109 (1978).

<sup>22</sup> U.C.C. § 3-104 (1978). "Writing" includes "printing, typewriting, or other intentional reduction to tangible form." U.C.C. § 1-201(46) (1978).

<sup>23</sup> The states of Florida and Georgia have adopted non-standard amendments to U.C.C. § 4-104(g) (1978) which incorporate the concept of a wire transfer or EFT transaction. Florida provides that:

"Item" means any instrument or electronically recorded, stored, or transmitted message for the payment of money even though it is not negotiable, but does not include money, and a photographic or other similar reproduction of an item may be treated in all respects as the original item by any payor bank or nonbank payor of the item upon being furnished with an affidavit that the original item has been lost or destroyed and upon being furnished with security satisfactory to such payor.

FLA. STAT. ANN. § 674.104(1)(g) (West Supp. 1986). Georgia provides that:

"Item" means any instrument for the payment of money even though it is not negotiable but does not include money; "item" shall also include any stored electronic message unit for the payment of money.

GA. CODE ANN. § 11-4-104(g) (1982). There appear to be no judicial decisions construing these non-standard variations in the U.C.C.

be drawn from the word "instrument." The term "instrument" is defined in neither Article 4 nor in the general definitional provisions of section 1-201.<sup>24</sup> The term's definition in section 9-105(1)(i)<sup>25</sup> contemplates a conventional writing.<sup>26</sup>

One argument suggests that electronic transfers, or their representation as magnetic impulses on computer tape, may be considered "writings" and that where Article 4 "provides either no explicit rule or an inappropriate rule to govern the relationships between the parties, the Article is congenial to be supplemented and varied by agreements, while affording, in Section 4-103, an effective screen against unfairness."<sup>27</sup> The "writing" argument has its difficulties, as suggested above, and the Fed, clearing houses and private institutions have thus far failed to adopt agreements or rules including wire transfers in the definition of "writings." Although there are analogies to the debit transfer in the consumer EFT context, the usual commercial wire transfer, a "credit transfer," is considered a transmittal for *delivery* by a payor to a payee of a sum of money to be paid to the recipient payee. Assuming that the latitude provided by section 4-103 of the U.C.C. extends to the establishment of rules for transactions not otherwise covered by the Code, the fact remains that there are no standard agreements in the industry and no Fed rules. Whatever its merits in the abstract, the few courts which have directly addressed the issue have rejected the contention that the U.C.C. applies to wire transfers.

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<sup>24</sup> Clarke, *supra* note 20, at 111-12.

<sup>25</sup> "Instrument" means a negotiable instrument (defined Section 3-104), or a certificated security (defined in Section 8-102) or any other *writing* which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. (Emphasis supplied.)

U.C.C. § 9-105(1)(i) (1978).

<sup>26</sup> See BLACK'S LAW DICTIONARY 719-20 (5th ed. 1979); Moore v. Diamond Dry Goods Co., 47 Ariz. 128, 54 P.2d 553 (1936); Little v. Hilliard, 117 Colo. 163, 184 P.2d 665 (1947).

<sup>27</sup> Clarke, *supra* note 20, at 109. U.C.C. Subsections 4-103(1) and (2) provide:

(1) The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearing house rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled.

U.C.C. §§ 4-103(1), (2) (1978).

Clarke also notes that Article 4 by its terms applies only to what are referred to as "debt transfers," that is, to transactions (such as the typical processing for collection of a check) where an instrument is placed into the collection process by the payee with the intent that it result in a debit to the ultimate recipient which will affect payment to the payee. Clarke, *supra* note 20, at 112, 116-17.

### B. Common Law Rules

The few U.S. cases relating specifically to wire transfers touch upon three relatively narrow legal issues: (1) the liability of a transmitter to the sending customer for a mishandled transfer; (2) the finality of wire transfers; and (3) the liability of a receiving bank for an unauthorized transfer.

#### 1. Transmitter Liability

The precursors to the modern wire transfer cases are the old telegraph company cases allocating responsibility for mishandled transfers. In *Kerr S.S. Co. v. Radio Corp.*,<sup>28</sup> the Kerr Steamship Company delivered a coded message to RCA for transmittal to the Philippines. The transmittal copy was lost by RCA and the message, instructions for the loading of a vessel, was never sent. Kerr claimed that as a result the vessel was never loaded, and it was damaged.<sup>29</sup> In reversing a trial court judgment in favor of Kerr, the New York Court of Appeals held, in an opinion by Justice Cardozo, that the telegraph company was not liable to Kerr for consequential damages arising out of its failure to transmit the message under the rule of *Hadley v. Baxendale*.<sup>30</sup> *Kerr* was a pre-U.C.C. decision and did not involve a bank wire transfer.

The most significant modern U.S. decision concerning liability for a mishandled wire transfer is *Evra Corp. v. Swiss Bank Corp.*<sup>31</sup> Evra Corporation (Evra) had chartered a vessel from Pandora Shipping Company (Pandora) for which it was obligated to make semi-monthly charter-hire payments at Banque de Paris et des Pays-Bas (Suisse) S.A., (Banque de Paris) in Geneva. Evra paid charter-hire by wire transfers which it initiated through its bank, Continental Illinois National Bank and Trust Company of Chicago (Continental). Continental made some of these transfers through its correspondent, Swiss Bank Corporation (Swiss Bank). Pandora was entitled to cancel the charter-party if Evra failed to make timely payment.<sup>32</sup>

On April 25, 1973, Evra requested by telephone that Continental wire transfer a charter-hire payment due on April 27, 1973. Continental in Chicago forwarded the message that afternoon to its London branch for retransmittal to Swiss Bank in Geneva. Continental's London branch received no response from Swiss Bank at the customary telex number. The London branch then used an alternate telex number which it had used occasionally in the past and there-

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<sup>28</sup> 245 N.Y. 284, 157 N.E. 140, cert. denied, 275 U.S. 557 (1927).

<sup>29</sup> *Id.* at 287, 157 N.E. at 143.

<sup>30</sup> *Id.* at 293, 157 N.E. at 149; see *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854).

<sup>31</sup> 522 F. Supp. 820 (N.D. Ill. 1981), *aff'd in part, rev'd in part, and vacated in part*, 673 F.2d 951 (7th Cir. 1982), cert. denied, 459 U.S. 1017 (1982).

<sup>32</sup> *Evra*, 522 F. Supp. at 823-24.



upon received Swiss Bank's answerback, from which the court concluded that Swiss Bank had in fact received the message. Swiss Bank, however, never processed the message and according to the court, Swiss Bank either lost the message or failed to keep paper in the machine so that it did not actually receive a printed copy of the wire transfer message.<sup>33</sup>

Pandora seized the occasion of the missed payment to cancel the charter, which was then at a rate very favorable to Evra. Evra sued Swiss Bank, charging breach of contract, negligence and breach of fiduciary duty.<sup>34</sup> Swiss Bank impleaded Continental as a third-party defendant which in turn cross-claimed against Evra which in its turn cross-claimed against Continental.<sup>35</sup>

Holding that Illinois law governed rather than Swiss law, the court concluded that though the Illinois U.C.C. was inapplicable, analogous reasoning was appropriate.<sup>36</sup> The court analogized Swiss Bank, as Continental's correspondent, to a "collecting bank" under Article 4 of the U.C.C. and concluded that Swiss Bank was Evra's agent.<sup>37</sup> The court also found that "Swiss Bank owed a duty of care to plaintiff to maintain a system of receiving and disposing of telex messages upon which plaintiff could rely, and that Swiss Bank breached that duty" and further that "Swiss Bank was also negligent in failing to institute a system for logging messages to insure that diverted messages (messages intended for other departments) were not lost or mishandled."<sup>38</sup>

The district court found Swiss Bank liable for Evra's damages, consisting of lost profits arising out of the cancellation of its charter-party. Plaintiff's other claims were dismissed, as were the cross-claims. The Seventh Circuit Court of Appeals reversed the award of consequential damages.<sup>39</sup>

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<sup>33</sup> *Id.* at 824-25.

