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DEVELOPMENTS IN PAYMENTS LAW 2008

Creative Consumer Lawsuits and Robust Government Enforcement

I. Introduction

Consumers benefitted from a recent proliferation of lawsuits, final and proposed regulations, and federal agency enforcement actions. This is a welcomed change from the past several years, which witnessed efforts by consumers and their advocates, but efforts often frustrated by lawsuits forced into mandatory arbitration before unfriendly tribunals[1] and by federal agencies more enthusiastic about preempting the states' consumer protection laws than using their authority to curb abusive practices.[2] For whatever reason, several federal agencies have begun to act on several fronts to deal with the many obstacles consumers face in an increasingly complex payments marketplace. Meanwhile, states have continued to pass new legislation and consumer lawyers have brought innovative litigation.

II. Telephone checks: The circle of possible liability continues to expand.

So-called "telephone checks" are actually drafts primarily created by telemarketers, internet sellers, and debt collectors.[3] Many companies also use third party payment processors to process the drafts for them. Telephone checks are used to draw money from consumer bank accounts. The drafts are issued by the business, bear the consumer's bank account number and state that the consumer has authorized the withdrawal (usually authorization is done orally over the phone), but do not contain the consumer's signature. The UCC calls telephone checks "remotely-created consumer items." [4] State laws call them demand drafts. If the consumer did not authorize the draft and notifies the consumer's bank, the bank should recredit the consumer's account.[5] These drafts are now covered by Regulation CC.[6] The revised UCC and Reg. CC provides an incentive for the consumer's bank to shift liability for unauthorized telephone checks to the depositary bank. The ability to transfer liability to the depositary bank should make the consumer's bank less resistant to recrediting the consumer's account.

In the past, the Federal Trade Commission ("FTC") went after merchants engaging in unfair and deceptive practices directly with consumers. In a significant development, the FTC is now also going after companies with whom merchants contract to process the payments, companies whose expertise is knowing how to get money out of the consumer's bank account. The FTC has taken action against several payment processors.[7] In one action, the FTC was joined by seven states.[8] The FTC and the states claim the defendants knew that the merchants for whom they were processing transfers from consumer accounts were engaging in a variety of deceptive sales practices, resulting in unauthorized debits from the consumers' accounts. The payment processors nevertheless continued to process payments from these merchants.

A consumer class action goes even further, bringing the bank into the picture. The parties to the class action alleged Wachovia Bank conspired with payment processors it knew or should have known were processing telephone checks by telemarketers engaged in fraudulent activities.[9] The complaint claimed Wachovia violated the Federal RICO statute. The alleged predicate offenses included mail and wire fraud, and the crime of using, trafficking in or possessing, with intent to defraud, unauthorized "access devices."[10] An access device includes account numbers.

The Office of the Comptroller of the Currency ("OCC") also brought its own action against Wachovia.[11] In April 2008, the OCC reached a settlement with Wachovia in which the bank agreed to pay a penalty of $10 million. The OCC found that Wachovia failed to block telemarketers and their payment processors from using deceptive trade practices to obtain bank information from consumers, information which was used to obtain unauthorized transfers from the consumers' accounts using telephone checks. While some criticized the penalty as far too little, others pointed out it was the second largest penalty the OCC had ever imposed. Wachovia also agreed to reimburse consumers up to $125 million and contribute almost $9 million to consumer education programs targeted to the elderly. Observers noted that the OCC had applied anti-money-laundering concepts to a consumer fraud problem.[12]

At the same time the OCC announced its settlement with Wachovia, the OCC issued a guidance to national banks discussing banks' responsibilities in regard to customers who are payment processors.[13]

Canada prohibited demand drafts in 2004. The attorneys general of 35 states as well as the District of Columbia and American Samoa have asked the Federal Reserve Board to ban these drafts.[14]

III. Credit cards: Unfair and deceptive practices.

In parallel actions, the Federal Deposit Insurance Corporation ("FDIC") sued two banks and the FTC sued a credit card company. Defendants were accused of violating the FTC Act because of their misrepresentations in marketing subprime credit cards.[15] According to the FDIC and the FTC, defendants offered three types of cards. Regarding the first card type, the defendants failed to adequately disclose significant upfront fees and misrepresented the credit that consumers would have available. Regarding the second card type, the defendants did not adequately disclose the fact that only half of the credit the issuer said would be available could be accessed by the consumer for the first 90 days. In addition, the defendants did not disclose that it might reduce the credit limit based on the consumer's behavior. Finally, regarding the third card type, the defendants misrepresented the features of their debt transfer Visa credit card. Contrary to promises made to consumers, the consumers' prior charged off debt was not immediately transferred to the card and reported to consumer reporting agencies as paid in full. The two banks reached a settlement with the FDIC.

