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ARTICLES

GOLDSTEIN'S CURSE

*James J. White**

ON April 16, 1980, a man using the name Marvin Goldstein opened a bank account at a Baltimore branch of Union Trust Company. He deposited \$15,000 in cash. He told the branch manager that he planned to establish a Baltimore office of his father's New York business, "Goldstein's Precious Metals and Stones." Goldstein identified himself with a New Jersey driver's license and gave a bank reference from New York. On May 6, Goldstein deposited a check for \$880,000 at another Union Trust branch near the branch where he had opened the account. Words on this check indicated that it was drawn on the account of Metropolitan Investment Corporation at First Pennsylvania Bank, a large Philadelphia bank. Unbeknownst to the Union Trust officers, the fractional numerals in the upper right hand corner of the check identified Albany State Bank as the payor, and the numerals at the bottom of the check were gibberish: they identified no bank at all. Apparently Goldstein had altered the numerals at the bottom for they were not magnetic numerals, were of the wrong size and were nonsensical. On most checks the name of the drawee, the fraction in the upper right hand corner and the Magnetic Ink Character Recognition ("MICR")—encoded numerals on the bottom—all identify a payor.

Because the numerals on the bottom were not magnetically encoded, the Union Trust machine could not read them and the check had to be sent for collection manually. Accordingly, Union Trust transferred it by courier to Philadelphia National Bank (PNB). In apparent reliance on the numerical indication in the fraction, PNB sent it to the New York Federal Reserve processing

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center in Utica, New York on May 7; Albany State received the check on the morning of May 9. On May 10, Albany returned it to the Utica center stamped "Sent in Error," and on May 13 it was returned to the New York Federal Reserve Bank's New York City office. The New York Federal Reserve Bank then sent it on May 14 to the Federal Reserve Bank of Philadelphia for collection at First Pennsylvania. It was presented on May 14 at 9 a.m. at First Pennsylvania; First Pennsylvania notified PNB of dishonor at 9:45 on the morning of May 16. PNB sent word of dishonor to Union Trust in the middle of the afternoon on May 16.

Unfortunately, Goldstein had come to Union Trust on May 15 to withdraw \$95,000 in cash and to direct a wire transfer of \$660,000 to the account of a Maryland coin dealer. On May 16, Goldstein picked up his coins and disappeared. No one has heard from him since.

I. THE CURSE

Goldstein's curse is the inability of the banking system to distinguish between legitimate payment orders and fraudulent ones. When checks were not widely used, and when bank employees knew each depositor and recognized each signature, it would have been impossible for Goldstein to have escaped with \$800,000.

To understand why the curse rests upon our system and why we will not be able to exorcise it, consider the qualities that are necessary for its existence. First is a high volume of transactions. The American system handled more than forty-seven billion checks in 1987,¹ and the two principal wire payment systems, Fedwire and Clearinghouse Interbank Payments System ("CHIPS"), transfer about one trillion dollars per day.² If each of those transactions had been handled by one with a comprehensive knowledge of the practical and legal consequences

1. D. Humphrey & A. Berger, *Market Failure and Resource Use: Economic Incentives To Use Different Payment Instruments*, table A-1 (Apr. 1988) (paper presented at the Federal Reserve Bank of Richmond Payments System Symposium, Williamsburg, Va.).

2. Prefatory Note, Article 4A, *reprinted in* ALI-ABA COURSE OF STUDY MATERIALS, THE EMERGING NEW UNIFORM COMMERCIAL CODE (Supp. Sept. 1989) [hereinafter THE NEW U.C.C.].

of each act, the system could not have worked. The volume of transactions demands that a larger and larger share of the work be done mechanically and electronically and that the human labor come in a form that is highly specialized and semi-skilled.

Because most of the work must be done electronically or mechanically, there must be a way to distinguish mechanically or electronically between one account and another, one bank and another, and one transaction and another. Whatever their intelligence in the hands of a clever programmer, computers—even those that can handle a large volume of transactions—are notoriously rigid and highly restricted in their adaptability to new information.

A second quality of our funds transfer system that feeds the curse is its complexity. Few of the people associated with the funds transfer system fully understand its operation. A person who MICR encodes the dollar amounts on the check in the basement of the depository bank may be highly efficient at doing that but is unlikely to be able to distinguish a drawer's from an indorser's signature or to understand the legal consequences of either. The person who operates the photographic and sorting machine at the payor bank may have a detailed knowledge about how the machine can become jammed or the camera can breakdown, but is unlikely to understand that her bank will be liable if it holds a check beyond the midnight deadline. Those at the receiving bank who routinely enter electronic funds transfers into various accounts identified by number are blissfully ignorant of the fact that even though the number on the electronic fund message and on the account may be identical, the names on the two may be different. The complexity, the volume, and the necessary compartmentalization of the human activity in the system all feed Goldstein's curse.

Nor is the system likely to change in ways that will allow us to be rid of it. Consider three events that have occurred within the last twenty years that have magnified the impact of the curse. First is MICR encoding. Almost all preprinted checks have MICR encoding to identify the payor bank, the drawer's account, the location of the payor and the type of instrument. At the depository bank, the payment amount is manually MICR encoded at the bottom of the check.³ The check is then fed into

3. For examples of how mistakes in manual MICR encoding can cause

a machine that automatically sorts it, reads the dollar amount,

confusion, see *First Nat'l Bank v. Fidelity Bank, Nat'l Assoc.*, 724 F. Supp. 1168 (E.D. Pa. 1989); *SOS Oil Corp. v. Norstar Bank*, 152 A.D.2d 223, 548 N.Y.S.2d 308 (1989); *Georgia R.R. Bank & Trust v. First Nat'l Bank & Trust Co.*, 139 Ga. App. 638, 229 S.E.2d 482 (1976), *aff'd*, 238 Ga. 693, 235 S.E.2d 1 (1977).

In *First National Bank*, the depository bank encoded a \$100,000 check as a \$10,000 check. 728 F. Supp. at 1169. The payor bank paid \$10,000 shortly before the drawer's account was closed. Holding that the payor would have been liable had sufficient funds remained in the drawer's account, the court nevertheless freed the payor bank from liability since the account had been closed. *Id.* at 1172-73.

