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MUDDYING THE WATER: ELECTRONIC BENEFITS TRANSFER AFTER THE WELFARE REFORM ACT OF 1996

When Congress enacted the Omnibus Consolidated Rescissions and Appropriations Act of 1996,¹ it opened the door to enable public assistance and public payments delivery to be brought into the twenty-first century. As part of this legislation, Congress mandated that all federal payments, including Veteran’s Benefits and Social Security Supplemental Income, be made by Electronic Funds Transfer (EFT) by January 1, 1999.² More momentous is that part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act)³ that requires “each State agency [to] implement an electronic benefit transfer system”⁴ for the delivery of public assistance such as food stamps and Temporary Assistance to Needy Families (TANF).

In balancing policy considerations of consumer protection and efficiency in payment delivery, consumer protection lost as Subtitle C of Title VIII of the Welfare Reform Act⁵ expressly exempts Electronic Benefits Transfer (EBT) from the protections afforded consumers⁶ under Regulation E,⁷ which provides basic consumer protection for banking transactions conducted via

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2. See id. § 31001(c)(1)(A)(e)(1).
5. See id. § 891. The Act states that Regulation E will not apply to programs administered by the states. See id. § 891(2)(B). This affects a large portion of welfare program dollars, as the federal program of Aid to Families With Dependent Children was eliminated as part of the welfare reform bill and replaced with a new program, TANF, which will be provided through block grants to the states. See 142 CONG. REC. E1570-01 (1996). Federally administered benefits, though pooled in the same account with state administered benefits, will be covered by Regulation E. See Steve Weber, Fed Exempts Some EBT Programs from Reg E, ONLINE BANKING NEWSL. Aug. 25, 1997, at 1.

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electronic media. This policy choice leaves a potentially large number of individuals without basic consumer protections, including disclosures, error resolution, liability limitation for lost or stolen access devices, and other unauthorized transfers from a consumer's account.

"Whether or not an EBT system fulfills its potential as an enhanced delivery system for recipients and does so without causing any new problems depends on the design of the system." That basic consumer protections have been excluded from that design may bode trouble for the full success of the government's initiative as witnessed by the concern of numerous consumer groups about the exclusion of consumer protections for EBT recipients. The National Consumer Law Center (NCLC), a nonprofit organization specializing in consumer credit issues, and the Food Research and Action Center have submitted a proposal to Congress advocating minimum consumer protections for EBT recipients.

While Congress resolved the issue of consumer protection as to EBT in the Welfare Reform Act, it left many questions unanswered and created more issues that will muddy the water as to EBT and perhaps make the system's operation anything but smooth sailing. This Note will address policy issues relative to consumer protection for EBT and identify some of the unresolved issues related to EBT. Part I describes the current status of arrangements for Electronic Benefit Transfer of public assistance funds. Part II discusses public policy issues involved in the choice to exempt this delivery of funds from consumer protection. Part III identifies and addresses issues and questions resulting from this choice as to the rights and obligations of the parties to EBT transactions. Part IV explores proposed alternatives that address unresolved consumer protection issues bearing on the success of

8. See id. § 205.1.
9. See id. §§ 205.6, 205.7, 205.8.
10. Electronic Benefit Transfer Systems and Regulation E: Submitted to Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services United States House of Representatives, 104th Cong. 3 (1996) (testimony of the National Consumer Law Center and the Food Research and Action Center) [hereinafter Testimony of the NCLC].
11. See 142 CONG. REC. S8395-04, S8419 (1996) (statement of Sen. Edward M. Kennedy); see also Testimony of the NCLC, supra note 10, at 1 (stressing importance of mandating basic consumer protection for low income participants in EBT systems).
12. See Testimony of the NCLC, supra note 10, at 1.
EBT. Finally, Part V analyzes EBT's potential impact absent consumer protection.

I. ELECTRONIC BENEFITS TRANSFER OF PUBLIC ASSISTANCE

A. What is EBT?

EBT is the application of electronic funds transfer technology, which includes electronic authorization, to the provision of government benefits such as cash welfare payments. EBT will utilize typical electronic payment devices such as automated teller machines (ATMs) and point-of-sale terminals (POS) to provide access to government benefits and "federal and state benefits will be commingled on a single card." Several states have issued 'smart cards' to benefit recipients. These cards use integrated chip technology to put some of the 'intelligence' that currently resides on central computers on a portable device in the home or a wallet of a consumer, providing the consumer with an expanded set of secure payment options.

In 1994, the Federal Electronic Benefits Transfer Task Force—consisting of officials from the Office of Management and Budget, the Department of Health and Human Services, the U.S. Department of Agriculture (USDA), and the U.S. Department of the Treasury—reported that each year federal and state programs deliver almost $500 billion in cash benefits and food assistance and that at least 12 federal and state benefit programs could use electronic benefits transfer

14. See Invitation For Expressions of Interest to Acquire EBT Services for the Southern Alliance of States, Volume 1, Version 3.0, at 4 (Financial Management Service, Department of the Treasury, Mar. 9, 1995) (hereinafter IEI). A "point-of-sale terminal" is an electronic device that is not located in a bank, but rather a "nonbank" business outlet that electronically records transactions with a bank that are the result of a sale of goods or services at the non-bank business outlet. See O.C.G.A. § 7-1-603(a)(3) (1997).
15. IEI, supra note 14, at 1.
17. Id.
(EBT) to replace the current paper benefit delivery methods.\textsuperscript{18}

Recipient participation in the program will be mandatory for receipt of state benefits,\textsuperscript{19} unless an individual has a bank account, in which case benefits will be provided electronically by direct deposit to that account.\textsuperscript{20} According to the Treasury's Invitation to Express Interest (IEI), to deliver EBT "individuals who live in States that implement EBT will be required to use the EBT system to receive their State administered benefits."\textsuperscript{21}

Services provided to the recipient under EBT will include:

\begin{itemize}
  \item[(1)] Access to an EBT ‘account’ ... covered by Federal Insurance at a financial institution ....
  \item[(2)] Issuance and available training on the use of the Benefit... Card ... and personal identification number (PIN) for accessing benefits.
  \item[(3)] At least one free monthly automated teller machine withdrawal transaction, at least one POS cash withdrawal transactions [sic] ... and unlimited free POS purchase transactions from any terminal connected directly to or through networks to the EBT acquirers. Additionally, clients shall also receive one free card replacement per year.
  \item[(4)] Account balance information available through balance inquiry transaction ....
  \item[(5)] Seven day a week, 24 hour per day, customer service access by toll-free telephone call.\textsuperscript{22}
\end{itemize}

The funds will flow through the settlement process performed by the Financial Agent.\textsuperscript{23} Recipients will access their funds either at a POS terminal or an ATM and the Financial Agent

\begin{flushleft}
\textsuperscript{19} See IEL, supra note 14, at 195.
\textsuperscript{21} IEL, supra note 14, at 195.
\textsuperscript{22} Id. at 197-98.
\textsuperscript{23} See id. at 213. The Financial Agent is the financial institution selected to deliver EBT services for the Treasury. See id. at 1. The Financial Agent and the Financial Management Service of the Treasury Department will enter into a contractual agreement which will stipulate the general terms and conditions for the services to be provided. See id. at 73.
\end{flushleft}
will complete the authorization for the electronic transaction. The Financial Agent will then "draw funds from the various governmental agencies and place them into the commercial payment system to reimburse banks and merchants for EBT transactions." 

