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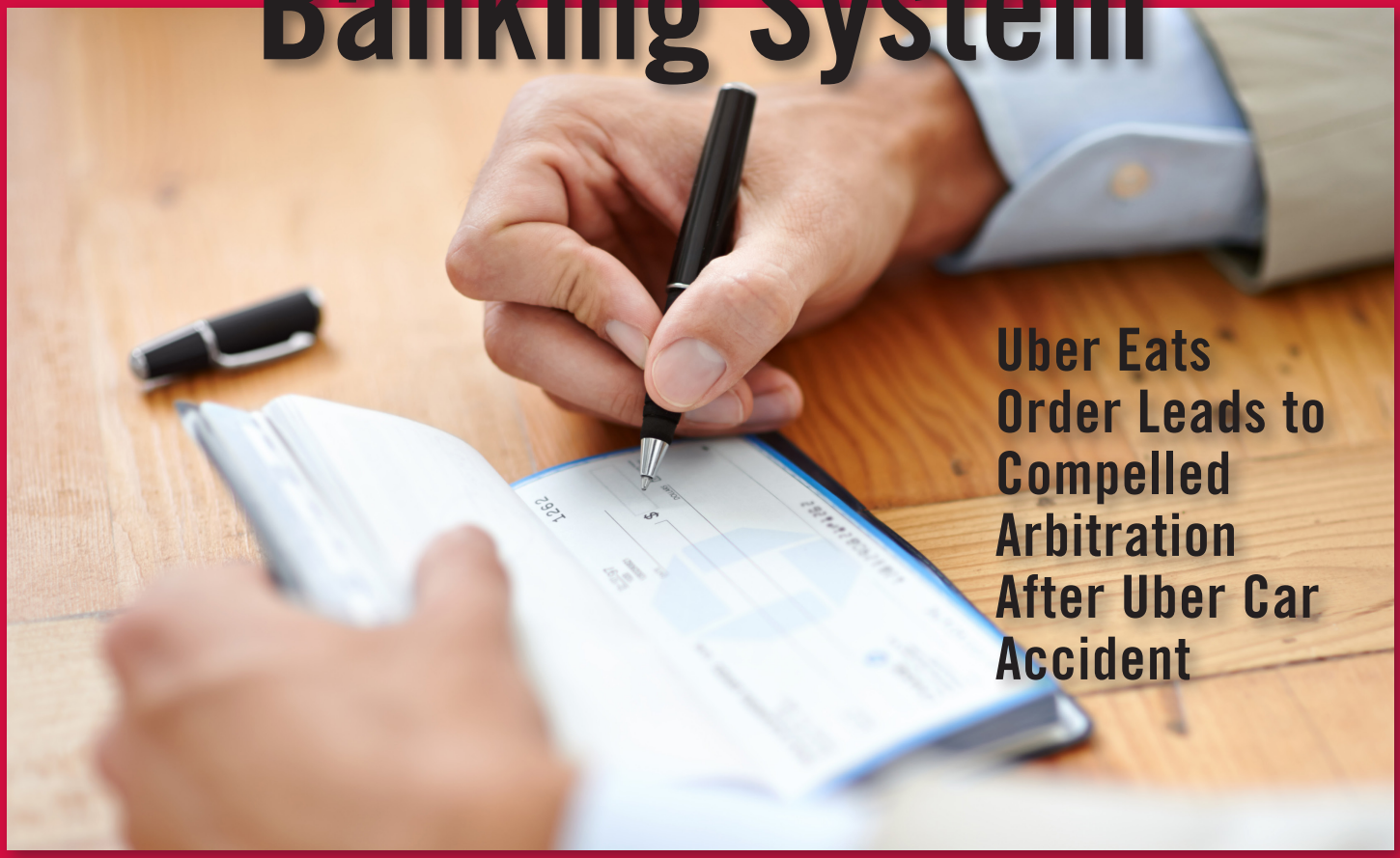
Scams, Deception and Fraud in the Banking System



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Consumer & Commercial Law

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Articles

Recent Developments

Scams, Deception and Fraud in the Banking System

POTENTIAL REMEDIES FOR CONSUMERS*

By Carla Sanchez-Adams **

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I. INTRODUCTION[1] AND OVERVIEW

Payment fraud impacts all Americans across many communities—young, old, those highly educated, those with little formal education, those with technology fluency, and those that are technology novices. Payment fraud encompasses both unauthorized transactions, which are not initiated by a consumer, and fraudulently induced transactions, which are initiated by a consumer based on some type of deception or scam. Additionally, payment fraud permeates all types of payment systems and platforms like peer-to-peer payment applications, bank-to-bank wire transfers, checks, ACH payments, debit cards, and Electronic Benefits Transfer (EBT) cards.

The increasing ease and use of mobile and online banking through technological advancement have also provided opportunities for fraudsters and scammers to exploit these newer payment technologies. Whether a consumer can be made whole after payment fraud will depend on the payment method as well as the fraud type. This article only covers payments and fraud in the banking system, but lawyers should be aware that other types of payment fraud exist, for example, through gift cards, non-bank wire transfers, money service transfers, and credit cards.

The rights and remedies available to a consumer who is a victim of fraud often turn on whether the payment was unauthorized or fraudulently induced.

An unauthorized payment is one that was initiated by the fraudster without the consumer's authorization. The fraudster may have obtained payment credentials—such as bank account login information or the dual-factor identification code—from the consumer because of a fraud scheme, but the actual payment transfer was performed by the fraudster. Consumers generally have rights regarding unauthorized transfers, though the extent of those rights depends on the payment system involved.

A fraudulently induced payment, on the other hand, is initiated by the consumer. The consumer is defrauded into sending the money—for example, by using a P2P payment app, by buying and providing gift cards, or by sending a wire transfer. Fraudulently induced payments that occur over faster payment platforms (e.g., FedNow and RTP®) are sometimes referred to as "authorized push payment fraud" or "APP" fraud.

Consumers generally have very limited, if any, rights or remedies for fraudulently induced transactions, though some states may have elder abuse prevention statutes that could create a duty to protect against these types of transactions in certain scenarios. Some consumers may have a chance of recovering some money if they act quickly, or if the bank or payment service misled the consumer or grossly failed to meet its obligations.

Federal and state laws provide some protections for payments sent from bank accounts, but they are strongest when the payment is unauthorized.

State law gives consumers the right to stop payment of checks, including Remotely Created Checks (RCCs) and, in practice, Remotely Created Payment Orders (RCPOs). The Electronic Funds Transfer Act gives consumers the right to stop preauthorized, recurring electronic fund transfers (including recurring ACH payments and recurring debit or prepaid card payments), but not one-time payments such as those made through payment apps. Nacha Operating Rules and Guidelines also provide a stop payment right, including for some one-time preauthorized ACH payments. However, in practice, when a consumer has been defrauded, it will usually be too late to stop the payment.

Consumers may have better luck disputing a payment after the fact if it was unauthorized. State UCC laws give consumers the right to dispute unauthorized "signatures" on checks, including RCCs, and check alterations, such as when a check is stolen and the payee or amount is changed. The EFTA provides dispute rights for unauthorized electronic fund transfers. All electronic fund transfers, including those made through Zelle or Venmo, may be disputed and reversed as unauthorized if the consumer did not initiate or authorize the transfer. Authorizations must be clear and readily understandable, and if the fraudster initiates the electronic fund transfer (such as an ACH or debit card payment) after obtaining the account information and authorization by fraud, those payments are disputable as unauthorized.

The EFTA's protection for unauthorized payments does not

include fraudulently induced payments initiated by the consumer—for example, by Zelle, Venmo, or other electronic fund transfer (e.g., a debit card purchase)—though a payment is unauthorized if it was induced by force.

However, in some cases, depending on the circumstances, the private rules of the payment network (PayPal, Visa, Mastercard) may give the consumer additional remedies. For example, Zelle reimburses for some imposter frauds. In addition, the website where an item was purchased (eBay, Amazon) may allow the consumer to dispute the charge if they did not receive what they purchased.

It is possible that some fraudulently induced payments, such as those made to imposters, could be disputed as errors even if they are not unauthorized.

Whatever the merits of the consumer's unauthorized use or error claim under the EFTA, the financial institution (including a bank, prepaid company, or P2P provider) must undertake a reasonable investigation and generally conclude that investigation within 10 days, unless the institution gives the consumer a provisional credit. The institution must report its findings to the consumer, and if it determines that the charge was unauthorized, it must reverse the charge within one business day of that determination. The burden of proof is on the financial institution to show that the charge was authorized.

State law, primarily the Uniform Commercial Code (UCC) Article 4A, governs all other electronic funds transfers that are not covered by the EFTA. UCC Articles 3 and 4 govern check transactions and the rights and remedies of defrauded consumers when they are drawers or payees of checks.

II. CONSUMER REMEDIES FOR ELECTRONIC FUND TRANSFERS UNDER THE ELECTRONIC FUND TRANSFER ACT

The Federal Electronic Fund Transfer Act (EFTA) and its implementing Regulation E generally govern any "electronic fund transfer" that authorizes a "financial institution" to debit or credit a "consumer's account."[1] The EFTA is a consumer protection statute enacted "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective …. however, is the provision of individual consumer rights."[2]

The EFTA provides protections to consumers who have been impacted by payment fraud when the electronic funds transfer is unauthorized. However, a consumer who has initiated an electronic funds transfer based on a scam or deception, (a "fraudulently induced transaction") will not be able to benefit from the EFTA's unauthorized use protections.

A. Applicability of the EFTA to an unauthorized electronic funds transfer

For a consumer to benefit from the unauthorized use protections of the EFTA, the transaction must meet the definition of an electronic funds transfer (EFT),[3] and the account where the consumer's money was stored must meet the definition of an account under the EFTA.[4] Finally, the institution that maintains the account must meet the definition of "financial institution."[5]

1. What is an "electronic fund transfer" (EFT) under the EFTA?

The EFTA defines an EFT as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account."[6]

An EFT under the EFTA includes transfers initiated by means of an access device, such as a debit card, and transfers that do not involve a card at all, such as direct deposit and other ACH transactions.

The EFTA and Regulation E give a non-exclusive list of the types of transfers that are included within the definition:

- Point-of-sale transfers through a debit card or other access device;[7]
- Deposits, transfers, or withdrawals by ATM, including a deposit in cash or by check, provided a specific agreement exists between the financial institution and the consumer for EFTs to or from the account to which the deposit is made;[8]
- Direct deposit or withdrawal of funds;[9]
- Transfers initiated by telephone;[10] and
- Transfers resulting from debit card transactions, whether or not initiated through an electronic terminal.[11]

Most (but not all) electronic transfers through the ACH system are EFTs.[12] The list of EFTs in the EFTA is not comprehensive,[13] and Congress intended a broad reach to encompass services not yet in existence.[14]

Person-to-person transfers initiated online or through a mobile app—such as payments through Zelle, PayPal, Venmo, and Cash App—are EFTs if they transfer funds from an account within the EFTA's scope.

The EFTA and Regulation E exclude the following items from the definition of EFT:

- Checks;[15]
- Check guarantees or authorizations;[16]
- Transfers, other than ACH transactions, by financial institutions of funds held at Federal Reserve banks or other depository institutions by means of a service that is not designed primarily to transfer funds on behalf of a consumer;[17]
- Transfers to purchase regulated securities and commodities (an exclusion that might impact purchases of crypto-assets);[18]
- Automatic transfers by an account-holding institution;[19]
- Transfers initiated by a telephone call to the financial institution making the transfer (but not other telephone transfers);[20] and
- Transfers involving small institutions.[21]

2. What is an "account" under the EFTA?

To fall within EFTA's scope, the electronic fund transfer (EFT) must authorize a debit or credit to an "account."[22] "Account" is defined in the statute as "a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement."[23]

The EFTA generally refers to a "consumer account" established primarily for personal, family, or household purposes.[24]

Regulation E's core definition of "account" is similar to the statute but adds that the account is one "held directly or indirectly by a financial institution."[25]

In some respects, these definitions are circular—an account is covered if it is held by a financial institution, and an entity is a financial institution if it holds an account or issues an access device that provides access to an account. In practice, the further detail on the types of accounts that fall under the definition of "account," and the types of entities that are financial institutions, provide more specificity.

Regulation E adds to the definition of "account" coverage of "prepaid accounts,"[26] which includes payroll card accounts, certain government benefit card accounts,[27] and other types of prepaid accounts including general-use prepaid cards and mobile wallets that can store funds.

Two general types of government benefit accounts are covered by Regulation E: (1) accounts used by the federal government to distribute cash benefits (regardless of whether the benefits are means tested)28 and (2) accounts used to distribute non-needs-tested state or local government benefits. Regulation E does not define "needs-tested," but the CFPB has identified Temporary Assistance for Needy Families (TANF), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP) as examples of needs-tested government benefits.29 Conversely, the CFPB has stated that unemployment insurance, child support, certain prison and jail "gate money" benefits, and pension plan payments are examples of government benefits that are *not* needs-tested and that *are* covered by Regulation E.[30] Indeed, the statutory exemption for "needs-tested benefits" specifically excludes "employment-related payments, including salaries and pension, retirement, or unemployment benefits established by a Federal, State, or local government agency."[31]

Money market accounts also appear to be covered if they can be accessed by a debit card or other access device to purchase goods or services or to obtain cash.

Money market accounts also appear to be covered if they can be accessed by a debit card or other access device to purchase goods or services or to obtain cash.[32] Coverage of other types of accounts that hold assets, such as those that can hold or be used to purchase crypto-assets, is less clear.

The official interpretations limit "accounts" to those "located in the United States through which EFTs are offered to a resident of a state . . . whether or not a particular transfer takes place in the United States and whether or not the financial institution is chartered in the United States or a foreign country."[33] One court has ruled that an account is covered where at least one authorized signatory or joint accountholder is a resident of a state even though the other accountholders are residents of other countries.[34]

3. What is a "financial institution" under the EFTA?

The term "financial institution" under the EFTA is defined broadly. "Financial institution" includes federally- or state-chartered depository institutions *and* "any person" who either:

- (1) "directly or indirectly holds an account belonging to a consumer" or
- (2) "issues an access device and agrees with a consumer to provide electronic fund transfer services."[35]

This definition captures not only banks and credit unions that hold consumer accounts, but also non-bank companies that either hold asset accounts or issue an access device used for "electronic fund transfer services." These non-bank companies may partner with a depository institution that holds the funds, hold the funds on their own books in uninsured accounts, or merely provide an access device used for fund transfers from accounts held by a different institution.

The entities that fall within the definition of "financial institution" are primarily determined by the definitions of the terms "account,"[36] "access device,"[37] and "electronic fund transfer"[38] that are incorporated into the two prongs of the definition. For example, companies that provide prepaid accounts, including payroll cards and government benefits cards, are now considered financial institutions because prepaid accounts have been brought within the definition of "account."

The second prong of the definition of "financial institution" includes an entity that "issues an access device and agrees with a consumer to provide electronic fund transfer services."[39] The terms "access device"[40] and "electronic fund transfer"[41] are defined in Regulation E, but the term "electronic fund transfer services" is not. It may be that any entity that issues an access device that a consumer can use to initiate electronic fund transfers is offering electronic fund transfer services.

A court has held that Early Warning Services (EWS)—the operator of the Zelle person-to-person payment service offered through financial institutions—is not a financial institution because it does not hold an account belonging to a consumer and does not issue the phone numbers and email addresses that are used as access devices for Zelle transfers.[42] The court did not consider whether the Zelle app is an access device issued by EWS.

B. Does the EFTA apply to crypto-assets?

Crypto-assets are growing in popularity as a way of receiving fraudulent payments. There are several different ways in which fraud schemes may involve crypto-assets:

- Funds may be transferred from a bank account to a crypto exchange or crypto bank, with or without the consumer's authorization.
- Funds at a crypto exchange may be initially held in dollar-based accounts, before being transferred into crypto-assets.
- Accounts holding crypto-assets may be hacked and the assets transferred elsewhere.
- Fake crypto-asset accounts may also be created, designed to create the illusion that funds are generating returns that can be withdrawn, before the entire account is stolen.

The EFTA may provide protection for unauthorized transfers in some of these situations, but the issues are complex. EFTA coverage may turn on (1) whether the transfer falls within the exception for transfers to purchase or sell a security or commodity,[43] (2) whether an account at a crypto exchange, even if held in dollars, is an "account" within the meaning of the EFTA, and (3) whether crypto-assets are "funds" and thus meet the definition of an "electronic fund transfer."

Even if the EFTA applies in theory, it may be difficult to find an entity to hold responsible, given the purportedly decentralized nature of crypto-assets. Moreover, the EFTA likely does not protect consumers from fraudulently induced transactions that the consumer initiates (as opposed to unauthorized transactions).

1. Is an account at a crypto-exchange an "account" under the EFTA?

Neither Regulation E nor the CFPB have addressed whether accounts that hold crypto-assets—or dollar-denominated ac-

counts used to buy or sell crypto-assets—can be "asset accounts" within the scope of the EFTA. Note that even if the account is within the scope of the EFTA, particular transfers to or from the account may be exempt if their primary purpose is to purchase or sell a regulated security or commodity.[44]

The EFTA does apply to certain accounts held by non-bank entities. Under Regulation E, the term "account" covers "a demand deposit (checking), savings deposit, *or other consumer asset account*,"[45] as well as a "prepaid account."[46] Regulation E does not define the term "asset account." The account must be held by a "financial institution," but that term includes "a bank, savings association, credit union, *or any other person* that directly or indirectly holds an account . . . or that issues an access device and agrees with a consumer to provide electronic fund transfer services."[47]

To date, there are few decisions addressing EFTA coverage for accounts holding crypto-assets, and none squarely addressing whether crypto-asset accounts are "asset accounts." One court held that crypto-asset accounts are used for investment purposes and therefore are not for personal, family, or household purposes, so not covered by the EFTA.[48] Another court rejected that view, finding that crypto-asset accounts were used for *personal* investment purposes and that crypto-assets were "funds," so the transfers were "electronic fund transfers."[49] It is not clear if the terms "asset" (as in "asset account") and "funds" are synonymous.

Crypto exchanges and other entities involved with crypto-assets may offer various types of accounts that may need to be analyzed differently.

Some accounts at crypto exchanges are denominated at or spendable in dollars, which enhances the argument for them being viewed as asset accounts. For example, crypto exchanges receive transfers from bank accounts and may hold those funds in FDIC-insured bank accounts.[50] This is especially true if the transfer from the bank account happens through an ACH or wire transfer—mechanisms that only work bank-to-bank. A crypto-exchange could potentially partner with a bank or credit union to offer demand deposit accounts holding dollars, which are explicitly covered by the EFTA. Or, an account holding dollars at a crypto-exchange or other crypto-related business could qualify as a prepaid account or another type of asset account.

A digital wallet might access one account in dollars, which are transferred into an account holding stablecoins (a form of crypto-asset purportedly tied to the value of the dollar or another stable index), and then into another account holding other crypto-assets.

One court has held that a crypto-asset exchange engaged in "electronic fund transfers" because crypto-assets are "funds," given that they are a digital form of liquid, monetary assets.[51] Of course, if an account holds "funds" and "monetary assets," then it is likely an asset account under the EFTA. A proposed rule by the CFPB (not under Regulation E) supports the view that crypto-assets are "funds."[52]

Accounts that hold or are related to crypto-assets may also be prepaid accounts. When releasing the prepaid accounts rule, the CFPB stated that it was not resolving whether Regulation E generally or the prepaid accounts rule specifically applies to crypto-assets (then called virtual currencies.)[53]

The definition of "prepaid account" in the prepaid accounts rule includes four types of accounts, and one potentially covers accounts holding crypto-assets—an account "whose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services or at [ATMs], or to conduct person-to-person transfers."[54] Some crypto-asset accounts, or accounts at crypto exchanges, might meet this test.

The ability to use an account to transfer crypto-assets among different people or entities might be viewed as meeting the function of providing transfers for goods, services, or person-to-person transfers. Or, the account might offer another method of conducting transactions for goods, services, or person-to-person transfers.

However, as noted above, even if the account is within the scope of the EFTA, some transfers might be exempt if their primary purpose is to buy or sell a regulated security or commodity.

2. Are crypto- assets "funds" under the EFTA?

Neither the EFTA nor Regulation E defines the term "funds."

One court has discussed various other sources that define "funds" outside of the EFTA and concluded that crypto-assets are "funds" under the EFTA because they are a digital form of liquid, monetary assets.[55] In a subsequent decision, the court also emphasized that there is nothing in the EFTA that would limit coverage to fiat currencies or exclude crypto-assets, and the EFTA was intended to be flexible and broad to reach situations not expressly anticipated by Congress.[56]

Similarly, in a proposed rule exercising its authority under the Consumer Financial Protection Act (CFPA) to regulate services that transmit or exchange "funds,"[57] the CFPB stated that "the term 'funds' in the CFPA is not limited to fiat currency or legal tender, and includes digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange. Crypto-assets, sometimes referred to as virtual currency, are one such type of digital asset."[58] The CFPB relied on decisions finding that crypto-assets are "funds" within the meaning of laws that prohibit money laundering and unlicensed money transmitters.[59]

Whether assets constitute "funds" may also be relevant to the question of whether an account is an "asset account" under the EFTA. For example, a securities or commodities account such as a money market account can be an asset account if it can be used for electronic fund transfers using a debit card.[60]

C. What remedies does the EFTA provide for payment fraud?

1. Unauthorized EFT protections

The EFTA limits consumers' liability for unauthorized transfers. The EFTA provides for different tiers of protection depending on whether an access device was lost or stolen and when the unauthorized transfer was reported. However, those distinctions have no bearing on the protection from an initial unauthorized transfer; instead, they impact whether the consumer will be protected from subsequent unauthorized transfers that could have been prevented if the initial transfer had been reported promptly.

i. Unauthorized v. fraudulently induced transfers

The EFTA provides protections for unauthorized electronic fund transfers. An "unauthorized electronic fund transfer" is "an electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit."[61]

The term "unauthorized electronic fund transfer" (unauthorized EFT) under the EFTA and Regulation E includes a transfer that is initiated by someone who obtained the access device from the consumer through fraud or robbery.[62] Thus, if a fraudster initiated a transfer without the consumer's authorization, the transfer is unauthorized even if the consumer was defrauded into providing the credentials, dual-factor authentication code, or other means of account access used by the fraudster.[63]

The transfer is also unauthorized if the means of access are stolen, as in a computer hack or a fraudster who accesses the consumer's phone.[64] For example, if a fraudster uses a "SIM swap" to transfer the consumer's mobile phone number to the fraudster's phone, and then uses the phone to access the consumer's accounts and make a transfer, it is an unauthorized transfer. Similarly, if a fraudster gains control over the consumer's computer and accesses the consumer's account without authorization, the transfer is unauthorized. However, proving that it was the fraudster and not the consumer who initiated the transfer may be difficult.

It is key that the fraudster be the one that initiated the transaction. If the consumer sent the funds and initiated the transfer, then the transaction falls outside the definition of "unauthorized electronic fund transfer" even if the consumer was induced to initiate the transfer by fraud.[65] However, there is an exception to this aspect of the definition if the consumer was induced by force to initiate the transfer, such as by a criminal at an ATM.[66]

Even if the consumer did initiate a fraudulently induced transfer that is excluded from the definition of "unauthorized electronic fund transfer," it might qualify as a different type of error subject to the EFTA's error resolution procedures.

The definition of unauthorized electronic fund transfer does not itself set out a basis for liability; a plaintiff must allege a specific provision of the EFTA governing unauthorized transfers or errors that has been violated.[67]

ii. Limits on liability for unauthorized EFTs

The EFTA has three tiers of potential consumer liability for unauthorized transfers: (1) $0 to $50, (2) $500, and (3) unlimited—depending on whether a lost or stolen access device was involved and when the consumer reports the loss. However, these tiers are irrelevant to the first unauthorized transfer. They only come into play if there are subsequent unauthorized transfers that could have been prevented with timely notice.

For the consumer to have *any* liability for unauthorized charges following loss or theft of an access device, the following conditions must be met:

- (1) The financial institution must have provided the consumer with certain initial disclosures.[68]
- (2) The transfer must involve an accepted access device.[69]
- (3) The financial institution must have provided a means—such as a PIN or comparison of the consumer's signature, fingerprint, or photograph[70]—to identify the consumer to whom the access device was issued.[71]

If all three conditions are not met, there is no consumer liability (unless the charge appears on a statement and is not timely challenged, as discussed below). If a transfer does not involve an access device, there is no liability. For example, there is no liability when the transfer, instead of being initiated by a debit card, is initiated by a telephone instruction to the financial institution.

Even when a debit card or other access device is utilized, there is no liability for unauthorized use if the merchant has not provided a means to identify the person with whom the merchant is dealing. For example, this may occur when the access device is used by mail, or over the phone or online to initiate a transfer.[72]

A financial institution cannot increase the consumer's maximum liability for unauthorized transfers by entering into an agreement with the consumer in which the consumer agrees to greater liability than provided for in the EFTA.[73] The fact that state law imposes higher liability limits also cannot be used as a basis to increase the consumer's liability for unauthorized transfers beyond that permitted by federal law.[74]

iii. Timeline for reporting unauthorized EFTs

Contrary to popular understanding, there is no time limit in the EFTA for reporting the first unauthorized transfer. Financial institutions must protect consumers from liability for unauthorized transfers even if the consumer is late in reporting the transfers.[75] The Federal Reserve Board has explained that "some institutions mistakenly believe [the] timing requirement for error notices also applies to the limits on a consumer's liability for unauthorized transactions. However, the Official Staff Commentary for Regulation E clarifies that even when a consumer notifies the financial institution of unauthorized transactions more than 60 days after the institution transmitted the periodic statement listing the unauthorized transactions, the liability limits under § 1005.6 still apply for transactions that occurred prior to the 61st day."[76] However, the EFTA's one-year statute of limitations effectively puts a time limit on efforts to dispute an unauthorized charge.[77]

If a lost or stolen debit card is not reported promptly or if

unauthorized transfers appearing on a statement are not reported within the required time frame, the EFTA imposes liability on the consumer for *subsequent* unauthorized transfers that could have been prevented with timely notice. Additionally, to trigger the financial institution's error resolution requirements, the consumer must generally report unauthorized transfers appearing on a statement within sixty days of transmittal of a statement showing those.

The account agreement might attempt to limit the bank's responsibility for charges that are not reported in sixty days, but the agreement cannot waive the consumer's rights under the explicit scheme set out in the EFTA. Delayed reporting, however, relieves the financial institution of the requirement to follow the error resolution requirements.[78]

Separate from the unauthorized transfer provisions are the error resolution provisions, which do have time limits. The error resolution provisions establish procedures for addressing errors (including unauthorized transfers), set forth the financial institution's duties and the consumer's rights, and may require the financial institution to promptly recredit the consumer's account pending investigation. The EFTA's protection against unauthorized transfers and error resolution procedures are distinct. In some situations, consumers may have protection against unauthorized transfers even if they have not met the deadlines needed to trigger the error resolution requirements.

1. Lost or stolen access device

Although there is no specific time limit for reporting the first unauthorized transfer, if an access device (like a debit card) is lost or stolen and the consumer does not promptly report the loss or theft, the consumer can have liability for subsequent transfers that could have been prevented with timely notice.

The consumer's liability for unauthorized use is limited to a maximum of $50 if the consumer reports the debit card as being lost or stolen within two business days after the consumer *learns* of the card's loss or theft.[79] The time period may be extended to four business days if the lost or stolen access device is issued by a service provider that is not the account-holding institution and that does not provide periodic statements.[80]

The consumer's liability for unauthorized use is limited to a maximum of $50 if the consumer reports the debit card as being lost or stolen within two business days after the consumer learns of the card's loss or theft.

As mentioned above, if the access device was not lost or stolen, the $50 liability provision does not apply, and the consumer generally has no liability if unauthorized charges are reported within sixty days of the periodic statement.

When the access device is lost or stolen and the consumer promptly reports the loss, the consumer's maximum liability is the *lesser* of $50 or the amount in unauthorized transfers that had occurred before the consumer provided notice to the financial institution. (Many financial institutions will waive even this amount, either in practice or through their agreement with the consumer. The institution's advertising or website may promise "zero liability" under certain circumstances.) For example, on Monday a consumer realizes that their debit card has been stolen and a thief makes an unauthorized transfer of $100 that same day. The consumer notifies the debit card issuer on Tuesday before any further transfers are made. The consumer is liable for a maximum of $50 even if additional transfers occur. If instead, the thief made an unauthorized transfer of only $25 on Monday and the consumer reports the theft to the card issuer Monday night and then on Tuesday, the thief makes an unauthorized transfer of $75, then the consumer's liability is limited to $25 for the Monday transfer.

The two-day period in which to make a prompt notification is triggered not when the card is lost or stolen but when the consumer learns that the card is lost or stolen. The EFTA is unclear as to how a court is to determine when the consumer has learned of the loss or theft of the access device. The official interpretations of Regulation E state that the court can consider as a factor that the consumer received a periodic statement that reflects an unauthorized transfer. However, the official interpretations indicate that, "in determining whether the consumer had knowledge of the loss or theft," the fact that the consumer had received such a periodic statement "cannot be deemed to represent conclusive evidence that the consumer had such knowledge" of the unauthorized transfer.[81]

Regulation E specifies how to count the two business days. A "business day" is a day in which the offices of the consumer's financial institution are open to the public for carrying on substantially all business functions.[82] In addition, the two-business day period does not include the day the consumer learns of the loss or theft or any day that is not a business day. The rule is calculated based on two 24-hour periods, without regard to the financial institution's business hours or the time of day that the consumer learns of the loss or theft. For example, a consumer learns of the loss or theft at 6 p.m. on Friday. Assuming that Saturday is a business day and Sunday is not, the two-business-day period begins on Saturday and expires at 11:59 p.m. on Monday, not at the end of the financial institution's business day on Monday.[83]

The consumer is potentially liable for up to $500 if they (1) fail to notify the financial institution within two business days after learning of the loss or theft (or four business days in rare cases[84]) but (2) report the transfers within sixty days of transmittal of the statement (or longer in certain situations if there are no statements provided). The consumer's liability is potentially unlimited if the unauthorized transfers are not reported within sixty days of the statement. The higher liability of up to $500 applies only if a timely report would have prevented subsequent charges. If the consumer fails to timely report loss or theft of an access device, the consumer's maximum liability is the *lesser* of $500 or the total of:

- (1) The amount for which the consumer is liable for transfers that occur within the first two business days ($50); and
- (2) The amount of unauthorized transfers that occur after the close of those first two business days and before the consumer notifies the institution.[85]

The consumer is liable for that amount, however, *only* if the financial institution can establish that these transfers would not have occurred if the consumer had notified the institution within the two business days after the consumer learned of the loss or theft of the access device.[86]

For example, on Monday the consumer realizes their debit card has been stolen and the thief makes an unauthorized transfer of $100 that same day. The consumer reports the theft on Friday.

The consumer's liability is limited to $50 for transfers that occur during the time between the theft and the end of the two-business-day period after they learn of the theft, regardless of when they notify the issuer. Consider, instead, if on Thursday the thief also makes an unauthorized transfer of $600, and the consumer notifies the card issuer on Friday. The consumer is liable for a total of $500. The consumer had until Wednesday (two business days) to notify the card issuer to limit their total liability to $50. Because they did not do so, they are liable for $50 of the $100 transfer that occurred on Monday. They are also liable for the Thursday transfer of $600—for a total of $650, which the EFTA caps at $500. With regards to $450 of this liability, however, they are liable only if the Thursday transfer would not have occurred but for the consumer's failure to notify the bank within two business days.

2. Unauthorized EFTs appearing on statement

As previously discussed, there is no specific time limit for reporting the first unauthorized transfer. However, the consumer is potentially liable for subsequent unauthorized transfers if the unauthorized transfer appears on a periodic statement and the consumer fails to report that transfer within sixty calendar days of transmittal of the periodic statement (or longer in some situations such as with prepaid accounts where a consumer does not receive a statement).

The consumer's liability "shall not exceed the amount of the unauthorized transfers that occur after the close of the [sixty] days and before notice to the institution, and that the institution establishes would not have occurred had the consumer notified the institution within the [sixty-day] period."[87] Put differently, if the consumer does report the transfers within sixty days of the statement, the consumer has no liability, unless a lost or stolen access device is involved that was not timely reported and a timely report would have prevented the transfers as discussed above.

Thus, the consumer's liability is potentially limited by two factors.

First, even if notice is not timely, the consumer is potentially liable only for charges after notice was due.[88] Consider this example: the consumer's account was debited monthly for payments towards a membership club that they did not authorize. The first transfer is made on June 15 and appears on the monthly statement that is transmitted on July 10. Subsequent transfers occur monthly. The consumer is only liable for unauthorized transfers that occur after September 8—i.e., sixty days after the July 10 statement—until the consumer gives notice, provided that the financial institution establishes that it would have blocked those subsequent transfers had notice been timely.

Second, the financial institution must establish that the unauthorized transfers after the notice deadline would not have occurred with timely notice. For example, if the financial institution had notice from another source and failed to act, it is possible that timely notice would not have prevented the unauthorized transfers.[89]

The financial institution bears the burden of showing that timely notice would have prevented the subsequent unauthorized transfers.[90] The Ninth Circuit found a reasonable inference that the transfer would not have been prevented by timely notice where the consumer alleged that her bank became aware of a security breach after the receiving bank found the transfer suspicious and contacted the fraud department of her bank.[91] According to the consumer, her bank "took no action to protect her account from further unauthorized withdrawals," such as freezing the account, changing the password, or contacting the consumer.[92]

Relatedly, notice "may be considered constructively given when the institution becomes aware of circumstances leading to the reasonable belief that an unauthorized transfer to or from the consumer's account has been or may be made."[93] The institution may not hold the consumer liable for charges after the bank "is notified of, *or otherwise becomes aware of*, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be effected."[94]

iv. Consumer's notice to financial institution of unauthorized EFT

Crucial to limiting the consumer's liability for unauthorized transfers is providing effective notice to the financial institution. The consumer is merely required to take "steps reasonably necessary to provide the institution with the pertinent information."[95] The notice is effective "whether or not a particular employee or agent of the institution actually receives the information."[96]

The consumer's notice is reasonable so long as the consumer notifies the institution, even if the consumer does not use the address or telephone number specified by the institution for such notice.[97] The consumer may notify the institution either in person, by telephone, or in writing.[98] Consumers can have a third party provide notice on their behalf,[99] but the institution can require appropriate documentation from the third party to determine whether the third party is actually acting on the consumer's behalf.