In *SOS Oil Corp.*, the Appellate Division of the New York Supreme Court came to the opposite conclusion. It found the payor bank liable for the difference between the encoded amount and the actual amount on the ground that the payor had held the check beyond its midnight deadline without paying or settling and thus had liability under U.C.C. § 4-302 (1987). 152 A.D.2d at 225, 548 N.Y.S.2d at 310.

The warranties proposed in the amendments to article 4 in § 4-208 (Proposed Amendments to Article 4, Draft No. 1, Feb. 1, 1990) will cover these cases. Under this section the depository bank that manually does the MICR encoding will warrant the accuracy of its encoding 4-208(1) and, in cases like the three discussed here, would have liability and, presumably, would be unable, therefore, to recover from a payor bank under § 4-302. Thus, the amendments would affirm the outcome of *First National Bank*, although for different reasons, and would reverse the outcome in *SOS Oil Corp.*

Proposed § 4-207A reads:

Encoding and Retention Warranties.

(1) A person that encodes information on or with respect to an item after issue warrants to any subsequent collecting or returning bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depository bank encodes pursuant to agreement with the depository bank, that bank also makes this warranty.

(2) A person that undertakes to retain an item pursuant to a truncation agreement warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the truncation agreement. If a customer of a depository bank undertakes to retain an item pursuant to agreement with the depository bank, that bank also makes this warranty.

(3) A person to whom the warranties are made under this section may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus interest losses and expenses incurred as a result of the breach.

(4) Unless a claim for breach of warranty is made within 30 days after the claimant has reason to know of the breach and identity of the warrantor, the warrantor is discharged to the extent of any loss caused

credits the proper account, debits another, and sends the check toward its apparent payor. Thereafter, the check may never again be manually handled. This MICR encoding is now universal and means that there is usually no human intervention in the transfer of funds after the check goes through the first step in the process at the depository bank.

A second recent change is the imposition of dollar cutoffs below which banks do not examine drawers' signatures. Although banks do not advertise this behavior, few banks now check all signatures.⁴ Failure to check signatures is a direct response to the volume and to the need for speed, but that omission, of course, removes all possibility with respect to such checks that a forgery will be discovered by comparing the signature on the check with the true signature of the depositor.

A third event is check truncation. Truncation is the destruction of the check before it reaches the payor bank. Currently truncation is practiced by many credit unions which hire banks to collect their checks and which allow the banks to destroy the checks and send the information to the credit union electronically. Almost certainly truncation will spread to banks generally and then turn upstream to occur at the depository bank. In the twenty-first century, checks will be photographed and then destroyed at the depository bank and all of the information will be transmitted only electronically.⁵

Each of these three events speeds the transaction, but each diminishes the possibility that a human being will intervene to distinguish between a legitimate and a fraudulent transfer. Projecting this experience into the future, we can predict that

by the delay in making the claim.

(5) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

4. American Bankers Association, *National Operations/Automation Survey 1986* 119, table 35E (1987). Of the 3,400 banks surveyed in a 1987 banking study, only 52.4% with assets of less than \$100 million verify signatures on all checks before payment. This percentage decreases dramatically as the assets of the banks grow; only 1% of banks with assets of \$5,000 million or more verify all signatures before payment.

5. Ultimately it may be possible electronically to transmit a picture of the check in some form to the depositor, but the day of seeing the actual check will be long gone.

the damage wreaked by Goldstein's curse will grow, not diminish, and that those in charge of the payment system will have difficulty merely to maintain the system's current ability to distinguish legitimate from fraudulent transactions.

II. FOUR EXAMPLES

Before I examine the legal doctrines that allocate the losses arising from Goldstein's curse, I will finish Goldstein's story and describe three other common frauds to give an appreciation of the scope and nature of the problem.

The civil debris left by Goldstein's crime fell at the feet of Judge Haight in the Southern District of New York. In *United States Fidelity & Guaranty Co. v. Federal Reserve Bank of New York ("Union Trust")*,⁶ Union Trust argued that the various collecting banks downstream from it, namely PNB, Albany State, and the Federal Reserve Bank of New York were agents and were liable to it under section 4-202 for negligent handling of the \$880,000 Goldstein check. They also argued that First Pennsylvania had liability for holding the check beyond its midnight deadline. Judge Haight rejected all of those arguments and left the loss on Union Trust.⁷

The Judge rejected the invitation to apply a comparative negligence standard. Rather, he applied section 3-406 by analogy to the behavior of Union Trust. Union Trust had done a variety of acts with respect to Goldstein and the Goldstein check which showed it to be a "substantial contributor to the loss." In the first place, the teller failed to put a hold on the \$880,000 check of the kind that the bank procedures normally required.⁸ In the second place, the Bank's own check processing machine spit out the check because the letters at the bottom were not magnetically encoded. Despite its obvious deficiencies (the numerals were not

6. 590 F. Supp. 486 (S.D.N.Y. 1984), 620 F. Supp. 361 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 77 (2d Cir. 1986). For other MICR fraud cases, see *Northpark Nat'l Bank v. Bankers Trust Co.*, 572 F. Supp. 524 (S.D.N.Y. 1983); *Citizen's State Bank v. Martin*, 227 Kan. 580, 609 P.2d 670 (1980).

7. 590 F. Supp. at 494-99.

8. *Id.* at 492-93. As the normal hold would have expired before May 15, the failure to comply with this procedure probably had no impact on the outcome.

only not MICR encoded, but they were the wrong size and shape), the check was sent on for manual collection. Union Trust failed to record Goldstein's alleged banking association in New York and so was unable to check on it. Had it inquired with the New York banking reference, there Union Trust would have found no knowledge of Goldstein. When it did check with credit bureaus and with First Pennsylvania, it was told there was no account in the name of the drawer on the \$880,000 check and that the credit bureaus had no knowledge of Goldstein. Finally, the bank officer should have been put on notice when Goldstein appeared at the bank with an expensive bottle of champagne to speed the bank's approval of his withdrawal of the funds.

