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COMMENTARY:
TECHNOLOGY AS THE DRIVER OF PAYMENT SYSTEM RULES:
WILL CONSUMERS BE PROVIDED SEATBELTS AND AIR BAGS?

MARK E. BUDNITZ*

INTRODUCTION

Taken together, the articles in this Symposium issue present a fascinating and disturbing picture of the world of consumer payment systems. The articles document the death of the world as payment lawyers have known it. Some of the deaths have already occurred. The concept of “agreement” used to be an essential element of the contractual relationship between the parties to a contract. That concept is dead; modern consumers are contractually bound to onerous terms under circumstances where there is no meaningful agreement.¹ Often, consumers are notified of major changes in terms through stuffers in their monthly statements.² To a significant extent, public law is dead. That is because many of the newest products and services are processed through the Automated Clearing House system (ACH), which is subject to private rulemaking from which consumers are excluded.³ The pervasive use of mandatory pre-dispute arbitration clauses has killed consumers’ access to the courts. Arbitration also has

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1. Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 883–88 (2008). Comptroller of the Currency John Dugan has criticized the “aggressive practices” of credit card companies that impose “eye-popping penalty interest rates, ‘universal default’ provisions that trigger the higher rates, and ever-increasing fees.” Cheyenne Hopkins, *A Change in Tone from OCC on Card Fee Policies*, AM. BANKER, Sept. 28, 2007, at 1, 3 [hereinafter *A Change in Tone*].

2. *E.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1133–34 (9th Cir. 2003). The Federal Reserve Board has proposed requiring credit card issuers to notify consumers at least forty-five days in advance of rate increases resulting from a penalty. *A Change in Tone*, *supra* note 1, at 3. The Comptroller of the Currency believes this is inadequate because the rate hike could be caused by an event unrelated to the account, such as a lower score on the consumer credit report. *Id.* He noted between 10% and 20% of the complaints the OCC receives “involve interest rate hikes the consumer does not understand.” *Id.*; see Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1660 (2006).

3. As discussed *infra* at note 48, many electronic fund transfers are subject to private rulemaking by the National Automated Clearinghouse Association. Consumers, however, still have substantial protection under the Electronic Fund Transfers Act and Regulation E. 15 U.S.C. §§ 1693–1693r (2000); 12 C.F.R. pt. 205 (2007).

contributed to the death of public law, for arbitrators are not required to decide cases in accordance with that law. Some of the deaths are occurring now. One is the steady death of state law governing consumer payments. State law is dying as consumer payments law increasingly becomes federal law, and federal agency regulations preempt state law favorable to consumers. In addition, federal agencies are snatching enforcement authority from the hands of state agencies.⁴ The paper check is dying, replaced by plastic debit cards.⁵ Transparency is dying due to the proliferation of new payment products and processing systems, and increased involvement of intermediaries.⁶ Technology has greatly complicated payments law, hampering consumers' ability to understand their legal rights and obligations.⁷

In sharp contrast, technology is alive and well, growing stronger every day and driving many of the new developments in payments law. At the same time that it has caused the death of many features of payment systems favorable to consumers,⁸ technology also has produced benefits for consumers. Technology has increased consumers' choices of payment products and increased their ability to monitor their accounts.

4. See, e.g., *Office of the Comptroller v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005); *Mortgage Market Turmoil: Causes and Consequences: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 110th Cong. (2007) (statement of Joseph A. Smith, Jr., N.C. Comm'r of Banks, testifying that OCC has supported national banks' challenges to Spitzer's attempts to enforce federal laws, while refusing to enforce those laws itself); Duncan A. MacDonald, *Viewpoint: Electoral Tide, a Warning on Preemption*, AM. BANKER, Dec. 15, 2006, at 11 (predicting that Congress will pass legislation supporting Spitzer's position that the OCC does not have the authority to preempt state enforcement of laws against national banks). The Supreme Court recently upheld the OCC's power to preempt state law. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564–65 (2007); see Duncan A. MacDonald, *Eventually, Industry Will Regret Watters Ruling*, AM. BANKER, May 18, 2007, at 11 (the former general counsel of Citigroup's Europe and North America card business opining that "[t]he industry's justification for Watters—that a myriad of federal laws will adequately protect consumer interests—is a joke. Much of federal law provides only nominal protection of consumers and some of it is actually harmful to their interests.").

5. E.g., Stephanie Heller, *An Endangered Species: The Increasing Irrelevance of Article 4 of the UCC in an Electronics-Based Payments System*, 40 LOY. L.A. L. REV. 513, 515 (2006); Robert J. Samuelson, *The Vanishing Greenback*, NEWSWEEK, June 25, 2007, at 35 (asserting that the U.S. has become a "cashless society" and a "Plastic Nation").

6. NAT'L AUTOMATED CLEARING HOUSE ASS'N, 2007 ACH RULES: A COMPLETE GUIDE TO RULES AND REGULATIONS GOVERNING THE ACH NETWORK, at ACH PRIMER 2 (2007) [hereinafter 2007 ACH RULES] (describing financial institutions' use of third-party service providers in processing electronic fund transfers in the Automated Clearinghouse system).

7. Gail Hillebrand, *Before the Grand Rethinking: Five Things to Do Today with Payments Law and Ten Principles to Guide New Payments Products and New Payments Law*, 83 CHI.-KENT L. REV. 769, 785–87 (2008). Even all the disclosure and education in the world could not end some of consumers' ignorance and confusion, for the applicability of the law itself is unclear. *Id.* at 790–91; Linda J. Rusch, *Reimagining Payment Systems: Allocation of Risk for Unauthorized Payment Inception*, 83 CHI.-KENT L. REV. 561, 580–81 (2008).

8. For example, technology has increased the speed of check processing, making it infeasible in many circumstances for consumers to exercise their right of stop payment. The U.C.C. requires the customer to notify the bank to stop payment at a time that "affords the bank a reasonable opportunity to act." U.C.C. § 4-403(a) (2005).

This commentary discusses these developments and the issues they raise for placing responsibility and imposing liability on consumers. It draws upon the analyses included in many of the outstanding articles prepared for this Symposium. In addition, this commentary focuses on critical factors that the articles in this Symposium do not sufficiently take into account. It argues that consumer protection should not be sacrificed in order to gain the maximum “efficiencies” that technology may be able to achieve. This commentary recommends including certain minimum protections in consumer payments law. Consumers should have these protections regardless of the payment product used or the manner in which the payment is processed.

I. TECHNOLOGY IS IN THE DRIVER’S SEAT

A. *Checks Are Dying, but Check Law Is Still Important*

Technology is responsible for some of the death noted in the introduction. For example, technology has made possible the development of new payment products, which will result in the eventual death of checks.⁹ We currently are in a transitional stage in which checks increasingly are processed electronically and often used merely as an information source for payment processing that is entirely electronic.¹⁰

Although checks eventually will go the way of the dinosaur, for many years we will be in this transitional stage in which consumers will still use checks.¹¹ It is therefore important that consumers have adequate protection when they use checks. The 1990 revision of Articles 3 and 4 of the Uniform Commercial Code (U.C.C.), however, took the opposite approach. The comment to section 4-101 states that “[a]n important goal of the 1990 revision of Article 4 is to promote the efficiency of the check collection process by making the provisions of Article 4 more compatible with the needs of an automated system.”¹² At the same time, that comment also explicitly states that Article 4 “is not a regulatory statute. It does

9. *Fed Announces New Round of Check-Processing Reductions*, CARDLINE, June 29, 2007, available at 2007 WLNR 12306192.

10. John B.C. Porter, *The Convergence of Systems: Check Imaging and the ACH Network*, 2 J. OF PAYMENT SYS. L. 400, 401 (2006).

11. Rusch, *supra* note 7, at 602 n.219.

12. U.C.C. § 4-101 cmt. 2.

not . . . prescribe what constraints [states] may wish to impose on [the bank-customer] relationship in the interest of consumer protection.”¹³

Most of the contributors to this Symposium at least implicitly acknowledge that the approach taken in 1990 is unsuitable today because they recognize that payments law, including check law, must take the needs of consumers into account. Even assuming the decision to exclude consumer protection and focus on the accommodation of technology was justified in the 1990s, that approach is increasingly problematic today as technology facilitates the convergence of checks and other payment systems. In recommending changes to check law, the contributors recognize that the laws governing checks continue to be important, even though there is no dispute that technology will eventually kill checks.

The articles fail to recognize, however, that the U.C.C. will still be important even after consumers stop using checks altogether, because funds likely will continue to be transferred from their accounts through the use of “demand drafts.”¹⁴ In all probability, telemarketers and others will continue to use demand drafts. Consumers need greater legal protection in regard to these payment instruments because many abuses have been associated with them.¹⁵

B. *Check Processing: The Death of Transparency*

Many of the articles in this Symposium talk about technology, convergence, and consumer protection. They raise fundamental questions regarding the proper objectives of payments law. Professor Rusch’s article is particularly helpful in that regard. As Professor Rusch states in reference to risk allocation, an objective of a legal regime for payment systems should be “a transparent set of rules whereby the system participants know what

13. *Id.* § 4-101 cmt. 3; *see also id.* § 4-401 cmt. 3 (stating that the U.C.C. does not regulate bank fees); *id.* § 4-406 cmt. 3 (stating the U.C.C. does not specify sanctions for a drawee bank’s failure to furnish items or its copies as required by section 4-406(b), and does not regulate fees banks may charge for those items or copies). The information a drawee bank must supply the drawer in a truncated environment is dictated not by the customer’s needs, but by the information the bank’s computer can obtain from the MICR line on the check. *Id.* § 4-406 cmt. 1. The drawee-payor bank can ignore the date on a postdated check unless specific notification rules are followed “because the automated check collection system cannot accommodate postdated checks.” *Id.* § 4-401 cmt. 3.

