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Problems of Proof When There's a Computer Goof: Consumers Versus ATMs, 2 Computer L.J. 49 (1980)

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INTRODUCTION

Automated teller machines (ATMs) have been the most successful application of electronic banking.\(^1\) Surveys indicate that consumers use them primarily because of their convenience.\(^2\) Unfortunately, two types of errors occur in using these machines. Occasionally, an ATM dispenses less cash to the consumer than it deducts from the consumer's account.\(^3\) Second, a consumer may make a deposit at an ATM which is not credited to his account.\(^4\)

This article discusses the difficulties that consumers will encounter in trying to prove that the bank's computers or employees made an error in a transaction involving an ATM. The focus is on presumptions, and the burden of going forward with evidence to rebut these presumptions, if the dispute reaches the trial stage. The allocation of burden may have a substantial impact on prelitigation resolution of the dispute as well.
The new federal law governing electronic funds transfers applies to ATM withdrawals and deposits. Because that law is silent on many aspects of the burden question, however, state court decisions on analogous, non-electronic bank transfers provide helpful models for resolving some of these legal issues. At the most fundamental level, these legal issues raise social policy questions.

Should the legal system facilitate the promotion and marketing of computer-assisted financial transfers by placing the burden of going forward with proof of error squarely on the aggrieved consumer? Or, should the legal system give the consumer an advantage by establishing a presumption and shifting the burden of proof to the financial institution once the consumer has presented the limited evidence he has under his control? Though the latter choice may retard the proliferation of ATMs and result in banks placing restrictions on their use, society's goals should be to favor consumers over computers.

I. ATM Deposits

A typical deposit transaction works in the following manner. A consumer places his checks and/or cash in a deposit envelope and

6. In the past, the United States has adopted legal doctrines to promote commercial interests. "One of the most striking aspects of legal change during the ante-bellum period is the extent to which common law doctrines were transformed to create legal immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 100 (1977). When courts set out to promote commercial interests, or adopt rules which have the effect of promoting them, they are performing the "social engineering function of balancing the utility of economically productive activity against the harm that would accrue." Id. at 102. Computer technology benefits the public, not just the financial institutions using that technology. But there are also dysfunctions, including the harm to individual consumers when computers fail to perform correctly, and the risk of promoting over-investment in computer equipment and technology. Before deciding whether or not to favor the promotion of computer banking over individual consumer rights, the legal system should determine whether the "social benefits" exceed the "social costs." See generally id. at 100.
7. Placing the burden of proof on the injured consumer does not necessarily promote electronic banking. If computer errors were rampant, and hundreds of consumers sued but lost, because of the absence of favorable presumptions and the onerous burden of going forward in presenting evidence, presumably word would get out and many consumers would stop using ATMs. Under these circumstances, a burden rule favoring financial institutions would have the effect of retarding the promotion and marketing of ATMs. But it is doubtful that this will occur. Consumer controversies rarely proceed as far as trial, which is where the burden rules come into play. Therefore, while individual consumers may lose their cases because of burden rules, these rules would not dissuade most consumers from using ATMs.
instructs the machine that he is making a deposit. The ATM may ask the consumer to type in the amount of the deposit and instruct him to place the envelope into a special feeder which moves it into the machine and out of the control of the consumer. The ATM then provides a transaction document as a written record of the deposit. Though the document provided may include a printed notation of an amount of money identified as a deposit, this merely reflects what the consumer has typed into the ATM. The ATM does not count the money in the deposit envelope. Consequently, an empty envelope could be fed into the ATM.

A perplexing problem is presented by the consumer who claims that he made a deposit at an ATM, while the financial institution claims that it can find no evidence of the deposit. Three possible explanations exist. The consumer may be lying and trying to defraud the financial institution into crediting his account for a deposit that he never made; the ATM may have malfunctioned, failing to secure the deposit envelope, and permitting a subsequent customer to remove it; or the financial institution employee who services the ATM may have stolen the deposit envelope. The question for the legal system is which party should bear the burden of proving who is responsible.