The assistant branch manager who ultimately authorized the wire transfer, on May 15, apparently believed that the check had been paid because the Union Trust computer treated the funds as "collected." Evidently that employee did not realize that the fact that an item is shown as "collected" in the computer memory does not mean that final payment has occurred, but is merely a reflection of an assumption that is itself built into the computer program about the *expected* time it should take for the final payment of a check. For all of these reasons, Union Trust was properly regarded as far more negligent than any other party in the transaction; surely it was the least cost-risk avoider in this case and should have borne the loss.

That was exactly the outcome that Judge Haight required. He did so by applying 3-406 by analogy to the behavior of Union Trust. He commented as follows:

The depository bank, like the drawer of the check, is well situated to protect the system against MICR fraud. The depository bank has an opportunity to examine the check free of time pressures which prevent collecting banks from giving checks more than a cursory glance. Perhaps more important, the depository bank is in the unique position of being able to examine both the depositor and the check. No other bank in the collecting chain can examine the depositor, a crucial advantage given the seeming difficulty of detecting this type of fraud.⁹

9. 620 F. Supp. at 372.

The Judge pointed out that there may be cases of MICR fraud in which the depository bank should not bear the loss but where the collecting bank should be liable under section 4-202.¹⁰

My second example deals with a most ancient and common form of check theft—forging the drawer's signature. This case shows the impact of the curse even on conventional frauds. In *Medford Irrigation District v. Western Bank*,¹¹ a bookkeeper forged the name of her employer on a number of checks which were cashed at the defendant bank. For the purpose of summary judgment, the plaintiff conceded its negligence in not supervising the bookkeeper, not auditing the accounts, and in failing to review the bank statements. It also conceded that its negligence substantially contributed to the forgeries.¹² Nevertheless, plaintiff argued that the bank did not follow "reasonable commercial banking standards" or exercise "ordinary care" because it failed to examine signatures on checks for amounts of less than \$5,000.

The appellate court affirmed the summary judgment for the plaintiff. Because it found the bank to be negligent, it ruled that the depositor's negligence in supervising the embezzler was irrelevant.¹³

*Rhode Island Hospital Trust National Bank v. Zapata Corp.*¹⁴ is indistinguishable from *Medford Irrigation*, but the First Circuit comes to the opposite conclusion. There, an embezzler stole a number of blank checks from Zapata, forged its signature and entered amounts between \$150 and \$800 on each check. Between

10. *Id.* First Pennsylvania escaped its apparent liability for holding the check beyond its midnight deadline on the ground that Union Trust was estopped from making such a claim against First Pennsylvania. Recall that First Pennsylvania had responded that there was no account at its bank in the name of the named drawer, and the court found that that message given to Union Trust early in the transaction estopped Union Trust from later claiming final payment. *Id.* at 373. The court also suggested that it might have reached the same result on the ground that First Pennsylvania could have recovered the money on a restitution theory, as Union Trust did not change its position in reliance upon final payment.

On the latter point the court may be on shaky ground. If First Pennsylvania had stopped payment during the day of May 15, some or all of the money might have been kept out of Goldstein's hands.

11. 66 Or. App. 589, 676 P.2d 329 (1984).

12. *Id.* at 589, 676 P.2d at 331.

13. *Id.* at 590, 676 P.2d at 334.

14. 848 F.2d 291 (1st Cir. 1988).

March and July 1985, the payor paid \$109,247.16 of these forged checks. Relying on section 4-406, the court of appeals affirmed a judgment for the bank as to the checks presented for payment more than two weeks after Zapata had received the first bank statement reflecting the forgeries.¹⁵ A banking expert testified that most banks do not examine drawers' signatures on checks under a certain dollar amount; he also testified that this practice had not caused any significant increase in forgery losses. The court concluded that such behavior was not negligent.

In concluding that the payor's failure to examine was not negligent, the court made explicit reference to Judge Hand's famous definition of "duty" in *United States v. Carrol Towing Co.*¹⁶ There, Judge Hand recognized that one can fail to take certain plausible and possible precautions and yet not be negligent because of such failure if the burden of precaution is large compared with the gravity of the harm and the probability of its occurrence.

What is new about *Rhode Island Trust* and *Medford Irrigation* is not the acts of the embezzlers; it is the acts of the banks. The increased volume of checks handled by every bank has caused virtually all banks to abandon the practice of examining signatures on every check.¹⁷ The differing outcomes in these two cases exactly demonstrate the differing responses to Goldstein's curse.

My third case is a common theft that has been described in appellate decisions for more than 100 years.¹⁸ An unfaithful corporate employee first procures a proper corporate signature on a check payable to the order of a bank. The thief then deposits the check in his own account at that bank or receives cash on the check's presentation.¹⁹ Bank employees are accustomed to treating checks payable to their bank as though they are payable to cash, and recognize them as a means by which depositors withdraw their own funds. Routinely, therefore, tellers and bank operations employees follow the instructions of persons in possession of such checks because they confuse this

15. *Id.* at 292-95.

16. 159 F.2d 169 (2d Cir. 1947).

17. *See supra* note 4 and accompanying text.

18. *See Sims v. United States Trust Co.*, 103 N.Y. 472, 9 N.E. 605 (1886).

19. *See id.* at 474.

fraudulent use of the check with its legitimate use. Here the thief takes advantage not of the computer's ignorance, but of the ignorance of the bank employees.

*J. Gordon Neely Enterprises Inc. v. American National Bank of Huntsville*²⁰ is illustrative of these cases. In that case, a Huntsville Midas Muffler shop was operated by the Neelys. In 1976, the Neelys hired Louise Bradshaw as a Kelly Girl. Louise stayed on to help Mrs. Neely learn how to "keep the corporate books."²¹ Among other things, Louise suggested that the Neelys open a bank account at American National Bank and that funds be put in that account by checks drawn on their regular account at First Alabama. The American National account was to be used for payroll and certain other purposes. In 1977, Louise Bradshaw made out nineteen different checks payable to the order of American National Bank for the signature of Mrs. Neely. Louise left large gaps to the left of the amount written on the designated line, but Mrs. Neely signed them anyway. Louise would then add a digit or two to the left of the original amount or raise the first digit by using liquid erasure. She then made a split deposit at American National by putting the original amount into Neely's American National payroll account and depositing the rest into her own account. Louise saw to it that she got possession of the checks when they were returned to the Midas Shop and she covered up her defalcation by again using liquid erasure on the checks to return them to the original amount and by reconciling the accounts by herself or doing so with Mrs. Neely in a way in which Mrs. Neely never saw the statements.

