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EXCESS IN CONSUMER DISCLOSURE**

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NEW YORK CASE UNDERCUTS AGREED DEADLINES FOR COMPLAINTS ABOUT FUNDS TRANSFERS

RANDALL D. QUARLES

The New York Court of Appeals recently held that bank account agreements cannot shorten the one-year period under UCC Article 4A for customers' reports of unauthorized wire transfers. This article shows that the decision is inconsistent with the governing Article 4A provisions and the UCC's freedom-of-contract principles.

Two customers go to the same bank on the same day to dispute allegedly improper \$100,000 debits that were made 61 days earlier in each of their accounts. They have identical deposit agreements with the bank. But in the wake of a new decision by New York's highest court, if one of the transactions was a wire transfer and the other was a check, the customers may well leave the bank with very different results.

The New York Court of Appeals announced in *Regatos v. North Fork Bank*¹ that it will not allow banks and their customers to agree to their own deadlines for objections to unauthorized funds transfers,² even though they have long been able to do just that for reports of forged or altered checks.³ Under *Regatos*, if the deposit agreement in the above scenario requires objections to account debits within 60 days after notice, for example, the customer complaining about a check on the 61st day may be a day late and \$100,000

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short. For the customer complaining about a wire transfer, though, the 60-day deadline is meaningless. The customer could have waited a full year before letting the bank know that anything was wrong with the transfer.⁴

The immediate effect of *Regatos* is to invalidate contractual deadlines for complaints about funds transfers that are governed by New York's version of Article 4A of the Uniform Commercial Code (the "UCC"). But the case could have a far broader impact as courts elsewhere look for guidance in applying other states' codifications of Article 4A or the Federal Reserve System's Regulation J, which incorporates Article 4A for more than \$1 trillion in Fedwire transfers each day.⁵ Many funds-transfer agreements and general account agreements require bank customers to report problems much more quickly than the one-year period contained in Article 4A itself.⁶ Such contract terms have been routinely enforced for reports of forged or altered checks, which are governed by UCC Article 4.⁷ If the agreed deadlines are toothless under Article 4A, however, banks may be exposed to funds-transfer claims for a longer period after the transactions.

In a second major holding, *Regatos* also declared that the time for an objection to a funds transfer does not start running until the customer receives "actual notice" of the transaction.⁸ This "actual notice" rule applies even if the customer has *asked* the bank to hold account statements for later inspection and then dawdles for months before going to the bank to look at them.⁹

In both of the above holdings, *Regatos* contravenes the letter and the spirit of the UCC by impairing the freedom of contract of the parties to a banking relationship. This article examines the combination of faulty statutory construction and skewed policy considerations that led the New York court awry.

THE ARTICLE 4A DEBATE

Many in the nation's banking sector awaited *Regatos* with high interest in the wake of mixed results from the only three other reported decisions that had addressed the agreed-notice issue for funds transfers.¹⁰ Two of those decisions were federal court installments in the same *Regatos* dispute, before the UCC question was certified to the New York Court of Appeals. The United

States District Court for the Southern District of New York foreshadowed the state court's ultimate holding by concluding that an account agreement *cannot* vary the time allowed by Article 4A.¹¹ On the appeal from the district court's judgment, the United States Court of Appeals for the Second Circuit tilted distinctly toward the no-variance view but certified the question to the New York state court.¹² Weighing in on the other side of the issue, in 2002 the Minnesota Court of Appeals declared in *Steffes v. Heritage Bank NA Willmar* that an account agreement *can* shorten the one-year period under Article 4A for complaints about wire transfers.¹³ Commentators on the subject have been ambivalent.¹⁴

The problem arises from the interplay of several sections of UCC Article 4A and Article 1. Section 4A-505 is a "statute of repose" that gives a customer one year in which to object to an unauthorized or misdirected transfer after receiving notice of the transaction.¹⁵ If the customer fails to report a problem to the bank within this one-year period, "the customer is precluded from asserting that the bank is not entitled to retain the payment" for the transfer.¹⁶