The United States Department of Agriculture (USDA) has issued standards for the EBT system as it relates to food stamps. The standards describe the system as one that utilizes "a computer-based system in which the benefit authorization is received from a central computer[;] ... [recipients] utilize magnetic-stripe plastic cards and have accounts maintained at the central computer in lieu of food stamp coupons to purchase food items at authorized food retailers." The functional requirements, set forth in the USDA regulations for food stamp EBT, describe a settlement mechanism utilizing transmission through an automated clearing house (ACH) tape for subsequent credit to the accounts of retailers; thus, recipients never have possession of food stamp benefit funds.

B. Who Will Participate in the Delivery of EBT?

In March 1995, the Financial Management Service of the Department of the Treasury solicited "[f]inancial [i]nstitutions to deliver the full scope of EBT services ... in the Southern Alliance of States (SAS)." The Southern Alliance of States (SAS) is a coalition of seven southern states ... [and includes] Alabama, Arkansas, Florida, Georgia, Missouri, North Carolina, and Tennessee. "States have been banding together to gain the economies of scale that reduce prices for the delivery of EBT services." The Treasury will issue a National IEI to acquire EBT services for the rest of the country that will identify multiple financial institutions capable of providing EBT rather

24. See id. at 213.
25. See id.
27. Id. § 274.12(a).
28. See id. § 274.12(b)(3).
29. IEI, supra note 14, at 1.
30. Id. at 2.
than a single Financial Agent as was done with the SAS.\textsuperscript{32} Participating Financial Agents will provide all services associated with EBT including account establishment, card issuance and training, transaction processing, settlement, and reporting.\textsuperscript{33}

In August 1996, a ruling by the United States Court of Appeals for the District of Columbia Circuit cast uncertainty over the arrangements established between the Department of the Treasury and the SAS and their designated Financial Agent.\textsuperscript{34} The Treasury’s requirement that only banks be the primary contractors for delivery of EBT was challenged by Transactive Corporation, a subsidiary of a state lottery processor, who challenged the arrangement as a violation of federal procurement regulations.\textsuperscript{35} Likewise, five check cashing companies moved to stop New York from moving ahead with EBT on the grounds that their exclusion from the bidding process was arbitrary and capricious.\textsuperscript{36}

This uncertainty in the delivery of EBT was resolved by Congress by an “11th-hour addition to the Federal budget bill . . .”\textsuperscript{37} “In passing the legislation (HR 11747), Congress validated the . . . [Treasury’s] . . . IEI procurement process which prevent[ed] non-banks from being named prime contractors.”\textsuperscript{38} Thus the EBT arrangements entered into through IEIs will proceed with banks as the prime providers of EBT in these very lucrative contracts.\textsuperscript{39}

C. Why EBT for Public Benefits?

The impetus for the conversion from paper (checks and food stamps) to EBT for the delivery of public assistance was part of efforts by the Clinton Administration to reduce government “red tape.”\textsuperscript{40} The National Performance Review Information

32. See IEI, supra note 14, at 2.
33. See generally id.
35. See id. at 15.
39. See id. (reporting that SAS contract has been valued between $200 million and $400 million and is most lucrative EBT project in nation).
40. IEI, supra note 14, at 5 (citing Vice President Al Gore, Report of the National
Technology Report addressed the application of information technology solutions to government business needs. The dollars involved are significant; according to Jim Leach, chairman of the House Banking Committee, "more than $110 billion of cash benefits and food aid may eventually be provided through . . . EBT."  

1. Government Efficiency

The savings from this change could be substantial; the National Performance Review Report cited the cost of Electronic Fund Transfers (EFTs) as "only 6 cents per transfer, compared with 36 cents per check," and noted that each year the Treasury disburses approximately 100 million more checks than EFTs. The report suggested that estimated savings could amount to $1 billion over five years. The savings in food stamp processing alone could be significant considering that it "involves billions of bits of paper that absorb thousands of administrative staff years." According to the National Performance Review,

More than 3 billion food stamps will be printed . . . [in a year] and distributed to more than 10 million households. Each month, 210,000 authorized food retailers receive these coupons in exchange for food. These retailers carry stacks of coupons to 10,000 participating financial institutions, which then exchange them with Federal Reserve Banks for currency. The Federal Reserve Banks count the coupons—although they already have been counted more than a dozen times—and destroy them. The administrative cost of this system—shared equally by federal and state governments—is almost $400 million a year.

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41. See GITS Report, supra note 16.
43. See Gore, supra note 40; see also, Janet Novack, The Check Is Not in the Mail, FORBES, Sept. 9, 1996 (available in 1996 WL 5800633) (stating that cost to both issue and mail paper check is 42 cents compared with two cents to process electronic payment).
44. See Gore, supra note 40.
45. Id.
46. Id. (emphasis added).
Applying technology to improve government will continue to be a focus of the present administration, as attested by Executive Order 13,011, which was issued July 16, 1996. The Executive Order established a Government Information Technology Services Board “to ensure continued implementation of the information technology recommendations of the National Performance Review and to identify and promote the development of innovative technologies, standards, and practices among agencies and State and local governments and the private sector.” A major mission area specifically assigned to the board is electronic benefits.

2. Reduction in Fraud Losses

The Federal EBT Task Force cited a reduction in fraud losses as a potential benefit of EBT. According to the General Accounting Office, various law enforcement officials estimate that losses to benefits programs from fraud increase ten percent each year. “The U.S. Department of Agriculture estimated that food stamp fraud costs $815 million a year, although other estimates range as high as $2 billion to $3 billion.” Fraud is also a concern to states, as demonstrated by the Missouri Department of Social Services, which specifically cited fraud as the reason for moving to EBT. Under the paper coupon system, some recipients “illegally sold their food stamps for cash, at 50 to 70 cents on the dollar, or traded them for drugs or alcohol. EBT is expected to reduce [such] trafficking . . . .”

3. Recipient Advantages

EBT, like other technological advances, offers prospective advantages “both for recipients and for program agencies.”