14. Demand drafts are also called “telephone checks.” RONALD J. MANN, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS 86–87 (3rd ed. 2006). The U.C.C. calls them remotely created consumer items. They also are subject to Regulation E and Regulation CC. *See* Collection of Checks and Other Items by Federal Reserve Banks, 70 Fed. Reg. 71,218 (Nov. 28, 2005) (codified at 12 C.F.R. pts. 210 and 229).

15. *See, e.g., Demand Draft Fraud: Hearing Before the H. Banking Comm.*, 104th Cong. (Apr. 15, 1996), available at www.ftc.gov/speeches/other/ddraft.shtm (statement of Jodie Bernstein, Dir. of the Bureau of Consumer Protection, Fed. Trade Comm’n); Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. TIMES, May 20, 2007, at 1.

risks they are taking on in using the system.”¹⁶ The primary focus in this commentary is on one participant in the system: the consumer. A consumer paying by check confronts a set of rules that is far from transparent and knowable without incurring substantial transaction costs. It is very difficult for consumers to ascertain the risks they take when using checks and the responsibilities the law imposes on them. That is because checks are now being processed in different ways that trigger not only the application of the U.C.C. but also Check 21’s new legal rules, about which most consumers likely know next to nothing.¹⁷ Moreover, increasingly when consumers tender checks neither of these laws apply. Using advances in electronic technology, many payees engage in electronic check conversion, using the check merely as a source document. The information from the check is processed through the ACH system, and an entirely different set of legal rules under the Electronic Fund Transfer Act (EFTA) and Regulation E apply.¹⁸ In addition, these transactions and many others are subject to the rules of the National Automated Clearinghouse Association (NACHA), a private rulemaking body.¹⁹

A distinguishing feature of convergence and lack of transparency is consumers’ lack of knowledge and loss of control. An example of this occurs when a consumer mails a check to a credit card company. That company, at its option, may process the consumer’s check in the traditional way in which the transaction is subject to the U.C.C. and Regulation CC or as an ACH entry, subject to Regulation E and the NACHA rules.²⁰ If the company chooses to process the check in the traditional way, the collecting banks have a variety of processing methods available. They may process the check electronically through inter-bank agreements, in which case the

16. Rusch, *supra* note 7, at 591.

17. See Mark E. Budnitz, *The Check 21 Challenge: Will Banks Take Advantage of Consumers?*, 58 CONSUMER FIN. L.Q. REP. 369 (2004). My informal polling of law students taking my Payment Systems course indicates that almost none of them know, before we study U.C.C. section 4-401(c), that the drawee bank can ignore the date on a postdated check. I have questioned law students, law professors, and highly educated non-lawyers about their rights and obligations under Check 21, and their familiarity with electronic check conversion. Not surprisingly, they have little or no understanding of any of these matters. See Ronald J. Mann, *Making Sense of Payments Policy in the Information Age*, 93 GEO. L.J. 633, 634 (2005) (describing a colleague’s confusion over his rights on debit cards and credit cards).

18. Anita Ramasastry, *Confusion and Convergence in Consumer Payments: Is Coherence in Error Resolution Appropriate?*, 83 CHI.-KENT L. REV. 813, 829–33 (2008) (describing electronic check conversion).

19. 2007 ACH RULES, *supra* note 6, at ACH PRIMER 14.

20. Even if the company processes the check the traditional way, a subsequent transferee, such as a depository bank or intermediary bank, may convert the check to an electronic image, triggering the application of Check 21 as well as the U.C.C. The text describes electronic check conversion “at the lockbox.” Electronic check conversion also can take place at the point of sale, or in the “back office.”

U.C.C. and Regulation CC apply.²¹ Alternatively, the banks may process the check using electronic imaging, in which case Check 21 also applies. The consumer has no way to know, when the check is mailed, which method the company and the banks may choose. A third option, electronic check conversion, is increasingly popular with credit card issuers and retailers. If the payee wants to exercise this option, the law merely requires the company notify the consumer that it may, in its discretion, process the check in that way.²² The legally required notices often are buried or otherwise obscured in the monthly statement and worded in such a way that the consumer is unlikely to fully appreciate their significance.²³ I am not suggesting that the credit card company or retailer should be required to inform the consumer in advance which method it will use. Given the consumer's inability to understand the increasingly complex and ever-changing world of payment processing, however, the least the law should do is establish fair and understandable rules that provide baseline mandatory consumer protection, regardless of which option the company or subsequent transferees choose.

22. Hillebrand, *supra* note 7, at 780.

22. Electronic Fund Transfers, 71 Fed. Reg. 1638, 1638 (Jan. 10, 2006) (codified at 12 C.F.R. § 205).

23. My American Express bill contains a sixty-six line single-spaced paragraph with information about payments, charges and questions about my bill. The following appears, starting in the middle of line ten:

Authorization for electronic Debt: We will process checks electronically, at first presentment and any re-presentments, by transmitting the amount of the check, routing number, account number and check serial number to your financial institution, unless the check is not processable electronically or a less costly process is available. By submitting a check for payment, you authorize us to initiate an electronic debit from your bank or asset account. When we process your check electronically, your payment may be debited to your bank or asset account as soon as the same day we receive your check, and you will not receive that cancelled check with your bank or asset account statement. If we cannot collect the funds electronically we may issue a draft against your bank or asset account for the amount of the check.

In other words, American Express may process the check electronically, or it may choose not to process it using that method. If it chooses another method, there is no disclosure of what that method might be. Apparently, it might choose to process the payment as a check. The disclosure does not explain what is meant by issuing a draft "[i]f we cannot collect the funds electronically." Does that mean there was a breakdown in the electronic processing equipment? Does it mean the consumer's account lacked sufficient funds? At any rate, the consumer is unlikely to understand the significance of American Express issuing a draft.

My CitiBank credit card contains information about payment by check in a separate short paragraph that is much easier to spot than the American Express disclosure. The entire paragraph is in bold type. Unfortunately, it is on the reverse side of the portion of the bill that I send in with my payment. Therefore, unless I make a copy of the disclosure, I no longer have it once I mail my check. The disclosure states:

If you send an eligible check with this payment coupon, you authorize us to complete your payment by electronic debit. If we do, the checking account will be debited in the amount on the check. We may do this as soon as the day we receive the check. Also, the check will be destroyed.

Electronic check conversion at the lockbox is subject to Regulation E. See Electronic Fund Transfers, 71 Fed. Reg. 1638 (Jan. 10, 2006).

C. *Uniform Consumer Objectives and Limited Options*

Professors Gillette and Walt correctly point out that “different payment systems are intended to serve different objectives.”²⁴ Therefore, they conclude it may be inappropriate to impose uniform rules that apply to all payment systems. While different payment systems do serve different objectives, there is another way to look at the issue of whether uniform rules are justified. An alternative approach is to consider whether all consumers using payment systems share identical objectives, regardless of the system selected. Consumers want money transferred from their accounts only if authorized. They want the transfers to occur when authorized and in the amount authorized. Whatever system is used, consumers want readily available remedies to correct unauthorized payments and errors. Of course, the inquiry should not end with determining whether there are common consumer objectives that would require uniform rules. One also must ask whether it is operationally and economically feasible to require financial institutions to comply with rules that would ensure these consumer protections. But, if policymakers start by identifying common consumer objectives rather than adopting Gillette’s and Walt’s approach, they will likely come to different conclusions on whether there should be at least some uniform payment rules.

Professors Gillette and Walt contend that different liability rules provide consumers with more choices than would a uniform rule. For example, they believe consumers may choose one payment system for large dollar payments and another for small dollar payments, depending on the legal rules on negligence liability.²⁵ Consumer choice is an important consideration, and it would be bad policy to impose uniform rules, with regard to negligence or other issues, if that significantly decreased consumer choice, and countervailing considerations did not negate the benefit of increasing consumer choice. Nevertheless, to a low income consumer living from paycheck to paycheck, even a small dollar transaction gone awry may have a substantial impact. Those consumers need minimum protection regardless of the amount of the payment. Furthermore, more choices may not benefit consumers if they merely result in a highly complex payment system in which none of the choices provide sufficient protection. Finally, before adopting a policy that discards current consumer protection rules in favor of rules that increase consumers’ exposure to liability, policymakers should

24. Clayton P. Gillette & Steven D. Walt, *Uniformity and Diversity in Payment Systems*, 83 CHI.-KENT L. REV. 499, 535 (2008).

25. *Id.* at 525–28.

require solid evidence that greater choices would result, and that most consumers would have the information necessary, at low transaction costs, to make informed choices.