<sup>34</sup> *Id.* at 822.

<sup>35</sup> *Id.* at 822-23.

<sup>36</sup> *Id.* (citing *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. 1979), *aff'g* 464 F. Supp. 989 (S.D.N.Y. 1979)); *see infra* note 36 and accompanying text.

<sup>37</sup> The court stated that:

[A] correspondent bank in a wire transfer transaction may be presumed to be an agent of the initiator of the transaction until such time as the transaction is completed. The court finds that Swiss Bank, as a correspondent bank in the subject transaction, was an agent of plaintiff and owed plaintiff the same duty of care as did Continental with whom plaintiff had an express contractual relationship.

*Id.* at 828.

<sup>38</sup> *Id.* at 829.

<sup>39</sup> Evra suffered no direct damages since the transfer was not made and its account with Continental did not bear interest. The court of appeals found that wire transfers were such a customary and usual business practice that Swiss Bank could not be held to be on notice of any special consequences relating to the transaction, and that the rule of *Hadley v. Baxendale* was applicable. *Evra*, 673 F.2d at 955-56 (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)).

*Kerr and Evra* were followed by a New York court decision, *Central Coordinates Inc. v. Morgan Guaranty Trust Co.*<sup>40</sup> Bellmore Investment Ltd. (Bellmore) had an option to acquire certain stock from Intercare Management Services, Inc. (Intercare). To exercise certain of the options which would expire on July 14 and July 21, 1983, Bellmore on July 8, 1983, directed its bank, Union Chelsea National Bank (Chelsea), to wire transfer 91,500 dollars to the New York branch of Barclay's Bank International (Barclay's) to the account of "Alexander P. Maillis/U.S. Dollar Client," a customer at Barclay's Bahamas branch. The funds were to be withdrawn from Maillis' account and delivered to Intercare as payment for the stock by July 14, 1983.

Chelsea, on July 11, wired the funds through the Fedwire to its correspondent Morgan Guaranty Trust Company (Morgan), with instructions to credit Barclay's account with Morgan for credit by Barclay's to the designated Maillis account. Morgan credited the funds to Barclay's account that afternoon. Morgan failed, however, to notify Barclays of the credit or of the related instructions until after the close of Barclay's business hours on July 14, 1983 (after having been advised by Chelsea that the transmission had not gone through). Barclay did not credit the funds to Maillis' account until July 15.<sup>41</sup>

Plaintiff, Central Coordinates, Inc., (Bellmore's assignee), sued Morgan for negligence, breach of contract and strict liability claiming losses resulting from the delay in completing the wire transfer and the consequent lapse of the options. On motions for summary judgment, the court denied plaintiff's motion and granted Morgan's to the extent it sought dismissal of plaintiff's claims for consequential damages. The court held that plaintiff could not recover consequential damages either under the U.C.C. or any common law principle of contract, tort or strict liability, citing *Hadley v. Baxendale*, *Kerr and Evra*.<sup>42</sup>

## 2. Finality of Transfers

Several New York cases have held that a wire transfer is final when the transmitting bank notifies the receiving bank that it has credited the receiving bank's account, regardless of any posting or bookkeeping entries remaining to be effected by the transmitting bank.<sup>43</sup>

The major modern wire transfer finality decision is *Delbrueck &*

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<sup>40</sup> 129 Misc. 2d 804, 494 N.Y.S.2d 602 (Sup. Ct. 1985).

<sup>41</sup> *Central Coordinates*, 129 Misc. 2d at 805, 494 N.Y.S.2d at 603-04.

<sup>42</sup> *Id.* at 806-07, 494 N.Y.S.2d at 604-05.

<sup>43</sup> *Singer v. Yokohama Specie Bank*, 293 N.Y. 542, 58 N.E.2d 726 (1944), *rev'g* 267 App. Div. 980, 48 N.Y.S.2d 799 (1944), *reh'g denied*, 294 N.Y. 689, 60 N.E.2d 842 (1945); *Guaranty Trust Co. v. Lyon*, 124 N.Y.S.2d 680 (Sup. Ct. 1953).

*Co. v. Manufacturers Hanover Trust Co.*<sup>44</sup> In that case, Delbrueck and Company (Delbrueck), a German banking firm, sued Manufacturers Hanover Trust Company (Manufacturers) claiming that Manufacturers had negligently failed to reverse two funds transfers to Chase Manhattan Bank (Chase) for the account of Bankhaus I.D. Herstatt, K.G.a.A. (Herstatt), also a German bank. Delbrueck, which maintained an account at Manufacturers, had foreign exchange dealings with Herstatt, which maintained an account at Chase. In connection with certain foreign exchange transactions, Delbrueck instructed Manufacturers by telex on June 25, 1974, to transfer on June 26, 12.5 million dollars to Chase for the account of Herstatt. On June 26, Delbrueck instructed Manufacturers to pay another ten million dollars due on June 27. At 10:30 a.m. on June 26, Herstatt was closed by German banking authorities. After hearing of the closing, Chase immediately froze all payments out of the Herstatt account but continued to accept incoming transfers. At 11:30 a.m. on June 26, Delbrueck instructed Manufacturers not to effect the ten million dollars transfer authorized for June 27. At 11:36 and 11:37 a.m., Manufacturers' transfer to Chase of the total 12.5 million dollars authorized for June 26 was effected through the Clearing House Interbank Payment System (CHIPS). Later in the day Delbrueck called and telexed Manufacturers in an effort to cancel the 12.5 million dollars transfer and Delbrueck and Manufacturers both called Chase to the same end. These efforts were unsuccessful and Chase formally credited the 12.5 million dollars to Herstatt's account at 9 p.m. on June 26.<sup>45</sup>

The decisive issue in the *Delbrueck* case was whether the transfers were final and irrevocable at 9 p.m. when the transfers were credited by Chase to the Herstatt account, as Delbrueck contended, or whether the finality of the transfers had occurred at 11:36 and 11:37 a.m. when the transfers were effected through the CHIPS system. Both the district court and the Court of Appeals for the Second Circuit held that the transfers were final and irrevocable when effected through CHIPS at 11:36 and 11:37 a.m. and that, accordingly, Manufacturers was not negligent in failing to do what was impossible for it to do.<sup>46</sup>

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<sup>44</sup> 609 F.2d 1047 (2d Cir. 1979), *aff'g* 464 F. Supp. 989 (S.D.N.Y. 1979).

<sup>45</sup> *Delbrueck*, 464 F. Supp. at 991-92.