48. Id.
49. See id.
50. See GAO Report, supra note 18, at 3.
51. See id. at 7.
53. See id.
54. Id.
55. See Statement by Griffith L. Garwood, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services, U.S. House of Representatives, 82 FED. RES. BULL.
properly designed EBT system could eliminate many of the problems recipients encounter with the older benefit delivery systems.\textsuperscript{56}\textsuperscript{6} According to the Federal Reserve:

The electronic transfer of benefits offers numerous advantages over paper-based delivery systems\ldots for recipients\ldots [which] include faster access to benefits, greater convenience in terms of times and locations for obtaining benefits, improved security because funds may be accessed as needed, lower costs because recipients avoid check-cashing fees, and greater privacy and dignity.\textsuperscript{57}

II. POLICY CONSIDERATIONS OF CONSUMER PROTECTION FOR EBT

The policy debate over providing consumer protection for EBT transactions (as well as other new technology used to deliver financial services) is reminiscent of the debate over the enactment of the Electronic Funds Transfer Act (EFTA)\textsuperscript{58} in 1978.\textsuperscript{59} The legislative history of the EFTA expresses that EFTA's "purpose is to provide for consumer rights and safeguards in electronic fund transfer systems and to create a framework defining the liabilities and responsibilities of all participants in electronic fund transfers."\textsuperscript{560}

A. Regulation E

To implement the EFTA, the Treasury promulgated Regulation E\textsuperscript{61} which provides for basic consumer protections of electronic financial transactions including disclosures, error resolution requirements, and liability limitation for lost or stolen access devices and other unauthorized transfers from a consumer's account with a financial institution.\textsuperscript{62}

\textsuperscript{57} Statement by Griffith L. Garwood, supra note 55.
\textsuperscript{59} See Electronic Money No Threat to Payment System, Greenspan Says, 65 BANKING REP. (BNA) No. 22, at 946 (Dec. 11, 1995). Federal Reserve Chairman Alan Greenspan said "alarmist" predictions relating to electronic cash are "reminiscent of the intense discussions about electronic payments in the 1970s." Id.
\textsuperscript{61} Regulation E, 12 C.F.R. § 205 (1996).
\textsuperscript{62} See id. §§ 205.6, 205.7, 205.11.
1. **Disclosures**

The legislative history of the EFTA shows that Congress considered disclosures an essential aspect of consumer protection in the area of electronic funds transfer.\(^{63}\) "Prior to a consumer's first EFT transaction, a financial institution must provide the consumer with a written disclosure statement that is in readily understandable language and that sets forth the terms and conditions under which the EFT service is provided."\(^{64}\) The disclosures include the following:

1. A summary of the consumer's liability under [Regulation E] . . . .
2. The telephone number and address of the person or office to be notified when the consumer believes that an unauthorized electronic fund transfer has been or may be made.
3. The financial institution's business days . . . .
4. The type of electronic fund transfers that the consumer may make and any limitations on the frequency and dollar amount of transfers . . . .
5. Any charges for electronic fund transfers or for the right to make transfers.
6. A summary of the consumer's right to receive documentation of electronic fund transfers as provided in [Regulation E].
7. A summary of the consumer's right to stop payment of a pre-authorized electronic fund transfer and the procedure for initiating a stop-payment order, as provided in [Regulation E].
8. A summary of the financial institution's liability to the consumer for its failure to make or to stop certain transfers . . . .
9. The circumstances under which the financial institution in the ordinary course of business will disclose information to third parties concerning the consumer's account.

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2. Error Resolution Requirements

"The timely assertion by a consumer of an error relating to EFT services triggers mandatory error resolution procedures."\(^{66}\)

In enacting the EFTA, Congress noted that "[p]rompt investigation and correction of account errors is of crucial importance in EFT..."\(^{67}\) "EFT systems rely totally on computers and electronics, [thus] errors are bound to occur... [and] a consumer is likely to discover an EFT error only after it has occurred, meaning that... the consumer [may be] left without money to meet his essential expenses like rent, utility bills, and groceries."\(^{68}\)

An error is defined under Regulation E to include the following:

(1) [An] unauthorized electronic fund transfer;
(2) An incorrect electronic fund transfer to or from the consumer's account;
(3) The omission from a periodic statement of an electronic fund transfer to or from the consumer's account that should have been included;
(4) A computational or bookkeeping error made by the financial institution relating to an electronic fund transfer;
(5) The consumer's receipt of an incorrect amount of money from an electronic terminal.\(^{69}\)

A consumer has sixty days within which to provide either oral or written notification of an error to the financial institution.\(^{70}\)

After this notice is given, the financial institution must promptly investigate the asserted error using either a ten-business-day procedure or a forty-five-calendar-day procedure, at the choosing of the institution.\(^{71}\) The institution must provide provisional credit to the consumer for the amount of the purported error less

\(^{65}\) Regulation E, 12 C.F.R. § 205.7(e)(1)-(10) (1996).
\(^{66}\) Huber, supra note 64, ¶ 22.05(1), at 22-29.
\(^{68}\) Id. at 9408-09.
\(^{69}\) Regulation E, 12 C.F.R § 205.11(a)(1)-(5) (1996).
\(^{70}\) See id. § 205.11(b)(1)(G).
\(^{71}\) See Huber, supra note 64, ¶ 22.05[1][a], at 22-31.
fifty dollars (provided notice was given within the proper time period) to use the longer forty-five day investigation period.\textsuperscript{72} If an error is discovered in the consumer's account, the account must be credited within one business day.\textsuperscript{73}

The Consumers Union, a nonprofit organization chartered to provide information, education, and counsel about consumer goods and services, stated that error resolution procedures were of critical importance in the context of EBT.\textsuperscript{74}

3. \textit{Liability Limitation}

Liability limitations for unauthorized transactions are another protection identified as critical for EBT by the Consumers Union.\textsuperscript{75} Liability for unauthorized transactions is scaled from fifty dollars to five hundred dollars to an unlimited amount, depending on the timing of notification to the financial institution.\textsuperscript{76} “[N]otification of loss instantly relieves the consumer['] of responsibility for losses resulting from subsequent transactions.”\textsuperscript{77} Notification within two business days limits the consumer's liability to fifty dollars.\textsuperscript{78}

Notification requirements are simple in that notice is satisfied when a consumer takes reasonable measures to inform the financial institution of the unauthorized transaction or loss of the access device.\textsuperscript{79} “[T]he] time limits can be extended for a 'reasonable' period of time if the failure by the consumer to provide notification was due to 'extenuating circumstances,' such as extended travel or hospitalization.”\textsuperscript{80}