The consumer must merely provide "pertinent information," and the consumer's notification may be adequate even if the consumer is not able to provide the institution with the account number or the debit card number when reporting the card as lost or stolen. The notice is adequate so long as the consumer can identify the account sufficiently. For example, it would be sufficient if the consumer can identify the account by the name of the account and the type of account.[100] The fact that part of the consumer's notice may list an incorrect transfer amount does not deny a financial institution the "pertinent information" to identify the unauthorized transfer at issue.[101]

The consumer's liability for unauthorized use depends on when the notice is given. Written notice is considered given at the time the consumer mails the notice or delivers it for transmission to the institution by any other usual means.[102] Because Regulation E provides that notice is considered given at the time the consumer transmits it; oral notice should be considered effective at the time it is spoken by the consumer.

v. Burden of proof for unauthorized EFTs

If a consumer alleges that an electronic fund transfer (EFT) is unauthorized, the burden of proof is on the financial institution to show that it was authorized or that the conditions for consumer liability have been met.[103] If the consumer did not timely report the unauthorized transfers, the financial institution must show that timely notice would have prevented subsequent unauthorized transfers.[104]

The EFTA does not require the bank to accept the consumer's claim that the transfer was unauthorized.[105] However, if the financial institution cannot meet its burden to establish that the disputed EFT transaction was authorized, the financial institution must credit the consumer's account.[106]

A financial institution cannot deny a consumer's claim based just because a consumer is unable to explain how their PIN was compromised.[107] Consumer negligence plays no role in assessing whether a transfer was unauthorized,[108] liability is determined solely by the consumer's promptness in notifying the financial institution.[109] "Other factors **may not** be used as a basis to hold consumers liable."[110] An example of consumer negligence could be when someone writes a PIN on the debit card and there

is an unauthorized EFT through use of the debit card. Despite the consumer's negligence, which facilitated the unauthorized EFT, the consumer's liability is totally unaffected.[111] Similarly, the consumer's negligence in succumbing to a scam and providing the fraudster a dual-factor authentication code does not change the fact that the transfer was unauthorized.[112] When a consumer is fraudulently induced into sharing account access information with a third party, and a third party uses that information to make an EFT from the consumer's account, the transfer is an unauthorized EFT under Regulation E.[113]

Additionally, a financial institution cannot simply conclude that a transfer is authorized because the consumer has a history of transactions with the merchant without considering other evidence—including the consumer's assertion that the transfer was unauthorized or for an incorrect amount—or without considering the basis for the consumer's claim.[114] The CFPB has found that some entities violated Regulation E and the duty to perform a reasonable investigation when they denied claims solely because consumers had previously conducted business with a merchant.[115] However, some courts have cited similar factors in denying the plaintiff's claim, without considering that the institution has the burden to show that a claim was authorized.[116]

2. Error resolution procedures and timeline[117]

i. Types of errors: unauthorized EFTs are errors

The EFTA contains a detailed procedure for consumers to use to resolve errors related to electronic fund transfers.[118] These procedures apply not just to money coming out of the consumer's account but also to money going into it. Regulation E defines "error"[119] to include:

- (1) An unauthorized electronic fund transfer;
- (2) An incorrect transfer to or from the consumer's account;
- (3) The omission of a transfer from a periodic statement;
- (4) A computational or bookkeeping error made by the financial institution relating to a transfer;
- (5) The consumer receipt of an incorrect amount of money from an electronic terminal;
- (6) A transfer not identified in accordance with Regulation E rules on receipts at terminals, periodic statements, and preauthorized transfers; and
- (7) The consumer's request for documentation or for additional information or clarification concerning a transfer, including the consumer's request for information in order to determine whether an error exists within the meaning of the previous six situations.

Unauthorized electronic fund transfers are just one category of error. Thus, an electronic fund transfer can constitute an error even if it is authorized. For example, if a consumer is trying to pay a $30 taxi fare but the driver has incorrectly entered $3000 on a phone or other payment device, the fact that the consumer clicks "ok" or "yes" on the device does not prevent it from being incorrect or an error.

An "error" includes "an incorrect electronic fund transfer to or from the consumer's account.[120] That may be an important way of bringing a dispute within the scope of the EFTA if an unauthorized transfer was made from the consumer's business account to their personal account as the initial part of a fraudulent scheme, because the transfer from a business account is not covered by the EFTA. Note that even though a transfer to a consumer's account can be an error if it is incorrect, it is possible that a deposit may not be an unauthorized transfer, as the definition of "unauthorized electronic fund transfer" is one "from" the consumer's account.

Although the list of errors does not specifically include a failure to close an account as directed, which a consumer may want to do after repeated unauthorized transfers, but consumers may dispute transfers after an account has been closed. An electronic fund transfer that should not have been made after an account was directed to be closed is an error.[121]

ii. Consumer notice of error

1. Timing of notice

To trigger the error resolution requirements of the EFTA, the consumer must generally notify the financial institution of the error no later than sixty days after the financial institution sends the periodic statement on which the error is first reflected.[122] In some circumstances, that timing is extended or, if statements are not provided under modified rules governing prepaid accounts, the timeline runs from a different date.[123] If the consumer does not know if or when the statement was provided, some courts will presume that it was sent and will calculate the sixty days from when it was presumably sent,[124] unless the consumer has reported the failure to receive a statement.[125]

The sixty-day time period may be extended to ninety days if the transfer was initiated through a service provider that is not the account-holding institution and that does not provide periodic statements.[126] The service provider must also extend the timeframe by a reasonable amount of time if a delay resulted from an initial attempt by the consumer to notify the account-holding institution.[127] For payroll cards, public benefit prepaid cards, and other prepaid cards that are subject to the EFTA or that follow EFTA rules, the sixty days may begin running from a different point in time, and a longer deadline may apply if no statement is provided.[128] Many person-to-person (P2P) systems, such as Venmo and PayPal, are technically prepaid accounts.

A consumer's notification of the error to their financial institution must allege timely notice to state a claim for violation of the error resolution requirements.[129] In other words, the consumer should state when the unauthorized use occurred and when they discovered the unauthorized transaction(s). Some courts have held that a complaint for EFTA violations must allege with specificity when the error first occurred on the account statement.[130]

When consumers consent to receive statements electronically, they may not be able to access the statement until they log into their account. If an account has been frozen and does not permit electronic access, that may affect the timing of when the statement was provided. One court has found that a consumer who tried to call the bank but could not get through satisfied the notice requirement.[131] The CFPB brought an enforcement action against a bank for, among other things, impeding consumers from filing notices of error due to long customer wait times, which the CFPB concluded was an unfair practice.[132]

One court has found that a consumer timely notified her bank of unauthorized charges when she disputed the initial charge, ordered that her account be closed, and did not hear from the bank again until nearly two years later when the bank sought to recoup several subsequent unauthorized charges that increased the negative balance on the account.[133]

When the error is an unauthorized transfer, the consumer's failure to provide timely notice does not relieve the financial institution of the duty to protect the consumer from liability for the initial unauthorized transfers as discussed in the sections above.[134]

2. Form and content of notice

The consumer can give either an oral or written notice.[135] The official interpretations state that the institution may request

a written, signed statement, but may not delay initiating or completing an investigation pending receipt of the statement. However, the institution may later reverse a provisional credit if it does not receive the requested statement.[136]

The consumer's institution is permitted to require the consumer to give notice of the alleged error only at a specified telephone number or address that the institution discloses to the consumer but only if the institution maintains reasonable procedures to refer the consumer to the required telephone number or address if the consumer attempts to give notice in another manner.[137] The institution cannot require the consumer to visit a branch to complete an error notice.[138]

If the consumer provides oral notice of the alleged error, the financial institution may require the consumer to give the institution written confirmation of the error within ten business days of the oral notice.[139] However, (and especially important in the context of unauthorized use and fraud), the institution may not impose additional requirements beyond those in Regulation E, such as submitting an affidavit, police report, or other notice to law enforcement authorities.[140] Nor may it require the consumer to attempt to resolve the issue with the merchant first, or delay investigating for other reasons.

If an institution chooses to require written confirmation, it must inform the consumer of this requirement and must provide the address where the confirmation must be sent. This information must be provided when the consumer gives the oral notification. If the consumer sends the written confirmation to the wrong address, the institution "must process the confirmation through normal procedures."[141]

In its notice of unauthorized use, the consumer must provide enough information to enable the financial institution to identify the consumer's name and account number.[142] For example, giving the institution the consumer's Social Security number would be sufficient in most cases.[143]

The notice must also indicate why the consumer believes an error exists and should include—to the extent possible—the type, date, and amount of the error (except for requests for documentation, additional information, or clarification).[144] Bare allegations of "fraud" not connected to transfers are insufficient to provide notice of an error, but an allegation about an allegedly fraudulent transfer is sufficient.[145] The notice is sufficient and a financial institution is required to start the error resolution process if the consumer reports the loss or theft of an access device and also alleges possible unauthorized use.[146]

A consumer does not have to demonstrate that a qualifying error occurred before a financial institution is required to investigate the consumer's complaint, since the statute refers only to a consumer's "belief" that the submitted documentation supports an "error" under EFTA.[147] Thus, the requirement to investigate is triggered when a consumer reports that a transaction was not authorized or incorrect, even if it eventually turns out that the transaction was in fact authorized or correct.[148]

iii. Financial institutions' duties after error reported

A consumer may send notice of an error to a financial institution complaining about a transaction that is actually fraudulently induced rather than being unauthorized. However, whatever the merits of the consumer's unauthorized use claim, and whether it is in fact unauthorized or not, the financial institution (including a bank, prepaid company, or P2P provider) must still investigate the claim. The financial institution must conduct a reasonable investigation, complete its investigation within certain time limits, report the results within three days of completing the investigation, correct any error within one day after determining that an error occurred, and respond to any request from the consumer for documents related to the investigation.[149]

In some cases, an electronic fund transfer may be made through a platform or device provided by one institution but is debited from an account at another institution. For example, a consumer may link their PayPal account to their bank account. In that case, both institutions have error resolution responsibilities under the EFTA.[150] The first institution is subject to the EFTA because it issued an access device and agreed to provide electronic fund transfers. The EFTA is applicable to the second institution because it is the account-holding institution.

1. Timeline for investigation and provisional credit

The financial institution must begin its investigation promptly upon receipt of a ***timely*** oral or written dispute.[151] If the consumer does not report the error within sixty days (or longer in certain situations) from the date of the first periodic statement reflecting the error, then the financial institution is not required to comply with the procedures and time limits for investigating errors.[152] However, as mentioned above, when the consumer reports an unauthorized electronic fund transfer, the institution may still be required to protect the consumer from liability even if the report is beyond the error notice deadline.

While the financial institution may require the consumer to send in written confirmation if the initial report was oral, the investigation may not be delayed by the institution until it has received the written confirmation.[153] Furthermore, the financial institution may not require the consumer to first contact the merchant before investigating.[154] Additionally, the financial institution may not require the consumer to submit additional information or documents (other than written confirmation of the dispute), visit a branch, file a police report, or take other action as a condition of investigating, (though if the consumer does not provide this information, it may impact the outcome of the investigation).[155] Finally, even if the account has been closed, the financial institution must still investigate and comply with the error resolution procedures.[156]

A financial institution may decline to conduct an investigation under the error resolution procedures of the EFTA, but only if it makes a final correction to the consumer's account in the amount or in the manner requested by the consumer who reported the error.[157] Otherwise, the financial institution must conduct an investigation.

The financial institution must complete its investigation and determine whether an error occurred within ten business days, with certain exceptions.[158] The financial institution may complete its investigation and determination within forty-five calendar days if it is "unable to complete its investigation within ten business days,"[159] but Regulation E imposes substantial duties upon an institution that chooses the forty-five day option. The institution must provisionally credit the consumer's account in the amount of the alleged error (including interest when applicable[160]) within ten business days of receiving the error notice,[161] and the institution must inform the consumer of the amount and date of the provisional crediting.[162]

There are two exceptions to the provisional credit requirement. First, the institution need not give the provisional credit if the institution requires but does not receive written confirmation within ten business days of an oral error notice.[163] There is also an exception from the provisional credit requirement if the alleged error involves a securities account that is subject to Regulation T.[164] Even if the financial institution meets one of the two exceptions, it must nevertheless comply with all other error resolution requirements.[165] If the financial institution fails to provisionally credit the consumer's account, it is liable for treble damages.[166]

Even if a financial institution provides provisional credit, it

is permitted to withhold a maximum of fifty dollars from the provisional credit if the institution has a reasonable basis for believing that an unauthorized electronic fund transfer has occurred.[167]

2. Completion of investigation and duties when investigation is concluded

As previously mentioned, a financial institution must complete its investigation within ten business days and determine whether an error has occurred.[168] A financial institution is generally only required to examine its own records during an investigation, but the investigation must be reasonable. In any action under the EFTA involving the consumer's liability for an EFT, the burden of proof is on the financial institution to show that the charge was authorized.[169]

If the financial institution cannot complete the investigation within 10 business days, it must provisionally credit the consumer's account in the amount of the alleged error and then may take up to 45 days to finish the investigation.[170]

The financial institution must report its findings to the consumer within three days of completing its investigation.[171]

If it determines that the charge was unauthorized, it must reverse the charge within one business day of that determination.[172] If the financial institution finds no error, or a different error than the consumer alleged, it must provide a written explanation of its findings and note the consumer's right to request the documents on which the institution relied. Upon request, the institution must promptly provide copies of the documents.[173]

a. Notice of completion of investigation

A financial institution must notify the consumer that the investigation is complete. Although the official interpretations of the error resolution provision state that, unless otherwise indicated, notice to the consumer may be provided either orally or in writing, at least one court has held that the institution's notice to the consumer of the results of its investigation must be in writing.[174]

b. Notice of finding of error

If the institution finds that an error occurred, the institution may include the notice of correction of an error on a periodic statement if that statement is mailed or delivered within the ten-business-day time limit, so long as the periodic statement clearly identifies the correction to the consumer's account.[175]

c. Reporting results and explanation of investigation

A financial institution must report the results of its investigation, including a written explanation of the financial institution's findings.[176] The explanation must be accurate,[177] and it must actually explain the results and not merely state that the claim has been closed or denied.[178]

d. Notice of right to request documentation

A financial institution must also provide notice of the consumer's right to request the documents that the institution relied upon in making its determination.[179] If the consumer requested the documents, the financial institution must promptly provide copies of these documents to the consumer in an "understandable form."[180]

e. Correcting error

The financial institution is required to correct the error within one business day after determining that an error has occurred even if that is determined well before the end of the ten-day period for investigation and determination.[181] Correction of the error includes a credit of interest or a refund of any fees (such as overdraft) imposed as a result of the error.[182] Once the error has been corrected, the financial institution cannot reopen the investigation or reverse the credit.[183]

f. Reversing provisional credit if no error found

If no error has been found to have occurred and a financial institution has provisionally credited the consumer's account, the institution may debit the provisionally credited amount.[184] The institution must notify the consumer of the date and amount of the debit and that the institution will continue to honor checks and other instruments payable to third parties, as well as preauthorized transfers from the consumer's account for five business days after the notification. The institution must honor those payment devices without charge to the consumer, resulting from any overdraft that might occur.[185]

As an alternative procedure for debiting the consumer's account, the financial institution can debit the account five business days from the transmittal of a notification to the consumer of debiting, specifying the calendar date on which the debiting will occur.[186]

D. EFTA enforcement

In an individual case or class action, any person (not only a financial institution) who fails to comply with *any* EFTA provision with respect to any consumer is liable under 15 U.S.C. § 1693m for the sum of:

- (1) Any actual damage sustained by the consumer;
- (2) Statutory damages in an individual case of not less than $100 nor greater than $1000 or, in a class action, such amount as the court may determine, with a maximum of the lesser of $500,000 or 1% of the defendant's net worth; and
- (3) The costs of the lawsuit together with reasonable attorney fees.[187]

Section 1693m is not an independent basis for liability but rather an enforcement mechanism for other statutory provisions.[188]

A consumer can be liable for attorney fees and costs if the consumer brings an unsuccessful action under section 1693m, and the court finds that the action was brought in bad faith or for purposes of harassment.[189]

1. Actual damages

Cases assessing whether a consumer has suffered injury in fact for standing purposes may also be relevant in determining actual damages. As with other federal consumer protection statutes, emotional distress damages will be available to plaintiffs for their EFTA claims.[190]

Some courts hold that the consumer is required to prove detrimental reliance in order to recover actual damages.[191] Other courts hold that detrimental reliance is not an element of an EFTA claim.[192] When detrimental reliance is not required, the plaintiff must show some form of causation to tie the actual damages to the violation.[193]

2. Statutory damages

The EFTA lists factors that a court should consider in determining the amount of the statutory damages in an individual case—the frequency and persistence of the person's noncompliance, the nature of that noncompliance, and the extent to which the noncompliance was intentional.[194] In a class action, the court should also consider the defendant's resources and the number of persons adversely affected.[195]

A court may award statutory damages even when it denies actual damages or no actual damages are incurred.[196]

Except in cases involving a financial institution's efforts to correct an error pursuant to section 1693m(e), merely recrediting an unauthorized charge to the consumer's account does not moot a claim under the EFTA or remove liability for statutory damages and other available remedies.[197]

3. Treble damages

A special EFTA remedy provision makes a financial institution liable for treble damages under 15 U.S.C. § 1693f(e) if it did not provisionally credit a consumer's account within ten days after receiving the consumer's notice of an error and either did not conduct a good faith investigation or did not have a reasonable basis for believing the consumer's account was not in error.[198] The financial institution is also liable for treble damages if it knowingly and willfully concluded that the consumer's account was not in error when it had no reasonable basis for that determination.[199]

4. Statutory defenses to liability

Section 1693m contains four statutory defenses to EFTA liability.

First, a defendant is not liable where it can show by a preponderance of the evidence that its violation was (1) not intentional and (2) resulted from a bona fide error (3) notwithstanding the maintenance of procedures reasonably adapted to avoid the error.[200] A financial institution is still liable for actual damages when it fails to follow transfer instructions, even though its conduct was not intentional and resulted from a bona fide error.

The second EFTA statutory defense to liability provides that a defendant is not liable for any act done or omitted in good faith that conforms to any rule, regulation, or interpretation by the CFPB or in conformity with any interpretation or approval by an official or employee duly authorized to issue interpretations or approvals under prescribed procedures, notwithstanding that the rule, regulation, or approval is later invalidated.[201]

The third statutory defense to EFTA liability provides that there is no liability if the person uses the appropriate model clause issued by the CFPB.[202]

The fourth statutory defense to EFTA liability provides that a person is not liable if, before the consumer filed the lawsuit, the person notified the consumer, complied with the requirements of the EFTA, made an appropriate adjustment to the consumer's account, and paid actual damages.[203]

5. Statute of limitations

A consumer must bring an action under 15 U.S.C. § 1693m within one year from the date the violation occurred.[204]

For a violation based on a financial institution's failure to comply with the error resolution procedures, the statute of limitations is based not on the date of the error (i.e., unauthorized charge), but on the date of the institution's violation of those procedures. Thus, if the violation is the failure to correct an error or provide provisional credit within ten days of the consumer's notice, the statute of limitations begins to run ten days after the date the consumer gives notice of the alleged error to the financial institution.[205]

For an action based on unauthorized recurring transfers, some disagreement exists over whether the injury triggering the statute of limitations is the first unauthorized recurring transfer or whether a new injury occurs each time another recurring transfer is made. Several courts have determined that a suit must be filed within one year after the first transfer in a series of recurring transfers, even if later transfers appear to fall within the limitations period.[206] Other courts have adopted the "continuing violations theory" in the EFTA context and apply the limitations period to each violation.[207]

Some courts have applied the doctrine of equitable tolling to extend the limitations period. One court applied the doctrine when the consumer was unable to obtain access to United States courts within the one-year period.[208] Another court concluded that equitable tolling applied to a dispute over unauthorized transfers where the financial institution "took fifteen months to 'investigate' claims of fraud that it admitted it never legitimately disputed were fraudulent, promised to reimburse [the consumer] for the full extent of his loss, and then rejected his claims as untimely even though it had failed to timely send [the consumer] statements showing that account."[209]

III. CONSUMER REMEDIES FOR BANK-TO-BANK WIRE TRANSFERS

Wire transfers from bank accounts, which generally use the FedWire, SWIFT or CHIPS systems, fall outside the scope of the EFTA under an exemption for transfer systems not designed primarily for consumer transfers.[210] Because all electronic transfers that are not governed by the EFTA are governed by UCC Article 4A, bank to bank wire transfers would be subject to UCC Article 4A. However, in a recent amicus brief, the CFPB asserted that parts of a wire transfer can be considered an EFT covered by the EFTA,[211] namely the portions of the transaction that are conducted electronically through an online browser or mobile banking app when a consumer or fraudster initiates the transaction. However, the court has not ruled on that issue to date.

International wires, even if otherwise regulated by Article 4A, are regulated by the remittances provisions of Regulation E. The provisions give consumers the right to dispute certain errors,[212] but unauthorized transfers and fraudulently induced

transfers are not among those errors.

Article 4A provides some protections against unauthorized transfers, but they are not as robust as the EFTA's. In particular, the bank may resist compensating the consumer if the bank verified the authorization using a commercially reasonable security procedure to which the consumer agreed. Like the EFTA, UCC Article 4A contains no protection if the consumer initiated the transfer.

Article 4A allows consumers to request the cancellation of a wire transfer, but the consumer's bank generally has discretion as to whether to cancel the transfer if the payment order has been accepted or if provided by the agreement. Moreover, cancellation may not be effective if the payment order has been accepted by the beneficiary bank.

A. Transactions covered by UCC Article 4A

UCC Article 4A does not apply to electronic fund transfers that are governed by the EFTA.[213] Regulation E, which implements the EFTA, excludes from its coverage "[a]ny transfer of funds through Fedwire or through a similar wire transfer system that is used primarily for transfer between financial institutions or between businesses" (with an exception for some international remittances, discussed below).[214] The Official Interpretations of Regulation E state that CHIPS and SWIFT are both "similar wire transfer systems."[215] UCC Article 4A and the EFTA are, for the most part, mutually exclusive.

However, not every transfer labeled a "wire transfer" on a statement is actually a wire transfer exempt from the EFTA. The "wire transfer" must be between different financial institutions using Fedwire or a similar service. It is important to examine the transaction on a consumer's statement carefully and to engage in discovery. Just because a transaction is labeled "wire transfer" or "WT" on the consumer's statement does not mean that the transfer actually used Fedwire or a similar service. This could also be the case with entries labeled "book transfer" or "BT."

If a financial institution makes an ACH transfer or other electronic fund transfer to a consumer account after receiving funds through Fedwire or a similar network, the transfer is covered by the EFTA.

If a financial institution makes an ACH transfer or other electronic fund transfer to a consumer account after receiving funds through Fedwire or a similar network, the transfer is covered by the EFTA and Regulation E. Similarly, an electronic fund transfer that transfers funds from one of the consumer's accounts to another one at the same institution is covered by the EFTA. This means that the transfer is protected against unauthorized transfers, even if the fraudster subsequently transfers the funds out of the second account via wire transfer. Likewise, a transfer to a different person's account at the same institution is not done through a wire transfer using Fedwire or a similar service and is merely an internal transfer (often called a book transfer).

Additionally, some aspects of international remittances, though they may be wire transfers, are covered by the EFTA, while others are governed by UCC Article 4A. In the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (the Dodd-Frank Act), Congress added to the EFTA special provisions regulating international remittances, including international wire transfers. Regulation E implements these provisions. In enacting Regulation E, the CFPB determined that UCC Article 4A no longer applied to any part of an international remittance transfer because of the EFTA's regulation of such transfers.[216] The CFPB left open the possibility that states could amend UCC Article 4A to change this result so that Article 4A would govern the aspects of those transfers not regulated by the EFTA. Every state except Wyoming has taken the CFPB up on this offer, adding two new subsections to U.C.C. § 4A-108. The result of these changes is that international wires are governed in part by the EFTA and in part by UCC Article 4A. In the event of an inconsistency between the EFTA and UCC Article 4A, the EFTA provision applies to the extent of the inconsistency.[217]

B. Unauthorized transfers under UCC Article 4A

UCC Article 4A addresses wire transfers not authorized by the originator (the consumer) and how responsibility for fraud is allocated between the originator and the receiving bank (i.e., between the consumer and their bank). The general rule is that the consumer is not liable for a wire transfer that the consumer did not authorize.[218]

However, liability may be shifted to the consumer under two conditions.[219] First, the bank may show that the consumer authorized the payment order for the wire transfer or that the consumer is otherwise bound by the payment order under applicable laws of agency.[220] Second, a wire transfer is deemed authorized by the consumer if the bank verified the authenticity of the payment order instruction with a security procedure agreed to by the consumer.[221]

1. Agency or consumer "authorization"

A consumer can be liable for an unauthorized wire transfer if the consumer authorized the payment order or if the consumer is otherwise bound by the payment order under applicable laws of agency.[222]

Many UCC Article 4A cases that deal with the question of agency arise in the business-to-business context. It is highly unlikely that a bank would be able to assert that a consumer is bound under the applicable laws of agency. As the First Circuit explained, " 'in a very large percentage of cases covered by Article 4A, . . . [c]ommon law concepts of authority of agent to bind principal are not helpful' because the payment order is transmitted electronically and the bank 'may be required to act on the basis of a message that appears on a computer screen.' "[223]

However, it is important to look at state law to determine whether a bank may be able to successfully argue that a consumer authorized a wire transfer when the consumer provides account login information or other identity verification to a fraudster who then is able to gain access to the consumer's account and initiate the wire transfer.

2. Commercially reasonable security procedure

UCC Article 4A provides a second way for a bank to shift liability to the consumer for unauthorized wire transfers.[224] A funds transfer is deemed authorized by the consumer if the bank verified the authenticity of the instruction with a security procedure agreed to by the consumer.[225] The bank must verify the authenticity of the payment order in good faith using a commercially reasonable security procedure that the consumer and bank had previously agreed would govern the authenticity of payment orders.[226]

There are several components to this defense:

- The bank must have used a "security procedure";[227]

- The security procedure must be "commercially reasonable";
- The consumer must have agreed to the security procedure; and
- The bank must have acted in good faith.

a. Commercially reasonable

Whether a bank's security procedure is a "commercially reasonable method of providing security against unauthorized entries" is a question of law.[228] It is, however, a flexible inquiry.[229] U.C.C. § 4A-202(c) identifies factors to be considered by a judge when making a commercial reasonableness determination, including "considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered by the customer, and security procedures in general use by customers and banks similarly situated."[230] As explained in the official comments to U.C.C. § 4A-203, "[i]t is reasonable to require large money center banks to make available state-of-the-art security procedures," but "the same requirement may not be reasonable for a small country bank."[231] The UCC makes clear that "a security procedure that fails to meet prevailing standards of good banking practice applicable to the particular bank should not be held to be commercially reasonable."[232]

As technology improves and the methods of fraudsters evolve, the question of what is commercially reasonable should change over time. Outdated methods that were previously adequate might no longer be viewed as commercially reasonable, even if they were identified as such in older agency guidance.

Ironically, excessive security procedures might actually be more insecure. The First Circuit found that a bank's security system was not commercially reasonable where the institution required challenge questions to be answered for every transaction over $1.[233] The court reasoned that this security procedure actually increased the foreseeable risk that such answers would be compromised by keyloggers or other malware, especially for customers who had frequent, regular, and high-dollar transfers.[234] Additionally, after the bank's system flagged the transactions as unusually "high-risk" because they were inconsistent with the timing, value, and geographic location of the customer's regular payment orders, the bank did not monitor the transactions or provide notice to customers before allowing the transaction to be completed.[235] The bank's core banking technology provider had also offered the bank several additional security measures that it chose not to implement. As the court noted, "these collective failures taken as a whole, rather than any single failure" rendered the security system commercially unreasonable.[236]

The New York Attorney General recently filed suit against Citibank, alleging that its security policies and procedures were insufficient to protect consumers from wire transfer fraud, in violation of multiple New York state laws, including the UCC.[237] In its complaint, the attorney general analyzed the effectiveness of security procedures that only rely on MFA:

> MFA, however, has been shown to be ineffective when used alone. Consumers' email accounts, browsers, and mobile devices are common access points for scammers. Thus, the FFIEC recommends that financial institutions employ layered security approaches, which incorporates multiple preventative, detective, and corrective controls, and which is designed to compensate for potential weaknesses in any one control, including MFA.[238]

The complaint also alleges that Citibank's use of discretionary security procedures was not commercially reasonable as it was so haphazardly implemented.[239]

b. Agreed to by consumer

The security procedure used by the bank must be one "established by agreement of a customer and a receiving bank."[240] The term does not apply to "procedures that the receiving bank may follow unilaterally in processing payment orders."[241] The consumer must agree to a specific security procedure, not merely the fact that the bank will use some unspecified security procedure.[242]

There is one exception to the "established by agreement" rule: "[i]f a bank offers its customer a security procedure, and the customer declines to use that procedure and agrees in writing to be bound by payment orders issued in its name and accepted by the bank in accordance with another security procedure, then the customer will bear the risk of loss from a fraudulent payment order if the *declined* procedure was commercially reasonable."[243]

c. Good faith

Even when a security procedure is deemed to be commercially reasonable, a bank may avoid liability for unauthorized wire transfers only if it acted in "good faith" in compliance with the security procedure.[244] "Good faith" means honesty in fact and observance of reasonable commercial standards of fair dealing.[245]

The good faith standard is both subjective and objective.[246] "Honesty in fact" is a subjective inquiry; a bank subjectively acts in good faith if it accepted the payment order honestly.[247] However, the second prong of the good faith standard—"observance of reasonable commercial standards of fair dealing"—is an objective standard.[248] This objective standard "should not be equated with a negligence test."[249] A bank objectively acts in good faith if it accepted the payment order in accordance with the security procedure "in a way that reflects the parties' reasonable expectations as to how those procedures will operate."[250]

In summary, to show that it acted in "good faith," a bank must establish that it accepted and executed a payment order in a way that comported with the customer's "reasonable expectations, as established by reasonable commercial standards of fair dealing."[251] According to at least one court, the bank bears the burden of demonstrating that it accepted the wire transfer payment order in good faith.[252]

C. Cancellation and amendment of bank-to-bank wire transfer payment orders for fraudulently induced payments

Consumers can be manipulated, deceived, or fraudulently induced into sending a wire transfer payment to a person with a bank account number that belongs to a scammer. One of the most common scenarios of fraudulently induced wire transfers is when a consumer sends a valid payment order but to the wrong bank account number. For example, a consumer may believe they are sending payment to their title company when purchasing a home, but a scammer directs the consumer to send the payment to a bank account number that does not belong to the title company.[253] As a result, the payment order would have the correct name of the beneficiary but the bank account number of the scammer. This mismatched payment order would not be considered an unauthorized wire transfer because the consumer (i.e., originator) initiated the request, and therefore the protections for unauthorized wire transfers would not apply.[254] Instead, the fraudulent payment order would be treated as a misdescription, and the beneficiary bank is likely to escape liability under UCC Article 4A if it relies on the bank account number and has no actual knowledge of a discrepancy between the account number and the name on the payment order.

If a consumer submits a payment order that has the correct name of the intended beneficiary but the wrong account number,

the consumer has very little protection once the payment order is accepted and paid by the beneficiary's bank who relied on the account number. The beneficiary bank may rely on the account number listed in the order, even if the identified beneficiary does not own the identified account.[255] The beneficiary bank is not required to determine whether the name and number refer to the same person.[256] It may accept the payment order and is entitled to payment from the originator's bank,[257] unless it knows that the name and account number do not match.[258]

But if a consumer quickly realizes there was an error in the payment order, the consumer can try to cancel or correct the order.[259]

UCC Article 4A provides that a "sender"[260] may request cancellation or amendment of the payment order orally, electronically, or in writing.[261] A sender may be the consumer (originator), the consumer's bank (the originating bank), or a previous receiving bank. A receiving bank is the bank that first receives the wire transfer payment order. A beneficiary is the person who is intended to receive (benefit from) the funds from the wire transfer. The beneficiary bank is the bank of the beneficiary.

If there is a security procedure in effect between the sender and the receiving bank, the request is not effective to cancel or amend the order unless the request is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.[262] The request to cancel or amend a payment order is not effective unless it is received "at a time and in a manner affording the receiving bank a reasonable opportunity to act" before accepting the payment order.[263]

If the payment order has already been accepted by the receiving bank, it is up to the receiving bank to agree to cancel or amend the payment order, or the payment order may be cancelled or amended without the agreement of the bank if the funds-transfer system rules allow it.[264] If the receiving bank is not the beneficiary's bank, then that receiving bank must also issue a conforming cancellation or amendment of the payment order for it to be effective.[265] The receiving bank has the ability to limit its acceptance of any request for cancellation or amendment by agreement[266] and has sole discretion to decide whether or not to accept a request for cancellation or amendment of a payment order.[267] A consumer should look to their bank account agreement for any language that may limit their ability to cancel or amend a payment order.

If the receiving bank agrees to a cancellation or amendment of the order, or is bound by a funds-transfer system rule allowing cancellation or amendment of the order without the receiving bank's agreement, the sender—which may be the consumer—is then liable to the receiving bank for any loss and expenses, including reasonable attorney fees, incurred by the receiving bank as a result of the cancellation or amendment or attempted cancellation or amendment regardless of whether or not the cancellation or amendment is effective.[268]

If the payment order was accepted by the beneficiary's bank, the cancellation or amendment is not effective unless the order was an unauthorized payment order, or the sender made a mistake that: (i) resulted in a duplicate of a payment order previously issued by the sender; (ii) orders payment to a beneficiary not entitled to receive payment from the consumer; or (iii) orders payment in an amount greater than the amount the beneficiary was entitled to receive from the consumer.[269] In any of these instances, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary "to the extent allowed by the law governing mistake and restitution."[270]

In sum, for a beneficiary's bank to effectively cancel payment after accepting a payment order, the beneficiary bank must (1) agree to the cancellation and (2) the cancellation must be made to correct one of the specified mistakes—that is, a duplicate order, a misstated beneficiary, or an erroneous amount.[271] If these conditions are not met, the beneficiary's bank cannot nullify its obligation to its customer (the beneficiary).[272]

In practice, it is rare for a sender's institution/the receiving bank to agree to modify or cancel a payment order. Victims of fraudulently induced payment fraud are often frustrated when they attempt to cancel a payment order shortly after discovering the scam but are told by bank personnel that they cannot make any changes to a system that is completely automated.

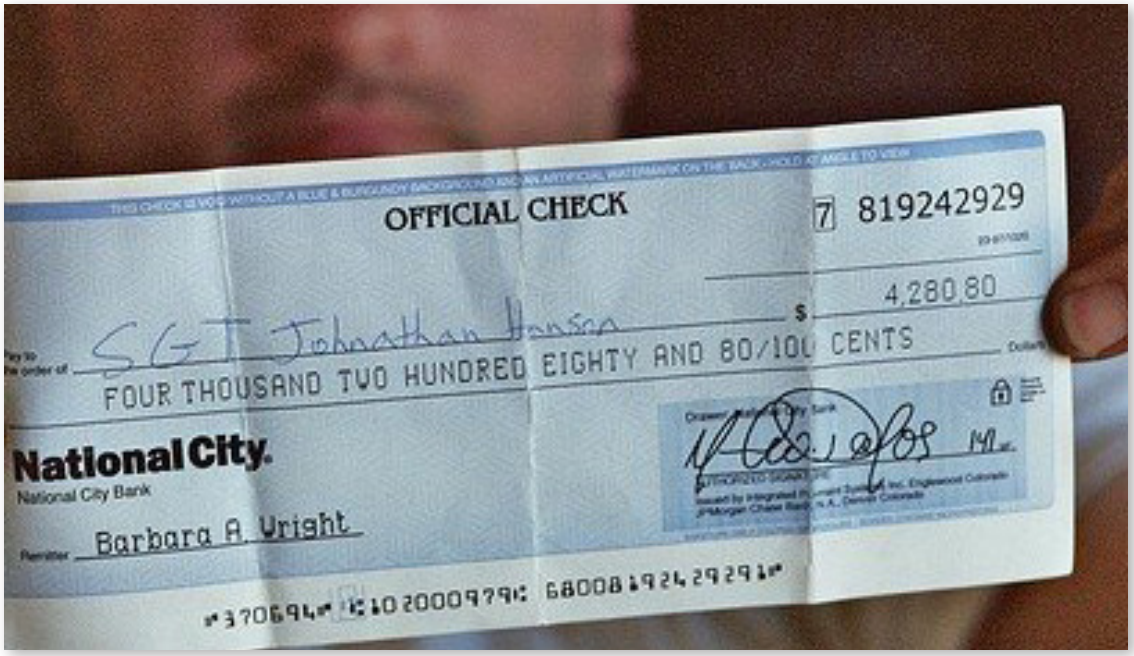
D. Timeline to dispute bank-to-bank wire transfer

UCC Article 4A contains a "bank statement rule" that places duties upon the consumer (i.e., originator) similar to those placed on bank customers under UCC Article 4 for checks.[273] The bank customer must review any bank statements or notifications provided by the bank for any errors or unauthorized transfers. Under U.C.C. § 4A-304, if the customer fails to notify its bank of an error within ninety days after receipt of notification, the customer cannot recover interest on any refundable amount.[274] Likewise, under U.C.C. § 4A-204, a customer must notify its bank of any payment order that was unauthorized within a reasonable time not exceeding ninety days, or the customer cannot recover interest.[275]

There is some confusion as to whether the time to dispute errors in a payment order or an unauthorized wire transfer may be modified by agreement under U.C.C. § 4A-501(a).[276] Properly read, the only impact of a shorter dispute deadline specified in the agreement is on the ability to get interest on funds that are restored, not the ability to dispute liability for the error. U.C.C. § 4A-204(b) specifically states that the reasonable time period to notify the bank of an unauthorized transfer may be modified by agreement, but it does not negate the obligation of the customer's bank to refund any amount lost due to an unauthorized transfer. If the customer reports the error or unauthorized use within one year as required under U.C.C. § 4A-505, then the customer is entitled to receive a refund of the amount of error or unauthorized transfer.[277] As a result, if the customer notifies the bank of an unauthorized transfer within one year but not within ninety days (or other reasonable period of time as modified by the account agreement), the only penalty is loss of interest.[278] Presumably, the same rationale would apply to payment errors.[279] As a result, if the consumer notified the bank of the unauthorized use or error within one year and the bank did not recredit their account, the consumer may file suit to recover the funds.