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The Federal Reserve Board ("FRB"), Office of Thrift Supervision, and the National Credit Union Administration published a proposed rule regulating many credit card practices found to be unfair and deceptive.[16] The proposed regulation: 1) restricts applying an increased APR to an outstanding balance; 2) prohibits treating a payment as late unless the card issuer gives consumers a reasonable amount of time to pay; 3) establishes rules for allocating payments where the consumer has balances with different interest rates; 4) prohibits two-cycle billing; and 5) prohibits assessing fees if the consumer exceeds the credit limit solely due to a hold placed on available credit. The proposed rule also addresses the practice that is the subject of the FDIC and FTC lawsuits described above. It does this by restricting financing fees and charges for opening a credit card account, where the fees and charges are more than half the credit limit.

The proposed rule also regulates bank practices that impose

overdraft fees pursuant to discretionary overdraft programs to which the consumer had not agreed. Under the proposed rule, the consumer has the opportunity to opt out of the program. In addition, the proposed rule addresses a problem that often arises when consumers use debit cards to purchase goods and services. The business may place a hold for an amount that far exceeds the consumer's obligation.[17] Banks are prohibited from assessing an overdraft fee when the overdraft would not have occurred but for the debit hold.

IV. Credit cards: Solicitation on campus restricted.

In 2007 and 2008, several states restricted credit card companies that solicit on public colleges and universities.[18] For example, in Maryland, universities are required to develop policies mandating that credit card issuers marketing their cards at a university inform students about good credit management practices in a program developed in conjunction with the university.[19]

A new Texas law prohibits campus credit card marketing activities except at those campus locations designated by the post-secondary educational institution, or at times other than those prescribed by the institution.[20] The issuer also must develop financial educational material either in consultation with or subject to approval by the institution, and the issuer is required to make the material available to students when they market the cards. Issuers may not offer gifts or other incentives in exchange for students who complete applications for credit cards. Finally, institutions must have a policy requiring a credit card and debt counseling session as part of any orientation for new students.

In a new law that applies to state universities, Tennessee law now prohibits credit card issuers from recruiting "potential student cardholders or customers for credit card business or other credit services on campus."[21] In addition, issuers may not offer gifts or other promotional incentives to students to entice them to apply for credit cards. These requirements also apply to marketing other credit services.

V. Stored value cards: Payroll cards, gift cards, bankruptcy, and telephone cards.

It used to be easy to categorize plastic cards and identify the law that applied to each. The Truth-in Lending Act and Reg. Z applied to credit cards.[22] The EFTA and Reg. E applied to debit cards.[23] No federal law applied specifically to all the other cards, generally known as stored value cards, including payroll cards, gift cards, prepaid "debit" cards, prepaid telephone cards, cards used to transfer insurance payouts, medical benefits, etc.

The lines between those cards suddenly became blurred, however, when the FRB declared that payroll cards henceforth would be subject to Reg. E; the same law that applies to debit cards.[24] The primary justification for this extension apparently was the FRB's acknowledgment that it was necessary to ensure that consumers had basic legal protection because the funds represented by payroll cards were essential for those consumers' well-being. Consumer advocates had urged the FRB to apply Reg. E to other types of stored value cards, because other cards, especially those held by low income consumers, contained vital funds that consumers need safeguarded. Although the FRB declined to apply Reg. E to any other type of stored value cards, it stated that it would continue to monitor developments, holding out the prospect that it might extend Reg. E to other stored value cards as well.