\textsuperscript{72} See id.
\textsuperscript{73} See id. \S 22.05(1)[b], at 22-32.
\textsuperscript{74} See Comments of Consumers Union in Response to Proposed Food Stamp Program Regulations: Standards for Approval and Operation of Food Stamp Electronic Benefit Transfer Systems 3-4 (Feb. 11, 1992) [hereinafter Comments of Consumers Union].
\textsuperscript{75} See id. at 3.
\textsuperscript{76} See Regulation E, 12 C.F.R. \S 205.6(b) (1996); HUBER, supra note 64, \S 22.05(2)[a], at 22-35.
\textsuperscript{77} HUBER, supra note 64, \S 22.05(2)[a], at 22-35 (emphasis added).
\textsuperscript{78} See Regulation E, 12 C.F.R. \S 205.6(b) (1996); see also HUBER, supra note 64, \S 22.05(2)[a], at 22-35.
\textsuperscript{79} See Regulation E, 12 C.F.R. \S 205.6(c) (1996); see also HUBER, supra note 64, \S 22.05(2)[b], at 22-36.
\textsuperscript{80} HUBER, supra note 64, \S 22.05(2)[a], at 22-35.
B. The Need for Consumer Protection for EFT in 1978

In 1978, when Congress first addressed the need for consumer protection for EFTs, EFT services were relatively new.\textsuperscript{81} Congress took note, however, that the use of such services was growing rapidly, and that questions as to the rights and liabilities of the EFT consumer, as well as financial institutions, were "undefined in the law."\textsuperscript{82} The Committee on Banking, Housing, and Urban Affairs, from which the EFTA was sent to the floor, stated that "the most important protection [required was the] limit on consumer liability in the event a consumer's EFT card is lost or stolen and his bank account is drained."\textsuperscript{83} The committee cited the "unique risks which card-actuated EFT systems present in this respect."\textsuperscript{84} The fifty dollar limitation on liability for unauthorized transfers was derived by the committee in part from the similar fifty dollar liability limit on credit cards applicable since the enactment of the Truth in Lending Act in 1969.\textsuperscript{85}

C. Opposition to Consumer Protection for EFT in 1978

Opponents of the passage of consumer protections for users of Electronic Funds Transfer cited the risk of stifling a beneficial new technology with "costly and cumbersome" regulation.\textsuperscript{86} The legislative history of the EFTA cites opposition to the provision of consumer protections for EFT as being concerned that such protections would "den[y] many Americans the convenience of modern payments services at a reasonable cost instead of protecting the consumer against future EFT problems."\textsuperscript{87} The Act's opposition predicted that the protections afforded through the EFTA "would so load the system as to impede the development of a more efficient and less expensive funds transfer and payments mechanism... [and] would tend to stifle competition and inhibit the entry of small business and small

\textsuperscript{82} Id. at 9404-05.
\textsuperscript{83} Id. at 9407.
\textsuperscript{84} Id. at 9408.
\textsuperscript{85} See id.
\textsuperscript{86} Id. at 9421.
\textsuperscript{87} Id. at 9422.
financial institutions into [the] market." In 1978, there were some eight thousand ATMs nationwide, and in 1995, one transaction processor alone reported 22,556 ATMs connected to its network. A Consumer Bankers Association policy paper stated that, as of 1991, there were over 80,000 ATMs nationwide.

D. The Argument for Regulation E Protection for EBT

The change to EBT will impact a large number of people; according to congressional findings, "the number of individuals receiving aid to families with dependent children [(AFDC)] . . . has more than tripled since 1965 . . . [and] the average monthly number of children receiving AFDC benefits . . . was 9,300,000 in 1992." The number of individuals who will lack consumer protection will be significant as some "twenty million recipients of government benefits . . . cannot afford checking accounts." The proportion of benefit recipients without bank accounts has been cited as being as high as 75%. Support for coverage of EBT by Regulation E has come from both consumer groups and the Federal Reserve Board.

88. Id.
89. See id. at 9404.
90. See Card Briefs: Star System Transaction Volume Up 27% in '95, AM. BANKER, Mar. 18, 1996, at 16; see also Michael R. Harris, The Impact of Alternative Delivery on Branch Automation Series, AM. BANKER, Sept. 4, 1996, at 16 (citing a survey showing that ATM transaction volume has grown at an average annual rate of 14% since 1988).
95. See Rehm, supra note 42, at 2; Testimony of the NCLC, supra note 10, at 1; Statement by Griffith L. Garwood, supra note 55, at 720.
1. Consumer Group Arguments

Consumer groups have advocated consumer protection for EBT recipients on the basis that, unlike middle class consumers who can decide whether to use electronic transfers for financial services, "[p]oor people who receive their benefits through EBT have no choice."96 Representatives of low-income consumers who are participants in EBT systems have advocated the mandating of basic consumer protections for such individuals on the basis of fairness; in fact, some have suggested that not only should Regulation E cover EBT transactions, but that additional protections be extended.97 These groups cite the fifty dollar liability provision for unauthorized transactions resulting from lost or stolen cards as being too great a burden for EBT participants.98

One of the problems with EBT is that it provides the recipient with cash.99 Thus, EBT may "increase the theft of cash benefits."100 If few withdrawals are permitted, recipients may be more susceptible to mugging or losing their money because to pay bills they will have to take their funds from ATMs to a store that sells money orders.101

Although most cash assistance recipients currently have to obtain cash for the full amount of their benefits at the time they negotiate their benefit checks, many recipients usually cash their checks at locations where they can also directly pay their bills or purchase money orders for such purpose. As a result, even if they are robbed after negotiating their checks, they do not lose the full amount of their grants.102

96. See Testimony of the NCLC, supra note 10, at 3 (entire original emphasized).
97. See id. at 1-2; see also Comments of Consumers Union, supra note 74, at 3 (explaining that Regulation E should cover EBT transactions and that additional protections should be provided).
98. See Testimony of the NCLC, supra note 10, at 2; see also Comments of Consumers Union, supra note 74, at 3 (explaining that fifty dollar ceiling is too burdensome for EBT recipients).
99. See Budnitz, supra note 93, at 847.
101. See Budnitz, supra note 93, at 847.
102. Leyser & Blong, supra note 100, at 413.
2. **Federal Reserve and Other Government Positions**

The Federal Reserve Board initially proposed Regulation E coverage for EBT, as stated to a banking panel: “EBT transactions fit the definition of electronic funds transfers and must be covered by the same rules.”\(^{103}\) As recently as June 1996, “[t]he Federal Reserve’s Consumer Advisory Council . . . adopted a resolution urging Congress to include ‘essential’ consumer protection in any bill addressing the electronic transfer of public assistance and related government benefits.”\(^{104}\) The council stressed specific coverages and said that “Congress should mandate loss protection policies and an error resolution process for . . . EBT [participants].”\(^{105}\)

Senator Patrick J. Leahy, in a discussion of the conference committee’s understanding of the Welfare Reform Act’s exemption of EBT from consumer protection coverage, noted that

