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# Payment Law Update FedExchange 2009

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# Objective

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- Review updates to payment laws and regulations
  - Focus on developments in light of “technological advances”
- Discuss laws and regulations related to counterfeit and altered checks
- Question and Answer Session

# Check Fraud Increasing Despite Decrease in Check Volume

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- Check Volume
  - 30.6 billion checks paid in 2006 (down 6.4% since 2003)
    - *Source: 2007 Federal Reserve Payments Study, available at: [www.frbervices.org/files/communications/pdf/research/2007\\_payments\\_study.pdf](http://www.frbervices.org/files/communications/pdf/research/2007_payments_study.pdf)*
- Check Fraud
  - Counterfeit checks resulted in loss of \$271 million for financial institutions in 2006 (160% increase from 3 years prior)
  - Check-related fraud overall: \$969 million in 2006
    - *Source: 2007 News Release by American Bankers Association, available at: [www.aba.com/Press+Room/112707Deposit+fraudsurvey.htm](http://www.aba.com/Press+Room/112707Deposit+fraudsurvey.htm)*

# Liability for a Forged Check

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- Uniform Commercial Code – Paying bank warrants to the presenting bank that the check is genuine (not forged).
  - So if forged check the paying bank should be the one held liable.

# Liability for an Altered Check

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- Uniform Commercial Code – a depository bank that presents a check for payment by the bank that issued the check warrants that the check “has not been altered.”
  - So if altered check the depository bank should be the one held liable.

THIS CHECK CONTAINS SECURITY FEATURES: FACE HAS BLUE BACKGROUND - MICROPRINT BORDER - WATERMARK ON BACK (HOLD AT ANGLE TO VIEW) - CHEMICAL PROTECTION

**THE MEDIA EDGE**  
230 PARK AVENUE SOUTH  
NEW YORK, NY 10003-1591

4000-413142

66-753  
501

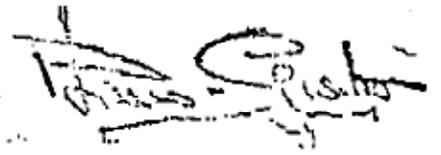
**PAY** One hundred thirty three thousand thirty six and 00/100 Dollars

\*\*\*\*\$133,036.00

**DATE**  
NOV13/02

**Pay To  
The Order Of**

**SUNJIN CHOI CHOI**  
3906 RUGEN ROAD  
GLENVIEW  
GLENVIEW, IL 60026



Wachovia Bank, N.A.  
Raleigh, NC

⑆4000413142⑆ ⑆053107633⑆ 626100??701⑆ ⑆0013303600⑆

9530-90183 1122002  
WACHOVIA BANK, N.A. CUC  
CHARLOTTE, NC 0405-007

2000704023

11/22/02  
055150

2287790

773-565-7700  
THE CUSTER BANK  
CHICAGO, IL  
DU71008282

NOV 21 02

2190 65126

X  
*Sunjin Choi Choi*  
511150

## Wachovia Bank, N.A. v. Foster Bank (457 F.3d 619 (7<sup>th</sup> Cir. 2006))

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- In the case of a tie – the tie goes to the paying bank!
  - Depository bank must do more than merely assert the possibility of forging a check rather than altering.
  - “Reform is needed in the light of modern copying technology should be left to the Uniform State Commissioners rather than engineered by a federal court in a diversity case.”

## Chevy Chase Bank, FSB v. Wachovia Bank, N.A. (2006 U.S. Dist. LEXIS 29944)

- Unpublished Opinion
- Court held: “. . . Wachovia has failed to offer any evidence from which a reasonable factfinder could conclude that the check was altered as opposed to counterfeited.”

# Will there be UCC revisions?

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- Study Committee on Payment Issues
- March 16, 2009 Memorandum on issues under the UCC Articles 3 and 4 available at:  
[http://www.law.gonzaga.edu/About-Gonzaga-Law/Commercial-Law-Center/Files/white\\_paper\\_ucc\\_art\\_3\\_4.pdf](http://www.law.gonzaga.edu/About-Gonzaga-Law/Commercial-Law-Center/Files/white_paper_ucc_art_3_4.pdf)URL
  - Memorandum notes on page 8 that “[t]his partial list of issues indicates that technology and industry practice have outpaced the governing law.”