When a new accountant was hired in the latter part of 1977, he quickly discovered embezzlements of \$17,005.18. The Neelys sued American National for conversion.²² They argued that, although the bank had been directed to make payment to itself ("pay to bank" the checks had said), instead it had paid more than \$17,000 to Louise Bradshaw. Relying upon the bank's expert testimony to the effect that banks normally treat such checks as "payable to the order of cash," the court treated the

20. 403 So. 2d 887 (Ala. 1981).

21. *Id.* at 888.

22. *Id.* at 889.

checks as bearer paper and found American National neither negligent nor guilty of conversion.²³

There is no explicit provision in the current versions of articles 3 or 4 that deals with cases like *Neely*. The majority of the courts have disagreed with the *Neely* outcome and have concluded that the bank should bear liability for its failure to follow the customer's order.²⁴

The case demonstrates that Goldstein's curse is not merely a problem of rigid and unintelligent computers, but inheres also in the inability of human actors with limited skill and understanding to distinguish honest from fraudulent transactions. Louise Bradshaw—and many before her and many to come—instinctively appreciate that the meaning which a bank teller or the bank operations person places on a check payable to the “order of the bank” is different from the meaning that a lawyer or a sophisticated banker might apply to that same instrument. To the low-level employee, that check means “pay this amount as the bearer says.” To the lawyer (and sometimes to the courts) it means “pay this amount to the bank and, where that seems not sensible, investigate.”

My fourth and final case shows that the most modern transactions are at least as susceptible to the curse as the ancient ones are. It involves an electronic funds transfer. In this case, the thief instructs a bank (over the forged signature of the depositor, the true owner of the account) to make payment to

23. *Id.* at 890-91.

24. See generally *Bullitt County Bank v. Publishers Printing*, 684 S.W.2d 289 (Ky. Ct. App. 1984); *Bank of S. Maryland v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978); *Sun 'n Sand, Inc. v. United California Bank*, 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920 (1978); *Wright v. Mechanic's Bank*, 466 S.W.2d 174 (Mo. Ct. App. 1971); *Pacific Indem. Co. v. Security First Nat'l Bank*, 248 Cal. App. 2d 75, 56 Cal. Rptr. 142 (1967); *City Nat'l Bank v. Louisiana Sav. Bank & Trust Co.*, 216 Ala. 262, 43 So. 2d 602 (1949); *Graham v. Southington Bank & Trust Co.*, 99 Conn. 494, 121 A. 812 (1923).

For cases holding the customer liable, see generally *First Fed. Sav. & Loan Ass'n v. Union Bank & Trust*, 291 N.W.2d 282 (S.D. 1980); *Johnson v. Citizens Nat'l Bank*, 30 Ill. App. 3d 1066, 334 N.E.2d 295 (1975); *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812 (Tex. Civ. App. 1974); *Martin v. First Nat'l Bank*, 358 Mo. 1199, 219 S.W.2d 312 (1949); *Mayo Bros. Chem. Corp. v. Capital Nat'l Bank*, 192 Miss. 293, 5 So. 2d 220 (1941); *Griffin v. Nat'l Bank of Commerce*, 246 S.W. 180 (Mo. 1922).

its own depositor but into a numerically identified account at another bank. The success of this fraud depends upon the sending bank's necessary ignorance of the significance of the account number at the receiving bank. It is aided by the fact that the sending bank regards the transfer merely as the shifting of funds by its own depositor to an account at another bank also owned by the same depositor. Finally, it depends upon the knowledge that the employee at the receiving bank will disregard the name on the incoming message and the name on its account and will simply deposit funds into the account at its bank whose number corresponds with the number on the electronic funds message. In effect, the thief understands that the outbound message will be treated as a message identified by name and that the inbound message will be treated as a message identified by number.

In *Bradford Trust Co. of Boston v. Texas American Bank-Houston*,²⁵ two persons using the names of Hank and Dave Friedman sent a forged letter and a stock power to Bradford Trust, the agent for a mutual fund. This letter directed the liquidation of \$800,000 from the mutual fund account of Frank Rochefort. The authors of the letter instructed Bradford to wire the \$800,000 to the account of Frank Rochefort, account number 057141, in the Texas American Bank-Houston. Bradford instructed its bank, State Street Bank of Boston, to wire the funds to Texas American, and it did. The employee at Texas American ignored Rochefort's name²⁶ and put the \$800,000 in account number 057141. That account belonged to Colonial Coins, not to Frank Rochefort.

Prior to the receipt of the funds, the Friedmans had arranged to buy coins worth \$800,000 and had told Colonial they would soon be depositing the purchase price in Colonial's account at Texas American. When the money appeared in its account, Colonial released the coins and the Friedmans disappeared with them. Here we see a variation on the curse that combines elements of the "pay to the order of the bank" transaction and the MICR encoding fraud. The thieves anticipated that the transmitting party would be put at ease by the fact that their

25. 790 F.2d 407 (5th Cir. 1986).

26. *Id.* at 408. Rochefort was in fact misspelled as "Rochnefort" on the message.

own customer Rochefort was to be the recipient of the money. Moreover, they anticipated that neither Bradford nor State Street Bank could easily find out the true owner of the account numbered 057141 at a Houston bank. They also anticipated that the machine operator in the basement of the Houston bank would identify the recipient by number and number only. Because that operator would be doing hundreds of such transactions per hour, they assumed that she would not take the time to compare the name on account number 057141 and the name of the intended recipient on the incoming message. Thus, the system treats the outbound message as one for Rochefort and the inbound message as one for 057141.

