South Carolina Law Review

Volume 49
Issue 4 *SYMPOSIUM: CONDUCTING BUSINESS OVER THE INTERNET*

Article 11

Summer 1998

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BOOK REVIEW

CYBER-BANKING GAINS CURRENCY—AND INTEREST

21ST CENTURY MONEY, BANKING & COMMERCE. By Thomas P. Vartanian, Robert H. Ledig & Lynn Bruneau. Herndon, Va.: National Automated Clearing House Association, 1998. Pp. 653. $95.00.

*Reviewed by Walter A. Effross**

According to popular legend, when the Depression-era criminal Willie Sutton was asked why he robbed banks he replied, "Because that's where the money is." Today, however, as the physical realities of both cash and banks recede into the shadows of cyberspace, not only bankers, robbers, and consumers but also lawyers and regulators are struggling with the contours of the virtual financial landscape.

Few books have attempted to map, particularly with regard to the demands of practice, the complex crossroads at which electronic commerce converges with banking law. A number of recent discussions of online payment technologies have omitted banking issues.[1] In addition, a well-respected treatise entitled *The Law of Electronic Commerce* primarily addresses the creation, retention, and authentication of electronic records and the enforcement of electronic contracts, setting aside only a chapter to discuss the established law concerning wire funds transfers among banks.[2] Only two of the fourteen chapters in a recent survey of modern banking concern electronic payment issues,[3] and a scholarly study of "virtual

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1. *See, e.g.*, VIJAY AHUJA, SECURE COMMERCE ON THE INTERNET (1997) (exploring the issues, concepts and technologies necessary to achieve secure commerce over the Internet); SETH GODIN, PRESENTING DIGITAL CASH (1995) (introducing readers to the expansion of electronic commerce through payment systems involving digital cash); DAVID KOSIUR, UNDERSTANDING ELECTRONIC COMMERCE (1997) (providing insight into profiting from online commerce); PETE LOSHIN, ELECTRONIC COMMERCE: ON-LINE ORDERING AND DIGITAL MONEY (1995) (exploring security options and payment techniques for Internet users); DANIEL MINOLI & EMMA MINOLI, WEB COMMERCE TECHNOLOGY HANDBOOK (1998) (offering technical guidance concerning Internet commerce).

2. BENJAMIN WRIGHT & JANE K. WINN, THE LAW OF ELECTRONIC COMMERCE §§ 20.01-.30 (3d ed. 1998) (discussing the application of Article 4A of the Uniform Commercial Code to electronic funds transfers).

3. MARTIN MAYER, THE BANKERS: THE NEXT GENERATION 128-82 (1997) (discussing

money" issues and banking devotes much of its analysis to chaos theory and to economics.[4] Each of these last two books begins by tracing the transformation of money from hard goods to folding paper to software's bits and bytes.[5]

However, from its first chapter *21st Century Money, Banking & Commerce* leaves no doubt that banking law dominates the perspective of its authors. Thomas Vartanian and Robert Ledig, partners in the financial institutions group of the Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson, and Lynn Bruneau, partner in charge of the New York Metropolitan regional Computer Risk Management Group at Arthur Andersen, discuss "A Revolutionary Era for the Banking Industry"[6] before tracing the history of "The Business of Banking in the United States."[7] Only in the third chapter do the authors address the concept of "Money as Information," emphasizing that "money's value *as money* does not derive from its intrinsic usefulness *per se*, but rather *from the confidence among those accepting it that others will accept it.*"[8] In this context, banks may well enjoy a "reservoir of trust and confidence that they bring to their dealings with present and potential customers,"[9] but are nonetheless threatened by the emergence of nonbank issuers of electronic cash—such as CyberCash, Ecash, and Digicash—and the increasing

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the emergence of credit cards, automatic teller machines, smart cards, and Internet banking).

4. ELINOR HARRIS SOLOMON, VIRTUAL MONEY: UNDERSTANDING THE POWER AND RISKS OF MONEY'S HIGH-SPEED JOURNEY INTO ELECTRONIC SPACE 101-15 (discussing "money control layers"); *id.* at 185-99 (embarking on a "search for chaotic market patterns"); *id.* at 201-15 (examining virtual money as a market force).