Two other UCC provisions appear on their face to permit the parties to a banking relationship to set their own deadlines. Section 4A-501(a) states: "Except as otherwise provided in this article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." Also, a general provision in UCC Article 1 provides that, with certain exceptions that are not pertinent here, "[t]he effect of provisions of [the UCC] may be varied by agreement."¹⁷ Based on comparable language in Article 4, which governs account deposits and collections other than funds transfers, banks have successfully enforced contractual deadlines that shorten the statutory one-year time period for reports of forged or altered checks to 60, 30 or even 14 days.¹⁸

For the three courts involved with *Regatos*, though, the rub comes in other Article 4A sections that define authorized transfers and require banks to refund payments for unauthorized transfers.¹⁹ In particular, Section 4A-204(a) requires a bank to refund to its customer the principal of any payment for an unauthorized transfer "to the extent the bank is not entitled to enforce the payment."²⁰ The customer also is entitled to receive interest on the sum if the customer exercises ordinary care in determining that the transfer was

not authorized and reports it to the bank “within a reasonable time not exceeding 90 days after the customer received notification from the bank” about the transaction.²¹ Section 4A-204(b) permits parties to agree to less than 90 days as a “reasonable time” for purposes of the right to interest.²² The statute, however, concludes with this caveat: “but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.”²³

As the Second Circuit opined in its contribution to the *Regatos* trilogy, “the dispute seems to turn on whether the variance [of the one-year period in Section 4A-505] is a variance of the bank’s refund obligation, or merely a variance of the time by which the customer must assert that obligation.”²⁴ If a contractual deadline is deemed to alter a bank’s duty to pay back its customer, then the last clause in Section 4A-204(b) forbids it. If reducing the one-year reporting period is not a substantive change in the bank’s underlying refund obligation, however, then one would think that Section 4-A-501 “would allow the parties to shrink the temporal window in which the sender can demand a refund.”²⁵

THE *REGATOS* OPINIONS

The facts of *Regatos* were somewhat unusual in several respects. The plaintiff, Regatos, lived in Brazil. He opened a deposit account with Commercial Bank of New York, the predecessor to defendant North Fork Bank. His account agreement required him to report “any irregularity” no more than 15 calendar days after an account statement was “first mailed or available” to him.²⁶ Regatos typically ordered wire transfers from his home by telecopying a payment order to the bank’s representative in Brazil. The order would then be confirmed by telephone. His monthly account statements reflected wire transfers, but he did not receive a separate notice for each such transaction. Also, by either explicit or tacit agreement, the bank held his monthly account statements and sent him information only at his request. Over a period of several years, Regatos intermittently requested and received extracts from his account statements.

The bank transferred \$450,000 from the account in March 2001 and another \$150,000 in April 2001 after receiving payment orders that it

believed to be from Regatos. Whether the bank's representative called Regatos about the orders was disputed. He did not review account information for the pertinent period until August 9, 2001, which was four to five months after the account statements became available. Upon seeing the entries for the two March and April transfers, he informed the bank that he had not authorized them. The bank refused to refund the \$600,000, and Regatos sued.

The United States District Court for the Southern District of New York stated three key grounds for denying the bank's motion for summary judgment. First, the court held that, while "[n]othing in [4A-505] explicitly prohibits the one year notice provision from being varied by agreement," the provision nevertheless "strongly implicates the *invariable* right of refund provided by Sections 4-A-202 and 4-A-204."²⁷ Second, the district court concluded that the contractual 15-day deadline was unreasonable and unenforceable as a matter of law even if the one-year period could be shortened by agreement.²⁸ Third, the court held that regardless of whether the contractual or the statutory time period applied, Regatos gave a timely report to the bank after he received *actual* notice of the transfers.²⁹ Section 4A-204(a) provides that a customer must notify a bank within a reasonable time after the customer "received notification" of a transfer. The district court concluded that Section 4A-204(a) thereby mandates actual notice, and subsection (b) precludes any variance in the notice requirement even if the customer agreed that the bank would hold statements for later inspection.³⁰