In 2008, the economic turndown resulted in many retailers filing for bankruptcy. Consumers found themselves holding worthless gift cards. For most consumers, their only recourse was to file a claim as an unsecured creditor; a claim unlikely to be satisfied.[25] Some state laws, however, distinguish between gift cards issued before a bankruptcy petition is filed from those issued after, requiring a gift card issuer to honor gift cards issued prior to the bankruptcy filing.[26]

Some states regulate gift cards, establishing rules for fees and expiration dates.[27] Sellers of these cards, however, sometimes are successful in avoiding these laws by involving entities, such as national banks, that are regulated by federal law. Under certain circumstances, courts hold that federal law preempts state law, even where there is no federal law directly related to the consumer problem addressed by the state law.[28]

Although no federal law directly regulates stored value cards except payroll cards, the FTC Act prohibits unfair and deceptive practices, regardless of the type of payment device involved.[29] The FTC took advantage of this in bringing an action against the seller of prepaid telephone cards to recent immigrants.[30] The FTC claimed that the seller failed to provide consumers with the number of minutes they would have available.

Some state Attorneys General have been aggressive in going after sellers of prepaid calling cards. The Texas Attorney General has sued a prepaid calling card company, alleging it failed to disclose information about fees and charges, resulting in consumers receiving far fewer minutes than the company promised.[31] The Florida Attorney General reached a settlement with nine companies that charged hidden fees or inadequately disclosed fees.[32] In addition, sellers of prepaid calling cards targeted non-English speaking consumers in ads, but made disclosures only in English.

VI. Rebate ads: Challenges to rebates provided through stored value cards.

Unlike cash or checks, stored value cards are accompanied by many restrictions and requirements. In that sense, stored value cards have less value than cash or checks. This is the basis of a lawsuit alleging that Cingular is liable for misrepresentation because its advertising and marketing about rebates led consumers to believe they would receive the value of their rebate in cash or by check, but instead received the rebate in the form of a less valuable stored value card, the "Cingular VISA Rewards Card."[33]

VII. Electronic commerce: Blind consumers demand equal access.

Many consumers buy and pay for goods on the Internet. Such shopping often exposes the consumer to a wider selection of goods and better prices than at traditional stores.

Software is currently available that enables blind shoppers to access web sites selling goods and services. The software vocalizes text and describes a web page's content. Consumers are challenging retailers who make it impossible or difficult for blind consumers to access websites despite the availability of this software. The consumers allege violations of state and federal law.[34]

VIII. ATM cards: Does an overdraft program subject ATM cards to credit card requirements?

Consumers sued Washington Mutual ("WAMU"), claiming its ATM card should be subject to the law governing credit cards because of WAMU's discretionary overdraft "bounce" protection program.[35] The consumers alleged violations of the Truth in Lending Act ("TILA"), the Home Owners' Loan Act ("HOLA"), and California state law. The court deferred to the FRB, agreeing with the FRB that there is a crucial distinction between discretionary overdraft programs and written agreements requiring

the bank to pay overdrafts. The court held that the ATM cards were not subject to credit card law because there was no written agreement requiring WAMU to pay overdrafts. The agreement specifically said that WAMU had no obligation to pay overdrafts. The consumers argued that the court should consider the conduct of the parties. In fact, WAMU routinely and automatically paid all overdrafts. The consumers contended this conduct gave rise to an implied contract. The court rejected the implied contract theory, again deferring to the FRB's distinction between courtesy overdraft programs and written agreements obligating the bank.

Finally, the court held that pursuant to the HOLA, WAMU is subject to the regulations of the Office of Thrift Supervision, which preempt state law. Preemption is a major impediment to consumers seeking enforcement of favorable state law. A recent U.S. Supreme Court case strengthens the hand of those arguing for preemption.[36]

IX. Electronic transfers: The role of private rule-making.

NACHA Rules supplement the EFTA and Reg. E, but consumers (and the government) have no formal role in the rule-making process. Consumers may have no right to sue parties who enter into a contractual relationship with NACHA in which they agree to comply with the rules, but who then violate the rules.[37] Some of the rules go beyond any state or federal law in protecting consumers.[38] Therefore, consumers would benefit from being able to enforce compliance.

For example, in 2007, NACHA issued an interim policy on notice requirements when there is a breach of ACH data.[39] ACH data includes the customer's bank account number together with a bank routing number, or the customer's name together with the customer's social security number. If a data breach is known or suspected, the financial institution is required to investigate and notify NACHA and the consumer's financial institution. Hopefully, the consumer's financial institution will then notify the consumer, although NACHA rules do not require this step. If a company knows of a breach and fails to comply with the NACHA notice rules, resulting in the consumer's bank not notifying the consumer or taking steps to protect the consumer's account, consumers should be able to sue the incompliant company for breach of NACHA's rules.