5. *See* MAYER, *supra* note 3, at 37-62 (defining and discussing the "nature" of money); SOLOMON, *supra* note 4, at 15-23 (tracing the evolution of money and banks). For an extended examination of the historical and cultural meaning of money, see JAMES BUCHAN, FROZEN DESIRE: THE MEANING OF MONEY (1997).

6. VARTANIAN ET AL., 21ST CENTURY MONEY, BANKING & COMMERCE 3-12 (1998).

7. *Id.* at 13-34.

8. *Id.* at 38; *see also* BUCHAN, *supra* note 5, at 19-20 (poetically characterizing money as "incarnate desire" and noting that

> [w]hile barter seeks to match two wishes and annul them, money survives each sale or payment and must be deployed by its new holder or it ceases to be money. In thus mobilizing wishes, money sets people and matter in motion, has made great cities, railroads, satellites in the heavens, phantom warehouses of computing power, systems of law and equity, gardens, immense and long-winded corporations, sanguinary wars, monuments of architecture, teeming populations);

SOLOMON, *supra* note 4, at 11 (observing that "money is defined as a store of value, but its most necessary characteristic is its general acceptance as a medium of exchange. . . . Given that broad definition, many kinds of money now exist, each superimposed on preexisting money forms").

9. VARTANIAN ET AL., *supra* note 6, at 12.

"commoditization" of financial services as consumers surf web sites in search of the lowest interest rates on loans.

The authors (Vartanian and Ledig are adjunct professors as well as practitioners) have produced a consistently impressive combination of a treatise and a client memorandum. Particularly useful in their survey of the proliferating profusion of electronic payment technologies, regulatory actions, and judicial decisions are separate sections (each of which can be read independently) on the missions and relevant activities of various regulatory agencies—the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Financial Crimes Enforcement Network—as well as a seven-page time line[10] of their efforts in this area. The timeliness and relevance of the authors' work is underscored by the fact that the first of the seventy developments identified on the time line through December 1997 is as recent as January 1996.[11]

Vartanian, Ledig, and Bruneau pursue a descriptive rather than prescriptive approach, preferring to summarize rather than criticize developments. However, this apparent shortcoming appears to have been dictated by the topic, form, and function of the book itself. First, the regulatory process remains very much in flux; as even the casual reader will recognize, so many cooks are now stirring the regulatory soup that financial institutions can take advantage of the many "opportunities for creative regulatory responses to emerging issues and simultaneously can . . . play one agency or government against another through regulatory arbitrage."[12] Second, the underlying technology in these fields is still being developed, even as competing payment systems go online. As a result, the cycles of digital one-upmanship between hackers and corporate security experts,[13] as well as between lawyers and regulators,[14] will surely continue into the indefinite future. Third, as many sections of the book demonstrate, few easy

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10. *Id.* at 93-99.

11. *Id.* at 93 (noting the date when the Comptroller of the Currency "challenge[d] the banking industry to establish a leadership position in the development and distribution of new electronic money and payment technologies").

12. *Id.* at 81. The authors summarize the few documents issued and hearings held by federal interagency task forces concerned with electronic banking, including statements on financial institutions' management of the risk that computer systems might fail as January 1, 2000 arrives. *Id.* at 83-93. Also included is a detailed examination of the various agencies' perspectives on the regulation of stored-value systems. *Id.* at 490-505.

13. *See The Ins and Outs of Metrocard Gold*, 2600 MAGAZINE, Summer 1997, at 44 (examining the technological functioning of the New York mass transit system stored-value card and discussing "potential security holes" in its operation).

14. Acknowledging the rapid pace of developments in this area, the authors have developed an "e-mail and web page service" to provide the latest news to purchasers of the book. VARTANIAN ET AL., *supra* note 6, at i.

analogies exist in cyber-banking between traditional payment systems and financial institutions and other entities. The authors' introductory disclaimer provides two additional considerations: First, legal or consulting advice "can only be provided by counsel or consultants that are familiar with a party's specific situation."[15] Second, the authors' firms already represent "clients in electronic banking and commerce matters, including matters discussed in this book."[16]

Nevertheless, *21st Century Money, Banking and Commerce* highlights a number of growing tensions in these areas. The most prominent involves the role of the regulators themselves. The authors note that regulators give a competitive advantage to nonbank entities and that by intervening "too soon or too deeply, they risk skewing the development of the market and stifling the creativity of the banking industry's innovators."[17] This might be seen as the "restaurant-reviewer" theory of regulation, under which custom and common courtesy oblige a critic to allow a restaurant six months to establish its operations before he samples its fare for review purposes.