The case proceeded to trial in the district court, where the jury returned a verdict against the bank for \$600,000 plus interest. On appeal the Second Circuit expressed its own skepticism about varying the one-year period in Section 4A-505. The appeals court quoted a treatise for the view that "Section 4-A-505 should not be interpreted to allow what cannot be done by agreement under 4-A-204."³¹ Although the court remarked that "we might find this analysis determinative," it nevertheless elected to certify the question to the New York Court of Appeals as a matter of first impression under New York law.³²

Responding to the Second Circuit, the seven judges on the New York Court of Appeals held unanimously that neither the one-year time period in Section 4A-505 nor the "received notification" requirement in Section 4A-

204(a) can be varied by agreement.³³ The state court basically combined Section 4A-505 and 4A-204 into one, calling the Section 4A-505 repose period “essentially a jurisdictional attribute of the ‘rights and obligations’” referenced in Section 4A-204(b).³⁴ Therefore, the court concluded, “[t]o vary the period of repose would, in effect, impair the customer’s [S]ection 4-A-204(1) right to a refund, a modification that [S]ection 4-A-204(2) forbids.”³⁵

The Court of Appeals grounded its rationale primarily on the court’s view of the underlying policy goals of Article 4A rather than on statutory language:

In context, the policy behind article 4-A encourages banks to adopt appropriate security procedures. Only when a commercially reasonable security procedure is in place (or has been offered to the customer) may the bank disclaim its liability for unauthorized transfers (UCC 4-A-202). Permitting banks to vary the notice period by agreement would reduce the effectiveness of the statute’s one-year period of repose as an incentive for banks to create and follow security procedures.

....

Article 4-A was intended, in significant part, to promote finality of banking operations and to give the bank relief from unknown liabilities of potentially indefinite duration (*see Banque Worms v. BankAmerica International*, 77 N.Y.2d 362, 371 [1991]). This legislative purpose does not suggest that those interests alter (or should alter) the statute’s fine-tuned balance between the customer and the bank as to who should bear the burden of unauthorized transfers.³⁶

On the “received notification” issue, the state court concluded that “[j]ust as the one-year notice limitation is an inherent aspect of the customer’s right to recover unauthorized payments, the actual notice requirement provides the bedrock for the exercise of that right.”³⁷ Based on “policy arguments” and “an eye toward business realities and the predictable consequences of legal rules,” the court declared that it would not countenance any arrangement where “crucial information could be sitting in the bank’s possession for weeks, awaiting discovery by the customer” while the notice peri-

od runs.³⁸ Consequently, “[e]ven where customers enter ‘hold mail’ agreements with their banks, the actual notice rule still applies.”³⁹

A DIFFERENT RESULT IN STEFFES

Missing from the three *Regatos* opinions is any mention of the opposite result that the Minnesota Court of Appeals reached in *Steffes v. Heritage Bank NA Willmar*.⁴⁰ Unfortunately for banks, what is missing from *Steffes* is a persuasive analysis of the interrelationship between Sections 4A-501, 4A-505 and the no-variance language in Section 4A-204 and other sections. Indeed, *Steffes* does not mention Section 4A-204 or its no-variance provision.

The Minnesota appellate court in *Steffes* enforced a 30-day notice provision in a bank agreement. The plaintiffs were a group of investors who had backed a corporation’s plan to produce an electric car. The corporation’s sole shareholder directed the defendant bank to wire \$1.3 million from the designated investment account to an account at a different bank. The investors learned about the transfer within about four months but did not notify the bank that had held the investment account. They sued the bank almost five years later. Although they had signed a signature card when the account was opened, the investors contended that they were not bound by the account agreement. Nevertheless, the trial court granted summary judgment in favor of the bank on the ground that the challenged transfers were not reported within the account agreement’s 30-day notice period. The trial court relied on the variation-by-agreement provision in Article 4.⁴¹ The three-judge panel of the Minnesota Court of Appeals affirmed the judgment, but on the basis of Article 4A rather than Article 4 because the disputed transactions were funds transfers.⁴² The appeals court saw no reason to treat contractual deadlines differently under Article 4A, but it offered only this short explanation:

