
The Incredible Shrinking Broker-Dealer: Applying the Uniform Commercial Code to Brokerage Firms Providing Commercial-Banking-Like Services on their Brokerage Accounts

By Matthew R. Salzwedel and Matthew B. Johnson

Easy enough to talk of soul and spirit and existential worth, but not when you're three feet tall.

—*The Incredible Shrinking Man* (1957)

Introduction

Lost in the financial tsunami of 2007–2008 was the less-reported story of the incredible shrinking broker-dealer. It was not always like this. During the roaring 1990s and 2000s, Wall Street titans such as Merrill Lynch, Morgan Stanley, and Goldman Sachs played an important role in the US financial-services industry that fueled the breakneck economic expansions during those decades. This article does not seek to recount the rise and fall of the investment-banking industry in the United States, although it does touch on parts of that rollercoaster ride. Nor does it advocate for the separation or consolidation of commercial and investment banking in the United States, which currently is a hot topic of debate.¹ Instead, this article has a relatively limited, yet important purpose: It seeks to explain why the myriad commercial-banking-like services provided by the ever shrinking broker-dealer in conjunction with its brokerage accounts should be subject to and governed by the same Uniform Commercial Code (UCC) provisions that govern commercial bank deposits and collections.

Matthew R. Salzwedel is an attorney at Lockridge Grindal Nauen, P.L.L.P., in Minneapolis, Minnesota who specializes in litigating cases under the bank deposits and collections provisions (Articles 3 & 4) of the Uniform Commercial Code, as well as complex antitrust litigation. He represented Morgan Stanley DW, Inc. as trial counsel litigating the issue of first impression under the UCC of whether a depository bank could make presentment warranties to a registered broker-dealer that provided customers check-writing privileges on brokerage accounts. *Nisenzon v. Morgan Stanley DW, Inc.*, 546 F. Supp. 2d 213 (E.D. Pa. 2008).

Matthew B. Johnson is an attorney at Lockridge Grindal Nauen, P.L.L.P., who specializes in complex class action, antitrust, and products-liability litigation, in which he frequently employs his background in corporate finance. The authors would like to thank Laura B. Eide for her research and contributions to this article.

Whether the UCC governs commercial-banking-like services provided by broker-dealers in conjunction with their brokerage accounts has never been a settled question. Lacking express guidance from the UCC itself,² the courts have struggled during the past few decades to shoehorn the commercial-banking-like services provided by broker-dealers into the (arguably anachronistic) provisions of the 1962 and 1990³ versions of the UCC, neither which versions of the UCC explicitly recognized that nonbank financial institutions that provided commercial-banking-like services (such as broker-dealers and insurance and trust companies) were subject to and governed by the bank deposits and collections provisions of the UCC.

In contending that the commercial-banking-like services provided by broker-dealers should be subject to and governed by the same UCC provisions governing bank deposits and collections, this article focuses specifically on how and why the UCC's provisions governing check processing and check-fraud-loss allocation should be applied in the same way to the check-writing and similar demand-deposit-account-like privileges offered by broker-dealers to their brokerage-account customers. This article contends that there is little reason why the traditional commercial-banking-like services afforded to customers of broker-dealers should be treated any differently than the traditional demand-deposit-account services provided to customers of commercial banks. In many (if not all) cases, broker-dealers providing commercial-banking-like services on their brokerage accounts partner or contract in some form with third parties, including licensed commercial banks and third-party data processors, to provide these services. As such, the actual mechanical processing of brokerage account "checks" by broker-dealers or their third-party agents is substantially the same as the check-processing functions engaged in by licensed commercial banks through the Federal Reserve Clearinghouse

System. The recent consolidation and form-of-entity changes in the investment-banking community also should put any lingering doubt (if there was any) to rest regarding whether the UCC should apply to the commercial-banking-like services offered by broker-dealers on their brokerage accounts.

The arguments made in this article are not an academic exercise. Applying the bank deposits and collections provisions of the UCC to the commercial-banking-like services offered by broker-dealers on their brokerage accounts is vitally important for the broker-dealers offering these services, their customers who take advantage of them, and the commercial banks that are incidental participants in the provision of these services. Without the relative uniformity provided by the UCC, it will remain uncertain how the various disputes arising from the handling or processing of broker-dealer “checks” or the allocation of responsibility for any fraudulent activity involving check-writing privileges and related transactions should be resolved. For example, if the UCC does not apply to commercial-banking-like services provided by broker-dealers, any number of state-law statutory, contract, or tort theories may be trotted out by one or more of the parties to a transaction if a dispute relating to these services results in litigation. This obviously would be an unsatisfactory way to address the increasing use by the investing public of brokerage accounts that offer commercial-banking-like services, and it would ignore the fact that these types of transactions often cross state lines. Applying the UCC to the commercial-banking-like services offered by broker-dealers on their brokerage accounts would result in relative uniformity in this area of financial services, and would necessarily decrease the transaction costs (including litigation expenses) associated with providing and utilizing these services.

This article first recounts the history of US commercial and investment banking in the context of the evolution and growth of the US financial-services industry as a whole. Next, it explains the economic environment that allowed registered broker-dealers to evolve from providing traditional investment-banking services in the post-Depression Era to become full-service financial-service entities. This evolution allowed the investing public to invest its money in mutual funds that often functioned like traditional demand-deposit accounts at commercial banks. The article then

discusses recent federal regulation that may impact the provision of commercial-banking-like services by broker-dealers, as well as recent form-of-entity changes by several prominent broker-dealers that have further blurred the line between commercial and investment banking in the United States.

The article next discusses the historical judicial treatment of broker-dealers providing commercial-banking-like services on their brokerage accounts, including the recent case of *Nisenzon v. Morgan Stanley DW, Inc.*, where US District Court for the Eastern District of Pennsylvania determined that a broker-dealer that contracted with a licensed commercial bank and a third-party data processor to provide its customers with check-writing privileges on their brokerage accounts was entitled to assert a breach of presentment warranty action under the UCC against a depository bank for accepting checks (written on a brokerage account maintained at a broker-dealer) for deposit that contained unauthorized payee indorsements.⁴

The article concludes by contending that broker-dealers that provide commercial-banking-like services on their brokerage accounts should be governed by the same UCC rules that apply to commercial banks that provide these services to their customers. In making this point, the article discusses how uniform application of the UCC rules governing commercial bank deposits and collections, including the UCC’s check-fraud-loss-allocation provisions, is essential to providing a uniform, relatively understandable framework to govern the provision of commercial-banking-like services by broker-dealers, which, in turn, will eliminate the transaction costs associated with the less attractive alternative of subjecting these commercial-banking-like services to myriad state-law tort, contract, and statutory regimes, none of which regimes were intended to govern, or, for that matter, are well-equipped to handle, disputes arising from the provision and use of these services.