A. Applicability of the EFT Act

The Electronic Funds Transfer (EFT) Act provides that any required documentation given to the consumer by a terminal "which indicates that an electronic transfer was made to another person shall be admissible as evidence of such transfer and shall constitute prima facie proof that such transfer was made." Before the consumer can take advantage of this evidentiary rule, however, he must show that the transfer was an electronic funds transfer as defined by the Act. The law provides, _inter alia_, that the term means any transfer of funds, "other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal . . . so as to order, instruct, or authorize a financial institution to debit or credit an account." The definition of electronic funds transfer includes deposits and withdrawals made at ATMs.

One can argue that depositing a check into an ATM is "a trans-
action originated by check” and is therefore outside the definition of an electronic funds transfer and not covered by the Act. That does not appear, however, to be a correct construction of the definition. The exemption of transactions originated by check was intended to exclude the traditional, routine use of checks in which electronics may play a role somewhere in the process, but in which no electronic machine, such as an ATM or POS terminal, is used in the initial stages of the transfer.11 In addition, the exclusion of ATM check deposits would have an anomalous result, since cash deposits at ATMs are clearly included in the Act.

Even if one can safely assume that both check and cash deposits are within the definition, the language of the EFT Act presents another potential barrier. In order to take advantage of the statute’s prima facie rule, the deposit must be a transfer made to “another person.”12 When a consumer makes a deposit to his own account through an ATM, is this a transfer to another person, to the financial institution,13 or a transfer from the consumer to the same person—himself? The consumer may argue that a deposit is technically a loan made to the financial institution and is not a transfer of money.

11. The original Riegle bill, which was the basis for the final EFT Act was S. 2065. It provided, inter alia, that “the term ‘electronic fund transfer’ means any transfer of funds the effectuation of which is dependent in whole or substantial part on electronic means . . . .” Id. § 803(5). At Senate hearings on that bill, several witnesses testified that the definition was too broad, since it would include many routine bank transactions, including check transactions, in which electronics play an incidental role. The inclusion of check truncation was objected to by Citicorp. However, inclusion of check deposits at ATMs was not singled out for objection by these witnesses. Hearings on S. 2065 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. 225 (1977) (testimony of J. Frederic Ruf); 309-10 (testimony of David A. Huemen); 357 (testimony of Citicorp.); 375 (testimony of Robert Patrick).

The subsequent legislative history and the statute which was enacted appear to be responsive to the criticisms expressed at the hearings. Routine check transactions are excluded by the language exempting transactions originated by check. 15 U.S.C. § 1693a(6) (1978). The Senate Report states that this exclusion includes check truncation even where the checks are “routed or processed electronically.” S. Rep. No. 915, 95th Cong., 2d Sess. 4 (1978) [hereinafter cited as Senate Report].

However, deposits of checks at ATMs do not appear to be excluded. The Senate Report specifically mentions the withdrawal and deposit functions of ATMs in justifying the need for EFT legislation. Id. at 2. In explaining the scope of the Act, the Report lists several types of EFT services, including ATMs, stating that they are included because each “is initiated and carried out primarily by electronic means.” Id. at 3. Depositing a check through an ATM is an act which is “initiated and carried out primarily by electronic means.”


13. The Senate Report specifies that a transfer to another person includes a transfer to the consumer’s bank. Senate Report, supra note 11, at 13.
into the consumer's account. Once the financial institution accepts the deposit, it is not a bailee of the depositor's money; it has no obligation to keep the depositor's money separate from other funds. Instead, a debtor-creditor relationship is established, since the depositor has "lent" the deposited funds to the financial institution. The institution's obligation is to properly credit the amount of the deposit to the depositor's account, and to pay it out upon the depositor's order. Therefore, when a consumer makes a deposit at an ATM, it is a transfer to "another person," and not a transfer from the consumer to himself, though it is credited to his account.

B. Prima Facie Rule

Assuming that the consumer has met these initial criteria, he can use the document issued at the terminal—the deposit slip—as prima facie evidence that he made a deposit. This does not mean, however, that the consumer will prevail if a dispute arises. For instance, the consumer may not be able to take advantage of the rule because he lost or threw away the deposit slip, or the machine may have malfunctioned and recorded the wrong amount on the deposit slip or failed to furnish the deposit slip.