Like [UCC] Article 4, Article 4A also provides that the parties may vary by agreement “the rights and obligations of a party to a funds transfer.” Minn.Stat. § 336.4A-501 (2000). The 30-day limitation period in the account agreement therefore time-barred *Steffes’s* conversion claim.⁴³

In addition to the absence of a careful analysis of Sections 4A-505 and

4A-204, another weakness of *Steffes* is that the holding on the agreed-variation issue may be mere *dicta*. The opinion notes that *either* the account agreement's 30-day notice requirement or the one-year period in Article 4A barred the investors' claims.⁴⁴ Therefore, it was not necessary for the court to decide whether the statutory deadline could be varied by agreement.⁴⁵

CRITIQUE, PART I

Notwithstanding its superficial treatment of the subject, *Steffes* announced the correct result under a fair reading of the UCC. The statutory scheme expressly reserves to parties the right to agree to vary "the effect of provisions" of the UCC⁴⁶ or "the rights and obligations of a party to a funds transfer"⁴⁷ except where otherwise provided. Section 4A-505 does not otherwise provide that its one-year period cannot be varied by agreement.

The federal district court and the New York Court of Appeals advanced various arguments to justify their conclusions, but none survives scrutiny. One of the weakest arguments was the district court's preoccupation with the placement of Section 4A-505 in the "Miscellaneous Provisions" section of Article 4A rather than in the sections that "prescribe the substantive obligations and rights of parties to a funds transfer."⁴⁸ The district court inferred from the location of Section 4A-505 that it cannot be varied because Section 4A-501 permits changes only to the "rights and obligations of a party."⁴⁹ There is no reason, though, why a "miscellaneous provision" cannot pertain to the rights or obligations of bank customers. Section 4A-505 pertains to the obligation of a customer to notify a bank within a certain time period. Section 4A-501(a) is also in the "Miscellaneous Provisions" portion of Article 4A, and it definitely states the rights of parties to vary Article 4A's terms by agreement. The district court also overlooked Section 1-102(3) and its broad authority for agreements varying the effect of "provisions" of the UCC. If, as the district court insisted, Section 4A-505's designation as a "miscellaneous provision" were significant, then Section 1-102(3) would allow such a "provision" to be varied by agreement even if Section 4A-501 did not apply.⁵⁰

The district court further asserted that the UCC's drafters expressly indicated which of the code's statutes of repose are subject to modification. That is not correct. The one-year notice period in Section 4-406(f) for reports of

forged or altered checks is, like Section 4A-505, a statute of repose.⁵¹ The UCC does not expressly state that the Section 4-406(f) repose period can be modified, but courts overwhelmingly have held that parties are at liberty to do so.⁵² State and federal courts in New York are among those that have readily enforced bank agreements which substantially reduced the one-year notice period in Section 4-406(f) for reporting forged or altered checks.⁵³

What the district court seemed to forget is that the authority to vary by contract, as declared in Sections 1-102(3) and 4A-501(a), applies unless there is a stated *exception* elsewhere in the UCC. The two sections do not exclude statutes of repose from their scope, and their plain language does not require that any additional authority for a variance be stated in other sections. In short, it is immaterial whether other time provisions expressly state that they can be varied. The determinative question is whether a UCC time provision affirmatively *prohibits* variation by agreement. Section 4A-505 does not contain such a prohibition.⁵⁴

Similarly, the policy considerations advanced by the New York Court of Appeals cannot be reconciled with the UCC drafters' explicit declaration that "freedom of contract is a principle of the Code."⁵⁵ The Court of Appeals chose to subordinate that announced principle to the court's own view of the appropriate policy for allocating responsibilities for funds transfers and objections. In the process, the court disregarded what the UCC sections at issue actually say. Section 4A-204's only reference to a time element is the variable 90-day period for determining an entitlement to interest. No deadline is built into the receiving bank's "obligation...to refund payment" that is invariable under Section 4A-204(b). Section 4A-505 does state a deadline for objections to funds transfers, but it does not prohibit variation of the deadline by agreement. To reach its result, therefore, the Court of Appeals read into Section 4A-204 an invariable deadline component that is not there, and it read into Section 4A-505 a no-variance provision that is not there.⁵⁶