Courts that have performed a detailed analysis of UCC Article 4A have agreed with the conclusion that the one-year period for disputing unauthorized transfers cannot be modified by agreement.[280] Only one Louisiana court concluded that the one-year period can be modified by agreement,[281] and that court cited to a Minnesota Court of Appeals decision that does not support its holding.[282] The Minnesota Court of Appeals never explicitly stated that the one-year period could be modified by agreement for any claim brought under UCC Article 4A.[283] The plaintiff was suing on a conversion claim for disbursed funds from an escrow account, and the Minnesota Court of Appeals explained that a conversion claim is subject to a six-year statute of limitations except as provided by the UCC.[284] The court then explained that although funds transfers are governed by UCC Article 4A—which provides for a one-year statute of limitations on claims brought under Article 4A[285]—the rights and obligations of a party to a funds transfer can be varied by agreement.[286] The language of the agreement provided for a thirty-day limitations period on liability for "any altered check or any check with a forged signature."[287] The agreement also stated that any other account problem had

to be reported within thirty calendar days and failure to do so would result in a loss of the "right to assert the problem against us."[288] The court concluded that the plaintiff's conversion claim was barred by "either the [thirty]-day account limitation or the UCC statute of limitations regarding funds transfers."[289] In other words, if UCC Article 4A did apply to the plaintiff's claim, the one-year statute of limitations of Article 4A would apply; if Article 4A did not apply, then the conversion claim would be subject to the thirty-day limitations period indicated in the account agreement.



E. Claims for violation of UCC Article 4A

As mentioned in the previous section, the only damages a consumer may seek for any violation of UCC Article 4A is the amount of the unauthorized wire transfer plus interest if the consumer timely disputed the unauthorized wire. The UCC does not provide for attorney's fees or compensatory damages. However, it is possible that violation of the UCC could also serve as the basis for a violation of another statute (like an elder abuse statute) that does provide for compensatory damages.

Some common law claims for payment fraud occurring through bank-to-bank wire transfers may be precluded by UCC Article 4A.[290]For example, a plaintiff may assert a common law claim based upon a funds transfer if the claim "(1) arises from circumstances not contemplated in Article 4A or (2) represents rights and obligations not contrary to those set forth in Article 4A."[291]

IV. CONSUMER REMEDIES FOR CHECKS

Many payment scams begin with a check payment *to* the consumer. There are many varieties of these scams, including mystery shopping, personal assistants, car wrap decals, sweepstakes prizes, and overpayments.[292] The consumer is given a check to deposit and is told that they can keep a portion of the check and then must send the remainder to the fraudster, often by gift card, money order, or wire transfer. The consumer deposits the check, sees that the money is in their account, and then withdraws or transfers funds to pay the fraudster. But then the check deposit is reversed after the check turns out to be a fake or drawn on a closed account.

Other types of check fraud occur when the consumer is "writing" the check and their account is debited in the amount of the check. This type of check fraud can occur when a check is stolen, usually from the mail, and then altered to change the payee and often the amount. This can also happen when a check is stolen and forged, or even in instances where consumers have no checks associated with their accounts, but a fraudster creates fake checks in the name and account number of a consumer.

This article will not focus on check scams where the consumer is receiving the payment, but instead will focus on payment fraud where the consumer is sending payment by check.

A. What law applies to checks?

1. UCC

Articles 3 and 4 of the Uniform Commercial Code (UCC) apply to checks.

a. UCC Article 3: negotiable instruments

Article 3 of the UCC governs transactions involving negotiable instruments. Checks are also almost always negotiable instruments.[293] There are two kinds of negotiable instruments and both types of negotiable instruments must be in writing.[294] The first kind of negotiable instrument governed by UCC Article 3 is a note, which is a promise to pay that a consumer might sign—for example, in relation to a mortgage or car loan.[295] The second kind of negotiable instrument governed by UCC Article 3 is a draft, which is an order to pay.[296] A check is a type of draft because it is an order from the "drawer" (the person writing the check) to the "drawee" (the bank where the drawer has an account) to pay the "payee" (the person to whom the check is made payable) or anyone whom the drawer tells the drawee to pay.[297]

Since checks are orders, they must be a "written instruction to pay money,"[298] which means that they must originate in paper form.[299] In other words, the initial instruction itself must be transmitted physically in writing. As such, remotely created payment orders, which are remotely created checks that are submitted through the check system but were never printed as paper checks, are not checks.[300] It is unclear at this time what law governs remotely created payment orders.

b. UCC Article 4: bank deposits and collections

Article 4 of the UCC uses the term "item," which means an order to pay money that is handled by a bank for collection or payment.[301] The term "item" includes checks.

Often, the UCC provisions governing check transactions do not use the term "check" at all. Instead, provisions may refer to "instruments," "drafts," "orders to pay," or "items." Any of these provisions may apply to checks. A check is an instrument, a draft, an order to pay, and, for Article 4 purposes, an item.

In addition to the UCC, a consumer may have other common law claims for check fraud.

2. Applicability of common law claims

Common law principles may be used to supplement the UCC's provisions to the extent that they do not conflict with the UCC. However, the UCC displaces any common law claim based on specific conduct covered by the UCC.[302] Thus, common law claims cannot be used to displace UCC claims arising from the rights and liabilities of parties to a check that is covered by the UCC. For example, a claim against a depository bank for paying a check without a co-payee's indorsement must be brought as a conversion claim under the UCC, not as a common law negligence claim.[303]

Where the UCC does not displace the common law, both the UCC and common law will be relevant to a claim against a bank.[304] As a result, courts have allowed common law claims against banks by their customers, and by parties to a check against other parties to a check, to the extent those claims are based on conduct not covered by UCC Articles 3 and 4.[305]

In sum, when conduct is not addressed by the UCC, it can be analyzed under the common law.[306] For example, if a bank allows illegal activity outside of the scope of the UCC to occur, the common law negligence rules—not the UCC—govern.[307] Banks may be subject to the common law duty of inquiry when, for example, unauthorized checks are drawn, payable to a bank, and deposited in an account at that bank by the unauthorized third party seeking to negotiate the checks for their own benefit. In this situation, a common law duty of inquiry is owed to the victim of the forged drawer's signature by the payee/depository bank, and that common law duty of inquiry can be breached by the payee bank.[308]

Other state laws may apply in check disputes. The fact that a checking account holder and a bank have a depository contract may mean that the bank can be sued for breach of contract, negligence, and other common law claims based on the contractual relationship.[309] The account agreement cannot disclaim the bank's responsibility to act in good faith or to exercise ordinary care.

B. What protections do consumers have for forged or altered checks under the UCC?

A bank with which a consumer has a checking account "may charge against the account of a customer an item [check] that is properly payable."[310] If the check is not properly payable, the bank may not charge the account, and if the bank charges an account for a check that is not properly payable, it must generally recredit the account. As a result, one of the key questions to answer for a consumer who has been the victim of payment fraud by check is whether the check is properly payable.

"Properly payable" means that the consumer has authorized the payment, and the payment violates no agreement between the consumer and the bank.[311]

1. If the consumer's signature is forged

When a consumer drawer signs a check, the consumer is ordering their bank—the drawee bank—to make the payment as indicated on the check. A "signature," can be authorized and not actual, as with a remotely created check. If the consumer drawer authorizes the signature by authorizing the creation of a check, the check is properly payable.

If the consumer's signature on the check is forged or missing, then there is no authorization by the consumer to their bank (the drawee bank) to pay that check. As a result, a check is not properly payable from the consumer's account if the consumer's signature on the check is missing or forged.[312] The consumer's bank/drawee bank cannot charge the consumer's account.[313] A counterfeit check is treated the same as a check with a forged signature, since the check was not signed or issued by the consumer; the check is not treated as an altered check. The same is true for any check that was not actually issued or signed by the consumer.[314]

Similar considerations come into play in the case of remotely created checks when the consumer has not authorized their signature. In that case, the consumer's signature is treated as forged and the amount is not properly payable out of the consumer's account.[315] This could also apply to withdrawal slips that are forged or unauthorized; the slip would be treated as a check that is not properly payable.

If the consumer's bank pays a check that is not properly payable out of the consumer's account because of a forgery or missing signature, the consumer cannot sue their bank or any other party under a conversion claim.[316] The remedy is to demand that the consumer's bank recredit the account for the amount paid, which it must do.

However, certain conduct by the consumer may alter the consumer's right to insist on recredit from their bank. As discussed below, the consumer's failure to examine the bank statement and timely dispute the forged check, negligence, or validation of the forged signature (by, for example, retaining the benefits of the transaction), may alter the normal rules for a forged signature.

2. If the payee's name is forged

If a consumer writes a check and the payee or a special indorsee signs the check in blank (i.e., without indorsing it to an identified person), and the check is then stolen, the check is still properly payable out of the consumer's account. The blank indorsement has turned the check into bearer paper. But if the payee's indorsement signature or the signature of a special indorsee is forged, then the check is not properly payable, and the consumer's bank/drawee bank cannot charge the consumer's account.[317] This is because the consumer instructed the bank to follow the instructions of the payee (with "pay to the order of" language) and later special indorsees. If the payee or a special indorsee never indorses the check, the payee or special indorsee has not given further instruction, and title to the check is still with the payee or special indorsee who did not indorse the check.

In most states, consumer drawers do not have a duty to review their statements for returned checks in order to detect and notify their bank about forged indorsements.[318] Practically speaking, the only way a consumer drawer would find out about a forged indorsements would be if the payee contacted the consumer and indicated that the check had not been received or was stolen. The consumer would not have the ability to reasonably discover a forged indorsement (as opposed to an alteration in the amount or payee, or a forgery of the consumer drawer's own signature) because the consumer would not be expected to know what the indorser's signature looks like.

Therefore, whether or not the consumer notifies their bank, the check is not properly payable from the consumer's account. The consumer's bank absolutely has to recredit the consumer drawer's account. It cannot resist recrediting using subrogation rights.[319]

In most states, if the consumer's bank refuses to recredit the consumer's account for a check that was not properly payable due to an unauthorized indorsement, the consumer has three years from the date the cause of action accrued to file a lawsuit to force their bank to recredit the account.[320]

3. When the check is altered or incomplete

The UCC defines an alteration as an "unauthorized change . . . that purports to modify in any respect the obligation of a party," including "an unauthorized addition of words or numbers" to an incomplete check.[321] A counterfeit check is not treated as an altered check, since the check was not signed or issued by the

purported drawer. Rather, this is treated the same as a check with a forged drawer's signature. Checks can be altered in a myriad of ways, but the consumer is only responsible for payment according to the original terms of the check drawn, not according to the altered terms.[322] In other words, the altered check is properly payable from the consumer drawer's account according to its original terms.[323]

One common type of alteration that occurs in payment fraud is when the amount owed on a check is changed. If a check was altered by raising the amount to be paid on the check from $50 to $500, the check would be properly payable from the consumer drawer's account only for the original amount of $50.[324] Another type of common alteration in payment fraud is changing the payee on a check. It has become increasingly common for thieves to steal mail that contains bill payments and use check "washing" technology to change the payee (and potentially, the amount). In this scenario, the check would not be properly payable to the altered payee.

While an altered check is not properly payable for the altered excess amount or to the altered payee, consumers may have difficulty asserting their right of recredit if they do not notice and report the altered check promptly. The fact that consumers no longer receive the return of their original paper check may make it more difficult to spot alterations. For this reason, it is incredibly important for consumers to review their bank statements and provide timely notice about any alteration.

While an altered check is not properly payable for the altered excess amount or to the altered payee, consumers may have difficulty asserting their right of recredit if they do not notice and report the altered check promptly.

Other types of problems with alterations can occur when a consumer writes an incomplete check. An incomplete check is one that has been signed by the consumer drawer but is not completely filled out, as is the case when the payee or the amount is left blank—be it intentionally or unintentionally. The UCC rules indicate that the consumer drawer does this at their own peril. If someone takes that incomplete check and fills in the amount or the payee, the check is properly payable for that amount or to that payee out of the consumer's account.[325] In other words, even if the check is completed by an unauthorized party through an "unauthorized addition of words or numbers or other change,"[326] the check is properly payable out of the consumer's account according to the terms as completed. However, if the bank has notice that the completion was improper, an incomplete check that has been completed without authorization is not properly payable.[327] For example, if a consumer leaves the amount of a check blank but writes on the check "Not to Exceed $100," the check is only properly payable up to $100, even if someone later completed the check to include a $200 amount.

C. Deadline to dispute a problem with a check: the bank statement rule

The "bank statement rule" requires the consumer to review statements and notify the bank if the consumer drawer's signature was forged or unauthorized or if a check has been altered.[328] If the consumer does not abide by the requirements of the rule, the consumer may not be able to assert their rights against their bank to recredit their account for payment of a check that had a forged drawer signature or alteration.

For example, if the consumer drawer's signature is forged, the check is not properly payable, and the consumer's bank must recredit the consumer's account. Similarly, if the check is altered, it is only properly payable from the consumer's account according to its original terms.[329] However, under the "bank statement rule," failure by the consumer to review their bank statements and challenge an unauthorized check may alter this normal result and shift liability back to the consumer.

The bank statement rule is therefore a doctrine that may shift liability between the consumer and the consumer's bank. Many consumers may not know of their duties under the bank statement rule, as the UCC does not require banks to inform consumers of this duty. However, account agreements may detail consumers' duties and may even shorten the time period to dispute problems with checks as discussed more below.

1. General duty to examine statement and report a problem

Once the consumer's bank has made a bank statement and cancelled checks (or copies) available to the consumer, the consumer has a duty to examine them with reasonable promptness for unauthorized drawer's signatures and alterations.[330] Under the uniform provision of the bank statement rule, the customer does not have a duty to identify forged indorsements, though they may have a duty to identify other inaccuracies, and some states have non-uniform provisions that cover forged indorsements.

If an unauthorized payment is reasonably discoverable, the consumer must promptly notify the bank of the unauthorized payment and relevant facts.[331] If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.[332] Thus, the obligation to report unauthorized payments includes payments that do not have sufficient signatures.[333]

Not every alteration can be reasonably discovered by a consumer based on information the bank provides.[334] If the check was altered by changing the name of the payee, the consumer would not be able to detect the fraud unless the consumer is given the paid check or the statement of account discloses the name of the payee of the altered check.[335] If the alteration could not reasonably be detected, the usual "properly payable" rules would apply rather than the bank statement rule.[336] Changes in how checks and statements are delivered, as well as technological changes, have made alterations harder to spot. For example, original checks are generally no longer returned, and instead, electronic images of those checks are returned. Those images may be small, poor quality, and difficult to read, and may make it harder to spot an alternation than if the original check were returned.

2. How to notify a bank of unauthorized signatures or alterations

The UCC does not require the consumer's notice of unauthorized drawer's signatures or alterations to be in writing or specify how a consumer must "notify" their bank of the error.[337] At the very minimum, the consumer must report the specific items that have been altered or that lack an authorized signature; general references to a possible crime are not sufficient.[338] However,

bank account agreements may require that consumers provide written notice of errors, including unauthorized signatures and alterations.

The general rule is that the consumer must exercise "reasonable promptness" in examining the bank statement. What constitutes "reasonable promptness" can vary depending on the circumstances.[339] The consumer must then notify their bank of the unauthorized drawer's signature or alteration within one year.[340] However, and crucially because it is often the case, the one-year deadline may be shortened by the account agreement.

Ordinarily, a consumer loses all rights under the UCC in regard to the payment of a check with a forged drawer's signature or alteration if the consumer does not give their bank notice of the forgery or alteration within one year from the date on which the bank statement was made available to the customer.[341] In other words, the notice is a prerequisite to filing suit, and failure to provide notice precludes a suit.[342]

Courts have generally held that this duty commences when the statement is sent, not when it is received,[343] though some courts have ruled that it is triggered by receipt of the statement.[344] At least one court, applying the New York version of the UCC, held that when there is a series of stolen checks by the same wrongdoer, each monthly statement begins its own one-year period for the customer to report the forgery.[345]

If the consumer did give the required notice of forgery or alteration within a year, the consumer can demand that their bank recredit the account. If notice was given as required, the consumer can also sue to force their bank to recredit even after the year has passed, so long as the suit is commenced within the applicable statute of limitations.[346]

If the consumer does not give notice within the year (or less, if mandated by state law or altered by agreement), the consumer cannot demand that their bank recredit their account.[347] Although the one-year notice requirement in U.C.C. § 4-406(f) is not a statute of limitations, it can have the same impact—if the consumer did not give notice within the year, the consumer will not prevail in a suit to enforce recrediting of the account.

Here there are multiple incidents of checks with forged drawer signatures, each forged check is a separate claim where the statute of limitations runs based on each separate check.[348] The analysis of when the statute of limitations begins to run is separate from the analysis on the preclusion to bring suit as provided by U.C.C. § 4-406(f).[349] In fact, a separate provision—U.C.C. § 4-406(d)(2)—may preclude the consumer from asserting claims for subsequent unauthorized signatures or authorizations by the same wrongdoer if the consumer did not provide notice within a reasonable time, not to exceed thirty days (or less in some states).[350]

Courts have generally held that the UCC's one-year notice requirement bars a consumer's belated claim that their bank was negligent,[351] but at least one court has held that the UCC's one-year notice requirement does not preclude a negligence claim with a longer statute of limitations.[352]

The courts have also held that the absolute one-year notice requirement in U.C.C. § 4-406 applies even if the consumer's bank acted in bad faith.[353] In 1992, the UCC was amended to remove a good faith requirement, and the UCC now requires notice in one year '[w]ithout regard to care or lack of care of either the customer or the bank."[354] But some courts have held that the consumer may assert a claim based on bad faith even without giving notice within one year.[355]

a. One year notice period may be shortened by agreement

Courts have generally allowed banks to shorten the notice period by contract in the deposit agreement.[356] This is consistent with the general rule that the UCC may be varied by agreement.[357] Some of the courts that upheld provisions in bank deposit contracts that shortened the one-year notice period analyzed whether the shortened periods were manifestly unreasonable.[358]

b. Multiple unauthorized signatures or altered checks

If a single check contains an unauthorized signature or alteration, the consumer can seek recredit as long as they report the problem with reasonable promptness and no later than one year (or a shorter time period if allowed by statute or contract). However, in the case of multiple unauthorized signatures or alterations by the same wrongdoer, the bank may resist recrediting subsequent items if the consumer did not report the first item or group of items after a reasonable time not exceeding thirty days (or, in some states, as short as fourteen days). Once this period for examination is over, the bank is not liable for payments made to the same wrongdoer from the expiration of the examination period until the bank receives notice of the forgery or alteration.[359] This is called the "same wrongdoer rule."[360]

The purpose of the wrongdoer rule is to provide an incentive for the consumer to promptly notify the bank so that it may stop paying additional checks.[361] The UCC commentary cautions that these considerations "do not apply if there are no losses resulting from the payment of additional items," and thus the shorter time limits for multiple

items "should not be imported by analogy" into the normal reasonable promptness rule.[362]

When a single actor repeatedly forges the consumer drawer's signature or alters the consumer drawer's checks, the checks can be divided into three groups. The first group of forged or altered checks shows up on the bank statement with the first forgery or alteration. These are treated the same as if there is a single forgery or alteration.[363] If the bank proves that the consumer failed in their duty to notify the bank about problems that are reasonably discoverable after this first group of checks shows up on the bank statement, then the consumer is precluded from asserting against the bank other unauthorized signatures or alterations by the same wrongdoer if payment was made by the bank before receiving notice but after the consumer had "a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify the bank."[364]

During the time for examination of the statement, a second group of checks may clear the consumer's account. The checks in this second group are also treated the same as if there is a single forgery. They are not covered by the thirty-day rule as they were paid before the consumer had a duty to report the first group.

The third group of checks are those that are paid after the consumer has had time to examine the statement and prior to the consumer giving notice to the bank. That is the group of checks that the consumer is precluded from asserting against the bank.

In states adopting the uniform version of U.C.C. § 4-406, the consumer's time for examination expires no more than thirty days after the consumer receives the bank statement containing the first in the series of forgeries or alterations.[365] It may expire sooner than that, since the UCC only requires that the consumer be "afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank."[366]

Finally, the time for examination may be shortened by agreement as reflected in the bank-customer agreement.[367]

The following example illustrates how the wrongdoer rule operates.[368] Assume that a thief steals a book of twenty-five checks from a consumer on January 1, and the consumer does not know the book has been stolen. During the month of January, the thief writes three checks that show up on the consumer's January 31 bank statement. During the month of February, four checks cleared. In March, five checks cleared. In this case, the three January checks are treated the same as when there is a single forgery or alteration. The four February checks are likely to be treated the same as when there is a single forgery or alteration, since the UCC gives the customer "a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank."[369] The five checks that cleared in March are subject to the "same wrongdoer rule," as are any checks that clear from that time until notice is given to the bank.[370] If the consumer did not notify their bank of the forged checks, the consumer cannot demand that the bank recredit the account for the checks that are subject to the same wrongdoer rule (March through the time of the notice to the bank).[371]

D. Claims for violations of UCC Article 4

As mentioned in the previous sections, a consumer may seek the amount of the forged check or the altered amount (as it varied from the original amount) for any violation of UCC Article 4, but only if the consumer timely notified its bank of the forgery or alteration. Practically, a consumer should check the terms of their demand deposit account agreement to determine the time frame for notifying a bank about a forged or altered check. Because the UCC does not provide for attorney's fees or compensatory damages and consumers often do not timely provide notice to their bank about a forgery or alteration, it can be difficult for a consumer to find an attorney who will help enforce consumer remedies for check fraud.

V. ALTERNATE THEORIES OF RECOVERY

With the ever-increasing problem of payment fraud, many consumer advocates have sought to hold financial institutions accountable for allowing bad actors to open or maintain bank accounts used to receive or launder fraudulent payments. Robust Bank Secrecy Act/Anti-money laundering (BSA/AML) compliance can help to prevent the opening of fraudulent accounts or the use of these accounts to receive fraudulent payments. Conversely, weak BSA/AML compliance can facilitate fraud.

The BSA does not have a private right of action.[372] Accordingly, those who have suffered harm because of an institution's failure to comply with the BSA have attempted to bring suit under either state unfair and deceptive acts and practices (UDAP) statutes or common law claims such as negligence. This has led to mixed results.

A court in California did not preclude a UDAP claim based on a violation of the BSA, but dismissed the claim because the plaintiff failed to sufficiently plead which BSA act or practice the defendant violated.[373] A court in Connecticut also considered whether a violation of the BSA and its implementing regulations could form the basis of a UDAP claim; it concluded, among other things, that the plaintiff had not demonstrated the defendant failed to comply with the BSA.[374]

Negligence claims based on violations of the BSA have failed because banks do not owe duties to non-customers, even when an account with the bank is fraudulently opened in a non-customer's name,[375] or when a violation of federal law may serve as a basis for a state law negligence action.[376] Courts have rejected negligence per se claims, finding there can be no duty of care arising out of the BSA's monitoring requirement when there is not a private right of action under the BSA.[377]

Similarly, Racketeer Influenced and Corrupt Organizations Act (RICO) claims against financial institutions for acts that violate the BSA have failed where plaintiffs could not demonstrate that the financial institution participated in the operation or the management of the "enterprise" (i.e., scam/fraud scheme) that caused the harm.[378] These claims are brought independently from a BSA claim, but they are based on acts by banks that allegedly failed to comply with BSA requirements.[379]

It is possible that other common law claims, such as aiding and abetting a tort—for example, fraud—could be brought for fraudulent schemes that violate BSA requirements (i.e., failing to determine beneficial ownership).[380] However, many of these common law claims based on torts require proof that the financial institution knew about the activity complained of and provided substantial assistance to allow for the fraudulent activity to occur.[381] The Federal Trade Commission has brought actions alleging that non-bank companies violated the Telemarketing Sales Rule and other laws by providing assistance to fraudsters and abetting fraudulent activity when they ignored signs of fraud and failed to maintain effective BSA/AML programs.[382]

VI. CONCLUSION

Although payment fraud can occur utilizing any number of payment methods (electronic fund transfer, bank-to-bank wire transfer, check, gift cards, credit cards, money orders, traveler's checks, etc.), the strongest protections available to consumers are if payment is made by credit card (subject to the Truth in Lending Act),[383] or through an electronic fund transfer subject to the Electronic Fund Transfer Act. Even with the strong protections of the EFTA, however, consumers currently have very little to no protection for fraudulently induced transfers.

If the payment occurred by bank-to-bank wire transfer or check, it is likely that the only remedies available to consumers will be under the UCC, (as codified in the Texas Business and Commerce Code), but only in very limited circumstances. Even then, a consumer cannot obtain compensatory damages or attorney's fees for successful claims brought under the UCC, which makes it likely that it will cost a consumer more money to hire and retain an attorney to pursue a claim than the recovery the consumer would obtain if they were successful in their claim. As a result, many consumers end up being unable to afford to enforce their rights under the UCC and are devastated by payment fraud.

Finally, even when a consumer can afford to pursue a claim for payment fraud, whether under the EFTA, the UCC, or an alternate theory, an arbitration clause may likely be present in the demand deposit account agreement. Consumer advocates should be prepared for the unique dynamics and challenges that arbitration poses in being able to obtain discovery or pursue class action claims.

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1 Reg. E, 12 C.F.R. § 1005.3(a).
2 15 U.S.C. § 1693(b).
3 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3 [§ 205.2].
4 15 U.S.C. § 1693a(2); Reg. E, 12 C.F.R. § 1005.2(b) [§ 205.2(b)].
5 15 U.S.C. § 1693a(9); Reg. E, 12 C.F.R. § 1005.2(i) [§ 205.2(i)].
6 15 U.S.C. § 1693a(7). *See also* Reg. E, 12 C.F.R. § 1005.3(b) [§ 205.3(b)] (stating basic definition as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account").
7 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3(b)(1)(i) [§ 205.3(b)(1)(i)]. *See* Reg. E, Official Interpretations § 1005.2(h)-2 [§ 205.2(h)-2] ("A POS terminal that captures data electronically, for debiting or crediting to a consumer's asset account, is an electronic terminal for purposes of Regulation E if a debit card is used to initiate the transaction").
8 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3(b)(1)(ii) [§ 205.3(b)(1)(ii)]; Reg. E, Official Interpretations § 1005.3(b)(1)-1.i [§ 205.3(b)(1)-1.i]
9 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3(b)(1)(iii) [§ 205.3(b)(1)(iii)].
10 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3(b)(1)(iv) [§ 205.3(b)(1)(iv)].
11 15 U.S.C. § 1693a(7); Reg. E, 12 C.F.R. § 1005.3(b)(1)(v) [§ 205.3(b)(1)(v)]; Reg. E, Official Interpretations § 1005.3(b)-1.iv [§ 205.3(b)-1.iv] (even if no electronic terminal is involved at the time of the transaction, the transfer is covered by the Act if it is a transfer from the consumer's account resulting from a debit card transaction at a merchant's location and if the consumer's account is subsequently debited for the amount of the transfer).
12 Non-sufficient funds checks that are re-presented through the ACH system are not EFTs within the meaning of Regulation E.
13 15 U.S.C. § 1693a(7) (The term " 'electronic fund transfer'... includes, but is not limited to" the listed examples); Reg. E, 12 C.F.R. § 1005.3(b)(1) [§ 205.3(b)(1)] (same).
14 Kashanchi v. Texas Commerce Med. Bank, 703 F.2d 936, 939–940 (5th Cir. 1982) ("Congress undoubtedly intended the Act's coverage to be broad; the Act itself provides that its list of electronic fund transfers is not all-inclusive. 15 U.S.C. § 1693a(6). Aware that computer technology was still in a rapid, evolutionary stage of development, Congress was careful to permit coverage of electronic services not yet in existence."); S. Rep. No. 915, 95th Cong., 2d Sess. at 9 (1978) ("The definition of 'electronic fund transfer' is intended to give the Federal Reserve Board flexibility in determining whether new or developing electronic services should be covered by the act and, if so, to what extent.").
15 Reg. E, 12 C.F.R. § 1005.3(c)(1) [§ 205.3(c)(1)]
16 15 U.S.C. § 1693a(7)(A); Reg. E, 12 C.F.R. § 1005.3(c)(2) [§ 205.3(c)(2)].
17 15 U.S.C. § 1693a(7)(B); Reg. E, 12 C.F.R. § 1005.3(c)(3) [§ 205.3(c)(3)].
18 15 U.S.C. § 1693a(7)(C); Reg. E, 12 C.F.R. § 1005.3(c)(4) [§ 205.3(c)(4)].
19 15 U.S.C. § 1693a(7)(D); Reg. E, 12 C.F.R. § 1005.3(c)(5) [§ 205.3(c)(5)].
20 15 U.S.C. § 1693a(7)(E); Reg. E, 12 C.F.R. § 1005.3(c)(6) [§ 205.3(c)(6)].
21 *See* Reg. E, 12 C.F.R. § 1005.3(c) [§ 205.3(c)]; Reg. E, Official Interpretations § 1005.3(c) [§ 205.3(c)].
22 15 U.S.C. § 1693a(7).
23 15 U.S.C. § 1693a(2). *See* Reg. E, 12 C.F.R. § 1005.2(b).
24 15 U.S.C. § 1693a(2); Reg. E, 12 C.F.R. § 1005.2(b)(1) [§ 205.2(b)(1)]. *See* Sanders v. Truist Bank, 2021 WL 4185889, at *3 (W.D. Tenn. Mar. 31, 2021) (noting that use of the word "purposes" suggests that "the proper analysis under § 1693a(2) concerns the envisioned or actual use of the account as opposed to just its mere designation"; finding here that plaintiff's account did not qualify for coverage under EFTA).
25 Reg. E, 12 C.F.R. § 1005.2(b)(1) [§ 205.2(b)(1)]; Cobb v. Monarch Fin. Corp., 913 F. Supp. 1164 (N.D. Ill. 1995) (holding that the EFTA applied to plaintiff's accounts when funds from her wages were directly deposited into her bank account, and then transferred by her bank to the lender's account in payment of her loan).
26 The Consumer Financial Protection Bureau (CFPB) issued a final rule, the prepaid accounts rule (hereafter "the prepaid rule"), effective April 1, 2019. The prepaid rule amends Regulations E and Z to provide consumer protections for prepaid cards and other prepaid accounts. 81 Fed. Reg. 83,934 (Nov. 22, 2016).
27 Reg. E, 12 C.F.R. § 1005.2(b)(3)(i).
28 Consumer Fin. Prot. Bureau, Bulletin 2022-02, Compliance

Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10,297, 10,298 (Feb. 24, 2022). However, EBT cards used to distribute SNAP benefits are exempt from Regulation E. 7 U.S.C. § 2016(h)(10).

29 Consumer Fin. Prot. Bureau, Bulletin 2022-02, Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts, 87 Fed. Reg. 10,297, 10,298 n.15 (Feb. 24, 2022).

30 *Id.*; Press Release, Consumer Fin. Prot. Bureau, CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-enter Society After Incarceration (Oct. 19, 2021), *available at* www.consumerfinance.gov; Consent Order, *In re* JPay, L.L.C., No. 2021-CFPB-0006 (C.F.P.B. Oct. 19, 2021), *available at* https://files.consumerfinance.gov.

31 15 U.S.C. § 1693b(d)(2)(A)(ii). *See also* Mohamed v. Bank of Am. N.A., 93 F.4th 205 (4th Cir. 2024) (card used for pandemic unemployment assistance benefits was a government benefit card).

32 Reg. E, Official Interpretations § 1005.3(c)(4)-3. For a more in-depth discussion on which money market accounts could be considered an "account" subject to the EFTA and regulation E, *see* National Consumer Law Center, Consumer Banking and Payments Law (7th ed. 2024), Chapter 7, *updated at* www.nclc.org/library.

33 Reg. E, Official Interpretations § 1005.3-3.

34 Lopez-Ortega v. Suntrust Bank, 2012 WL 12896352 (S.D. Fla. July 11, 2012) (also relying on the fact that Congress did not limit "consumers" to residents of the United States in 15 U.S.C. § 1693a(6)).

35 15 U.S.C. § 1693a(9); Reg. E, 12 C.F.R. § 1005.2(i) [§ 205.2(i)]. *See also* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see questions 1 through 4 of "Financial Institutions" section).

36 15 U.S.C. § 1693a(2).

37 As defined by Regulation E, an "access device" is "a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers." Reg. E, 12 C.F.R. § 1005.12(c) [§ 205.12(c)]. Thus, an access device does not have to be a physical card.

38 15 U.S.C. § 1693a(7).

39 15 U.S.C. § 1693a(9); Reg. E, 12 C.F.R. § 1005.2(i) [§ 205.2(i)].

40 Reg. E, 12 C.F.R. § 1005.12(c) [§ 205.12(c)].

41 Reg. E, 12 C.F.R. § 1005.3(b) [§ 205.3(b)] (stating basic definition as "any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account").

42 Tristan v. Bank of Am., 2023 WL 4417271 (C.D. Cal. June 28, 2023), *later decision*, 2023 WL 8168848 (C.D. Cal. Oct. 26, 2023).

43 The EFTA excludes from coverage:

Any transfer of funds the primary purpose of which is the purchase or sale of a security or commodity, if the security or commodity is:

(i) Regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission; or

(ii) Purchased or sold through a broker-dealer regulated by the Securities and Exchange Commission nor through a futures commission merchant regulated by the Commodity Futures Trading Commission; or

(iii) Held in book-entry form by a Federal Reserve Bank or Federal agency.

Reg. E, 12 C.F.R. § 1005.3(c)(4) [§ 205.3(c)(4)].

44 Reg. E, 12 C.F.R. § 1005.3(c)(4).

45 Reg. E, 12 C.F.R. § 1005.2(b)(1) (emphasis added).

46 Reg. E, 12 C.F.R. § 1005.2(b)(3).

47 Reg. E, 12 C.F.R. § 1005.2(i) (emphasis added).

48 Yuille v. Uphold HQ, Inc., 686 F. Supp. 3d 323 (S.D.N.Y. 2023).

49 *See* Nero v. Uphold, 688 F. Supp. 3d 134 (S.D.N.Y. 2023). *See also* Rider v. Uphold HQ, Inc., 657 F. Supp. 3d 491 (S.D.N.Y. 2023) (earlier decision in same case).

