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Liability For Lost or Stolen Funds in Cases of Name and Number Discrepancies in Wire Transfers: Analysis of the Approaches Taken in the United States and Internationally

Introduction

Modern wire transfer systems allow banks and large corporations to make payments and effect settlements with remarkable speed.¹ These systems move staggering volumes of money, with the major wire networks transferring almost \$1 trillion dollars a day. The average wire transfer transaction involves \$2 million, and most wire transfers send payments across international boundaries.² Evidence suggests that the use of wire transfers will continue to grow.³

A simple wire transfer executes a payor-payee transaction using sophisticated computer technology. For example, suppose a Chicago

1. Wire transfers take only a "few minutes" to transfer funds while checks can take two to six days. J. VERGARI & V. SHUE, CHECKS, PAYMENTS AND ELECTRONIC BANKING 524 (1986) [hereinafter VERGARI & SHUE].

The term wire transfer as used in this Note differs from the term "electronic funds transfer." An electronic funds transfer refers to all forms of electronic payment including automatic teller machines, point-of-sale transactions, and automated clearing houses. A wire transfer, by contrast, transfers large values through pay orders and is used exclusively by banks, large economic entities and corporations. A pay order instructs a bank to transfer money from one account to another. Banks have used wire transfers since shortly after the invention of the telegraph, but the advent of computer and telecommunications technology has contributed to the recent rise in their use. Tallackson & Vallejo, *International Commercial Wire Transfers: The Lack of Standards*, 11 N.C. J. INT'L L. & COM. REG. 639 (1986) [hereinafter Tallackson].

2. U.C.C. Revision Committee Introduces New Article 4A Governing Wire Transfers 49 Banking Rep. (BNA) 313, 314 (Aug. 17, 1987) [hereinafter Banking Report].

3. See *infra* notes 21-24, and accompanying text. In 1984 the major wire transfer networks, Fedwire and CHIPS, handled \$668 billion a day. This figure reflects an estimated 48.4 percent increase since 1980. TIEN, RICH, & CAHN, ELECTRONIC FUND TRANSFER SYSTEM FRAUD: COMPUTER CRIME, vi (1985) [hereinafter TIEN]. Although wire transfers constitute only .04% of the number of payments made throughout the United States, they account for 78.5% of the value of payments made in the U.S. Humphrey, *Payment System Risk, Market Failure, and Public Policy*, in ELECTRONIC FUNDS TRANSFERS AND PAYMENTS: THE PUBLIC POLICY ISSUES 83, 84 (E. Solomon ed. 1987). 22 CORNELL INT'L L.J. 91 (1989)

merchant enters into a contract with a South American shipper that binds the Chicago merchant to make periodic payments of \$27,000 into the shipper's Swiss bank account.⁴ To make the payments by wire transfer, the merchant (the "sender") directs his bank in Chicago (the "sending bank") to debit his account and pay \$27,000 to the shipper's Swiss account.⁵ Using a computer terminal, the sending bank contacts a wire transfer network and sends the "transfer order."⁶ In Switzerland, the shipper's bank (the "receiving bank") receives the transfer order and credits \$27,000 to the shippers's ("beneficiary's") account.⁷ Upon the completion of the transfer, the sending and receiving banks settle the debt between themselves.⁸

Large banks and corporations favor wire transfers over traditional payment instruments, such as checks, because wire transfers move funds faster, more efficiently, and more conveniently.⁹ Most wire transfers proceed without difficulty: the beneficiary receives the funds, the banks settle, and the wheels of commerce turn smoothly on. Sometimes, however, problems occur that, given the size of each wire transfer, usually result in substantial economic losses. A 1984 study of 207 wire transfer incidents estimated the average loss at \$942,450. Averaging only the most recent years, the study estimates the potential wire transfer loss at \$1.6 million.¹⁰ The causes of such "gone awry" wire transfers vary considerably, ranging from simple negligence or carelessness on the part of bank employees to fraud committed by imposters.

An example of a fraudulently initiated wire transfer with international implications occurred on May 13, 1988, when a First Chicago National Bank employee and six accomplices initiated three fraudulent

4. The facts of this example are derived from *Evra v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982) (Posner, J.) (holding consequential damages unavailable when the receiving bank's failure to credit a transfer order properly results in the plaintiff forfeiting a valuable contract).

5. The terms "sender," "sending bank" and "receiving bank" appear in Comment, *Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT*, 22 HARV. INT'L. L.J. 621, 633 (1981). The term "sender" appears in Banking Report, *supra* note 2, at 314.

6. A transfer order instructs a bank to pay an amount of money. See Banking Report, *supra* note 2, at 313.

7. The term "beneficiary" appears in Banking Report, *id.* at 314. A more complicated wire transfer might involve the Chicago bank sending a transfer to a London bank which in turn would send the transfer on to the shipper's Swiss bank. The London bank would be termed the "intermediate bank."

8. "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or as otherwise instructed. A settlement may either be provisional or final. U.C.C. § 4-104(j). For purposes of this Note, "settlement" will refer to final settlement. The method for settling wire transfers depends on the system used to complete the transfer. Settlement may occur at the time of transfer or sometime shortly thereafter. For a complete discussion, see *Corporate Wire Transfers*, 42 REC. A.B. CITY N.Y. 526, 532-38 (1987) [hereinafter RECORD].

9. RECORD, *supra* note 8, at 527.

10. TIEN, *supra* note 3, at vi.

wire transfers sending nearly \$70 million to two banks in Austria.¹¹ Officials uncovered the fraud before the perpetrators could abscond with the funds, but their plan nearly succeeded.¹² In cases of fraudulent or negligent wire transfers, courts in the United States as well as international organizations have struggled with the issue of how to allocate liability.

In a leading United States wire transfer case, *Bradford Trust v. Texas American Bank-Houston*,¹³ the Fifth Circuit confronted the issue of bank liability for fraudulent wire transfers. The court held that when a sending bank wires a forged transfer order to a receiving bank which fails to credit the account as the transfer order directs, the sending bank is liable if the forger cannot be made to answer for the loss.¹⁴ *Bradford Trust* involved two United States banks sending a wire transfer on a domestic wire transfer system, yet the case carries important implications for the developing international law of wire transfers.

As a leader in the use of modern wire transfer technology,¹⁵ the United States sets an example both for other nations and for international legislative bodies developing their own wire transfer law. Additionally, absent international or private agreements to the contrary, United States law is likely to govern in many international wire transfer disputes¹⁶ because many electronic wire transactions involve United States parties.¹⁷

11. Bailey, *U.S. Charges Seven in "No-Tech" Attempt to Steal \$70 Million from First Chicago*, Wall St. J., May 19, 1988, at 8, col. 1.

12. Bock, "The Chairman" and His Board: Embezzlers Nearly Get Away With \$69 Million from First Chicago, TIME, May 30, 1988, at 45.

13. 790 F.2d 407 (5th Cir. 1986).

14. *Id.* at 407-08.

15. The largest United States wire transfer networks, Fedwire and CHIPS, have been in operation since 1973 and 1970, respectively. RECORD, *supra* note 8, at 532-34. See also *infra* notes 25-30 and accompanying text. The wire transfer networks of England and France have only been operational since 1984. See also Robinson, *The Structure and Characteristics of the Principal Electronic Banking Systems*, in ELECTRONIC BANKING THE LEGAL IMPLICATIONS 5, 9 (Goode ed. 1985) [hereinafter Robinson]; *Draft Legal Guide on Electronic Funds Transfers, Report of the Secretary-General* at 30, U.N. Doc. A/CN.9/266/Add.1 (1985) [hereinafter *Draft*]. See *infra* notes 31-34 and accompanying text. SWIFT, a wire transfer network organized privately by several international banks, is the only wire transfer network based outside the U.S. which has operated more than five years. Robinson, *supra*, at 12. See also *infra* notes 35-36 and accompanying text.