Even if the consumer has the deposit slip and can use the prima facie rule, it will not necessarily give him a substantial advantage when he brings an action for damages under section 915 of the Act. The marginal effect of the prima facie rule is illustrated by cases involving non-EFT deposit transactions where a similar rule also applies. Courts have down-played the significance of the deposit slip, characterizing it as merely an acknowledgement, a receipt or a memorandum. Though the slip is prima facie evidence, it creates a rebuttable presumption, not a conclusive one. In the ATM situation, it permits the presumption that a deposit was made in the amount recorded on the deposit slip. However, in most jurisdic-

16. Even if the consumer has lost the deposit slip, he may be able to obtain bank records of the transaction through discovery. If the ATM produces a written record identical to the deposit slip for the bank, this may be just as good evidence for the consumer as his deposit slip. However, if a machine malfunction caused erroneous information to be recorded, the bank's record will be of no help to the consumer. Regardless, the discussion in the text concerns the effectiveness of the EFT Act's prima facie evidence rule, and is not meant to imply that the consumer might not be able to produce evidence through other less expeditious and more expensive means.
18. 5B A. MICHIE, BANKS AND BANKING 227 (1973).
19. Id. at 228.
20. See generally Ash v. Livingston State Bank & Trust Co., 129 So.2d 863, 867 (La.
tions, the burden of persuasion is still on the consumer. The pre-
sumption acts merely to put the burden of production of evidence
on the defendant; the financial institution must explain or contra-
dict the presumption which the prima facie rule allows.

The courts are then faced with the question of whether the
financial institution has produced sufficient evidence to rebut the
presumption. The Federal Rules of Evidence do not specify how
much evidence the defendant must submit to rebut the presum-
ption. Consequently, federal courts have discretion in this area.

State courts have adopted several different approaches, ranging
from a minimum amount of credible evidence to a preponderance of
the evidence. Perhaps courts will rule that the financial institution
has met its burden once it has produced evidence that it exercised
stringent procedures, e.g., the ATM was checked for malfunctions
every day and no problems were found; not one but two trusted em-
ployees went through the deposit envelopes fed into the ATMs; no
other customers complained about the problem. Until courts have
been confronted with actual cases, it is impossible to know what
type and amount of evidence will be sufficient. It may come down to
little more than the court's judgment on which witnesses seem to be
telling the truth, as it often does in non-EFT deposit cases.

C. Relationship Between the Consumer and the Bank

Assuming that the consumer cannot prevail merely by asserting
the prima facie rule for any of the several reasons given above, it is
necessary to decide how liability should be determined. First, it is
important to clarify the relationship of the consumer to the financial
institution when he feeds a deposit envelope into the ATM. The cru-
cial issue is, when does a deposit occur? Is a deposit made when the
consumer feeds the envelope into the ATM, or only later when a

Ct. of App. 1961); 5B A. MICHIE, supra note 18, at 228; Abelle, Evidentiary Problems
Relevant to Checks and Computers, 5 RUTGERS J. COMPUTERS & L. 323 (1976).

21. Federal Rules of Evidence 301 provides that "a presumption imposes on the
party against whom it is directed the burden of going forward with evidence to rebut
or meet the presumption, but does not shift to such party the burden of proof in the
sense of the risk of nonpersuasion, which remains throughout the trial upon the party
on whom it was originally cast." State courts have adopted a bewildering variety of
approaches to the problem of presumptions and their effect on burdens. See gener-
ally Hecht & Pinzler, Rebutting Presumptions: Order Out of Chaos, 58 B.U.L. Rev. 527,
554 (1978).