Regatos also creates an incongruous situation where a deposit agreement can afford an individual consumer only weeks or a couple of months to report a forged check that is governed by Article 4, but the same time limit cannot be applied by agreement to sophisticated business customers who order funds transfers governed by Article 4A. By way of illustration, in one New York case an individual depositor missed a 30-day contractual deadline

and lost his chance to recover for an altered check.⁵⁷ Under *Regatos*, if the depositor had been a business customer complaining about an unauthorized funds transfer, he could have procrastinated for a year before demanding reimbursement. Nothing in the policies underlying the UCC in general or Article 4A in particular warrants such radically different treatment of debits for checks as opposed to wire transfers. As one commentary suggests, “the policy arguments in favor of freedom of contract are probably stronger for wires” than for checks.⁵⁸

At the core of the *Regatos* holdings is the assumption, or presumption, that a notice period is central to the UCC’s apportionment of liability between banks and customers. Courts that have addressed the notice provisions for checks under Article 4 have considered and rejected the same theory. The Virginia Supreme Court, for example, held that contractual deadlines do not affect either the basis for a bank’s liability under the UCC or the recoverable damages. Thus, even though they set a tighter schedule, such provisions “do not alter the scheme of liability between banks and their customers.”⁵⁹

The New York Court of Appeals would have done well to follow the solid analysis of a lower court in that state, which enforced a two-week notice requirement for forged checks after examining the fundamental policies and purpose of the UCC with regard to banks and their customers. The lower court explained that, so long as contractual time provisions are reasonable and otherwise conform to the requisites of contract law, they “have been routinely accepted in the banking relationship, usually without extensive analysis.”⁶⁰ Said the court: “Such provisions are not only compatible with statute and case law; they are in accord with public policy by limiting disputes in a society where millions of bank transactions occur every day.”⁶¹ The same logic applies with every bit as much force to the millions of wire transfers that move trillions of dollars.

CRITIQUE, PART II

The second *Regatos* holding is equally troubling. The new “actual notice” requirement embraced by the New York Court of Appeals could have a significant and unfortunate effect even on banks that do not have agreements limiting the one-year notice period. *Regatos* focuses on the “received

notification” language in Section 4A-204(a), but Section 4A-505 also keys the start of the one-year repose period to the time at which “the customer received notification reasonably identifying the order.” Consequently, under the reasoning in *Regatos*, any bank that enters into a “hold mail” agreement with its depositor may also be granting the depositor an indefinite extension of the one-year notice period in Section 4A-505.

The New York Court of Appeals and the district court summarily equated “received notification” with “actual notice” while eliminating any field of operation for “constructive notice.”⁶² It is not clear precisely what the courts meant by “actual notice,” either. The district court indicated that it would be sufficient to “send” a notice to a customer.⁶³ Merely mailing or otherwise sending a notice, however, may not constitute “actual notice.”⁶⁴ Proof of “actual notice” could entail a showing that the customer actually possessed and read the statement. The New York Court of Appeals did not elaborate on what would be satisfactory “actual notice” other than to say that a telephone call would have sufficed.⁶⁵

Article 4A does not suggest, much less state, that a bank and its customer do not have the power to agree that account statements will be held at the bank for inspection, without extending any notice deadlines. A customer may actually want a “hold mail” arrangement. *Regatos* would penalize banks that do hold statements, while encouraging inattention and delay on the part of customers. The plaintiff in *Regatos* waited four or five months to look at his account information. Under the rationale of the New York Court of Appeals, he could have waited even longer without consequence. Neither the language of Article 4A nor the “business realities” that the court invoked justify such a result.

CONCLUSION

Regatos is not the last word on Article 4A’s notice provisions, and there is no reason yet for banks to discard contractual terms setting deadlines for complaints about funds transfers. Courts in other states may well take a different view, as in *Steffes*. The Board of Governors of the Federal Reserve System could resolve the issue for all Fedwire transfers by issuing its own interpretation of Section 4A-505. Nevertheless, the opinion of the New York

Court of Appeals could influence other courts, particularly given the weaknesses in the *Steffes* opinion and the dearth of other authorities on point. The tally now stands at seven state court judges and one federal court judge who have come out against agreements altering Section 4A-505's time period, to three state judges who have found nothing wrong with the practice, with three federal judges who were officially uncommitted but leaning toward the "no" column. Still, if courts will follow it, the language of the UCC itself continues to provide a strong argument for permitting banks and their customers to agree to their own reasonable deadlines, and for letting them enter into hold-mail arrangements without extending time limits for objections to funds transfers.