<sup>46</sup> The court of appeals cited Judge Broderick's step-by-step analysis of the transfer through CHIPS, illustrating the very moment when the transfer was deemed final:

When a determination is made at the sending bank (Manufacturers) to make the payment, the [send] form is returned to one of the computer terminal operators, reinserted in the computer and the release key is depressed. At that moment, the central computer at the Clearing House causes a credit ticket to be printed automatically at the terminal of the receiving bank (Chase) and a debit ticket to be printed at the terminal of the sending bank (Manufacturers). Further, the central computer automatically makes a permanent record of the transaction and debits the Clearing House account of

The court of appeals advanced several grounds for its affirmation. First, it considered that the CHIPS rules contemplated finality. Second, it stated that the U.C.C. was not applicable but that "analogous use of concepts such as the finality of checks once 'accepted' (§ 3-410, 4-303) would support the irrevocability of these transfers."<sup>47</sup> Third, it stated that the transfers were irrevocable under common law principles as assignments of choses in action (Delbrueck's deposits with Manufacturers) in which the necessary notice to the assignee was given and effective on the morning of June 26 when Chase received notice of the transfers.<sup>48</sup>

### 3. Fraud

Perhaps the best known of the few fraud cases is *Securities Fund Services, Inc. v. American National Bank & Trust Co.*<sup>49</sup> Securities Fund Services, Inc. (SFS), in its capacity as servicing agent for Templeton Growth Fund Ltd. (Templeton), a mutual fund, received on October 14, 1980, fraudulent written instructions purporting to be from Bushman, a Templeton shareholder, directing the liquidation of his Templeton shares and the transfer of the liquidation proceeds (some \$2,017,867.50) to an account at the American National Bank and Trust Company of Chicago (ANB) designated "John Bushman, Trustee//204471."<sup>50</sup> SFS directed Templeton's bank and custodian, New England Merchants National Bank of Boston (NEMB) to effect the transfer, which NEMB initiated on October 15, 1980.<sup>51</sup>

ANB had no account in Bushman's name. Nonetheless, ANB credited the transfer to account number 204471, which it held in the name of Gerald S. Haberkorn, Inc. (Haberkorn), without notifying or

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the sending bank and credits the Clearing House account of the receiving bank. In this case, this step was effected at 11:36 and 11:37 for the \$10 million and \$2.5 million payments, respectively, from Manufacturers for Delbrueck to Chase for Herstatt.

*Delbrueck*, 609 F.2d at 1049 n.1.

<sup>47</sup> *Delbrueck*, 609 F.2d at 1051.

<sup>48</sup> On this latter point, the court of appeals made the following observations:

Chase was the assignee. Delbrueck's direction in the telex message was to pay

To CHASE BANK N Y  
ACCT BANKHAUS ID HERSTATT  
KGAA

When Manufacturers transferred the money to Chase, Chase received a written credit slip at its computer terminal. That was notice to Chase of the assignment.

Even if one assumes that Herstatt, not Chase, was the assignee, notice to Chase will be imputed to Herstatt. Chase was the paying and receiving agent of Herstatt, and notice to an agent is imputed to the principal.

*Id.* at 1051-52 (citing *Farr v. Newman*, 14 N.Y.2d 183, 187, 199 N.E.2d 369, 250 N.Y.S.2d 272 (1964)).

<sup>49</sup> *Securities Fund Servs., Inc. v. American Nat'l Bank & Trust Co.*, 542 F. Supp. 323 (N.D. Ill. 1982).

<sup>50</sup> *Id.* at 325.

<sup>51</sup> *Id.*

making any inquiry of NEMB as to the discrepancy. Haberkorn had agreed to sell two million dollars worth of Jewels to two individuals upon their transfer of this sum to Haberkorn's account at ANB.<sup>52</sup>

By the time SFS discovered the fraud on November 4, 1980, the funds transferred to the Haberkorn account had been withdrawn. SFS paid for the reissuance of the liquidated Templeton shares to Bushman and brought suit against ANB for the loss, charging negligence, breach of duties as an agent, breach of duties as a bailee, conversion, a third-party beneficiary claim (of an alleged contract between NEMB and ANB) and estoppel to deny the existence of a deposit.<sup>53</sup> On motions, the court dismissed the bailment, conversion and estoppel counts but let stand the remaining counts, which sounded basically in agency and negligence. In its opinion, the court relied heavily on the opinion of the district court in *Evra*, analogizing ANB to Swiss Bank in that case and concluding that ANB owed SFS a duty of care which might have been breached.<sup>54</sup> The court was aware of the *Evra* reversal on *Hadley v. Baxendale* grounds, observing that "a different case was presented where, as here, direct damages are sought."<sup>55</sup>

*Shearson/American Express, Inc. v. American National Bank & Trust Co.*<sup>56</sup> is a similar case in which it was claimed ANB failed to meet its obligations. It was alleged that Shearson/American Express, Inc. (Shearson), on August 11, 1982, directed Chemical Bank (Chemical)

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 325-26.

<sup>54</sup> *Id.* at 327.

In the present case, SFS (like *Evra*) is the initiator of the wire transfer. NEMB (like Continental Bank) is the custodial bank for funds disbursed by SFS. ANB, as the receiver of the wire transfer, is in the same position as Swiss Bank. In light of the holding in *Evra*, this court concludes that under the facts alleged, an agency relation existed between SFS and ANB. Accordingly, ANB owed SFS a duty of care which its actions in handling the transfer may have breached.

.....  
In this case, SFS can likewise be deemed to be a "customer" of ANB. Section 4-104(e) of the U.C.C. defines a customer as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." Through the agency relation discussed, ANB was acting essentially as a collecting bank for NEMB which in turn was the custodial agent of the funds disbursed by SFS. Furthermore, the official comment to U.C.C. § 4-203, dealing with the effect of instructions given to a collecting bank by the transferor, states that the collecting bank is liable for failure to exercise good faith or ordinary care. Thus, reading the complaint in the light most favorable to SFS, it was a "customer" of ANB which owed it a duty to use due care in handling the wire transfer. Further, the loss of the transferred funds is the reasonably foreseeable result of a deposit made where the name on the transfer instructions differs from the name on the account into which the funds are deposited.

*Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Shearson/American Express Inc. v. American Nat'l Bank and Trust Co.*, No. 83-C-0555 (N.D. Ill. Aug. 18, 1983) (available on LEXIS).

to wire one million dollars to ANB for deposit to account number 244074 held by ANB in the name of Irving Mazur. Upon receipt, ANB credited the one million dollars to account number 244074, which was owned by "Phone Bat-Tery Ltd.," not Irving Mazur (who had no account at ANB nor any connection with account number 244074 or Phone Bat-Tery Ltd.). ANB made no inquiry regarding the discrepancy. After uncovering the error in December 1982, ANB refused payment to Shearson.<sup>57</sup>

Shearson's complaint charged reckless, willful and wanton misconduct constituting gross negligence; failure to act in accordance with reasonable commercial standards; negligence; breach of fiduciary duty; breach of bailment duties; conversion; breach of contract; breach of agency; and estoppel.<sup>58</sup> Consistent with and citing *SFS*, the court granted ANB's motion to dismiss the counts based on conversion and bailment,<sup>59</sup> but, in contrast to *SFS*, denied the motion to dismiss the estoppel count as well as the other counts.<sup>60</sup>

The facts of *SFS* were virtually duplicated in *Bradford Trust Co. v. Texas American Bank*.<sup>61</sup> Bradford Trust Company of Boston (Bradford), in its capacity as transfer agent for Massachusetts Cash Management Trust (MCMT), a money market fund, received on May 27, 1980, a fraudulent letter and stock power purporting to be from one Frank S. Rochefort, Jr., an MCMT account holder, directing the liquidation of 800,000 dollars of his account and transfer of the proceeds to account number 057-141 at Southern National Bank (Southern—the name of which at the time of the litigation had been changed to Texas American Bank-Houston). Bradford directed its bank, State Street Bank and Trust Company of Boston (State Street) to wire the proceeds to "Southern National Bank A/C Frank S. Rochefort, Jr. Acct. 057-141," which State Street did on May 28, 1980.<sup>62</sup>

Southern had previously been advised by its customer, Colonial Coins, Inc. (Colonial), that Colonial was expecting an 800,000 dollar wire transfer in connection with a purchase of coins and bullion from Colonial by two individuals, the Friedmans. Colonial had in connection with that transaction advised the Friedmans of its account number with Southern, 057-141, the account number specified in the fraudulent liquidation order received by Bradford (Rochefort had no account with Southern). Upon receipt of the wire transfer from State

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<sup>57</sup> *Id.*, slip op. at 2.