22. See note 21 supra.


24. Id. at 546.

financial institution employee opens the machine and physically takes possession of the envelope? If it is the latter, perhaps there is a bailor-bailee relationship from the time the consumer feeds the envelope into the ATM until the employee exercises control over the envelope. In contrast, if a court holds that the financial institution begins processing the deposit as soon as the envelope is fed into the machine, there is a debtor-creditor relationship throughout the time period. This would put the consumer in an advantageous position since, as a debtor of the consumer, the financial institution would be under a higher standard of care to safeguard the consumer's money than it would as a bailee.\footnote{26}

In cases involving deposits made in a non-EFT mode, courts have held that a debtor-creditor relationship arises when title to the money passes to the financial institution. This occurs when the deposit is in the possession of and has been accepted by the institution.\footnote{27} But courts have also held that acceptance does not occur until the money has been counted to determine the amount of the deposit.\footnote{28} A deposit envelope for use in an ATM which says “[a]ll deposits and payments are subject to proof and verification” seems to assert the financial institution's right to open the envelope and examine and count its contents before accepting the deposit. At least in jurisdictions which follow the line of cases holding that acceptance does not occur until the money is counted, and which would probably follow the same analysis in ATM deposit cases, consumers will not be able to rely on an assertion of a debtor-creditor relationship at the time the envelope is fed into the ATM.

D. Bailor-Bailee Relationship: Night Depository Cases

The consumer, however, may derive an advantage even if he can show only that a bailor-bailee relationship exists. Courts have found that a bailment for mutual benefit is created in night depository cases. The night depository is analogous to the ATM deposit situation. In both, the depositor surrenders control of the deposit by putting it into a device operated by the financial institution. In both, no employee is present to witness the delivery or to take possession of the deposit at the time of delivery. This is unlike the normal bailment situation where the prospective bailee is present to examine the property and determine its exact nature and amount before entering into the bailment relationship. The dilemma is the same in the night depository and ATM deposit situations. The bailee-

\footnote{26. See generally 5A A. Michie, supra note 18, at § 100.\\27. Id. at 44.\\28. Id.}
financial institution has no way of proving that the customer did not make the deposit, except by making the bald assertion that it never found the deposit when its personnel checked the device. Of course, the bailor-customer can rely only on his own word that he made the claimed deposit.

The case of *Irish & Swartz Stores v. First National Bank* illustrates one approach to resolving night depository problems. In that case, the depository worked in the following manner. When the door was closed, the tray was supposed to slip the bag into a chute which led to a vault. A sign above the tray instructed the depositor to reopen the door after putting in the deposit bag to ensure that the bag had entered the chute.

The trial court instructed the jury that if the depositor did deliver the bag, the law raised a presumption that the failure of the bank to find the bag in the morning was caused by the bank's negligence. In additional instructions, the court specified that delivery was proven if the depositor followed the instructions and reopened the door to make sure that the bag actually went into the chute. The depositor testified that he “couldn't swear” that he reopened the door to check, but felt sure that he did, since that was his usual practice. The jury returned a verdict in favor of the bank.

The supreme court of Oregon upheld these instructions, finding that the depositor must prove that the bag actually entered the chute and could not be removed by a subsequent customer or thief. The plaintiff claimed that it was impossible to produce that kind of evidence. The court answered that it was equally impossible for the bank to prove that a depositor had not put the bag in the depository, or put it there, but that it failed to reach the vault through the depositor's, and not the bank's, fault. In upholding the instructions despite the onerous burden placed upon depositors, the court was greatly influenced by the fact that the depositor had agreed to a contract containing an exculpatory clause which placed the risk of loss of a deposit bag on the depositor. The court refused to follow a line of cases striking down these clauses. In those cases the courts found that banks are professional bailees, and therefore, must be held to some standard of care regardless of their contracts.

30. *Id.* at 367, 349 P.2d at 817.
31. *Id.* at 368, 349 P.2d at 818.
32. *Id.* at 369, 349 P.2d at 818.
33. *Id.* at 371-72, 349 P.2d at 819.
34. *Id.* at 373, 349 P.2d at 820.
35. *Id.*
36. *Id.* at 375, 349 P.2d at 821.
with depositors. The Oregon court found that there had been no showing that the public's need for night depository services was so great that banks should be subject to what amounted to "almost absolute liability."

In a subsequent decision, the supreme court of Oregon cast grave doubt upon the validity of exculpatory clauses in night depository cases. Further, clauses of that kind are specifically prohibited by the EFT Act. It would, therefore, be inappropriate for a court deciding an ATM case to follow the Irish & Swartz holding insofar as it was based upon the exculpatory clause.