> [t]he Department of Agriculture is empowered to establish regulations which will provide some protections against recipients’ loss of benefits through electronic transfer systems. We encourage the Department of Health and Human Services (HHS) to develop similar regulations which will require procedures to minimize the losses of benefits for aid to families with dependent children recipients. It is also the conferees’ understanding that nothing in [the] bill in any way prevents or discourages HHS from promulgating these essential regulations.\(^{106}\)

Further, Senator Edward M. Kennedy acknowledged the concern of consumer groups about the exclusion of consumer protections from EBT.\(^ {107}\) He noted that

> [i]f the final welfare reform bill includes the exemption from consumer protections, EBT users will not have the same basic safeguards against benefit losses caused by computer error, merchant fraud, or theft that other credit card holders

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103. Rehm, supra note 42, at 2.
105. Id.
now have. Clearly, it is unfair to deny reasonable safeguards to welfare beneficiaries.\textsuperscript{108}

E. The Argument Against Regulation E Protection for EBT

Opposition to affording basic consumer protection for EBT through Regulation E has come from both state government and the financial services industry.

1. Government Concerns

State governments have expressed concerns about costs as represented in a statement by Idaho state Controller J.D. Williams, who said: "If we are not exempted from the liability provisions of [Regulation E]. . . EBT is dead in its tracks in many western states."\textsuperscript{109} According to a Minnesota official, if states had to pay the Regulation E liability protection it would make EBT too expensive.\textsuperscript{110}

One characterization some states have assigned to the fifty dollar liability limitation is that it is an "inducement to fraud."\textsuperscript{111} Some states have even asserted that the potential losses from fraud and misuse could force them to discontinue EBT if Regulation E coverage were mandatory for EBT.\textsuperscript{112}

Further, there may be some conflict between the error resolution provisions of Regulation E and regulations that govern benefit programs such as AFDC (now TANF).\textsuperscript{113} The error resolution provisions call for provisional credit to be given when an institution cannot resolve an error within a specified period of time.\textsuperscript{114} Many government programs "prescribe procedures for recouping overpayments of benefits and . . . limit on a case-by-case basis the amount" that can be taken back from a recipient's account.\textsuperscript{115}

Agencies have also suggested to the Federal Reserve Board that it is "inappropriate for Regulation E to apply [to government

\textsuperscript{108} Id. (emphasis added).
\textsuperscript{109} Rehm, supra note 42, at 2.
\textsuperscript{110} See id.
\textsuperscript{111} Novack, supra note 43.
\textsuperscript{112} See Statement by Griffith L. Garwood, supra note 55, at 721-22.
\textsuperscript{113} See David E. Teitelbaum, Developments in the Regulation of Electronic Benefit Transfer Systems, 49 BUS. LAW. 1355, 1361 (1994).
\textsuperscript{114} See id.
\textsuperscript{115} Id.
agencies] because government agencies differ from private-sector financial institutions in a number of ways related to how compliance costs can be borne.\textsuperscript{116}

2. Private Sector Concerns

The private sector has likewise expressed cost concerns, particularly those that relate to the liability provisions of Regulation E, because Regulation E coverage may limit potential profit to be gained from participation in the delivery of public benefits.\textsuperscript{117} "The altogether legitimate goal of business is profit."\textsuperscript{118} "[T]he potential imposition of a cap on the [r]ecipient's liability would place the burden of covering such losses on the other participants in the EBT system, including, potentially, the EBT service provider."\textsuperscript{119} Banks have been opposed to the imposition of requirements to offer similar consumer products such as basic banking for profitability reasons.\textsuperscript{120} An "American Bankers Association survey found that [sixty percent] of banks lost money or broke even on basic banking."\textsuperscript{121} Additionally, the periodic statement requirement of Regulation E would increase the cost of EBT services.\textsuperscript{122}

F. Consumer Protection Implications for Emerging Technologies

The result of the debate over consumer protection for EBT is a reflection of and may indeed foretell the outcome of a larger controversy over regulation of other new financial service technology. "Representatives of new electronic payment systems . . . [have urged Congress to] avoid rushing in to regulate . . . technological alternatives to paper currency . . ."\textsuperscript{123} A bank executive has suggested that it is premature to consider revision of Regulation E to cover

\textsuperscript{116} Statement by Griffith L. Garwood, supra note 55, at 721.
\textsuperscript{117} See Matt Barthel, Bill Offered to Exempt EBT from Liability, AM. BANKER, Oct. 26, 1994, at 12.
\textsuperscript{119} See Teitelbaum, supra note 113, at 1360.
\textsuperscript{120} See Budnitz, supra note 93, at 844.
\textsuperscript{121} Id. at 848 n.155.
\textsuperscript{122} See id. at 846.
\textsuperscript{123} Congress Told to Avoid New Regulation of Emerging Electronic Payment Systems, 65 BANKING REP. (BNA) No. 5, at 191 (July 31, 1995) [hereinafter Avoid New Regulation].
developing technologies such as smart-cards.\textsuperscript{124} Echoing the sentiments of those who expressed opposition to consumer protection for EFT in the 1970s,\textsuperscript{125} representatives of new electronic payment systems have told Congress that “[a]dditional regulation of new systems is not only currently unnecessary, [but] new regulation could kill nascent products and chill innovation....”\textsuperscript{126} Citing proposed legislation that could weaken consumer protection afforded under Regulation E, consumer groups have noted that “Congress should be making the consumer protection laws work better—not throwing them out altogether[;] ... Congress appears more interested in ‘banker relief’ than ‘consumer relief’....”\textsuperscript{127}

III. THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO EBT

An “important issue to banks is their potential liability arising from participating in EBT....”\textsuperscript{128} The rights and obligations of the parties to EBT may be determined based on the characterization of the account and the resulting ownership of EBT funds.\textsuperscript{129} Two areas of potential liability for financial institutions that participate in the delivery of EBT are liability for criminal attacks at ATMs and the provision of required access to facilities for the disabled under the Americans with Disabilities Act.\textsuperscript{130}

A. Ownership of the Account

The Treasury’s IIEI (to solicit financial institutions to deliver EBT) indicates that the Financial Agent will establish the EBT account, which may be “an individual account in the name of each participant, a sub-account of a master account, or an equivalent account mechanism approved by the Financial

\textsuperscript{124} See Regulation of Stored-Value Cards Premature, Fed Urged to Slow Reg E Revision Process, BANKING DAILY (BNA) (Sept. 12, 1996). Stored-value cards include products such as the Visa Cash Card used during the 1996 Summer Olympics in Atlanta. See id.
\textsuperscript{125} See supra Part II.C.
\textsuperscript{126} Avoid New Regulation, supra note 123, at 191.
\textsuperscript{127} Consumer Groups Unveil Relief’ Plan; Call for Integration of TILA and RESPA, 64 BANKING REP. (BNA) No. 22, at 1044 (May 29, 1995) (quoting Michelle Meier, Consumer Unions Counsel for Governmental Affairs).
\textsuperscript{128} BAKER & BRANDEL, supra note 94, ¶ 5.06(3)[c], at 5-54.
\textsuperscript{129} Cf. Budnitz, supra note 118, at 765-67.
\textsuperscript{130} See infra Part III.C-D.
Management Service." Another section of the IEI that describes account structure states that "benefits can be either prefunded at the beginning of each benefit period or funded only after the client accesses benefits (day of draw benefits)."