<sup>58</sup> *Id.*, slip op. at 2-3.

<sup>59</sup> *Id.*, slip op. at 4-5.

<sup>60</sup> *Id.*, slip op. at 5-6.

<sup>61</sup> *Bradford Trust Co. v. Texas Am. Bank*, No. H-81-2144 (S.D. Tex. Oct. 3, 1983) (memorandum order), (S.D. Tex. July 12, 1984) (final judgment) (available on LEXIS), *rev'd*, 790 F.2d 407 (5th Cir. 1986).

<sup>62</sup> *Id.*, No. H-81-2144, slip op. at 10-11.

Street, Southern credited Colonial's account number 057-141 and so advised Colonial. Colonial thereupon shipped the coins and bullion to the Friedmans.

On June 2, 1980 Rochefort (presumably having received a statement of account, although the opinion does not make this clear) advised Bradford that he had never made a liquidation request and demanded that his account be reinstated for the 800,000 dollars debited to it. After investigation, Bradford credited Rochefort's account for the 800,000 dollars debit and demanded reimbursement from both Southern and Colonial, both of whom refused.<sup>63</sup> Litigation ensued.

On motions to dismiss and for summary judgment, the court let stand Bradford's claims against Southern based on Southern's alleged breach of duty to Bradford and negligence in paying the transferred funds to Colonial's account when they were intended for Rochefort's (non-existent) account. It also allowed to stand a claim that Southern or Colonial wrongfully retained 13,309 dollars which remained after 786,686 dollars was transferred to Colonial.<sup>64</sup> The court dismissed claims based on the U.C.C. (citing *Delbrueck and Evra*), conversion (on the ground that the funds could not be identified as a specific chattel), mistake of fact and unjust enrichment (on the ground that the undisputed facts showed that Southern had changed its position in reliance on Bradford's instructions) and several claims that it considered duplicative of the basic breach of duty and negligence claims (wrongful change of the beneficiary's name, other specific acts, and failure to follow reasonable banking practices).<sup>65</sup> The court dismissed all claims of Bradford against Colonial except the wrongful retention claim referred to above and a claim sounding in negligence. The negligence claim was dismissed on the theory that Bradford might be able to prove facts showing that Colonial was somehow put on notice that the transaction was so irregular that it should have investigated before concluding its coin and bullion transaction with the Friedmans.<sup>66</sup>

In its memorandum and order with respect to the motions to dismiss and for summary judgment, the court concluded, as did the *Delbrueck* and *Evra* courts, that the U.C.C. does not apply to wire transfers and noted that the EFTA was not applicable to the transaction.<sup>67</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, slip op. at 12.

<sup>65</sup> *Id.*, slip op. at 12-13.

<sup>66</sup> *Id.*, slip op. at 13.

<sup>67</sup> The conclusion that the U.C.C. is inapplicable does not entirely dispose of Bradford's first cause of action since the common law may support its assertion that Southern breached certain legal duties. The common law concerning wire transfers is poorly developed. Most of the reported cases are old and involve the liability of telegraph carriers. *E.g.*, *Western Union Telegraph*

After further proceedings (the precise nature of which is not entirely clear from the reported decisions), the court rendered a final judgment and a memorandum and order with respect thereto. The court's judgment was that the aggregate loss of 799,995 dollars should be borne equally by Bradford and Southern (*i.e.*, that Bradford recover half of that amount from Southern) because "[t]he Plaintiff contributed to the causation of the loss by negligently dealing with an imposter. The Defendant unreasonably failed to follow the instructions of the wire transfer issued on behalf of the Plaintiff."<sup>68</sup> The court skirted the issue of precisely what legal theory was the basis for its decision, stating simply that its decision was "the only sensible and practical solution."<sup>69</sup>

The Fifth Circuit Court of Appeals reversed the district court's allocation of liability, directing judgment against Bradford and in

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Co. v. Cosby, 99 S.W.2d 662 (Tex. Civ. App.-Fort Worth 1936, *writ dismissed*). The case law does establish, however, that the pre-U.C.C. common law imposes a basic obligation on banks to act in accordance with a customer's instructions and not to act on unauthorized instructions. For example, in Peavy-Moore Lumber Co., Inc. v. First National Bank of Beaumont, 128 S.W.2d 1158 (Comm. App. 1939), the Court held that where a draft was drawn by an agent on his principal through a collecting bank and the draft expressly stated it was for the account of a named customer, the collecting bank had a duty to collect the draft and to dispose of the proceeds in accordance with the instructions given. The bank was liable for the loss caused by its failure to follow the instructions set forth on the draft. *Id.* at 1161. This liability may be based on either the contractual relation created between the sender and the bank or on basic agency principles. *Shrewsbury v. Dupont Nat'l Bank*, 10 F.2d 632 (D.C. Cir. 1925). The agency theory has been applied in the recent case of Securities Fund Services, Inc. v. American Nat'l Bank & Trust Co., 542 F. Supp. 323 (N.D. Ill. 1982), under facts similar to the instant dispute. While Securities Fund was decided under Illinois law, we are convinced that the same result would be proper under Texas law. *Peavy-Moore, supra*, at 1161-1162.

*Id.*, slip op. at 112. The court also noted that there appeared to be no law governing allocation of losses in wire transfers, suggesting that the Texas comparative negligence statute, TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1985) might be applicable. *Id.* This statute was repealed and subsequently enacted as § 33.001 of the Civil Practice and Remedies Code. *Bradford*, 790 F.2d at 408 n.1.

<sup>68</sup> *Bradford*, No. H-81-2144, slip op. at 8.

<sup>69</sup> *Id.* Although it cited the comparative negligence statute (Article 2212a referred to above) its decision did not indicate that the statute applied and it seemed at pains not to specify whether it contemplated a contract, agency or negligence theory or a combination thereof, stating:

The law of Texas clearly favors apportionment of liability among tortfeasors and in situations where there is a mixture of strict liability and negligence. Art. 2212a, Tex. Rev. Civ. Stat. Ann.; *Duncan v. Cessna Aircraft Co.*, [665] S.W.2d [414], 27 Tex. Supp. St. J. 213 (Tex. 1984). While we have not located recent authorities which apply principles of apportionment to a dispute such as the instant one, we believe that Texas courts confronted with this issue would rule in favor of apportioning the loss between two parties whose combined negligence (or fault) proximately caused the loss. Furthermore, based on the peculiar facts of this case, the Court concludes that the wrongful actions of Plaintiff and Defendant contributed equally to the causation of the loss.

*Id.* at 9.



favor of Southern.<sup>70</sup> The court of appeals viewed the district court's decision as an application of the Texas comparative negligence statute, which it found inapplicable. Instead, the court of appeals, finding no direct authority, looked to pre-U.C.C. Texas law and the U.C.C. for guidance and concluded that two factors emerged from those sources that were helpful in analyzing the issues: (1) which party was in the best position to avoid the loss; and (2) which solution promotes the policy of finality in commercial transactions.<sup>71</sup> It concluded that the first factor would be best served by holding Bradford liable since Bradford, having dealt directly with the imposters, was in the best position to avoid the loss.<sup>72</sup> It concluded that the second factor would also be best served by holding Bradford liable, since ending the transaction when Bradford paid on the forged instructions would better serve the interests of finality than would inquiring into and upsetting later transactions after the forgery was discovered. The court did agree that Southern was negligent in failing to notice the discrepancy between the account number and name of the owner of the account, but held that even if the allocation of the loss depended entirely upon a determination of which party was more at fault, that would not alter its decision to hold Bradford liable, since Bradford's honoring of the forged authorization was the primary cause of the loss.<sup>73</sup> Thus, the court of appeals apparently rejected without discussion the reasoning of *SFS* (which it cited only in passing as a decision which had reasoned from the U.C.C. by analogy).<sup>74</sup>

### III. United Kingdom Law

The United Kingdom, like the United States, has no statute or code of regulations generally applicable to wire transfers. Like the United States, the few wire transfer cases have been decided on common law principles but with no apparent reliance on analogies to statutory rules. Most of the United Kingdom cases relate to finality of payment and, like *Evra*, arose out of the vessel charter-hire gyrations which occurred in the 1970s.