NOTES

¹ 2005 WL 2664712 (N.Y. Oct. 20, 2005).

² *Id.*; slip op. at 7-9. Because the Westlaw version did not contain star pagination at this writing, pinpoint citations to the opinion hereinafter will refer only to the slip opinion.

³ *See, e.g.*, cases cited *infra* notes 18 and 53.

⁴ The one-year period is in UCC § 4A-505, which is reproduced *infra* note 16 and discussed throughout this article. The only downside for a customer who waited a year to dispute a transfer would be the loss of a right to receive interest on the principal amount of the transfer. UCC § 4A-204(a); *see infra* notes 19-23 and accompanying text.

⁵ 12 C.F.R. Part 210, Subpart B ("Funds Transfers Through Fedwire"); *see* 12 C.F.R. § 210.25(b)(1) & App. B (incorporating Article 4A). Fedwire is the funds-transfer system that is owned and operated by the Federal Reserve Banks. 12 C.F.R. § 210.26(e). Regulation J governs the rights and obligations of bank customers if they are informed through their agreements or otherwise that their transfers may use Fedwire. *Id.* § 210.25(b)(2); UCC § 4A-507(c). For Fedwire information and statistics, *see Fedwire and National Settlement Services Annual Data and Fedwire Funds Transfer System Self-Assessment of Compliance with the Core Principles for Systemically Important Payment Systems*, Dec. 19, 2001, which are available at <http://www.federalreserve.gov/paymentsystems/fedwire/wireannual.htm> and <http://www.federalreserve.gov/paymentsystems/coreprinciples/default.htm>. Neither Regulation J nor Article 4A governs consumer transactions that fall within the scope of the federal Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* *See* 12 C.F.R. § 210.25(b)(3);

UCC 4A § 4A-108.

⁶ See UCC § 4A-505.

⁷ See, e.g., cases cited *infra* notes 18 and 53. Article 4, “Bank Deposits and Collections,” deals largely with the processing and collection of checks. See UCC § 4-101 cmts. 1-3. Article 4A focuses on the “specialized method of payment referred to in the Article as a funds transfer but also common referred to in the commercial community as a wholesale wire transfer.” *Id.* § 4A-102 cmt.

⁸ Slip op. at 10-12.

⁹ See *id.*

¹⁰ The American Bankers Association and The Clearing House Association L.L.C., a group consisting of 11 large banks, filed *amicus* briefs in the New York Court of Appeals. The brief from The Clearing House Association lists its members as Bank of America, N.A.; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; UBS AG; U.S. Bank N.A.; Wachovia Bank, N.A.; and Wells Fargo Bank, N.A.

¹¹ *Regatos v. North Fork Bank*, 257 F. Supp. 2d 632 (S.D.N.Y. 2003).

¹² *Regatos v. North Fork Bank*, 396 F.3d 493, 497-98 (2d Cir. 2005).

¹³ No. C9-01-1940, 2002 WL 1363985, at *5 (Minn. Ct. App. June 19, 2002).

¹⁴ See, e.g., 3 James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE §§ 22-3, 22-4 (4th ed. 1995) (noting that the UCC generally permits parties to vary its terms by agreement, but questioning whether or to what extent the one-year notice period can be changed); BARKLEY CLARK & BARBARA CLARK, CLARKS’ BANK DEPOSITS & PAYMENTS MONTHLY, Aug. 2004, available on Westlaw at 08-04 BDEPPM 2 (calling the validity of notice “cutdown” provisions “the biggest unresolved issue in wire transfer law” and observing that “there are good arguments on both sides”).