In *Bradford Trust*, the trial court applied the Texas comparative negligence statute and apportioned the loss equally between Bradford and Texas American Bank.²⁷ Both banks appealed; each argued that the other should bear the entire loss. The appellate court concluded that the loss should fall on Bradford Trust Company of Boston because it had failed to follow its own procedures, procedures that would have stopped the loss had they been followed.²⁸ Because of an earlier fraud, Bradford had a procedure requiring that requests for wire transfers of large dollar amounts be verified by a senior supervisor at the bank. Bradford's procedure apparently also required a phone call to Rochefort, which, of course, would have uncovered the fraud.²⁹ The court also noted that Bradford had dealt with the thieves, but Texas American had dealt only with its own customer, Colonial Coin.

The court's reasoning about who could most easily avoid the loss, therefore who should bear it, seems persuasive. Like Judge Haight in the *Union Trust* case, the court makes a sensible and conventional judgment about who could most easily have avoided the loss.³⁰ Moreover, the court properly declined to find that the sender of the message should always bear the loss as opposed to the recipient. Under *Bradford Trust*, it would always be open

27. *Id.* at 407-08.

28. *Id.* at 411.

29. *Id.* at 410. The court also relied upon some early Texas cases and suggests that its judgment is supported by the policy of finality embodied in U.C.C. § 3-418 (1987). *Id.* The latter suggestion seems unpersuasive to me.

30. *See id.* at 411.

to the sender in a later case to argue that the receiver of the message was the one most at fault.

III. WHAT THE DRAFTERS HAVE PROPOSED

The specific problems that I have suggested above are well known to commercial lawyers, and *a fortiori* to the bright commercial lawyers who are drafters of the newly proposed article 4A and of the amendments to articles 3 and 4.³¹ It is not surprising, therefore, to find that three of the four specific problems that I have suggested are dealt with in these amendments. First, I will discuss the specific sections in article 4A and in the amendments to articles 3 and 4 that will touch upon each of the four examples that I have suggested. Then I will raise the question whether those responses are the wisest and most sensible responses that could be made to these problems. Specifically, I will address the question whether the drafters should behave like repairmen who replace a shock absorber and an occasional bent A-arm or whether they should design a new vehicle with stronger A-arms and better shock absorbers.

Recall that Judge Haight applied section 3-406 by analogy to *Union Trust*. Section 3-406 is usually used to estop a payee or a drawer from proving that his signature is not his own because he "substantially contributed" to the making of the forgery. That section did not apply to *Union Trust* for its signature was not forged; yet the court used the section by analogy. I see nothing in the amendments to article 4 and in article 4A that would directly apply to the *Union Trust* case.³² If the case were

31. Article 4A has been approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. It is currently being considered by the state legislatures.

The amendments to article 3 have been approved by the National Conference of Commissioners on Uniform State Laws but have not yet been considered by the American Law Institute.

The amendments to article 4 have not yet been approved by the National Conference of Commissioners on Uniform State Laws.

32. As I read the proposed § 4-208 (warranty on encoding), it fails to reach the *Union Trust* case for two reasons. First, § 4-208(1) is a warranty made only by "a person that encodes information" or made by a depository bank whose customer encodes information pursuant to agreement. In the *Union Trust* case there was no encoding by *Union Trust*, nor any according

to arise again, a bank in Union Trust's position could assert the same claims against the downstream banks for negligence under 4-202, just as Union Trust did. If the court concluded that Union Trust should bear the loss, it would have to go through almost the same kind of analysis that Judge Haight used in that case.

There is, however, one twist in the proposed amendments; they incorporate a rule of comparative negligence. Proposed section 3-406 provides that the "loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss."³³ If the judge were to apply section 3-406, by analogy under that regime, presumably he would have to determine whether the New York Federal Reserve, the Albany State Bank, the Philadelphia National Bank, or First Pennsylvania Bank had "substantially" contributed to the loss and, if they had, allocate a percentage of the loss to them. Beyond that change in section 3-406, the amendments leave the judge free to reason by analogy and give him little or no guidance.

The second example, the forged signature dispute illustrated by *Rhode Island Hospital Trust* and *Medford Irrigation District*, is explicitly resolved by section 4-406(6) that reads as follows:

Whether the bank failed to exercise ordinary care is determined by reasonable banking standards at the time and place where the

to agreement by Goldstein. Secondly, § 4-208 would not reach the *Union Trust* case because the check was forwarded for manual handling after Union Trust itself had discovered the MICR encoding could not be read by its machine. Forwarding an item for manual handling would take it completely out of the MICR encoding system and would foreclose the possibility of a subsequent bank being misled by the MICR encoding.

Note that § 4-208 might govern in a case in which the depository bank put the check in an envelope and then manually MICR encoded the fractional number on the bottom of the envelope to allow the check to be sent electronically. In that case, the depository bank undertakes the responsibility of entering the proper numbers.

Once the system completely refuses to handle checks manually, § 4-208 will cover a larger percentage of the cases and will properly put the burden on the depository bank to do the correct investigation and to enter the correct numbers.

33. U.C.C. § 3-406 (Proposed Amendment to Article 3, Feb. 1, 1990).

check was paid. Reasonable banking standards do not require a payor bank to examine an item that is processed for payment by automated means if the failure to examine did not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from reasonable procedures followed by comparable banks.³⁴

The proposed comment three explicitly refers to the two cases and states that it is rejecting the latter and adopting the rule of the former.

The third example involving the "pay to bank" case is apparently resolved by the addition of a new section 3-307,³⁵ Notice of Breach of Fiduciary Duty. Section 3-307(d) states that one who takes a check from a fiduciary (including an agent) has notice of a breach of a fiduciary's duty, if, among other

34. U.C.C. § 4-406(b) *reprinted in* THE NEW U.C.C., *supra* note 2, at 267.

35. U.C.C. § 3-306 *reprinted in* THE NEW U.C.C., *supra* note 2, at 159.

(1) This section applies if (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty. Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person. "Fiduciary" means an agent, trustee, partner, corporation officer or director, or other representative owing a fiduciary duty with respect to the instrument. "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty is owed.