50 The FDIC has issued cease and desist letters to several companies for making misrepresentations about FDIC deposit insurance in connection with crypto-assets and crypto exchanges. *See* Press Release, Fed. Deposit Ins. Corp., FDIC Issues Cease and Desist Letters to Five Companies For Making Crypto-Related False or Misleading Representations about Deposit Insurance (Aug. 19, 2022), *available at* www.fdic.gov (describing letters to Cryptonews.com, Cryptosec.info, Smartasset.com, FTX US, and FDICCrypto.com, including statements related to Coinbase, Gemini, and other exchanges).

51 Rider v. Uphold HQ, Inc., 657 F. Supp. 3d 491 (S.D.N.Y. 2023).

52 88 Fed. Reg. 80,197, 80,202 (Nov. 17, 2023) ("Without fully addressing the scope of that term, the CFPB believes that, consistent with its plain meaning, the term 'funds' in the [Consumer Financial Protection Act, i.e., 12 U.S.C. § 5481(15)(A)(iv)] is not limited to fiat currency or legal tender, and includes digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange.").

53 *See* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth In Lending Act (Regulation Z), Final Rule, 81 Fed. Reg. 83,934, 83,978 (Nov. 22, 2016) ("The proposed rule did not resolve specific issues with respect to the application of either existing regulations or the proposed rule to virtual currencies and related products and services. Accordingly, although the Bureau received some comments addressing virtual currency products and services, the Bureau reiterates that application of Regulation E and this final rule to such products and services is outside of the scope of this rulemaking."). *Accord* Rider v. Uphold HQ, Inc., 657 F. Supp. 3d 491 (S.D.N.Y. 2023).

54 Reg. E, 12 C.F.R. § 1005.2(b)(3)(i)(D).

55 Rider v. Uphold HQ, Inc., 657 F. Supp. 3d 491 (S.D.N.Y. 2023).

56 Nero v. Uphold HQ, Inc., 688 F. Supp. 3d 134 (S.D.N.Y. 2023).

57 12 U.S.C. § 5481(15)(A)(iv).

58 88 Fed. Reg. 80,197, 80,202 (Nov. 17, 2023) (citing Financial Stability Oversight Council, Report on Digital Asset Financial Stability Risks and Regulation, at 7 (Oct. 3, 2022), *available at* https:// home.treasury.gov).

59 *See* United States v. Iossifov, 45 F.4th 899, 913 (6th Cir. 2022); United States v. Murgio, 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016); United States v. Budovsky, 2015 WL 5602853 at *14 (S.D.N.Y Sept. 23, 2015); United States v. Faiella, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014); United States v. Ulbricht, 31 F. Supp. 3d 540, 570 (S.D.N.Y. 2014).

60 Reg. E, 12 C.F.R. § 1005.3(c)(4) [§ 205.3(c)(4)].

61 Reg. E, 12 C.F.R. § 1005.2(m) [§ 205.2(m)]. *Accord* 15 U.S.C. § 1693a(12). *See* Estate of Tolliver v. Regions Bank, 2019 WL 2435871, at *6 (N.D. Ala. June 11, 2019) (discovery needed on issue of whether deceased father validly executed power of attorney appointing daughter as his agent giving her actual authority to add herself to the account).

62 Reg. E, Official Interpretations § 1005.2(m)-3 [§ 205.2(m)-3]. Rusthoven v. TCF Nat'l Bank, 2009 WL 2171105 (D. Minn.

July 20, 2009) (rejecting bank's motion for summary judgment when consumer alleged he authorized his fiancée only to drive his truck home after his arrest, not use his ATM card that was in truck's closed center console); *See also* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 5 in "Error Resolution: Unauthorized EFTs" section; "[W]hen a consumer is fraudulently induced into sharing account access information with a third party, and a third party uses that information to make an EFT from the consumer's account, the transfer is an unauthorized EFT under Regulation E").

63 *See* Green v. Capital One, N.A., 557 F. Supp. 3d 441 (S.D.N.Y. 2021) (transfer initiated by fraudster using account information that was furnished by consumer to scammer impersonating customer service for Square's Cash App was not "authorized" access under EFTA; disputed transfers were "unauthorized," and consumer's liability for them should not have exceeded $50); Ognibene v. Citibank, 446 N.Y.S.2d 845, 848 (N.Y. Civ. Ct. 1981) (plaintiff who was duped into giving his ATM card to a party pretending to test the machine did not furnish his code to anyone within the meaning of EFTA and transfer was unauthorized). *See also* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 5 in "Error Resolution: Unauthorized EFTs" section; "Similarly, when a consumer is fraudulently induced into sharing account access information with a third party, and a third party uses that information to make an EFT from the consumer's account, the transfer is an unauthorized EFT under Regulation E. For example, the Bureau is aware of the following situations where a third party has fraudulently obtained a consumer's account access information, and thus, are considered unauthorized EFTs under Regulation E: (1) a third-party calling the consumer and pretending to be a representative from the consumer's financial institution and then tricking the consumer into providing their account login information, texted account confirmation code, debit card number, or other information that could be used to initiate an EFT out of the consumer's account, and (2) a third party using phishing or other methods to gain access to a consumer's computer and observe the consumer entering account login information. EFTs stemming from these situations meet the Regulation E definition of unauthorized EFTs."); *Id.* at question 6 ("A consumer who is fraudulently induced into providing account information has not furnished an access device under Regulation E. As explained above in Electronic Fund Transfers Error Resolution: Unauthorized EFTs 3, 4, and 5, EFTs initiated using account access information obtained through fraud or robbery fall within the Regulation E definition of unauthorized EFT. See Comment 1005.2(m)-3."); Fed. Deposit Ins. Corp., Consumer Compliance Supervisory Highlights 5 (Mar. 2022), *available at* www.fdic.gov.

64 Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 4 in "Error Resolution: Unauthorized EFTs" section).

65 *See* Holmes v. Capital One, N.A., 2023 WL 6318883 (N.D.N.Y. Sept. 28, 2023); Sanchez v. Navy Fed. Credit Union, 2023 WL 6370235 (C.D. Cal. Aug. 14, 2023); Tristan v. Bank of Am., 2023 WL 4417271, at *10 (C.D. Cal. June 28, 2023) (rejecting argument that the fraudster initiated the chain of events); Cook v. USAA Fed. Sav. Bank, 2023 WL 3949735, at *2 (D. Md. June 12, 2023) (bank was not liable where plaintiff admitted to sending funds through Zelle, because even though he alleged he was "induced by fraud," he nevertheless authorized the transfer).

66 Reg. E, Official Interpretations § 1005.2(m)-4 [§ 205.2(m)-4]. The official interpretations use the term "[f]orced initiation" and define that term as "an unauthorized transfer if the consumer has been induced by force to initiate the transfer."

67 I.B. *ex rel.* Fife v. Facebook, Inc., 905 F. Supp. 2d 989, 1007 (N.D. Cal. 2012).

68 Reg. E, 12 C.F.R. § 1005.7(a).

69 An accepted access device is defined in Reg. E, 12 C.F.R. § 1005.2(a)(2) [§ 205.2(a)(2)].

70 Reg. E, Official Interpretations § 1005.6(a)-1 [§ 205.6(a)-1].

71 Reg. E, 12 C.F.R. § 1005.6(a) [§ 205.6(a)].

72 *See* Mark Furletti & Stephen Smith, Fed. Reserve Bank of Phila., The Laws, Regulations, and Industry Practices That Protect Consumers Who Use Electronic Payment Systems: Credit and Debit Cards 22 (Jan. 2005), *available at* www.philadelphiafed.org ("For transactions conducted by phone, through the mail, or over the Internet, however, card issuers generally do not provide any means for identifying a consumer. As such, consumers do not face any liability under Regulation E's three-tiered liability scheme for fraudulent purchases that are made online or by mail or phone.").

73 Reg. E, § 1005.6(b)(6) [§ 205.6(b)(6)]; Reg. E, Official Interpretations § 1005.6(b)-3 [§ 205.6(b)-3].

74 Reg. E, Official Interpretations § 1005.6(b)-3 [§ 205.6(b)-3].

75 *See* Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579 (9th Cir. 2021) (consumer who fails to timely report "is not automatically liable for all subsequent losses," only those that would not have occurred with timely notice); Beaman v. Bank of Am., 2023 WL 4784254 (D.N.J. July 27, 2023) (untimely reporting does not complete the EFTA analysis); Perry v. OCNAC #1 Fed. C.U., 423 F. Supp. 3d 67 (D.N.J. 2019) (same; plaintiff had until one year and ten days following the initial unauthorized transfer to meet the statute of limitations).

76 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org (citing Reg. E, Official Interpretations §1005.11(b)(1)-7 ("Effect of late notice. An institution is not required to comply with the requirements of this section for any notice of error from the consumer that is received by the institution later than 60 days from the date on which the periodic statement first reflecting the error is sent. Where the consumer›s assertion of error involves an unauthorized EFT, however, the institution must comply with § 1005.6 before it may impose any liability on the consumer.")).

77 Perry v. OCNAC #1 Fed. C.U., 423 F. Supp. 3d 67 (D.N.J. 2019) (plaintiff had until one year and ten days following the initial unauthorized transfer to meet the statute of limitations).

78 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org.

79 Reg. E, 12 C.F.R. § 1005.6(b)(1) [§ 205.6(b)(1)].

80 Reg. E, § 1005.14(b)(1)(v) [§ 205.14(b)(1)(v)].

81 Reg. E, Official Interpretations § 1005.6(b)(1)-2 [§ 205.6(b)(1)-2].

82 Reg. E, 12 C.F.R. § 1005.2(d) [§ 205.2(d)].

83 Reg. E, Official Interpretations § 205.6(b)(1)-3 [§ 1005.6(b)(1)-3], *as amended by* 66 Fed. Reg. 15,193 (Mar. 16, 2001).

84 Reg. E, § 1005.14(b)(1)(v) [§ 205.14(b)(1)(v)].

85 Reg. E, 12 C.F.R. § 1005.6(b)(2)(ii) [§ 205.6(b)(2)(ii)].

86 *See* Reg. E, Official Interpretations § 1005.6(b)(2)-1 [§ 205.6(b)(2)-1] (illustration of how this liability tier operates); Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and

Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org (consumer's liability is limited to $50 even if the consumer does not report the loss or theft for four months if the unauthorized charges happened within two business days of the loss or theft).
87 Reg. E, 12 C.F.R. § 1005.6(b)(3) [§ 205.6(b)(3)].
88 Reg. E, Official Interpretations § 1005.6(b)(3)-2 [§ 205.6(b)(3)-2] (if account is debited for $200, and then $400 on day sixty-one, consumer is liable for $400); Illsley v. Truist Bank, 2023 WL 3690094, at *2 (E.D.N.C. May 26, 2023) (bank remained liable for unauthorized transactions that took place during sixty-day window even though plaintiff missed deadline); Patterson v. Suntrust Bank, 2013 WL 139315 (Tenn. Ct. App. 2013) (bank required to reimburse consumer only for losses incurred in first sixty days after unauthorized use of account via debit card stolen by consumer's ex-girlfriend).
89 *See* Office of the Comptroller of the Currency, Comptroller's Handbook, Interagency Consumer Laws and Regulations, Electronic Fund Transfer Act (Interagency) (Mar. 2019), *available at* www.occ.gov ("Notice [to the financial institution of an unauthorized charge] may also be considered given when the financial institution becomes aware of circumstances leading to the reasonable belief that an unauthorized transfer has been or may be made (12 CFR 1005.6(b)(5)(iii))."). *See also* Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579 (9th Cir. 2021) (because bank did not take action after the receiving bank flagged the first transfer as suspicious and returned it, the plaintiff plausibly alleged an EFTA violation, but she would have the burden to prove that the bank would not have prevented the additional unauthorized transfers if she had provided timely notice).
90 15 U.S.C. § 1693g(b) ("if the electronic fund transfer was unauthorized, then the burden of proof is upon the financial institution to establish that the conditions of liability set forth in subsection (a) have been met"); Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579, 583 (9th Cir. 2021).
91 Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579, 583 (9th Cir. 2021).
92 *Id.*
93 Reg. E, 12 C.F.R. § 1005.6(b)(5).
94 15 U.S.C. § 1693g(a) (emphasis added). *See* Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579 (9th Cir. 2021).
95 Reg. E, 12 C.F.R. § 1005.6(b)(5)(i) [§ 205.6(b)(5)(i)].
96 *Id.*
97 Reg. E, Official Interpretations § 1005.6(b)(4)-1 [§ 205.6(b)(4)-1].
98 Reg. E, 12 C.F.R. § 1005.6(b)(5)(ii) [§ 205.6(b)(5)(ii)].
99 Reg. E, Official Interpretations § 1005.6(b)(5)-2 [§ 205.6(b)(5)-2].
100 Reg. E, Official Interpretations § 1005.6(b)(5)-3 [§ 205.6(b)(5)-3].
101 *See* Exarhos v. JPMorgan Chase Bank, N.A., 2021 WL 3047152, at *4 (N.D. Ill. July 20, 2021) (exhibits included correct amount).
102 Reg. E, 12 C.F.R. § 1005.6(b)(5)(iii) [§ 205.6(b)(5)(iii)].
103 15 U.S.C. § 1693g(b). *See* Sparkman v. Comerica Bank, 2023 WL 5020269 (N.D. Cal. Aug. 4, 2023); Illsley v. Truist Bank, 2023 WL 3690094, at *2 (E.D.N.C. May 26, 2023) (aside from "attacking [the plaintiff's] version of events," bank provided no evidence that he authorized his caregiver to withdraw cash with his debit card; burden of proof on bank to show that transfer was authorized); Green v. Capital One, 557 F. Supp. 3d 441, 450 (S.D.N.Y. 2021); Exarhos v. JPMorgan Chase Bank, N.A., 2021 WL 3047152, at *3 (N.D. Ill. July 20, 2021) (the EFTA explicitly places the burden on financial institutions to establish consumers' liability for unauthorized transfers); Acafrao v. U.S. Century Bank, 2010 WL 11596731, at *9–10 (S.D. Fla. Aug. 8, 2010) (burden on the bank to prove authorization; bank not entitled to summary judgment where it did not provide the electronic fund transfer disclosure or periodic bank statements directly to consumers; statements provided to third parties without proof of authorization from consumers); Pace v. Gulf Coast Bank & Tr. Co., 2014 WL 4657482, at *4 (La. Ct. App. Sept. 17, 2014) ("Ms. Pace had a duty to notify the Bank of any errors or unauthorized ATM transactions within 60 days after receiving documentation of the electronic transfer. Thereafter, the burden of proof is on the Bank to prove that the debits were authorized and that the loss would not have occurred but for her failure to report Mr. McCray's transfers within sixty days of transmittal of her periodic statement.").
104 *See* Widjaja v. JPMorgan Chase Bank, N.A., 21 F.4th 579, 583 (9th Cir. 2021) (finding reasonable inference that notice would not have prevented subsequent transfers where bank took no action after receiving bank found second transfer suspicious and contacted fraud department); Beaman v. Bank of Am., 2023 WL 4784254 (D.N.J. July 27, 2023).
105 *See, e.g.*, O'Donovan v. CashCall, Inc., 2009 WL 1833990 (N.D. Cal. June 24, 2009) (upholding bank's determination that plaintiff was attempting to defraud bank and that the payments were authorized).
106 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org.
107 Consumer Fin. Prot. Bureau, Supervisory Highlights 11 (Fall 2014), *available at* www.consumerfinance.gov.
108 Reg. E, Official Interpretations § 1005.6(b)-2 [§ 205.6(b)-2]. *See* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 3 in "Error Resolution: Unauthorized EFTs" section).
109 Reg. E, Official Interpretations § 1005.6(b)-3 [§ 205.6(b)-3]. *See also* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 8 in "Error Resolution: Unauthorized EFTs" section).
110 Consumer Fin. Prot. Bureau, Supervision and Examination Manual, Consumer Liability and Error Resolution 24 (Mar. 2019), *available at* https://files.consumerfinance.gov.
111 Reg. E, Official Interpretations § 1005.6(b)-2 [§ 205.6(b)-2]. *See also* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 3 in "Error Resolution: Unauthorized EFTs" section).
112 *See* Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 5 in "Error Resolution: Unauthorized EFTs" section).
113 *Id.*
114 Consent Order, *In re* USAA Fed. Sav. Bank, No. 2019-BCFP-0001 at 9 (C.F.P.B. Jan. 3, 2019), *available at* https://files.consumerfinance.gov.
115 *See* Consumer Fin. Prot. Bureau, Supervisory Highlights 18 (Summer 2021) (noting that "[o]ne institution, upon seeing that a consumer was challenging a charge from a merchant with whom the consumer had prior transactions, closed error investigations without completing them, and instead instructed consumers to first direct the claim to the merchant that made the charge"), *available at* https://files.consumerfinance.gov.
116 *See* Tristan v. Bank of Am., 2023 WL 4417271 (C.D. Cal. June 28, 2023) (finding that bank properly investigated the claim where investigation found that the transaction was completed

using a device consistent with previous activity; was validated using an authentication code sent to a valid phone number; and was confirmed by plaintiff's text or telephone conversation), *later decision*, 2023 WL 8168848 (C.D. Cal. Oct. 26, 2023) (dismissing amended complaint; plaintiff did not identify records that bank should have reviewed).

117 For a more detailed discussion of the EFTA's procedures for resolving errors, *see* National Consumer Law Center, Consumer Banking and Payments Law (7th ed. 2024), Section 7.8, *updated at* www.nclc.org/library.

118 15 U.S.C. § 1693f; Reg. E, 12 C.F.R. § 1005.11 [§ 205.11]. *See* Mark E. Budnitz, *Federal Regulation of Consumer Disputes in Computer Banking Transactions*, 20 Harv. J. on Legis. 31 (1983).

119 Reg. E, 12 C.F.R. § 1005.11(a)(1) [§ 205.11(a)(1)]. *See* 15 U.S.C. § 1693f(f).

120 Reg. E, 12 C.F.R. § 1005.11(a)(1) [§ 205.11(a)(1)] (emphasis added). *See* 15 U.S.C. § 1693f(f)(2).

121 The CFPB entered into a consent order with USAA Federal Savings Bank after it found that the bank debited or credited accounts previously closed by the accountholders. Press Release, Consumer Fin. Prot. Bureau, CFPB Settles with USAA Federal Savings Bank (Jan. 3, 2019), *available at* www.consumerfinance.gov (providing link to consent order in *In re* USAA Fed. Sav. Bank, No. 2019-CFPB-0001 (C.F.P.B. Jan. 3, 2019)).

122 Reg. E, 12 C.F.R. § 1005.11(b)(1)(i) [§ 205.11(b)(1)(i)].

123 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Error Resolution and Liability Limits for Prepaid Accounts and Foreign Remittance Transfers, Consumer Compliance Outlook (2d Issue 2021), *available at* https://consumercomplianceoutlook.org (summarizing error resolution requirements for prepaid accounts; the modified deadline for disputing applies to prepaid accounts).

124 *In re* Bank of Am. Cal. Unemployment Benefits Litig., 674 F. Supp. 3d 884 (S.D. Cal. 2023) (construing the allegation in the light most favorable to plaintiff; the sixty-day period started at the end of the month).

125 Camacho v. JPMorgan Chase Bank, 2015 WL 5262022 (N.D. Cal. Sept. 9, 2015) (presuming the statement was sent as the consumer did not report not receiving a statement).

126 Reg. E, 12 C.F.R. § 1005.14(b)(1)(v) [§ 205.14(b)(1)(v)].

127 Reg. E, 12 C.F.R. § 1005.14(b)(2)(i) [§ 205.14(b)(2)(i)].

128 For prepaid accounts, if the financial institution does not provide periodic statements but makes transaction and balance information available, it must comply with the error resolution procedures if it receives the notice of error by the earlier of (1) Sixty days after the date a consumer electronically accesses the consumer's account containing the error; or (2) Sixty days after the date the financial institution sends the first written account transaction history reflecting the alleged error. Reg. E, 12 C.F.R. § 1005.11(e)(2)(i). Alternatively, if the institution does not send periodic statements, it can opt instead to use as a rule that it must respond to a consumer's notice of error received within 120 days after the erroneous transfer was credited or debited to the consumer's prepaid account. Reg. E, 12 C.F.R. § 1005.18(e)(2)(ii).

129 *In re* Bank of Am. Cal. Unemployment Benefits Litig., 674 F. Supp. 3d 884 (S.D. Cal. 2023).

130 Beaman v. Bank of Am., 2023 WL 4784254 (D.N.J. July 27, 2023) (failure to allege when each plaintiff received the statement containing the fraudulent transfer prevents the court from determining whether the plaintiff met the threshold for triggering the error resolution process).

131 *In re* Bank of Am. Cal. Unemployment Benefits Litig., 674 F. Supp. 3d 884 (S.D. Cal. 2023) (citing Jacobs v. Tenneco W., Inc., 231 Cal. Rptr. 351 (Ct. App. 1986) ("A party who prevents fulfillment of a condition of his own obligation . . . cannot rely on such condition to defeat his liability.")) (citations omitted).

132 Consent Order, *In re* Bank of Am., N.A., No. 2022-CFPB-0004 (C.F.P.B. July 14, 2022), *available at* https://files.consumerfinance.gov.

133 *See* Commerce Bank/Delaware v. Brown, 2007 WL 1207171 (Del. Ct. Com. Pl. Feb. 20, 2007).

134 As discussed in the sections above on unauthorized transfer protections under the EFTA, the failure to provide timely notice merely makes the consumer liable for transfers that could have been prevented had the notice been timely. Failure by the financial institution to reimburse the first unauthorized transfer is still actionable.

135 Reg. E, 12 C.F.R. § 1005.11(b)(1) [§ 205.11(b)(1)].

136 *See* Uchacz v. Gov't Employees Ins. Co., 2003 WL 21028653 (N.D. Ill. Apr. 18, 2003) (granting summary judgment for bank where consumer failed to submit a written report and an affidavit after bank recredited account and also failed to respond to bank's request for documentation to dispute bank's validation of disputed withdrawals after investigating consumer's claim).

137 Reg. E, Official Interpretations § 1005.11(b)(1)-6 [§ 205.11(b)(1)-6]. *See* Almon v. Conduent Bus. Servs., 2022 WL 902992, at *19 (W.D. Tex. Mar. 25, 2022) ("The EFTA does not mandate that a customer follow a financial institution›s individual reporting procedures in order to trigger its duty to investigate an error. The customer needs only to provide timely information that allows the institution to identify the consumer, the affected account number, and the reason to believe that an error exists."; finding duty to investigate notices that were reported to department other than the fraud department).

138 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org.

139 Reg. E, 12 C.F.R. § 1005.11(b)(2) [§ 205.11(b)(2)].

140 *In re* Bank of Louisiana, 2016 WL 9050999, at *7 (F.D.I.C. Nov. 15, 2016) ("Nothing in Regulation E permits the rigorous documentation requirements imposed by the Bank"); Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 4 in the "Error Resolution" section); Consumer Fin. Prot. Bureau, Supervisory Highlights 7 (Summer 2022), *available at* https://files.consumerfinance.gov (deposit agreements that required consumers to cooperate, including providing affidavits and notifying law enforcement authorities, violated Regulation E; "By requiring consumers to 'cooperate' with Regulation E error investigations and provide information beyond that which is required in EFTA and Regulation E, the financial institutions' agreements contained provisions that waived consumers' rights in violation of EFTA."); Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org (institution may not require that "consumers provide information not specified in the regulation. Common examples of requests the regulation does not require in a consumer's error notice, and therefore may not be used as a condition to begin the investigation, include asking a consumer to visit a branch to complete an error notice, requesting that the consumer first try to resolve the dispute with the merchant, or requiring a notarized affidavit or the filing of a police report."); Consumer Fin. Prot. Bureau, Supervisory Highlights 10 (Fall 2014), *available at* https://files.consumerfinance.gov (Regulation E requires "sufficient information to identify the consumer's name and

account number and why the consumer believes an error exists, including, to the extent possible, the type, date, and amount of the error. A financial institution cannot deny an error claim on the basis of a consumer failing to provide additional information, or require the consumer to contact the merchant involved first.").
141 Reg. E, Official Interpretations § 1005.11(b)(2)-1 [§ 205.11(b)(2)-1].
142 Reg. E, 12 C.F.R. § 1005.11(b)(1)(ii) [§ 205.11(b)(1)(ii)]. *See* Hardin v. Bank of Am., 2022 WL 3568568 (E.D. Mich. Aug. 18, 2022) (dismissing claim of plaintiff who did not comply with request to verify identity).
143 Reg. E, Official Interpretations § 1005.11(b)(1)-1 [§ 205.11(b)(1)-1].
144 Reg. E, 12 C.F.R. § 1005.11(b)(1)(iii) [§ 205.11(b)(1)(iii)]. *See* Rallis v. First Gulf Bank, 2008 WL 4724745 (N.D. Fla. Oct. 24, 2008) (dismissing complaint without prejudice where plaintiff failed to identify particular transactions he claims were unauthorized or to provide dates of such transactions; also failed to plead timely notice to bank of fraudulent activities; timely notification is essential element of an EFTA violation).
145 *See* Tristan v. Bank of Am., 2023 WL 4417271, at *10 (C.D. Cal. June 28, 2023) (call to bank about allegedly fraudulent transfer was sufficient to initiate a claim of error); *In re* Bank of Am. Cal. Unemployment Benefits Litig., 674 F. Supp. 3d 884 (S.D. Cal. 2023) (dismissing claims of plaintiffs who merely alleged "fraud," but refusing to dismiss those that identified fraudulent or unauthorized transactions).
146 Reg. E, Official Interpretations § 1005.11(a)-3 [§ 205.11(a)-3].
147 15 U.S.C. § 1693f(a)(2).
148 Guarnieri v. Be Money Inc., 2022 WL 11381916, at *6–7 (C.D. Cal. Oct. 18, 2022) ("To read in a requirement that the consumer must also demonstrate an 'error' before a financial institution is subject to the EFTA's investigatory proscriptions would not only contravene the boundaries of [§ 1693f(a)'s] criteria, but render § 1693f(d)'s requirement that a financial institution provide a customer with its explanation of its determination that an error *did not occur* entirely superfluous. This proscription would serve no purpose if a financial institution could ignore the EFTA's investigatory requirements merely because a reported 'error' turned out to be a valid transaction.").
149 Reg. E, 12 C.F.R. § 1005.11(c)(2)(iii) and (iv) [§ 205.11(c)(2)(iii) and (iv)].
150 *See* Fed. Deposit Ins. Corp., Consumer Compliance Supervisory Highlights 5–6 (Mar. 2022), *available at* www.fdic.gov.
151 Reg. E, 12 C.F.R. § 1005.11(c) [§ 205.11(c)]; Reg. E, Official Interpretations § 1005.11(c)-2 [§ 205.11(c)-2] ("A financial institution must begin its investigation promptly upon receipt of an oral notice. It may not delay until it has received a written confirmation."). *But cf.* Nero v. Uphold HQ, Inc., 688 F. Supp. 3d 134 (S.D.N.Y. 2023) (EFTA does not require institution to implement an immediate freeze upon receipt of an error report or to investigate within minutes or hours).
152 Reg. E, Official Interpretations § 1005.11(b)(1)-7 [§ 205.11(b)(1)-7]; 71 Fed. Reg. 1638, 1652, 1653, 1663 (Jan. 10, 2006).
153 Reg. E, Official Interpretations § 1005.11(c)-2 [§ 205.11(c)-2] ("A financial institution must begin its investigation promptly upon receipt of an oral notice. It may not delay until it has received a written confirmation."); Reg. E, Official Interpretations § 1005.11(b)(1)-2 [§ 205.11(b)(1)-2] ("While a financial institution may request a written, signed statement from the consumer relating to a notice of error, it may not delay initiating or completing an investigation pending receipt of the statement."). *See* Consent Order, *In re* USAA Fed. Sav. Bank, No. 2019-BCFP-0001 at 9 (C.F.P.B. Jan. 3, 2019), *available at* https://files.consumerfinance.gov (bank violated EFTA by requiring consumers to complete form before bank would investigate); *In re* Bank of Louisiana, 2016 WL 9050999 (F.D.I.C. Nov. 15, 2016); Consumer Fin. Prot. Bureau, Supervisory Highlights 15 (Summer 2021), *available at* www.consumerfinance.gov (stating that the CFPB has regularly found violations, including requiring written confirmation of an oral notice of error before investigating); Consumer Fin. Prot. Bureau, Supervisory Highlights (Fall 2014), *available at* https://files.consumerfinance.gov (Regulation E requires the consumer to submit "sufficient information to identify the consumer's name and account number and why the consumer believes an error exists, including, to the extent possible, the type, date, and amount of the error. A financial institution cannot deny an error claim on the basis of a consumer failing to provide additional information, or require the consumer to contact the merchant involved first.").
154 Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 3 in "Error Resolution" section); Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org (common examples of requests that may not be used as a condition to begin an investigation include asking a consumer to visit a branch to complete an error notice and requesting that a consumer first try to resolve the dispute with the merchant); Consumer Fin. Prot. Bureau, Supervisory Highlights 15 (Summer 2021), *available at* www.consumerfinance.gov (stating that the CFPB has regularly found violations, including requiring consumers to contact merchants about alleged unauthorized EFTs before investigating); Consent Order, *In re* USAA Fed. Sav. Bank, No. 2019-BCFP-0001 at 9 (Jan. 3, 2019), *available at* https://files.consumerfinance.gov (bank violated EFTA by requiring payday loan consumers to contact lender first before bank would investigate).
155 Consumer Fin. Prot. Bureau, Electronic Fund Transfers FAQs, *available at* www.consumerfinance.gov (see question 4 in "Error Resolution" section). *See* § 7.8.2.2, *supra*.
156 Reg. E, Official Interpretations § 1005.11(a)-4 [§ 205.11(a)-4].
157 Reg. E, Official Interpretations § 1005.11(c)-4 [§ 205.11(c)-4].
The institution must comply with all the other requirements of section 1005.11 [§ 205.11] even though it is excused from making an investigation under these circumstances. *Id.*
158 Reg. E, 12 C.F.R. § 1005.11(c)(2) [§ 205.11(c)(2)].
159 Reg. E, 12 C.F.R. § 1005.11(c)(2) [§ 205.11(c)(2)].
160 Reg. E, 12 C.F.R. § 1005.11(c)(2)(i) [§ 205.11(c)(2)(i)].
161 Consent Order, *In re* Bank of Am., N.A., No. 2022-CFPB-0004 (C.F.P.B. July 14, 2022), *available at* https://files.consumerfinance.gov (bank violated EFTA by failing to complete investigation in ten days or to give provisional credit). *See also* Yick v. Bank of Am., 539 F. Supp. 3d 1023 (N.D. Cal. 2021) (granting preliminary injunction; finding strong likelihood of success that bank failed to conduct an adequate, good faith investigation, improperly denied claims, deprived consumers of provisional credits, and simply froze accounts based on faulty screening process). *But cf.* Nero v. Uphold HQ, Inc., 688 F. Supp. 3d 134 (S.D.N.Y. 2023) (complaint failed to allege that company had any obligation to provisionally credit account as the complaint did not assert that the company failed to complete

investigation within ten days and report its conclusions to the plaintiff).
162 Reg. E, 12 C.F.R. § 1005.11(c)(2)(ii) [§ 205.11(c)(2)(ii)].
163 Reg. E, 12 C.F.R. § 1005.11(c)(i)(A) [§ 205.11(c)(i)(A)]. The institution also has additional time to investigate before providing a provisional credit if the consumer has sent written confirmation to the wrong address and the institution is delayed beyond ten business days in arriving at the correct location because of the consumer's error. Reg. E, 12 C.F.R. § 1005.11(c)(2)(i)(A) [§ 205.11(c)(2)(i)(A)]; Reg. E, Official Interpretations § 1005.11(b)(2)-1 [§ 205.11(b)(2)-1].
164 12 C.F.R. pt. 220—Credit by Brokers and Dealers (Regulation T). *See* Reg. E, 12 C.F.R. § 1005.11(c)(2)(i)(B) [§ 205.11(c)(2)(i)(B)].
165 Reg. E, Official Interpretations § 1005.11(c)(2)(i)-1 [§ 205.11(c)(2)(i)-1].
166 15 U.S.C. § 1693f(e). *See* Almon v. Conduent Bus. Servs., 2022 WL 4545530 (W.D. Tex. Sept. 28, 2022) (certifying class of consumers who did not receive provisional credit as required).
167 Reg. E, 12 C.F.R. § 1005.11(c)(2)(i) [§ 205.11(c)(2)(i)].
168 Reg. E, 12 C.F.R. § 1005.11(c) [§ 205.11(c)].
169 15 U.S.C. § 1693g(b).
170 12 C.F.R. § 1005.11(c).
171 Reg. E., 12 C.F.R. § 1005.11(c)(1); Almon v. Conduent Bus. Servs., 2022 WL 4545530 (W.D. Tex. Sept. 28, 2022) (certifying class of consumers who did not receive timely results of the investigation); Almon v. Conduent Bus. Servs., 2022 WL 902992 (W.D. Tex. Mar. 25, 2022) (plaintiff stated violation of Regulation E where notice of denial of claim was provided several days late).
172 12 C.F.R. § 1005.11(c)(1).
173 12 C.F.R. § 1005.11(d)(1).
174 Reg. E, Official Interpretations § 1005.11(c)-1 [§ 205.11(c)-1]. Unless otherwise indicated in section 1005.11 [§ 205.11], the institution may provide all required notices to the consumer either orally or in writing. *Id. But see* Bisbey v. D.C. Nat'l Bank, 793 F.2d 315 (D.C. Cir. 1986) (section 1693f notice must be in writing).
175 Reg. E, Official Interpretations § 1005.11(c)-5 [§ 205.11(c)-5]. ("The institution must determine whether such a mailing will be prompt enough to satisfy the requirements of the section, taking into account the specific facts involved.")
176 Reg. E, 12 C.F.R. § 1005.11(d)(1) [§ 205.11(d)(1)]; Bisbey v. D.C. Nat'l Bank, 793 F.2d 315 (D.C. Cir. 1986) (bank liable where it provided oral explanation and did not inform consumer of right to request documents).
177 Consumer Fin. Prot. Bureau, Supervisory Highlights 15 (Summer 2021), *available at* www.consumerfinance.gov (stating that the CFPB has regularly found violations, including failing to provide an explanation or an accurate explanation of investigation results when determining that no error—or a different error—occurred).
178 Sparkman v. Comerica Bank, 2023 WL 5020269 (N.D. Cal. Aug. 4, 2023) (bank's statement denying claim based on a conflict with information resulting from the bank's research and finding that "we cannot confirm that fraud occurred" were not sufficient to show that the disputed transactions were authorized); *In re* Bank of Am. Cal. Unemployment Benefits Litig., 674 F. Supp. 3d 884 (S.D. Cal. 2023) (plaintiffs stated plausible claim that they were not provided the results of the investigation when they received only brief letters informing them their claim was closed or denied or very limited explanations that the bank determined that no error has occurred). Compare Tristan v. Bank of Am., 2023 WL 4417271, at *10 (C.D. Cal. June 28, 2023) (finding that bank properly investigated the claim of unauthorized transactions when it sent a letter stating "[o]ur investigation found that the transaction in question was completed using a device that is consistent with previous valid account activity; (ii) our investigation found that the transaction in question was validated using an authentication code sent to a valid phone number belonging to a signer on the account; and (iii) our investigation found that the transaction in question was confirmed by your via (SMS/MMS) text message response or speaking directly with Fraud Detection employee").
179 Reg. E, 12 C.F.R. § 1005.11(d)(1) [§ 205.11(d)(1)]; Bisbey v. D.C. Nat'l Bank, 793 F.2d 315 (D.C. Cir. 1986) (bank liable where it provided oral explanation and did not inform consumer of right to request documents); Consumer Fin. Prot. Bureau, Supervisory Highlights 15 (Summer 2021), *available at* www.consumerfinance.gov (stating that the CFPB has regularly found violations, including failing to include a statement regarding the consumer's right to obtain the documentation that the institution relied on).
180 Reg. E, Official Interpretations § 1005.11(d)(1)-1 [§ 205.11(d)(1)-1] ("If an institution relied on magnetic tape it must convert the applicable data into readable form, for example, by printing it and explaining any codes"). *See* Almon v. Conduent Bus. Servs., 2022 WL 4545530 (W.D. Tex. Sept. 28, 2022) (certifying class of consumers who were not sent requested documents); Almon v. Conduent Bus. Servs., 2022 WL 902992 (W.D. Tex. Mar. 25, 2022) (receipt of investigation documents during litigation does not obviate claim for failing to provide documents).
181 Reg. E, 12 C.F.R. § 1005.11(c)(1); Almon v. Conduent Bus. Servs., 2022 WL 902992 (W.D. Tex. Mar. 25, 2022) (plaintiff stated violation of Regulation E where error was corrected more than one business day after completion of investigation).
182 *See* Reg. E, Official Interpretations § 1005.11(c)-6 [§ 205.11(c)-6] (discussing correction procedures, including the crediting of interest, the refunding of fees, and how the institution should deal with a combined credit and EFT transaction); Consumer Fin. Prot. Bureau, Supervisory Highlights 19 (Summer 2021), *available at* https://files.consumerfinance.gov (describing violations, recommended actions, and procedures taken to rectify violations); Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org (correction of error must include interest and refund of any fees, such as overdraft fees caused by the error).
183 Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices (2d issue 2021), *available at* www.consumercomplianceoutlook.org. *See also* Consent Order, *In re* Bank of Am., N.A., No. 2022-CFPB-0004 (C.F.P.B. July 14, 2022), *available at* https://files.consumerfinance.gov. *See also* Commerce Bank/Delaware v. Brown, 2007 WL 1207171 (Del. Ct. Com. Pl. Feb. 20, 2007) (bank violated duty to investigate unauthorized charges where it reversed initial charge that consumer disputed but then, nearly two years after account was closed, sought to recoup subsequent unauthorized charges without investigation).
184 Reg. E, 12 C.F.R. § 1005.11(d)(2) [§ 205.11(d)(2)].
185 "The institution shall honor items as specified in the notice, but need honor only items that it would have paid if the provisionally credited funds had not been debited." Reg. E, 12 C.F.R. § 1005.11(d)(2)(ii) [§ 205.11(d)(2)(ii)].
The institution may not impose overdraft fees; however, it may

"impose any normal transaction or item fee that is unrelated to an overdraft resulting from the debiting. If the account is still overdrawn after five business days, the institution may impose the fees or finance charges to which it is entitled, if any, under an overdraft credit plan." Reg. E, Official Interpretations § 1005.11(d)(2)-2 [§ 205.11(d)(2)-2].