16. An interesting choice of law issue arises when a U.S. bank is a party to the action. It may be resolved by looking to the state where the bank has the greatest business connections or by other methods. Because the issue is beyond the scope of this Note it will not be addressed in further detail.

17. While no available figures indicate the relative number of U.S. entities sending wire transfers, one could reasonably assume that the number is significant. The prominent position of the U.S. in world banking suggests that a large percentage of wire transfers would likely involve American entities. See STATISTICAL ABSTRACT OF THE UNITED STATES 474 (106 ed. 1988) (U.S. banks represent 20.4% of the world's 500 largest banks and hold 11.4% of the total deposits). See also Patrikis, *Global EFT Guidelines: What They Can Mean to U. S. Banks*, BANK ADMINISTRATION Sept., 1987, at 30 ("Most U.S. banks are asked to transfer funds internationally at one time or

Indicative of the growing international interest in wire transfers, the United Nations Commission on International Trade Law has been investigating wire transfers law for several years.¹⁸

This Note investigates the allocation of liability when fraud or negligence in a wire transfer leads to a loss. Specifically, the Note analyzes methods for assessing liability where a sending bank negligently sends a transfer order containing a discrepancy between account number and account name, and the receiving bank credits the account corresponding to the number despite this discrepancy. After surveying the limited background of United States wire transfer case law, Part One of this Note concludes that the law which does exist is both confused and malformed. Part Two examines two recent proposals to modify the law of wire transfers—the work of the United Nations Commission on International Trade Law, and the approach taken in the new proposal for the Uniform Commercial Code, Article 4A. Part Three analyzes the *Bradford Trust* opinion and concludes it was wrongly decided, from both a legal and a policy perspective. Because the court in *Bradford Trust* and the UN Commission's Legal Guide advocate a similar rule of sending bank liability, the *Bradford Trust* decision provides an excellent vehicle for considering emerging international law. Finally, in Part Four, this Note advocates the approach articulated by the drafters of the newly updated Uniform Commercial Code, which places liability on the receiving bank.

I. Background

The law governing wire transfers is in disarray.¹⁹ Legal rights and responsibilities in transfer cases often depend on where the plaintiff files suit.²⁰ There is no current international law governing wire transfers, nor is there any international agreement stipulating which jurisdiction's law will govern international wire transfer disputes. The current United States case law addressing wire transfers is thin, but as wire transfers become more common, so will disputes. Courts and legislatures will be called upon to fashion law for this important area.

A. Wire Transfer Systems

Wire transfers have existed since the invention of the telegraph,²¹ but modern banks execute wire transfers using complex computer systems.²² These computers link banks in a computer network which make

another, and most have had the experience of receiving payments from abroad for a customer's account"). *Id.*

18. See *infra* Part II.A.

19. See, e.g., 1 J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 809 (Practitioner's ed. 1988) [hereinafter WHITE & SUMMERS]; Tallackson *supra* note 1, at 663-66.

20. Note, *New SWIFT Rules on the Liability of Financial Institutions for Interest Losses Caused by Delay in International Funds Transfers*, 13 CORNELL INT'L L.J. 311, 316 (1980).

21. Tallackson, *supra* note 1, at 639.

22. RECORD, *supra* note 8, at 531.

it possible to transfer funds and settle accounts with remarkable speed.²³ The advent of these modern systems explains the increased use of wire transfers as a method of payment.²⁴

Fedwire and Clearing House Interbank Payments System ("CHIPS") are the two most important United States based wire transfer networks.²⁵ The twelve Federal Reserve Banks own and operate Fedwire, the largest American wire transfer network.²⁶ Fedwire provides communication and settlement services to all United States commercial banks and thrift institutions.²⁷ CHIPS is owned and operated by the New York Clearing House Association and handles ninety-five percent of the international transfers made in dollars.²⁸ CHIPS' membership is limited to 120 banks worldwide,²⁹ but non-member banks who maintain a relationship with a CHIPS member can use the network.³⁰

European banks share three wire transfer networks. The Clearing House Automated Payment System ("CHAPS") is the United Kingdom's wire transfer network,³¹ and is the most important system for payments in the British pound sterling.³² The *Système automatique de gestion intégré par télétransmission de transactions avec imputation du règlements Etranger* ("SAGITTAIRE") is the French wire transfer network,³³ and provides the French link for most international transfers in the franc.³⁴ The last major network, the Society for Worldwide International Financial Telecommunications ("SWIFT"), is a privately operated non-profit society organized under Belgian law.³⁵ SWIFT member banks are located throughout North and Latin America, Western Europe, Japan, and Southeast Asia.³⁶ Central banks in West Germany,

23. See VERGARI & SHUE, *supra* note 1, at 524. See also Comment, *Risk Allocation in International Interbank Electronic Funds Transfers: CHIPS & SWIFT*, 22 HARV. INT'L L.J. 621 n.1 (1981).

24. See Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664, 1678 (1983) ("... the amount of money moved by wire [has grown] geometrically in response to technological change . . .").

25. Banking Report, *supra* note 2, at 314 ("Most wire transfers currently take place on either [Fedwire or CHIPS] . . .").

26. RECORD, *supra* note 8, at 532.

27. N. PENNEY & D. BAKER, *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* 9-4. (Supp. 1986) [hereinafter PENNEY & BAKER].

28. *Id.* See also, Banking Report, *supra* note 2, at 315.

29. RECORD, *supra* note 8, at 534. Half of the CHIPS members are U.S. banks, the remainder are U.S. branches of foreign banks or Edge Act Corporations. *Id.* "[A]n Edge Act corporation is a bank subsidiary that specializes in transacting in international business and finance." VERGARI & SHUE, *supra* note 1, at 525-26. The Edge Act is codified at 12 U.S.C. § 611 *et seq.* (1982).

30. RECORD, *supra* note 8, at 534.

31. *Draft*, *supra* note 15, at 31.

32. Frankel & Marquardt, *International Payments and EFT Links*, in *ELECTRONIC FUNDS TRANSFERS AND PAYMENTS: THE PUBLIC POLICY ISSUES* 111, 113 (E. Solomon ed. 1987).

33. *Draft*, *supra* note 15, at 30.

34. *Id.*

35. RECORD, *supra* note 8, at 536.

36. *Id.*

Japan, the Netherlands, and Switzerland are currently developing their own modern wire transfer networks.³⁷ Many banks also send wire transfers on public communications systems such as telex.³⁸

B. United States Governing Law—Legislative

Given the particular importance of wire transfers to the United States banking community, one might think that American legislatures would have given careful attention to regulations for wire transfers. Surprisingly, United States legislative bodies have regulated most other forms of payment, but have neglected wire transfers.³⁹ This is particularly ironic given the volume of payments made in this manner and the potential liability involved.⁴⁰

1. Federal Law and Regulations

Limited statutory and regulatory coverage dominates the federal regulatory picture surrounding wire transfers. In 1978, Congress enacted the Electronic Funds Transfers Act⁴¹ in reaction to the increasing prevalence of automatic teller machines.⁴² Since the act was primarily concerned with providing safeguards in consumer-oriented transactions, it did not address wire transfers.⁴³

The Board of Governors of the Federal Reserve System, under the authority of the Federal Reserve Act, issues regulations governing the operation of the Federal Reserve Banks. Federal Reserve System "Regulation J" governs wire transfers,⁴⁴ but its effect is limited. First, the regulation only applies to Fedwire transfers, leaving most international wire transfers unregulated.⁴⁵ Second, Regulation J does not provide a comprehensive scheme governing wire transfers, but instead focuses on the rights of the Federal Reserve Banks.⁴⁶ For example, Regulation J includes language authorizing reserve banks to debit and credit

37. Frankel & Marquardt, *supra* note 32, at 113.

38. Scott, *supra* note 24, at 1669. Certain other wire transfer networks have not been successful. See PENNY & BAKER, *supra* note 27, at 9-10 (discussing the demise of the Bankwire system).