On the other hand, if the regulators are to abandon the field to the dictates of the market and of the private contracts between the financial institutions and their customers, when *will* be the appropriate time for them to step forward? In this context it seems more appropriate to compare financial regulators to state or municipal health officials, who should be instituting health and sanitation codes and overseeing a restaurant even before it opens, to ensure that its owners observe at least minimum standards. Whether of food or finance, no menu should be required by law to satisfy the most demanding gourmet tastes; however, it should neither mislead nor cause harm to the consumer.

On a level of consumer disclosure, the financial regulators might best be analogized to their counterparts at the Food and Drug Administration (FDA). The FDA requires that ingredients and certain warnings be listed on food packaging and oversees the consistent application of such descriptive terms as "low fat." Concern over consumer disclosure is underscored by the authors' discussion of the introduction of credit cards

15. *Id.* at ii.

16. *Id.*

17. *Id.* at 83. Banks advanced this argument in opposition to a proposal by the Federal Reserve Board of Governors in May 1996 to revise Regulation E in order to expand consumer protections to stored-value cards. At the same time, banks were also paradoxically insisting that the proposed regulation was unnecessary because consumers already understood the operation and legalities of the new payment technologies. For an analysis of the proposal and the comments of the regulated community, see Walter A. Effross, *Putting the Cards Before the Purse?: Distinctions, Differences, and Dilemmas in the Regulation of Stored Value Card Systems*, 65 UMKC L. REV. 319 (1997).

in the United States by Bank of America in the late 1950s. The authors note that some of the initial stumbling blocks involved the level of delinquent accounts, customer creditworthiness,[18] and consumer fear concerning who would bear the responsibility for theft or fraud.[19] However, as another account has observed, those consumers who troubled to read the cardholder agreement quickly replaced their worries with anger: its fine print "said that the person to whom the card was issued could be held responsible for any purchase made, even if the card had been lost or stolen. After this became widely known, there was another round of condemnation [of credit cards]."[20]

If banks have grown more adept at gauging risk, they have yet to be more forthcoming in disclosing relevant information to their customers. In July 1997 the *New York Times* reported that "[r]ight or wrong, millions of Americans are getting debit cards—also known as check cards—that they did not ask for. And many are carrying them around without realizing they have them."[21] These payment systems afford a customer the ability to debit his checking account directly, but involve "perils that consumers usually are unaware of and that banks do not like to discuss: liability for lost or stolen cards."[22] Shortly thereafter, MasterCard and Visa loudly announced liability limits for their debit cards.[23] As Vartanian, Ledig, and Bruneau note, "the industry moved to reassure consumers and forestall possible legislative action."[24] The careful reader should suspect that the latter was the industry's primary concern.

18. VARTANIAN ET AL., *supra* note 6, at 56 (citing JOSEPH NOCERA, A PIECE OF THE ACTION 32-33 (1994)). Nocera observed that these difficulties were caused by Bank of America's optimistic projections concerning consumer behavior. The Bank estimated that only 4% of accounts, as opposed to the resulting 22%, would be delinquent; it had not planned to set up a collections department; the program was a victim of "rampant" fraud; and the Bank did not anticipate the resistance of merchants to paying a transaction fee of 6%. NOCERA, *supra*, at 30.

19. VARTANIAN ET AL., *supra* note 6, at 56 (citing NOCERA, *supra* note 18, at 58).

20. NOCERA, *supra* note 18, at 31.

21. David J. Morrow, *Handy? Surely, But Debit Card Has Risks, Too*, N.Y. TIMES, July 13, 1997, at A1.

22. *Id.* at A1. The authors note that "[l]osses from credit card theft are capped at $50. But with debit cards, the loss limitation quickly climbs to $500 and is unlimited if the theft is not reported for 60 days." *Id.* The authors also observe that "people who write checks can always stop payment on them; they lack that option with some debit cards." *Id.*

23. *See* David Balto, *Limiting Consumer Liability Is Just First Step*, AM. BANKER, Aug. 15, 1997, at 12 (applauding recent developments but encouraging the adoption of additional measures for consumer protection); Charles Keenan, *Visa One-Ups Rival on Consumer Card Liability*, AM. BANKER, Aug. 14, 1997, at 1 (observing that although MasterCard restricted liability for unauthorized debit card purchases to $50, Visa announced that consumers reporting such transactions within two days would face no liability at all).