It is instructive to explore the issue of consumer choice in the context of electronic check conversion at the lockbox. What choices are available to consumers who want to avoid the situation they confront in regard to electronic check conversion at the lockbox when they pay their credit card bill? Consumers could refuse to use a credit card, instead paying with cash, which in many situations is impossible or inadvisable.²⁶ Alternatively, they can pay with a debit card. But a debit card has its own disadvantages. For example, the potential liability for unauthorized use is much greater than with a credit card.²⁷ In addition, consumers paying by debit lose the leverage they have when paying with a credit card, since with a debit card the money is transferred from the consumer's account immediately. If a problem arises, the consumer has to try to get the money back into the account, a far less advantageous situation than with a credit card where the consumer is not even obligated to pay until some time after the bill arrives, and even then only a minimum payment is required. In addition, the law enables the consumer paying with a credit card to withhold payment under many circumstances—their right of “chargeback.”²⁸

Consumers also have the option of engaging in electronic bill paying.²⁹ Electronic bill paying, however, comes with its own set of disadvantages and problems. For example, as with a debit card, the consumer loses the right of chargeback. Furthermore, banks insert onerous terms into their agreements with customers using online banking.³⁰

Professors Gillette and Walt seem to think consumers engage in a careful analysis of the various options, and that legal rules should provide different levels of liability so consumers can choose which rules they want to govern their transactions.³¹ I believe the reality is quite different. As Alces and Hopkins suggest, it would be a waste of time for consumers to carefully read their contracts with banks, since they are non-negotiable and

26. Payment by cash is impossible if the consumer is purchasing over the Internet. It is inadvisable if the consumer must mail the payment to the seller. It is risky for consumers purchasing directly from sellers to carry large amounts of cash on their person.

27. 15 U.S.C. § 1693g (2000).

28. Hillebrand, *supra* note 7, at 807.

29. Rusch, *supra* note 7, at 563–64.

30. Mark E. Budnitz, Donald F. Clifford, Michael Ferry & Margot Saunders, *Home Banking Agreements: Don't Bank On Them*, 61 BUS. LAW. 641, 642 (2006).

31. Gillette & Walt, *supra* note 24, at 525–26.

consumers would not understand the significance of their terms.³² Most consumers could not afford to incur the substantial transaction costs of gaining an understanding of the various state and federal statutes, plus the Federal Reserve Bank (FRB) regulations applicable to each of these alternatives. Even if they could, it is doubtful that incurring those transaction costs would make financial sense. Rather, consumers probably reasonably assume that the law offers basically the same protection, regardless of which payment system the consumer uses. This is a reasonable assumption, and the law should be reformed to satisfy that expectation.

D. Technology Helps Banks Impose Fees Free of Regulation

Most of the articles in the Symposium do not pay sufficient attention to banks' use of technology to generate greater fee income.³³ The U.C.C. and federal law do not regulate the fees that banks can charge consumers. This is left to "freedom of contract."³⁴ As Alces's and Hopkins's article demonstrates, that concept does not apply to contracts between banks and consumers.³⁵ "Bounced check protection" illustrates both how banks use technology to generate fee income and the death of the concept of agreement. Banks use technology to determine when this expensive overdraft program will be triggered.³⁶ The program is provided independent of any agreement between the bank and the consumer. The program applies not

32. Alces & Hopkins, *supra* note 1, at 883–84. "How many bank customers really appreciate what is at stake if a choice of law or arbitration clause is enforceable? Indeed, how many lawyers could certainly tell them?" *Id.* at 882. "Banks dictate and customers acquiesce." *Id.* Alces and Hopkins suggest customers can change banks, hoping another bank will offer better terms. Professor Overby has described the practical difficulties consumers have if they try to change banks. A. Brooke Overby, *Check Fraud in the Courts After the Revision to U.C.C. Articles 3 and 4*, 57 ALA. L. REV. 351, 409–10 (2005).

33. Hillebrand's article is an exception. Hillebrand, *supra* note 7, at 803–04.

34. A U.C.C. comment suggests that customers can use the doctrines of good faith and unconscionability to challenge bank fees, and the comment cites two cases. U.C.C. § 4-406 cmt. 3 (2005). In neither case, however, did the court hold the consumer had successfully challenged the fees.

35. Alces & Hopkins, *supra* note 1, at 882–84.

36. Katie Kuehner-Hebert, *Debit Reward Payoff: More Bounce Fees*, AM. BANKER, Mar. 1, 2007, at 1 (reporting that at Cornhusker Bank, income from nonsufficient fund fees rose 10%, in substantial part because consumers were using debit cards more often); Tom Thomas & Christopher Halaska, *Overdraft Protection Programs: A Good Income Opportunity If Done Correctly*, KY. BANKER MAG., Jan. 2007, at 15, available at 2007 WLNR 1797162. Congress has been considering legislation to restrict banks' use of bounced check programs. Stacy Kaper, *House Panel Set to Vote On Overdraft Restrictions*, AM. BANKER, Sept. 25, 2007, at 1 (reporting that Rep. Maloney's bill would require financial institutions to receive consumers' written consent to an overdraft program, financial institutions would have to disclose repeated overdraft charges in an interest rate format, and consumers would have to approve overdraft charges imposed on ATM transactions). Thecla Fabian, *Almost 20 Percent of Bank Customers Paid Overdraft Fees Over Past Year. Poll Says*, 89 Banking Rep. (BNA) No. 9, at 349 (Sept. 10, 2007) (reporting on American Bankers Association survey of 1,000 consumers in which 18% stated they had paid at least one overdraft fee in the past year).

only to non-sufficient funds (NSF) checks, but also to the more technologically-advanced debit card and withdrawals at automated teller machines (ATMs).³⁷ Technology also comes into play when a bank re-presents an NSF check. The bank can decide to use the ACH to re-present the NSF check electronically.³⁸ Each time the check bounces, another fee can be assessed.

Whether payments law should include regulation of fees implicates another major issue that the articles in the Symposium ignore: preemption of state law by the federal banking agencies without substituting comparable federal consumer protections. Preemption of state law by federal agencies affects not only fee income from NSF checks and debit cards but also state law governing the fees that can be imposed for using stored-value cards³⁹ and much more.⁴⁰

II. TECHNOLOGY'S IMPACT ON ERROR RESOLUTION

The articles in the Symposium do not adequately consider the problems consumers may have persuading other parties to investigate errors and promptly resolve consumer disputes. Technology has enabled banks to offer many new payment products and to process payments in new ways. Many parties other than the consumer's bank are involved in each transaction. Due to the lack of transparency, it may be difficult for the consumer to identify how an error occurred, or who may be responsible for that error.⁴¹

37. Deb Gruver, *Consumer Debt: Some Overuse Bank Overdraft Programs*, WICHITA EAGLE, June 26, 2006, at A1, available at 2006 WLNR 11027976 (explaining that many banks offer overdraft protection as a "courtesy" to customers when, in fact, such programs could just as accurately be characterized as high-interest loans that consumers are powerless to reject).

38. 2007 ACH RULES, *supra* note 6, § 2.8, at OR 9.

39. *Compare* SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir. 2007) (holding state gift card law is preempted by OCC), *with* SPGGC, Inc. v. Blumenthal, 408 F. Supp. 2d 87 (D. Conn. 2006) (holding state gift card law is not preempted by OCC). *See also* O.T.S. Priv. Ltr. Rul. P-2006-3 (June 9, 2006) (opining that five categories of state law provisions governing gift cards are preempted by federal law).

40. A comprehensive discussion of preemption of state law by federal agencies is beyond the scope of this article. Preemption was given a significant boost by the Supreme Court in *Watters v. Wachovia*, 127 S. Ct. 1559 (2007), which upheld the OCC's preemption of state laws as applicable to the real estate operating subsidiary of a national bank. The OCC's preemption of state law makes a national bank charter subject to OCC regulation more attractive than a state charter. Consequently, banks drop their state charters and obtain national charters. Cheyenne Hopkins, *Taylor, Going, Repeats Dual System Fears*, AM. BANKER, Mar. 9, 2007, at 1. Banks dropping their state charters results in a substantial reduction in revenue for the state banking agency. Consequently, those agencies have an incentive not to rigorously enforce state consumer protection law, so as to encourage banks not to relinquish their state charters. *Id.* at 3.

41. Examples include MICR encoding errors (was the error made by the payor bank or the depository bank?), double debits when checks are processed through check imaging (was the error made by the paying bank, the depository bank, or an intermediary bank?), an incorrect preauthorized electronic fund (was the error made by the biller or one of the banks?), and failure to transfer direct deposits of payroll into the correct account (was it the employer's error, the employer's bank, or the consumer's

In addition, the law handles error resolution in myriad ways, violating Professor Rusch's assertion that an objective of a legal regime for payment systems should be "a transparent set of rules whereby the system participants know what risks they are taking on in using the system."⁴² If there is unauthorized use or bank error, the consumer may have no feasible means of getting the bank to investigate the consumer's complaint. Furthermore, the consumer likely cannot afford to hire an attorney in order to sue the bank and obtain a remedy. The U.C.C. provides no required error resolution procedure. Therefore, a bank can simply refuse to investigate a consumer's complaint. Check 21 provides a required error resolution procedure, but only for those consumers who refuse to have their checks truncated and who can satisfy a baffling set of requirements for alleging a very narrowly defined category of complaints.⁴³ The EFTA mandates the error resolution procedure most favorable to consumers. But it has a limited scope. If the consumer engages in an electronic transfer subject to the EFTA and invokes the error resolution procedure, the consumer's financial institution must investigate. But that investigation is limited to the institution's own "four walls."⁴⁴ The error may have been caused by a third party, outside the scope of the EFTA; the consumer will be hard put to determine who might be responsible and to achieve legal redress.