¹⁵ The Official Comment to Section 4A-505 states that the time period “is in the nature of a statute of repose for objecting to debits made to the customer’s account.”

¹⁶ Section 4A-505 states in full: “If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer’s objection to the payment within one year after the notification was received by the customer.”

¹⁷ This provision previously was in UCC Section 1-102(3), but it appears in Section 1-302 in an amended version of Article 1 approved by the National Conference of Commissioners on Uniform State Laws.

¹⁸ Section 4-103(a) states in pertinent part that “[t]he effect of the provisions of this article may be varied by agreement.” Section 4-406(f) allows a customer one year in which to report a forged or altered item after a statement or the item is made available to the customer. Courts have upheld terms in deposit agreements that shortened the one-year period to 60 days (*see, e.g., Am. Airlines Employees Fed. Credit Union v. Martin*, 29 S.W.3d 86 (Tex. 2000)); 30 days (*see, e.g. Fundacion Museo de Arte Contemporaneo de Caracas—Sofia Imber v. CBI-TDB Union Bancaire Privee*, 996 F. Supp. 277 (S.D.N.Y. 1998)); and 14 days (*see, e.g., Borowski v. Firststar Bank Milwaukee, N.A.*, 579 N.W.2d 247 (Wis. Ct. App. 1998)). *But see Mueller v. Miller*, 834 N.E.2d 862 (Ohio Ct. App. 2005) (holding that an agreement for a 30-day notice was unenforceable).

¹⁹ *See* UCC §§ 4A-202 (addressing authorized transfers and security procedures for verifying payment orders) & 4A-204 (requiring refunds for unauthorized transfers).

²⁰ The New York statute cited in the *Regatos* opinions designates the Section 4A-204 subsections as (1) and (2) rather than (a) and (b).

²¹ UCC § 4A-204(a).

²² Thus, in the hypothetical that began this article, the customer complaining of the wire transfer might have lost any right to interest on the principal amount of the transfer if the customer had unreasonably delayed more than 90 days or some other agreed time before objecting. The right to the principal itself, though, would have remained in place for the full one-year period.

²³ UCC § 4A-204(b). The “receiving bank” is the bank that debits its customer’s account after receiving an order to transfer funds from the account. *Id.* § 4A-103(a)(1). The parties’ “rights and obligations” under Sections 4A-202 and 4A-203, which makes some verified payment orders nevertheless unenforceable, also cannot be varied by agreement. *Id.* § 4A-202(f). Although *Regatos* specifically addressed the UCC provisions governing unauthorized transfers, similar refund obligations and non-variance clauses are included in Sections 4A-303 (“Erroneous Execution of Payment Order”) and 4A-402 (“Obligation of Sender to Pay Receiving Bank”). Section 4A-402(f) states that “[t]he right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.” Thus, the holding in *Regatos* that precludes a shortening of the one-year statute of repose in connection with unauthorized transfers presumably would apply to misdirected or other erroneous transfers as well.

²⁴ 396 F.3d at 497.

²⁵ *Id.*

²⁶ *Regatos*, 257 F. Supp. 2d at 635.

²⁷ 257 F. Supp. 2d at 642 (emphasis by the court).

²⁸ *Id.* at 644-45.

²⁹ *Id.* at 645-46.

³⁰ *Id.*

³¹ 396 F.3d at 498 (quoting 3 James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 22-4 (4th ed. 1994)).

³² *Id.*

³³ Slip op. at 13.

³⁴ *Id.* at 9.

³⁵ Slip op. at 9.

³⁶ *Id.* at 7-9.

³⁷ *Id.* at 12.

³⁸ *Id.* at 11-12.

³⁹ *Id.* at 12.

⁴⁰ As an officially “unpublished” decision that is available on electronic databases but not in book form, *Steffes* is not “precedential” for Minnesota courts. Minn. Stat. § 480A.08(3) (2005). Courts are certainly at liberty to discuss and analyze it, though, and to embrace or reject its holding. Surprisingly, none of the three *Regatos* opinions even acknowledges *Steffes*.

⁴¹ See UCC § 4-103(a).