Commercial & Investment Banking: From Separateness to Functional Equivalence

Today’s commercial- and investment-banking landscape is in no way the result of a long, well-thought-out set of plans by the federal government to regulate the US financial-services industry. Instead, it is the product of a gradual evolution of the regulation of the US

financial-services industry that has changed over time in reaction to the state of the American economy, as well as the public's perception of the proper role of commercial and investment banking in the United States. During the Great Depression, the federal government sought to separate these formerly discrete parts of the financial-services industry. Over time, however, these discrete parts of the industry slowly consolidated and formed a system where a wide variety of financial institutions now offer substantially the same financial products to the investing public in a fiercely competitive environment.

After the widespread bank failures in the late 1920s and early 1930s, Congress set out through legislation to ensure complete separateness between the commercial- and investment-banking segments of the US financial-services industry. Congress's primary goal at the time was to reduce the risk of future bank failures. Through the Glass-Steagall Act of 1933, Congress explicitly prevented commercial banks from engaging in the "issue, flotation, underwriting, public sale or distribution either wholesale, or retail or through a syndicate participation, of stocks, bond, debentures, notes or other securities."⁵ Glass-Steagall, therefore, functionally eliminated any overlap between commercial- and investment-banking activities. After Glass-Steagall, the array of financial products offered by commercial banks was severely limited; banks basically could accept demand deposits from the investing public, and then lend those demand deposits at a premium. Through Glass-Steagall, Congress also heavily regulated what part of the demand deposits the banks could lend, as well as the interest rates they could offer on those accounts. From the outset, commercial banks looked for ways to offer additional financial products to the investing public while attempting to avoid the myriad regulations on their lending practices.

In the 1970s, interest rates increased rapidly; however, interest rates on commercial bank demand deposits remained subject to restrictive interest-rate ceilings.⁶ As a result, commercial banks began to encounter increased competition for demand deposits from nonbank financial institutions such as broker-dealers. It became increasingly difficult, for example, for banks to retain existing and attract new customers because an increasingly attractive alternative to bank deposits—the money market fund—was being offered by broker-dealers.⁷ Because broker-dealers were not subject to the same regulations

as commercial banks, money market funds incorporated and managed by broker-dealers were not subject to the interest-rate ceilings imposed on bank demand deposits.⁸ As a result, during the 1970s the demand for money market funds exploded: in June 1976, a mere \$3 billion was held in money market funds. By the end of 1982, over \$230 billion was held by investors in money market funds managed by broker-dealers.⁹

As money market funds became more and more popular with the investing public because of their comparably higher rates of return, investors increasingly found commercial bank demand deposits to be less attractive investment vehicles. In response to this trend, however, commercial banks were hamstrung. Onerous banking regulations prevented commercial banks from diversifying their financial-product offerings to compete with the broker-dealers. Consequently, the financial stability and competitiveness Congress sought to ensure for commercial banks through Glass-Steagall was slowly being undermined by the increasingly diversified financial products offered by broker-dealers.

In 1980, Congress attempted to level the playing field between commercial banks and broker-dealers. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) slowly phased out the restrictions on interest ceilings for demand deposits.¹⁰ But this legislative action was insufficient to stem the tide, as the rates of return offered by money market funds continued to rise disproportionately compared to the rates of return offered by commercial banks on demand deposits. The commercial-banking deregulation enacted by Congress through the DIDMCA was later viewed to be reactive, rather than proactive, and commercial banks continued to find it difficult to compete effectively with broker-dealers even with the phasing-out of the interest-rate ceilings on demand deposits. By the 1980s, the way the investing public viewed demand deposits had experienced a paradigm shift.

Because the DIDMCA failed to fully stem the shift from demand deposits to money market funds, Congress again attempted to level the playing field between commercial banks and broker-dealers. In 1982, Congress enacted the Garn-St. Germain Depository Institutions Act.¹¹ Garn-St. Germain authorized banks to establish and offer money market deposit accounts (MMDAs).¹² Through MMDAs, commercial banks were finally able

to offer a deposit account that was a comparable and competitive alternative to money market funds.¹³ After Garn-St. Germain, it appeared that the competitive and regulatory field between commercial banks and broker-dealers had finally been leveled.

Since the 1980s, commercial banks have continued to push the boundaries of their banking activities by expanding their offerings of financial products and services to the investing public. But it was not the commercial banks alone that continued to evolve. Inflationary concerns and subsequent interest rate increases, among other economic conditions, again prompted Congress and the federal regulatory agencies to change incrementally the rules of the banking game as a whole. Congressional amendments to the Bank Holding Company Act of 1970, various court decisions, and subsequent government compromise continued to erode Glass-Steagall, which Congress finally fully repealed as part of the Gramm-Leach-Bliley Act of 1999. Among other notable deregulations, Gramm-Leach-Bliley permitted the formation of bank holding companies that could engage in both commercial and investment banking, as well as provide securities services and insurance.¹⁴

Broker-Dealers: Non-Banks Acting A Lot Like Banks

As discussed above, for several decades after the Glass-Steagall Act, broker-dealers and commercial banks offered markedly different financial products to the investing public. As a result, there was little competition between these two segments of the US financial-services industry. Competition between these two segments only began to emerge in the late 1970s and early 1980s with the creation and marketing by broker-dealers of money market funds. The explosion of money market funds, for the reasons outlined above, led to a concomitant explosion of the need for money-market management by broker-dealers, and an increasing need by broker-dealers to provide commercial-banking-like services to their investors.

