

[Subcommittee on Payments](#)
by Sarah Howard Jenkins, Chair

Part A

Dinosaur: one that is impractically large, out-of-date, or obsolete . . . a check

The UCC subcommittees are asked to provide a brief column on an interesting legal development – some new case, statute, or regulation – that affects practice in their substantive area. Patricia Allowise, Sarah Jane Hughes, and Stephen T. Middlebrook in their recent article, *Developments in the Laws Affecting Electronic Payments and Stored-Value Products: A Year of Stored-Value Bankruptcies, Significant Legislative Proposals, and Federal Enforcement Actions*, 64 *The Business Lawyer* 219 (2008), cover the waterfront on cases, statutes, and regulations impacting the practice of payments law in 2008. My updating research unearthed only one significant piece of information as an addition to their thorough research.¹ If you have not read their article, download it immediately and review its contents. If your time is limited, at least read their conclusion.

Migration to electronic payment systems is increasing at a robust rate with new models that challenge existing legal regimes and diverse rules that may hinder solid representation of client interests. *Community Banker*, an industry magazine published by the American Bankers Association, reported in December that “two-thirds of all banks and 40 percent of all U.S. financial institutions will have adopted remote deposit capture” by the end of 2008 and most mid-size and community banks by the end of 2009.² Remote deposit capture permits businesses to scan checks received from their customers and to transmit the digitized images to their banks for collection.³ *American Banker* reports that e-commerce transactions for those without credit cards – yes, your teenage daughter – will be greatly facilitated by a mobile payments service offered by Paymo, Inc., a payments network for digital goods, to AT&T and Verizon Wireless customers. The service permits the charging of the purchase price to the customer’s cell phone bill.⁴ Allowise, Hughes, and Middlebrook conclude that the proliferation of innovative electronic payment mechanisms such as these necessitate for all players the development of harmonizing rules to govern regulated and non-regulated payment devices and services. Further, they suggest as a model the envisioned European Union Single Euro Payments Area (“SEPA”) that was implemented by the EU 2007 Payment Services Directive. On Thursday, April 16, 2009, at the Vancouver Spring Meeting, the UCC Subcommittee on Payments, the Electronic Banking Subcommittee, and the Electronic Financial Services Subcommittee of the Cyberspace Law Committee will jointly host a meeting organized by Hughes and Middlebrook, co-chairs of the Electronic Financial Services Subcommittee, on SEPA, followed on Friday, April 17, 2009, by a jointly

¹ See Part B, *infra*.

² *Robust Adoption of Remote Deposit Capture Continues*, *Community Banker* 18.12 (Dec. 2008).

³ See, generally, 10A Hawkland, Part 1. Non-U.C.C. Payment Methods Chapter 2, Other Payment Methods and Systems: ECCHO, Stored Value, PayPal, Home Banking, Mobile Financial Services § 2:19. *ECCHO check presentment* (last viewed 1/09/09); Walt Young, *Metavante Regulatory Services: Hot Issues, Remote Deposit Capture for Retail Customers -- Why Everyone Is Talking About It But Not Many Are Doing It - Yet!* (June 4, 2008).

⁴ Wolfe, Daniel, *Mobile Micropayments To Target U.S. Teenagers*, *American Banker* 6-7 (Dec. 22, 2008).

hosted presentation by Fred Miller, Chair, and Linda Rusch, Reporter, of the recently appointed NCCUSL-ALI Study Committee on Payments. Miller and Rusch will discuss the Committee's charge, its issues, its past, and its future activities.

PART B

FDIC to Insure Open-loop Stored Value Cards

On November 13, 2008, the Federal Deposit Insurance Corporation ("FDIC") issued notice of a new General Counsel's Opinion No. 8.⁵ Therein, the Legal Division of the FDIC clarified that funds underlying stored value products and "other nontraditional access mechanisms" that provide access to money at insured depository institutions will be insured up to the insurance limits. These open-loop cards may be distributed by the insured depository institution or a third party such as an employer issuing payroll cards. Of concern is whether the insurance accrues to the benefit of the holder of the card or to the distributor of the card. The Opinion clarifies that, as with other types of deposits, pass-through insurance coverage will be available if: 1) the account records of the insured depository institution disclose an agency or custodial relationship; 2) the records of the institution or those maintained by the custodian disclose the identities of the actual owners and the amount owned by each; and 3) the funds in the account are owned pursuant to agreement between the parties by the owners and not by the custodian or another party. Although not required, the FDIC encourages that information on the FDIC insurance coverage should be displayed on the stored value cards.

⁵ 73 Fed. Reg. 67,155 (Nov. 13, 2008).