39. See Scott, *supra* note 24, at 1664. Other payment transactions are regulated by federal and state electronic funds transfer laws, the Consumer Credit Protection Act, 15 U.S.C §§ 1601-1667(e) (1982), and Articles 3 and 4 of the Uniform Commercial Code.

40. Scott, *supra* note 24, at 1664.

41. 15 U.S.C. §§ 1693-1693r (1982).

42. See 15 U.S.C. § 1693 (1982) ("The primary objective of this subchapter, however, is the provision of individual consumer rights."); Note, *The Courts and CHIPS, SWIFT & Fedwire: A Proposal for Filling the Regulatory Gap*, 2 INT'L PROPERTY J. 289 (1984).

43. 15 U.S.C. § 1693(a)(6) (1982). Subsection (a)(6) of the Act specifically excludes wire transfer from the statute's scope. See also Federal Reserve System Regulation E, 12 C.F.R. § 205.3(b) (1988); Note, *supra* note 42.

44. 12 C.F.R. 210.25-210.38 (1988).

45. Tallackson, *supra* note 1, at 640.

46. *Id.* at 741.

accounts, but it contains no provisions for determining the rights and obligations of the transferor and the transferee.⁴⁷

2. *State Law—Uniform Commercial Code*

Articles 3 and 4 of the Uniform Commercial Code (“U.C.C.”) are the most important state statutes governing payments. Some parties before courts contend that these statutes apply to wire transfers, but most courts follow *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*⁴⁸ which held that “the U.C.C. is not applicable [to wire transfers] because [it] does not specifically address the problem of electronic funds transfers.”⁴⁹ Generally, commentators addressing this issue conclude that Article 3 (on commercial paper) and Article 4 (on bank deposits) apply only to written instruments.⁵⁰ One influential commentary on the U.C.C. argues that Articles 3 and 4 fit wire transfer transactions “most imperfectly” and suggests that courts should resist applying the U.C.C. to the problems of modern wire transfers.⁵¹

As electronic funds transfer payments became more widely used, the Permanent Editorial Board of the U.C.C. became more concerned with the gap in the Code’s coverage. In 1977, it created the “3-4-8 Committee” to devise a method of handling electronic funds transfers.⁵² The 3-4-8 Committee formulated the Uniform New Payments Code (“NPC”), which attempted to unify the law governing all non-cash payment mechanisms under one statutory scheme.⁵³ The NPC’s drafters designed it not only to govern wire transfers and other electronic funds transfer mechanisms, but also to replace much of Articles 3 and 4.⁵⁴

Ultimately, the NPC failed to find support. In 1985, the National Conference of Commissioners on Uniform State Law, the American Law

47. *Id.* at 542. The Federal Reserve Board has promised to study whether a bank may justifiably “rely on account number[s] when posting transactions.” 51 Fed. Reg. 43087.

48. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. 1979).

49. *Id.* See also *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982), *cert denied*, 459 U.S. 1017 (1983) (U.C.C. inapplicable), and *Walker v. Texas Commerce Bank, N.A.*, 635 F. Supp. 678 (S.D. Tex. 1986) (U.C.C. inapplicable); *Houston Contracting Co. v. Chase Manhattan Bank, N.A.*, 539 F. Supp. 247, 249 (S.D.N.Y. 1982) (“telexed payment order . . . is not a ‘demand item’ ” as defined by the U.C.C.; therefore, bank not liable for loss under U.C.C.).

50. *WHITE & SUMMERS*, *supra* note 19, at 809-10. Tallackson, *supra* note 1, at 641-2. Georgia and Florida have amended their versions of the U.C.C. specifically to include electronic funds transfers in the definition of an item governed by the Code. Fla. Stat. Ann. § 674.104(1)(g) (West Supp. 1988); Ga. Code Ann. § 11-4-104(1) (g) (1982).

51. *WHITE & SUMMERS*, *supra* note 19, at 809-10.

52. H. Scott, An Introduction to the Uniform New Payments Code, in Memorandum to the National Conference of Commissioners on Uniform State Laws 1 (June 15, 1983).

53. Miller, *Report on the New Payments Code*, 41 BUS. LAWYER 1007, 1007-08 (1986).

54. Tallackson, *supra* note 1, at 665.

Institute, and the Permanent Editorial Board of the U.C.C. all agreed to discontinue work on the new Code.⁵⁵ There are two possible explanations for the NPC's failure. First, it "propos[ed] to fix . . . that which [was] not broken" by rewriting the law of paper based transactions.⁵⁶ Second, it sought to force all payment mechanisms to conform to the same rules, a goal which many commentators believe is undesirable.⁵⁷

After the NPC failed, the Uniform Commissioners decided to scale down their efforts. They began two separate projects: first, to revise Articles 3 and 4 and second, to draft a new statute governing wire transfers.⁵⁸ The new wire transfer statute, Article 4A, is still in its drafting stage. Nevertheless, it represents the most recent effort to produce comprehensive legislation governing wire transfers.⁵⁹

C. United States Governing Law—Cases

Since federal and state legislatures have failed to articulate liability rules governing wire transfers when both the transmitting and receiving banks are negligent, courts must fashion the law without statutory guidance.⁶⁰ Only two American courts have heard wire transfer cases involving negligent sending and receiving of a transfer order with a discrepancy between account name and number. The Northern District of Illinois ruled in two cases that the sending bank may shift the loss to the receiving bank in some circumstances. The Fifth Circuit, however, reached the opposite conclusion. It ruled that when the sending bank sends a wire transfer with a discrepancy between account name and number, which the receiving bank honors by paying the account designated by the number, the sending bank cannot shift its loss to the receiving bank.

1. Northern District of Illinois

The first Northern District of Illinois case was *Securities Fund Services v. American National Bank*.⁶¹ In *Securities Fund*, the sending bank plaintiff accepted forged instructions purporting to bear the signature of one John Bushman. The request directed the sending bank to redeem Bushman's shares in a fund and transfer the proceeds to an account at the receiving bank. Pursuant to these instructions the sending bank issued a transfer order to the receiving bank directing it to deposit \$2,017,867.50 in the account of "John Bushman Trustee // 204471."⁶² The receiving bank credited account 204471, but this was not John Bushman's account. Bushman had no account with the receiving bank in either an individual or trustee capacity, and the money was not recov-

55. *Id.* at 665-66. See also, Miller, *supra* note 53, at 1007, 1010.

56. Tallackson, *supra* note 1, at 665.

57. *Id.* at 665-66. The recent efforts toward redrafting U.C.C. Articles 3 and 4 indicate that the second explanation is more likely correct.

58. Miller, *supra* note 53, at 1007, 1010.

59. Banking Report, *supra* note 2, at 314.

60. WHITE & SUMMERS, *supra* note 19, at 809-10.

61. 542 F. Supp. 323 (N.D. Ill. 1982).