Due to technology, consumers have more choices than ever among payment products. Increasingly, consumers use stored-value cards, such as gift cards, prepaid "debit" cards, and phone cards. No federal law applies, many states do not regulate these products, and those that do generally do not include a mandated error-resolution procedure.⁴⁵ Moreover, federal agencies have preempted state law,⁴⁶ but failed to substitute state law with federal rules requiring error-resolution procedures.

Lacking adequate rules for error resolution when using many types of payment instruments, the consumer's only choice may be to litigate. But banks and non-bank firms issuing payment devices have erected barriers

bank?). The transition from paper checks to image replacement documents and ACH transactions has resulted in increased instances where the customer's account is debited more than once for the same payment. Steve Bills, *New Products Reflect Increased Duplication Risk*, AM. BANKER, Feb. 13, 2007, at 10, available at 2007 WLNR 3282763 (quoting a vice president at Frost National Bank: "We're seeing more and more problems on duplicates. It's across the board. Whole files are being duplicated. Partial files are being duplicated. Single items are being duplicated.").

42. Rusch, *supra* note 7, at 591.

43. Budnitz, *supra* note 17, at 371.

44. 12 C.F.R. § 205.11(c)(4) (2007).

45. See generally MARK BUDNITZ & MARGOT SAUNDERS, CONSUMER BANKING AND PAYMENTS LAW § 7.7 (3d ed. 2005).

46. See O.T.S. Priv. Ltr. Rul. P-2006-3 (June 9, 2006).

that prevent consumers from being able to litigate. They use the death of “agreement” in contract law to their advantage, requiring consumers to arbitrate disputes. Since arbitrators are not required to follow the law, consumers have no assurance they will reap the advantages of the consumer protections in federal and state law. Moreover, the prohibition of class actions in these contracts often makes litigation, even in an arbitration setting, infeasible.⁴⁷ The partial death of public law also presents problems for consumers whose only alternative is litigation. The courts are divided on the issue of whether consumers can sue parties to NACHA’s private rules when they fail to comply with those rules. Not all courts permit consumers to succeed in such lawsuits because the commercial parties agree to follow the NACHA rules as a matter of contract, and consumers are not a party to these contracts.⁴⁸

III. TECHNOLOGY BENEFITS AND EMPOWERS CONSUMERS

The previous parts of this comment paint a bleak picture of the consumer’s prospects in the current and future law of payment systems, a picture filled with many dark colors, with technology appearing at best as indifferent to consumer needs. There is, however, another picture we could paint, one with many bright and cheery colors, with technology as the consumer’s friend and helper. Technology has brought many benefits to consumers. It has vastly increased consumer choice among payment products. Stored-value cards are a relatively recent example. The use of one type, the “prepaid debit card,” may be greatly increased by Wal-Mart’s promotion of its card in 2007.⁴⁹ This card may provide disadvantaged consumers with a useful and needed payment product, since many of them cannot qualify for

47. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 79–82, 85–86, 88–89 (2004).

48. *Compare Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 952, 955 (8th Cir. 2006) (consumer cannot sue a party to the NACHA Rules for breach of contract), *with Sec. First Network Bank v. C.A.P.S., Inc.*, No. 01-C-342, 2002 WL 485352, at *6 (N.D. Ill. Mar. 29, 2002) (customer can sue for breach of NACHA rules even though customer was not a party to NACHA agreement because customer’s agreement with bank incorporated the NACHA rules).

49. Richard Cowden, *Wal-Mart to Offer Stored-Value Cards, Expand Number of Money Services Facilities*, 88 BNA Banking Rep. (BNA) No. 25, at 1104 (June 25, 2007) (noting consumers using the Wal-Mart card would not be subject to overdraft fees because the card, being prepaid, cannot be overdrawn); Michael Barbaro & Eric Dash, *At Wal-Mart, a Back Door into Banking*, N.Y. TIMES, June 21, 2007, at C1, C9 (reporting that the retailer planned to charge \$8.95 upfront for “Wal-Mart Money-cards,” plus a \$4.95 monthly maintenance fee). Although called a prepaid “debit card,” this payment instrument is not a debit card governed by the EFTA. Rather, it is more accurately categorized as a stored-value card, subject to no federal law. *See Hillebrand, supra* note 7, at 784, 794 (discussing the Wal-Mart card).

credit cards and cannot qualify for a debit card because they do not have a bank account.

Technology has enabled payments to be processed far more cheaply and quickly than payment by check,⁵⁰ resulting in a more efficient payment system. Presumably consumers reap some amount of the benefit from this efficiency in the form of a lower cost for bank services.⁵¹ The greater processing speed that technology makes possible has enabled some banks to make depositors' funds available even sooner than Regulation CC requires.⁵²

Due to improved technology, banks can make payment transfers far more convenient for consumers. Consumers can bank at home. They can shop on the Internet, paying with the click of a mouse. In addition, consumers who engage in banking over the Internet can pay their bills online, at any time. They can have their paychecks transferred to their accounts through direct deposit, saving the time and expense of going to check cashers or traveling to the bank to deposit their checks and make cash withdrawals. Consumers can make deposits and withdrawals any time at ATMs. Cell phones soon will be equipped with software enabling them to make payment transactions.⁵³

Consumers who engage in online banking can access information about their account activity 24/7. They do not have to wait until paper checks or images of checks arrive in the mail once a month to identify questionable transactions.

As discussed below, these technological advances raise questions about whether the law should be changed.

50. See generally Hillebrand, *supra* note 7, at 801; Samuelson, *supra* note 5, at 35.

51. Whether banks pass down some of their cost savings to consumers may depend to a large extent on whether the banks need to do so in order to stay competitive. Gillette and Walt assume the savings are passed to consumers. Gillette & Walt, *supra* note 24, at 554.

52. *Implementation of the Check Clearing for the 21st Century Act: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Serv.*, 109th Cong. 28 (2005) (statement of David Hayes, Chairman, Independent Community Bankers of America); see Peralte C. Paul, *Whose Money Is It?*, ATLANTA J.-CONST., May 10, 2007, at B1 (reporting that Regions Financial bank makes deposited funds available as soon as they clear).

53. John Engen, *Mobile Banking's Second Act*, U.S. BANKER, June 2007, at 35; see Hillebrand, *supra* note 7, at 773, 778, 782, 785; Daniel Wolfe, *Mastercard, Trade Group To Test Phone Payments*, AM. BANKER, Feb. 13, 2007, at 10 (reporting that companies are developing a system to transfer international person-to-person payments through cell phones).

IV. CONSUMER RESPONSIBILITY AND LIABILITY IN LIGHT OF THE CHANGES IN THE PAYMENTS LANDSCAPE

It is appropriate to reevaluate the legal rules on consumer liability for unauthorized transfers as well as the requirements for reporting these and other errors to the consumers' banks in light of recent developments in payment products and systems.

A. *Great Variation in Legal Rules Regarding Consumer Responsibility*

The current legal rules vary greatly as to how much responsibility is placed on consumers and the extent to which they are protected.⁵⁴ The U.C.C. demands that consumers be responsible for their check transactions. They must report forged drawer signatures and alterations promptly.⁵⁵ Courts uphold bank-customer account agreements containing "cutdown clauses."⁵⁶ These clauses require drawers to report forgeries and alterations much sooner than the one-year period provided for in U.C.C. section 4-406(f).⁵⁷ Moreover, drawers are liable if they are negligent.⁵⁸ In contrast, negligence plays no role in the limits placed on consumer liability when there is unauthorized use of a credit card, and liability is capped at \$50 regardless of when or if the consumer reports the loss or theft of the card. The EFTA takes an approach somewhere in between the two extremes represented by the check model and credit card model. While consumer negligence is irrelevant, the consumer's liability for failure to report an erroneous electronic fund transfer can be considerably greater than \$50.⁵⁹ If the consumer reports a lost or stolen debit card within two days, liability is capped at \$50; if the consumer reports after the two days, liability increases to \$500. For unauthorized transfers of a debit card or any other type of electronic fund transfer, liability skyrockets to all the money in the consumer's account and any line of credit, if the consumer fails to report within sixty days of when the bank statement is made available.

54. Gillette & Walt, *supra* note 24, at 504.

55. U.C.C. § 4-406(c) (2005). In some states, customers also must report forged indorsements within a specified time. *E.g.*, ALA. CODE § 7-4-406(f) (West 2006); FLA. STAT. ANN. § 674.406(6) (West 1993); GA. CODE ANN. § 11-4-406(f) (West 2003); OR. REV. STAT. ANN. § 74.4060(6) (West 2003); WASH. REV. CODE ANN. § 62A.4-406(f) (West 2003).

56. Gillette & Walt, *supra* note 24, at 553.

57. *E.g.*, Nat'l Title Ins. Corp. Agency v. First Union Nat'l Bank, 559 S.E.2d 668, 670-71 (Va. 2002); Borowski v. Firststar Bank Milwaukee, N.A., 579 N.W.2d 247, 249-50 (Wis. Ct. App. 1998).