Money Market Funds: Not Your Traditional Bank Account

To fully understand the role broker-dealers played in the evolution of the US financial-services industry, it is important to understand the regulatory environment in which they have traditionally operated. The activities of broker-dealers, including their management of

money market funds, are governed primarily by the Investment Company Act of 1940 (ICA).¹⁵ Under the ICA, a broker-dealer-managed money market fund may offer shares in the fund at either a fixed-share value or a share value that fluctuates based on changes in the value of the underlying securities held by the fund.¹⁶ If a broker-dealer establishes a money market fund as a fixed-share-value fund, any change in the underlying value of the securities held by the fund is reflected in a corresponding increase or decrease in the number of shares owned by the fund's shareholders. In contrast, where a broker-dealer establishes a money market fund as an adjustable-share-value fund, the number of shares held by the fund's shareholders will always remain the same, but the value of those shares will fluctuate based on any changes in the underlying value of the securities held by the fund.¹⁷

With their exponential growth in the late 1970s and 1980s, money market funds became widely accepted by the investing public as a near equivalent to demand deposit accounts at commercial banks. The common acceptance of money-market-fund shares as the functional equivalent to demand-deposit accounts was due to the nature of the securities underlying the funds' value. Money market funds commonly invest in short-term, relatively liquid securities such as short-term bonds or secured commercial paper. But at least in the beginning, the funds' short-term investment strategy did not allow the funds to offer their account holders the ability to access the value of their money-market-fund accounts on demand. This soon would change.

Money Market Fund Innovation: Commercial-Banking-Like Account Services

Broker-dealers offering money market funds increasingly realized that their account holders wanted the ability to make withdrawals from their funds on demand similar to the way a demand-depositor could write a check or make a withdrawal to access immediately the funds in her bank account. Broker-dealers soon realized that they could offer to their shareholders, through a fixed-share-value fund, the ability to make demand-like withdrawals by offering check-writing and similar services on their brokerage accounts. Because changes in the underlying value of the securities held by a fixed-share-value fund correspond directly with an increase or decrease in the total number of shares held by the

investor, a shareholder could redeem a certain number of shares in a manner resembling a withdrawal from a demand-deposit account. By offering the investing public check-writing and similar services on their money-market-fund accounts, broker-dealers had finally created a substantially similar substitute to the commercial banks' demand-deposit accounts, but with the additional ability to offer their investors a higher rate of return on their deposits in certain economic climates.

In 1977, Merrill Lynch launched its pioneering Cash Management Account (CMA), which was the first commercially available money-market-fund product to offer the investing public commercial-banking-like services in conjunction with a brokerage account.¹⁸ Merrill Lynch's CMAs offered customers check-writing privileges and charge and credit cards tied directly to their brokerage accounts, both of which features allowed the customers to access easily the funds held in their CMA accounts.¹⁹ By 1984, Merrill Lynch managed one million CMAs, more than ten times the number of its closest rival.²⁰ Merrill Lynch was able to provide these services to its brokerage-account customers by contracting with Bank One to process the checks written on their customers' brokerage accounts.²¹ Other broker-dealers soon followed Merrill Lynch's lead.

In addition to the competition between commercial banks and broker-dealers, broker-dealers increasingly began competing with each other by offering innovative commercial-banking-like services incident to their brokerage accounts. Dean Witter Reynolds, for example, began to offer its money-market-fund customers a service that allowed its customers to cash checks for up to \$250 at any Sears store.²² In 1983, the Fidelity Group launched a marketing program to persuade existing customers of Merrill Lynch's CMAs to switch to Fidelity funds by offering similar privileges as CMAs, as well as competitive balance requirements.²³ By 1993, most broker-dealers offered some form of an asset-management account that offered commercial-banking-like services.²⁴ And by 1999, almost every major broker-dealer offered check-writing privileges and credit or debit cards to its brokerage-account customers.²⁵

Broker-dealers continue to market check-writing and other commercial-banking-like services to their brokerage account customers as part of their larger attempt to create and maintain their strong brand names

in the financial-services industry, as well as to create in the mind of the investing public the perception that they are a one-stop financial-services shop at which the customer can have every facet of his financial needs met.²⁶ Like the Merrill Lynch-Bank One relationship discussed above, broker-dealers have partnered or otherwise contracted with commercial banks and other third-party data processors to provide check, credit, and debit-card clearing systems through, among other systems,²⁷ the Federal Reserve Clearinghouse System.²⁸

We're All Banks Now: Recent Regulation and Form-of-Entity Changes To Broker-Dealers

Until Congress enacted the Gramm-Leach-Bliley Act and retired the anachronistic Glass-Steagall Act, licensed commercial banks and registered broker-dealers were subject to markedly different regulatory regimes. Gramm-Leach-Bliley blurred if not eliminated the regulatory regimes specific to each segment of the financial-services industry, and permitted the creation of bank holding companies. Despite the different regulatory regimes existing over time, however, broker-dealers offering commercial-banking-like services on their brokerage accounts still were governed by Securities and Exchange Commission regulations, not the regulations governing commercial banks. Although this still happens to be the case, the financial services regulatory world continues to evolve.

November 1, 2008 marked a watershed date for broker-dealers offering commercial-banking-like services on their brokerage accounts. On that date, new federal regulations implementing Section 114 of the Fair and Accurate Credit Transactions Act (FACT Act) became effective.²⁹ Under the FACT Act regulations, all "financial institutions" are required to develop and implement a written program to prevent and mitigate identity theft for certain consumer accounts.³⁰ Under the regulations, a "financial institution" is defined as a commercial bank, savings institution, and any person that directly or indirectly holds a "transaction account" belonging to a consumer.³¹ Under this definition, broker-dealers offering commercial-banking-like services on their brokerage accounts arguably are subject to the regulations implementing the FACT Act.