# Regulation CC

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- As the Federal Reserve Banks reduce their check infrastructure an increasing proportion of checks are defined as local under Regulation CC.
- Regulatory considerations?

# Payment Law Update

## “Rapid Fire”

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- Unlawful Internet Gambling Enforcement Act (UIGEA) and Regulation GG
- Stored Value cards and FDIC insurance
- Data privacy – Mass. law impact
- Regulator guidance on remote capture
- Regulation E proposal on overdraft program

# Unlawful Internet Gambling Enforcement Act

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- UIGEA prohibits any person engaged in the business of betting or wagering from knowingly accepting payments in connection with the participation of another person in unlawful Internet gambling, known as a “restricted transaction.”
- UIGEA required the Board and the Department of the Treasury to identify payment systems that could be used to facilitate such restricted transactions—such a designation makes the payment system, and the financial transaction providers participating in the system subject to the requirements of the regulations.
- The Board labeled the regulations “Regulation GG”  
The “Designated Payment Systems”
  - ACH
  - Card Systems
  - Check Collection
  - Money Transmitting Businesses\*
  - Wire Transfer System

# Regulation GG

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- Regulation GG provides an exemption to all participants in the ACH systems, Check Collections systems, Wire Transfer systems, and Money Transmitting Businesses, except for participants that possess the customer relationship with the commercial recipient of the funds.
- Final rules became effective 1/19/2009 with compliance required by 12/1/2009.

Available at:

[www.federalreserve.gov/newsevents/press/bcreg/bcreg20081112a1.pdf](http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20081112a1.pdf)

GG

GG

GG

GG

# Stored Value Cards

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- New FDIC General Counsel Opinion #8 — replaced the old opinion from 1996.
- The new opinion treats all funds underlying stored value products as “deposits” if they have been placed at an insured depository institution.
  - Funds will be subject to FDIC assessments
  - Funds will be insured up to the insurance limits

# GC8

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- Funds are insurable to the holders of the access mechanisms provided that the FDIC's "pass-through" requirements are met
  - Existence of custodial relationship disclosed
  - Disclose identities of actual owners and the amount owned by each owner
  - Deposits must be owned by the named owners
- Available at:  
<http://edocket.access.gpo.gov/2008/pdf/E8-26867.pdf>

# Data Security Regulations

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- Office of Consumer Affairs and Business Regulations issued the regulations “Standards for the Protection of Personal Information of Residents of the Commonwealth”, 201 Code of Massachusetts Regulations 17.00 et seq.
  - Available at:  
<http://www.mass.gov/Eoca/docs/idtheft/201CMR17amended.pdf>
- To Whom does it apply?
  - All natural persons, businesses and other legal entities that own, license, store or maintain personal information about a resident of the Commonwealth, except state agencies.
- Personal Information is essentially a Massachusetts resident's first name (or first initial) and last name in combination with a Social Security number, a driver's license number or state-issued identification card number or a financial account number.

# Data Security Regulations

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- Requires the development, implementation, maintenance and monitoring of a “written information security program” (WISP)
- Lists minimums that a WISP must include
- Lists minimums for a computer security system
- Compliance is required by January 1, 2010



# “Risk Management of Remote Deposit Capture”

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- January, 2009
- Federal Financial Institutions Examinations Council (FFIEC) guidance available at:  
[http://www.ffiec.gov/pdf/pr011409\\_rdc\\_guidance.pdf](http://www.ffiec.gov/pdf/pr011409_rdc_guidance.pdf)

# Reg E

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- Regulation E proposed rule to limit the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) withdrawals and one-time debit card transactions that overdraw a consumer's account, unless the consumer is given notice of the right to opt out of the payment of such overdrafts, and the consumer does not opt out.
  - Comments were due by March 30, 2009
- Proposed Rule available at:  
<http://edocket.access.gpo.gov/2009/pdf/E8-31184.pdf>

# Question and Answer Session

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