*Zim Israel Navigation Co. v. Effy Shipping Corp., (the "Effy")*,<sup>75</sup> for example, involved the charter by Zim Israel Navigation Co. Ltd. (Zim) of the motor vessel *Effy* from Effy Shipping Corporation (Effy) under a charter party requiring payment on the fourth of each month. For the October 4, 1970 payment, Zim instructed Bank Leumi Le-Israel (Bank Leumi) to wire the amount due, for value on

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<sup>70</sup> *Id.*, 790 F.2d at 407.

<sup>71</sup> *Id.* at 409.

<sup>72</sup> *Id.* at 410.

<sup>73</sup> *Id.* at 411.

<sup>74</sup> *Id.* at 409-11.

<sup>75</sup> [1972] 1 Lloyd's Rep. 18.

October 4, 1970, to Williams Deacon's Bank (Williams Deacon's), 22 St. Mary Axe branch for "Account 7450 Nomikos," the bank, branch, and account specified for payment in the charter party.<sup>76</sup> Bank Leumi, on September 27, 1970, cabled its correspondent Manufacturers Hanover Trust Company of New York (MHT) with those instructions but omitted the specific branch designation. MHT credited the Williams Deacon's account accordingly on October 5, 1970 (the fourth being a Sunday) and simultaneously cabled its London branch, for relay to Williams Deacon's, that it had done so. Williams Deacon's 22 St. Mary Axe branch received the message only on the morning of October 6, 1970. In the meantime, Effy gave notice of termination of the charter party for late payment.<sup>77</sup>

The umpire, whose decision the court was reviewing, had found that "[i]n accordance with international banking practice a payment is made when it is credited in the bank's books, even though the recipient is not informed of the payment until later."<sup>78</sup> The court observed with respect to that finding:

I think [Effy's counsel] is right in his submission that this practice cannot be conclusive as to the meaning of payment under this charter-party and its addendum. Moreover, whilst the proper inference to be drawn from this finding probably is that banks engaged in international finance regard themselves as bound once they have credited an overseas bank in their books and despatched a communication to the overseas bank to that effect, no communication was sent to Williams Deacon's Bank until 9:32 on the morning of October 6. I am by no means satisfied on the findings in the special case that until the latter communication was despatched the credit in New York could not properly have been cancelled. Nor am I satisfied that if, for example, the New York bank had gone into liquidation before receipt of the communication from them by Williams Deacon's Bank, the latter would have been under any obligation to treat the communication as one on which they were prepared to rely as security for crediting the owner's account.<sup>79</sup>

*Tenax Steamship Co. v. The "Brimnes" (Owners)*,<sup>80</sup> another charter party case, involved the chartering by Tenax Steamship Co., Ltd. (the Charterers) of the motor vessel "Brimnes" from Reinante Transoceanica Navegacion, S.A., of Panama (the shipowners) and the cancellation of the charter by the shipowners for late payment. The shipowners had financed the acquisition of the *Brimnes* by a borrowing from Morgan Guaranty Trust Co. of New York (Morgan), to whom they gave a mortgage on the vessel and an assignment of the charter hire. The charter provided for "[p]ayment of said hire to be

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<sup>76</sup> *Id.* at 22.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 28.

<sup>79</sup> *Id.* at 33.

<sup>80</sup> [1972] 2 Lloyd's Rep. 465, *sub nom.* *Tenax S.S. Co. v. Reinante Transoceanica Navegacion, S.A., The Brimnes*, [1973] 1 W.L.R. 386 (1972), *aff'd*, [1975] 1 Q.B. 929 (1974), [1974] 3 W.L.R. 613, [1974] 3 All E.R. 88.

made in New York in cash in United States Currency to Morgan Guaranty Trust Co. of New York, 23 Wall Street, New York, for the credit of the account of [the shipowners] re m.s. 'Brimnes', monthly in advance."<sup>81</sup>

The major issues in the case were whether the payment due on April 1, 1970, concededly late, arrived before or after the shipowner's notice of cancellation of the charter party for late payment, and, if before, whether that barred the cancellation.<sup>82</sup> For purposes of this discussion it is the timing of the payment which is relevant. Payment was effected by an instruction from the charterers' agent to Hambros Bank Ltd. of Cheapside (Hambros) to transfer the charter hire due to Morgan for the credit of the shipowners' account.<sup>83</sup> Because of internal delays, this was not done until April 2, and accordingly it was not until that date that Hambros sent a telex to Morgan directing the transfer of funds.<sup>84</sup> The three justices before whom the appeal was argued considered the timing issue at some length.

Each of the three justices accepted the shipowners' contention that payment did not occur until, in the course of processing the telex, Morgan decided (or, perhaps, when it should have decided but failed to do so timely) to debit the Hambros account and credit the designated payment account. Each justice also distinguished a telex payment instruction from the remittance of a check or other instrument which confers legal rights upon delivery.<sup>85</sup> Each assumed that the telex instruction could be revoked until payment had actually occurred. Unlike in *Effy*, the agency issue was specifically considered. Justices Davies and Megaw took the view that in receiving and acting upon Hambros' instructions, Morgan was the agent of Hambros and accordingly the subagent of the charterers, and, in addition, that if due to the assignment Morgan were to be viewed as the direct payee, the same result as to timing would prevail.<sup>86</sup> Justice Cairns did not discuss the agency question.

*Astro Amo Compania Naviera S.A. v. Elf Union S.A.*<sup>87</sup> was yet an-

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<sup>81</sup> *The Brimnes*, 3 All E.R. at 92.

<sup>82</sup> *Id.*, 2 Lloyd's Rep. at 469.

<sup>83</sup> *Id.* at 468.

<sup>84</sup> *Id.* at 470.

<sup>85</sup> *Id.*, 3 All E.R. at 99.

<sup>86</sup> Justice Megaw said:

It may be that in some respects . . . [Morgan] might also owe a duty to their customers, the shipowners, in dealing with Hambros' telex. But primarily and for all relevant purposes [Morgan], as Hambros' "correspondents," were acting as the charterers' subagents up to the stage of decision to accept and act on the instructions; and it would be impossible for the charterers to contend successfully that, even if [Morgan] were in any respect careless or dilatory, payment was made before [Morgan] had at least decided to do that which their principals, the charterers, instructed them to do for the purpose of effecting payment.

*Id.* at 111.