⁴² 2002 WL 1363985, at * 5.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Steffes* also refers to Section 4A-505 as a statute of limitations rather than a statute of repose, but that erroneous reference does not appear to be material to the issue of whether the one-year period can be varied by agreement.

⁴⁶ Former UCC § 1-102(3), present § 1-302.

⁴⁷ UCC § 4A-501(a).

⁴⁸ 257 F. Supp. 2d at 644 & n.19. The New York Court of Appeals made a point of agreeing with the district court’s emphasis on the placement of Section 4A-505 under “Miscellaneous Provisions,” but the state court did not elaborate on the significance of that fact. Slip op. at 8-9.

⁴⁹ 257 F. Supp. 2d at 644.

⁵⁰ It also should be noted that Section 4A-204(b) prohibits variance of a *bank’s* refund obligation. Section 4A-505 states the *customer’s* obligation to object to a transfer.

⁵¹ Although neither the section nor the Official Comment specifically refers to it as a statute of repose, that is how courts have regarded it. See, e.g., *Wetherill v. Putnam Inv.*, 122 F.3d 554, 557 (8th Cir. 1997) (holding that the section “establishes a statute of repose”).

⁵² See cases cited *supra* note 18.

⁵³ See, e.g., *Josephs v. Bank of N.Y.*, 756 N.Y.S.2d 518 (N.Y. App. Div. 2003) (enforcing a 30-day contractual period); *Qassemzadeh v. IBM Poughkeepsie Employees Fed. Credit Union*, 561 N.Y.S.2d 795 (N.Y. App. Div. 1990) (same); *N.Y. Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.*, 343 N.Y.S.2d 538 (N.Y. App. Div. 1973) (same); *Parent Teacher Ass'n, Pub. Sch. 72 v. Manufacturers Hanover Trust Co.*, 524 N.Y.S.2d 336 (N.Y. Civ. Ct. 1988) (enforcing a 14-day provision).

⁵⁴ The district court's opinion also refers to the Official Comment to Section 4A-505, which notes that the refund provision in Section 4A-204 cannot be varied. The comment goes on to observe, however, that "the obligation to refund may not be asserted by the customer if the customer has not objected to the debiting of the account within one year." This statement appears to acknowledge that the obligation to refund is a right that exists *separately* from the time period in which it must be asserted.

⁵⁵ UCC § 1-102 cmt. 2.

⁵⁶ Such tortured statutory construction is unnecessary to give the UCC sections a reasonable meaning based on what they actually say as opposed to what a court may think they *should* provide. For example, the no-variance language in Section 4A-204(b) should preclude an agreement to limit a bank's obligation under subsection (a) to refund the *entire* amount of a payment that the bank is not otherwise entitled to enforce. And, like the one-year period for objections to checks in Article 4, the one-year period in Section 4A-505 could establish a presumptive deadline subject to any reasonable modification by agreement pursuant to Sections 4A-501 and 1-102(3).

⁵⁷ *Qassemzadeh v. IBM Poughkeepsie Employees Fed. Credit Union*, 561 N.Y.S.2d 795 (N.Y. App. Div. 1990).

⁵⁸ Barkley Clark & Barbara Clark, CLARKS' BANK DEPOSITS & PAYMENTS MONTHLY, Aug. 2004, available on Westlaw at 08-04 BDEPPM 2.

⁵⁹ *Nations Title Ins. Corp. Agency v. First Union Nat'l Bank*, 559 S.E.2d 668 (Va. 2002).

⁶⁰ *Parent Teacher Ass'n, Pub. Sch. 72 v. Manufacturers Hanover Trust Co.*, 524 N.Y.S.2d 336, 340 (N.Y. Civ. Ct. 1988).

⁶¹ *Id.*

⁶² *Regatos* slip op. at 11-12; 257 F. Supp. 2d at 645-46.

⁶³ 257 F. Supp. 2d at 645-46 (stating that Section 4A-204 required the bank "to send notice of the transfer to the customer if it wanted to avail itself of the notice time limit").

⁶⁴ See, e.g., *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703, 705 ("The act of mailing, in and of itself, does not constitute actual notice.").

⁶⁵ Slip op. at 12.