24. VARTANIAN ET AL., *supra* note 6, at 290.

If the relative rights and responsibilities of the parties are to be set principally by agreements drafted by the financial institutions and largely unreviewed by consumers, do consumers at least obtain some benefit from upgrading from Cash 1.0 to the new technologies? The authors analyze at length the ways in which banks can enhance the cost efficiency, convenience, and security features of their online products,[25] but early on they reveal the driving force behind the digital bandwagon: "[t]hough consumers perceive cash as the ideal payment instrument in terms of privacy and instantaneous payment, costs associated with cash, including transportation and protection costs, make it a costly payment mechanism *for banks*."[26] Yet there is little indication that the new financial products offer any real advantage to consumers beyond convenience.[27] In fact, consumers may be ill-served by even the most secure debit or stored-value card, which might not afford them the same well-established package of legal rights (for instance, to dispute charges or stop payment) as might a credit card or personal check.

This is not to detract from the excellence of subsequent chapters explaining the legal and technological approaches to protecting the security and privacy of online banking systems, or of a memorable chapter that examines in illuminating detail the operation of stored-value systems, comparing the Mondex, Visa Cash, Ecash, Millicent, and Citibank EMS systems. The authors explore at length the questions of who can—and who should—issue stored-value and electronic money under current law (including the still-valid Stamp Payment Act of 1862)[28]. Moreover, their

25. *Id.* at 289. The authors observe that consumer confidence "will come from the assurance that the relevant product or service is recognizable and difficult to counterfeit, enjoys reasonable stability, and is durable and will not deteriorate." *Id.* In addition, consumer confidence will hinge on "whether consumers perceive these products and services to provide adequate protection in terms of confidentiality, privacy, and security." *Id.*

26. *Id.* at 288 (emphasis added). The authors note that "[t]he average cost of a teller assisted branch transaction is $1.07. Telephone transactions typically cost $0.54 and ATM transactions $0.27. By comparison, the estimated costs of a similar transaction executed through personal computer ("PC") banking is $0.02 and through a smart card is $0.01." *Id.* (footnotes omitted).

27. The authors predict that "[c]onsumers are likely to respond to new payment products and services that are convenient with respect to time, location, and method of use." *Id.* However, perhaps because of concerns about their legal rights with regard to smart cards, consumers have been noticeably reluctant to embrace them. *See, e.g.*, Peter Pae & Devon Spurgeon, *Smart Cards Get Off to a Slow Start*, WASH. POST, Mar. 21, 1998, at D1 (noting that the "lackluster response" to a recent test of smart cards in Manhattan, "along with disappointing results from a similar test during the Summer Olympics in Atlanta in 1996, has prompted intense debate among bankers as to whether smart cards will ever take off with American consumers")

28. The Act, now dodified at 18 U.S.C. § 336 (1994), prescribes a fine or imprisonment for not more than six months for "[w]hoever makes, issues, circulates, or pays out any note,

chapter on "Remote Banking and Financial Services," while also analyzing online brokerage and insurance services, highlights the benefit to the consumer of Internet banking: "[a]s the variety of services continues to expand, and as regulatory barriers to entry continue to fall, banks will have to compete aggressively to maintain and grow market share, relative both to other banks and to non-bank competitors."[29] The last sections of the book address the new issues of intellectual property and jurisdiction that the Internet has introduced.

Quotations from various rock songs preface major sections of *21st Century Money, Banking, and Commerce.* Yet perhaps, at this state of their development, the best attitude to adopt towards digital cash and banking's technological flash is that expressed in Jimmy Buffett's cheery off-shore cynicism:

> Scales and clocks just can't be trusted
> Keys and locks are destined to be busted
> Metaphors were never meant for keeping score . . . .
> . . . .
> Only time will tell.[30]

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check, memorandum, token, or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States . . . ." *Id.*

29. VARTANIAN ET AL., *supra* note 6, at 412.

30. JIMMY BUFFETT, *Only Time Will Tell, on* BANANA WIND (MCA Records 1996).