In addition to the regulations implementing the FACT Act, the financial crisis of 2007-2008 and the

resulting intervention by the federal government in the US financial system resulted in several form-of-entity changes by several prominent broker-dealers. These form-of-entity changes, among other developments, ushered in a new era of consolidation between broker-dealers and commercial-banks, and has further blurred the lines between commercial banking services and the functional equivalents offered by broker-dealers. During and in the wake of the financial crisis, for example, Bear Stearns and Lehman Brothers imploded; Merrill Lynch was swallowed up by Bank of America; and both Morgan Stanley and Goldman Sachs converted their broker-dealer operations to bank holding companies at least in part to conform with and take advantage of the financial assistance offered by the Treasury Department and Federal Reserve.³² The irony of these prominent broker-dealers converting to bank holding companies was not lost on those involved in the financial-services industry. Paul Mortimer-Lee, a research analyst at BNP Paribas, was quoted as saying that “[i]t is ironic that the broker dealers were born as a result of the bank and broker-dealer separation that was deemed necessary as a result of the 1930s crisis, and now broker-dealers and [commercial] banks get put back together as a result of the nearest thing since to a 1930s-style crisis.”³³

Historical Judicial Treatment of Broker-Dealers Providing Commercial-Banking-Like Services on Their Brokerage Accounts

Although comprehensive treatment of how Articles 3 and 4 of the UCC govern bank deposits and collections is well beyond the scope of this article, various provisions of the UCC are identified below as part of a larger discussion of how the courts have analyzed disputes involving broker-dealers that provide commercial-banking-like services on their brokerage accounts. Suffice to say, the UCC comprehensively regulates how drafts and checks are written, processed, and paid, and, in particular, establishes myriad rules governing, among other things, the time by which a bank must provide its customers with timely notice of dishonor, when a bank can cut off a customer’s claims for repayment when fraud occurs in connection with a check written on an account, and when a bank may otherwise seek to shift the loss of check fraud to either its customer or to another bank in the check-collection and payment process.

Broker-Dealers Must Provide Timely Notice of Dishonor

*Edward D. Jones & Co. v. Mishler*³⁴ addressed whether a broker-dealer that provided its customers with accounts in which they could deposit funds and from which they could make withdrawals using a check was a “bank” for purposes of the UCC.³⁵ In *Mishler*, the customer maintained a “Daily Passport Cash Trust” with Edward D. Jones that essentially was a money market account. Edward D. Jones issued its customer checks to make withdrawals from his account. The face of the checks bore the name of “Edward D. Jones” and below that the name of State Street Bank of Boston, with which Edward D. Jones had contracted to process the checks. Several months after opening his account, the customer deposited two third-party checks into his account, and Edward D. Jones promptly credited the amount of the checks to the account.³⁶ The deposited checks were not legitimate, and Edward D. Jones subsequently learned that the first of the two checks had been dishonored by the third party’s bank. Edward D. Jones, therefore, charged back to its customer’s account the total amount of the two deposited checks. In the interim, the customer had written two legitimate checks on the account, which, as a result of the charge-backs, caused his account to be overdrawn. Edward D. Jones sued its customer for the amount of the overdrafts, plus interest. In response, the customer argued that Edward D. Jones was a “bank” under the UCC provisions applicable at the time of the transactions, and that Edward D. Jones had wrongfully converted the amount of the overdraft because Edward D. Jones had not given him timely notice of its dishonor of the two third-party checks.³⁷

The *Mishler* court concluded that Edward D. Jones was operating as a “bank” for purposes of the UCC, and that it was required to give its customer timely notice of its dishonor of the two third-party checks, which Edward D. Jones had failed to do.³⁸ Under the statute in effect at the time of the transactions, Edward D. Jones was required to give its customer notice of the dishonor “by its midnight deadline or within a longer reasonable time after it learn[ed] of the fact[s].”³⁹ Rejecting the argument by Edward D. Jones that it was not a “bank,” and thus not subject to the UCC provisions requiring timely notice of dishonor of the checks, the *Mishler* court observed that the analysis of whether Edward D. Jones was a “bank” had to focus on “function—*i.e.*,

whether a supposed ‘bank’ is an entity or person engaged in processing, paying on, and collecting on ‘items,’ including checks.”⁴⁰ Because Edward D. Jones had offered its customers what amounted to a checking account, and had participated in the check-collection and payment process by providing its customer checks that bore its name, Edward D. Jones had engaged in precisely the type of banking activities subject to the UCC.⁴¹ Edward D. Jones, therefore, was required to give its customer timely notice of its dishonor of the two third-party checks, and was not allowed to recover from its customer for the amount of the overdrafts as a result of its failure to do so.

Broker-Dealers Can Be Holders In Due Course

In *Asian International, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁴² a customer of Merrill Lynch deposited a check into his account at Merrill Lynch that was indorsed as payable to the order of the customer.⁴³ The issue before the court was whether Merrill Lynch was a holder in due course, such that it took the check free of all claims by Asian International and, therefore, was absolved from liability to Asian International for the tortious conversion of the check.⁴⁴ The *Asian International* court concluded that Merrill Lynch was, in fact, a holder in due course under Louisiana’s version of UCC § 3-305 in effect at that time,⁴⁵ even though it technically was not a “bank” under Louisiana law, because it had provided its customer “with a general securities and checking account, much like that provided by a depository bank to its depositing customer.”⁴⁶ Because Merrill Lynch supplied the required indorsement on the check, which was effective as its customer’s indorsement, negotiated the check, gave value, acted in good faith, and took the check without notice of any claims or defenses of Asian International, it was a holder in due course and was not subject to liability for the conversion of the check.⁴⁷

Broker-Dealers Can Assert the Protections of UCC Section 4-406

In *Lichtenstein v. Kidder, Peabody & Co., Inc.*,⁴⁸ a customer of Kidder, Peabody & Co., maintained a “Premium Account” with the broker-dealer that allowed the customer to deposit cash and securities into his brokerage account, as well as draft checks on the account.⁴⁹ Kidder, Peabody & Co. provided these

check-writing privileges through a program administered by Bank One. The customer alleged in her lawsuit that numerous checks were written on her brokerage account by her former husband, and that Kidder, Peabody & Co. was liable to her for the amount of the fraudulent checks.⁵⁰ In response, Kidder, Peabody & Co. asserted that Section 4-406 of the UCC in effect at the time in Pennsylvania precluded the customer from recovering the amount of some of the checks because the customer failed to report the forgeries to Kidder, Peabody & Co. “within one year from the account statements were made available to her.”⁵¹ Section 4-406 generally requires a customer of a “bank” to “exercise reasonable care and promptness to examine [the customer’s bank] statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank after discovery thereof.”⁵² And if a customer does not timely “discover and report his unauthorized signature or any alteration on the face or back of the item” the customer cannot recover the amount of the check.⁵³

The customer argued that Kidder, Peabody & Co. could not rely on the protections afforded by Section 4-406 because it was not a “bank” as that term was defined by the UCC. The customer argued that neither the Commonwealth of Pennsylvania nor federal law recognized Kidder, Peabody & Co. as a bank for regulatory purposes, and that Kidder, Peabody & Co. did not otherwise hold itself out to the public as a bank.⁵⁴ The *Lichtenstein* court rejected the customer’s argument, noting that the UCC “was established to provide a uniform body of rules governing commercial transactions.”⁵⁵ The court observed that, to be consistent with the UCC and case law from other states, a brokerage firm that offers check-writing services to its clients should be governed by the same rules that govern checking accounts generally. “It would be anomalous to establish one rule for checking accounts administered by a bank, and another rule for checking accounts administered by a brokerage firm in connection with a bank. The public policy interest in establishing a clear system of rights and liabilities between parties to a commercial transaction is the same in both cases.”⁵⁶ Accordingly, the *Lichtenstein* court concluded that Kidder, Peabody & Co. could avail itself of the protections afforded to “banks” under Section 4-406 of the UCC in defending itself against its customer’s claims.