58. U.C.C. § 3-406(a).

59. 15 U.S.C. § 1693g (2000).

B. *The Monthly Statement: Gillette's and Walt's Analysis*

Professors Gillette and Walt have examined the U.C.C.'s requirement that drawers report forged drawer signatures and alterations to their banks, and banks' use of cutdown clauses to force consumers to do so very quickly. Their analysis provides a useful framework for exploring the role of consumer responsibility. Professors Gillette and Walt assert that "[o]nce the bank has notified the customer about debits to its account, the customer has the information needed to detect forged or unauthorized alterations to checks. At that point the customer is better positioned than the bank to prevent ongoing forgeries and alterations"⁶⁰ Consequently, they assert that the U.C.C.'s scheme placing the duty on the customer to report forgeries and alterations promptly is appropriate. Gillette and Walt note that banks use cutdown clauses and the courts uphold them.⁶¹ They also acknowledge that consumers "may systematically underestimate the consequences of agreeing to a cutdown clause, and thus underprice the clause."⁶² Consumers "may be led to select terms they do not prefer . . . [and] this arguably justifies making 4-406(f) a mandatory rule for consumer users of checks."⁶³ Gillette and Walt seem to have misgivings, however, noting that not enough is known about consumer behavior, including, "cognitive failures," for one to be confident a mandatory rule is justified.⁶⁴ Furthermore, they suggest that "detailed disclosure" may provide an adequate remedy, negating the need for a mandatory one-year rule.⁶⁵

I agree with Gillette's and Walt's recommendation that the U.C.C. should be amended to make section 4-406(f) a mandatory rule, but I have several concerns about the way they discuss this issue. For instance, in many states consumers are in a worse position than the one in which the official version of the U.C.C. puts them. For in those states, customers also must report forged endorsements.⁶⁶ Consumers have an even greater need for a mandatory rule in those states since they have more responsibilities. In addition, courts have upheld very onerous cutdown clauses, including a

60. Gillette & Walt, *supra* note 24, at 554. Banks send eight out of every ten households a hard copy statement for their primary bank accounts rather than electronic statements. Mary T. Monahan, *Going Paperless: A Rare Strategy of Win-Win-Win*, AM. BANKER, Sept. 28, 2007, at 10.

61. Gillette & Walt, *supra* note 24, at 553; *see also* Overby, *supra* note 32, at 409–10 (discussing cutdown clauses).

62. Gillette & Walt, *supra* note 24, at 554.

63. *Id.* at 555.

64. *Id.* at 556.

65. *Id.*

66. *See supra* note 55.

requirement that the customer notify the bank within only fourteen days.⁶⁷ To appreciate how short a time this is, one should keep in mind that when a court upholds a clause with a fourteen-day reporting requirement, that clause provides that the fourteen days is measured by when the bank sends the monthly statement to the consumer, not by when the consumer receives it. Consumers may have far fewer than fourteen days to examine their statements and report errors once they receive the statement.

Gillette and Walt talk about consumers “led to select terms they do not prefer,” and believe they will “underestimate the consequences of agreeing to a cutdown clause.”⁶⁸ It is highly unlikely that consumers “select terms” and agree to cutdown clauses. Banks’ account contracts are presented on a take-it-or-leave-it basis and are long and complex. Consumers who take the time to read the contract cannot possibly understand the effect of the legalese on their rights and responsibilities unless they have knowledge of payments law. There is no reason to believe they would focus on the cutdown clause and use that as one of their bases for deciding whether to have an account at any particular bank. As discussed above and in Alces’s and Hopkins’s article, the concept of “agreement” is dead.⁶⁹

Gillette and Walt state that once the bank notifies the customer about debits to the account, the customer has the information needed to detect forgeries and alterations and is in a better position than the bank to prevent these problems by reporting them to the bank.⁷⁰ In the case of the customer who is a consumer rather than a business, that simple description of the situation masks a more problematic reality and ignores the effect of convergence on the information of account activity provided by the bank.

My January 2007 monthly bank statement illustrates that reality. Included are several original checks, some written by me and some by my wife. The various reporting deadlines imposed by the U.C.C. apply, except to the extent I have waived them in my bank’s cutdown clause. There also is a substitute check. The various reporting deadlines of the U.C.C., my contract with the bank, and Check 21 govern that check. The statement also contains images of the front of nine checks, reduced to less than 1½ inches by 3½ inches. My bank statement says that it received images of these checks rather than the originals.⁷¹ Other checks we wrote are not included

67. *Borowski v. Firststar Bank Milwaukee*, 579 N.W.2d 247, 253 (Wis. Ct. App. 1998).

68. Gillette & Walt, *supra* note 24, at 554–55.

69. Alces & Hopkins, *supra* note 1, at 883–86.

70. Gillette & Walt, *supra* note 24, at 554.

71. It is not clear what law applies to these images. Heller, *supra* note 5, at 531–32. Apparently these checks were processed electronically pursuant to interbank agreements. See Hillebrand, *supra* note 7, at 780; Rusch, *supra* note 7, at 580–81.

but are listed under the uninformative heading “Automated Checks.” The statement lists their check number, amount, the name of the payee, and lots of numbers, plus the term “ARC.”⁷² These are subject to the mandatory deadlines in the EFTA as well as the NACHA rules. Under the nondescriptive heading of “Other Withdrawals and Service Fees,” the statement lists both ATM withdrawals and preauthorized transfers for some of my recurring bills, such as the charges assessed by the electric company. Both are subject to the EFTA. The statement also lists the direct deposit of my salary, subject to the EFTA, and check deposits, subject to the Expedited Funds Availability Act.⁷³ If I had used my debit card, transfers made with that card would be included, subject to the EFTA. If I had purchased goods or services from a telemarketer, there likely would be transfers made with a “remotely-created consumer item,” subject to the U.C.C. and Regulation CC.⁷⁴ If I had engaged in online banking, online transfers governed by the EFTA would be listed, and my online banking activities also would be subject to the bank’s contract.⁷⁵

My monthly statement is less complex than some consumers’ statements.⁷⁶ Nevertheless, even in my simpler circumstances, the transactions reflected in every monthly statement are subject to many different federal and state statutes, each with its own requirements and deadlines, some mandatory, some not, for reporting unauthorized transactions and errors. The transactions reflected in my monthly statements also are subject to the bank’s contract with me and NACHA’s private rulemaking.

Professors Gillette and Walt seem to think that consumers can look at their monthly statements and know which items are subject to which reporting deadlines. Actually, the consumer who reads the statement may easily, and quite reasonably, be misled. Pursuant to the EFTA’s Regulation E,⁷⁷ every month my statement informs me that I have sixty days to notify the bank about errors in my “electronic transfers.” Nothing in my statement

72. ARC is the term used by the NACHA Rules to designate checks processed as electronic check conversions at the lockbox. See 2007 ACH RULES, *supra* note 6, § 2.9, at OR 10.

73. Expedited Funds Availability Act, 12 U.S.C. §§ 4001–4010 (2000).

74. U.C.C. §§ 4-207(a)(6), 4-208(a)(4) (2005); Collection of Checks and Other Items by Federal Reserve Banks, 70 Fed. Reg. 71,218, 71,225 (Nov. 28, 2005) (codified at 12 C.F.R. pt. 229).

75. Budnitz, Clifford, Ferry & Saunders, *supra* note 30, at 647.

76. I do not purchase goods or services from telemarketers, deposit funds into ATMs, use my debit cards, or engage in online banking. Purchases of gasoline and hotel rooms with debit cards can make it very difficult for consumers to determine the balance in their accounts as holds for far more than the amount of the purchase may be placed on the account for several days or weeks after the date of the purchase. The practice of placing a hold without notice to the consumer is being challenged. *Grillasca v. Amerada Hess Corp.*, No. 8:05-cv-1736-T-17TGW, 2006 WL 3313719, at *3 (M.D. Fla. Nov. 14, 2006).

77. 12 C.F.R. pt. 205 (2007).

mentions any other time limit for reporting problems to my bank. A reasonable consumer may assume the sixty day deadline applies to every item on the statement. After all, my statement does not define “electronic transfers,” and as a result of convergence, the line between electronic and non-electronic transfers has become very hazy. Under these circumstances, it is reasonable for consumers to believe that a check that was processed first as a paper original, then as an electronic image and eventually reached the consumer as a substitute check qualifies as an electronic transfer subject to the sixty-day rule rather than Check 21’s forty-day deadline.⁷⁸ Furthermore, it is reasonable for consumers to believe a check they mail to a credit card company that is processed as an electronic check conversion at the lockbox is subject to the same U.C.C. and contract rules for reporting errors as other checks, rather than the EFTA’s sixty-day rule.

The U.C.C. requires the customer to report forgeries and alterations that “the customer should reasonably have discovered.”⁷⁹ As the complexity of monthly statements increases, it may become ever more difficult for courts (or more likely arbitrators) to determine what problems it is reasonable for a consumer to discover among the clutter of so many transactions (and distractions) reflected on the statement. For today’s statements contain checks, substitute checks, and images of checks, as well as many non-check transfers. Surely, in this environment Professors Gillette and Walt are correct in recommending that the U.C.C. include a rule guaranteeing consumers a reasonable time to report forgeries and alterations.