The Treasury's response to questions concerning its IEI indicates that the "account" may be a hybrid account designed by the Financial Agent to facilitate the goal of providing access to federal and state administered cash benefits through the same EBT card. Thus, the treasury characterizes the EBT transaction less like an account that belongs to the recipient and more like a settlement mechanism for financial intermediaries to facilitate clearing and settlement of their accounts among one another for transactions they have processed.

However, according to the Department of the Treasury's Financial Management Service,

"[t]he account is more than a settlement account. The recipient actually will have a bank account. However, the account is different in some respects from a consumer bank account that a consumer would initiate with the bank. The account is established by the financial institution as the agent of the Treasury. Here, the Treasury is employing a financial institution as its agent; though once the funds are deposited they are not 'owned' by the Treasury. This is a special 'EBT account.' There is no access by checks, only by the card... the account is the Treasury's to close... [T]he financial institution is answerable to the treasury."

An indication that EBT accounts will be "owned" by the recipients is that EBT accounts will be subject to state escheatment laws. Escheatment is the "reversion of property to the state in consequence of a want of any individual competent to inherit." Another indication of recipient ownership is the Financial Management Service's provision that if funds remain in

132. *Id.* at 106.
134. *See id.*
an account after it is closed, the funds are the property of the account holder (unless they are subject to reclamation) and such remaining balances shall be forwarded to the owner by check.\textsuperscript{138}

B. \textit{Relationship Between Recipient and Financial Institution}

The typical account holder's relationship with a financial institution is a debtor-creditor relationship.\textsuperscript{139} The depository contract defines a bank's duty to disburse funds.\textsuperscript{140} If a bank account holder has occasion to bring suit against his bank, the suit is for breach of depository contract, an action based on debt.\textsuperscript{141} Here, the contract is between the Treasury and the Financial Agent, not between the EBT recipient and the financial institution holding "his" funds.\textsuperscript{142} This arrangement is unlikely to create any right or third-party beneficiary status for an EBT recipient because "[c]reation of a special account alone does not create a fiduciary or trustee relationship between a bank and third parties for whose benefit the account was established."\textsuperscript{143} However, in one situation, the financial institution will be liable to the EBT recipient for unauthorized charges against his account even though it is exempted from Regulation E protection, because the Treasury's IEI specifically assigns liability for "[a]ny losses from funds drawn from an account \textit{after the client notified the Financial Agent} that the card had been lost or stolen."\textsuperscript{144}

Thus, some ambiguity remains as to the scope of a bank's obligation to an EBT account holder and what rights the EBT account holder may assert against the financial institution.\textsuperscript{145} The Federal Reserve Board recognized the confusion in these arrangements resulting from the lack of consumer protection afforded EBT account holders when it stated that "from a recipient's viewpoint [(expecation)], an EBT system functions much the same as if the recipient had an ordinary checking account with direct deposits of government benefits and with automated teller machine and point of sale service available to

\textsuperscript{138} See IEI, supra note 14, at 202.
\textsuperscript{139} See SB MICHIE ON BANKS AND BANKING § 350, at 71 (Supp. 1988) [hereinafter MICHIE].
\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} See generally IEI, supra note 14; see also supra Part III.A.
\textsuperscript{143} MICHIE, supra note 139, § 349, at 71.
\textsuperscript{144} IEI, supra note 14, at 70 (emphasis added).
\textsuperscript{145} See infra Part III.E.
access the benefits . . . ."\textsuperscript{146} Such reasonable consumer expectations have been a factor for policy considerations by the Federal Deposit Insurance Corporation (FDIC) in dealing with consumer issues in other areas such as stored-value cards.\textsuperscript{147}

C. Financial Institution Liability for ATM Crime

An important issue to banks is the potential liability that arises from risks of crime committed at or near ATMs.\textsuperscript{148} "There is an increasing tendency toward imposing a duty on businesses to warn customers of dangers [at or near ATMs]."\textsuperscript{149} EBT recipients may be particularly vulnerable to crime at ATM locations.\textsuperscript{150} Though the number of ATM crimes is few, a 1988 survey "found that one violent crime occurs for every 3.5 million transactions."\textsuperscript{151} "[T]he few that occur are brought to the attention of the public by the media, particularly if violence is involved."\textsuperscript{152}

Liability is a matter of state law.\textsuperscript{153} "The key issue in this area is ‘foreseeability’ . . . ."\textsuperscript{154} This hurdle in establishing liability for criminal assault at an ATM may easily be overcome in Georgia.\textsuperscript{155} Recently the Georgia Court of Appeals noted that because ATM dangers are "well known and undeniable . . . , it would be difficult to say that a criminal occurrence at an ATM is unforeseeable as a matter of law."\textsuperscript{156} The court stated that the analysis in premises liability cases must also consider whether


\textsuperscript{147} See Stored Value Cards and Other Electronic Payment Systems, 61 Fed. Reg. 40,496 (1996). "A stored value card stores information electronically on a magnetic stripe or computer chip and can be used to purchase goods or services" with the balance on the card debited at a merchant’s point-of-sale terminal. Id. at 40,490. Some are designed to be used until the value is exhausted and then discarded while others are ‘reloadable.’ Id.

\textsuperscript{148} See Baker & Brandel, supra note 94, ¶ 5.06[3][c], at 5-54.

\textsuperscript{149} Stephen K. Huber, Bank Officer's Handbook of Government Regulation ¶ 22.05[3][d], at S22-12 (2d ed. Supp. 1993).

\textsuperscript{150} See Consumer Bankers Association, supra note 91, at 4.

\textsuperscript{151} Huber, supra note 149, ¶ 22.05[3][d], at S22-13.

\textsuperscript{152} Id. at S22-14.

\textsuperscript{153} See id. at S22-13.

\textsuperscript{154} Id. at S22-12.