62. *Id.* at 325.

ered. Upon discovery of the fraud, the sending bank reissued the redeemed shares to Bushman and sued the receiving bank to recover the mistakenly transferred funds.⁶³ Ruling on the receiving bank's summary judgment motion, the Northern District of Illinois dismissed counts sounding in bailment, conversion, and estoppel, but allowed claims in agency and negligence, and on a third-party-beneficiary theory.⁶⁴

The court held that the sending bank could prove that the receiving bank was either its agent or, that the sending bank was the receiving bank's customer by analogy to U.C.C. section 4-104(e).⁶⁵ Under either theory, the receiving bank owed a duty of reasonable care to the sending bank. Thus, the receiving bank's alleged failure to notice the discrepancy between account name and number created a cause of action.⁶⁶ The court reasoned that the sending bank must receive a direct benefit from the receiving bank in order to establish a third party beneficiary claim.⁶⁷ Viewing the facts most favorably to Securities Fund Services, the court found that the sending bank was a beneficiary of any contract to transfer funds between American National Bank and an intermediate bank. The sending bank benefitted because a properly conducted transfer prevents any loss to the bank or its customers.⁶⁸

One year later, the same court heard a case with facts virtually identical to *Securities Fund*. In *Shearson/American Express v. American National Bank*,⁶⁹ the sending bank sued the receiving bank for a one million dollar loss, charging negligence, breach of contract, breach of agency, breach of bailment duties, conversion, and estoppel. On the receiving bank's motion for summary judgment, the court dismissed the bailment and conversion counts. In contrast to its decision in *Securities Fund*, however, the *Shearson* court expressly rejected the *Securities Fund* holding on the estoppel issue,⁷⁰ ruling that the sending bank detrimentally relied on the receiving bank's silence and inaction in handling the fraudulent transfer order.⁷¹ Because the receiving bank "failed to make sufficient inquires or give sufficient notice . . . regarding the discrepancy between the named recipient of the [wire transfer] and the designated account

63. *Id.*

64. *Id.* at 326-29.

65. U.C.C. § 4-104(1)(e) reads as follows: "'Customer' means 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."

66. *Securities Fund*, 542 F. Supp. at 327.

67. *Id.*

68. *Id.* at 329.

69. No. 83-C-0555 (N.D. Ill Aug. 18, 1983) (LEXIS, Genfed library, Dist. file). In this case, Shearson directed Chemical Bank to wire \$1 million to American National Bank ("ANB") in Chicago. The transfer order indicated "Irving Mazer" as the beneficiary of the wire transfer with the account number 244074. Account number 244074 belonged to "Phone Bat-Terry Ltd." and not Irving Mazer who had no account with ANB. ANB credited the account by the number anyway without discovering the transfer order's discrepancy.

70. *Id.*

71. *Id.*

number,"⁷² the court stated that estoppel doctrine prevented it from "maintaining silence when it [had a] duty to speak, or claim the benefit of [its] own negligence. . . ."⁷³

The split between *Shearson* and *Securities Fund* on the estoppel issue is significant for two reasons. First, it provides evidence of the confusion in the law. Two courts in the same district, addressing virtually identical facts, reached two different results. Second, the split illustrates the extent of the dispute over the proper characterization of the relationship between sending and receiving banks. In each case, the court held that it was appropriate to apply the law of negligence and agency. In *Shearson*, however, the court found that even in the absence of a formal contract between the sending and receiving bank, a receiving bank is estopped to deny the existence of a contract when it behaves as if a contract existed.

2. Fifth Circuit—Bradford Trust

The Fifth Circuit heard *Bradford Trust v. Texas American Bank-Houston*,⁷⁴ the first federal court of appeals case addressing the problem of account name and number discrepancies in wire transfers. Two con artists agreed to purchase nearly \$800,000 worth of rare coins and gold bullion from Colonial Coin, a Houston merchant. They agreed with Colonial to wire payment to Colonial's account at Southern Bank, the receiving bank.⁷⁵ The con men then sent a forged letter to the sender, State Street Bank, a Boston financial institution that was the agent of a mutual fund. The forged letter directed the sending bank to liquidate \$800,000 from Frank Rochefort's account and wire the funds to the receiving bank for the account "Frank Rochefort, account number of 057-141"; this was Colonial's account. The sending bank, without complying with its own internal security procedures, directed its correspondent bank to send the transfer order to the receiving bank.⁷⁶

The transfer was sent on Fedwire and read ". . . Frank Rochnefort Jr. Acct. 057-141[.]"⁷⁷ Without noticing the discrepancy between the account name and number, the receiving bank credited account 057-141, even though Rochefort had no account at that bank. It then telephoned Colonial, informing the coin merchant that it received and credited the transfer. Colonial then released the merchandise to the con

72. *Id.*

73. *Id.* (quoting *People v. Michigan Avenue Trust Co.*, 233 Ill. App. 428 (1924)).

74. 790 F.2d 407 (5th Cir. 1986).

75. *Id.* at 408. Prior to litigation, Southern Bank changed its name to Texas American Bank-Houston. In this Note, the bank will be referred to as Southern Bank.

76. *Id.* A correspondent bank is a financial organization "which regularly performs services for another [financial organization] in a place or market to which the other does not have direct access." BLACK'S LAW DICTIONARY 311 (5th ed. 1979).

77. *Bradford Trust*, 790 F.2d at 408 n.4. State Street Bank also misspelled Rochefort's name in the transfer order, an error that went undetected by both banks. *Id.*

artists.⁷⁸ The fraud was discovered when the real Frank Rochefort received notice of the withdrawal and informed Bradford it was unauthorized. The sending bank reinstated Rochefort's account and sued the receiving bank to recover the transferred funds, claiming breach of contract, negligence, conversion, and mistake.⁷⁹ At trial, the Southern District of Texas found both the sending and receiving banks acted negligently. Applying the Texas comparative negligence statute, the court apportioned the loss equally between the two institutions.⁸⁰

On appeal to the Fifth Circuit, each bank claimed the other was the primary cause of the loss and should therefore bear the entire loss.⁸¹ The Fifth Circuit reversed and ruled the sending bank must bear the entire loss.⁸²

The Fifth Circuit also ruled that, while the U.C.C. itself did not apply to wire transfers, courts could draw analogies to the U.C.C. to help resolve the issues presented.⁸³ The court extracted two policy arguments from the U.C.C. which dictated that the sending bank must bear the loss. The first policy is that the party in the best position to avoid the loss should bear the liability.⁸⁴ The court reasoned that since the sending bank dealt most directly with the forgers, it could most ably avoid the loss.⁸⁵ Second, the court's solution should promote finality in commercial transactions.⁸⁶ The court argued that it is "highly desirable to end the transactions on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered."⁸⁷ The court concluded that assigning liability to the sending bank avoided the need to reopen the transaction

78. *Id.* at 408. Colonial released the coins and gold bullion to the con men. Neither the merchandise nor the transferred funds were recovered. *Id.*

79. *Id.* The district court dismissed Bradford's claim against Colonial.

80. *Id.* at 408; *Bradford Trust v. Texas American Bank-Houston*, No. H-81-2144 (S.D. Tex. Oct. 3, 1983) (LEXIS, Genfed library, Dist. file).

81. *Bradford Trust*, 790 F.2d at 408.

82. *Id.* The Fifth Circuit determined the trial court improperly applied the Texas comparative negligence statute. While acknowledging that the law in Texas included comparative negligence, the court ruled that the statute extended only to actions "to recover damages resulting in death or injury to persons or property." *Id.* Thus the statute applied to physical rather than economic harms. *Id.* at 409 (quoting Texas Statutes Ann., art. 2212a). While this statute has been repealed, the Texas legislature enacted a substantially identical law codified at Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (Vernon 1986). See also *Bradford Trust*, 790 F.2d at 408 n.1.

83. *Bradford Trust*, 790 F.2d at 409. The Fifth Circuit followed the Second Circuit's approach in *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. 1979), holding that "[t]he U.C.C. does not specifically address the problems of electronic funds transfers. However, analogous use of [U.C.C.] concepts . . ." is permitted. *Id.* at 1051.

84. *Bradford Trust*, 790 F.2d at 409.

85. *Id.* at 410.

86. *Id.* at 409.