(2) If the instrument is payable to the fiduciary, as such, or to the represented person, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(3) If the instrument is made or drawn by the fiduciary, as such, payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker of the breach of fiduciary duty.

(4) If the instrument is made or drawn by or on behalf of the represented person to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

things, the check is "deposited to an account other than the account of the fiduciary, as such, or an account of a represented person." Untwisted, this means that if a thief deposits the check to his personal account—as opposed to an account held "as" agent or trustee—it is not deposited to an account of the fiduciary "as such" and the very deposit in the personal account gives notice to the bank of the breach of duty. Because the bank is on notice of the breach of the fiduciary duty, it cannot be a holder in due course and it is presumably left open to the claims of the true owner of the money, namely, those of the thief's employer.

Name and number conflicts are dealt with explicitly in section 4A-305. That section authorizes the receiving bank to "treat the person identified by number as the beneficiary of the order, if the bank does not know that the name and number identify different persons." Although there are some other qualifications to the rule and some uncertainties inherent in it, the rule generally puts the burden on the sender of an electronic message, not on the receiver. Basically it authorizes the receiver of an electronic message to cast a blind eye on the name and to rely exclusively on the account number. Presumably that is exactly what receiving banks will do henceforth and the burden will fall on the sender, not on the receiving bank.³⁶

To give the drafters their due, I should point out that they have responded to certain aspects of Goldstein's curse in other, somewhat more expansive, ways. For example, sections 4A-202 and 4A-203 authorize a bank and its customer to establish commercially reasonable security procedures. With limited exceptions, those provisions allow the enforcement of even fraudulent transfer orders that are made in compliance with those security procedures. The rules embodied in sections 4A-

36. There are some qualifications on the rule as I have stated it. For example, if the receiver "knows" that the name and number identify different persons, then the outcome will be different. Also a different rule would apply if the beneficiary's bank has "otherwise agreed." Section 4A-305(3) contemplates that the loss will often be placed on the "originator" and not on the originator's bank. Normally the bank can insure that the loss will go back up to the customer by "informing" the customer that "payment of payment orders issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary." U.C.C. § 4A-305(3).

202 and 4A-203 are as close as the drafters come to a general recognition of the problems associated with the curse and, in my view, the rules that are set out are the correct ones.

With the exception of sections 4A-202 and 4A-203, I think it is fair to say that the drafters' actions are more in the nature of repairs, replacement of shock absorbers, not in the form of redesign of the A-arms. The dispute between those who seek to minimize costs by mere repair and those who seek grand improvement at higher risk occurs everywhere. There are, of course, good arguments on both sides of the repair or redesign argument, and I am not certain that I am right and that the drafters are wrong.

IV. WHAT THE LAW SHOULD BE

In conclusion, I turn to an evaluation of article 4A and of the proposed amendments to articles 3 and 4 as those proposals apply to Goldstein's curse. As one will see, I have one significant criticism and I accuse the drafters of a few peccadilloes.

To evaluate the response of article 4A and the new amendments to Goldstein's curse, I begin with three assumptions. If any of these is incorrect, my criticisms of article 4A and of the amendments to articles 3 and 4 are also defective.

My first assumption is that Learned Hand was right. I assume that society is best served by placing losses on those who could best have avoided them. I believe that we should not label one as negligent merely because he could avoid a loss at some price. We should compare the cost of avoidance with the probability of occurrence and the magnitude of the injury. I assume that placing the loss on the lowest cost-risk avoider will cause that person to take the most appropriate steps to avoid or minimize it and those steps would be less expensive by hypothesis than those that could or would be taken by others. Therefore, I assume that the overall cost to society of Goldstein's curse will be minimized by placing all or most of the losses associated with it on the one who could least expensively prevent those losses.

Second, I assume that the curse cannot be exorcised. I assume that speed and high volume in a payment system is antithetical to reflective intelligence. I assume that the number and amount of payments will grow in more or less its current form, but with paper gradually giving way to electronics. I assume,

therefore, that the system's day-to-day supervision will be in the hands of persons who understand only a small part of the process and who are largely unskilled and unsophisticated except in the operation of their own small parts of the larger system. I assume that an increasing share of all transfers will be without human intervention of any kind, accomplished by computers, by MICR encoding and by the reading of electronic messages. Therefore, I assume that the opportunity for the Goldsteins and others will grow, not shrink.

Third, I assume that the person who can most cheaply avoid the losses is nearly always someone outside the banking system or at its margins. In the embezzlement case, I assume that the employer of the embezzler can almost always avoid the loss at lower cost, by hiring and supervising the employee, by examining the check statements, and by maintaining sensible business practices.

Where, as in Goldstein's own case, the thief is not an embezzler, it is more difficult to predict who can most easily avoid the loss. Surely Judge Haight's judgment is persuasive that Union Trust was the villain in Goldstein's case, but one can imagine other cases, done by more clever thieves than Goldstein, where it might be a Federal Reserve or a collecting bank who could most easily discover the loss.³⁷ Because the bank's pockets will often be the deepest and it the most obvious object of the

37. See *Northpark Bank v. Bankers Trust Co.*, 572 F. Supp. 524 (S.D.N.Y. 1983). In this case, the thief used a check on which the MICR routing number was that of Bankers Trust Co. in New York, but the face of the check listed the Bank of Detroit as the payor bank. He deposited the \$62,500 check on November 7, 1979 in a Dallas bank at which he had an account. The Dallas bank put a 14-day hold on the check and presented it to its correspondent bank which in turn presented it to the Federal Reserve Bank of New York for collection.

On November 13, the check was presented to Bankers Trust for collection. After some undetermined period of time, Bankers Trust realized that the check was not drawn on one of its accounts and Bankers Trust sent it back to the Federal Reserve Bank of New York. The Federal Reserve Bank of New York then relied on the Bank of Detroit heading on the check and sent it to the Federal Reserve Bank of Chicago.