In *Pinasco v. Ara*,⁵⁷ the New York Supreme Court, Appellate Division, reached the same conclusion as the *Lichtenstein* court under similar circumstances, concluding that the one-year preclusion provision in Section 4-406 precluded a customer of Merrill Lynch from recovering for an improper disbursement from an account because he “timely received his monthly statement [from Merrill Lynch] but did not protest or object to the unauthorized withdrawal . . . for more than eighteen months.”⁵⁸ The *Pinasco* court, like the *Lichtenstein* court, concluded that Merrill Lynch “was entitled to the benefit of the one-year [s]tatute of [l]imitations set forth to bar untimely claims by customers against banks under [UCC §] 4-406 since, for the purposes of the [UCC], Merrill Lynch acted as an entity engaged in the business of banking by providing [the customer] with a checking account, honoring drafts, accepting deposits and forwarding monthly customer statements.”⁵⁹

Broker-Dealers Can Assert Claims for Breach of Presentment Warranty Against Depository Banks That Accept Checks For Deposit Containing Unauthorized Payee Indorsements

Although the courts above consistently applied the UCC to transactions involving checks written on brokerage accounts, the first court to examine comprehensively the UCC’s application to these transactions was *Nisenzon v. Morgan Stanley DW, Inc.*,⁶⁰ decided by the US District Court for the Eastern District of Pennsylvania in 2008. In *Nisenzon*, the plaintiffs-customers maintained an Active Asset brokerage account with Morgan Stanley that permitted them to write checks on the account.⁶¹ The court found that the customers’ Active Asset account was a multi-faceted brokerage account, not a checking or savings account and, in offering check-writing privileges, Morgan Stanley had entered into contractual arrangements with licensed commercial banks (specifically Bank One Columbus N.A.) and other third-party data processors to assist in offering the check-writing privileges. Despite these third-party contractual arrangements, however, the court found that Morgan Stanley had the ultimate authority to pay or decline payment on any particular check.

While their account remained open, the customers wrote checks to various payees, which Morgan Stanley, through the check-collection and payment

process, paid. After paying on the checks, Morgan Stanley would then debit its customers’ account for the amount of the checks.⁶² On two occasions in 2002, the customers wrote checks on their Active Asset account and sent the checks to their investment advisor to deposit in a non-Morgan Stanley account. The customers’ investment advisor, however, fraudulently indorsed the two checks and deposited the checks into his company’s checking account at Citizens Bank, a licensed commercial bank.⁶³ Citizens Bank failed to identify the fraudulent payee indorsements, and, after allowing the checks to be deposited, sought payment for the amounts of the checks upstream to Morgan Stanley through the Federal Reserve Clearinghouse System. Morgan Stanley paid the checks and debited the customers’ account.⁶⁴

Ultimately, the customers discovered that their investment advisor had fraudulently deposited the checks into his company’s account at Citizens Bank and they sued Morgan Stanley under Section 4-401 of the UCC seeking reimbursement from Morgan Stanley for the amount of the checks.⁶⁵ Morgan Stanley, in turn, filed a third-party complaint against Citizens Bank (the depository bank⁶⁶) for breach of presentment warranty seeking reimbursement from Citizens Bank in the event it was ultimately held liable to its customers for paying on the fraudulently-indorsed checks.⁶⁷ In its third-party complaint, Morgan Stanley argued that it was a “nonbank drawee”⁶⁸ of the checks in question, and that it was entitled to bring a claim for breach of presentment warranty against Citizens Bank.⁶⁹ Citizens Bank, however, refused repayment of the checks, and defended against Morgan Stanley’s claim for breach of presentment warranty by asserting that Morgan Stanley could not bring a claim for breach of presentment warranty because it (Morgan Stanley) was not a “drawee bank,” which Citizens Bank claimed was the only entity permitted by the UCC to bring such a claim.⁷⁰ Citizens Bank contended that Bank One (with whom Morgan Stanley had contracted with to provide check-writing privileges on the customers’ Active Asset account⁷¹) was the only entity that could possibly have brought a claim for breach of presentment warranty against Citizens Bank. The *Nisenzon* court rejected Citizens Bank’s argument.

The *Nisenzon* court observed that, although the UCC expressly defined the term “bank” as “[a] person

engaged in the business of banking, including a savings bank, savings and loan association, credit union or trust company,” other courts had previously held that “[b]rokerage firms offering checking services are ‘banks’ for purposes of the UCC.”⁷² According to the *Nisenzon* court, it did not matter that Morgan Stanley was not technically a “bank” under the UCC definition, because, as the *Lichtenstein* court observed, “[i]t would be anomalous to establish one rule for checking accounts administered by a bank, and another rule for checking accounts administered by a brokerage firm in connection with a bank.”⁷³

In the end, although Morgan Stanley was ultimately found liable to its customers for paying on the fraudulently indorsed checks under Section 4-401 of the UCC,⁷⁴ it was able to shift that loss to Citizens Bank because Citizens Bank, as the depository bank, had breached its presentment warranties to Morgan Stanley by requesting payment on the checks Citizens Bank had allowed to be deposited into the investment advisor’s checking account with the fraudulent indorsements.⁷⁵ As such, the *Nisenzon* court determined that Morgan Stanley was able to take advantage of the check-fraud-loss-allocation protections of the UCC, even though it was not technically a “bank” as that term is defined by the UCC.