87. *Bradford Trust*, 790 F.2d at 411 quoting U.C.C. § 3-418, comment 1. The Court also cited *Price v. Neal*, 3 Burr. 1354 (K.B. 1762), which holds that a drawee who pays on a negotiable instrument with a forged signature cannot recover his payment. *Id.*

and best served the policy of finality.⁸⁸

II. Alternative Approaches

The approaches taken by the Northern District of Illinois and the Fifth Circuit represent the current state of fraudulent wire transfer law in the United States. Two alternative approaches have been proposed addressing the issue of liability for payment on a wire transfer containing a discrepancy. Both the United Nations Commission on International Trade Law ("UNCITRAL") and the Permanent Editorial Board of the U.C.C. have studied wire transfer issues for several years.⁸⁹ UNCITRAL recently published a legal guide to problems in the law of international wire transfers. The guide takes no clear position on assignment of liability when loss results because of an inconsistent transfer order. Yet the guide's tone suggests its drafters favor the *Bradford Trust* rule of sending bank liability.⁹⁰ The Permanent Editorial Board of the U.C.C. takes a different approach in Article 4A. It rejects the *Bradford Trust* rule and assigns liability to the receiving bank when it credits a transfer order with a discrepancy between account name and number.

88. *Bradford Trust*, 790 F.2d at 411.

89. The General Assembly placed electronic funds transfers on UNCITRAL's priority list in 1978. Patrikis, *supra* note 17, at 30-31. The Permanent Editorial Board of the U.C.C. created the 3-4-8 committee to address issues arising in electronic funds transfers in 1977. See also H. Scott, *supra* note 52.

90. See U.N. LEGAL GUIDE, U.N. Doc. A/CN.9/250/Add.3 (1985) [hereinafter LEGAL GUIDE]. Based on the research conducted for the Legal Guide, UNCITRAL also authorized the Working Group on International Payments to prepare draft model rules for electronic funds transfer. UNCITRAL published a recent draft of these rules on October 3, 1988. U.N. DRAFT MODEL RULES, U.N. Doc. A/CN.9/WG.IV/WP.39. See U.N. Doc. A/41/17. The Commission hoped the Draft Model Rules would encourage the development of uniform rules governing electronic funds transfers. Unfortunately, on the issue of name and number discrepancies, the position of Draft Model Rules is even less clear than that of the Legal Guide. The writers of the Draft Model Rules have proposed two alternatives. Alternative A reads as follows:

If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, the receiving bank may consider each form of representation to be equally valid, unless the bank knew or ought to have known of the discrepancy.

U.N. DRAFT MODEL RULES, Article 3, Alternative A. U.N. Doc. A/CN.9/WG.IV/WP.39, at 8.

Alternative B states:

If the account that is debited or credited is expressed both by the name of the account holder and by an account number and there is a discrepancy between them, the account to be debited or credited is considered to be the account as expressed by name.

U.N. DRAFT MODEL RULES, Article 3(4), Alternative B. U.N. Doc. A/CN.9/WG.IV/WP.39, at 9.

One can argue that a receiving bank when faced with a transfer order with a name and number discrepancy ought to know that something in the transfer is amiss. This Note makes precisely this argument in section III.C, *infra*. Thus, the drafters of the Model Rules failed to decide directly the issue of name and number discrepancies, preferring instead to leave this problem in the hands of the national legislatures.

A. UNCITRAL Legal Guide

In 1982, a report of the United Nations Secretary-General concluded that electronic funds transfers had developed in a "partial legal vacuum."⁹¹ The Secretary-General requested UNCITRAL to study the matter and prepare a legal guide to the problems of electronic funds transfers.⁹² The UNCITRAL Working Group identified legal problems associated with electronic funds transfers and created the Draft Legal Guide on Electronic Funds Transfers [hereinafter Legal Guide] to assist national legislative bodies in developing their own wire transfer regulations.⁹³ While the Legal Guide is not law, its discussion could form the basis for future legislation addressing problems in the law of wire transfers.⁹⁴

The Legal Guide's chapter on private agreements for transferring funds discusses issues arising when a sending bank presents a receiving bank with a transfer order containing a discrepancy between an account name and number.⁹⁵ The Legal Guide concludes that allowing banks to rely on account number alone is more efficient than comparing the account name and number and more reliable than examining only the account name.⁹⁶ Banks often rely solely on numbers when sorting and routing funds to accounts. The Legal Guide concludes that "a fast, reliable and inexpensive electronic funds transfer system would clearly be furthered by enabling banks to rely entirely upon the account number after receiving a transfer instruction."⁹⁷

91. U.N. Doc. A/CN.9/221, at 23 (1982).

92. *Id.* at 23-24.

93. *Id.* at 24. The Working Group submitted draft chapters of the Guide at UNCITRAL's seventeenth and eighteenth sessions. U.N. Doc. A/CN.9/266/Add. 1-2 (1985).

94. See LEGAL GUIDE, *supra* note 90, at 2 ("This legal guide has been prepared to aid legislators and lawyers considering the rules for particular networks.") Some commentators have also suggested the United Nations's Draft Convention on International Bills of Exchange and International Promissory Notes should govern wire transfers. See, e.g., Patrikis, *supra* note 17, at 30. This Note will not address the Draft convention for two reasons. First, the United Nations General Assembly has not yet ratified the Convention. Even if the General Assembly had notified the convention, each nation using wire transfers would have to adopt the Convention before it became binding. *Id.* Second, the extent to which the Draft Convention will govern electronic funds transfers, even if ratified, remains unclear. Article Three of the Draft Convention expressly refers to "written instruments" and the drafters chose to leave "written" undefined "so that it could be interpreted in accordance with evolving practices and technological developments." U.N. Doc. A/41/17, 16-17 (Aug. 11, 1986). UNCITRAL's development of the Legal Guide and the Draft Model Rules suggests that UNCITRAL did not intend the Draft Convention to govern wire transfers.

95. LEGAL GUIDE, *supra* note 90, at 14-15 and U.N. Doc. A/CN.9/266/Add.2 (1985) at 27-28. The Legal Guide specifically addresses name/number discrepancies. *Id.*

96. LEGAL GUIDE, *supra* note 90, at 14-15.

97. *Id.* at 15. For a discussion of the use of account numbers in the checking context, see Note, *Computerized Check Processing and a Bank's Duty to Use Ordinary Care*, 65 TEX. L. REV. 1173 (1987) (concluding that courts should evaluate a bank's general

Another section of the Legal Guide discussing name and number discrepancies suggests that "in [the] case of conflict between the account number and account name, the account number prevail[s]".⁹⁸ This rule parallels the *Bradford Trust* rule, dictating that the sending bank would be liable when it sends a transfer order containing a name and number discrepancy. The Legal Guide effectively immunizes receiving banks, since it mandates that they rely upon the account number alone in the case of name and number discrepancy. The Legal Guide acknowledges that the opposite rule has merits,⁹⁹ but the Guide's tone betrays the drafters preference for sending bank liability. The Legal Guide states that if the "loss were attributable to the transferee bank, it would be a recognition that the loss could have been prevented by the subsequent action of the transferee bank."¹⁰⁰ The Legal Guide concludes, "[t]he normal rule in such a case would probably be the transferor bore the risk of such loss."¹⁰¹

B. Article 4A

On August 10, 1987 a committee created by the National Conference of Commissioners on Uniform State Laws and the American Law Institute unveiled its discussion draft of Article 4A, the proposed addition to the Uniform Commercial Code, designed specifically to govern wire transfers.¹⁰² While the drafting of Article 4A is still in its preliminary stages, it represents the only current comprehensive attempt to create uniform wire transfer law in the United States. The 1987 draft of 4A places liability on the receiving bank when it accepts a transfer order in which the account name and number do not match.¹⁰³ The 4A approach of receiving bank liability, therefore, stands opposite the sending bank liability rule of *Bradford Trust* and the UNCITRAL Legal Guide.

III. Analysis of *Bradford Trust* and Sending Bank Liability.

This Note argues that the receiving bank liability rule of Article 4A represents the fairest and most efficient method for allocating blame in cases of gone-awry wire transfers. In reaching this conclusion, Part IV utilizes the *Bradford Trust* decision as a vehicle for analyzing the weaknesses of the sending-bank liability rule. Since the *Bradford Trust* Court and the UNCITRAL Legal Guide both embrace sending-bank liability, consideration of *Bradford Trust* provides important insights to developing international law. As the United States, foreign nations, and international bodies develop wire transfer law, they can, and should, look to

duty of ordinary care by focusing on whether a bank's use of a computerized check processing system was reasonable in light of established banking practices).