After asserting that making section 4-406(f) a mandatory rule is “arguably justifie[d],” however, Gillette and Walt backpedal somewhat by saying that “the trouble might be remedied by detailed disclosure.”⁸⁰ Elsewhere in their article they state that “it is plausible that education to increase consumer awareness would create more welfare than making legal rules more uniform.”⁸¹ Alces and Hopkins point out, however, that “the limitations of disclosures have been well documented, and not all bank customers will take the time to educate themselves.”⁸² In addition, disclosure and education have major obstacles to overcome, given consumers’ ignorance of the ever-increasing array of payment products,⁸³ the plethora

78. 12 U.S.C. § 5006(a)(2).

79. U.C.C. § 4-406(c); *see also id.* § 4-406 cmt 1.

80. Gillette & Walt, *supra* note 24, at 555–56.

81. *Id.* at 502.

82. Alces & Hopkins, *supra* note 1, at 905.

83. Amy Baldwin, *Guide Kids Down the Green Path*, CHARLOTTE OBSERVER, June 10, 2007, at 1D (reporting on surveys by the North Carolina State Treasurer and Charles Schwab & Co.); M.P. Dunleavy, *Cards Train Teenagers To Use Plastic*, N.Y. TIMES, Aug. 25, 2007, at C6 (describing the problematic nature of Visa and Mastercard prepaid debit cards marketed to teens and a 2007 Charles

of disclosures already required,⁸⁴ and banks' tendency to counter disclosure and education with what Alces and Hopkins call "shrouding."⁸⁵ Furthermore, the mislabeling of some products, such as calling a prepaid stored-value card a "debit" card adds to consumer confusion.⁸⁶

C. *Who Is the Consumer and How Does the Consumer Use Payment Products?*

Although some of the articles in the Symposium make general assumptions about consumers, none engages in an in-depth examination of the characteristics and behavior of consumers.⁸⁷ Generalizing about consumers makes it easier to analyze legal issues and make recommendations, but the analysis will miss many salient elements and the recommendations will not be suitable for many consumers. That is because generalizations about consumers exclude large segments of the consumer population. This is inevitable because consumers include everyone from the most highly educated and sophisticated consumer, who has ready access to computers, lawyers, and financial advisors, to low income, uneducated, unsophisticated persons whose primary language may not be English, who have never had a bank account, who live paycheck to paycheck, and who likely have no experts to advise them.⁸⁸

Schwab survey in which most teens admitted they are not knowledgeable about interest charges or credit and debit cards).

84. Truth in Savings Act, 12 U.S.C. §§ 4301–4313 (2000); 12 C.F.R. pt. 230 (2007).

85. Alces & Hopkins, *supra* note 1, at 889.

86. Stored-value cards are not subject to federal regulation; true debit cards are regulated by the EFTA.

87. Professors Gillette and Walt seem to have in mind a rather sophisticated and well-informed consumer. Professor Ramasastry's and Ms. Hillebrand's consumer is justifiably confused. Hillebrand, *supra* note 7, at 785–87; Ramasastry, *supra* note 18, at 820–41. Even all the disclosure and education in the world could not end some of consumers' ignorance and confusion, for the applicability of the law itself is unclear. Hillebrand, *supra* note 7, at 790–92; Rusch, *supra* note 7, at 580.

88. Approximately one-half of all adults read at or below the eighth grade level. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 6 (2006); *see, e.g.*, William Launder, *Courting the Unbanked, Beyond Traditional Hubs*, AM. BANKER, June 13, 2007, at 1, 10 (describing bank efforts to attract customers from the unbanked immigrant Hispanic community, a community that at least tripled during the 1990s in the Midwest and Southeast, and where half of households earn \$36,000 per year or less). The new Wal-Mart prepaid debit card may provide many previously unbanked consumers with the opportunity to deal with other types of institutions involved in payments besides check cashiers. *See* Kathy Chu & Jayne O'Donnell, *Wal-Mart to Offer Payment Cards*, USA TODAY, June 7, 2007, at 1A. According to a 2001 study, 53% of those surveyed said that, at least some of the time, they live paycheck to paycheck. Press Release, America Saves, CFA Research Reveals Most Americans Have Built Little Wealth (Feb. 20, 2001), *available at* http://www.americasaves.org/back_page/little_wealth.cfm; *see* Anne D'Innocenzio, *Paychecks Stretched to Breaking Point*, ATLANTA J.-CONST., Oct. 21, 2007, at F9 (reporting that with food and energy prices rising faster than at any time since the 1980s, more people are unable to afford basic goods and services). The Chair of the FDIC reports that in 2006, the savings of American households was negative \$92 billion. Sheila C.

The great variety in the backgrounds, experiences, and expertise of consumers poses a major challenge to policymakers. Should the law impose responsibilities and liability on consumers on the assumption they are well-equipped to take care of themselves, or should it be consistent with the needs of the least capable? Should the law aim toward the middle, trying to be responsive to the needs and capabilities of the average consumer? If so, how can a policymaker determine the characteristics of the average consumer?

Despite the difficulty, maybe even the impossibility, of trying to come to grips with these issues, courts and legislatures routinely act on unstated assumptions about consumers. An example is the case law that upholds cutdown provisions requiring consumers to report errors to their bank within very short amounts of time. Those decisions assume consumers never go out of town and never have to go to the hospital. As discussed above, with the increasing complexity of today's bank statement, those courts also would have to assume consumers have a rather high level of sophistication about payment products and processing systems.

In addition to the difficulties of crafting rules for consumers using payment products and systems due to the great differences in the characteristics of consumers, consumers use the same payment products in different ways. Gillette and Walt assume the majority of consumers pay credit card bills in full each month.⁸⁹ Studies support that assumption.⁹⁰ They reach various conclusions based on that consumer behavior. For example, they believe consumers would be surprised to learn that reversibility rights they have with credit cards do not also apply to debit cards.⁹¹ I believe Gillette and Walt are correct regarding consumer confusion about differences in the laws related to debit and credit cards, but they oversimplify matters. While the majority of consumers use credit cards in a way that may confuse them with debit cards because they pay off the balance each month, a very substantial minority of consumers do not—over 46%, according to an FRB

Bair, Chairman, Fed. Deposit Ins. Corp., Remarks Before the City Club of Cleveland, Ohio (Mar. 2, 2007), *transcript available at* <http://www.fdic.gov/news/news/speeches/archives/2007/chairman/spmar0207.html>.

89. Gillette & Walt, *supra* note 24, at 522.

90. A Federal Reserve Board staff study found that from 2001 to 2004, 46.2% of families carried a balance on their credit card accounts. Brian K. Bucks, Arthur B. Kennickell & Kevin B. Moore, *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances*, FED. RES. BULL., Mar. 22, 2006, at A30, *available at* <http://www.federalreserve.gov/pubs/bulletin/2006/financesurvey.pdf>. A GAO study found that 35% of active credit card accounts were assessed late fees in 2005. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 88, at 5.

91. Gillette & Walt, *supra* note 24, at 522.

study.⁹² That substantial minority depend on their credit cards as a source of credit. Perhaps that minority is less confused about the differences between credit and debit cards than the majority. Nevertheless, there are strong policy reasons for imposing certain uniform rules to protect consumers, whichever card they use, regardless of the way they use them.⁹³ In addition, differences in the way consumers use cards likely vary over time. During recessions, consumers probably carry balances on their credit cards more often than during times of prosperity. As new payment products arise, consumers may use the older products in different ways. Therefore, while it is certainly relevant to consider how the majority of consumers use a given payment product at any particular time, policymakers should use caution in according it undue weight.

Who are the businesses participating in transactions involving payment products and systems? Just as it is impossible to generalize about the “typical” or “average” consumer, it also is impossible to generalize about the “typical” financial institution and other businesses with whom consumers must deal in transactions involving payments. While many businesses engage in fair business practices, others do not. For example, payday lenders have been widely criticized for their predatory practices.⁹⁴ Check cashers are another type of financial services provider with a less than stellar reputation.⁹⁵ Furthermore, even the most reputable financial institutions have abused “freedom” of contract, as Alces and Hopkins demonstrate.⁹⁶ One major bank, well aware that thieves had devised a clever scheme to trick consumers into innocently surrendering their ATM cards for a few moments, failed to adequately warn consumers of the nature of the scheme and claimed the consumers had authorized the thieves to withdraw the

92. Bucks, Kennickell & Moore, *supra* note 90, at A30; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 88, at 90.

93. See *supra* text accompanying notes 16–23.

94. See generally JEAN ANN FOX & ANNA PETRINI, CONSUMER FED'N OF AM., INTERNET PAYDAY LENDING: HOW HIGH-PRICED LENDERS USE THE INTERNET TO MIRE BORROWERS IN DEBT AND EVADE STATE CONSUMER PROTECTIONS 4 (2004), available at http://www.consumerfed.org/pdfs/Internet_Payday_Lending113004.PDF; Mary Kane, 'Fringe Banks' Profit from Customers Without Banks, in MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY 54–57 (Michael Hudson ed., 1996).