Broker-Dealers Providing Commercial-Banking-Like Services On Their Brokerage Accounts Should Be Subject to the Same UCC Provisions Governing Bank Deposits And Collections

As discussed above, courts have almost uniformly⁷⁶ concluded that broker-dealers providing commercial-banking-like services on their brokerage accounts should be subject to the UCC’s provisions governing bank deposits and collections, even if the UCC itself does not expressly include broker-dealers as “banks” subject to its provisions. Several commentators have reached the same conclusion.⁷⁷ These decisions were no doubt correct, and were driven primarily by the courts elevating the substance of the underlying transactions over the form of the UCC’s definition of the term “bank.” Indeed, the alternatives for these courts if they would not have applied the UCC in these circumstances would have been unsatisfactory. If the UCC would not have applied to these broker-dealers providing commercial-banking-like services on their brokerage accounts, the result

would have been that the myriad disputes among the customers, their broker-dealers, and the other banks in the check-collection and payment process would have fallen under one or more states’ statutory, contract, or tort regimes.⁷⁸ This alternative is not theoretical.

For example, in *Nisenzon*, in addition to bringing a claim against Morgan Stanley under Section 4-401 of the UCC, the customer also asserted a common-law claim for breach of contract against Morgan Stanley under Pennsylvania law. The *Nisenzon* court, however, did not need to reach the issue of whether the customers also could assert a claim for breach of contract against Morgan Stanley in addition to their claim under Section 4-401 because it found that the customers had properly brought their claim for repayment under Section 4-401 of the UCC, and that their claim for breach of contract under Pennsylvania law was effectively merged into that claim.⁷⁹ In addition to the “redundant” claim for breach of contract in *Nisenzon*, plaintiffs in other cases involving similar transactions involving broker-dealers have asserted a number of state-law claims in connection with their lawsuits. The plaintiff-customer in *Halsey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*,⁸⁰ for example, asserted no less than eleven state-law claims in his complaint, including claims for negligence and breach of fiduciary duty, leading the *Halsey* court to observe that the plaintiff had undertaken “an effort to make th[e] complex commercial and international factual background of this case fit some cognizable cause of action.”⁸¹

The result of not applying the UCC’s provisions governing bank deposits and collections to broker-dealers providing commercial-banking-like services on their brokerage accounts, therefore, could lead to future courts attempting to apply these state-law doctrines to circumstances where the UCC would otherwise provide a relatively uniform and predictable result.⁸² Obviously, the uncertainty engendered by such a patch-work approach by the courts would lead to unnecessary transaction costs for broker-dealers, their customers, and other banks in the check-collection and payment process. What is more, if the UCC’s provisions governing bank deposits and collections do not apply to broker-dealers providing commercial-banking-like services on their brokerage accounts, broker-dealers may begin to rethink whether the resulting transaction costs potentially outweigh the income derived from the provision of these services on their brokerage accounts. Finally, commercial banks

themselves should favor applying the UCC to broker-dealers providing commercial-banking-like services on their brokerage accounts because to not do so could allow broker-dealers a competitive advantage in providing these services to their brokerage-account customers. As the United States Court of Appeals for the Seventh Circuit has observed, albeit in a slightly different context:

[The same duties] should extend to enterprises such as [broker-dealers] that offer a checking service in competition with banks. . . . Banks make their money by lending, and they obtain much of that money by offering checking services to people looking to park their money. [The broker-dealer] wants to obtain capital from the same source—people who can be induced to deposit their money with a financial institution in exchange for the convenience of being able to deposit and withdraw the money by check. [If a broker-dealer is subject to different duties] this would reduce its costs of liability insurance and of scrutinizing checks submitted to it for payment and it could use its resulting cost advantage to lure customers from banks that, though they may be no less efficient than [the broker-dealer] cannot avoid those costs. There is no reason to confer such a windfall advantage on the brokerage industry.⁸³

It is true that, with the recent re-regulation of broker-dealers providing commercial-banking-like services on their brokerage accounts, such as the FACT Act, as well as the recent form-of-entity changes by Morgan Stanley, Goldman Sachs, and Merrill Lynch, the issues addressed in this article may arise less often in practice. Nonetheless, it is clear that establishing a uniform, predictable regime under the UCC for addressing issues related to these services is no less important today for the remaining broker-dealers providing these commercial-banking-like services on their brokerage accounts.

Conclusion

The commercial-and investment-banking industries in the United States have enjoyed a storied history. The incredible shrinking broker-dealer has played a large part in that history, and will continue to play at least some role in the US financial-services industry as the country emerges from the Great Recession. But one thing should be certain regardless of the currently

diminished role of the broker-dealer—to the extent they continue to provide commercial-banking-like services as part of their brokerage accounts, broker-dealers should be subject to and governed by the same UCC provisions that apply to commercial banks. Applying the UCC to broker-dealers providing these services will achieve the relative uniformity and predictability of result that commercial banks traditionally have enjoyed under the UCC. Applying the UCC to these services also will reduce the transaction costs associated with the less-attractive alternative of applying myriad state-law regimes to resolve disputes involving these services. For these reasons, applying the UCC to the commercial-banking-like services provided by broker-dealers on their brokerage accounts will benefit the broker-dealers that provide the services, their customers who take advantage of and increasingly rely on them, and the commercial banks that are incidentally involved in the transactions arising from the services.

Notes

1. Sewell Chan & Eric Dash, *Obama Moves to Limit 'Reckless Risks' of Big Banks*, N.Y. TIMES, Jan. 22, 2010 (noting that new banking rules proposed by the Obama Administration “would prohibit bank holding companies from owning, investing, or sponsoring hedge fund or private equity funds and from engaging in proprietary trading”)
2. The UCC definition of “bank” expressly does not include a broker-dealer or brokerage firm. See UCC § 4-105(1) (1990).
3. All citations to the UCC in this article are to the 1990 version of the Code, unless otherwise noted.
4. *Nisenzon*, 546 F. Supp. 2d 213.
5. Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221, 236 n.98 (2000); see also *id.* at 236 (stating that the underlying goal of the Glass-Steagall Act was “the ‘complete divorcement’ of commercial and investment banking”) (quoting S. REP. NO. 73-1455, at 185 (1934)).
6. Federal Regulation Q limited the interest rates that national banks could offer on their deposits. See Markham, *supra* note 5, at 238, 240.
7. See *id.* at 241 n.118 (describing the evolution of the money market fund).
8. *Id.* at 240, 241 n.118.
9. *Id.* at 241.
10. Depository Institutions Deregulation and Monetary Control Act, Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in sections of 12 U.S.C.).
11. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) (as codified in sections of 12 U.S.C.), amending Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1850 (1994).