186 Reg. E, Official Interpretations § 1005.11(d)(2)-1 [§ 205.11(d)(2)-1].

187 15 U.S.C. § 1693m(a). *See* Bisbey v. D.C. Nat'l Bank, 793 F.2d 315 (D.C. Cir. 1986) (bank is liable under section 1693m for nominal damages and attorney fees for violation of section 1693f(d) even though consumer suffered no actual damages); De la Torre v. CashCall, Inc., 2017 WL 5524718, at *11–13 (N.D. Cal. Nov. 17, 2017) (amount of attorney fees sought was reasonable even though it represented 40% of the total settlement fund where the attorneys requested only a fraction of a reasonable lodestar amount); Shelby v. Two Jinns, Inc., 2017 WL 6347090, at *8–11 (C.D. Cal. Aug. 2, 2017) (awarding 25% of gross settlement fund in a common fund case, after assessing the lodestar factors), *modified on other grounds*, 2018 WL 4191405 (C.D. Cal. June 25, 2018); Hicks v. GTEC Auto Sales, Inc., 2016 WL 11480194 (N.D. Tex. June 9, 2016) (fee request reduced by 5% where some block billing entries included only list of completed tasks and total time for that block, rather than the time expended for each particular task; otherwise fee documentation not vague; finding hourly rates reasonable based on other cases decided by the court); Kinder v. Dearborn Fed. Sav. Bank, 2013 WL 3364363 (E.D. Mich. July 3, 2013) (finding number of hours expended reasonable; reducing hourly rate for one attorney based on a state bar report on fees; reducing lodestar because request was disproportionate to the degree of success obtained; awarding $30,000 of $48,823 lodestar); McKinnie v. JP Morgan Chase Bank, 678 F. Supp. 2d 806 (E.D. Wis. 2009) (*pro se* litigant who is a lawyer is not entitled to attorney fees; attorney fees should be based on total common fund, not amount claimed by class members against the fund); Berenson v. Nat'l Fin. Servs., 403 F. Supp. 2d 133 (D. Mass. 2005) (consumer entitled to statutory damages when company failed to provide timely written response as required pursuant to EFTA's resolution procedure).

188 Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1094 (N.D. Cal. 2006). *See also* Houston v. Fifth Third Bank, 2019 WL 1200574, at *4 (N.D. Ill. Mar. 14, 2019).

189 15 U.S.C. § 1693m(f). *See* § 7.15.8, *infra*. *See also* Moore v. Southtrust Corp., 392 F. Supp. 2d 724 (E.D. Va. 2005), *aff'd*, 172 Fed. Appx. 533 (4th Cir. 2006).

190 *See, e.g.*, Almon v. Conduent Bus. Servs., 2022 WL 902992, at *19 (W.D. Tex. Mar. 25, 2022) ("Even if Plaintiffs were required to show an injury beyond these violations of the EFTA and Regulation E, they have adequately alleged the emotional distress that other courts have found to be sufficient in the context of statutory violations.") (citations omitted).

191 Nero v. Uphold HQ, Inc., 688 F. Supp. 3d 134, (S.D.N.Y. 2023) (stating that where the EFTA's disclosure provisions are at issue, courts have required a plaintiff to show detrimental reliance; to recover actual damages, plaintiffs must show a substantial nexus between the violation and the loss; reserving for summary judgment the question of whether the standard is substantial nexus or the more common proximate cause standard); Smith v. Bank of Hawaii, 2019 WL 404423, at *12 (D. Haw. Jan. 31, 2019) (detrimental reliance required to prove actual damages for an EFTA claim; finding genuine issue of material fact as to whether consumer relied on opt-in language and, if so, whether he relied to his detriment because he incurred overdraft fees based on that understanding), *adopted in part & rejected in part*, 2019 WL 2712262 (D. Haw. June 28, 2019); *In re* TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 165–168 (D.S.C. 2018) (must prove detrimental reliance to trigger award of actual damages under EFTA); Brown v. Wells Fargo & Co., 284 F.R.D. 432 (D. Minn. 2012) (reliance required for actual damages arising from disclosure violations); Muchnik v. Union Credit Bank, 2009 WL 3012811 (S.D. Fla. Sept. 16, 2009) (in case in which there was no physical notice of ATM fees, consumer failed to prove detrimental reliance when she continued ATM transaction after on-screen fee notice); Voeks v. Pilot Travel Centers, 560 F. Supp. 2d 718 (E.D. Wis. 2008) (same); Brown v. Bank of Am., 457 F. Supp. 2d 82 (D. Mass. 2006) (same); Martz v. PNC Bank, 2006 WL 3840354 (W.D. Pa. Nov. 30, 2006) (same); Polo v. Goodings Supermarkets, 232 F.R.D. 399 (M.D. Fla. 2004) (denying class certification where defendant alleges need to show reliance for actual damages purposes).

192 Friedman v. 24 Hour Fitness USA, Inc., 2009 WL 2711956, at *10 (C.D. Cal Aug. 25, 2009) (showing of detrimental reliance may not be necessary when EFTA violation involves making unauthorized withdrawals from consumers' accounts rather than giving them incorrect or inadequate information, and is relevant only at the damages, not liability, stage; certifying class); Savrnoch v. First Am. Bankcard, Inc., 2007 WL 3171302 (E.D. Wis. Oct. 26, 2007) (detrimental reliance not required for violation of section 1693b(d)(3)(C) prohibiting imposition of ATM fee not properly disclosed); Voeks v. Wal-Mart Stores, 2007 WL 2358645 (E.D. Wis. Aug. 17, 2007) (must show causation, but no need to show detrimental reliance where claim is not based directly on a disclosure violation but alleges that imposition of fee was wrongful because of failure to disclose it properly).

193 *See, e.g.*, Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1026 (9th Cir. 2011), *abrogated on other grounds*, Green v. Fed. Exp. Corp., 614 Fed. Appx. 905, 906 (9th Cir. 2015) (noting in class certification context that plaintiffs "must show a causal connection between the 'violation and the claimed actual damages' requiring at least the establishment of 'a substantial nexus between the injury' and the statutory violation"; no mention of detrimental reliance); Nero v. Uphold HQ, Inc., 688 F. Supp. 3d 134, (S.D.N.Y. 2023) (finding that plaintiff failed to plead any actual damages caused by crypto-exchange's failure to provide provisional credit for unauthorized transfers, or to provide a phone number, as plaintiffs were able to contact the company through chat and email and the EFTA does not require a company to institute an immediate freeze upon receiving a report of unauthorized transfer); Kemply v. CashCall, Inc., 2016 WL 1055251, at *12–14 (N.D. Cal. Mar. 16, 2016) (applying "but for" test before applying "substantial nexus test" to actual damages claim because, if plaintiff cannot meet the former, she cannot meet the latter; finding insufficient evidence of causation because had CashCall not conditioned loan upon EFT payments, consumers likely would have still incurred NSF fees), *order stricken in part on other grounds by* De la Torre v. CashCall, Inc., 2016 WL 6892693 (N.D. Cal. Nov. 23, 2016); Voeks v. Wal-Mart Stores, 2008 WL 89434 (E.D. Wis. 2008) (consumer must prove causation; such proof may, but is not required to, include detrimental reliance).

194 15 U.S.C. § 1693m(b). *Cf.* Skenandore v. FIP, L.L.C., 2019 WL 1041338, at *12 (D.N.M. Mar. 5, 2019) (awarding $1000 in statutory damages on default judgment where court was persuaded that defendant's actions were willful), *adopted*, 2019 WL 1318339 (D.N.M. Mar. 22, 2019); Carrels v. GMA Invs., L.L.C., 2018 WL 4643250, at *3 (N.D. Okla. Aug. 6, 2018) (finding, on default judgment, that "repeated electronic funds transfers (eleven transfers) made without benefit of a written authorization demonstrate a frequency, persistence, and intentional noncompliance to justify statutory damages of $1000"); James v. Lopez Motors, L.L.C., 2018 WL 1582552, at *4 (D. Conn. Mar.

31, 2018) (awarding $100 in statutory damages where consumers offered no evidence that defendant knew it was violating the EFTA by conditioning financing on enrolling in automatic withdrawals; defendant withdrew only two monthly payments in the correct amount, and consumers did not allege any actual damages); Anderson v. Union Bank & Tr., 2013 WL 12076542, at *2 (E.D. Ark. July 11, 2013) (stating intention to limit statutory damages to $100 minimum for failure to post a fee sign on ATM machine when plaintiff, characterized by court as "a lawsuit seeker who knew exactly what he was doing," was charged only forty cents and had filed almost fifty similar cases); Kinder v. Dearborn Fed. Sav. Bank, 2013 WL 879301 (E.D. Mich. Mar, 8, 2013) (awarding statutory damages of $100 to class representative and $1.50 to class members who filed claims for failure to post a fee sign on ATM machine when fee was $1.50; finding no evidence that noncompliance was intentional and small bank had compliance procedures in place, one of five offices did post the notice, plaintiff knew of fee amount due to on-screen disclosure, and no one was adversely affected by "redundant" notice).

195 15 U.S.C. § 1693m(b)(2); Daye v. Cmty. Fin. Serv. Ctrs., L.L.C., 233 F. Supp. 3d 946, 1017–1018 (D.N.M. 2017) (finding all factors exist; awarding 1% of net worth plus attorney fees for EFTA violations); Kemply v. CashCall, Inc., 2016 WL 1055251, at *15–18 (N.D. Cal. Mar. 16, 2016) (applying FDCPA cases to assess factors in absence of caselaw under EFTA; awarding maximum class statutory damages of $500,000), *order stricken in part on other grounds by* De la Torre v. CashCall, Inc., 2016 WL 6892693 (N.D. Cal. Nov. 23, 2016). *See also* Johnson v. W. Suburban Bank, 225 F.3d 366, 379 (3d Cir. 2000) (class action provisions of TILA and EFTA have the same meaning).

196 Brown v. Stored Value Cards, Inc., 2021 WL 2333636, at *5 (D. Or. June 8, 2021) (actual damages are not a prerequisite to recovery of statutory damages); Smith v. Bank of Hawaii, 2019 WL 2712262, at *8 (D. Haw. June 28, 2019) (same); *In re* TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 167 (D.S.C. 2018) (must prove detrimental reliance to trigger award of actual damages under EFTA; not so for statutory damages); Kemply v. CashCall, Inc., 2016 WL 1055251, at *15 (N.D. Cal. Mar. 16, 2016) (describing purposes of statutory damages), *order stricken in part on other ground by* De la Torre v. CashCall, Inc., 2016 WL 6892693 (N.D. Cal. Nov. 23, 2016); Traylor v. United Cash Sys., L.L.C., 2014 WL 7404558, at *3 (D. Conn. Nov. 10, 2014) ("Therefore, even if Traylor has not shown actual economic damages, as UCS has argued, Traylor is still entitled to bring an action under the EFTA purely for statutory damages. There is no constitutional bar to such an action because, as the courts have nearly unanimously agreed, a violation of the EFTA can cause an injury-in-fact even if it does not cause actual economic damages."); Klemetson v. WinCo Foods, L.L.C., 2013 WL 12123740, at *4 (C.D. Cal. Apr. 3, 2013) (consumer may seek statutory damages even when she suffers no actual damages); *In re* Regions Bank ATM Fee Notice Litig., 2011 WL 4036691 (S.D. Miss. Sept. 12, 2011) (consumer may recover statutory damages even in the absence of showing actual damages).

197 Cobb v. PayLease, L.L.C., 34 F. Supp. 3d 976 (D. Minn. 2014).

198 15 U.S.C. § 1693f(e)(1).

199 15 U.S.C. § 1693f(e)(2). *See* Houston v. Fifth Third Bank, 2019 WL 3002965 (N.D. Ill. July 10, 2019) (finding that allegations in amended complaint plausibly supported plaintiff's claim that defendant knowingly and willfully concluded that plaintiff's account was not in error notwithstanding evidence available to defendant).

200 15 U.S.C. § 1693m(c); Bazarganfard v. Club 360 L.L.C., 2023 WL 3402167 (C.D. Cal. Apr. 4, 2023); Simone v. M & M Fitness L.L.C., 2017 WL 1318012, at *4 (D. Ariz. Apr. 10, 2017) (identifying the required elements for establishing the bona fide error defense under the EFTA) (citing Singer v. EIntelligence, Inc., 55 F. Supp. 3d 1043, 1051 (N.D. Ill. 2014)); *In re* Cardtronics ATM Fee Notice Litig., 874 F. Supp. 2d 916, 922 (S.D. Cal. 2012) (same), *aff'd*, 559 Fed. Appx. 633 (9th Cir. 2014).

201 15 U.S.C. § 1693m(d)(1).

202 15 U.S.C. § 1693m(d)(2).

203 15 U.S.C. § 1693m(e).

204 15 U.S.C. § 1693m(g). *See* Peters v. Riggs Nat'l Bank, 942 A.2d 1163 (D.C. 2008) (EFTA claim barred when personal representative of his deceased mother's estate filed suit regarding unauthorized transfers from her account twenty months after last transfer and sixteen months after he had account statements that revealed transfers).

205 Berenson v. Nat'l Fin. Servs., 403 F. Supp. 2d 133, 144 (D. Mass. 2005). *See also* Katz v. JPMorgan Chase, N.A., 2015 WL 11251764, at *3 (S.D. Fla. Feb. 10, 2015) (claim based on error resolution procedure arises ten days after consumer provides notice of the error, not date when financial institution concludes its investigation, even if that occurs after the ten-day deadline). Thus, for an action against a financial institution, it is incorrect to start the limitations period on the date of the fraudulent transfer unless the claim is against the perpetrator of that transfer. *See* Wike v. Vertrue, Inc., 566 F.3d 590 (6th Cir. 2009); Hardin v. Bank of Am., 2022 WL 3568568 (E.D. Mich. Aug. 18, 2022).

206 *See* Wike v. Vertue, Inc., 566 F.3d 590 (6th Cir. 2009); Harvey v. Google, 2015 WL 9268125 (N.D. Cal. Dec. 21, 2015) (no continuing violation doctrine can save a claim filed more than one year after the first in a series of recurring transfers; however, all transfers at issue were within the one-year period; EFTA claim timely); Repay v. Bank of Am., 2013 WL 6224641 (N.D. Ill. No. 27, 2013) (finding that, since new written authorization is not required for each recurring transfer, statute of limitations begins to run with first transfer). *See also* Carrington v. Experian Holdings, Inc., 469 F. Supp. 3d 891, 898 (W.D. Wis. 2020).

207 *See* Vehec v. Asset Acceptance, L.L.C., 2016 WL 4995066 (W.D. Pa. Aug. 8, 2016) (recognizing possibility of a "continuing violations theory" when a plaintiff can show that each withdrawal was part of a persistent and ongoing pattern as opposed to continuing consequences of original violation; relying on language in section 1693m(g)—"occurrence of the violation"—and alleged violations of a series of continuing debits following revocation of authorization to rule that withdrawals made within one year of filing suit were actionable), *adopted by* 2016 WL 4998773 (W.D. Pa. Sept.19, 2016); Everette v. Mitchem, 2016 WL 470840 (D. Md. Feb. 8, 2016) (applying continuing violation theory but finding that none of the withdrawals were within one year of filing lawsuit); Diviacchi v. Affinion Grp., Inc., 2015 WL 3631605, at *10 (D. Mass. Mar. 11, 2015) ("[R]epeated transfers from plaintiff's bank account are independently actionable even though they all relate to plaintiff's July 1995 enrollment in the membership benefits package and the allegedly unknowing and invalid authorization of the charges. Each transfer constitutes a new harm above and beyond the prior harm of a prior transfer and it amounts to an independent violation"; applying statutory interpretation and continuing violation theory and finding same result under either approach), *recommendation adopted by* 2015 WL 3633522 (D. Mass. June 4, 2015). *See also* O'Malley v. Kass Mgmt. Servs., Inc., 539 F. Supp. 3d 935, 941 (N.D. Ill. 2021) ("[E]ach preauthorized transfer in violation of § 1693e constitutes a discrete occurrence and a new violation accrues for purposes of the statute of limitations."); Soileau v. Midsouth

Bancorp Inc., 2019 WL 5296499, at *4 (W.D. La. July 19, 2019) (holding that, in the case of purely unauthorized transfers, the one-year limitations period is triggered by each individual transfer), *adopted*, 2019 WL 4296505 (W.D. La. Oct. 18, 2019); Katz v. JPMorgan Chase, N.A., 2015 WL 11251764, at *4 (S.D. Fla. Feb. 10, 2015) (statute of limitations for unauthorized transfers runs from date of transfer; here, when some of a series of transferred occurred less than a year before complaint was filed, claims regarding them are not barred).

208 O'Donnell v. Wachovia Bank, 2010 WL 1416986 (S.D. Fla. Apr. 7, 2010).

209 Sachs v. Citizens Fin. Grp., Inc., 2021 WL 3421710, at *4 (D. Conn. Aug. 4, 2021) (finding that claim was tolled during pendency of defendant's alleged investigation; "Such incompetence, at best, and purposeful deception, at worst, on the part of a trusted financial institution ought to constitute exceptional circumstances warranting equitable tolling of the statute.").

210 15 U.S.C. § 1693a(7)(B); 12 C.F.R. § 1005.3(c)(3).

211 *See* Brief for C.F.P.B. as Amici Curiae Supporting Plaintiffs, New York v. Citibank N.A., ___ F.Supp.3d ___, No. 24-CV-659 (JPO) (S.D.N.Y. Jan. 21, 2025), available at https://files.consumerfinance.gov/f/documents/cfpb_ny-v-citibank-amicus-brief_2024-05.pdf. *But see* Motion by C.F.P.B. to Withdraw It's Statement of Interest, available at https://files.consumerfinance.gov/f/documents/69_Motion_to_Withdraw_CFPBs_Statement_of_Interest.pdf.

212 Reg. E, 12 C.F.R. § 1005.33(a)(1).

213 U.C.C. § 4A-108 cmt. 1.

214 Reg. E, 12 C.F.R. § 1005.3(c)(3).

215 Reg. E, Official Interpretations § 1005.3(c)(3)-3.

216 77 Fed. Reg. 6194, 6211–6212 (Feb. 7, 2012).

217 *See* 15 U.S.C. §§ 1693q, 1693r (note that the EFTA does not preempt state law unless there is a conflict, and stronger protections under a state law are not deemed a conflict).

218 U.C.C. § 4A-202(a); Patco Constr. Co., Inc. v. People's United Bank, 684 F.3d 197, 208 (1st Cir. 2012) ("Under Article 4A, a bank receiving a payment order ordinarily bears the risk of loss of any unauthorized funds transfer."). *Cf.* Carter v. Wells Fargo Bank, N.A., 689 F. Supp. 3d 253, 256-58 (W.D. Va. Aug. 30, 2023) (denying motion to dismiss in case where consumer alleged that fraudster set up online banking access and then made four wire transfers from account; finding that neither party provided any authority that "allocates the risk of loss between a bank and its customer where a third party gains online access to an account without the knowledge of either the bank or the customer").

219 U.C.C. § 4A-202(a); Patco Constr. Co., Inc. v. People's United Bank, 684 F.3d 197, 208 (1st Cir. 2012) ("The bank may shift the risk of loss to the customer in one of two ways, one of which involves the commercial reasonableness of security procedures and one of which does not.").

220 U.C.C. § 4A-202(a). *See also* U.C.C. § 4A-203 cmt. 1.

221 U.C.C. § 4A-202(b). *See also* U.C.C. § 4A-201 (defining "security procedure").

222 U.C.C. § 4A-202(a). *See also* U.C.C. § 4A-203 cmt. 1.

For an analysis on agency determination, see Experi-Metal, Inc. v. Comerica Bank, 2011 WL 2433383, at *9 (E.D. Mich. June 13, 2011). *See also* Harborview Cap. Partners, L.L.C. v. Cross River Bank, 600 F. Supp. 3d 485, 491 (D.N.J. 2022) (transfer not unauthorized because Harborview's accounting manager completed the wire transfer forms, even though he was the victim of a scam where a hacker impersonated Harborview's CEO and instructed the account manager to make the transfers). *Cf.* PacMoore Products, Inc. v. Fifth Third Bank, 671 F. Supp. 3d 873, 876–877 (N.D. Ill. 2023) ("PacMoore affirmatively alleges—indeed, more particularly in this context, it admits—that Moore specifically directed [the controller at a related company owned by PacMoore] to authorize a wire transfer from PacMoore's account. If that didn't make [the controller] PacMoore's agent for that purpose, it's hard to know what would.").

223 Patco Constr. Co., Inc. v. People's United Bank, 684 F.3d 197, 208 (1st Cir. 2012) (quoting U.C.C. § 4A-203 cmt. 1).

224 U.C.C. § 4A-202(b).

225 U.C.C. § 4A-202(b). *See also* U.C.C. § 4A-201 (defining "security procedure").

226 U.C.C. § 4A-202(b). *See also* Essgeekay Corp. v. TD Bank, N.A., 2018 WL 6716830, at *4 (D.N.J. Dec. 19, 2018) ("The risk of a fraudulent payment order remains with TD, however, unless TD 'proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer.'").

227 UCC Article 4A defines a "security procedure" as: "[A] procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure. U.C.C. § 4A-201.

228 U.C.C. § 4A-203 cmt. 4. *See* Capten Trading Ltd. v. Banco Santander Int'l, 2018 WL 1558272, at *3 (S.D. Fla. Mar. 29, 2018) ("The commercial reasonableness of the bank's security procedure under the UCC 'is a question of law to be determined by considering' a number of factors: 'the wishes of the customer expressed to the bank; the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank; alternative security procedures offered to the customer; and security procedures in general use by customers and receiving banks similarly situated.'" (citing Fla. Stat. § 670.202(3))). *See also* Burge v. JPMorgan Chase Bank, N.A., 2023 WL 3778276, at *3–4 (S.D. Ind. Mar. 28, 2023) (in case involving phishing scam targeting vulnerable consumers, finding that bank failed to employ commercially reasonable security methods when it accepted unauthorized transfers).

229 U.C.C. § 4A-202(b); U.C.C. § 4A-203 cmt. 4 ("The concept of what is commercially reasonable in a given case is flexible.").

230 U.C.C. § 4A-202(c).

231 U.C.C. § 4A-203 cmt. 4.

232 *Id.*

233 Patco Constr. v. People's United Bank, 684 F.3d 197 (1st Cir. 2012).

234 *Id.* at 210–211.

235 *Id.* at 211.

236 *Id.*

237 Complaint, New York v. Citibank, N.A., Case No. 24-Civ-0659 (S.D.N.Y. filed Jan. 30, 2024), *available at* https://ag.ny.gov.

238 *Id.* at 19.

239 *Id.* at 4 ("Citi's data security policies and procedures, its efforts to monitor, secure against, and defeat fraudulent activity in real time, and its responses to obvious red flags of identity theft and account takeover are haphazard and ineffective. Among other things: a. Citi permits scammers to alter contact information, usernames, and passwords, upgrade accounts to access online wire transfer services, and consolidate funds across multiple accounts, all without subjecting to robust scrutiny scammers' subsequent

requests to initiate large-dollar wire transfers that will empty consumers' accounts; b. Citi fails to employ tools that effectively monitor and respond to anomalous consumer or account activity, such as wire transfers that are the first ever involving consumers' accounts, that are for out-of-the-ordinary amounts based on past activity, or that will effectively empty consumers' accounts; and c. even when alerted to fraudulent activity, Citi does not effectively secure consumers' bank accounts, which remain vulnerable to scammers.").

240 U.C.C. § 4A-201. *See also* Choice Escrow & Land Title, L.L.C. v. BancorpSouth Bank, 754 F.3d 611, 617 (8th Cir. 2014) ("[O]nly security measures 'established by agreement' are considered 'security procedures' for purposes of Article 4A; security measures implemented unilaterally by the bank are irrelevant."); U.C.C. § 4A-203 cmt. 3 ("Subsection (b)(i) [of § 402] assures that the interests of the customer will be protected by providing an incentive to a bank to make available to the customer a security procedure that is commercially reasonable. If a commercially reasonable security procedure is not made available to the customer, subsection (b) does not apply. The result is that subsection (a) applies and the bank acts at its peril in accepting a payment order that may be unauthorized.").

241 U.C.C. § 4A-201 cmt. 1.

242 *See, e.g.*, Plaintiff's Memorandum in Opposition to Motion to Dismiss for Failure to State a Claim, Lawrence v. Truist Bank, Case No. 1:22-cv-00200-RDA-JFA (E.D. Va. filed Mar. 25, 2022) (available online as companion material to this treatise); Complaint, Harvey v. Coinbase Inc., Case No. 3:22-cv-01606-JSC (N.D. Cal. filed Mar. 14, 2022) (available online as companion material to this treatise); Complaint, Lawrence v. Truist Bank (Vir. Cir. Ct. filed Dec. 13, 2021) (available online as companion material to this treatise). *See also* § 9.4.6.3.1, *supra* (discussing definition of "security procedure").

243 Choice Escrow & Land Title, L.L.C. v. BancorpSouth Bank, 754 F.3d 611, 617–618 (8th Cir. 2014) ("To synthesize the rule and its exception: in assessing commercial reasonableness, courts consider (1) security measures that the bank and customer agree to implement, and (2) security measures that the bank offers to the customer but the customer declines, as long as the customer agrees in writing to be bound by payment orders issued in its name in and accepted by the bank in accordance with another procedure."); U.C.C. § 4A-202(c).

244 U.C.C. § 4A-202(b).

245 U.C.C. § 1-201(b)(20). *See* Experi-Metal, Inc. v. Comerica Bank, 2011 WL 2433383, at *11 (E.D. Mich. June 13, 2011).

246 Choice Escrow & Land Title, 754 F.3d at 622 ("The good faith standard has both a subjective component—honesty in fact—and an objective component—the observance of reasonable commercial standards of fair dealing.").

247 *Id.* at 623.

248 *See* Experi-Metal, Inc. v. Comerica Bank, 2011 WL 2433383, at *11 (E.D. Mich. June 13, 2011) (citing *In re* Jersey Tractor Trailer Training, Inc., 580 F.3d 147, 156 (3d Cir. 2009)); Maine Family Fed. Credit Union v. Sun Life Assurance Co. of Canada, 727 A.2d 335, 340 (Me. 1999).

249 Experi-Metal, Inc. v. Comerica Bank, 2011 WL 2433383, at *11 (E.D. Mich. June 13, 2011) (citing U.C.C. § 1-201 cmt. 20, which states: "Although fair dealing is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction.").

250 Essgeekay Corp. v. TD Bank, N.A., 2018 WL 6716830, at *4 (D.N.J. Dec. 12, 2018) (quoting Choice Escrow & Land Title v. Bancorp South Bank, 754 F.3d 611, 623 (8th Cir. 2014)).

251 Choice Escrow & Land Title v. Bancorp South Bank, 754 F.3d 611, 623 (8th Cir. 2014).

252 Experi-Metal, Inc. v. Comerica Bank, 2011 WL 2433383, at *13 (E.D. Mich. June 13, 2011) ("[W]hether Comerica acted in good faith does not simply 'hinge[ ] upon the bank's motives when it accepted the wire transfer payment orders.' Comerica was required to present evidence from which this Court could determine what the 'reasonable commercial standards of fair dealing' are for a bank responding to a phishing incident such as the one at issue and thus whether Comerica acted in observance of those standards. Comerica presented no such evidence and thus it has not satisfied its burden of showing that it satisfied the objective prong of the 'good faith' requirement."). *See also* Burge v. JPMorgan Chase Bank, N.A., 2023 WL 3778276, at *3 (S.D. Ind. Mar. 28, 2023) (under Indiana's version of UCC, payment order is effective only if "*the bank* proves that it accepted the payment order in good faith and in compliance" with commercially reasonable method of providing security against unauthorized payment orders; "[T]he bank bears the burden of proving good faith when an unauthorized payment order is accepted, not the customer. And even if a bank acts in good faith, the text of the statute also indicates the bank must prove that it employed commercially reasonable security measures.").

253 *See* Berry v. Regions Fin. Corp., 507 F. Supp. 3d 972, 981–982 (W.D. Tenn. 2020) (plaintiffs entered into a contract to purchase real property then received fraudulent emails sent by a scammer instructing wire transfer to account not belonging to intended beneficiary; because plaintiff's signature was on the wire request, the wire transfer was authorized and plaintiffs had no claim against the bank under the UCC).

254 *Id. See also* Harborview Cap. Partners, L.L.C. v. Cross River Bank, 600 F. Supp. 3d 485, 491 (D.N.J. 2022) (transfer not unauthorized because Harborview's accounting manager completed the wire transfer forms, even though he was the victim of a scam where hacker impersonated Harborview's CEO and instructed the account manager to make the transfers); Wellton Int'l Express v. Bank of China (Hong Kong), 612 F. Supp. 3d 358, 364 (S.D.N.Y. 2020) (computer hacker pretending to be from Welton Express emailed Welton International Express with instructions to wire money to a Wells Fargo bank account; name of beneficiary correct but account number did not belong to Welton Express).

255 U.C.C. § 4A-207(b), (c) cmt. 2. *See* Studco Bldg. Sys. U.S., L.L.C. v. 1st Advantage Fed. Credit Union, 509 F. Supp. 3d 560, 568 (E.D. Va. 2020) ("[I]f the bank receives a payment order that identifies the beneficiary by name and account number, the bank may rely on the account number even if the number and name identify different persons.").