The Irish & Swartz case was not overruled on the issue of what constitutes proper delivery, so that part of the opinion may serve as a model in other states as well. In the ATM situation, a duty comparable to that imposed in Irish & Swartz might require that the consumer not only put the envelope into the receptacle or feeder, but also check to make sure that the envelope was completely "swallowed" by the feeder so that the next customer could not remove it. Under the holding in Irish & Swartz, as clarified by the later case of Real Good Food Stores, if the trier of fact believes that the consumer did this, the burden then falls on the bank.

Unfortunately, such a rule would reduce every case to a "swearing contest," and the credibility of the consumer's story about how conscientiously he checked to make sure that the envelope was completely fed into the ATM would become crucial. Under skillful and harsh cross-examination, most consumers, like the depositor in Irish & Swartz, would probably admit that they "couldn't swear" that they rechecked the ATM to make sure that the envelope was fully "digested."

38. 220 Or. at 378, 349 P.2d at 822.
39. Real Good Food Stores, Inc. v. First National Bank, 276 Or. 1057, 557 P.2d 654 (1976). In Real Good Food Stores the holding of Irish & Swartz was interpreted as bearing solely on the issue of when delivery of the deposit takes place. The court asserted that the validity of the exculpatory clause was not even at issue on appeal in Irish & Swartz. Furthermore, in Real Good Food Stores the court refused to uphold an exculpatory clause because in that case the bank admitted the deposit had been delivered. Id. at 1064, 557 P.2d at 658. In addition, the court in Irish & Swartz pointed out that in the case before it the deposit bag was opened the next business day by the depositor. If the bag was opened instead by the bank out of the depositor's presence, as is the case with ATM deposits, the court admitted that a "different rule may be called for. . . ." 220 Or. at 377, 349 P.2d at 822.
41. 276 Or. 1057, 557 P.2d 654 (1976).
In one night depository case, however, the judge was convinced that the financial institution would lose every time under such a rule. All the depositor need do is testify that he placed the bag in the chute. The financial institution is then forced to rely on circumstantial evidence that it never found the bag. "[T]he cards would appear to be stacked unfairly against the bank." Consequently, though the court refused to enforce a standard exculpatory clause, it suggested that a reasonable agreement would be one in which the depositor would have to meet the standard of "clear and convincing proof." In practice, the court found that this probably could be satisfied by the testimony of one witness in addition to the depositor.

In would be unfair and unwise for courts to impose this burden upon consumers using ATMs. It would be unfair unless consumers were clearly informed in advance of their duties relative to ensuring that the envelope was completely delivered, and of the need for a witness should any dispute arise. But even if consumers were adequately informed through notices at ATMs, such a policy seems unwise because, as the Irish & Swartz case suggests, unsophisticated consumers may not win "swearing contests" under close cross-examination, and most consumers will not bother to bring along a witness, particularly a disinterested witness, every time they make a deposit.

If financial institutions believe that consumers stand a slim chance of succeeding in a lawsuit, they will be less likely to settle deposit disputes prior to trial. This will frustrate the error resolution procedure of the EFT Act, which is designed to save both parties the time and expense of judicial proceedings. Imposition of this burden also would force the consumer into making a difficult choice. The major reason for using the ATM is its convenience. If the consumer must take proper precautions should a dispute arise, he will have to forego much of this convenience. The problem will become more severe if financial institutions limit their regular business hours and close branches so that consumers have to rely more on ATMs. The energy shortage may also make banks increasingly inaccessible and ATMs ever more convenient.

If financial institutions are really worried about large-scale

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43. Id. at 328.
44. Id.
45. Id.
fraud perpetrated by consumers falsely alleging that they made deposits, they can take steps to reduce their losses by limiting the amount of deposits that will be accepted at an ATM within a stated period of time. However, this will make the service less convenient, and may result in a loss of business. The institution can also refuse to continue offering ATM services to a consumer if the financial institution is convinced that the consumer is making false claims about deposits.