<sup>87</sup> [1976] 2 Lloyd's Rep. 382.

other charter-party termination dispute. The disputed payment was due from Elf Union, S.A., the charterer, to Astro Amo Compania Naviera S.A., the owner, in a specified account at a branch of First National City Bank (FNCB) in London on September 1, 1973 (a Saturday). On August 29, 1973, Societe Generale Paris, the charterer's bank, sent a telex to the New York branch of FNCB directing payment of the charter-hire to FNCB's London branch. FNCB's New York branch, in turn, telexed the London branch after the close of business on Friday, August 31, 1973, to the effect that the London branch had been credited with the respective amount for credit to the owner's account. The telex from the New York branch to the London branch, having arrived after business hours, was not actually "processed" by the London branch until sometime during the morning of Monday, September 3, 1973. It was not until the afternoon of September 3 that the amount of the charter hire payment formally "posted" to the owners' account.<sup>88</sup>

Wishing to cancel the charter, the owners had inquired on September 3 whether the charter payment had been received. After being advised by FNCB that it had not, the owners issued a notice of termination of the charter hire on that same day. FNCB so advised the owner after having conducted an internal investigation that failed to turn up the telex advice from FNCB New York. Subsequently, however, FNCB advised the owner on Tuesday that telex advice had arrived and on Wednesday delivered an Advice of Credit with respect to the charter payment.<sup>89</sup> The owner sued the charterer seeking termination of the charter-party and also sued FNCB claiming that it had failed to meet its obligation to the owner by incorrectly advising that the payment had not been received.<sup>90</sup>

Viewing such a telex as the equivalent of the delivery of cash or a bank draft, the court held that the telex from FNCB New York to FNCB London was final payment upon arrival, regardless of whether it had then been formally posted to the owner's account and whether the owner had been notified.<sup>91</sup> In response to an argument by owner's counsel that the telex from FNCB New York to FNCB London was analogous to the telex in *The Brimnes* and was thus not considered final payment until credited to the owner's account, the court reasoned that the telex from Societe Generale to FNCB New York was analogous to *The Brimnes* telex which had to be acted upon before it was effective. The telex sent by FNCB New York to FNCB London was the requisite action.<sup>92</sup>

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<sup>88</sup> *Id.* at 384-86.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 383.

<sup>91</sup> *Id.* at 390.

<sup>92</sup> Addressing also the issue of agency status, the court observed:

The *Brimnes* telex instructions corresponds to the Societe Generale telex

*Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia, The Laccania*,<sup>93</sup> involved not a conventional wire transfer but instead a payment through the London Currency Clearance Scheme, a local clearing house arrangement. Payment being due on Sunday, April 12, the charterers' bank, Midland Bank, at the charterers' instruction, delivered a "payment order" to First National City Bank at about three o'clock in the afternoon on the preceding Friday (at which time London banks close for the day). The payment order was received and the beginnings of First National City Bank's internal processes set in motion. Before they were completed, however, they were reversed in accordance with instructions given earlier by the shipowners not to accept tender of payment, and a payment order was delivered the next day by First National City Bank in the amount of the tendered payment to the charterers.<sup>94</sup>

The House of Lords held that the charterers had failed to make punctual payment under the terms of the charter and ruled in favor of the shipowners.<sup>95</sup> In its determination that payment had not been punctual and that the shipowners had not waived the breach by the charterers, the court found that the shipowners had the option of accepting or refusing a late payment.

In reaching its conclusion, the House of Lords deemed the bank, although an agent of the shipowners, to have only limited au-

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instructions given on Aug. 29 to New York. This telex, as was the case in relation to the *Brimnes* telex, was, until acted upon, merely instructions which could be revoked. The New York telex to London was not such a telex. It informed that it, New York, had already credited London with the hire. It confirmed what New York had done as a result of *Societe Generale's* telex. It thus comes a stage later than the telex in the *Brimnes* case. I accept the charterers' contention that New York probably acted as the charterers' agents up to the moment of decision in New York to carry out the instructions of *Societe Generale*. That decision is comparable to the decision which occurred in the *Brimnes* case when [Morgan] decided to act on *Hambros'* instructions. True it was, that the New York telex to London was, in one sense, instructions to the London branch to inform its customer of the existence of the credit, but so also is a payment order or the delivery of a draft by hand. It is implied that the bank credits the amount involved and informs the customer that it has done so. Until New York acted upon *Societe Generale's* telex instructions of Aug. 29, those instructions could have been revoked. Once however they were acted upon on Aug. 31, then there could be no question of revocation by the charterers or their bank. Once the decision was taken in New York to credit the London branch as agent for the owners, New York held the money for the owners' agents. Thereafter the money was, so to speak on its way to the owners' account and again there was nothing that the charterers could have done to have stopped it.

The defendants' contention is, in my judgment, correct and it accordingly follows that it is irrelevant that prior to noon on Sept. 3, the hire had not been credited to the owners' account or that the owners did not know of the payment before the withdrawal.

*Id.* at 390-91.

<sup>93</sup> [1977] 1 All E.R. 545, *rev'g* [1976] 2 All E.R. 249.

<sup>94</sup> *Id.* at 551.

<sup>95</sup> *Id.*

thority.<sup>96</sup> It was not, however, decided whether in the absence of the specific instructions which had been given in the present case, banks would have authority to bind a customer by accepting late payments. More importantly, the acceptance by First National City Bank and, even in its interim, the processing of the payment order, was deemed to be "not irrevocable, but [a] provisional and reversible act, consistent with an alternative decision of the customer which might be to accept or reject."<sup>97</sup>

This finding by the House of Lords again puts to question the finality of payment issue, at least where payment is rejected by the payee, the typical setting in many charter party cases. The case provides no guidance as to the point in the bank processes of First National City Bank at which payment would have been final. Furthermore, it remains unclear whether the same result would be reached in instances where the *payor* requested a reversal of payment. There is some suggestion in the language of the opinions that finality of payment for technical banking purposes may not even be relevant to the holding, the proper construction of the charter party being the more significant factor.

In addition to the group of shipping cases, there is a United Kingdom counterpart to *Delbrueck*, in which Delbrueck won for essentially the same reason it lost in the United States.<sup>98</sup> On June 24, 1974, Delbrueck and Herstatt made a foreign exchange contract for the sale by Delbrueck of Deutsche Marks to Herstatt in exchange for £120,000, value date June 26. Payment was to be made by credit to Delbrueck's account at Barclays Bank International Ltd., at which Herstatt also had an account. On June 25 Herstatt instructed Barclays by telex to debit its account with Barclays for £120,000 and credit Delbrueck's account for value June 26. This was done, notwithstanding that on the morning of the 26th there was a debit balance in Herstatt's account of about £4,650. Thereafter, Barclays learned of the Herstatt failure. After some temporizing, on June 27th Barclays reversed the £120,000 credit to Delbrueck's account, recredited Herstatt's account in that amount and revised its records and customers' accounts accordingly. Delbrueck subsequently sued.<sup>99</sup>

Delbrueck, of course, contended that the credit to its account was final when made on the 26th. Barclays took the position that the credit could not be considered final until the next day and was subject to reversal on the next day. Barclays' reasons included the fact

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 552.

<sup>98</sup> *Momm v. Barclays Bank Int'l Ltd.*, [1977] Q.B. 790, [1977] 2 W.L.R. 407, [1976] 3 All E.R. 588, *sub nom.* *Delbrueck & Co. v. Barclay's Bank Int'l Ltd.*, [1976] 2 Lloyd's Rep. 341.