98. U.N. Doc. A/CN.9/266/Add.2, at 28 (1985).

99. *Id.*; LEGAL GUIDE, *supra* note 90, at 14.

100. *Id.* at 28; U.N. Doc. A/CN.9/266/Add.2, at 28 (1985).

101. *Id.*

102. Banking Report, *supra* note 2, at 313.

103. WHITE & SUMMERS, *supra* note 19, at 814.

Bradford Trust as an analytical starting point from which to develop the law of wire transfers.

A. Inappropriateness of Comparative Negligence

The *Bradford Trust* court correctly concluded that comparative negligence does not apply to wire transfers.¹⁰⁴ As the court noted, the primary reason for comparative negligence is to "avoid the harsh distributional results of precluding recovery of the slightly negligent plaintiff who has suffered a devastating loss."¹⁰⁵ The court argued that in the commercial banking world where "risks can be priced or shifted to others,"¹⁰⁶ the traditional rationale for comparative negligence is unconvincing.¹⁰⁷ Professor Hal Scott, a prominent authority on wire transfer law, agrees that comparative negligence should not apply and argues that fund transfers can be most effectively insured when the risks are clearly identified and assigned.¹⁰⁸ Finally, a contributory negligence regime avoids long expensive trials where each party attempts to prove the other's relative fault.

B. Inapplicability of the U.C.C.

The *Bradford Trust* court concluded that U.C.C. Articles 3 and 4 do not directly apply to wire transfers. Case law on this point is nearly settled as *Delbrueck v. Manufactures Hanover Trust*¹⁰⁹ and other cases make clear.¹¹⁰ Most commentators also agree that courts should not directly apply the U.C.C. to wire transfers.¹¹¹

104. *Bradford Trust*, 790 F.2d at 409. The Fifth Circuit addressed for the first time the applicability of the statute to wire transfer cases and refused to read the statute broadly enough to include economic damages. *Id.*

105. *Id.* (citing PROSSER AND KEATON, *THE LAW OF TORTS* 469 (5th ed. 1984)).

106. *Bradford Trust*, 790 F.2d at 409.

107. *Id.* In the case of accidents, risks cannot be allocated between the parties in advance because it is impossible for every potential victim to contract with every potential injurer. This reasoning does not apply to wire transfers because banks sending and receiving transfer orders must contact one another prior to transmission. Since each bank has the opportunity to assign liability prior to engaging wire transfers, an argument in favor of comparative negligence loses much of its force. *See generally* PROSSER & KEETON, *supra* note 105, at 482-84.

108. Scott, *supra* note 24, at 1715. "An insurance system works best if premiums can be calculated against the background of a system of rules in which risks are identified and assigned."

109. *See, e.g., Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. 1979).

110. *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982), *cert denied*, 459 U.S. 1017 (1983); *Houston Contracting Co. v. Chase Manhattan Bank, N.A.*, 539 F. Supp. 247 (S.D.N.Y. 1982); *Walker v. Texas Commerce Bank*, 635 F. Supp. 673, (S.D.Tex. 1986). The *Walker* Court held the day before *Bradford Trust* was decided that "article 4 could be stretched to encompass wire transfers, but such application was not within the contemplation of the draftsmen." *Id.* at 681.

111. *See, e.g., WHITE & SUMMERS, supra* note 19, at 810-11; Tallackson, *supra* note 1, at 641-2.

C. Inappropriateness of Analogy to the U.C.C.

Despite its recognition that the U.C.C. was not directly applicable, an analogy to the U.C.C. is at the heart of the fifth-circuit decision in *Bradford Trust*. Analogy to the U.C.C., however, provides an unsatisfactory framework for resolving wire transfer cases.

1. Party in the Best Position to Avoid the Loss

The *Bradford Trust* court begins its analogy by asserting that the party in the best position to avoid the loss should bear liability.¹¹² Comment 3 to U.C.C. section 3-417 seems to agree with the *Bradford Trust* reasoning that the party dealing most directly with the imposter should bear any loss caused by fraudulent transactions.¹¹³

Closer examination of the U.C.C., however, indicates that the drafters did not entirely accept this rationale. Section 3-418, addressing finality of payment, states that "acceptance of any instrument is final in favor of a holder in due course or a person who in good faith has changed his position in reliance on the payment."¹¹⁴ The Official Comments suggest that the drafters intended to adopt the *Price v. Neal* rule: "a drawee who accepts or pays on any instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment."¹¹⁵ The comment acknowledges that the "traditional justification for this result was the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it . . ."¹¹⁶ but labels this rationale "fictional."¹¹⁷ At least one court has argued that while in the days of *Price v. Neal* (a 1762 case) check transactions were "face-to-face," modern check processing proceeds at such a frantic pace that there is too little time to inspect signatures.¹¹⁸ If the archaic reasoning of *Price v. Neal* is inapplicable even to modern check processing, its application to wire transactions is especially misplaced. In wire transactions, speed is an important goal of the system. To an even greater degree than a drawee in a mod-

112. *Bradford Trust*, 790 F.2d at 409.

113. *Id.* at 410. Comment 3 to U.C.C. section 3-417 states: "the party who accepts or pays does not 'admit' the genuineness of indorsements, and may recover from the person presenting the instrument when they turn out to be forged. The justification for the distinction between forgery of the signature and forgery of an indorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an indorsement."

114. U.C.C. § 3-418. "A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." U.C.C. § 3-302.

115. U.C.C. § 3-418, comment 1. *See also* note 87.

116. *Id.*

117. *Id.*

118. *Perini Corp. v. First National Bank*, 553 F.2d 398, 405 (5th Cir 1977). In 1984, the *Wall Street Journal* estimated that 100 million checks were written in the United States *each day*, making the face-to-face approach inefficient and impractical. *Wall St. J.*, Mar. 6, 1984 at 37, col. 3.

ern check transaction, a sending bank in a wire transaction is in a poor position to police potential discrepancies.

2. *Finality in Transactions*

The *Bradford Trust* court also emphasized the policy of finality articulated in U.C.C. Section 3-418.¹¹⁹ Under Section 3-418, acceptance of a negotiable instrument is final if it is done in good faith by a holder in due course.¹²⁰ The Code only protects parties who accept negotiable instruments as holders in due course, and it is possible to be a holder without being a holder in due course.¹²¹ To analogize properly to the U.C.C. finality policy, the *Bradford Trust* court should have considered whether the receiving bank, when it accepted the fraudulent wire transfer, functioned as the equivalent of a holder in due course; or whether, in good faith, the receiving bank changed its position in reliance on the validity of the transfer order.

No case law on point provides a ready answer to these issues. However, check forgery cases may provide a useful basis for comparative analysis. In one such case, *Perini Corp. v. First National Bank of Habersham County*, a thief gained access to checks and a perfect copy of a facsimile signature used by Perini, the victimized company.¹²² The thief opened accounts at First National Bank for two fictitious sole proprietorships. Next, he deposited seventeen forged checks to the two accounts, indorsing each check with the facsimile signature.¹²³ These indorsements technically were unauthorized because they were in a personal, and not representative capacity.¹²⁴ First National accepted the checks, however, and entered them into the collection stream. Perini's bank paid on all seventeen forgeries.¹²⁵

After a great deal of analysis, the Fifth Circuit ultimately characterized Perini as the victim of a "forged check loss"¹²⁶ and concluded that Perini could not shift its loss to First National if the bank was a holder in due course.¹²⁷ The U.C.C. defines a holder in due course as "1) a holder 2) of a negotiable instrument 3) who took it for value 4) in good faith 5) without notice that it was overdue or had been dishonored or of

119. *Bradford Trust*, 790 F.2d at 410.