In addition to these reasons, tilting the burden of proof in favor of the consumer can be justified because of the financial institution's special position in society and the manner in which it is marketing ATM services. In striking down exculpatory clauses in night depository contracts, courts have characterized banks as "professional bailees."\textsuperscript{48} "[B]anking is an essential service upon which the public is required to rely and the night depository facility of a bank is an integral part of the business of banking."\textsuperscript{49} Similarly, financial institutions provide essential services to consumers. The use of ATMs has become so widespread and is such an important part of consumer banking that Congress found a need for federal legislation to regulate ATMs.\textsuperscript{50} At many banks the ATM is already an integral part of providing financial services.

In \textit{Irish \& Swartz}, the court resisted imposing a heavy burden upon banks unless it could be shown that there was a great public need for night depository services.\textsuperscript{51} That standard is misdirected in the ATM context. It is more appropriate to look at the promotional focus of financial institutions to see if they are offering ATMs as an integral part of their package of consumer banking services, and whether their marketing practices are directed toward creating the perception in the mind of the consumer that ATMs are a public need.

Advertisements illustrate both of these aspects. For example, a three-quarter page ad in the largest circulation Boston daily newspaper acknowledged that the ATM had become an integral part of the consumer package by informing customers that their Master Charge and Visa cards could be used to access the ATM, as well as the card originally distributed exclusively for that purpose.\textsuperscript{52} In this way, the ATM was directly linked to the consumer's credit account.

\textsuperscript{48} See, \textit{e.g.}, Real Good Food Stores, Inc. v. First National Bank, 276 Or. 1057, 557 P.2d 654 (1976).
\textsuperscript{50} Senate Report, \textit{supra} note 11, at 2.
\textsuperscript{52} The Boston Globe, May 22, 1979, at 12, col. 2.
as well as his checking account. The advertisement suggested that consumers really needed ATMs:

Because of course the real beauty of X-Press 24 is that regardless of what day or what time of day, instant cash is always ready and waiting.

Just think:

No more rushing to get to the bank before it closes.
No more “Who can we get to cash a check?” late at night or on Sundays.
No more “We can’t leave until the bank opens in the morning” when you’re going on a trip.
No more gearing your life around your bank’s hours.\(^{53}\)

It is appropriate for courts to shift the burden of proof to the financial institution once the consumer has presented a prima facie case, with or without a terminal document, since (1) consumers will have difficulty proving that ATMs properly accepted their deposit envelopes, (2) financial institutions provide essential services, (3) ATM deposits are an integral part of those services, and (4) ATMs are being promoted as fulfilling a public need. That is, once the consumer testifies that he made the deposit, provides the details of time, place, kind and amount of deposit, and offers the deposit slip, if available, into evidence, the burden should shift to the financial institution to overcome the presumption that it is responsible for any losses that occurred due to its failure to credit the deposit to the consumer’s account.

II. ATM Withdrawals

A second type of computer malfunction occurs when the cash dispenser on an ATM fails to provide the consumer with the amount of cash that he requested. For example, a consumer instructs the ATM to withdraw $100 from his account, the terminal spits out a slip indicating that $100 has been withdrawn, the subsequent periodic statement shows that $100 was debited from the account, but, when the consumer takes the money out of the dispenser, he finds only $50.

If the consumer retains the terminal document, it will serve as prima facie evidence that he did engage in the disputed transaction.\(^{54}\) However, the document will not help him prove that he received only $50. As in the deposit situation, the question arises as to whether there should be a presumption in favor of the consumer, and who should bear the burden of going forward. Once the con-

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53. Id.
sumer has presented evidence that he engaged in the transaction by submitting the terminal and/or periodic statement, and that his account was debited $100, and testifies that he only received $50, should a presumption arise that the bank failed to fulfill its responsibilities by providing less than the amount debited from the account? The EFT Act does not address this issue. Such a presumption obviously imposes a heavy burden on the financial institution. In evaluating whether it is an appropriate one, it is relevant to examine the relationship between a consumer and a financial institution when a withdrawal is made.