12. Kerry Cooper & Donald R. Fraser, *Banking Deregulation and the New Competition in Financial Services* 133 (1984).
13. *Id.*
14. Markham, *supra* note 5, at 263.
15. 15 U.S.C. §§ 80a-1 to -64 (1994).
16. Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. Corp. L. 691, 702 (2000).
17. *Id.*
18. Scott McMurray, *Merrill Lynch Tests Assets Management for Small Investors*, WALL ST. J., Mar. 12, 1984, at 1. For an example of how a Merrill Lynch CMA worked, see *Halsey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. CV90 0307979S, 1994 WL 35449 (Conn. Super. Ct. Jan. 31, 1994).
19. Rebecca Buckman, *Internet Brokerage Firms Break into Banking*, WALL ST. J., July 2, 1998, at C1.
20. McMurray, *supra* note 18.
21. Daniel Hertzberg & Scott McMurray, *Some Banks, Brokers Form Business Ties*, WALL ST. J., Feb. 15, 1984, at 1.
22. *In Brief: Brokerage Race Speeds Up*, BOSTON GLOBE, June 29, 1982.
23. Joan Fitzgerald, *Fidelity Offers New Account*, Boston Globe, Jan. 17, 1983, at 1.
24. Randall Smith, *Merrill's Once-Revolutionary CMA is Losing Its Edge*, WALL ST. J., Jan. 7, 1993, at C1.
25. John Hechinger & Paul Beckett, *Fidelity to Offer American Express Cards*, WALL ST. J., May 5, 1999, at 1.
26. Joseph Asher, *Promoting Brand Identity: What's Your Name Again?*, 89 A.B.A. BANKING J. 78, 80 (Sept. 1997).
27. The US "payments system" lacks precise definition. Commentators have suggested that "it refers to the clearing and settlement services that are provided by the Federal Reserve System ("FRS") through the regional Federal Reserve Banks, and by other clearing settling organizations that interact with the FRS and carry on their activities under the guidance of the operating rules and policies established by the Board of Governors of the FRS." Eugene M. Katz & Robert H. Rosenblum, *Rethinking Access to the Payments System*, FIN. SERVS. & E-COMMERCE NEWSLETTER (Federalist Society for Law & Public Policy Studies, Washington D.C.), July 1, 1997, available at http://www.fed-soc.org/publications/pubid.1610/pub_detail.asp (last visited Jan. 8, 2010).
28. Howell E. Jackson, *Regulation in a Multi-Sector Financial Services Industry: An Exploratory Essay* (Harvard Law Sch. Discussion Paper No. 258, May 1, 1999), available at <http://ssrn.com/abstract=166651> (last visited Jan. 8, 2010). See generally 7A HAWKLAND UCC Series § 8-501:04 (rev. 2009) (observing that "the mechanism by which an asset management account provides the customer with a check writing feature is to arrange with a bank a deposit account that is linked to the asset management account"); Federal Reserve Bank of New York, Fedwire and National Settlement Services, <http://www.newyorkfed.org/aboutthefed/fedpoint/fed43.html> (discussing the Federal Reserve's National Settlement Service).
29. Federal Trade Commission, *FTC Business Alert: New 'Red Flag' Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft*, June 2008, <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm> (last visited Jan. 8, 2010).
30. *Id.*
31. *Id.*
32. Philip Aldrick, *Goldman Sachs Brings to an End an Era in Investment Banking*, Telegraph, Dec. 11, 2009, available at <http://www.telegraph.co.uk/finance/financetopics/financialcrisis/3062431/Goldman-Sachs-brings-to-an-end-an-era-in-investment-banking.html> (last visited Jan. 9, 2010).
33. *Id.*
34. 983 P.2d 1086 (Or. Ct. App. 1999).
35. *Id.* at 1088.
36. *Id.* at 1089.
37. *Id.*
38. *Id.* at 1090.
39. *Id.* at 1091.
40. *Id.* at 1093.
41. *Id.* at 1095.
42. 435 So.2d 1058 (La. Ct. App. 1983).
43. *Id.* at 1060.
44. *Id.*
45. *Id.* at 1061.
46. *Id.* at 1062.
47. *Id.* at 1062-63. For another case where the court found that Merrill Lynch was a "bank" for purposes of the UCC, see *Halsey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. CV90 0307979S, 1994 WL 35449, *2 (Conn. Super. Ct. Jan. 31, 1994) (holding that Merrill Lynch was a "collecting bank" under the UCC and observing that "stock brokerage firms which accept deposits and allow withdrawals in the regular cause [sic] of business have also been found to be banks within the meaning of the UCC").
48. 727 F. Supp. 975 (W.D. Pa. 1989), *order vacated on other grounds*, 777 F. Supp. 423 (W.D. Pa. 1991).
49. *Id.* at 976.
50. *Id.*
51. *Id.* at 977.
52. *Id.*
53. *Id.*
54. *Id.* at 978.
55. *Id.*
56. *Id.* at 979.
57. 631 N.Y.S.2d 346, 219 A.D. 540 (N.Y. Sup. Ct. 1995).
58. *Id.* at 348, 219 A.D. at 541.
59. *Id.* In reaching this conclusion, the *Pinasco* court followed the lead of the Court of Appeals of New York in *Woods v. MONY Legacy Life Ins. Co.*, in which the court had previously concluded that Section 4-406 barred a similar claim by a customer of MONY