120. U.C.C. § 3-418. For a definition of holder in due course, see *supra* note 114.

121. "'Holder' means a person who is in possession of . . . an instrument . . . issued, or indorsed to him or his order or to bearer or in blank." U.C.C. § 1-201(20).

122. *Perini Corp.*, 553 F.2d at 398.

123. *Id.* at 401.

124. An indorsement is unauthorized if it is "made without actual, implied or apparent authority. . . ." U.C.C. § 1-201(43). A check can pass through the banking system for final payment only if properly endorsed. U.C.C. § 3-202. See also *Perini Corp.*, 553 F.2d at 403, n.7, and 410.

125. *Perini Corp.*, 553 F.2d at 401.

126. *Id.* at 420.

127. *Id.* at 417. Normally, Perini's bank would bear a forged check loss. In this case, however, Perini had agreed to bear all losses in consideration of its bank allowing it to "sign" its checks with a signature facsimile.

any defense against it or claim to it on the part of any person."¹²⁸ In order to avoid liability on remand, the court required Perini to show that First National either lacked good faith or had notice of the error when it accepted the forged, improperly indorsed checks.¹²⁹

The *Bradford Trust* court cites *Perini* to support its claim that the U.C.C.'s policy of finality should play a role in assigning losses in "double forgery" cases.¹³⁰ Yet the court ignores the *Perini* inquiry into the good faith of the party relying on the forged instrument and whether the party accepting the negotiable instrument had notice of a deficiency. If courts resolve wire transfer cases by analogy to the U.C.C., consistency demands that the party who accepts the fraudulent transfer order must do so in good faith, without notice of a defect in the order, before it is entitled to the protection of the finality policy.¹³¹

In *Bradford Trust*, there is a strong argument that the receiving bank accepted the transfer order with notice of a potential defect.¹³² When an instrument is "so irregular as to call into question its validity, terms or ownership, or create an ambiguity as to the party to pay,"¹³³ the Code implies notice of the irregularity. The discrepancy between name and account number in the *Bradford Trust* transfer order provided sufficient notice of an irregularity, since it indicated that the beneficiary was someone who did not even hold an account with the receiving bank. Nevertheless, the receiving bank accepted the transfer order without questioning the discrepancy and even calling the coin seller to confirm that it had deposited the funds. Given this obvious notice of a defect, the claim that the receiving bank was the equivalent of a holder in due course simply fails.

As a second defense, the receiving bank might still have invoked the policy of finality by arguing that it relied in good faith on the sending bank's promised payment.¹³⁴ The Code defines good faith as "honesty in fact,"¹³⁵ which most courts interpret as a subjective standard.¹³⁶ To

128. U.C.C. § 3-302(1).

129. *Id.* at 419. See also J. WHITE & R. SUMMERS, Uniform Commercial Code 617-18 (2d ed. 1980).

130. *Bradford Trust*, 790 F.2d at 411. The *Bradford Trust* Court limited *Perini* as applicable only in "double forgery" cases where banks pay on a negotiable instrument containing both a forged signature and a forged or unauthorized indorsement. See Comment, *Allocation of Losses From Check Forgeries Under The Law of Negotiable Instruments and the Uniform Commercial Code*, 63 YALE L.J. 417, 455 (1953).

131. See U.C.C. §§ 3-302, 3-418.

132. U.C.C. § 1-201(25)(c). A party has notice of a fact when "from all the facts and circumstances known to him at the time in question he has reason to know that it exists."

133. U.C.C. § 3-304.

134. See U.C.C. § 3-418 ("[P]ayment or acceptance is final in favor of a holder in due course, or, a person who has in good faith changed his position in reliance on the payment.") (emphasis added).

135. U.C.C. § 1-201(19).

136. See, e.g., *British Caledonia Airways Ltd. v. First State Bank*, 819 F.2d 593, 596-597 (5th Cir. 1987) (actual knowledge required); *First State Bank & Trust Co. v. George*, 519 S.W.2d 198, 203 (Tex. Civ. App. 1974) ("The test is not diligence or

properly employ the U.C.C. analogy, the *Bradford Trust* court should have inquired whether the receiving bank honestly believed the sending bank's transfer order was genuine. The *Bradford Trust* court failed to complete its analogy to the U.C.C. with a discussion of this issue, further indicating the difficulty and inappropriateness of applying the Code by analogy to fraudulent wire transfers.¹³⁷

3. *Dissimilarity Between Checks and Wire Transfers*

Even if the *Bradford Trust* court determined that Southern Bank accepted the transfer order in good faith and deserved holder in due course protection, the question remains whether courts and legislatures should form the law of wire transfers by drawing analogies to the law governing checks. Both the common law and the U.C.C. dictate that generally, checks with both a forged signature and an improper or forged indorsement are to be treated as forged checks for which the drawee is liable.¹³⁸ Arguably if analogies to the U.C.C. are appropriate in the wire transfer context the sending bank should bear the loss when both the sending and receiving banks are negligent. This argument, however, rests on the erroneous premise that wire transfers are sufficiently similar to checks.

Wire transfers differ fundamentally from checks.¹³⁹ In a check transaction, the drawer gives a signed check to a beneficiary who deposits it at his bank (the "depository bank").¹⁴⁰ The depository bank settles the debt by then presenting the check to the drawee bank, which in turn debits the drawee's account. By contrast, in a wire transfer, the receiving bank receives the transfer order *after* the sending bank examines it.¹⁴¹ Since the receiving bank operates the account into which the

negligence; and it is immaterial that the bank may have had notice of such facts as would put a reasonably prudent person on inquiry which would lead to discovery, unless the bank had actual knowledge of facts and circumstances, that would amount to bad faith.").

137. The Fifth Circuit in *Bradford Trust* emphasizes some sections of the Code more than others. However, the court fails to discuss the guidelines in the Code's rules of construction. The Code provides that words are more controlling than figures. Only where the words are ambiguous will figures control. U.C.C. § 3-118(c). The name and number in the *Bradford Trust* transfer order indicated two different entities creating the necessary ambiguity. If the U.C.C. applied to *Bradford Trust*, Southern Bank would be forced to credit the transfer to the account by the *name*—John Rochefort—an account Southern Bank did not hold. The court's failure to discuss or apply this vital U.C.C. section further demonstrates the inherent weakness in the U.C.C. analogy. Miller, *Commercial Paper, Bank Deposits and Collections and Electronic Funds Transfers*, 42 BUS. LAWYER 1269, 1291 (1987).

138. See Comment, *Allocation of Losses From Forgeries Under the Law of Negotiable Instruments and The Uniform Commercial Code*, 62 YALE L.J. 417, 455 (1953); O'Malley, *The Code and Double Forgeries*, 19 SYRACUSE L. REV. 36, 39-44 (1967). If the forger can be found and he is not judgment-proof, he will be responsible for returning his ill-gotten gains. Otherwise, the drawee is liable for replacement of the funds.

139. See WHITE & SUMMERS, *supra* note 19, at 810-11.

140. "'Depository bank' means the first bank to which an item is transferred for collection even though it is also the payor bank." U.C.C. § 4-105.

141. See WHITE & SUMMERS, *supra* note 19, at 811.

funds are deposited, it is in the best position to compare account names with account numbers and to detect discrepancies which the sending bank cannot police.¹⁴² Therefore, the receiving bank should have a greater responsibility to police against fraud and error than a bank which accepts a forged, improperly indorsed check.¹⁴³ In the checking context, the drawee bank is the last institution to examine the check prior to settlement. White and Summers, the most influential commentators on the U.C.C., point out that the drawee bank has the "last clear chance" to detect an irregularity.¹⁴⁴ In the case of wire transfers, the *receiving* bank is the last bank to examine the transfer order before settlement; it is the bank with the last clear chance to stop the loss.