The Federal Reserve Bank of Chicago stamped the check on November 20. At some point, the Federal Reserve Bank of Chicago sent the check to its Detroit branch where it was established that there is no Bank of Detroit. At this point, the check went back through the Federal Reserve Bank of Chicago

court's disapproval, I fear a natural inclination of some courts to put the loss on the banking system in the misguided notion that the banks can most easily avoid the loss and most easily spread it among their customers.

If one accepts my three assumptions, that losses will be minimized by putting them on the lowest cost-risk avoider, that Goldstein's curse cannot be exorcised, and the persons outside the banking system are most often the least cost-risk avoiders, one can find significant fault with article 4A and with the proposed amendments to articles 3 and 4.

First, consider three peccadilloes. As I have indicated above, section 3-307 would appear to decree that the depositor is the winner and the bank the loser in the "pay to bank" check case described above in *Neely*. One reaches this conclusion because 3-307 states that the bank is *ipso facto* on notice and, having notice, is not a holder in due course. Presumably, therefore, it is open to the claims of the true owner of the check for conversion. If the three assumptions under which I am proceeding are correct, this section will sometimes absolutely foreclose the correct outcome. In cases like *Neely*, I assume that the operator of the Midas Muffler Shop who deals with the embezzler on a day-to-day basis, who fails to use proper business practices, and who would know of the embezzlement with only ten seconds' examination of the bank statement, is the least cost-risk avoider. He is the one who should bear the loss—just as the court held in *Neely*. To the extent that section 3-307 invariably places the loss on the bank, I believe it is wrong.

On the other hand, I would not argue that the customer should always bear the loss in these cases. There may be many cases in which there are only a limited number of checks involved

and, eventually, ended up at the Federal Reserve Bank of New York on November 29. The depository bank finally received notice of non-payment some time in early December. *Id.* at 527.

Meanwhile, on November 21, the thief had tested the waters by making a \$9,000 withdrawal. After the first withdrawal went off without a hitch, the thief returned on November 24 and withdrew \$40,250. Needless to say he has not been seen since the last withdrawal. *Id.*

The Dallas bank brought suit against the Federal Reserve Bank of New York, the Federal Reserve Bank of Chicago, and Bankers Trust. The only reported litigation resulted in the dismissal of two of the four claims against the Federal Reserve Bank of New York.

and in which the procedures of the customer are adequate. In such cases, the bank may well be the one who should bear the loss as many courts have found in cases analogous to *Neely*.³⁸

The second peccadillo lies in sections 4A-204 and 4A-304. Each of these deals with the duty of the customer or sender to report unauthorized (4A-204) or erroneously executed (4A-304) payment orders.³⁹ Unlike section 4-406, where the customer bears at least his share of the loss if he fails to examine the bank statements and make timely reports, these sections give the

38. See *supra* note 24.

39. U.C.C. § 4A-204, reprinted in *THE NEW U.C.C.*, *supra* note 2, at 308. This section reads:

Refund of Payment and Duty of Customer to Report With Respect to Unauthorized Payment Order.

If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment, and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to advise the bank of the relevant facts within a reasonable time not to exceed 90 days from the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order, the customer is not entitled to interest from the bank on the amount to be refunded. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

The sender's erroneously executed payment "order is stated." U.C.C. § 4A-304. This section reads:

If the sender of a payment order that is erroneously executed as stated in Section 4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to advise the bank of the relevant facts within a reasonable time not to exceed 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount that is refundable to the sender under subsection (4) of Section 4A-402 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.

customer a mere slap on the hands. They deprive the customer of interest on the amount that was erroneously or improperly debited, yet they permit the negligent customer to recover the principal amount. If the customer is obliged to examine his statement that shows the payment of checks and if his failure to report improper payments shown on such statements renders him liable for subsequent withdrawals, I fail to understand why a similar obligation should not be imposed on the customer where the payment is done electronically. Indeed, with check truncation—where even check transfers are concluded electronically—any justification for a distinction for a different rule in sections 4-406 and 4A-204 and 4A-304 is more uncertain. In many such cases the customer will surely be the least cost-risk avoider and in such cases he should report the altered check to the bank or suffer the consequences.

My third complaint, and one that I assert with less confidence than the others, has to do with the introduction of a comparative negligence standard in sections 3-406 and 4-406. On the one hand, these rules may facilitate the allocation of losses arising out of the curse in ways consistent with my argument. Under the current sections 3-406 and 4-406, the bank can throw the loss back on the customer only if the bank itself is not contributorily negligent. If the bank failed to follow reasonable commercial standards or was contributorily negligent, it throws none of the loss on the customer; it bears it all. Comparative negligence standards will almost certainly permit the allocation of a larger share of the loss to the customer than is true under the current regime. Given my view about who is most likely at fault in such cases, I indorse that outcome. That is a virtue of the comparative negligence standard.

Yet, I have a fear about the practical effect of the comparative negligence standard. It is possible that the standard will cause allocation of some losses away from the least cost-risk avoider and contrary to what I have above predicted. Would courts in cases such as *Rhode Island Trust* be more likely to find that a bank (which had failed to examine any signature under a certain dollar amount) was itself partly at fault and so had “substantially” contributed to the loss and thus should bear some part of it? If that is true, the power of the loss allocation system to stimulate socially appropriate behavior will be diminished and the dead weight loss arising from litigation will be further increased by the hope of transferring some of the

loss to those who are now regarded as not at all at fault. In effect, I suggest that the use of a comparative allocation rule may have the unintended consequence of also changing the standards by which one measures negligence, that it may have the consequence of altering the Learned Hand calculus and of imposing duties where before none existed. That, of course, is not the purpose of a comparative standard, but it is plausible to think that it could have that consequence.