- Life Insurance Company because MONY, even though it was not a “bank,” “in its operation of the MONY money market account [MONY] was ‘engaged in the business of banking’ for purposes of UCC 4-406(4).” 617 N.Y.S.2d 452, 454, 641 N.E. 1070, 1072 (N.Y. 1994). The *Woods* court observed, correctly, that “the same policy concern that motivated [UCC §] 4-406—prompt detection of alterations and forgeries by the person better able to detect them—existed with respect to Woods’ account.” *Id.* In *Travelers Cas. & Surety Co. of Am. v. N.W. Mut. Life Ins. Co.*, 480 F.3d 499, 503-05 (7th Cir. 2007), the Seventh Circuit similarly concluded that Merrill Lynch was able to avail itself of the protections of the UCC (in particular, the three-year statute of limitations in UCC § 3-318) in defending against a claim under UCC § 3-307, although the court did not address the issue of whether Merrill Lynch was a “bank” under the UCC. *Id.*
60. 546 F. Supp. 2d 213 (E.D. Pa. 2008).
61. *Id.* at 217.
62. *Id.* at 217.
63. *Id.* at 219-20.
64. *Id.* at 219-21.
65. *Id.* at 215. UCC § 4-401 provides that a “bank may [only] charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.” An “item” includes a check. UCC § 4-104(a). In *Nisenzon*, the Active Asset account checks were not properly payable because they were paid by Morgan Stanley over the fraudulent payee indorsements. See 1990 UCC § 4-401 cmt. 1.
66. “Depository bank” is defined by the UCC as “[t]he first bank to take an item even though it is also the payor bank unless the item is presented for immediate payment over the counter.” UCC § 4-105.
67. See *Nisenzon*, 546 F. Supp. 2d at 216. Among other things, a depository bank warrants when presenting a check for payment “that there are no unauthorized or missing indorsements,” 1990 UCC § 3-417 cmt. 2, and a presentment warranty “really boils down to the statement ‘no forged indorsements here.’” 2 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 18-7, at 234 (4th ed. 1995). In general, a depository bank’s only defense to a properly brought claim for breach of presentment warranty is that the entity bringing the claim did not pay or accept the check in good faith. See UCC §§ 4-208, 3-417; see also *Wachovia Bank, N.A. v. Federal Reserve Bank of Richmond*, 338 F.3d 318, 323 (4th Cir. 2003) (a finding of bad faith requires a showing that the drawee of a check “acted in an unfair or dishonest manner, rather than a negligent manner”).
68. “Drawee” is defined by the UCC as the “person ordered in the draft to make payment.” See UCC § 3-103(a); see also UCC § 4-106(c) (discussing a “nonbank drawee”).
69. See *Nisenzon*, 546 F. Supp. 2d at 225.
70. *Id.* at 216.
71. For example, Morgan Stanley introduced evidence at trial that Bank One had made its routing number available to Morgan Stanley, which provided Morgan Stanley access to the Federal Reserve Clearinghouse System. See Trial Transcript 205-06, 219, 229-29 (Day 2). Nonetheless, Morgan Stanley also presented evidence at trial that it and its third-party data processor provided the actual paper checks to Morgan Stanley’s customers, verified drawer signatures, made pay/decline decisions, debited the customers’ accounts, and stored and retrieved check images. See *id.* at 197, 201, 202, 207-08, 224, 226, 227 (Day 2).
72. *Nisenzon*, 546 F. Supp. 2d at 224.
73. *Id.* at 225 (quoting *Lichtenstein v. Kidder, Peabody & Co., Inc.*, 727 F. Supp. 975 (W.D. Pa. 1989), order vacated on other grounds, 777 F. Supp. 423 (W.D. Pa. 1991)).
74. *Id.* at 225-26.
75. *Id.* at 226-27. Citizens Bank also raised several defenses under UCC §§ 3-417(c) and 4-208(c) in an attempt to reduce its ultimate liability to Morgan Stanley’s customer. See *Nisenzon*, 546 F. Supp. 2d at 227-36. The *Nisenzon* court, however, held that Citizens Bank failed to establish these UCC defenses, but found that it was nonetheless entitled to a partial set-off for part of the loss plaintiffs had recovered through a settlement in another lawsuit. *Id.*
76. The courts that have concluded that the UCC does not apply to brokerage firms because they are not “banks” have done so with little analysis of the issue. See *Software Design & Application Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 486, 56 Cal. Rptr. 2d 756 (Cal. Ct. App. 1996) (brokerage firms were not “receiving banks” under California’s version of the UCC “because they are not banks, let alone receiving banks”).
77. See generally BRADY ON BANK CHECKS § 1.24 (discussing cases holding that brokerage firms should be considered “banks” under the UCC); Matthew R. Salzwedel, *Toothless Tigers: Positive & Reverse-Positive Pay & The Illusion of Customer-Loss Allocation for Check Fraud*, 126 BANKING L.J. 130, 132 n.8 (2009) (observing that “the UCC’s default loss-allocation rules apply to more than just accounts at licensed banks”). Cf. ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 4-105:4 (3d ed.) (“A difficult question arises as to whether stock brokerage firms which offer their customers a checking-like account are banks. The rules governing banks in Revised Article 4 were drafted to take into account the manner and operation of true banks, as well as state and federal regulation of such institutions. It is not clear that all of the rules contained in Revised Article 4 can be appropriately applied to brokerage firms. Rather than classifying stock brokerage firms as banks, courts should apply Revised Article 4 by analogy in appropriate cases.”).
78. If the UCC applies to the transaction at issue, UCC § 4-102 provides the applicable choice-of-law rules to determine which state’s law applies.
79. See *Nisenzon*, 546 F. Supp. 2d at 216 n.4 (“We resolve the case in the same way and deem the claims [under the UCC and for breach of contract] to be redundant. We thus consider the breach of contract claim to be merged into the § 4401 claim”).
80. *Halsey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. CV90 0307979S, 1994 WL 35449, *2 (Conn. Super. Ct. Jan. 31, 1994).

81. *Id.*; see also *Travelers Cas. & Surety Co. of Am.*, 480 F.3d at 503-05 (rejecting attempt by the plaintiff to recharacterize its claim under UCC § 3-307 into a common-law claim for fraud, and noting that “[s]ince section 3-307 fits the facts of the case to a T, no room is left for recharacterizations intended to circumvent the statute of limitations applicable to such claims. It is one thing to fill gaps in the Uniform Commercial Code and another to contradict it by calling a UCC claim something else.” (citations omitted)); *Mishler*, 983 P.2d at 1089-90 (pointing out that the plaintiff had alleged claims for breach of

contract and unjust enrichment, but resolving the case under the UCC).

82. See UCC § 1-102 (stating that the purpose of the UCC is to “simplify, clarify and modernize the law governing commercial transactions”); *Menichini v. Grant*, 995 F.2d 1224, 1230 (3d Cir. 1993) (observing that the UCC seeks to promote “negotiability, finality, and uniformity in commercial transactions”).

83. *Travelers Cas. & Surety Co. of Am. v. Wells Fargo Bank N.A.*, 374 F.3d 521, 526-27 (7th Cir. 2004).

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