<sup>99</sup> *Momm*, 3 All E.R. at 596.

that its computerized accounts system could not determine the final balance of an account on any day until the morning of the following day, making credits provisional until the following day, and also that Delbrueck had not received notice of the credit prior to its reversal.<sup>100</sup> The court rejected both arguments, holding that payment was final when crediting occurred and that notice to the payee was unnecessary.<sup>101</sup>

The remaining finality case is *Royal Products Ltd. v. Midland Bank Ltd.*<sup>102</sup> Royal Products was a Maltese trading company which maintained bank accounts with Midland Bank Ltd. (Midland) in the United Kingdom and with Bank of Valetta Ltd. (National) and with The Bank of Industry, Commerce and Agriculture Ltd. (BICAL) in Malta.<sup>103</sup> Royal Products periodically effected funds transfers from Midland to National, routing them through BICAL to avoid transfer charges it would incur if effected directly. On Thursday, November 23, 1972, Royal Products directed Midland to transfer £13,000 by cable to Royal Products' account with BICAL. In this instance, however, Midland made the transfer through National, its correspondent in Malta, instructing National by telex on the same day to pay BICAL £13,000 "for advice credit Royal Products."<sup>104</sup> Midland debited Royal Products' account with it for the amount of the transfer and cable charges. National first became aware of the transfer message on the morning of Friday, November 24. During the course of that day, there was some concern as to BICAL's financial stability. This

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<sup>100</sup> *Id.*

<sup>101</sup> *Momm*, 3 All E.R. at 596. The court relied upon a rather old case, *Eyles v. Ellis*, (1827) 4 Bing. 112, quoting the judgment in full which is both short and illuminating:

The learned serjeant was right in esteeming this a payment. The Plaintiff had made the *Maidstone* Bankers his agents, and had authorized them to receive the money due from the Defendant. Was it then paid, or was that done which was equivalent to payment? At first, not but on the 8th a sum was actually placed to the Plaintiff's account; and though no money was transferred in specie, that was an acknowledgement from the bankers that they had received the amount from Ellis. The Plaintiff might then have drawn for it, and the bankers could not have refused his draft.

*Eyles*, 4 Bing. at 113-14. The background of the case was that the bank failed before the plaintiff could withdraw the credit and before he received notice of it. The court observes that its importance "is that the payment was held to be complete when the payee's bank account was credited and before the payee had had any notice that this had happened." *Momm*, 3 All E.R. at 596. Moreover, referring to the *Brimnes* and *Laconia* cases, the court went further to state that:

I therefore conclude that the authorities clearly support the contention that payment in the present case was complete when Mr. Bass decided to accept Herstatt's instructions to credit the plaintiffs' account and the computer processes for doing so were set in motion. Indeed, the present case is a fortiori to *The Brimnes* and *The Laconia*, because these processes were in fact completed before the defendants purported to revoke the payment by reversing the entries on the following morning.

*Momm*, 3 All E.R. at 598.

<sup>102</sup> *Royal Prods. Ltd. v. Midland Bank Ltd.*, [1981] 2 Lloyd's Rep. 194 (1980).

<sup>103</sup> *Id.* at 196.

<sup>104</sup> *Id.*

was not fully resolved by the end of the day. National did not make an immediate transfer or payment to BICAL but instead opened a special internal suspense account to which it credited the transferred funds and so notified BICAL toward the end of that day.<sup>105</sup>

At some time either on that same Friday or the next day, BICAL, at National's behest, drew a check on the suspense account payable to Malta National Lines in the amount of the funds transferred; the purpose of the check was to pay an obligation of BICAL to Malta National Lines which, as a credit to Malta National Lines' account with National, would cover an overdraft resulting from the dishonor by BICAL of several Malta National Lines checks.<sup>106</sup>

On Saturday morning, November 25, the general manager of the Central Bank of Malta warned Maltese banks that the Central Bank would not accept BICAL checks through the clearing system, and that evening, BICAL was closed by the Central Bank. On Sunday, November 26, a press release was issued to that effect and banks were advised not to effect transactions with BICAL without the approval of the Controller appointed for BICAL.<sup>107</sup>

On Monday, November 27, Royal Products requested Midland to amend the transfer instructions of November 23 and to transfer the £13,000 not to its account with BICAL but to its account with National. Midland relayed these instructions to National as a request for retrieval of the transfer, to which National responded that same day with the advice that the funds had been transferred to BICAL on Saturday, November 25. On Tuesday, November 28, National advised Midland that they were unable to retrieve the funds as BICAL was under the control of the Central Bank.<sup>108</sup>

After unsuccessfully suing National in Malta, Royal Products sued Midland charging breach of contract for failure to execute properly Royal Products' instructions, breach of Midland's agency obligations to Royal Products in effecting the transfer and in failing to procure reversal of the transfer, mistake of fact, breach of trust and constructive trust, and (in connection with the check to Malta National Lines) diversion of funds and breach of fiduciary duty.<sup>109</sup> At National's request and over Royal Products' objection, National was joined as a defendant. All of Royal Products' claims were dismissed.

Because the transaction constituted an ordinary banking operation, Midland owed Royal Products a duty to use reasonable care and skill. National, on the other hand, owed no duty directly to Royal Products. In the absence of privity of contract, no agency or fiduci-

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<sup>105</sup> *Id.* at 196-97.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 196.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 197.



ary duties arose from National to Royal Products. Midland, nonetheless, would be vicariously liable to Royal Products for any negligence on National's part.

The court found that Midland had carried out Royal Products' instructions, even though the transfer had been effected through National to BICAL, rather than to BICAL directly.<sup>110</sup> Because Royal Products had not specified the channels through which the funds were to be transferred, Midland had complied with Royal Products' instructions once Royal Products was able to draw on the credit established at BICAL.

The court also considered whether Midland had breached its duty to use reasonable care and skill by transferring the funds to BICAL in light of BICAL's pending insolvency. The court's analysis of the facts revealed that although there had been reason to suspect BICAL might have had some insolvency problems earlier in the day, by late in the evening when the transfer was effected, National no longer had any reasonable cause to suspect BICAL would become insolvent.<sup>111</sup> Furthermore, the court found BICAL was, or was to be treated as if it were, National's customer during the day of the transfer. As such, National owed BICAL a duty not to disclose to Royal Products or any other customer such confidential information as the questionable solvency of BICAL. Moreover, National was obligated to complete the transfer one way or another by the end of the banking day.<sup>112</sup> National did so when it effected the credit in the name of BICAL.

The court considered the issue of whether National was in breach of any duty by failing to reverse the credit upon Royal Products' request. The court, relying on the decision in *Momm v. Barclays Bank International Ltd.*,<sup>113</sup> held that at the time Royal Products requested the reversal, the transfer was complete and could not be reversed.<sup>114</sup>

As to its other claims, Royal Products was equally unsuccessful. The court deemed Royal Products' cable to Midland to be authority and instruction to transfer funds and not a separate contract. Further, this authorization did not give rise to any separate contract with National, which owed no contractual duty to Royal Products.<sup>115</sup> The court rejected the trust claims since the funds had not been transferred for any particular purpose. The court also rejected Royal Products' argument that the funds had been paid under a mistake of fact, reasoning that the funds had been paid to BICAL on the belief,

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<sup>110</sup> *Id.* at 198-99.

<sup>111</sup> *Id.* at 201.

<sup>112</sup> *Id.* at 209.

<sup>113</sup> *See supra* notes 98-101 and accompanying text.

<sup>114</sup> *Royal Prods.*, 2 Lloyd's Rep. at 209.

<sup>115</sup> *Id.* at 209-10.

which was not mistaken at the time, that BICAL was open for business and could accept the credit.<sup>116</sup> As to the diversion of funds issue, the court determined that the credit in favor of Malta National Lines occurred after Royal Products received advice of credit when National regarded the credit as being remitted to BICAL.<sup>117</sup> Thus, the money in the suspense account was BICAL's—not National's. Moreover, the transaction with respect to which National owed Royal Products a duty was complete. Lastly, Royal Products' claim that National breached its fiduciary duty by making profit using the knowledge of the remittance (which constituted property of Royal Products) was dismissed, the court having found that National owed no fiduciary duty to Royal Products.<sup>118</sup>

#### IV. Conclusion

The few reported U.S. and United Kingdom cases do not provide a comprehensive roadmap to the law of wire transfers. Many more common law decisions on differing fact situations will be required before it can be concluded that there is a governing body of wire transfer law to be synthesized. Predictability is further diminished by U.S. courts' tendency simultaneously to hold that the U.C.C. is inapplicable to wire transfers and to apply its provisions by analogy to arguably nonanalogous situations (*e.g.*, the *Delbrueck* analogy of an accepted check to the receipt of a wire payment and the analogy of banks transmitting (in *Evra*) and receiving (in *SFS*) wire transfers to collecting banks).