NACHA's rules and policies can benefit government enforcement agencies as well as individual consumers. Because of widespread deceptive practices by telemarketers and others, NACHA has issued guidelines on risk management practices, which include requiring parties transferring payments using the ACH system to monitor the transfers they process for signs of fraud.[40] The FTC has supported actions against payment processors by using statistics published by NACHA to support NACHA's enforcement actions.[41]

X. Issues awaiting resolution: What rules apply to the electronic image exchange of checks?

Banks have been adept at taking advantage of modern technology to increase the speed and efficiency of processing payments. Sometimes this has resulted in a situation where it appears the new method of transferring payments falls through the legal cracks, fitting into none of the extant rules, and entering into a black hole where no law seems to apply.

A check processed in the traditional way, the original paper check passing from drawer to payee, to depositary bank and other collecting banks, to the drawee-payor bank, is governed by Articles 3 and 4 of the UCC. Increasingly, banks use alternative methods to process payments where the consumer uses a check. For many years, banks presenting checks to the drawee-payor bank presented information about the check to the drawee-payor bank electronically. UCC section 4-110 permits such electronic presentation. In a more recent development, banks use advances in technology to convert the original check into an electronic image and exchange those images as the "check" makes its way to the drawee-payor bank. If a bank in the collection chain refuses to accept a payment transferred through electronic image exchange, the bank forwarding the image must convert the image into a "substitute check" pursuant to federal law, the Check 21 Act and FRB regulations.[42]

But what if a check is processed throughout the entire collection chain by electronic image exchange, never becoming a substitute check? It is not clear what law applies. Two prominent experts argue that UCC section 4-110 can be read to apply to this situation, and consequently the UCC as a whole applies.[43] Courts, however, may not accept this construction. Section 4-110 was not drafted to apply to this situation, having been drafted many years before electronic image exchange was invented. Moreover, as these experts acknowledge, electronic image exchange does not easily fit within the language of section 4-110, which applies only to presentment, and not to the earlier check processing stage of collection.[44]

Rather than asking courts to apply the UCC by analogy or through a strained interpretation of section 4-110, the better approach is to enact legislation specifically applying the UCC to electronic image exchange. However, depending on a UCC amendment is problematic. Check processing is a national enterprise and filling this legal gap requires a uniform global solution. The UCC can be amended only by every state adopting the amendment, a process that would take years. In addition, some states may enact non-uniform amendments, undermining the uniformity needed to solve this problem. Therefore, a superior solution would be a federal statute.[45]

XI. Issues awaiting resolution: What rules apply when it's impossible to determine whether the payment instrument is a counterfeit check or alteration of the original check?

The following describes a situation some check writers are experiencing. The consumer writes a check for $300. The con-

sumer's bank (payor bank) receives a check for $3,000 appearing to be from the consumer, pays the check, destroys the original check, and charges $3,000 to the consumer's account. In some situations, because the original has been destroyed, it is impossible to determine if the thief produced a counterfeit check or altered the original. If the check is a counterfeit, it is treated as a check with a forged consumer signature and the liability rests with the consumer's bank. If it's treated as an alteration, the consumer's bank can shift the liability to the bank where the check was deposited, the depositary bank. Although the UCC does not put the loss on the consumer under either approach, as a practical matter, if the check is treated as a counterfeit check, the consumer's bank may be more resistant to recrediting the consumer's account because that bank will be stuck with the loss. The bank may allege the consumer was negligent. If the bank were to prove the consumer's negligence in court or arbitration, the UCC's rules allocate the loss between the consumer and the consumer's bank under the principles of comparative negligence.[46] Because of the prevalence of identity theft and the widespread use of technology to produce counterfeit checks, this scenario is of increasing significance.

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Faced with the above type of situation, the Fourth Circuit held that the burden of proof is on the payor bank, the consumer's bank in the above illustration.[47] Because the payor bank in the case before the Fourth Circuit had destroyed the original check, it could not prove the check was altered by showing chemical bleach marks, broken fibers or other signs of alteration. Lacking such proof, the court assumed the check was a counterfeit and the loss was on the payor bank.