A. Relationship Between the Bank and Consumer: Debtor and Creditor

When a withdrawal is made through an ATM, a debtor-creditor relationship clearly exists. As the debtor, the financial institution is obligated to debit the consumer-creditor's account and transfer the funds according to the consumer's instructions. The courts' characterization of the relationship as debtor-creditor obviously contemplates that the consumer is entitled to certain benefits and advantages. The financial institution accepts its inferior status as a debtor and is amply rewarded by obtaining the funds it needs to carry out its business. It is consistent with the debtor-creditor relationship extant at the time of the withdrawal to tip the scales in favor of the consumer and impose a heavier burden on the financial institution when an ATM dispute occurs.

Traditional banking law cases illustrate some of the implications of the debtor-creditor relationship. The general rule is that once the consumer makes a deposit which is accepted by the bank, the bank becomes liable for that amount as a debt. This debt can be discharged only by payment in accordance with the customer's order. "The bank assumes the duty of seeing that it is so paid. If it pays out the money otherwise, it is liable to the depositor for the amount of such payment." One court has imposed what it characterized as a "high standard" on banks paying money from a depositor's account.

Some case law imposes an obligation, not only to use due care and diligence, but to use "active vigilance" in paying out a deposi-

55. This presumption is analogous to that used by the trial court in Irish & Swartz v. First National Bank, 220 Or. 362, 349 P.2d 814 (1960).
57. 5A A. MICHEL, supra note 18, at 273.
tor's money.\textsuperscript{59} One case has held that the depositor was not required to anticipate that the bank would make withdrawals negligently and was under no obligation to examine his passbook to ensure that the bank was not being negligent.\textsuperscript{60} Courts have declared a bank responsible for lost or stolen deposits, even if it was not negligent.\textsuperscript{61} A Texas court noted that a deposit is a loan made by the depositor to the bank, not a bailment, and held that the bank is liable for it "absolutely," no matter how it was lost.\textsuperscript{62} In light of these cases, it is not inconsistent with traditional banking law to impose a high standard of care and a somewhat onerous burden upon a financial institution when a claim is made that it paid out money erroneously in an ATM transaction.

Admittedly, the ATM cases can be distinguished from these cases in certain respects. In the non-EFT cases, there is no question that money has been paid out of the account contrary to the customer's orders, and there is no suggestion that the customer is in any way involved. In the ATM withdrawal situation, on the other hand, the consumer may be dishonest, falsely alleging that the ATM did not pay the money exactly as ordered. The issue is whether these factors justify a substantial retreat from the bank's traditional responsibility as a debtor in the withdrawal context.

**B. Allocation of Burden**

If withdrawals at ATMs cannot be made without the risk of consumer fraud, financial institutions should either stop using ATMs for withdrawals, or bear any losses. To make the innocent consumer bear the loss by imposing too heavy a burden on him substantially weakens the bank's traditional responsibility. It seems unjust to burden the consumer with the loss for two reasons. First, it has the effect of presuming that the consumer is the one at fault, rather than the bank or its machines. Second, the consumer never agreed or even realized that his traditional, superior position as a creditor in the withdrawal situation would be substantially eviscerated if he made the withdrawal via an ATM, rather than by using a human teller.

Placing the burden on the financial institution is also consistent with the general policy of placing it on the party who has superior access to the evidence which is needed to prove or disprove the

\textsuperscript{59} 5A A. Michie, \textit{supra} note 18, at 275-76.
\textsuperscript{60} Dow v. Stockport Savings Bank, 202 Ia. 594, 602, 210 N.W. 815, 818 (1926).
\textsuperscript{61} 5A A. Michie, \textit{supra} note 18, at 278.
\textsuperscript{62} Duncan v. Magette, 25 Tex. 245, 248 (1860).
case. Once the consumer has offered evidence that he engaged in the transaction, that his account was debited $100, but that he received only $50, there is no further evidence that he can produce. All additional evidence, if any, is under the control and possession of the financial institution. Through extensive and expensive discovery, the consumer may be able to learn enough about the mechanics of the computer's operation, the accuracy and reliability of the particular computer used by the institution, the financial institution's employees' role, and the interrelationships between the computers and employees, to discover evidence that it was technically possible for a human or computer error to have caused the cash dispenser to proffer the wrong amount. But such cases will rarely involve enough money to justify retaining a lawyer to settle such a case short of litigation, much less to pay a lawyer to file a lawsuit and engage in discovery of the required magnitude and complexity.