\textsuperscript{156} Id. at 680, 472 S.E.2d at 506.
the property owner had superior knowledge relating to criminal activity.\textsuperscript{157} There, the bank had stationed an employee near the ATM to monitor parking but he appeared to provide protection for customers who used the ATM.\textsuperscript{158} The court took note of this as evidence of superior knowledge that would support a plaintiff's premise liability claim.\textsuperscript{159} Thus, an EBT recipient harmed at an ATM in Georgia may have a different outcome than an EBT recipient in a similar situation in another state applying a different liability standard. This is an important issue because of the magnitude of potential liability in light of the large number of EBT recipients residing under differing state jurisdictions who will be brought into existing ATM networks.\textsuperscript{160}

\textsuperscript{157} See id. at 681, 472 S.E.2d at 506.
\textsuperscript{158} See id.
\textsuperscript{159} See id. In November 1997, the Georgia Supreme Court decided the case of Doe v. Prudential-Bache, 896G1784 (Ga. Nov. 3, 1997). In that case, a rape victim sued the landlord of her apartment complex and argued that based on a number of car break-ins and other crimes reported at the complex, the landlord was put on notice that a violent sexual crime might occur and, thus, was liable in tort. See Doe v. Prudential-Bache, 896G1784 (Ga. Nov. 3, 1997). In March 1997, the high court had overruled a prior decision holding that "a landlord's knowledge of prior criminal acts against property cannot establish the foreseeability of a brutal sex crime as a matter of law, and therefore [establishes] no duty ... ." See Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339, 340 (1997). In Sturbridge, the court cited \textit{Killebrew} in support of its finding that evidence of prior burglaries was sufficient to give rise to a triable issue based on knowledge, rather than foreseeability, and created a duty to exercise ordinary care to safeguard tenants against foreseeable risks posed by the prior burglaries. \textit{Id.} at 787, 482 S.E.2d at 341. In its recent opinion in Doe, the court cited \textit{Sturbridge} for the "well-settled" proposition that a landlord only has a duty to protect tenants from criminal attacks of third parties if those attacks are \textit{foreseeable}. See Doe, 896G1784 (Nov. 3, 1997). The court, relying on \textit{Sturbridge}, looked to factors including the location, nature and extent of the prior criminal activities and their likeness, proximity, or other relationship to the crime in question to determine whether foreseeability had been established. See id. While the court also relied on \textit{Sturbridge} for the proposition that foreseeability is generally for a jury's determination, the court found in Doe that the "nature" of the prior crimes did not establish foreseeability and therefore summary judgment for the defendants was affirmed. See id. How this judgment will impact the issue of premises liability in Georgia in an ATM context remains to be tested. It does, however, support the proposition that this issue of premises liability may be an impact on the cost, success, and acceptance of the EBT program.
\textsuperscript{160} See supra Part II.D.
D. Obligations to Disabled EBT Recipients

The Americans with Disabilities Act (ADA)161 "has great impact on financial institutions...."162 Legal duties are imposed to make banking facilities accessible to disabled persons.163 The most significant impact of the ADA relates to ATM machines,164 and creates an area of potential liability for banks participating in EBT.165 Additional liability may accrue to banks in delivering EBT in that "[t]o meet the needs of disabled SSI [(Supplemental Security Income)] recipients in an EBT program, the government may impose on banks requirements beyond those required under the ADA."166

Aside from the ATM issue, meeting the needs of the disabled will be a particular challenge for EBT to "reach the forty-three million disabled Americans who lead isolated lives and do not go to places of public accommodation[,] [m]ailing these people a plastic card with a secret number and a slick brochure is totally inadequate."167

IV. PROPOSALS FOR EBT CONSUMER PROTECTION

Blanket coverage by Regulation E is not the only way to provide consumer protection for EBT recipients.168 Both consumer groups and the Federal Reserve have proposed various protections for EBT recipients.169 Some of the proposals involve exceptions to Regulation E and others involve reduced liability coverage, while some involve enhanced protections.170

162. Budnitz, supra note 118, at 762.
163. See HUBER, supra note 149, ¶ 22.03[5], at S22-10.
164. See id.
165. See generally id. Because legal duties to provide accessible facilities for the disabled accrue under the ADA, liability may result from a breach of such duties. See generally id.
166. Budnitz, supra note 93, at 846.
167. Budnitz, supra note 118, at 763.
168. See infra Part IV.
169. See generally Testimony of the NCLC, supra note 10; Comments of Consumers Union, supra note 74; Statement by Griffith L. Garwood, supra note 55.
170. See generally Testimony of the NCLC, supra note 10; Comments of Consumers Union, supra note 74; Statement by Griffith L. Garwood, supra note 55.
A. Federal Reserve Board Proposals

In May 1996, the Federal Reserve Board (Fed) proposed exceptions from particular provisions of Regulation E that would make for workable Regulation E coverage of EBT.\textsuperscript{171} One requirement addressed was the periodic statement requirement.\textsuperscript{172} The Fed proposed that "[i]nstead of sending monthly statements, EBT programs may provide account balance information by telephone or at a terminal and a written account history upon request."\textsuperscript{173} The Fed noted that this alternative would address concerns about the documentation burden while meeting any needs for recipient information.\textsuperscript{174}

In addressing state concern about the fifty dollar liability limitation for unauthorized transactions, the Fed recognized the legitimate concerns about the need for control of fraudulent claims.\textsuperscript{175} The Fed identified various measures to help minimize fraudulent claims that comply with Regulation E, and proposed that "the agency [(providing the benefit)] could put recipients on restricted issuance (such as crediting the recipient’s benefits biweekly, rather than monthly); restrict the sites at which the recipient could receive benefits; or appoint a representative payee. The agency could also place the recipient on a paper back-up system."\textsuperscript{176}

The Fed stressed its belief that "it should be possible to implement EBT programs in conformity with Regulation E and EFTA and at the same time maintain the integrity of the programs and their accountability for public funds."\textsuperscript{177} The Fed also noted that "to the extent that it is necessary to balance the consumer protection afforded by the EFTA against concern about the potential effect of the law’s compliance costs on the nationwide delivery of EBT, the Congress may wish to reexamine the scope of the law’s coverage."\textsuperscript{178}

\begin{footnotes}
\item[172] See id.
\item[173] Statement by Griffith L. Garwood, supra note 55, at 721.
\item[174] See Proposed Rules, supra note 171, at 19,702.
\item[175] See Statement by Griffith L. Garwood, supra note 55, at 721-22.
\item[176] Id. at 722.
\item[177] Id.
\item[178] Id.
\end{footnotes}
B. NCLC Proposals

The NCLC and the Food Research and Action Center submitted a proposal to Congress for EBT recipient protections that balances some state concerns and recipient needs for loss protection. The NCLC noted that “all of the concerns [about Regulation E coverage] focus around the potential costs of liability of losses from unauthorized transfers.”