95. Mark Belko, *North Side Wary of Strip Club Possibility*, PITTSBURGH POST-GAZETTE, Sept. 18, 2007, at A1, A6 (reporting that a community leader opposed a casino's application to do business because it would attract strip clubs and check cashers); Joyce Moed, *CUs Save Pennsylvanians More than \$600k with Alternative to Payday Loan Program*, CREDIT UNION J., Sept. 10, 2007, at 7 (quoting a credit union official as saying that check cashers “strip wealth” from borrowers); Julie Kay, *Better than Bank Robbery*, DAILY BUS. REV. (Miami), July 23, 2007, at A1, A9 (reporting that a criminal indictment alleges a massive Medicare fraud was facilitated by three check cashing stores).

96. Alces & Hopkins, *supra* note 1, at 886–88.

money from their accounts.⁹⁷ The contracts used by banks for online banking place onerous liability on consumers.⁹⁸ Banks impose, and courts uphold, unreasonably short deadlines on consumers to report check forgeries and alterations.⁹⁹ Credit card companies and universities engage in highly questionable tactics to persuade college students to sign up for the companies' cards.¹⁰⁰ To complicate the situation further, third-party intermediaries play an increasingly significant role, making it even harder to generalize about the parties handling payment transfers.¹⁰¹

V. CONSUMER PROTECTION OR EFFICIENCY?

Professors Gillette and Walt claim that the rules on unauthorized electronic transfers subordinate efficiency to what they say is "touted as [a] consumer protection scheme."¹⁰² They assert that an efficient rule would "place losses on the party in the best position to avoid them."¹⁰³ Moreover, they claim that the effect of the rules ignoring consumer negligence is that the costs of negligence leading to unauthorized transfers are borne by all consumers, so those who are not negligent subsidize those who are.¹⁰⁴

The EFTA's liability limits were not based on Congress's concept of efficiency but, rather, were part and parcel of Congress's objective to ensure consumers basic protection. The EFTA specifically states that Congress's primary objective was "the provision of individual consumer

97. *Ognibene v. Citibank, N.A.*, 446 N.Y.S.2d 845, 847 (N.Y. Civ. Ct. 1981).

98. See generally Budnitz, Clifford, Ferry & Saunders, *supra* note 30.

99. *Borowski v. Firststar Bank Milwaukee*, 579 N.W.2d 247, 252-53 (Wis. Ct. App. 1998); see *supra* text accompanying note 67.

100. Creola Johnson, *Maxed Out College Students: A Call to Limit Credit Card Solicitations on College Campuses*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 191 (2005); see Temporary Restraining Order with Asset Freeze, *FTC v. EDebitPay*, No. CV-07-4880 ODW (AJWx) (C.D. Cal. July 30, 2007), available at <http://www.ftc.gov/os/caselist/0623125/070730edebitpaytro.pdf> (issuance of temporary restraining order against credit card issuers that the Federal Trade Commission accused of deceptively marketing credit cards on the Internet and electronically debiting consumer accounts for undisclosed fees, including accounts of consumers who had never had contact with the credit card issuers); LESLIE PARRISH & PETER SMITH, CTR. FOR RESPONSIBLE LENDING, BILLION DOLLAR DEAL: BANKS SWIPE FEES AS YOUNG ADULTS SWIPE DEBIT CARDS, COLLEGES PLAY ALONG (2007), <http://www.responsiblelending.org/pdfs/billion-dollar-deal.pdf>. Abuses by credit card issuers are not confined to marketing on college campuses.

101. 2007 ACH RULES, *supra* note 6, at ACH PRIMER 2 (describing financial institutions' use of third party service providers in processing electronic transfers in the ACH system); Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEX. L. REV. 681, 682 (2004); John Hintze, *Spring: Sweeps Season for Brokers, Regulators*, SEC. INDUS. NEWS, May 30, 2005, at 1 (reporting that brokerage firms use third party intermediaries to sweep funds from their customer accounts to bank accounts).

102. Gillette & Walt, *supra* note 24, at 535.

103. *Id.*

104. *Id.* at 539

rights.”¹⁰⁵ Before revising the EFTA’s risk allocation rules, Congress should ask whether there are compelling reasons to change the EFTA—in a way that is contrary to the overriding consumer protection objective of the EFTA—by subjecting consumers to liability in situations where formerly they were not. Congress should consider whether consumers need less protection.

As was true when the EFTA was enacted, consumers cannot hope to protect themselves by striking a fair bargain with their banks. Consumers lack bargaining power. The concept of “agreement” in consumer transactions is illusory.¹⁰⁶ Banks mislead consumers by “shrouding” certain contract terms.¹⁰⁷ Consumers are justifiably confused.¹⁰⁸ Banks decide what technology to employ; consumers play no role in that decision. Financial institutions take advantage of consumers’ inability to bargain over contract terms by imposing onerous terms,¹⁰⁹ engaging in abusive practices,¹¹⁰ and insisting on arbitration clauses that deprive consumers of access to a judicial forum and the assurance that the law will be followed.

Other factors, not considered in the Symposium, provide additional support for preserving the EFTA’s rules, rather than eroding the consumer protection it provides. What is at stake for consumers is the money they need for food, shelter, medical care, transportation, and other necessities. Most Americans do not have a significant amount of discretionary income.¹¹¹ Consequently, when there is an unauthorized transfer, consumers’ ability to pay for necessities is put in jeopardy. The cost of error and fraud can be very high for each consumer affected.

Second, it is government policy to encourage consumers to use traditional banks over fringe bankers¹¹² and to use electronic transfers rather

105. 15 U.S.C. § 1693(b) (2000).

106. Alces & Hopkins, *supra* note 1, at 881–85.

107. *Id.* at 889–90.

108. See generally Hillebrand, *supra* note 7, at 785–87; Ramasastry, *supra* note 18, at 820–41.

109. Alces & Hopkins, *supra* note 1, at 883, 886, 890–91.

110. See *supra* text accompanying notes 94–101.

111. Shira Boss, *Save, Save. Don’t Splurge on a Piggy Bank, a Tin Can Will Do.*, N.Y. TIMES, Sept. 1, 2007, at C5.

112. BUDNITZ & SAUNDERS, *supra* note 45, at 242, 249 (explaining that pursuant to a federal statute and Treasury rule, unless a consumer wants a hardship waiver, recipients of federal benefits who lack a traditional bank account must receive benefits electronically through an Electronic Transfer Account, and that non-financial institutions, such as check cashers, cannot qualify to establish such accounts); see *Bank Secrecy Act’s Impact on Money Services Businesses: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Serv.*, 109th Cong. 39–40 (2006) (statement of Gerald Goldman, General Counsel, Financial Services Centers of America, testifying that federal bank regulators perceive money services businesses, such as check cashers, to be “high risk” businesses, susceptible to money laundering and financial crime); Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Banks Announce Changes to Increase Check Service Efficiency

than paper checks.¹¹³ Legal rules that adopt a “consumer beware” policy do not promote this policy. They do not foster consumer trust and confidence in banks in general or in electronic transfers in particular.

Third, if consumers are liable for unauthorized transfers caused by their own negligence, banks may be tempted to claim the consumer was negligent whenever an unauthorized transfer occurs. As a result, courts and arbitrators will have to spend time, and the parties will have to spend money, sorting out the facts of each dispute over unauthorized transfers. As Professor Rusch points out, including in the law a consideration of the consumer’s lack of care introduces an element that is factually uncertain and potentially expensive, as the opposing parties fight over whether the consumer was negligent.¹¹⁴

Gillette and Walt discuss consumer negligence in the context of the consumer who writes her PIN on her debit card.¹¹⁵ Most probably would agree that consumer is negligent. But it is not at all clear that the law should adopt a negligence standard for consumers based on such an easy example. Instead, before changing the rules in such a fundamental fashion, we should acknowledge that there are countless other scenarios where it is problematic whether a consumer is negligent. Consider this situation: the consumer writes her MasterCard debit card PIN on her Visa credit card, and she always keeps her debit card in her briefcase and her credit card in her pocketbook. One night while she is at a movie someone steals her briefcase and her pocketbook, both of which were in the locked trunk of her car. Was the consumer negligent?

Gillette and Walt examine consumer negligence involving debit cards, but the EFTA includes rules on all consumer electronic transfers, including recurrent and one-time automated transfers. If policymakers consider changing the negligence rules regarding debit cards, they also should determine whether it makes sense to have one rule for debit cards and another for other types of electronic transfers subject to the EFTA. If the rule is changed to include all transfers subject to the EFTA, novel questions will constantly arise as electronic transfers become possible via new types of devices such as cell phones.¹¹⁶ Every new type of product and service is

(June 26, 2007), available at <http://www.federalreserve.gov/newsevents/press/other/20070626a.htm> (quoting the chairman of the Atlanta Federal Reserve Bank’s Financial Services Policy Committee stating the nation’s Reserve Banks will “encourag[e] the use of electronics within the nation’s check collection system”).

113. BUDNITZ & SAUNDERS, *supra* note 45, at 242.

114. Rusch, *supra* note 7, at 597–98.

115. Gillette & Walt, *supra* note 24, at 538.

116. Marissa Fajt, *USAA Brings Remote Capture into the Home*, AM. BANKER, May 11, 2007, at 1 (reporting that customers of an Internet bank can deposit checks online using a personal computer, a

accompanied by new opportunities for novel schemes by thieves to engage in unauthorized withdrawal of consumer funds.¹¹⁷ If the negligence rule were to apply only to debit cards but not other transfers subject to the EFTA, consumer confusion would be an even greater factor than it is now.