256 *Id. See* Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A., 795 Fed. Appx. 741, 748 (11th Cir. 2019) ("Beneficiary's Bank has no duty to determine whether there is a conflict, and it may rely on the number as the proper identification of the beneficiary of the order."); Harrington v. PNC Bank, N.A., 684 F. Supp. 3d 631, 634 (E.D. Mich. 2023) ("When a payment order includes the account name and account number, banks have no duty to check if the account name and number match; they are free to rely on the account number alone to process the transfer."); Studco Bldg. Sys. U.S., L.L.C. v. 1st Advantage Fed. Credit Union, 509 F. Supp. 3d 560, 568 (E.D. Va. 2020) ("[A] bank may accept a wire transfer relying solely on the number as the proper identification of the beneficiary of the order and it has no duty to determine whether there is a conflict *unless* the bank actually knows that the number and the name identify different accounts." (citing U.C.C. § 4A-207(b))); Donmar Enters., Inc. v. S. Nat'l Bank,

828 F. Supp. 1230, 1239–1240 (W.D.N.C. 1993), *aff'd*, 64 F.3d 944 (4th Cir. 1995).
257 U.C.C. § 4A-207(b)(1) cmt. 2.
258 If the beneficiary bank knows the name and account number belong to different persons, then acceptance of the payment order cannot occur unless the person paid by the beneficiary bank is the intended beneficiary. U.C.C. § 4A-207(b)(2).
259 *See, e.g.*, McLaughlin v. Comerica Bank, 2022 WL 16040109, at *4 (E.D. Mich. Apr. 18, 2022) (alleging that the request to cancel the wire transfer occurred approximately fifteen minutes after the plaintiff left the Comerica branch where she filled out the wire transfer payment order), *related case*, 2023 WL 4139623 (E.D. Mich. June 22, 2023) (granting summary judgment for defendant where payment was accepted before consumer called to cancel, and parties did not enter into an effective oral agreement for cancellation after acceptance of payment). *See also* Cosmopolitan Title Agency, L.L.C. v. JP Morgan Chase Bank, N.A., 649 F. Supp. 3d 459 (E.D. Ky. 2023) (alleging that company submitted a wire transfer recall within ten minutes after wiring funds and discovering that it had been defrauded); Jakob v. JP Morgan Chase Bank, N.A., 639 F. Supp. 3d 406 (E.D.N.Y. 2022) (denying motion to dismiss breach of contract claim where plaintiff alleged that he requested a cancellation "immediately" and that request should have been honored under Wire Transfer Agreement).
260 *Compare* U.C.C. § 4A-103(a)(5) (defining "sender" as "the person giving the instruction to the receiving bank" in a payment order), *with* U.C.C. § 4A-104(c) (defining "originator" as "the sender of the first payment order in a funds transfer").
261 U.C.C. § 4A-211(a).
262 *Id.*
263 U.C.C. § 4A-211(b). *See* Fischer & Mandell, L.L.P. v. Citibank, N.A., 632 F.3d 793, 802 (2d Cir. 2011) (cancellation order not effective where receiving bank had already executed the payment order); Sunset Cmty. Health Ctr., Inc v. Capital One Fin. Corp., 652 F. Supp. 3d 1020 (D. Minn. 2023) (plaintiff successfully pleaded claim based on its unilateral cancellation of payment order); McLaughlin v. Comerica Bank, 2023 WL 4139623 (E.D. Mich. June 22, 2023) (granting summary judgment for defendant where payment was accepted before consumer called to cancel, and parties did not enter into an effective oral agreement for cancellation after acceptance of payment).
264 U.C.C. § 4A-211(c). *But see* U.C.C. § 4A-211(h) (a funds-transfer system rule is not effective if it conflicts with U.C.C. § 4A-211(c)(2), which is when a payment order has already been accepted by the beneficiary's bank).
265 U.C.C. § 4A-211(c)(1).
266 *See* McLaughlin v. Comerica Bank, 2022 WL 16040109 (E.D. Mich. Apr. 18, 2022), related case, 2023 WL 4139623 (E.D. Mich. June 22, 2023) (granting summary judgment for defendant where payment was accepted before consumer called to cancel, and parties did not enter into an effective oral agreement for cancellation after acceptance of payment).
267 Kirschner v. Wells Fargo Bank, 2021 WL 5545957, at *3 (E.D. Mich. July 19, 2021) (citing Cumis Ins. Soc., Inc. v. Citibank, N.A., 921 F. Supp. 1100, 1105 (S.D.N.Y. 1996) (decision whether to return mistakenly transferred funds was within the receiving bank's "sole discretion" under U.C.C. § 4A-211)); Cmty. Bank, F.S.B. v. Stevens Fin. Corp., 966 F. Supp. 775, 786 (N.D. Ind. 1997) ("HomeSid's attempt to cancel or amend the payment order is not effective unless Community Bank, the receiving bank, agrees to the change—something Community is not required to do regardless of the circumstances."). *See also* Sunset Cmty. Health Ctr., Inc v. Capital One Fin. Corp., 652 F. Supp. 3d 1020, 1026–1027 (D. Minn. 2023) (UCC gives beneficiary bank "broad discretion" to cancel transfers; here, it was "not dispositive that defendant allegedly made statements that it would return the funds because consent may be revoked" and defendant had since indicated that it did not consent to return of remaining funds).
268 U.C.C. § 4A-211(f).
269 U.C.C. § 4A-211(c)(2).
270 *Id.*
271 Blue Flame Med. L.L.C. v. Chain Bridge Bank, N.A., 563 F. Supp. 3d 491, 503 (E.D. Va. 2021), *aff'd*, 2023 WL 2570971 (4th Cir. Mar. 20, 2023), *cert. denied*, 144 S. Ct. 195 (2023).
272 Blue Flame Med. L.L.C. v. Chain Bridge Bank, N.A., 563 F. Supp. 3d 491, 503 (E.D. Va. 2021) ("Although Chain Bridge did agree to return the funds, none of the specified mistakes applies. Therefore, defendant Chain Bridge's obligation to its customer, Blue Flame, cannot be nullified through the cancellation process."), *aff'd*, 2023 WL 2570971 (4th Cir. Mar. 20, 2023), *cert. denied*, 144 S. Ct. 195 (2023).
273 *Compare* U.C.C. § 4A-304, *with* U.C.C. § 4-406
274 U.C.C. § 4A-304 ("If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Section 4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.").
275 U.C.C. § 4A-204(a).
276 U.C.C. § 4A-501(a) states: "Except as otherwise provided in this Article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party."
277 *See also* U.C.C. § 4A-505 cmt. 1 ("This section is in the nature of a statute of repose for objecting to debits made to the customer's account. A receiving bank that executes payment orders of a customer may have received payment from the customer by debiting the customer's account with respect to a payment order that the customer was not required to pay. For example, the payment order may not have been authorized or verified pursuant to Section 4A-202 or the funds transfer may not have been completed. In either case the receiving bank is obliged to refund the payment to the customer and this obligation to refund payment cannot be varied by agreement. Section 4A-204 and Section 4A-402. Refund may also be required if the receiving bank is not entitled to payment from the customer because the bank erroneously executed a payment order. Section 4A-303. A similar analysis applies to that case. Section 4A-402(d) and (f) require refund and the obligation to refund may not be varied by agreement. Under 4A-505, however, the obligation to refund may not be asserted by the customer if the customer has not objected to the debiting of the account within one year after the customer received notification of the debit.").
278 U.C.C. § 4A-204 cmt. 2 ("The only consequence of a failure of the customer to perform this duty is a loss of interest on the refund payable by the bank. A customer that acts promptly is entitled to interest from the time the customer's account was debited or the customer otherwise made payment. . . . If the customer fails to perform the duty, no interest is recoverable for any part of the period before the bank learns that it accepted an unauthorized order. But the bank is not entitled to any recovery from the customer based on negligence for failure to inform the bank. Loss of interest is in the nature of a penalty on the customer designed to provide an incentive for the customer to police its account. There is no intention to impose a duty on the customer that might result in shifting loss from the unauthorized order to the customer.").
279 *See* U.C.C. § 4A-304 cmt. 1 ("This section is identical in effect to Section 4A-204 which applies to unauthorized orders issued in the name of a customer of the receiving bank. The

rationale is stated in Comment 2 to Section 4A-204.").
280 Rodriguez v. Branch Banking & Tr. Co., 46 F.4th 1247, 1255 (11th Cir. 2022) (overturning lower court's determination that the one-year period can be varied by agreement); JESCO Constr. Corp. v. Wells Fargo Bank, N.A., 579 F. Supp. 3d 827 (S.D. Miss. 2022) (one-year notice period for reporting fraudulent transactions and obtaining a refund of the principal amount of the transfers could not be modified by agreement under Mississippi's version of the UCC). *See also* Elliot v. First Tenn. Bank, N.A., 2007 WL 9706178, at *4 (W.D. Tenn. Feb. 7, 2007) ("[T]his Court agrees with New York State's high court that '[t]he period of repose in section [4A-505] is essentially a jurisdictional attribute of the rights and obligations contained in [section 4A-204]. To vary the period of repose would, in effect, impair the customer's section [4A-204] right to a refund, a modification that section [4A-204] forbids.'" (citing Regatos v. North Fork Bank, 5 N.Y.3d 395, 403 (N.Y. 2005))).
281 Priority Staffing, Inc. v. Regions Bank, 2013 WL 5462239, at *3 (W.D. La. Sept. 30, 2013) ("Louisiana Revised Statute 10:4A501(a) provides, 'Except as otherwise provided in this Chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.' Nowhere in Title 10, Section 4A does the law disallow a contractual limitation of the 1-year time period for disputing payment orders.").
282 *Id.* ("PSI argues that any limitation on the one-year time period should be void pursuant to La. R.S. 10:4A-202(f), which states: 'Except as provided in this Section and in R.S. 10:4A-203(a)(1), rights and obligations arising under this Section or R.S. 10:4A-203 may not be varied by agreement.' That statute is irrelevant in this instance however. It involves the authenticity and verification of payment orders, not a disputed transfer. Section 505 is on point and permits contractual limitation of the 1-year time period for customers to raise disputes. The facts here are similar to the circumstances in a Minnesota case involving the Minnesota law which is similar to Louisiana's Section 505. There, the court upheld the contractual agreement which reduced the one-year dispute period to 30-days." (citing Bonnema v. Heritage Bank N.A. Willmar, 2002 WL 1363985 (Minn. Ct. App. June 19, 2002))).
283 Bonnema v. Heritage Bank N.A. Willmar, 2002 WL 1363985, at *4–5 (Minn. Ct. App. June 19, 2002).
284 *Id.* at *4.
285 *Id.* at *4–5 (Minn. Ct. App. June 19, 2002) ("Article 4A bars a customer from asserting that a receiving bank is not entitled to retain funds received pursuant to a payment order if the customer fails to notify the receiving bank of its objection to the payment order within one year of the date that the customer received notice of the order."); Hedged Inv. Partners, L.P. v. Norwest Bank Minn., N.A., 578 N.W.2d 765, 769 n.1 (Minn. Ct. App. 1998) ("Article 4A precludes a customer from claiming that a bank is not entitled to retain payment unless the claim is made within one year of notification.").
286 Bonnema v. Heritage Bank N.A. Willmar, 2002 WL 1363985, at *5 (Minn. Ct. App. June 19, 2002) ("Like Article 4, Article 4A also provides that the parties may vary by agreement 'the rights and obligations of a party to a funds transfer.'").
287 *Id.* at *3.
288 *Id.*
289 *Id.* at *5. ("either the 30-day account limitation or the UCC statute of limitations regarding funds transfers barred Steffes's conversion claim").
290 For a detailed discussion on this topic, *see* National Consumer Law Center, Consumer Banking and Payments Law (7th ed. 2024), Section 9.4.10, *updated at* www.library.ncle.org
291 Wright v. Citizen's Bank of E. Tenn., 640 Fed. Appx. 401, 406 (6th Cir. 2016) ("Article 4A displaces common-law claims relating to wire transfers if the claims arise out of a situation addressed by Article 4A or attempt to create rights, duties, or liabilities inconsistent with Article 4A."); Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 89–90 (2d Cir. 2010) ("For Article 4A purposes, the critical inquiry is whether its provisions protect against the type of underlying injury or misconduct alleged in a claim."); Imperium Logistics, L.L.C. v. Truist Fin. Corp., 686 F. Supp. 3d 600, 608 (E.D. Mich. 2023) (where plaintiffs' conversion claim rested on defendant's knowing acceptance of a fraudulent order, the claim was not inconsistent with or contrary to the UCC; "Moreover, the UCC does not speak to what rights a third party has in such a situation, so the claims do not 'arise out of a situation addressed' by it."); Simple Helix, L.L.C. v. Relus Techs., L.L.C., 493 F. Supp. 3d 1087, 1105 (N.D. Ala. 2020); Koss Corp. v. Am. Exp. Co., 309 P.3d 898, 906 (Ariz. Ct. App. 2013), *as amended* (Sept. 3, 2013) ("[T]he U.C.C. does not necessarily preempt claims based on additional actions that occur outside the funds transfer process or exceed the allocation of liability under Article 4A provided the application of other law is not inconsistent with Article 4A.").
292 *See* Fed. Trade Comm'n, How To Spot, Avoid, and Report Fake Check Scams, *available at* https://consumer.ftc.gov.
293 To be called a negotiable instrument, a note or draft must have seven characteristics:

- 1. **A writing that is signed.** U.C.C. §§ 3-104(a), 3-103(6), 3-103(9).
- 2. **Unconditional Promise or Order to Pay.** U.C.C. §§ 3-104(a), 3-106. Note that checks are still considered negotiable instruments even if "to the order of" language is not present. U.C.C. §§ 3-104(c), 3-104(f).
- 3. **A fixed amount.** U.C.C. §§ 3-104(a), 3-112.
- 4. **Of Money.** U.C.C. §§ 3-104(a), 3-107.
- 5. **Payable to bearer or to order.** U.C.C. §§ 3-104(a)(1), 3-109, 3-110 (but "to the order of" language can be omitted from a check and the check will still be a negotiable instrument. U.C.C. § 3-104(c)).
- 6. **Payable on demand or at a definite time.** U.C.C. §§ 3-104(a)(2), 3-108.
- 7. **No other undertaking or instruction.** U.C.C. § 3-104(a)(3).

294 U.C.C. §§ 3-103(a)(8) (defining an "order" as a written instruction to pay), 3-103(a)(12) (defining a "promise" as a written undertaking to pay money). *See also* U.C.C. § 3-104 cmt. 1.
295 U.C.C. § 3-104(e).
296 U.C.C. § 3-104(e); U.C.C. § 3-103(a)(9) (pre-2002); U.C.C. § 3-103(a)(8) (post-2002).
297 U.C.C. § 3-104(f) (" 'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as 'money order.' "); U.C.C. § 3-103(A)(6) (pre-2002); U.C.C. § 3-103(A)(8) (post-2002). "'Bank' means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union or trust company." U.C.C. § 4-105(1).
298 U.C.C. § 3-103(a)(8) (defining "order" to mean "a written instruction to pay money signed by the person giving the instruction").
299 Regulation CC defines both "original check"—12 C.F.R. § 229.2(ww)—and "substitute check"—12 C.F.R. § 229.2(aaa)—in terms that include the word "paper." *Cf.* § 13.4.2, *infra* (discussing the E-Sign Act, 15 U.S.C. § 7001(c)(1), which governs when an electronic record may substitute for one required

to be in "writing"—that is, on paper).
300 Ana R. Cavazos-Wright, Fed. Reserve Bank of Atlanta, An Examination of Remotely Created Checks 12–13 (2009), *available at* www.frbatlanta.org.
301 U.C.C. § 4-104(a)(9).
302 U.C.C. § 1-103(b). The official comments address the meaning of § 1-103(b):
[T]he Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies. The language of subsection (b) is intended to reflect both the concept of supplementation and the concept of preemption.
U.C.C. § 1-103 cmt. 2.
303 Sterling Fire Restoration, Ltd. v. Wachovia Bank, 78 U.C.C. Rep. Serv. 2d 898 (N.D. Ill. 2012); Estate of Blaskowitz v. Dover Fed. Credit Union, 92 U.C.C. Rep. Serv. 2d 1052 (Del. Super. Ct. 2017) (negligence claim displaced but not breach of contract claim); Hardin Compounding Pharmacy, L.L.C. v. Progressive Bank, 125 So. 3d 493 (La. Ct. App. 2013) (ruling conversion claim under U.C.C. § 3-420 displaced breach of contract claim raised by accountholder (payee) against its bank (depository bank)). *See also* Advance Dental Care, Inc. v. Suntrust Bank, 816 F. Supp. 2d 268 (D. Md. 2011) (finding that plaintiff/payee's common law negligence claim was displaced because the UCC gave the payee a right to bring a conversion action); *In re* MERV Props., L.L.C., 2015 WL 2105884, at *25 (Bankr. E.D. Ky. May 4, 2015) (breach of contract claim displaced by UCC conversion claim), *aff'd on other grounds*, 539 B.R. 516 (B.A.P. 6th Cir. 2015); Braden Furniture Co. v. Union State Bank, 109 So. 3d 625 (Ala. 2012) (affirming summary judgment for depository bank and against the drawer on common law negligence claim alleging that drawer's employee wrote unauthorized checks listing no payee; deciding that drawee bank has an Article 4 duty to recredit, but that only drawee bank can proceed against depository bank; ruling that Article 4 displaces the common law); Dixon, Laukitis & Downing, P.C. v. Busey Bank, 993 N.E.2d 580 (Ill. App. Ct. 2013) (finding no common law duty of depository bank to its customer to inspect a check for genuineness or remind customer that it bears the risk of loss before final settlement of a deposited check; ruling that neither the account agreement between a law firm and its bank nor Article 4 created a duty to inspect for counterfeit checks; finding that law firm had transferred funds based on deposited check before final settlement at its own risk). *Cf.* EngineAir, Inc. v. Centra Credit Union, 107 N.E.3d 1061, 1070–1071 (Ind. Ct. App. 2018) (no duty of care owed by depository bank under U.C.C. § 4-406 to non-customer company whose employee forged its signature on checks payable to her and deposited them into her bank account; depository bank not in a position to know that drawer's signature was forged).
304 U.C.C. § 1-103(b) ("Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.").
305 *See, e.g.*, Perlberger Law Assocs., P.C. v. Wells Fargo Bank, 552 F. Supp. 3d 490, 497 (E.D. Pa. 2021) (declining to dismiss case as record is limited and it is unclear whether the UCC would redress the totality of plaintiff's breach of contract claim, which also includes allegations that bank failed to employ its fraud detection practices and permitted plaintiff to wire funds to a Nigerian bank; "[p]reemption is a fact-intensive inquiry, and at this juncture I cannot conclude [p]laintiff's admittedly unusual breach of contract claim is fully redressable by the [UCC]").
306 *See, e.g.*, Branch Banking & Tr. Co. v. Witmeyer, 2011 WL 3297682, at *8 (E.D. Va. Jan. 6, 2011) ("Because such communications are not addressed with specificity by the U.C.C., common law and equitable principles supplement the U.C.C. and govern the legal rights and responsibilities that apply to such cases."); Donovan v. Bank of Am., 574 F. Supp. 2d 192, 200–201, 203 (D. Me. 2008) (explaining that, to the extent plaintiff's common law negligence claims relate to defendant's handling of checks, the claims are displaced by the UCC; yet considering other common law tort claims because they were outside the scope of the UCC); Wells Fargo Bank, N.A. v. FSI, Fin. Servs., Inc., 127 Cal. Rptr. 3d 589 (Cal. Ct. App. 2011) (finding that depositor could bring common law claim against a bank when customer reasonably relies on bank's "inaccurate representations with regard to the status of a check," and based on that suffers a loss from writing checks that are subsequently dishonored, but limiting damages to the customer's overdraft fees); Holcomb v. Wells Fargo Bank, 66 Cal. Rptr. 3d 142, 147 (Cal. Ct. App. 2007) ("Thus, absent displacement by the CUCC, nothing bars a depositor from bringing an action for negligent misrepresentation or negligence against a bank."); First Nat'l Bank v. Ulibarri, 557 P.2d 1221 (Colo. App. 1976) (holding that depository bank that assured depositor that check had cleared was estopped from asserting its rights against the depositor); First Ga. Bank v. Webster, 308 S.E.2d 579, 581 (Ga. Ct. App. 1983) ("Thus, where the Code provides a comprehensive remedy for parties to a transaction, a common law action would be barred. While the U.C.C. provides a remedy for the negligent violation of the duties it imposes, it does not provide relief from common law negligence such as is alleged to have occurred in the present case. Therefore, appellee was entitled to bring a common law negligence action against the bank."); Chicago Title Ins. Co. v. Allfirst Bank, 905 A.2d 366, 377 (Md. 2006) ("In our view, to conclude that the prohibition of one tort action by the UCC means the prohibition of *all* tort actions is unsupported by Maryland law."); Avanta Fed. Credit Union v. Shupak, 223 P.3d 863, 871 (Mont. 2009) ("A cause of action for damages based on principles of common law or equity . . . may be brought against the bank."); Valley Bank of Ronan v. Hughes, 147 P.3d 185, 191 (Mont. 2006) ("Because such communications are not addressed with specificity by the U.C.C., common law and equitable principles supplement the U.C.C. and govern the legal rights and responsibilities that apply to [the bank's] representations to [the individual], upon which [the individual] relied."); Cumis Mut. Ins. Soc'y, Inc. v. Rosol, 73 U.C.C. Rep. Serv. 2d 611 (N.J. Super. Ct. App. Div. 2011) (finding that payee of a phony check could equitably estop depository bank from asserting its provisional credit rights under the UCC if depository bank "represented that . . . check had actually cleared or led [depositor] to a reasonable belief that it had"). *Cf.* Simmons, Morris & Carroll, L.L.C. v. Capital One, N.A., 144 So. 3d 1207 (La. Ct. App. 2014) (no dispute that bank customer's claims of negligent representation and detrimental reliance could be raised against its bank, but ruling that bank customer (law firm) was in best position to protect itself against check scam by checking its bank account through online access to determine whether the foreign check had cleared, even though bank employee had advised law

firm that check had cleared before the firm wired money from its account; noting the elements of the scam that should have raised concerns for the firm).
307 *See, e.g.*, Murray v. Bank of Am., 580 S.E.2d 194 (S.C. Ct. App. 2003) (finding that bank was negligent in opening account for identity thief). *See also* Fed. Ins. Co. v. Citizens Bank, 2012 WL 1565238 (D.R.I. 2012) (allowing plaintiff to proceed with a negligence claim against a bank that repeatedly allowed an embezzler to deposit checks made out to corporations in her personal account). By contrast, negligence in handling of a check that contributes to an alteration or a forgery is addressed in U.C.C. § 3-406, so would not be subject to common law negligence rules.
308 *See, e.g.*, Dawda, Mann, Mulcahy & Sadler, P.L.C. v. Bank of Am., N.A., 62 F. Supp. 3d 651, 654–658 (E.D. Mich. 2014) (applying Michigan common law and refusing to dismiss claim based on breach of this duty; bank that breaches this duty cannot be a holder in due course).
309 *In re* Clear Advantage Title, Inc., 438 B.R. 58, 65 (Bankr. D.N.J. 2010). *See also* Fischer & Mandell v. Citibank, 632 F.3d 793 (2d Cir. 2011) (UCC does not preempt breach of contract claim).
310 U.C.C. § 4-401(a).
311 U.C.C. § 4-401 cmt. 1.
312 U.C.C. § 4-401 cmt. 1.
313 U.C.C. § 4-401(a).
314 *See, e.g.*, Bank of Am. v. Amarillo Nat'l Bank, 156 S.W.3d 108 (Tex. App. 2004) (finding that a check was not an altered check of the drawer's when someone took the drawer's original check, made a copy, changed the payee, amount, and date, and deposited it in a depository bank).
315 *See* Interbank of N.Y. v. Fleet Bank, 730 N.Y.S.2d 208, 211 (N.Y. Civ. Ct. 2001) (pre-authorized check that was not actually authorized by the drawer would be treated as any other check that contains a forged drawer's signature), *aff'd*, 781 N.Y.S.2d 393 (N.Y. App. Term 2004).
316 U.C.C. § 3-420(a); Conder v. Union Planters Bank, 384 F.3d 397, 399 (7th Cir. 2004); 300 Broadway Healthcare Ctr., L.L.C. v. Wachovia Bank, N.A., 39 A.3d 248 (N.J. Super. Ct. App. Div. 2013).
317 U.C.C. § 4-401 cmt. 1 ("An item containing a . . . forged indorsement is not properly payable."). *See* Lawyer's Fund for Client Prot. of the State of New York v. Bank Leumi Tr. Co. of New York, 727 N.E.2d 563 (N.Y. 2000) (a settlement proceeds check was not properly payable due to the forged signature of one of the payees; permitting recovery of the face amount of the check even though innocent payee was entitled to only two-thirds of proceeds).
318 The bank statement rule, discussed below, does not require notification of forged indorsements. *See* U.C.C. § 4-406(c) (requiring customers to "exercise reasonable promptness in examining the [bank account] statement or the items [checks] to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized."
319 *But see* Kaskel v. N. Tr. Co., 328 F.3d 358 (7th Cir. 2003); Morof v. United Missouri Bank, Warsaw, 2009 WL 1260015, at *7 (E.D. Mich. Apr. 30, 2009) (applying the "intended payee" defense under Michigan UCC as defined in *Pamar Enterprises, Inc.*), *aff'd*, 391 Fed. Appx. 534 (6th Cir. 2010); Pamar Enters., Inc. v. Huntington Banks of Michigan, 581 N.W.2d 11, 17 (Mich. Ct. App. 1998) (intended payee defense provides that drawee bank is not liable to drawer of a check for improper payment if the "proceeds of the check reach the person the drawer intended to receive them and . . . the drawer suffers no loss proximately caused by the drawee's improper payment"). In *Kaskel*, the drawer wrote a check to a payee, who did not indorse the check but still sent the check to an individual. The individual deposited the check in his own account and the check was finally paid. The drawer complained that the drawee bank should not have paid the check because the payee's indorsement was missing. The court refused to force the drawee bank to recredit the drawer's account, holding that the drawer had suffered no loss because she would have had to make good on the check in any event and ratified the transfer of the money to the payee's transferee. The author of this article believes the court's ruling is incorrect.
320 U.C.C. §§ 4-111, 4-406 cmt. 5 ("Section 4-111 sets out a statute of limitations allowing a customer a three-year period to seek a credit to an account improperly charged by payment of an item bearing an unauthorized indorsement."). A few states have included a non-uniform provision in their version of the bank-statement rule that prohibits a customer from seeking recredit for checks paid over a forged indorsement if the forgery is not reported to the drawee bank within a particular period of time. *See* Ala. Code § 7-4-406(f) (one year); Ga. Code Ann. § 11-4-406(f) (one year); Or. Rev. Stat. § 74.4060(6) (eighteen months).
321 U.C.C. § 3-407(a).
322 U.C.C. §§ 3-407(b), (c) cmt. 2, 4-401(d)(1).
323 *Id.*
324 Note that there may be an exception to this rule if the customer's negligence contributed to the alteration or if any of the other liability-shifting provisions apply.
325 U.C.C. §§ 3-407(c) cmt. 2, 4-401(d)(2).
326 U.C.C. § 3-407(a)(ii).
327 U.C.C. § 4-401(d)(2).
328 U.C.C. § 4-406(c).
329 U.C.C. § 3-407(c) cmt. 2. Note that an incomplete check that is later altered through an "unauthorized addition of words or numbers or other change . . . relating to the obligation of a party" is properly payable out of the drawer's account according to its terms as completed. U.C.C. § 3-407(a)(ii), (c), cmt. 2.
330 U.C.C. § 4-406(c). *See* Chesler v. Dollar Bank, Fed. Sav. Bank, 951 N.E.2d 1098 (Ohio Ct. App. 2011) (finding that drawer who examined bank statement approximately forty-five days after the end of the time period to which the statement applied examined bank statement with reasonable promptness). *Cf.* Forcht Bank, N.A. v. Gribbins, 87 U.C.C. Rep. Serv. 2d 31, 2015 WL 4039612, at *3 (Ky. Ct. App. July 2, 2015) (bank statement rule not applicable when customer reported forgeries before receiving relevant bank statement).
331 U.C.C. § 4-406(c). See Dean v. Commonwealth Bank & Tr. Co, 77 U.C.C. Rep. Serv. 2d 290 (Ky. Ct. App. 2012) (finding that employer should reasonably have discovered the employee's unauthorized transactions even though the employee was "intercepting" the monthly bank statements).
332 U.C.C. §3-403(b).
333 Simi Mgmt. Corp. v. Bank of Am., N.A., 930 F. Supp. 2d 1082 (N.D. Cal. 2013); Edward Fineman Co. v. Super. Ct. of Los Angeles Cty., 78 Cal. Rptr. 2d 478 (Cal. Ct. App. 1998) ("[C]hecks lacking . . . a second required signature fall within the classification of items that must be discovered and reported pursuant to section 4406, subdivision (f)").
334 *See* Navigators Specialty Ins. Co. v. California Bank & Tr., 810 Fed. Appx. 498, 499 (9th Cir. 2020) ("As a practical matter, there is a significant difference between a forged check and a forged endorsement. A bank customer can be reasonably expected to discover a forged signature on the front of the check when she receives a copy of the returned check along with the bank statement. In contrast, she presumably will not know if there is a forged endorsement on the back of the check because

an endorsement is the payee's signature, not hers."). *See also* Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 963–964 (5th Cir. 2012) (customer could not have discovered missing endorsement on cashier's check through a review of its statement as a cashier's check is drawn on a bank, not on a customer's account, and is not reflected in the customer's bank statement).

335 U.C.C. § 4-406 cmt. 1, ¶ 3.

336 *Id.*

337 Horton v. JP Morgan Chase Bank, N.A., 94 U.C.C. Rep. Serv. 2d 889, 2018 WL 494776 (Tex. App. Jan. 22, 2018); Robinson Motor Xpress, Inc. v. HSBC Bank, USA, 826 N.Y.S.2d 350 (N.Y. Sup. Ct. App. Div. 2006) ("[T]he critical element of the notice is not its form, but the specificity with which it identifies the allegedly fraudulent items.") (citations omitted); Hatcher Cleaning Co. v. Comerica Bank-Texas, 995 S.W.2d 933 (Tex. App. 1999) (report need not be in writing).

338 Simi Mgmt. Corp. v. Bank of Am., 930 F. Supp. 2d 1081, 1094 (N.D. Cal. 2013) (customer "must alert the bank to the specific checks bearing the unauthorized signature," not a nebulous belief of foul play); Envtl. Equip. & Serv. Co. v. Wachovia Bank, N.A., 741 F. Supp. 2d 705, 720 (E.D. Pa. 2010) (same); Watseka First Nat'l Bank v. Horney, 686 N.E.2d 1175, 1179–1180 (Ill. App. Ct. 1997) ("Walker's handwritten note simply asks the Bank for copies of checks and bank statements from 1983 to 1987 because they suspected forgery. . . . He did not give the Bank a list of the forged checks and did not ask the Bank to restore the funds or pursue repayment of the forged checks through normal banking channels."); Knight Commc'ns, Inc. v. Boatmen's Nat'l Bank of St. Louis, 805 S.W.2d 199, 203–204 (Mo. Ct. App. 1991); First Place Computers, Inc. v. Sec. Nat'l Bank of Omaha, 558 N.W.2d 57 (Neb. 1997) (objection to a single check and expressing general concerns about irregularities in the account was not specific notice about other checks); Villa Contracting Co., Inc. v. Summit Bancorporation, 695 A.2d 762 (N.J. Super. Ct. Law Div. 1996) (telling bank employees that some of the company's checks had been forged was insufficient, as there was no evidence that the company ever provided defendant bank with the list of specific forged checks); Robinson Motor Xpress, Inc. v. HSBC Bank, USA, 826 N.Y.S.2d 350 (N.Y. Sup. Ct. App. Div. 2006) ("[T]he critical element of the notice is not its form, but the specificity with which it identifies the allegedly fraudulent items.") (citations omitted); Hatcher Cleaning Co. v. Comerica Bank—Texas, 995 S.W.2d 933, 938 (Tex. App. 1999) (blanket stop payment orders were not notice; factual issue remained as to whether requests for copies, with suspect check numbers circled, was sufficient notice; "both the check and the account should be specifically identified. General references to a possible [crime] are not sufficient 'reports' or 'items' under former section 4.406").

339 U.C.C. § 1-205 (pre-2001); U.C.C. § 1-204(2) (2001); U.C.C. § 4-406 cmt. 2 (see last sentence).

340 U.C.C. § 4-406(f).

341 U.C.C. § 4-406(f). *See, e.g.*, Kaplan v. JP Morgan Chase Bank, N.A., 86 U.C.C. Rep. Serv. 2d 660, 2015 WL 2358240, at *8 (N.D. Ill. May 12, 2015) (U.C.C. § 4-406 creates a statutory prerequisite to filing suit); Dean v. Commonwealth Bank & Tr. Co., 77 U.C.C. Rep. Serv. 2d 290 (Ky. Ct. App. 2012) (finding that duty to discover and report an unauthorized signature is not a statute of limitations, but a "pre-condition to a customer's lawsuit against a bank," and bars both UCC and common law claims); Royal Arcanum Hosp. Ass'n of Kings Cty., Inc. v. Hernkind, 950 N.Y.S.2d 726 (N.Y. Sup. Ct. 2012) (table; text available at 2012 WL 1087679).

342 *Id*. *See also* Chatsky & Assocs. v. Super. Ct., 12 Cal. Rptr. 3d 154, 157 (Cal. Ct. App. 2004) (Cal. Com. Code § 4406(f) (West) "acts as an issue-preclusion statute (rather than a statute of limitations)" citing Roy Supply Inc. v. Wells Fargo Bank, 46 Cal. Rptr. 2d 309 (Cal. Ct. App. 1995))).

343 Decatur Fed. Sav. & Loan Ass'n v. Litsky, 429 S.E.2d 300, 303 (Ga. Ct. App. 1993); Stowell v. Cloquet Co-Op Credit Union, 557 N.W.2d 567, 571 (Minn. 1997). *See also* Kaplan v. JP Morgan Chase Bank, N.A., 86 U.C.C. Rep. Serv. 2d 660, 2015 WL 2358240, at *7 (N.D. Ill. May 12, 2015) ("availability" of bank statement to customer does not depend on physical receipt). *But cf.* Simi Mgmt. Corp. v. Bank of Am., N.A., 930 F. Supp. 2d 1082 (N.D. Cal. 2013) (reading Cal. Code Civ. Proc. § 340(c) (West) with Cal. Com. Code § 4-406 (West) to mean that "made available" is the date of receipt of statement).

344 *See* Simi Mgmt. Corp. v. Bank of Am., N.A., 930 F. Supp. 2d 1082 (N.D. Cal. 2013) (reading Cal. Code Civ. Proc. § 340(c) (West) with Cal. Com. Code § 4-406 (West) to mean that "made available" is the date of receipt of statement).

345 Monreal v. Fleet Bank, 735 N.E.2d 880 (N.Y. 2000).

346 U.C.C. § 4-111; Roy Supply v. Wells Fargo Bank, 46 Cal. Rptr. 2d 309 (Cal. Ct. App. 1995) ("The one-year preclusion is not a statute of limitations. As long as notice is given by the customer within the one-year period, the customer may commence his action any time within the applicable statute of limitations."). *Accord* Tran v. Citibank, 208 F. Supp. 3d 302 (D.D.C. 2016).

347 *See* Coffey v. Bank of Am., 79 U.C.C. Rep. Serv. 2d 610 (Tex. App. 2013) (filing of a lawsuit alone is insufficient notice; finding no right to recredit).

348 *See, e.g.*, Navigators Specialty Ins. Co. v. California Bank & Tr., 810 Fed. Appx. 498 (9th Cir. 2020) (one-year limitations period applies independently with respect to each forged check); Chatsky & Assocs. v. Super. Ct., 12 Cal. Rptr. 3d 154, 157 (Cal. Ct. App. 2004) (same); Edward Fineman Co. v. Super. Ct., 78 Cal. Rptr. 2d 478, 482 (Cal. Ct. App. 1998), *as modified on denial of reh'g* (Cal. Ct. App. Oct. 2, 1998); Space Distributors, Inc. v. Flagship Bank of Melbourne, N.A., 402 So. 2d 586, 589 (Fla. Dist. Ct. App. 1981) ("the one-year limitation has been held to attach to each separate check in a series of forged or altered checks and thus a new one-year period begins to run with each subsequent check when it is made available to the customer"); Johnson Dev. Co. v. First Nat'l Bank of St. Louis, 999 S.W.2d 314, 317 (Mo. Ct. App. 1999) ("Implicit in the language of Missouri case law is that a new one-year limitation in section 400.4–406 begins to run on each separate check containing a forged signature or alteration, regardless of whether the same wrongdoer forged many checks over a term of years"); C. Nicholas Pereos, Ltd. v. Bank of Am., 352 P.3d 1133, 1138 (Nev. 2015); Associated Home & RV Sales, Inc. v. Bank of Belen, 294 P.3d 1276, 1282 (N.M. Ct. App. 2012); Millstream Bldg. Sys. Inc. v. Fifth Third Bank of Nw. Ohio, 637 N.E.2d 986, 988 (Ohio Ct. App. 1994).

349 *See, e.g.*, Navigators Specialty Ins. Co. v. California Bank & Tr., 810 Fed. Appx. 498 (9th Cir. 2020) (discussing the difference and interplay of section 4-406(f) and the statute of limitations).

350 *See* Redsands Energy, L.L.C. v. Regions Bank, 442 F. Supp. 3d 945, 953–954 (S.D. Miss. 2020) (the deposit agreement shortened the period in section 4-406(f) from one year to thirty calendar days and the "same wrongdoer" provision in the deposit agreement also modified section 4-406(d)(2) and defined "a reasonable period of time, not exceeding thirty (30) days" as "10 calendar days after the first statement describing the first altered or unauthorized item was sent or made available to you.").

351 A.B. Concrete Coating Inc. v. Wells Fargo Bank, N.A., 509 F. Supp. 3d 1217 (E.D. Cal. 2020); Valente v. TD Bank, N.A., 82 N.E.3d 1082, 1085 (Mass. App. Ct. 2017) ("The one-year period in § 4-406(4) is not a statute of limitations which might not start to run until the plaintiff knew or should have known of

his attorney's treachery, as the plaintiff argues. It is a statutory prerequisite of notice."); Roy Supply, Inc. v. Wells Fargo Bank, N.A., 46 Cal. Rptr. 2d 309, 318 (Cal. Ct. App. 1995) (finding that "the provisions of the [UCC] are controlling and must be deemed to displace common law negligence principles with respect to the payment of forged checks by a payor bank").