IV. Fixing the Flaws - the "Last Clear Chance" Doctrine and Receiving Bank Liability

The tort doctrine of last clear chance has often provided a negligent plaintiff a means of reviving his right to recovery. In the tort field the doctrine has fallen into disuse with the advent of comparative negligence. In the commercial context, however, where contributory negligence remains the law, the doctrine may serve a wholly new purpose.¹⁴⁵

In *Bradford Trust*, for example, the sending bank becomes a helpless plaintiff. Once the sending bank issued the forged transfer order, there was virtually no way to recall it. Under the standard test of last clear chance, a court would seek to determine whether the receiving bank had knowledge of the sending bank's position, in which case it would have a duty to exercise reasonable care.¹⁴⁶ In *Bradford Trust*, the receiving bank's knowledge of the danger to the sending bank may be difficult to prove. Nevertheless, many states apply the doctrine of "unconscious" last clear chance and allow recovery even when the defendant does not know of the plaintiff's peril, but has a duty to discover it.¹⁴⁷ The Fifth Circuit found that the receiving bank was negligent, implying that it had a duty to discover the discrepancy in the transfer order.¹⁴⁸

142. White and Summers strongly advocate the position that the two transactions—checks and wire transfers—are so entirely different that liability must be assessed for each transaction very differently. See WHITE & SUMMERS, *supra* note 19, at 811.

143. *Id.* at 811, 815.

144. *Id.* at 811.

145. White and Summers point out that the drawee bank has the "last clear chance" to detect irregularities in check transactions just as the *receiving* bank in wire transfers. White and Summers suggest that the bank with the last clear chance should stop the loss or be liable for paying on a forged instrument. *Id.* Guided by ordinary negligence principles, the sending bank should invoke last clear chance to shift its loss.

146. See PROSSER & KEETON, *supra* note 105, at 462-64.

147. *Id.* at 465-66.

148. *Bradford Trust*, 790 F.2d at 411. There are no Texas cases which apply the doctrine of last clear chance in a commercial dispute. Therefore, one could argue that just as comparative negligence is improper, so is last clear chance. There are three responses to this. First, last clear chance, unlike comparative negligence, is a

Important policies support the argument that the receiving bank should bear liability when it negligently fails to spot and subsequently pays on a transfer order with a discrepancy between account name and number. The law ought to assign liability to the party that can most cheaply and easily avoid losses.¹⁴⁹ Generally, assigning liability to the cheapest cost avoider will make wire transfers less expensive. Lowering the cost of wire transfers will encourage the use of wire transfers as a form of payment, facilitating international trade. Both the sending and receiving banks in *Bradford Trust* could have avoided the loss in this case by implementing simple security procedures. In more complex future cases, however, it may be much more difficult for the sending bank to prevent loss.

It is important to note that both parties have the ability to assign liability to the sending or receiving bank prior to executing the transfer order. For example, members of the CHIPS system are bound by the rule that “[a]ny loss incurred due to a fraudulent transfer originating at a participant [in a CHIPS transfer] shall be borne by such participant.”¹⁵⁰ When private parties contract, the party that assumes liability can take whatever steps are necessary to insure against loss. Presumably, the contracting banks who joined the CHIPS network had sound business reasons for agreeing to sending bank liability. Absent a compelling rationale, courts should refrain from interfering with such private ordering and business judgment.¹⁵¹ As with any form of contracting, however, courts and legislatures must set certain ground rules. At a minimum, rules developed to govern wire transfers can provide a gap-filling function when parties fail to plan for cases of fraud and mistake.

An international wire transfer can involve several different banks and several different wire transfer networks.¹⁵² As banks and wire transfer networks are added, the number of bank employees handling the transfer also increases. Anywhere along the process, an individual handling the transfer may, fraudulently or merely by accident, send a legiti-

court-made doctrine. Thus, courts are on firmer ground when expanding its scope. Second, because last clear chance will shift liability once sending bank negligence is shown, it does not result in the same uncertainty regarding the appropriate level of insurance that comparative negligence does. Finally, last clear chance will keep litigation costs down because last clear chance will avoid a long complex trial to prove relative fault.

149. See Comment, *supra* note 5, at 632 (arguing that the “least-cost-avoider” principle is widely adopted in other areas of the law, including the U.C.C.).

150. WHITE & SUMMERS, *supra* note 19, at 816 n.13, (quoting Rules Governing Clearinghouse Interbank Payment System, Rule 10).

151. WHITE & SUMMERS, *supra* note 19, at 815. For an example of a case that looks to private arrangements to determine wire transfer rules, see *Middle East Banking Co. v. State Street Bank*, 821 F.2d 897 (2d. Cir. 1987), where the court looked to rules and comments of the Council on International Banking to determine banking practices and general understandings within the Banking community.

152. For an example of such a complex wire transfer transaction, see Patrikis, *supra* note 17, at 31.

mately initiated transfer order to an unauthorized destination.¹⁵³ Given the increasing risks of error and the enormous sums of money that could be lost or stolen, bankers should concern themselves not only with fraudulently initiated transfers, but also with honest mistakes by bank employees.¹⁵⁴ Banking entities must also consider safeguarding against unauthorized access to the telecommunications system itself.

Considering the potential vulnerabilities of the wire transfer system, it would not be unduly burdensome for the last bank in the chain of messages to make a final check to insure nothing has gone awry during the transaction. The receiving bank is the only bank which is capable of determining whether the account name and number are consistent. Critics may argue that the added cost to the receiving bank may outweigh any benefits gained by policing against fraud and error. If this is the case, receiving banks may simply adopt a system whereby they pay the beneficiary on the basis of the account number alone.

Nevertheless, assigning liability to the receiving bank when it accepts an inconsistent transfer order is still appropriate. The receiving bank has the most complete information regarding how much it will cost to implement a defense against such losses. Thus, the receiving bank is the party in the best position to insure efficiently. Whether the receiving bank buys insurance, self insures, or forgoes insurance altogether, placing liability on the receiving bank will result in the most efficient pricing of wire transfer services.¹⁵⁵

Conclusion

Article 4A of the U.C.C. assigns liability to the receiving bank if it pays on a transfer order with a discrepancy between account name and number. United States courts and legislatures, UNCITRAL, foreign sovereigns, and the international banking community should adopt the

153. "[E]rrors can occur at all points in the wire transfer system, including at the point of initiation, in the manual procedures associated with the creation, processing and release of a message, and in the handling of the incoming message. These errors occur for a number or [sic] reasons. During a phone conversation with the sender, a clerk might record the wrong amount of money. Incoming messages—especially if written in a foreign language or if the dollar amount is in a foreign currency—can be misinterpreted. System failure, either with the bank's computer or the network's computer, can cause confusion as to which messages were and were not processed. . . . Finally, clerical errors, such a [sic] typographical error, can lead to improper enrichment." TIEN, *supra* note 3, at 17. Out of 207 wire transfer incidents surveyed, 108 errors led to fraudulently absconded funds; only 6 of 13 fraudulently initiated wire transfers succeeded. *Id.*

154. One recent study suggests that most wire transfer fraud occurs after an error by an innocent bank employee sends a legitimately initiated payment to an unauthorized individual. The unauthorized individual, wishing to keep his windfall of frequently hundreds of thousands of dollars, quietly absconds with the funds. TIEN, *supra* note 3, at 64.

155. The argument that holding the receiving bank liable in these cases will result in a decrease in the level of care on the part of the sending bank fails. Sending banks still must police against fraud and error because of the possibility that the unauthorized transfer order contains no discrepancies between account name and number.

approach of Article 4A. The National Conference of Commissioners created the article specifically to address problems in the law of wire transfers.¹⁵⁶ The approach taken by Article 4A will not work as a hardship on the receiving bank because it is in the best position to determine the costs of preventing losses and can most easily implement efficient safeguards to prevent them. Article 4A, by assigning liability to the bank that can most effectively prevent loss, provides an equitable framework for protecting wire transfers and should be adopted internationally.

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156. WHITE & SUMMERS, *supra* note 19, at 811.

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