The Seventh Circuit reached the opposite result.[48] The depositary bank contended that the payor bank cannot enforce the presentment warranty and shift the loss to the depositary bank unless the payor bank retains the paper check and shows the check was altered. The court refused to adopt the depositary bank's position. The court assumed that accepting the depositary bank's argument would require payor banks to keep huge numbers of paper checks. The court wanted to put the loss on the "cheaper cost avoider," and was not persuaded putting the loss on the payor bank would have that result. The court seemed to acknowledge that the UCC does not provide any guidance on how to resolve this issue. Later in its opinion, however, the court assumed putting the loss on the depositary bank is consistent with current law and suggested the legislature is the proper institution to decide whether to change the law. The court affirmed the lower court's grant of summary judgment for the payor bank.

XII. Conclusion

It is impossible to know if the relatively robust recent federal agency activity will continue. There will be a new president in 2009 whose appointments may dramatically change the direction of federal agencies with authority over payment systems. If that happens, 2009 and subsequent years will look very different from the past few years. Not only would this affect the federal landscape, it could also affect state law if it results in federal agencies tempering their zeal for federal preemption and permitting states to take the initiative to protect their consumers. Notwithstanding this uncertainty, it is likely consumers will confront new payment products accompanied by new risks, schemes and scams.[49]

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1. Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, Businessweek, June 16, 2008, at 72.
2. *See* Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007) (upholding OCC regulations that preempt state mortgage law as applied to a national bank's operating subsidiary). *See generally* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call For Reform*, 38 Hous. L. Rev. 1237 (2001).
3. *See generally* Mark Budnitz & Margot Saunders, Consumer Banking and Payments Law 27-8 (3d ed. 2005).
4. U.C.C. § 3-103(a)(16) (2005).
5. If the draft was not authorized, it is not properly payable. U.C.C. § 4-401(a) (2005).
6. 12 C.F.R. §§ 229.2(fff), 229.34(d) (2008). *See* 70 Fed. Reg. 71218 (Nov. 28, 2005). Often the payment is taken from the consumer's account through an electronic transfer rather than a draft. The Electronic Fund Transfers Act and Reg. E apply when the payment occurs electronically. 15 U.S.C. §§ 1693-1693s (2008); 12 C.F.R. pt.. 205 (2008).
7. FTC v. Cordeiro, No. 5:01-CV-20109 (N.D. Cal. Feb. 6, 2001). Most of the recent FTC actions have involved payment processors who used electronic debits rather than drafts. *E.g.*, FTC v. Universal Processing Inc., No. CV-05-6054FMC(VBKx) (C.D. Cal. Sept. 7, 2005)(Stipulation and Final Order); FTC v. Global Mktg. Group, No. 8:06-CV-2272T-30TGW (M.D. Fla. Feb. 15, 2006). In these cases, the payment processor is banned from using any method, electronic or paper drafts, to process telemarketer payments. The Attorneys General of Ohio, Florida, Illinois, North Carolina, and Vermont brought actions against Amerinet. In 2005, Amerinet agreed to stop processing the drafts they received from telemarketers. *Attorney General Madigan: Illinois, Four Other States Settle With Nationwide Check Processor*, US State News, Nov. 3, 2005, *available at* 2005 WLNR 17850105.
8. FTC v. Your Money Access, L.L.C., No. 07-5147 (E.D. Pa. Dec. 11, 2007) (Complaint for Injunctive and Other Equitable Relief).
9. Faloney v. Wachovia Bank, No. 2:2007-CV-01455 (E.D. Pa. April 25, 2008).
10. 18 U.S.C. § 1029 (2008).
11. OCC Directs Wachovia To Make Restitution to Consumers harmed by the Bank's Relationships with Telemarketers and Payment Processors, News Release, OCC NR 2008-48 (April 25, 2008), *available at* http://www.occ.treas.gov/ftp/release/2008-48.htm(last visted Aug. 9, 2008).
12. Cheyenne Hopkins, *In focus: Wachovia OCC Order Called Sign of 'New Era,'* 173 Am. Banker (2008), *available at* 2008 WLNR 7735962.
13. OCC Bulletin 2008-12 (April 24, 2008), *available at* http://www.occ.treas.gov/ftp/bulletin/2008-12.html(last visited Aug. 9, 2008).
14. AARP Testimony before the Senate Commerce, Science & Transportation Committee, July 31, 2007, *available at* http://www.commerce.senate.gov/public/_files/AARPTestimonyOversightofTelemarketingPractices073107.pdf
15. Federal Deposit Insurance Corporation, *FDIC Seeks in Excess of $200 Million Against Credit Card Company and Two Banks for Deceptive Credit Card Marketing*, http://www.fdic.gov/news/news/press/2008/pr08047.html (last visited June 10, 2008).
16 [16] Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28904 (May 19, 2008) (to be codified at 12 C.F.R. pt. 227).
17. When consumers use debit cards to pay for gas or hotel accommodations, at the time the merchant obtains authorization to