352 Sun 'n Sand, Inc. v. United Cal. Bank, 582 P.2d 920, 935 (Cal. 1978) ("In light of the policy disfavoring the diminution of fault-based liability absent a clear and express legislative intent, the language introducing subdivision (4) does not suffice to displace the three-year statute of limitations ordinarily applicable.").

353 Columbia Metal Prod. Co. v. First Nat'l Bank of Pawnee, 2018 WL 4328261, at *7 (N.D. Okla. July 26, 2018) (discussing the statutory interpretation that "good faith is irrelevant to § 4-406(f)'s one-year limitations period" as adopted by a majority of courts; noting that the UCC was amended in 1992 to remove the requirement that the bank act in good faith); Wilson & Muir Bank & Tr. Co. v. Travelers Cas. & Sur. Co. of Am., 71 U.C.C. Rep. Serv. 2d 981 (W.D. Ky. 2010) ("This Court favors the apparent majority position that good faith is not a condition precedent to enforcement of the repose period."), Pinigis v. Regions Bank, 977 So. 2d 446, 454 (Ala. 2007) (refusing to read good faith standard into U.C.C. § 4-406); Chester Twp. Bd. of Trustees v. Bank One, N.A., 2007 WL 1881311, at *7–8 (Ohio Ct. App. June 29, 2007) (declining to create a good faith standard); Halifax Corp. v. First Union Nat'l Bank, 546 S.E.2d 696, 703 (Va. 2001) (same).

354 U.C.C. § 4-406(f).

355 Canfield v. Bank One, 51 S.W.3d 828 (Tex. App. 2001); Falk v. N. Tr. Co., 763 N.E.2d 380, 385–386 (Ill. App. Ct. 2001) (bank not entitled to protection of prerequisites of U.C.C. § 4-406 when bank is either an active or passive party to a scheme to defraud customer).

356 Redsands Energy, L.L.C. v. Regions Bank, 442 F. Supp. 3d 945, 953–954 (S.D. Miss. 2020); Zambia Nat'l Commercial Bank Ltd. v. Fid. Int'l Bank, 855 F. Supp. 1377 (S.D.N.Y. 1994) (assuming validity of agreement requiring customer to notify bank of forgery within sixty days); Absolute Drug Detection Servs. v. Regions Bank, 116 So. 3d 1162, 79 U.C.C. Rep. Serv. 2d 284 (Ala. Civ. App. 2012) (permitting the 180-day period in Alabama's UCC to be reduced to thirty days by contract); Newsome v. Peoples Bancshares, 269 So. 3d 19, 2018 WL 4811892, at *9 (Miss. Oct. 4, 2018) (bank had authority under U.C.C. § 4-103 to reduce notification period to thirty days by agreement with its customer; no discussion of whether the twenty-day period was reasonable); Century Constr. Co., L.L.C. v. BancorpSouth Bank, 117 So. 3d 345 (Miss. Ct. App. 2013) (citing and relying upon numerous cases approving the contractual shortening of the one-year rule in U.C.C. § 4-406(f)); Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 954 N.Y.S.2d 156 (N.Y. App. Div. 2012) (upholding Capital One's contractual provision that the depositor has to notify the drawee bank of forgeries within fourteen days of account statement availability, and barring claim of depositor who did not give notice within fourteen days), *aff'd as modified*, 14 N.E.3d 367, 373–374 (N.Y. 2014); Qassemzadeh v. IBM Poughkeepsie Employees Fed. Credit Union, 561 N.Y.S.2d 795 (N.Y. App. Div. 1990) (assuming validity of agreement requiring customer to notify within thirty days after account statement mailed to him); *In re* Estate of Ray, 874 N.Y.S.2d 891 (N.Y. Sur. Ct. 2009) (upholding sixty-day deadline); Coffey v. Bank of Am., 79 U.C.C. Rep. Serv. 2d 610 (Tex. App. 2013) (approving the ability of bank to vary Article 4 provisions in customer agreement regarding time period in which a customer must report a forged or altered check even against the executor of customer's estate); Canfield v. Bank One, Texas, N.A., 51 S.W.3d 828 (Tex. App. 2001) (upholding ninety days); Nat'l Title Ins. Corp. Agency v. First Union Bank, 559 S.E.2d 668 (Va. 2002) (upholding sixty days).

357 U.C.C. § 4-103(a); Reg. CC, 12 C.F.R. § 229.37. For a comprehensive discussion of this issue, see Paul S. Turner, *Contracting Out of the UCC: Variation by Agreement Under Articles 3, 4 and 4A*, 40 Loy. L.A. L. Rev. 443 (2006). *See also* Redsands Energy, L.L.C. v. Regions Bank, 442 F. Supp. 3d 945, 953 (S.D. Miss. 2020) (the provisions of U.C.C. § 4-406 "may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable").

358 *See, e.g.*, Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 963–964 (5th Cir. 2012); Bloch v. Bank of Am., 2011 WL 4530642, at *7 (S.D.N.Y. Aug. 18, 2011) *aff'd*, 479 Fed. Appx. 399 (2d Cir. 2012) (finding bank contract that required depositor to report problems or unauthorized transactions within sixty days after statements or items were sent to depositor or otherwise made available by bank was not manifestly unreasonable); Freese v. Regions Bank, 644 S.E.2d 549 (Ga. Ct. App. 2007) (finding that a deposit agreement providing that depositor had to notify bank of inaccuracies on bank statement within thirty days of closing date of statement was not manifestly unreasonable); Stowell v. Cloquet Co-Op Credit Union, 557 N.W.2d 567, 569, 572–574 (Minn. 1997) (upholding an agreement providing that depositor had to notify bank of inaccuracies on bank statement within twenty days from mailing date of the statement); Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 14 N.E.3d 367 (N.Y. 2014) (ruling that reducing the one-year period in U.C.C. § 4-406(f) to fourteen days was not manifestly unreasonable when bank customer was financially sophisticated; observing that it could be unreasonable to impose this reduction by contract upon unsophisticated customers or small family businesses); *In re* Estate of Ray, 874 N.Y.S.2d 891, 894 (N.Y. Surr. Ct. 2009) (upholding sixty-day reporting time even though customer claimed to never have been made aware of the sixty-day limit in the contract); Levy Baldante Finney & Rubenstein, P.C. v. Wells Fargo Bank, N.A., 94 U.C.C. Rep. Serv. 2d 1237, 2018 WL 847756, at *6 (Pa. Super. Ct. Feb. 14, 2018) (thirty-day notification period not unreasonable in absence of bank's failure to exercise ordinary care); Borowski v. Firstar Bank Milwaukee, 579 N.W.2d 247 (Wis. Ct. App. 1988) (finding fourteen-day period within which customer was required to notify bank of unauthorized signature or alteration was not manifestly unreasonable). *Accord* Oguguo v. Wells Fargo Bank, 89 U.C.C. Rep. Serv. 2d 944 (D.N.J. 2016); Farquhar v. Companions & Homemakers, Inc., 2016 WL 4745348 (Conn. Super. Ct. Aug. 15, 2016); Ducote v. Whitney Nat'l Bank, 212 So. 3d 729 (La. Ct. App. 2017); Borowski v. J.P. Morgan Chase Bank, N.A., 522 S.W.3d 294 (Mo. Ct. App. 2016); Estate of Yahatz v. Bank of Am., N.A., 88 U.C.C. Rep. Serv. 2d 488 (N.J. Ct. App. 2015).

359 U.C.C. § 4-406(d)(2). *See, e.g.*, Union Street Corridor-Community Dev. Corp. v. Santander Bank, N.A., 191 F. Supp. 3d 147 (D. Mass. 2016) (bank customer barred from seeking recovery for checks drawn by unauthorized persons which appeared on customer's bank statement more than one year before customer notified bank of problem, and for checks that appeared on bank statement within past year, by the same wrongdoer); DMDB Adults, Inc. v. Bank of Am. Corp., 951 N.Y.S.2d 492 (N.Y. App. Div. 2012); Royal Arcanum Hosp. Ass'n of Kings Cty., Inc. v. Herrnkind, 950 N.Y.S.2d 726 (N.Y. Sup. Ct. 2012) (table; text available at 2012 WL 1087679).

360 Marx v. Whitney Nat'l Bank, 713 So. 2d 1142, 1146 (La. 1998) ("The rule stated in Subsection (d)(2) imposes on the customer the risk of loss on all subsequent forgeries by the same wrongdoer after the customer had a reasonable time to detect an initial forgery if the bank has honored subsequent forgeries prior to notice.").
361 U.C.C. § 4-406 cmt. 2 ("One of the most serious consequences of failure of the customer to comply with the requirements of subsection (c) is the opportunity presented to the wrongdoer to repeat the misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine the statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items."). *See also* Marx v. Whitney Nat'l Bank, 713 So. 2d 1142, 1147 (La. 1998) ("the customer . . . is in the best position to discover and report small forgeries before the wrongdoer is emboldened and attempts a larger misdeed").
362 U.C.C. § 4-406 cmt. 2.
363 U.C.C. § 4-406(d)(1).
364 U.C.C. § 4-406(d)(2). Note that some states give the depositor longer or shorter periods for reporting a forged drawer's signature or alteration by the same wrongdoer. For example, Iowa gives depositors sixty days. Iowa Code § 554.4406(4)(b). Montana gives depositors only fourteen days after the customer receives the statement or the statement is made available. Mont. Code Ann. § 30-4-406(4)(b).
365 U.C.C. § 4-406(d)(2).
366 *Id.*
367 Redsands Energy, L.L.C. v. Regions Bank, 442 F. Supp. 3d 945, 953–954 (S.D. Miss. 2020) (the deposit agreement shortened the period in U.C.C. § 4-406(f) from one year to thirty calendar days and the "same wrongdoer" provision in the deposit agreement also modified section 4-406(d)(2) and defined "a reasonable period of time, not exceeding thirty (30) days" as "10 calendar days after the first statement describing the first altered or unauthorized item was sent or made available to you.").
368 For a more detailed analysis of how multiple unauthorized transactions are precluded or allowed under U.C.C. § 4-406(d)(2), see Mercantile Bank of Arkansas v. Vowell, 117 S.W.3d 603, 610-613 (Ark. Ct. App. 2003).
369 U.C.C. § 4-406(d)(2).
370 *Id.*
371 U.C.C. § 4-406(c).
372 James v. Heritage Valley Fed. Credit Union, 197 Fed. Appx. 102, 106 (3d Cir. 2006) (BSA does not authorize a private cause of action against a financial institution or its employees) ; Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371 (3d Cir. 2005) (a private citizen may only enforce a federal law if Congress has created a private right of action); AmSouth Bank v. Dale, 386 F.3d 763, 777 (6th Cir. 2004) ("[T]he Bank Secrecy Act does not create a private right of action."); Rider v. Uphold HQ Inc., 657 F. Supp. 3d 491, 503 (S.D.N.Y. 2023) (plaintiffs brought a negligence per se claim based on violations of the Federal Torts Claim Act, the Bank Secrecy Act, Gramm-Leach-Bliley Act, and the EFTA; dismissing claims because "a decision to allow such a claim would effectively afford a private right of action that the statute does not recognize—contravening the legislative scheme"); Venture Gen. Agency, L.L.C. v. Wells Fargo Bank, N.A., 2019 WL 3503109, at *7 (N.D. Cal. Aug. 1, 2019); Trudel v. SunTrust Bank, 223 F. Supp. 3d 71, 91 (D.D.C. 2016) (no private cause of action under the BSA or Patriot Act); Shtutman v. TD Bank, N.A., 2014 WL 1464824, at *2 (D.N.J. Apr. 15, 2014) (no private right of action under the BSA or its relevant regulations); Sterling Sav. Bank v. Poulsen, 2013 WL 3945989, at *19 (N.D. Cal. July 29, 2013) (BSA and Patriot Act do not provide a private right of action); Bottom v. Bailey, 2013 WL 431824, at *5 (W.D.N.C. Feb. 4, 2013) (BSA does not provide a private right of action; citing cases from other jurisdictions in support); New World Mortg. v. TD Bank, 2011 WL 13225032, at *1 (C.D. Cal. Aug. 3, 2011) (no private right of action under the BSA); Armstrong v. Am. Pallet Leasing Inc., 678 F. Supp. 2d 827, 874-75 (N.D. Iowa 2009) (listing district court cases that have held the same); Hanninen v. Fedoravitch, 583 F. Supp. 2d 322, 326 (D. Conn. 2008) (the BSA and Patriot Act do not authorize a private right of action).
373 S&S Worldwide, Inc. v. Wells Fargo Bank, 509 F. Supp. 3d 1154, 1167 (N.D. Cal. 2020) ("To the extent the claim is based on an unlawful act or practice, S&S states it is relying on WFB's alleged 'violat[ions] [of] the Bank Secrecy Act and related banking regulations' as well as WFB's opening accounts 'without customer authorization' . . . however, the complaint does not identify the section(s) of the BSA, any regulation promulgated thereunder, or any other law WFB is alleged to have violated, nor has S&S alleged WFB, rather than Kuntz, opened the account on which the instant claims are based").
374 Haworth Country Club, L.L.C. v. United Bank, 2022 WL 2751722, at *7–9 (Conn. Super. Ct. July 8, 2022).
375 Venture Gen. Agency, L.L.C. v. Wells Fargo Bank, N.A., 2019 WL 3503109, at *6 (N.D. Cal. Aug. 1, 2019) (citing Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 226 (4th Cir. 2002)).
376 Bottom v. Bailey, 2013 WL 431824, at *5 (W.D.N.C. Feb. 4, 2013) (analyzing whether removal of a state law claim based on violation of the BSA was appropriate); Guyton v. FM Lending Servs., Inc., 681 S.E.2d 465, 474 (N.C. Ct. App. 2009) ("utilizing federal statutes as the basis for recognizing a state law duty is undoubtedly appropriate in some instances").
377 InjuryLoans.com, L.L.C. v. Buenrostro, 529 F. Supp. 3d 1178 (D. Nev. 2021) (plaintiff "could not maintain a private right of action under the Bank Secrecy Act, Patriot Act, and the associated regulations either independently or under a theory of negligence per se"); Venture Gen. Agency, L.L.C. v. Wells Fargo Bank, N.A., 2019 WL 3503109, at *7 (N.D. Cal. Aug. 1, 2019); Belle Meade Title & Escrow Corp. v. Fifth Third Bank, 282 F. Supp. 3d 1033, 1040 (M.D. Tenn. 2017) (BSA does not create a private right of action and therefore does "not create a common law duty on the part of banks to non-customers."); Towne Auto Sales, L.L.C. v. Tobsal Corp., 2017 WL 5467012, at *2 (N.D. Ohio Nov. 14, 2017) (dismissing negligence per se claim because the BSA does not provide a private cause of action); Ferring v. Bank of Am. N.A., 2016 WL 407315, at *4 (D. Ariz. Feb. 3, 2016) ("the BSA does not authorize a private right of action for its violation," and the BSA cannot be relied on by plaintiff to "establish a duty"); SFS Check, L.L.C. v. First Bank of Del., 990 F. Supp. 2d 762, 775 (E.D. Mich. 2013), *aff'd*, 774 F.3d 351 (6th Cir. 2014) (the BSA does not create a private right of action and "does not provide a basis for imposing a duty of care owed by [the bank] to [p]laintiff"); Blanchard v. Lee, 2013 WL 4049003, at *3 (E.D. La. Aug. 9, 2013) ("[T]he Bank Secrecy Act does not create a private right of action or give rise to a duty."); Lusk v. Kellogg, 2011 WL 13225140, at *6 (C.D. Cal. Aug. 10, 2011) (dismissing plaintiff's suit; finding that "[t]he Bank Secrecy Act creates neither a private right action nor any parallel duty to a bank customer" when plaintiff argued that the ongoing violations of the BSA were evidence of negligence); Pub. Serv. Co. of Oklahoma v. A Plus, Inc., 2011 WL 3329181, at *8 (W.D. Okla. Aug. 2, 2011) ("Courts have repeatedly rejected negligence claims based on a bank's duty arising under the [BSA], concluding a bank's duty created by the Act is owned only to the government and not to private parties."); *In re* Agape, 681 F. Supp. 2d 352, 360–361 (E.D.N.Y. 2010) ("[B]ecause the Bank Secrecy Act does not create a private right of

action, the Court can perceive no sound reason to recognize a duty of care that is predicated upon the statute's monitoring requirements."); Armstrong v. Am. Pallet Leasing Inc., 678 F. Supp. 2d 827, 874–875 (N.D. Iowa 2009) (BSA does not permit a private right of action; thus, "it cannot be construed as giving rise to a duty of care flowing to plaintiffs"); Marlin v. Moody Nat'l Bank, N.A., 2006 WL 2382325, at *7 (S.D. Tex. Aug. 16, 2006) ("The obligation under [the BSA] is to the government rather than some remote victim. The [bank's] obligation is not to roam through its customers looking for crooks and terrorists. By that act, banks do not become guarantors of the integrity of the deals of their customers. It does not create a private right of action and, therefore, does not establish a standard of care."), *aff'd*, 248 Fed. Appx. 534 (5th Cir. 2007); Aiken v. Interglobal Mergers & Acquisitions, 2006 WL 1878323, at *2 (S.D.N.Y. July 5, 2006) ("[N]either the Bank Secrecy Act nor the Patriot Act affords a private right of action. This Court may not announce a duty of care where the [state] courts have declined to do so; nor may this Court impose a duty of care based upon a statute that does not permit a private right of action.").

378 *In re* Agape Litig., 681 F. Supp. 2d 352, 369 (E.D.N.Y. 2010) (complaint fails to allege that defendant "directed the affairs of the purported enterprise," and "alleges in a conclusory fashion" that the defendant had actual knowledge of the scheme and that defendant's "actions (or inaction) aided the commission of his fraud"); Int'l Outdoor, Inc. v. RBS Citizens Bank, N.A., 2010 WL 11541842, at *4 (E.D. Mich. Sept. 28, 2010) ("The complaint lacks factual allegations that Defendants participated in the operation or management of the enterprise"); Rosner v. Bank of China, 528 F. Supp. 2d 419 (S.D.N.Y. 2007); Wuliger v. Keybank Nat. Ass'n, 2006 WL 42186, at *2 (N.D. Ohio Jan. 6, 2006); Wuliger v. Liberty Bank, N.A., 2006 WL 42089, at *2 (N.D. Ohio Jan. 6, 2006).

379 *See, e.g.*, Rosner v. Bank of China, 528 F. Supp. 2d 419, 423 (S.D.N.Y. 2007) (plaintiff alleged that defendant knew about the fraudulent scheme, knowingly used its correspondent relationships with US banks to transfer the stolen funds, disregarded applicable laws and regulations—such as bank secrecy and AML laws—that, if followed, would have prevented the laundering of the funds, was a knowing and willing participant in the fraudulent scheme, and provided the banking services necessary to enable the transfer of the stolen funds).

380 *See* McCraner v. Wells Fargo & Co., 2023 WL 2728719, at *6 (S.D. Cal. Mar. 30, 2023) (denying a motion to dismiss on plaintiffs' aiding and abetting fraud claim because the petition alleged sufficient facts to support that defendant had knowledge of the fraud and provided substantial assistance to the fraud).

381 *Id. See also* Huang v. Hong Kong & Shanghai Banking Corp. LTD, 2022 WL 4123879, at *5 (S.D.N.Y. Sept. 9, 2022) ("It is well settled in the Second Circuit that a bank's negligent failure to identify warning signs of fraudulent activity, such as atypical transactions—even where such signs converge to form a veritable 'forest of red flags'—is insufficient to impute actual knowledge of ongoing fraud" (citing Heinert v. Bank of Am., N.A., 410 F. Supp. 3d 544, 549–550 (W.D.N.Y. 2019), *aff'd*, 835 Fed. Appx. 627 (2d Cir. 2020))); S&S Worldwide, Inc. v. Wells Fargo Bank, 509 F. Supp. 3d 1154, 1166 (N.D. Cal. 2020).

382 *See* Amended Complaint For Permanent Injunction, Monetary Relief, Civil Penalties, and Other Relief, Fed. Trade Comm'n v. Walmart, No. 1:22-cv-03372 (N.D. Ill. filed June 30, 2023), *available at* www.ftc.gov; Complaint for Permanent Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. W. Union, No. 1:17-cv-00110-CCC (M.D. Pa. filed Jan. 19, 2017), *available at* www.ftc.gov; Complaint for Injunctive and Other Equitable Relief, Fed. Trade Comm'n v. MoneyGram Int'l, Inc., No. 109-cv-06576 (N.D. Ill. filed Oct. 19, 2009), *available at* www.ftc.gov; Press Release, Fed. Trade Comm'n, MoneyGram Agrees to Pay $125 Million to Settle Allegations that the Company Violated the FTC's 2009 Order and Breached a 2012 DOJ Deferred Prosecution Agreement (Nov. 8, 2018), *available at* www.ftc.gov. In *Fed. Trade Comm'n v. Walmart*, a federal district court found that the FTC's initial complaint against Walmart did not plausibly allege accessory liability under the Telemarketing Sales Rule but did allege unfair acts or practices and ongoing or imminent misconduct. Fed. Trade Comm'n v. Walmart, Inc., 664 F. Supp. 3d 808 (N.D. Ill. 2023). The FTC has filed an amended complaint.

383 Though not discussed in this article, consumers have strong protections under the Truth in Lending Act (TILA) for billing errors and the unauthorized use of credit cards. For an in-depth discussion on these types of credit card protections under TILA, *see* National Consumer Law Center, *Truth in Lending* (11th ed. 2023), Chapter 7, *updated at* www.nclc.org/library.

OPINION

UBER EATS ORDER LEADS TO COMPELLED ARBITRATION AFTER UBER CAR ACCIDENT*

By Jeremy Telman
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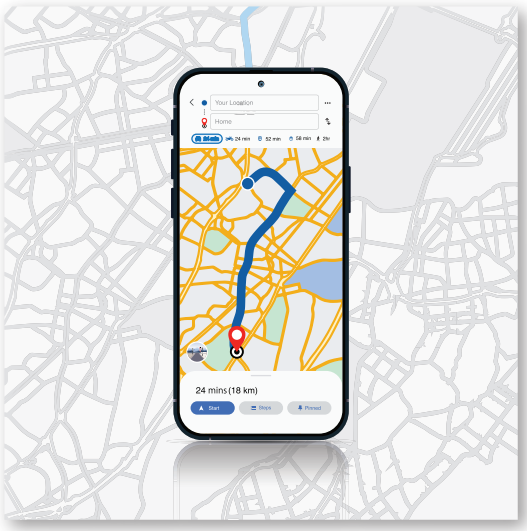


We have been commenting regularly lately on what I have called arbitration clause bootstrapping, and David Horton has alternatively called *Infinite Arbitration Clauses* and *Accidental Arbitration*. There was the report of the New York Post discussing Disney invoking arbitration with respect to an incident at a Disney-owned restaurant based on a family member's prior registration for a trial subscription to the Disney + streaming service. Disney eventually abandoned that argument after it generated a lot of negative attention. There also was Airbnb's attempt to compel arbitration in *Peterson v. Devita*, brought by a man injured in a fall at a party at a house that the party's host had rented on Airbnb. The injured man was a guest, not a party to the rental agreement, but he had once registered on Airbnb's site, although he never used the site. Airbnb's motion was denied, but there was a dissent.

Third time's the charm. In *McGinty v. Zheng*, a New Jersey appellate court granted Uber's motion to compel arbitration. The McGintys got in an Uber on March 31, 2022. Their driver ran a red light and hit another car. The McGintys suffered serious injuries. Georgia McGinty was unable to work for one year. John McGinty suffered broken bones, and still suffers from diminished use and sensation in his left wrist. They sued the driver and Uber. Uber filed a motion to compel arbitration.

The right to a civil jury matters when the alternative is proceedings before an administrative tribunal, but for some reason, not arbitration.

As Uber users know, when Uber updates its terms of use, you get a warning on the welcome screen. There is no way to use the app unless you agree to the updated terms, and the terms relevant to the McGinty's use of the app included a conspicuous arbitration clause. So an easy case.

But not so easy. It turns out, there is just one app for both Uber rides and Uber Eats, and the McGintys claimed that it was not them but their twelve-year-old daughter who manifested asset to Uber's terms when she ordered take-out on her mother's account with her mother's consent. In addition, the McGintys pointed out that Uber's updated terms made no mention of a waiver of the right to a jury trial.

As to the latter issue, New Jersey requires no "magic words" when assessing whether arbitration clause effects notice that one is waiving the right to a jury trial. Here Uber's emphatic language that disputes were to be settled in arbitration and not in a court of law sufficed. Cases like this cause me to muse on the cavalier ways in which courts allow for the shedding of some constitutional rights but not others in some contexts but not others. So, would a court be as blasé about the boilerplate click-through and, to borrow David Horton's language, infinite and accidental relinquishment of 1st or 2nd Amendment rights? And as we know from the *Jarkesy* case, the right to a civil jury matters when the alternative is proceedings before an administrative tribunal, but for some reason, not arbitration.

*Re-printed from the ContractsProf Blog, Tuesday, March 4, 2025.

DECEPTIVE TRADE PRACTICES AND WARRANTY

TRIAL COURT DID NOT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF DEFENDANT BECAUSE PLAINTIFF FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE ALL THE ELEMENTS OF HIS BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY CLAIM UNDER THE DTPA

TO RECOVER ON A BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY CLAIM, THE PLAINTIFF MUST PROVE THAT THE GOODS WERE DEFECTIVE WHEN THEY LEFT THE SELLER'S POSSESSION

Pleasant v. Murphy Oil USA, Inc., 2024 Tex. App. LEXIS 8399 (Tex. App.—Beaumont 2024).
https://casetext.com/case/pleasant-v-murphy-oil-us

FACTS: Appellant Pleasant alleged that his truck failed to start due to water contamination in the fuel he purchased from the Appellee Murphy Oil USA, Inc. d/b/a Murphy USA #7335 (hereinafter "Murphy Oil"). Pleasant brought claims under the Texas Deceptive Trade Practices Act ("DTPA"), asserting evidence that Murphy Oil breached its implied warranty of merchantability and misrepresented the fuel quality through testimony and a fuel service report. Murphy Oil refuted and presented evidence showing there was not any water contamination in its fuel storage tanks during the relevant period as well as evidence that customers had not reported any issues.

Murphy Oil moved for a directed verdict and final judgment. The court found for Murphy Oil. Pleasant appealed.
HOLDING: Affirmed.
REASONING: The trial court held that Pleasant's evidence was insufficient to establish the elements of his breach of implied warranty of merchantability. Pleasant failed to demonstrate by a preponderance of the evidence that the water contamination in his fuel tank was caused by defective diesel fuel purchased from Murphy Oil. While Pleasant relied on evidence such as the condition of his fuel tank and testimony about the fuel's quality, the evidence did not sufficiently link the alleged defect to Murphy Oil's storage tanks. Murphy Oil further refuted Pleasant's claim by providing records showing no water contamination in its storage tanks during the relevant period.

The court explained a claim for breach of implied warranty of merchantability requires proof that the goods were defective when they left the seller's possession.

The court explained a claim for breach of implied warranty of merchantability requires proof that the goods were defective when they left the seller's possession. Pleasant's evidence of the repair estimate, as well as their testimony, was insufficient to establish that Murphy Oil's diesel fuel contained water at the time of sale. Conversely, Murphy Oil presented evidence in the form of inspection records and sales data showing that its fuel met regulatory standards and that no other customers had reported similar issues at the time of the sale. Absent any other evidence, Pleasant could not meet his burden of proof under the DTPA. The court affirmed the trial court's order and final judgment.

UNDER THE DECEPTIVE TRADE PRACTICES ACT, AN INSURED MAY RECOVER DAMAGES CAUSED BY AN INSURER'S UNCONSCIONABLE ACTION OR COURSE OF ACTION

THE RESULTING UNFAIRNESS MUST BE GLARINGLY NOTICEABLE, FLAGRANT, COMPLETE, AND UNMITIGATED

THE VULNERATIBILITY OF THE CONSUMER IS RELEVANT TO THE DETERMINATION OF UNCONSCIONABILITY AND FACTORS SUCH AS OLD AGE INCREASE THE LIKELIHOOD THAT UNCONSCIONABILITY WILL BE FOUND

IF THE INSURER'S UNCONSCIONABLE CONDUCT IS COMMITTED KNOWINGLY, THEN THE INSURED MAY RECOVER UP TO THREE TIMES THE AMOUNT OF HER DAMAGES

State Farm Lloyds v. Ladkin, 2025 Tex. App. LEXIS 704 (Tex. App.—Fort Worth, 2025)
https://scholar.google.com/scholar_case?case=202016992521689110 9&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Appellee ("Ladkin"), an elderly widow, filed a homeowner's insurance claim with Appellant ("State Farm") for wind and hail damage to the roof of her home. State Farm denied the claim after observing damage to other components of Ladkin's property and without thoroughly examining the damaged roof. However, an appraisal panel later agreed that a full roof replacement was necessary and awarded Ladkin $20,000 for the damage to her home. Due to Ladkin's infirmity, her son reached out to State Farm multiple times regarding the roof leak, to communicate the urgent need for repairs. Rather than paying the appraisal award, State Farm commissioned a forensic engineering firm to find an alternative way to object to Ladkin's claim. The firm determined that the damage to the roof was caused by "blistering and mechanical damage" and State Farm subsequently mailed a check for $2,500 to cover a portion of the damaged items in the appraisal. Ladkin brought suit for DTPA violations. A jury sided with Ladkin, awarding her actual damages for her roof and repairs, treble damages based on State Farm's knowingly unconscionable conduct, and attorney's fees. State Farm appealed.
HOLDING: Affirmed.
REASONING: In asserting her DTPA claim, Ladkin provided evidence that State Farm disregarded numerous hail spots on her roof without reasoning, issued the denial letter without examining the damage that was under the tarp on her roof, commissioned disingenuous expert analysis, and took advantage of her vulnerability as an elderly consumer.

Under the DTPA, an insured may recover actual damages caused by an insurer's "unconscionable action or course of action." Tex. Bus. & Com. Code Ann. §17.50(a)(3). "Unconscionable action" is an act that takes advantage of a consumer's lack of knowledge, ability, experience, or capacity to a grossly unfair degree. §17.45(5). The court cited *Bradford v. Vento*, to express that the resulting unfairness must be "glaringly noticeable, flagrant, complete, and unmitigated." If the insurer's unconscionable conduct is committed with actual awareness of the falsity, deception, or unfairness of the act or practice, Tex. Bus. & Com. Code Ann. §17.45(9), the insured may recover treble damages up to three times the amount of their damages. Id. §17.50(b)(1).

The court noted that Ladkin's infirmity bolstered her DTPA claim, as factors like old age tend to increase a finding of unconscionability. Ladkin was 80 when she filed her claim, heavily relied on her son to assist her with the claim and exhibited signs of confusion during her testimony. These factors were pertinent to the jury's determination that State Farm was aware of Ladkin's infirmity and, nonetheless, proceeded to act in a manner that would result in unmitigated unfairness.

The court concluded the evidence was sufficiently strong to support the jury's finding that State Farm had taken advantage of Ladkin to a grossly unfair degree by disregarding the hail damage, issuing an unsubstantiated denial letter, and providing shifting excuses for its denial, with the knowledge of Ladkin's infirmity.

TEXAS UCC REQUIRES A BUYER MUST WITHIN REASONABLE TIME AFTER HE DISCOVERS OR SHOULD HAVE DISCOVERED ANY BREACH NOTIFY THE SELLER OF THE BREACH

THIS STATUTE APPLIES TO SALES OF GOODS WHICH DOES NOT INCLUDE THE SALE OF AN ADVERTISEMENT

Bradley v. GateHouse Media Texas Holdings, II, 2025 U.S. App. LEXIS 2632 (5th Cir. 2025)
https://casetext.com/case/bradley-v-gatehouse-media-tex-holdings-ii-3

FACTS: Plaintiff Bradley contracted with Defendant GateHouse for an anonymous newspaper advertisement urging fellow parishioners to attend an upcoming church meeting with the hope of securing new church leadership. Plaintiff fully paid for the ad and was assured his identity would remain anonymous. Approximately one month after publication, Defendant mailed an invoice bearing the plaintiff's name to the church. Plaintiff sued, alleging breach of contract and breach of warranty under the Texas Deceptive Trade Practices Act (DTPA). The district court granted summary judgment for the defendant, ruling in part that Plaintiff's claim failed because he did not provide pre-suit notice of the alleged breach as required under the Texas UCC.
HOLDING: Reversed and remanded.
REASONING: Texas law requires the buyer, within a reasonable time after he discovers or should have discovered any breach, to notify the seller of that breach. The court reasoned that this notice requirement only applies if the transaction involves "goods" as defined by the Texas UCC. The court explained that §2.607(c)(1) of the Texas Business & Commerce Code is intended to give the seller a fair opportunity to "cure" a product-related issue before it becomes a bigger legal issue. Because tangible, movable goods can typically be inspected or repaired, notifying the seller makes sense. Failing to give notice to the seller can bar the buyer from damages, as he did not give the seller a chance to rectify the situation. Essentially, the statute's goal is to keep both parties on even footing and to reduce the risk that a seller will be blindsided by a legal claim long after the seller has completed the sale.

Failing to give notice to the seller can bar the buyer from damages, as he did not give the seller a chance to rectify the situation.

The court then examined whether an advertisement could be classified as a "good" under the UCC, reasoning that it could not because advertisements are intangible services. The court reiterated that the UCC's notice requirement is not applicable where the transaction involves a service or falls outside the UCC's definition of a "sale of goods." Because Plaintiff's purchase was an advertisement, the defendant had no statutory right to pre-suit notice. As a result, imposing a UCC notice requirement on Plaintiff's breach-of-warranty claim was improper. The court accordingly reversed and remanded.

COURT FINDS NO AUTHORITY HOLDING A DTPA "FAILURE TO DISCLOSE" CLAIM REQUIRES A PRIOR BREACH OF CONTRACT FINDING.

Mock v. St. David's Healthcare P'ship, LP, LLP, 2025 Tex. App. LEXIS 1049 (Tex. App.—Austin, 2025).
https://law.justia.com/cases/texas/third-court-of-appeals/2025/03-22-00708-cv.html

FACTS: Plaintiff, Appellant Melanie Mock, sought medical treatment at Defendant Appellee St. David's Healthcare's Emergency Department. After Plaintiff received treatment, Defendant provided Plaintiff with a contract outlining the Financial Agreement Plaintiff was to fulfill in exchange for the hospital services. The Agreement detailed that charges would be processed for hospital services or other "special items" provided. After Plaintiff received a bill that included Evaluation and Management Services (EMS) charges, Plaintiff brought a DTPA claim, among others, alleging that the item was an undisclosed charge outside the Agreement's scope.

The trial court granted the Defendant's motion to dismiss on the DTPA claim. Plaintiff appealed.
HOLDING: Reversed and Remanded.
REASONING: Plaintiff argued that Defendant failed to disclose the EMS charge which violated the DTPA. Defendant argued that Plaintiff's DTPA claim arose from the same conduct alleged in Plaintiff's breach-of-contract claim and that because the breach-of-contract claim was previously dismissed by the trial court, the DTPA claim should follow. Defendant also brought case law supporting that assertion. The court disagreed with Defendant.

First, none of Defendant's case law addressed the factual scenario at issue of presenting a contract to an already treated patient. The court reasoned that while there may be case law that supported certain DTPA claims to be impermissible absent

a breach-of-contract finding, Plaintiff's allegation for "failing to disclose" is a separate issue. Defendant presented no governing authority addressing a DTPA action based on a failure to disclose.

Second, while the alleged facts are based on the same conduct, each cause of action requires different elements of proof. A DTPA claim has its own set of elements independent of a breach-of-contract action. Because Defendant's motion for summary judgment on Plaintiff's DTPA claim did not explain why Plaintiff could not meet their burden, Defendant failed to show the absence of a genuine issue of material fact. Thus, the court reversed and remanded the motion to dismiss Plaintiff's DTPA claim.