To address cost concerns, the NCLC has proposed that “[r]ather than limiting consumers’ liability for unauthorized transfers to $50, . . . state[s] pay $0 for losses occurring prior to a notification of a compromise of the access device, unless there was system error, merchant fraud or force involved.” The NCLC also proposed that Regulations E’s disclosure requirements and error resolution provisions still apply. The NCLC pointed out that under current law, a state would have no liability for fraudulent transfers and that losses of this type are the crux of the states’ concerns. This proposal provides basic consumer protection and limits the liability of states for potential losses; therefore, “[e]verybody gains.”

C. Consumers Union Proposals

The Consumers Union, on the other hand, takes the position that Reg E protections apply to EBT as a matter of law and that as a matter of public policy these protections should apply to all consumers unequivocally and, in particular, when a consumer’s financial welfare is implicated even stronger protections are required.

The Consumers Union has proposed that the liability ceilings of Regulation E are “too high for recipients of needs-based assistance[; thus, r]ecipients should be able to avoid all liability for unauthorized transfers that occur through no fault of the recipient . . . .” The group has noted that retailers may abuse

179. See Testimony of the NCLC, supra note 10, at 7.
180. See id.
181. Id. at 8.
182. Id. at 7.
183. See id.
184. See id. at 8.
185. Id.
186. See Comments of Consumers Union, supra note 74, at 3.
187. Id.
the system by fraudulently siphoning funds from recipient accounts when they must be involved in the authorization process when the system is not operating. In all other situations, the union suggests that the EBT recipient should never be liable for more than fifty dollars "or a percentage of the amount of the monthly allotment, whichever is less." The basis for this suggestion is that the proposed liability limitation is in fact weaker than existing protections for benefits currently provided by check. For example, checks are governed by commercial paper law that would totally exempt a drawee (that is, the recipient) from liability for forged endorsements.

The Consumers Union has also made proposals to enhance error resolution provisions as applied to EBT. The group noted that the ten-day investigation period before which provisional credit may be given is too long for EBT recipients to wait for receding. The union has suggested that provisional credit be granted to EBT recipients within twenty-four hours after the error is first reported. This enhancement is necessary because "recipients could be left with no means to put food on the table for days." The group's position is that these enhancements are "of critical importance in the context of EBT" because these consumers are in most need of protection.

V. Analysis

The exemption of EBT from Regulation E creates confusion because existing understandings of the rights and obligations of parties in banking relationships do not apply. It appears that the "EBT accounts" will be owned by the recipients. However, the only control the recipient may exercise over the funds in the

188. See id.
189. Id.
190. See id. at 4.
191. See id.
192. See id.
193. See id.
194. See id.
195. Id. at 5.
196. Id. at 3.
197. See id.
198. See supra Part III.B.
199. See id.
account is the ability to withdraw funds by use of an ATM or POS. There is no other access afforded, and EBT does not create an account into which a recipient may deposit other funds; only the government agencies may put funds into the account. Thus typical property rights, such as the ability to control and exclude, will not accompany ownership of these accounts. Yet some liability will accrue to financial institutions participating in EBT. Recipients will be using existing bank ATMs though the relationship between the bank and the recipient is not the traditional bank-depositor, or characterized as a debtor-creditor relationship. When a recipient’s card is captured by an ATM or he receives an incorrect transaction amount from the machine, he will likely contact the bank owning the ATM. But, in light of the exemption of existing consumer protections, the bank’s obligation to the EBT recipient will be different from its obligation to its traditional account customers. If an EBT recipient is harmed while using an ATM, the financial institution may be liable to him depending on the application of relevant state law. If a disabled EBT recipient is unable to utilize a bank’s facilities to access his EBT account, he will most likely approach the bank which has an obligation to provide accessible facilities to the disabled under the Americans with Disabilities Act. The recipient in these situations sees the EBT account as a relationship between himself and the bank rather than some hybrid arrangement that results from a contract between the Treasury and a remote Financial Agent. The likely confusion created may be an obstacle to the full success of the EBT system.

Financial institutions that participate in the delivery of EBT have legitimate concerns as to bearing liability coverage for unauthorized EBT transactions. Because the government initiated this mandatory system and the potential savings are so great, there should be some room for funding agencies to afford a

200. See id.
201. See generally id.
202. See supra Part III.
203. See id.
204. See id.
205. See id.
206. See supra Part III.C.
207. See supra Part III.D.
208. See supra Part II.E.2.
minimum of liability coverage. The proposals of the NCLC\textsuperscript{209} seem to adequately balance the legitimate cost concerns of both the private-sector and government agencies with the need for loss protection for EBT recipients. The limited liability coverage proposed by the NCLC would limit the potential liability to funding agencies as well as counter any incentive for fraud.\textsuperscript{210} This liability protection, complemented with the NCLC's suggestions as to error resolution and the Fed's documentation proposals, would provide a balanced compromise for all parties to the EBT system while clarifying the rights and obligations of the parties.

\section*{Conclusion}

EBT for delivery of public assistance payments offers significant benefits for recipients, the private-sector financial services industry, and government agencies.\textsuperscript{211} Perhaps the potential savings are so great that we cannot afford for the government to not utilize technology for this task. However, to the extent that consumer protection is not afforded to EBT recipients, potential problems may erode the full success of EBT. In effect, two classes of consumers have been created: those who can afford the protections of existing consumer protection regulations and those who cannot because they do not have or cannot afford a traditional banking account relationship.

However, the potential obstacles created by this situation need not frustrate the goals of this worthy initiative because workable measures have been suggested that, if employed, will result in more effective and efficient government program administration.

Since 1978, this country has afforded consumers protections for financial transactions that involve the use of electronic technology.\textsuperscript{212} These protections have created reasonable consumer expectations as to the use of similar types of financial services. That EBT is exempted from such protection may presage either an erosion of existing protections (as witnessed by recent congressional suggestions to weaken liability limitations under Regulation E) or the failure to extend such protections to

\begin{thebibliography}{1}
\bibitem{209} See supra Part IV.B.
\bibitem{210} See id.
\bibitem{211} See supra Part I.C.
\bibitem{212} See supra Part II.A.
\end{thebibliography}
new financial service technologies such as smart-cards or Internet banking.\textsuperscript{213} The arguments against extension of consumer protection to both EBT and other emerging technologies echo the very arguments in opposition to such protection for EFT in the 1970s.\textsuperscript{214} In light of the expansion of financial services technologies, those arguments (for example that excessive cost of regulation would impede development) have been proven false. Only by balancing the interests in a secure payment system, efficient government, profitable financial institutions, and consumers will the full value of EBT be realized.

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\begin{footnotesize}
\textsuperscript{213} See supra Part II.F.
\textsuperscript{214} See supra Parts II.C and I.E.
\textsuperscript{215} The Author acknowledges with appreciation the assistance of Professor Mark Budnitz of Georgia State University College of Law in the writing of this Note.
\end{footnotesize}