honor the card, a hold is placed on the consumer's account for a pre-set amount. For example, when the consumer purchases gas, a $75 hold may be placed on the account. Later, the amount of the hold is compared to the actual purchase price, and the hold is removed, the consumer's account having been debited for the actual amount of the purchase. *See generally* Grillesca v. Amerada Hess Corp., 2007 WL 2702334 (M.D. Fla 2007) (challenging debit hold practice dismissed without prejudice because of lack of subject matter jurisdiction).

18. *See generally* Creola Johnson, *Maxed Out College Students: A Call To Limit Credit Card Solicitations on College Campuses*, 8 N.Y.U. J. Legis. & Pub. Pol'y 191 (2005); Maria Aspan, *Tenn's University Solicitation Law Toughest One Yet*, 173 Am. Banker (2008), *available at* 2008 WLNR 10632294.

19. Md. Code Ann., Educ. § 15-102 (West 2008).

20. Tex. Bus. & Com. Code Ann. § 35.131-7 (Vernon 2007).

21. Tenn. Code Ann. § 49-7-142 (2008).

22. 15 U.S.C. § 1601 (2007); 12 C.F.R. pt. 226 (2008).

23. 15 U.S.C. § 1693 (2007); 12 C.F.R. pt. 205 (2008).

24. 71 Fed. Reg. 51437 (2006).

25. Another possibility for consumers who purchased gift cards with their credit cards might be to exercise their rights under federal law to dispute billing errors. Regulation Z provides that, if a consumer notifies the credit card issuer of a billing error within sixty days of when the error first appeared on a periodic statement, the issuer is required to follow a detailed procedure to investigate and resolve the dispute. 12 C.F.R. § 226.13 (2008). A billing error is defined to include the consumer being billed for services not delivered to the consumer as agreed by the parties. 12 C.F.R. § 226.13(a)(4) (2008).

26. Cal. Civ. Code § 1749.6 (West 2003); Wash. Rev. Code Ann. § 19.240.090 (2008).

27. Budnitz & Saunders, *supra* note 3, at 178-79.

28. *Compare* SPGGC v. Ayotte, 488 F.3d 525 (1st Cir. 2007) (holding federal banking laws preempt state gift card law where mall owner was merely issuing agent of banks) *with* SPGGC v. Blumenthal, 505 F.3d 183 (2nd Cir. 2007)(holding federal banking laws do not preempt state gift card law).

29. 15 U.S.C. § 45(a)(1) (2006).

30. FTC v. Clifton Telecard Alliance One, L.L.C., No. 08-CV-1480 (PGS) (D. N.J. April 1, 2008) (alleging that the phone card issuer: (1) advertised consumers would receive a specified number of minutes of talk time, but providing substantially fewer minutes; (2) failed to disclose adequately that fees will reduce the value of the cards; and (3) failed to disclose adequately that the value of the cards will be reduced even when the consumer's call is not connected). *See generally* Mark E. Budnitz, Martina Rojo, & Julia Marlowe, *Deceptive Claims For Prepaid Telephone Cards and the Need For Regulation*, 19 Loy. Consumer L. Rev. 1 (2006).

31. State Telecom Activities, Communications Daily, June 2, 2008, *available at* 2008 WLNR 10563594.

32. *Attorney General McCollum Announces Prepaid Calling Card Settlements, Industry-Wide Reform*, US State News, June 11, 2008, *available at* 2008 WLNR 11052126.