I am not convinced consumer negligence is a significant problem that needs a radical solution. I am unaware of empirical research that documents the extent to which unauthorized electronic transfers are due to consumer behavior, whether of the sort all reasonable lawyers would categorize as negligence, or whether it is of the kind that we would characterize as ill-advised, but not negligent. Quite possibly, financial institutions suffer insignificant losses because of consumer conduct. Gillette and Walt provide indirect support for this possibility because they argue that, in regard to protection of debit card PINs, consumers are well-informed of the risks of careless practices leading to unauthorized transfers.¹¹⁸ If that is true, presumably consumers use that information to protect their PINs. Even if consumers are not taking sufficient steps to protect their information, given the extent and frequency of the breach of company databases containing personally identifiable consumer information, it is entirely possible that far more losses from unauthorized transfers are due to hackers than to careless consumers.¹¹⁹ If that is true, it is questionable whether the consumer negligence rules need to be changed in order to reduce the “subsidy” that Gillette and Walt posit, wherein non-negligent consumers pay

scanner, and an Internet connection); H. Michael Jalili, *Visa Taps Vendor To Devise Mobile Payments Tool*, AM. BANKER, Dec. 15, 2006, at 8 (reporting that Visa is working on developing a cell phone that can be used to make payments at point-of-sale, to display online banking records, and to transfer payments from person to person).

117. Cf. Steve Bills, *Phone Banking Could Be Next Big Fraud Channel*, AM. BANKER, Mar. 30, 2007, at 9 (reporting that as consumers become more careful about revealing banking information on the Internet and banks improve online security, criminals devise alternative tactics to obtain the information needed to make unauthorized transfers of consumer funds).

118. See Gillette & Walt, *supra* note 24, at 538–39.

119. Based on press reports, the GAO concluded that “breaches of sensitive personal information have occurred frequently and under widely varying circumstances.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-737, PERSONAL INFORMATION: DATA BREACHES ARE FREQUENT, BUT EVIDENCE OF RESULTING IDENTITY THEFT IS LIMITED; HOWEVER, THE FULL EXTENT IS UNKNOWN 5 (2007). The GAO also found that “most breaches have not resulted in detected incidents of identity theft.” *Id.* The GAO admitted, however, that it is difficult to determine whether breaches result in identity theft because often identity theft victims don’t know how personal information about them was obtained by the thief, and thieves often delay using the information for unauthorized transactions for a year or more. *Id.* at 6. Furthermore, privacy and confidentiality concerns pose substantial obstacles to conducting comprehensive studies. *Id.* at 29. Despite the GAO’s inability to document the identity theft that was the direct result of data breaches, there is good reason to believe that some extensive security breaches were for the purpose of making unauthorized consumer transfers. For example, law enforcement officials have recovered 200,000 credit account numbers stolen from TJX, that resulted in fraud losses of more than \$75 million. Larry Greenemeier, *Secret Service Busts Four Fraudsters With Ties To T.J. Maxx Attack*, INFORMATION WEEK, July 12, 2007, <http://www.informationweek.com/story/showArticle.jhtml?articleID=201001100>.

the increased costs that result from card issuers having to initially absorb the costs resulting from the EFTA's failure to include a negligence standard.¹²⁰

Changing the rules to place liability on the consumer may cause banks faced with a disputed transfer to take the approach that is most administratively efficient for them: assume that an unauthorized transfer was caused by the consumer's negligence, such as writing a PIN on a card. The burden then would fall on the consumer who knows she did not engage in negligent conduct to determine whether the transfer may actually have occurred because a wrongdoer used technology to loot a company's database and steal information that was used to make the unauthorized transfer. The cost to the consumer of paying a lawyer or investigator to uncover such a security breach would likely be more than the amount of the unauthorized transfer. Alternatively, perhaps the unauthorized transfer was caused by the bank's lack of ordinary care. Again, the cost to the consumer of proving the bank's negligence may well be more than the amount in dispute. In addition, if the dispute is in arbitration, arbitrators typically limit discovery, which may impede the consumer's effort to prove bank negligence.¹²¹

Finally, it would be unjust to change the rules without giving consumers fair warning. How would consumers be alerted to a new rule holding consumers liable if they are negligent? Would a disclosure in legalese stuffed into a monthly statement suffice? How should the warning explain what conduct would now be considered negligent?

Gillette and Walt assume that by now consumers' use of ATMs and debit cards is so widespread and that consumers are so familiar with them that they appreciate the need to take precautions and should be liable for loss if they are negligent.¹²² Gillette and Walt seem to picture electronic fund transfers (EFT) as a photograph, frozen in time. A more realistic metaphor would be to imagine electronic fund transfers as a fast-paced movie where the actors chase across an ever-changing landscape. Transactions involving electronic transfers are becoming ever more complex and less transparent. As Professor Ramasastry relates, with technology as the

120. See Gillette & Walt, *supra* note 24, at 539.

121. *Kristian v. Comcast Corp.*, 446 F.3d 25, 42–43 (1st Cir. 2006) (holding that arbitration's limits on discovery is not a ground for rendering an arbitration clause unenforceable). Limited discovery can be a significant obstacle to consumers suing creditors where crucial information is in the hands of the financial institution issuing a payment product or providing a payment service. See Zahed Amin, Note, *Exposing Dead Air: Challenging the Constitutional Sufficiency of Uninsured Motorist Arbitration Procedures*, 22 OHIO ST. J. ON DISP. RESOL. 527, 540–41(2006) (asserting that limited discovery favors insurance companies because claimants have "the burden of producing evidence that is likely in the possession of the insurer").

122. Gillette & Walt, *supra* note 24, at 538–39.

driver, convergence is occurring at a rapid rate.¹²³ For example, as described above, when consumers mail a check to a credit card company, several different legal regimes may apply, and consumers have no way to know when they mail that check whether or not an electronic transfer will even occur.¹²⁴ New systems involving debit cards are being developed continually. For example, banks are seriously considering a debit card that is processed through the ACH network.¹²⁵

Professors Gillette and Walt acknowledge information asymmetry.¹²⁶ That is, consumers have far less information than banks about payment systems and the meaning of their contracts with banks. They suggest consumer education¹²⁷ and disclosure can remedy that asymmetry.¹²⁸ I have difficulty understanding how this consumer education would occur. Would the federal government mandate that payment system rules be taught in the schools to ensure that new generations of consumers know what precautions they should take? Would the government fund adult consumer education courses to ensure that those who did not have the advantage of those courses in school also would understand their responsibilities? Nor is disclosure a panacea. Its efficacy has been questioned by many.¹²⁹

This is not to say that consumers should have no responsibility at all. For example, consumers should be liable for unauthorized transfers that they should have discovered on their periodic bank statements. But the law should include mandatory non-waivable uniform rules ensuring consumers a reasonable time to report unauthorized transactions and other errors. In addition, the law should require a standardized format and descriptive headings on bank statements that make it easier for consumers to understand the items listed on the statement. The U.C.C.'s approach is totally

123. Ramasastry, *supra* note 18, at 831 (describing electronic check conversion as an example of convergence); *see also* Heller, *supra* note 5.

124. *See supra* text accompanying notes 20–23.

125. David Breitkopf, *Risk-Reward Views Evolve on ACH Debit*, AM. BANKER, June 12, 2007, at 1, 7 (quoting David Bowen, an executive vice president at National City Corp., describing problems consumers may face under this new system: "Some consumers who get an ACH debit card from a third party might be confused about whom to contact if they have questions or concerns about a transaction. . . . Are you going to get two different companies pointing at the other, with the customer left in the middle with nowhere to go?").

126. Gillette & Walt, *supra* note 24, at 530, 558–59.

127. *Id.* at 502.

128. *Id.* at 524 (noting that "conveying better information" may be a better strategy than discarding distinctions among payment products and adopting uniform rules).

129. Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 360–62 (1988); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 262 (2002).

inadequate. It provides banks a free rein to overreach, and some banks take full advantage of that freedom.¹³⁰

CONCLUSION

The articles in this Symposium provide policymakers with a wealth of sharp analysis, keen insight, and well-considered recommendations for considering whether to make changes in payments law. This commentary has selected for further examination a few issues discussed in the main articles where I considered what the authors had to say particularly conducive to further discussion.

The conclusion I have reached in considering the main articles is this: While a rigid set of uniform rules that apply to all payment systems and products may not be called for, the law should guarantee all consumers several basic minimum rights regardless of the payment product or system used. These should include the right to error resolution; the right to bring disputes before a judicial forum; and the right to a uniform sixty-day deadline for reporting unauthorized payments that appear on bank statements, whether they involve checks, substitute checks, or electronic fund transfers. If Congress believes certain state laws should be preempted, it should pass legislation that replaces state law with federal law that adequately protects consumers, rather than merely acquiesce in action by federal agencies to preempt state law in the absence of federal protection.¹³¹

130. See *Borowski v. Firststar Bank Milwaukee, N.A.*, 579 N.W.2d 247, 252–54 (Wis. Ct. App. 1998).

131. See also Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247 (2005).