These decisions give rise to more questions than they answer. For example, although there is some certainty after *Evra* that the rule in *Hadley v. Baxendale* applies to wire transfers, it is still unclear under what circumstances, if any, a transmitting bank may be liable for consequential damages arising out of a defective wire transfer. The list of open questions which banks, their correspondent banks, their customers, their insurers and their respective counsel might consider includes the following: In general, what will constitute notice to a bank of unusual consequences which might arise out of a contemplated transfer? May the bank contract out (with a standard form) of the liability which might otherwise prevail? May a customer unilaterally impose potential liability on a bank by accompanying its wire transfer request with a notice of the dire consequences which will ensue if it is not handled expeditiously and correctly? Would such a notice be effective even if delivered only to a ministerial wire transfer room employee? May a bank refuse to accept a wire transfer order

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

under those conditions? Or may the bank charge a greater fee in consideration of the greater exposure?

The uncertainties which exist regarding the issues addressed in the reported cases are minimal when compared to the total lack of authority which exists in other areas. The frauds involved in *SFS*, *Shearson* and *Bradford* were essentially the same: an old-fashioned unauthorized order to transfer funds to an account to which the malefactor had access at another bank. Modern technology, of course, offers opportunities for many other ingenious frauds and diversions that might not be nearly so easy for even a highly diligent institution to uncover in time to prevent loss. An electronic intruder may manipulate the system so that the institution's personnel are unaware of the transfer, let alone that it is unauthorized. The computer hacker scenario is an all too real possibility. Yet there is apparently no authority whatsoever relating to the rights and liabilities of originating banks, their correspondents and their customers in connection with losses arising out of third party intrusion into any of their computer or telecommunications systems or the systems that link them. It is questionable whether rules allocating liability for loss based on a bank's responsibility to know its customer's signature are appropriate bases for allocating liability for losses arising out of the actions of an invisible intruder into a computer or telecommunications system.

Legislation is, of course, the obvious solution to such uncertainties. Legislation is not, however, without its perils. The risk of ossification is a serious objection to legislation in the wire transfer area. The wire transfer system, which for years involved basically the same technology, is, with many other elements of society, in the throes of technological change. The increasing influence of the micro-computer in corporate life, together with related telecommunications technology, may bring about wholesale changes in the ways wire transfers are effected in the future. Technological changes are accelerating at an exponential rate, to the point where it is increasingly difficult to keep up. It may be unrealistic to expect that legislation, given the time required for analysis, drafting, introduction, passage and then necessary amendments, will be up-to-date when enacted or that, once enacted, it will be kept current by amendments.

Those considerations may not be pertinent if it is assumed that technological changes should not affect risk allocation; that is, if it is assumed that the only effect of technological progress is to permit the accomplishment of the same old tasks more effectively. Such, however, is not necessarily the case. More than the effective accomplishment of old tasks may be present; high technology may permit the accomplishment of new tasks, or at least the accomplishment of old tasks in such a different way that the old rules should not apply. A time of rapid change and new developments may not be the most

appropriate time to embark on a program of codification which may freeze rules prematurely.

In this situation, it may be best to let the common law continue to evolve naturally. This would permit courts to respond to situations as they arise and on their particular facts, unhampered by the strictness of a code. It would also permit participants to experiment with private agreements and the expansion of private system rules. It is not clear that the wire transfer system is paralyzed or is suffering from impediments to creativity because of uncertainty as to the governing rules.

On the other hand, the desirability of rules permitting the reasoned calculation of or insurance for risks involved in doing business is obvious. A bank providing wire transfer services needs to know the level of its obligations and exposure in order to determine whether to undertake the risk and, if such risk is undertaken, how to price the service, what level of supervision and security to provide in the operation of the system and what to provide in its agreements. Customers likewise need this information to determine whether terms and fees are acceptable and whether the risks and benefits are appropriate to the transaction. Both parties and insurers need this information in order to determine the level of coverage and cost of relevant insurance. Without this information, all parties are at risk that significant business decisions are being made on the basis of false premises with potentially disastrous consequences. In particular, intermediaries in transactions (such as "correspondents" or "collecting" banks) may not be in a position to utilize agreements to allocate risk and, thus, may not be able to protect themselves from potential and incalculable liability to persons with whom they are not in privity of contract. Indeed, under the current state of the law they may be uncertain as to whom they owe duties, let alone the level of those duties. Further, in the absence of legislation comparable to U.C.C. § 4-103 there may be a question whether parties not directly subject to the clearing house rules and the like may be bound by them.

The proposed Uniform New Payments Code (U.N.P.C.)<sup>119</sup> is an attempt to respond to these and other concerns. As a meaningful candidate for enactment, however, it has apparently failed to inspire the necessary support. This may be due, in part, to two major perceived flaws. First, the Code proposes to fix, by radically rewriting Articles 3 and 4 of the U.C.C., that which is not broken. Second, it gives too much heed to Emerson's famous hobgoblin in seeking to

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<sup>119</sup> *Uniform New Payments Code* (Permanent Editorial Board Draft No. 3 1983). For a general discussion of the U.N.P.C. and related wire transfer issues, see Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664 (1983); Prutzman, *CHIPS and the Proposed Uniform New Payments Code*, 10 RUTGERS COMPUT. & TECH. L.J. 1 (1984).

conform all payment mechanisms to the same rules. The draftsmen of the U.N.P.C. apparently reasoned that the development of new and more efficient methods of effecting commercial transactions should not be hamstrung by the application of discriminatorily burdensome legal rules and that, since wire transfers are just another mode of effecting payment, they should be subject to the same rules as other modes of payment.

The difficulty with this "level playing-field" principle is that users of different methods of effecting payment may, in fact, not be playing the same game or, if they are, they may in fact be playing on different fields.<sup>120</sup> A payor who uses a certified check presumably has priorities and needs which are different from those of a payor who uses a regular personal check; it is clear that very different consequences can arise out of the use of one mode of payment as opposed to another. It seems all the more reasonable to assume that a payor who uses a wire transfer probable has priorities and needs which are different from those of a payor who uses a check, and it does not necessarily follow that the same consequences should flow from each.

The foundering of the U.N.P.C. is a sad fate for an ambitious and laudable effort. It should not, however, spell the end of efforts to develop a comprehensive code for wire transfers. Although common law courts unquestionably have the genius necessary to evolve over time a set of rules, that process is slow and expensive both in the costs imposed by uncertainty and in the litigation costs incurred in attaining certainty. The absence of clear guidelines may lull participants in wire transfer systems into unjustified complacency, exposing them to devastating losses which the planning permitted by knowledge of the risks could prevent. A related risk is the possibility that a serious disruption in the wire transfer process could lead to precipitate, ill-conceived and unwelcome remedial legislation.

Considering the magnitude of the exposure to loss of all parties to the wire transfer process and the truly monumental void which exists in the legal system for dealing with problems which arise in that process, the preparation of a carefully considered comprehensive code to govern the wire transfer process seems a highly desirable goal. In its absence, the costs of uncertainty can only be a burden on all participants and a diversion from the conduct of the business which wire transfers are intended to facilitate.

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<sup>120</sup> Prutzman, *supra* note 119, at 14, 29-30.