33. Faigman v. AT&T Mobility, L.L.C., 2007 WL 2088561 (N.D. Ga. 2007) (denying defendant's motion to dismiss). The plaintiffs alleged stored value cards were less valuable because, *inter alia*, cards are accepted in a limited number of locations, can incur service charges, will be declined in transactions that exceed the balance on the cards, include an expiration date, are not redeemable for cash, are not divisible, are not transferable, collect private information, and are issued in maximum increments of $50.

34. Nat'l Fed'n of the Blind v. Target Corp., 2008 WL 54377 (N.D. Cal. 2008) (denying defendant's motion to dismiss); Nat'l Fed'n of the Blind v. Target Corp., 2007 WL 2846462 (N.D. Cal. 2007) (certifying a nationwide class for purposes of alleged violation of Americans With Disabilities Act, and a subclass of California consumers for purposes of alleged violation of state Unruh Civil Rights Act and the Disabled Persons Act).

35. In re Wash. Mut. Overdraft Prot. Litig., 539 F. Supp. 2d 1136 (C.D. Cal. 2008).

36. Watters v. Wachovia, 127 S. Ct. 1559 (2007).

37. *Compare* Volden v. Innovative Fin. Sys., 440 F.3d 947 (8th Cir. 2006) (holding consumer cannot bring breach of contract action for failure to comply with NACHA rules) *with* Sec. First Network v. C.A.P.S., Inc., 2002 WL 485352 (N.D. Ill. 2002) (holding receiver can bring a breach of contract action for failure to comply with NACHA rules).

38. *See generally* Budnitz & Saunders, *supra* note 3, at 85-97.

39. 2008 ACH Rules, OR xix (Nat'l Automated Clearing House Assoc. 2008) [hereinafter NACHA Rules]. Many states have enacted statutes requiring notice to consumers when there is a data breach, but they vary considerably in their scope and requirements. Paul M. Schwartz & Edward J. Janger, *Notification of Data Security Breaches*, 105 Mich. L. Rev. 913 (2007).

40. NACHA Rules, Supplement #1-2008 at Supp. 1-5 (Nat'l Automated Clearing House Assoc. 2008).

41. Your Money Access, LLC, No. 07-5147. (E.D. Pa. 2007) (Complaint for Injunctive and Other Equitable Relief).

42. 12 U.S.C. §§ 5001-18 (2008); 12 C.F.R. pt. 229, Subpart D (2008). The most recent innovation is "electronic check conversion." In ever more transactions, when a consumer tenders a check, the retailer or credit card company uses the check merely as a "source document," a source of information, and processes the payment as an electronic fund transfer, governed by federal law, the EFTA and Reg. E.

43. Barkley Clark & Barbara Clark, Clarks' Guide to Electronic Check Collection 3-16 (2008); Stephanie Heller, *An Endangered Species: The Increasing Irrelevance of Article 4 of the UCC in an Electronic-Based Payments System*, 40 Loy. L. Rev. 513 526-37 (2006).

44. Heller, *supra* note 43, at 532.

45. An example of this process relates to demand drafts. A few states enacted statutes changing the usual warranty rules for this type of draft. The rules applied to both commercial and consumer transactions. Then, sponsors of the UCC recommended amendments to the UCC that would apply these revised warranty rules only to demand drafts used in consumer transactions. U.C.C. §§ 3-103(a)(16), 3-416(a)(6), 3-417(a)(4), 4-207(a)(6), 4-208(a)(4) (2002). The FRB finally ensured universal adoption by amending Regulation CC to incorporate the warranty rules, applying them to both commercial and consumer transactions. 12 C.F.R. § 229.2(fff), 229.34(d) (2008). *See* 70 Fed. Reg. 71218 (2005).

46. U.C.C. § 3-406 (2008).

47. Chevy Chase Bank v. Wachovia Bank, 208 F. App'x 232 (4th Cir. 2006). It should be noted under Fourth Circuit rules, unpublished opinions are not binding precedent.

48. Wachovia Bank v. Foster Bancshares, 457 F.3d 619 (7th Cir. 2006).

49. An example of a new development is mobile banking and mobile payments whereby consumers can conduct their banking transactions via their cell phones. Steve Bills, *Text Service For USA Members,* 173 Am. Banker (2008), *available at* 2008 WLNR 13385881.