Furthermore, for all but those attorneys with experience in these types of cases, such discovery is bound to be inefficient, with many inappropriate avenues explored and questions asked. In those cases which do result in a lawsuit, it would seem far more reasonable to require the financial institution to assemble the required information in order to overcome a presumption that it was at fault.

C. Use of the EFT Act's Error Resolution Procedure

Placing the burden on the financial institution will also encourage settlement of consumer disputes prior to litigation through the use of the error resolution procedure contained in the EFT Act. Because withdrawal disputes will usually not involve large sums of money, most consumers probably will initially attempt to resolve disputes by invoking this procedure, since it does not require retention of an attorney or undue time and expense. If the financial institution knows that a successful consumer lawsuit is unlikely because the onerous burden and absence of favorable presumptions will make such an action too expensive to institute or too difficult to win, the institution will have no incentive to attempt to settle the dispute in the consumer's favor. If the institution refuses to settle, as a practical matter, the consumer has no further redress. Shifting the burden to the financial institution makes a successful consumer lawsuit far more likely, and should provide the necessary incentive for institutions to offer fair settlement under the error resolution procedure to avoid litigation.

64. See generally Abelle, supra note 20, at 372-74.
To comply with the EFT Act's error resolution procedure when a consumer complains about withdrawal problems, and to protect itself from potential treble damage claims, the financial institution should be collecting much of the evidence it would need to collect in order to carry its burden of proof if litigation eventually ensued. Under the EFT Act the institution must resolve the consumer's dispute within ten days.66 If the institution needs more time to investigate, it must provisionally recredit the consumer's account so that the consumer has full use of the disputed funds until the institution completes its investigation.67 To ensure fair and complete investigations of consumer disputes, the EFT Act provides that the consumer is entitled to treble damages if the institution fails to provisionally recredit the consumer's account within ten days and (1) did not make a good faith investigation of the alleged error, or (2) did not have a reasonable basis for believing that the consumer's account was not in error.68 The treble damage provision also applies if the financial institution "knowingly and willfully" concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available during its investigation of the alleged error.69

Shifting the burden to the financial institution should not cause undue inconvenience. Not only does the institution have possession and control of the evidence, but it already will have or should have gathered the evidence necessary to carry its burden in the course of complying with the error resolution procedure of the EFT Act.

If it is not possible for the financial institution to produce evidence to rebut the presumption that it was at fault, then arguably it deserves the resulting liability for unleashing computers which dispense money under circumstances where even the persons who control the computers cannot prove whether or not they are working correctly.

III. CONCLUSION

The use of computers in consumer transactions with financial institutions creates many new problems. The problems are not confined to situations in which computers make mistakes. The use of computers creates circumstances in which it is nearly impossible for a court to know whether a mistake occurred, as when a consumer claims that the cash dispenser disbursed the wrong amount. Situa-

66. Id. § 1693f(a).
67. Id. § 1693f(c).
68. Id. § 1693f(e).
69. Id.
tions also occur where it is possible that (1) no mistake occurred and the consumer is lying, (2) the computer made a mistake, or (3) the computer made no mistake, but its use provided the opportunity for a thief, either a financial institution employee or a stranger, to steal the consumer's money. Deposits at ATMs illustrate this dilemma.

The legal system must determine how to allocate the risks under these circumstances. One of the most crucial aspects of this allocation occurs during trial in placing burdens of proof and creating presumptions. In analyzing the problems, one may learn from traditional banking laws and analogous banking transactions. Courts must also be careful that their decisions are consistent with the EFT Act. When all is said and done, it comes down to a basic value judgment: should the law favor those who control the computers, or those who are cajoled into using them?

70. See, e.g., id. § 1693d(f) (documentation shall constitute prima facie evidence of a transfer); id. § 1693f (error resolution procedure).
71. See Budnitz, supra note 47, at 364-66.