TO RECOVER REPAIR OR COMPLETION COSTS AS ACTUAL DAMAGES, A PARTY MUST PROVE THAT THE COSTS WERE REASONABLE AND NECESSARY

UNDER THE DECEPTIVE TRADE PRACTICES ACT (DTPA), BREACH OF CONTRACT, AND BREACH OF IMPLIED WARRANTY CAUSES OF ACTION, ONLY A PREVAILING PARTY MAY RECOVER ATTORNEY'S FEES

Edmond Demiraj d/b/a ALB Painting and Remodeling v. Martinez, ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2025, no pet.).
https://law.justia.com/cases/texas/first-court-of-appeals/2025/01-23-00493-cv.html

FACTS: Plaintiffs-Appellees Noe and Judy Martinez entered a contract with Defendant/Appellant Edmond Demiraj to repair flood damages to their home. The parties agreed that the Martinezes would purchase construction materials while Demiraj provided labor. Demiraj had only performed fifty percent of the project when he requested an additional $65,000 from the agreed price to complete the work. Dissatisfied with the quality of his performance, the Martinezes terminated Demiraj. They sought an alternative contractor, All Star Construction, to repair Demiraj's defective work and complete the remainder of the project.

The totality of the evidence was ample to show that the service cost was reasonable and necessary, entitling the Martinezes to the $45,000 award.

The Martinezes sued Demiraj for breach of contract, breach of implied warranty, and a DTPA claim, seeking actual damages and attorney's fees. They incurred $53,863.77 for construction materials and $45,000 for All Star's repair, totaling $98,863.77. The trial court held for the Martinezes and awarded them the full cost of actual damages and attorney's fees. Demiraj appealed.

HOLDING: Reversed and remanded in part; affirmed in part.

REASONING: Demiraj argued that the Martinezes had insufficient evidence to show that the actual damages were reasonable and necessary, warranting a reversal of the award.

First, the court held that the record contained more than a scintilla of evidence showing that $45,000 for All Star's services was a reasonable amount. The court considered that All Star offered to fix and finish the project for $20,000 less, the final price was consistent with similar industry rates, and the Martinezes provided photographs of the project's defects in Demiraj's work. The totality of the evidence was ample to show that the service cost was reasonable and necessary, entitling the Martinezes to the $45,000 award.

However, while evidence of Demiraj's work may have shown the necessity in their purchase of construction materials, the Martinezes offered no proof as to the reasonableness of the amount. Thus, the court held that the evidence for the materials was legally insufficient to support that the $53,863.77 was reasonable and necessary, warranting reversal.

Demiraj also argued that because the awarded damages must be reversed, so should the attorney's fees, a position the court agreed with. The court held that only a prevailing party may recover attorney's fees, and because the damages award was in dispute, the Martinezes did not prevail. Thus, also warranting a reversal for attorney's fees.

DEBT COLLECTION

A TDCA CLAIM REQUIRES CALLS WERE MADE WITH INTENT TO ANNOY, HARASS OR THREATEN, WHICH REQUIRES A HIGH VOLUME OF CALLS UNDER CERTAIN CIRCUMSTANCES

Luna v. PHH Mortg. Corp., 2024 U.S. Dist. LEXIS 209753 (S.D. Tex. 2024).
https://casetext.com/case/luna-v-phh-mortg-corp

FACTS: Defendant PHH Mortgage Corporation (hereinafter "PHH") held the mortgage to Plaintiffs' Juan Luna and Raquel Spinoso (hereinafter "Plaintiffs") home. PHH commenced a non-judicial foreclosure, and Plaintiffs filed this lawsuit and obtained a temporary restraining order halting a planned foreclosure sale. Plaintiffs asserted causes of action against PHH for breach of contract and violations of the TDCA.

PHH moved to dismiss this case contending that the Plaintiffs' allegations failed to state a claim upon which relief can be granted.

HOLDING: Dismissed without prejudice.

REASONING: Plaintiffs asserted that PHH harassed them by continuously calling them without disclosing the name of the individual making the call and with the intent to annoy, harass, or threaten a person at the called number and other various violations under the TDCA. The court disagreed.

The court rejected the argument stating that the Plaintiffs failed to state a claim for violations of the TDCA because their allegations were insufficient to establish that PHH made telephone calls to Plaintiffs with the intent to annoy, harass, or threaten them, which is fatal to a TDCA claim. The court explained that PHH's phone calls to Plaintiffs were not made with the requisite intent under the TDCA, for it must be shown that there was a great volume of phone calls and extenuating circumstances, such as making those calls at odd hours or threatening personal violence. There was no information regarding how many calls they received, the substance of the phone calls, or the circumstances surrounding the calls. Thus, Plaintiffs' allegations did not rise to the level of harassment that is actionable under the TDCA. The court granted the motion to dismiss, and the case was dismissed without prejudice.

THE PHRASE "COMMUNICATE WITH A CONSUMER" UNDER THE FDCPA AND FCCPA MEANS THE DEBT COLLECTOR MUST ACTUALLY TRANSMIT OR TRANSFER INFORMATION TO THE CONSUMER

MERELY SENDING AN EMAIL DOES NOT CONSTITUTE "COMMUNICATING WITH" THE CONSUMER UNTIL THE CONSUMER RECEIVES AND OPENS/READS THE EMAIL

Quinn-Davis v. TrueAccord Corp., ___ F. Supp. 3d ___ (S.D. Fl. 2024).
https://casetext.com/case/quinn-davis-v-trueaccord-corp

FACTS: Defendant TrueAccord Corp. (hereinafter "TrueAccord") sent Plaintiff Quinn-Davis (hereinafter "Quinn-Davis") an email concerning debt collection at 8:23 p.m. on November 29, 2022. The email was delivered to Quinn-Davis's inbox at 10:14 p.m. on November 29, 2022. Quinn-Davis first opened and read the e-mail at 11:44 a.m. on November 30, 2022.

Quinn-Davis argued that receiving a debt collection email at 10:14 p.m. was presumptively inconvenient and unlawful. However, TrueAccord contended that although the email was delivered to Quinn-Davis's email server at that time, it was not opened until the following morning. Quinn-Davis sued TrueAccord, asserting violations of the Fair Debt Collections Act ("FDCPA") and the Florida Consumer Collection Practices Act ("FCCPA"). TrueAccord moved for summary judgment on all of Quinn-Davis's claims.

HOLDING: Granted.

REASONING: Quinn-Davis alleged that the email from TrueAccord delivered at 10:14 p.m. was in violation of the FDCPA and FCCPA. The court disagreed. The FDCPA prohibits a debt collector from communicating with a consumer in connection with the collection of any debt at any unusual time or place, and the FCCPA prohibits a person collecting a consumer debt from communicating with the debtor between the hours of 9 p.m. and 8 a.m. The language in both the FDCPA and FCCPA is substantially similar and the court applied the same standard to both claims. To bring a claim of FDCPA/FCCPA violation, the plaintiff must show that (1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA.

TrueAccord's email, though sent at night, was not opened until the next day during acceptable hours.

The parties agreed that Quinn-Davis met the first two elements of the FDCPA/FCCPA violation claim, so the court only considered the third element, whether TrueAccord's email was a prohibited communication under the FDCPA. The court held that the plain meaning of the phrase "communicate with the consumer" in the FDCPA means that a debt collector must transmit or transfer information to another person in order to "communicate with a consumer," not merely send it. By reaching this conclusion, the court explained that no e-mail communication with a consumer takes place until the consumer reads or at least receives it. It is not enough to merely send the communication prior to the statutory deadline. In this case, the court held that TrueAccord's email, though sent at night, was not opened until the next day during acceptable hours, and therefore did not constitute communication at an inconvenient time under the acts. Therefore, the court granted summary judgment.

FEARS OF HYPOTHETICAL FUTURE HARM[S] DO NOT PROVIDE ARTICLE III STANDING

BECAUSE PLAINTIFF "DIDN'T MAKE A PAYMENT, PROMISE TO DO SO, OR OTHERWISE ACT TO HER DETRIMENT IN RESPONSE TO ANYTHING IN OR OMITTED FROM THE LETTER," SHE FAILED TO ESTABLISH A SUFFICIENT INJURY-IN-FACT FOR ARTICLE III STANDING

A READING OF THE ENTIRE FINAL LETTER WOULD LEAD THE LEAST SOPHISTICATED CONSUMER TO UNDERSTAND THAT DEFENDANT INTENDED TO FOLLOW ALL STATE AND FEDERAL LAWS REGARDING ACCELERATION AND FORECLOSURE

Whitfield v. Selene Fin. LP, 2024 U.S. Dist. LEXIS 161062 (M.D. Ga. 2024).
https://law.justia.com/cases/federal/district-courts/georgia/gamdce/5:2024cv00153/133325/23/

FACTS: Plaintiff Lequita R. Whitfield was a homeowner with a mortgage funded by U.S. Bank Trust National Association (hereinafter "U.S. Bank"). Defendant Selene Finance (hereinafter "Selene") obtained the servicing rights to Plaintiff's mortgage through U.S. Bank by becoming an agent of the Bank.

Plaintiff defaulted on the mortgage and became more than 45 days delinquent. Selene sent a "GA Final Letter" to Plaintiff to "coerce and intimidate her into paying the entire default amount of the loan." Plaintiff claimed she was "anxious and terrified" and that she was afraid Selene was going to foreclose on her home at any moment. In response to the letter, Plaintiff borrowed money from her brother but did not ultimately have to use the funds borrowed.

Plaintiff alleged the GA Final Letter violated the Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"). The district court denied Selene's first Motion to Dismiss as moot considering Plaintiff's Amended Complaint. Selene alleged a Second Motion to Dismiss.
HOLDING: Dismissed.
REASONING: Selene argued that Plaintiff's amended complaint was faulty due to lack of standing and lack of violation of the FDCPA. The court agreed.

The court explained that to have Article III standing, Plaintiff must establish a sufficient injury-in-fact. Selene contended that because Plaintiff neither incurred financial loss nor took detrimental action based on the allegedly deceptive or unfair statements in the notice, she did not suffer an injury-in-fact. The court agreed, claiming that fears of hypothetical future harm[s] do not provide Article III standing. Further, because Plaintiff "didn't make a payment, promise to do so, or otherwise act to her detriment in response to anything in or omitted from the letter," she failed to establish a sufficient injury-in-fact for Article III standing. Borrowing money from her brother was not necessitated by any action or omission related to the letter, the court held. Therefore, she lacked sufficient injury-in-fact to establish Article III standing.

The circumstances giving rise to an alleged FDCPA violation are evaluated from the perspective of the least sophisticated consumer.

Second, the FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. §1692e. The circumstances giving rise to an alleged FDCPA violation are evaluated from the perspective of the least sophisticated consumer. Plaintiff alleged the GA Final Letter was deceptive and threatened action it did not intend to take. However, because Selene used the appropriate language that they would comply with all applicable laws in accelerating and foreclosing, the court explained a reading of the entire final letter would lead the least sophisticated consumer to understand that Defendant intended to follow all state and federal laws regarding acceleration and foreclosure. Therefore, Plaintiff failed to state a claim under §1692e. The court granted the Second Motion to Dismiss.

PLAINTIFF ALLEGED CONCRETE HARMS STEMMING FROM FDCPA VIOLATIONS, INCLUDING MONETARY EXPENDITURES, REPUTATIONAL HARM, AND PHYSICAL/EMOTIONAL DISTRESS, WHICH ARE SUFFICIENT TO ESTABLISH ARTICLE III STANDING UNDER *TRANSUNION V. RAMIREZ*

THE DEBT COLLECTION NOTICES CONTAINED MATERIALLY FALSE STATEMENTS ABOUT DEBT AMOUNTS THAT WOULD MISLEAD THE LEAST SOPHISTICATED CONSUMER

Carrasquillo v. Nat'l Credit Sys., 2025 U.S. Dist. LEXIS 28252 (S.D.N.Y. 2025).
https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2024cv01029/615515/46/

FACTS: Plaintiff Carrasquillo received two collection notice letters, one from NCS and another from Borland (jointly known as "Defendants"), regarding an outstanding debt she owed to Faxon Commons Apartments ("Faxon"). Carrasquillo believed that the remaining debt she owed to Faxon was $260.54. However, the collection notice she received from NCS reported that she owed $5,534.20, and the letter from Borland stated that she owed $3,922.20 to Faxon. Both letters represented that the debt amounts were "verified" or "validated," and referred to the same creditor and client account numbers, suggesting they were for the same debt. These letters caused Carrasquillo to experience distress, anxiety, humiliation, embarrassment, difficulty sleeping, and an increased heart rate from fear that debt collectors would come after her for the debt she did not owe. Carrasquillo expended time and money to clarify the issue regarding the erroneous outstanding debt amounts. However, the debt sought was reported to Carrasquillo's credit report, resulting in a lower score.

Carrasquillo sued Defendants and later amended her complaint to allege that they had violated provisions of the FDCPA. Defendants moved to dismiss the amended complaint.
HOLDING: Defendants' motion to dismiss was denied.

REASONING: Defendants claimed the court lacked subject matter jurisdiction under Article III and, therefore, lacked standing to pursue Plaintiff's FDCPA claims.

To pursue an FDCPA claim under Article III, a plaintiff must allege a concrete harm that is both independent of and stems from, a procedural or legal violation. The *TransUnion* Court recognized that physical and monetary harms, as well as reputational harms, readily qualify as concrete injuries under Article III. Analyzing Article III standing in the context of FDCPA violations, the *Markakos v. Medicredit* court stated concrete injuries can arise if a defendant's misrepresentation caused "a plaintiff to pay extra money, affected a plaintiff's credit, or otherwise altered a plaintiff's response to a debt." Here, the court held that Carrasquillo sufficiently established that she suffered concrete harms caused by Defendants' allegedly false and misleading debt collection notices, as she expended money to clarify the unpaid debt amount, the supposed debt amount decreased her credit score, and Carrasquillo experienced physical and emotional distress, such as anxiety and difficulty sleeping, from the erroneous debt collection notices.

To pursue an FDCPA claim under Article III, a plaintiff must allege a concrete harm that is both independent of and stems from, a procedural or legal violation.

The court in *Cohen v. Rosicki* stated that statements made by a debt collector must be materially false or misleading to be actionable under the FDCPA. The *Cohen* court explained that to satisfy materiality, it must show that the challenged statement would be false, deceptive, or misleading from the objective perspective of the least sophisticated consumer.

The court here reasoned Carrasquillo's argument was persuasive because the debt obligations were misstated. Further, because Defendants "verified" or "validated" that the debt obligations they sent to Carrasquillo were correct, the least sophisticated consumer would be misled by the letters' false statements. The court denied Defendant's motion to dismiss for failure to state a claim.

NINTH CIRCUIT FINDS STANDING BASED ON RECEIPT OF DEBT COLLECTION LETTER

Six v. IQ Data International, Inc., ___ F.3d ___ (9th Cir. 2025). **https://cdn.ca9.uscourts.gov/datastore/opinions/2025/02/24/23-15887.pdf**

FACTS: Defendant-Appellee IQ Data International ("IQ") acquired a debt obligation for Plaintiff-Appellant Ryan Six's ("Six") alleged breach of a residential lease. Six mailed a letter disputing the debt and requested documentation of it. The same day, Six's attorney mailed a letter directly to IQ to provide notice of Six's representation by counsel and to send all correspondence to the attorney. IQ received Six's letter and then submitted an internal request to generate and send the requested documentation to Six's mailing address. The next day, IQ updated its records to show it had processed Six's counsel's letter, but on the same day, IQ sent the verification of debt letter to Six's mailing address. Upon receiving the records directly from IQ, Six sued in the District of Arizona under the Fair Debt Collection Practices Act ("Act"). The Act prohibits debt collectors from directly communicating with a consumer in connection with the collection of any debt when the collector knows that an attorney represents the consumer. *See* 15 U.S.C. § 1692c(a)(2). The district court dismissed the case, ruling that Six lacked Article III standing because he could not show that he suffered any injury in fact. Six appealed the dismissal to the Ninth Circuit court of appeals.

HOLDING: Reversed and remanded.

REASONING: To determine whether Six had standing to bring his claim, the court of appeals considered whether he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042 (9th Cir. 2017). The Ninth Circuit Court of Appeals held that Six had standing under the Act to bring a suit for the unwanted letter from IQ. In doing so, the court rejected the district court's argument that Six receiving one unwanted letter was not akin to the traditional types of harm meant to be prevented by the Act.

The court of appeals acknowledged that a mere breach of the Act was not necessarily enough to grant standing. However, the court explained that Six suffered an injury in fact because Congress, in passing the Act, recognized the privacy interest of consumers who would be the recipient of a letter from a debt collection agency. The court held that the letter Six allegedly received from IQ was akin to a violation of Six's privacy.

The court of appeals then assessed whether Six had identified a close analogue for his asserted injury that is traditionally recognized as providing a basis for a lawsuit in American courts. The court reasoned that Six had satisfied this requirement because actions similar to an invasion of privacy has been heard before in American courts; trespass and nuisance were cited by the court as analogues cases. Last, the court held that Six further met the requirements for standing by ruling that he suffered harm that was both particularized and actual that could be redressed by a favorable judicial decision. The Ninth Circuit reversed and remanded.

INSURANCE

WITHOUT A VALID BREACH OF CONTRACT CLAIM, THE CUTCHALLS' EXTRA-CONTRACTUAL CLAIMS (BAD FAITH, TEXAS INSURANCE CODE VIOLATIONS, DTPA VIOLATIONS) ALSO FAIL

Cutchall v. Chubb Lloyd's Ins. Co., 2024 U.S. Dist. LEXIS 234546 (S.D. Tex. 2024)
https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2023cv03745/1937357/58/

FACTS: Plaintiffs, Kimberly Cutchall and Michael Cutchall (hereinafter, the "Cutchalls") had an insurance policy with Defendant Chubb Lloyd's Insurance Co., (hereinafter, "Chubb") for certain types of damages to their home. The Cutchalls submitted an insurance claim to Chubb for water damage. Chubb's investigation, supported by expert evaluations, determined the damage was due to various non-covered causes, such as pre-existing defects and maintenance issues. The Cutchalls' policy excluded coverage for damages arising from such conditions.

The Cutchalls sued for breach of contract and extra-contractual claims. The Cutchalls asserted claims for breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code provisions related to unfair settlement practices, violations of the Texas Insurance Code provisions related to the prompt payment of claims, and violations of the Texas Deceptive Trade Practices Act. Chubb filed a motion for summary judgment.

HOLDING: Granted.

REASONING: Chubb argued that because the Cutchalls failed to show evidence that proved the losses should be covered and failed to raise a genuine dispute of material fact, summary judgment should be granted. The court agreed. Chubb's policy explicitly excluded the causes of the damages claimed by the Cutchalls, and their investigation substantiated this exclusion. The court explained the Cutchalls failed to establish their claim is covered by the policy as the evidence contradicted itself and the Cutchalls failed to segregate damages.

Under Texas law, extra-contractual claims depend on the existence of a valid breach of contract.

Under Texas law, extra-contractual claims depend on the existence of a valid breach of contract. Because the damages were not covered under the policy terms, Chubb's denial of the claim was not in bad faith and did not violate the Texas Insurance Code or the DTPA. The Cutchalls' failure to raise a fact issue regarding their breach of contract and bad faith claims rendered the foundation for these extra-contractual claims legally insufficient. The court concluded without a valid breach of contract claim, the Cutchalls' extra-contractual claims (bad faith, Texas insurance code violations, DTPA violations) also fail.

The court granted summary judgment on all the extra-contractual claims.

A BONA FIDE COVERAGE DISPUTE ABOUT REPAIR COSTS IS NOT SUFFICIENT TO SUPPORT BAD FAITH CLAIMS

THE SAME LEGAL STANDARDS APPLY TO BOTH COMMON LAW AND STATUTORY BAD FAITH CLAIMS IN TEXAS, SO DISMISSAL OF THE COMMON LAW CLAIM NECESSITATES DISMISSAL OF THE STATUTORY CLAIMS

Missions v. Church Mut. Ins. Co., 2025 U.S. Dist. LEXIS 41367 (N.D. Tex. 2025).
https://law.justia.com/cases/federal/district-courts/texas/txndce/4:2024cv00057/385269/36

FACTS: Cowboy Christian Mission's ("Plaintiff) property sustained damage from a tornado. Plaintiff submitted a claim for insurance coverage under the Policy it had with Church Mutual Insurance Company ("Defendant"). After conducting an inspection of the damage, Defendant sent two payments to Plaintiff. Later, Plaintiff sent a demand letter to Defendant for other expenses, including relocation costs and other non-salvageable items. Defendant refused to cover these costs.

Plaintiff filed suit, alleging violations of extra-contractual claims under the Texas Insurance Code, the DTPA, and common-law breach of duty of good faith and fair dealing. Defendant filed summary judgment on Plaintiff's extra-contractual claims.

HOLDING: Defendant's motion granted.

REASONING: Defendant argued that Plaintiff failed to show that it acted in bad faith, as the evidence supported only a bona fide coverage dispute, which bars extra-contractual claims that involve elements of bad faith. The court agreed. Under Texas law, a bona fide coverage dispute does not demonstrate bad faith, as a genuine dispute over the scope of insurance coverage is reasonable for denying coverage. Defendant argued that it did not fail to conduct a reasonable investigation, because it could not be shown that the expenses from the engineering reports and damage estimates for relocation expenses or coverage of non-salvageable items were 'covered costs.' Additionally, Defendant urged that Plaintiff failed to meet its burden of showing that its relocation expenses were necessary.

The court explained Plaintiff's report alone did not establish that Defendant under paid the claim and that Plaintiff failed to meet its burden of showing that it incurred any extra expenses. If the insurer had a reasonable basis to deny or delay payment of a claim, even if that basis was eventually determined by the fact finder to be erroneous, the insurer is not liable for the tort of bad faith.

The court further reasoned that Texas courts have ruled that extra-contractual tort claims require the same predicate for recovery as bad faith causes of action in Texas. Therefore, because the statutory and common law standards are the same, a finding that there was no common law violation as a matter of law also eliminated the statutory claims alleged by Plaintiff. Defendant's motion for summary judgement was granted.

LANDLORD TENANT

FORECLOSURE IN TEXAS ENFORCES THE DEED OF TRUST, NOT THE UNDERLYING NOTE, AND CAN BE CONDUCTED WITHOUT JUDICIAL SUPERVISION OR PRODUCING THE ORIGINAL NOTE

Clark v. PHH Mortg. Corp., 2025 U.S. Dist. LEXIS 52190 (W.D. Tex. 2024).
https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2024cv00996/1172802966/10/

FACTS: Plaintiff Diana Clark executed a promissory note ("Note") and security instrument ("Deed of Trust") in favor of a mortgage company and pledged its real property ("Property") as collateral for repayment of the Note. The Deed of Trust was later assigned to Defendant PHH Mortgage Corporation (hereinafter "PHH"). Plaintiff defaulted on the loan and a foreclosure was scheduled, consistent with bankruptcy proceedings in state court.

The court explained that Texas law differentiates between enforcement of a promissory note and foreclosure. Foreclosure enforces the deed of trust, not the underlying note, as an independent action against the collateral and may be conducted without judicial supervision.

Plaintiff filed suit, challenging PHH's authority to foreclose on the Property based on its failure to produce certified copies of documents showing all of the transfers and assignments of the Deed of Trust and the Note. PHH moved to dismiss Plaintiff's claims.

HOLDING: PHH's motion granted.

REASONING: PHH argued that Plaintiff's claims should be dismissed because they rely on a meritless "show-me-the-note" theory with no basis in Texas law. The court agreed. The theory relies on the rationale that judicial enforcement of a promissory note requires the enforcing party to prove possession of the original note, and as such, a mortgagee in a nonjudicial foreclosure action should be required to do the same.

The court explained that Texas law differentiates between enforcement of a promissory note and foreclosure. Foreclosure enforces the deed of trust, not the underlying note, as an independent action against the collateral and may be conducted without judicial supervision. Additionally, the Texas Property Code does not mandate the production of the original promissory note for nonjudicial foreclosures, requiring only written authorization for the servicer from the mortgagee. In this case, the servicer (PHH) had obtained written authorization from the mortgagee. Consequently, the court held that Plaintiff's claim as it relies on the "show-me-the-note" theory fails under Texas law. The court granted PHH's motion to dismiss Plaintiff's claims.

ARBITRATION

CASE LAW ESTABLISHES THAT THE PRECLUSIVE EFFECT OF AN ARBITRAL AWARD IS AN ISSUE FOR THE ARBITRATOR TO DECIDE, NOT A FEDERAL COURT

Nat'l Cas. Co. v. Cont'l Ins. Co., 121 F.4th 1151 (7th Cir. 2024).
https://law.justia.com/cases/federal/appellate-courts/ca7/23-3373/23-3373-2024-11-22.html

FACTS: Plaintiffs-Appellants National Casualty Company and Nationwide Mutual Insurance Company (hereinafter "National Casualty and Nationwide") agreed to reinsure Defendant-Appellee Continental Insurance Company (hereinafter "Continental"). The reinsurance agreements each contained an arbitration clause. After a billing dispute arose, National Casualty and Nationwide maintained that prior arbitration proceedings over similar matters resolved the dispute. Continental disagreed and demanded arbitration. National Casualty and Nationwide instead initiated an action asserting that the prior arbitral awards precluded new arbitration proceedings and sought declaratory and injunctive relief on that basis.

Continental moved to compel arbitration and dismiss the action. The district court granted the motion. National Casualty and Nationwide appealed.

HOLDING: Affirmed.

REASONING: National Casualty and Nationwide argued that arbitral awards issued from a prior proceeding in 2017 should resolve the current issue and preclude new arbitration. The court disagreed. The court explained existing case law established that the preclusive effect of an arbitral award is an issue for the arbitrator rather than the court.

The court emphasized that arbitrators alone are entitled to decide procedural questions that may arise before the final decision, including the preclusive effect of any earlier awards. Additionally, the court noted that the decision was consistent with Supreme Court precedent, which held that the Federal Arbitration Act ("FAA") enabled arbitrators to decide procedural issues that "grow out" of an arbitrable dispute and affect its final decision. Preclusion constitutes one such procedural issue.

Arbitrators alone are entitled to decide procedural questions that may arise before the final decision, including the preclusive effect of any earlier awards.

The court further mentioned that Section 13 of the FAA does not require federal courts to determine the preclusive effect of arbitral awards. The provision, as interpreted by prior case law, was indeterminate regarding what forum or entity should determine the effect of the judgment in action. Its terms clarified that a district court's order confirming an arbitral award should be just as binding as a judgment. Thus, the court declined to resolve the preclusive effect of arbitral awards and reaffirmed the district court's holding to dismiss the action and compel arbitration.

AMEX DEFAULTED UNDER SECTION 3 OF THE FEDERAL ARBITRATION ACT WHEN THE COMPANY REFUSED TO PAY $17 MILLION IN FEES

FEDERAL COURTS CANNOT COMPEL ARBITRATION IF A PARTY IS IN DEFAULT

AMEX CLEARLY WAS NOT "READY" AND "WILLING" TO ARBITRATE ON ANYONE'S TERMS BUT ITS OWN, AND THAT IS NOT HOW THE ARBITRATION SYSTEM WORKS

5-Star Gen. Store v. Am. Express Co., 759 F. Supp. 3d 317 (D.R.I. 2024).
https://casetext.com/case/5-star-gen-store-v-am-express-co

FACTS: Plaintiffs 5-Star General Store and other merchants (hereinafter, "Merchants") entered into an agreement with Defendant credit card company American Express (hereinafter, "AMEX") to accept Amex credit cards and follow the non-discrimination provisions (hereinafter, "NDPs") in AMEX's Merchant Operating Guide. The Merchants' agreement with Amex included an agreement to arbitrate disputes.

Merchants later initiated arbitration to challenge the legality of Amex's NDPs. When a dispute arose regarding arbitration fees, AMEX refused to pay the fees, and the claims were administratively closed due to nonpayment. Following arbitration, Merchants filed suit, alleging federal antitrust law violations under the Federal Arbitration Act. AMEX replied and filed a Motion to Compel Arbitration.

HOLDING: Denied.

REASONING: Merchants argued that AMEX waived their right to compel arbitration by failing to pay arbitration fees. The court agreed. The court determined that AMEX had defaulted under Section 3 of the Federal Arbitration Act by refusing to pay $17 million in arbitration fees, establishing that federal courts cannot compel arbitration if a party is in default.

The court emphasized that AMEX's refusal to comply with its financial obligations under its initiated arbitration agreement illustrated a disregard for the principles of mutual consent and fairness foundational to arbitration. By selectively adhering to the terms, AMEX acted contrary to the arbitration system's intent to resolve disputes efficiently and equitably. This behavior rendered AMEX's motion to compel arbitration untenable under the FAA, as the court commented "AMEX clearly is not 'ready' and 'willing' to arbitrate on anyone's terms but its own, and that is not how the arbitration system works. . ." AMEX's actions highlighted the statutory requirement that a party must not be in default of arbitration proceedings to compel arbitration. AMEX's Motion to Compel Arbitration was, therefore, denied.

MISCELLANEOUS

SUPREME COURT RULES THE "TRANSIENT VICTORY" OF A PRELIMINARY INJUNCTION IS NOT ENOUGH TO DECLARE A LITIGANT THE PREVAILING PARTY

Lackey v. Stinnie, 604 U.S. ___ (2025).
https://www.supremecourt.gov/opinions/24pdf/23-621_5ifl.pdf

FACTS: A Virginia statute required the suspension of driver's licenses for those who failed to pay court fines. Drivers whose licenses were suspended under the statute sued the Commissioner of the Virginia Department of Motor Vehicles, challenging the constitutionality of the statute. The drivers asserted that the statute violated the Fourteenth Amendment Due Process and Equal Protection Clauses because it failed to provide drivers with sufficient notice or hearing before the suspension of their licenses, and because it had an unfair impact on those who could not afford to pay the court fines. The drivers sued for declaratory relief, a preliminary and permanent injunction, and attorney's fees under 42 U.S.C. §1988(b).

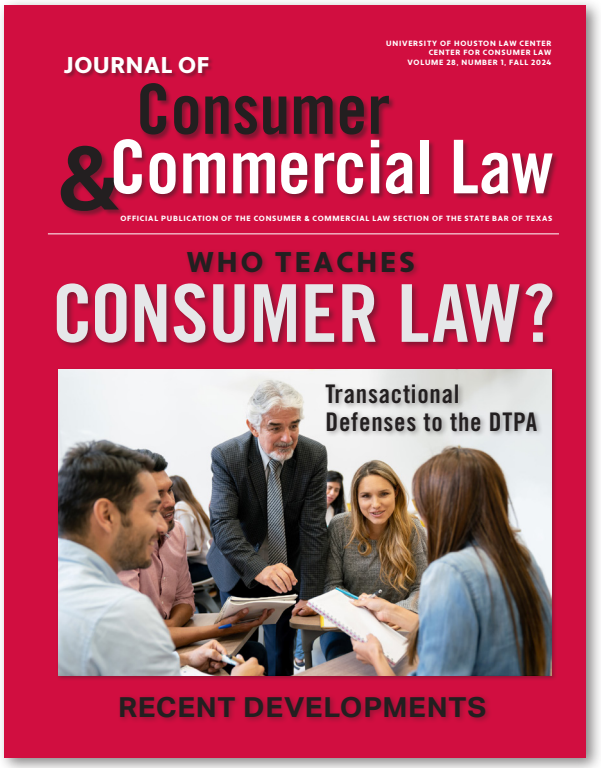
The District Court granted a preliminary injunction prohibiting the enforcement of the statute against the drivers and any future class members. Before trial, the statute was repealed, and the suspended licenses were reinstated. The parties agreed that the action had become moot and decided to dismiss the pending case, but the drivers still maintained that they were entitled to attorney's fees under §1988(b), which states that attorney's fees can be awarded to "prevailing parties." The District Court did not award attorney's fees to the drivers because it found that parties who obtain a preliminary injunction are not prevailing parties. A Fourth Circuit panel affirmed the holding of the District Court, but the Fourth Circuit reversed the holding en banc and held that some preliminary injunctions can provide lasting and merits-based relief such that plaintiffs could qualify as prevailing parties. The Supreme Court granted certiorari to determine whether a party awarded a preliminary injunction in a case which becomes moot before the court reaches a final judgment qualifies as a prevailing party for the purposes of §1988(b).

The Court stated that preliminary injunctions are of a "transient nature" and "do not conclusively resolve legal disputes," further noting that preliminary injunctions are not always congruent with the final judgment.

HOLDING: Reversed.

REASONING: When §1988(b) was initially adopted, "prevailing party" was defined in Black's Law Dictionary as one "who successfully prosecutes the action or successfully defends against it" and "[t]he party ultimately prevailing when the matter is finally set at rest." Black's Law Dictionary 1352 (rev. 4th ed. 1968). Because of this, the Supreme Court placed specific emphasis on the need for the conclusiveness of a final judgment. The Court stated that preliminary injunctions are of a "transient nature" and "do not conclusively resolve legal disputes," further noting that preliminary injunctions are not always congruent with the final judgment. Therefore, the Court determined that preliminary injunctions do not confer prevailing party status given the fact that they do not conclusively resolve the rights of the parties on the merits.

The Court stated that a plaintiff prevails when it is awarded judicial relief that constitutes a "material alteration of the legal relationship of the parties." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U. S. 782, 792–793 (1989). The Court further emphasized that the relief must be awarded through judicial sanction for a party to be considered prevailing, as determined in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*. 532 U. S., at 605. The Court also referenced *Sole v. Wyner*, in which it held that the change in the legal relationship between the parties must be "enduring" for one of them to have prevailed. 551 U. S., at 86. In considering these two holdings, the Court found that the enduring nature of the judicially sanctioned change in the legal relationship of the parties must itself be judicially sanctioned. A plaintiff cannot be made a prevailing party through external events during which their transient victory in the form of a preliminary injunction is turned into a lasting one. Instead, parties must obtain enduring judicial relief through the court's conclusive resolution of their claim.



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THE LAST WORD

Welcome to the last issue of Volume 28 of the Journal.

I want to thank our Student Editor-in-Chief Heather Erickson and her entire staff for doing such a good job during the past year. I know you all join me in wishing them all the best with their legal career.

As usual, this issue contains numerous *Case Digests,* as well as an interesting short editorial piece discussing "accidental arbitration." I think you will agree with me that sometimes courts seem to go too far in compelling arbitration.

And as you are aware, in each issue of the *Journal* there is usually an article discussing a current area of law. While I always recommend you read the article, and suggest you will find it valuable and interesting, I know many of you don't see an immediate reason to take time to read an article about a subject you are not currently dealing with. This issue is different.

This Volume's lead article by Carla Sanchez-Adams, Scams, Deception & Fraud, in the Banking System: Potential Remedies for Consumers, is a lengthy and comprehensive discussion of an area of law that most consumer attorneys are not familiar with. But as Carla explains,

> Payment fraud impacts all Americans across many communities— young, old, those highly educated, those with little formal education, those with technology fluency, and those that are technology novices.

In fact, problems arising from a consumers use of the banking system are not uncommon and often need the assistance of an attorney to be resolved. For example, among the many laws discussed in thearticle is the Electric Fund Transfer Act. The EFTA is a consumer protection statute enacted,

> [to] provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective …. however, is the provision of individual consumer rights.

So here is my suggestion. If you don't think you will be reading this article anytime soon, ***SAVE IT ON YOUR COMPUTER!*** Odds are you will need to read it sometime in the future, and you will be surprised how useful it is.

Enjoy,

Richard M. Alderman
Editor-in-Chief