One other fault in the comparative negligence standard lies in its potential for stimulating litigation where none would now exist. If there are now many cases that are settled without litigation because one party finds itself hopelessly at fault and understands that it will bear the entire loss, and if those cases would be litigated in a comparative negligence regime out of a hope of recovering at least a part of the loss, the comparative negligence standard may bring with it a dead weight loss in the form of litigation expense that will outweigh its virtues. Whether that will happen is impossible to predict. The data on the impact of comparative negligence on the torts system in this respect are equivocal.⁴⁰

My final and most serious complaint is one that probably could have been directed at the drafting committee of each of the articles of the Uniform Commercial Code and certainly at the drafters of every set of amendments to any of the articles. That is the complaint that there is no explicit rule that deals with the problems posed by Goldstein's curse when none of the specific rules apply. The drafters should be applauded for their recognition of specific issues in sections such as the amendments to sections 3-406 and 4-406. Indeed, in sections 4A-202 and 4A-203, the drafters have come quite close to a general recognition of the problems arising from the curse, at least in electronic

40. See Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 98-100 (1959). This study sought to examine the effect of Arkansas' "pure" comparative negligence statute on judicial administration in that state. The results indicated that the comparative negligence rule did prompt attorneys to accept more cases than they had under the contributory negligence rule. Thus, it appears that more cases will be actively pursued under the comparative negligence rule. However, the study also indicated that more cases were settled before they reached the trial stage under the comparative negligence rule. The result was that roughly the same number of cases went to trial under either system.

funds transfer cases. Yet, there is no general rule of default in article 4A or in the amendments to articles 3 and 4. Worse, the proposals for the use of comparative negligence in sections 4-406 and 3-406 may leave the courts confused about the appropriate analogy. Some courts are likely to conclude that they should copy sections 3-406 and 4-406; other courts may follow the direction of section 1-103 into the common law and so apply traditional rules of negligence and contributory negligence.

Of course, if the specific sections of articles 3, 4 and 4A have dealt with every case that could arise from Goldstein's curse, my concerns are unfounded. To show that that is not so, consider three cases that are not covered by article 4A or by the amendments to articles 3 and 4. First is Goldstein's own case. There Judge Haight refused to allow Union Trust to recover from the downstream banks under section 4-202 by applying 3-406 by analogy to Union Trust. Neither the current section 3-406 nor the proposed reaches the *Union Trust* case. No Union Trust signature was at issue and so the bank could not be estopped to deny its signature. Nothing in the amendments changes this outcome and even after the amendments a judge would be called upon to make his own law.

The second case that will soon come to the court, if it has not already, arises when the sending or receiving bank "helps along" a fraudulent electronic fund transfer. Assume, for example, that a thief successfully breaks a security code and somehow acquires most, but not all of the proper identification of the depositor's account. The thief then sends a message instructing a withdrawal (or a deposit if it is done at the receiving end) to an account numbered 55555. Unbeknownst to the thief, the sending (or the receiving) bank account contains a letter at the end of the numerals, i.e., 55555E. Is the sending or receiving bank who unintentionally assists the thief in committing a fraud by adding the "E" to the "55555" itself engaged in negligence? If fraudulent transfers are more likely than non-fraudulent ones to have small defects and if such defects would put a reasonably prudent banker on notice, should not the bank be held negligent and bear the loss? It seems so to me, yet I see nothing in article 4A that would allow that result.

Consider yet another form of apparent negligence practiced in an actual case that did not come to court. In that case an American and a group of Colombians—all apparently in the

drug trade—stole several millions of dollars by use of the name-number discrepancy now covered by section 4A-305. They ultimately attempted to withdraw the money by appearing en masse in a foreign, and non-Spanish speaking country, to carry away their funds in cash in paper bags. According to the testimony given in that case, the appearance of a wild-eyed group seeking to take more than \$10 million in cash in a paper bag, would put any reasonable bank on notice of something amiss. If the bank ignored that notice, should it not bear the loss? I believe it should, but there is nothing in article 4A that would allow it.

If anything is certain, it is that the imaginations of honest lawyers and law professors are much more impoverished than the imagination of the Goldsteins. Therefore, we can safely predict that there are frauds now secretly at work and others soon to occur that are well beyond our imaginations.⁴¹

How should the courts then deal with my three examples and with the scores of others that Goldstein's curse will present to the courts over the next twenty years? Are the courts simply to apply the rules in articles 3, 4 and 4A and to ignore the fact that those rules require the loss to fall on someone who may not be the least cost-risk avoider? If not that, then what? Should the courts apply section 3-406 by analogy? Should they apply the common law via section 1-103?

Here the drafters have failed us. We need a specific section. In my view this section should direct the court to place the loss on the one most seriously at fault who, by hypothesis, could most cheaply have avoided the loss. I believe that the section should be supported by commentary that would spell out the three assumptions that I have above posed.

Absent such a rule, I foresee not only the probability of bad law, but also of non-uniform law. Because my three assumptions

41. I have recently heard of a check written on disintegrating paper. In effect this is a variation of Goldstein's ploy. Presumably the depositor puts the check into his account and receives a provisional credit. The check then travels to a distant bank and, if things work according to Hoyle, disintegrates before the payor bank can determine that it is a fraud. Because the check is never returned, the depository bank eventually assumes that it has been paid and allows the thief to withdraw the money. Of course, the fraud will be discovered when the accounts of the various banks in the system do not balance, but by then, it will be too late.

are indorsed only by implication and by inference to be drawn from sections such as 4A-202 and 4A-203, those rules will not be obvious to judges who are not as thoughtful as Judge Haight. Moreover, some courts will erroneously conclude that the banking system as a whole should bear the loss because they believe that system is a better risk spreader and because they believe it can most easily avoid future losses. Finally, even well-intentioned courts may seize on different elements of different rules and apply them by analogy. The modest bow to comparative negligence in sections 3-406 and 4-406 invites this lack of uniformity.

In conclusion, I applaud the incremental recognition of Goldstein's curse by the drafters of the amendments to articles 3 and 4 and article 4A. I predict that the system's ability to distinguish between fraudulent and honest transactions will not improve and is likely to decline. I believe, therefore, that Goldstein's curse will be with us for the foreseeable future and that the civil law problems it will present to the courts will increase. I hope that I am not a Cassandra and that at least the courts, if not the drafters, will agree with my three assumptions and so place the losses arising from Goldstein's curse on those who can most easily avoid them. And I hope that is so, even though those losers will most often be persons outside of or at the margins of the bank payment system.