PAYMENT METHODS FOR CONSUMER-TO-CONSUMER ONLINE TRANSACTIONS†

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Transactions between strangers have grown at a tremendous rate in recent years, largely as a result of the popularity of eBay and other Internet auction sites.[1] Internet auctions are an international phenomenon. In the United States alone, over 35 million people have participated in online auctions,[2] and eBay alone boasts more than 22 million registered users worldwide.[3] Most online transactions occur without a hitch, but the opportunities for mischief and mistake, together with the tremendous volume of transactions, inevitably result in a significant number of problems. Auction sites have undertaken efforts to reduce the incidence of problems and, to a lesser extent, address

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1. This Article focuses on transactions consummated through online auction sites largely because of the predominance of eBay and its competitors, including Amazon Auctions and Yahoo Auctions. However, much of the analysis contained herein is equally applicable to non-auction transactions. Concerns that relate specifically to the auction process, such as shilling, sniping, bid shielding, bidder siphoning and stealing, are beyond the scope of this Article. *See generally* LAURA FISHER KAISER & MICHAEL KAISER, THE OFFICIAL EBAY GUIDE TO BUYING, SELLING, AND COLLECTING JUST ABOUT ANYTHING 138-42 (Fireside 1999); James M. Snyder, Note, *Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?,* 52 FED. COMM. L.J. 453, 457 (2000) ; Josh Boyd, *Safety on the Auction Block,* Information Security Magazine, Jan. 2000, *at* http://www.infosecuritymag.com/articles/january00/columns_security_market.shtml; Dennis Prince, *Dirty Tricks: Online Auction Scams,* AuctionWatch.com, Aug. 16, 1999, *at* http://www.auctionwatch.com/awdaily/features/dirtytricks/.

2. National Consumers League, *Online Auction Survey Summary at* http://www.nclnet.org/onlineauctions/auctionsurvey2001.htm (Jan. 31, 2001).

3. eBay, *eBay to Celebrate and Reward Half Billionth Listing at* http://www.shareholder.com/ebay/news/20010314-34238.htm (Mar. 14, 2001). Many of eBay's registered users are businesses rather than individual consumers, but the distinction between the two often is not entirely clear.

problems after they arise.[4] Unfortunately, victims of auction fraud and related problems frequently find themselves without a practical remedy.

Participants in online auctions use a variety of payment mechanisms, but checks and money orders still represent the most commonly used means of payment.[5] Credit cards afford greater protection to buyers, but until recently payment by credit card was not even an option for person-to-person transactions. However, several online payment services have been established that enable individuals to make credit card payments to one another, generally with the payment service acting as an intermediary.[6] These services are growing rapidly, mainly because of the speed and convenience that they offer. Yet relatively little attention has been paid to the risks and potential liabilities they involve for buyers and sellers. This Article compares online payment systems and similar intermediary services to traditional payment mechanisms in that context.

I. BACKGROUND

Online auctions, in many respects, operate like traditional auctions: bidders offer successively higher amounts for an item placed at auction by a seller, and the auction site administers the bidding process and announces the high bidder and price at the conclusion of the auction. However, an online auction site plays a somewhat lesser role in completing the transaction than does a traditional auctioneer, largely

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4. *See, e.g.,* Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "EBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 728-31 (2000) (discussing eBay's "public safety" efforts); Snyder, *supra* note 1; Paula Selis, Anita Ramasastry & Charles S. Wright, *Bidder Beware: Toward a Fraud-Free Marketplace—Best Practices for the Online Auction Industry*, 9-28 *at* http://www.law.washington.edu/lct/files/2000_online_auctions_full.doc (Apr. 17, 2001) (describing "risk reduction tools" offered by auction sites and third parties).

5. Andy Roe, *E-Payment Reluctance,* AuctionWatch.com (Mar. 2, 2001), *at* http://www.auctionwatch.com/awdaily/features/reluctance/ (noting that over 80% of eBay sales involve payment by personal check, money order, or cashier's check); National Consumers League, *supra* note 2 (noting that 69% of buyers pay by check, money order, or cashier's check).

6. PayPal is by far the dominant such service, with over 7 million registered users. PayPal, *About Us, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/about-outside (accessed March 30, 2001). PayPal's leading competitors are affiliated with the major auction sites: Billpoint (eBay), Amazon Payments (Amazon Auctions), and Yahoo! PayDirect (Yahoo! Auctions). Other online payment services include Achex, BidPay, c2it (Citibank), CCNow, ecount, eMoneyMail (Bank One), EnergyFlow, FairMarket ASAP, MoneyZap (Western Union), ProPay, and now-defunct ExchangePath, PayMe.com, and PayPlace. *See* David E. Sorkin, *Online Payment Systems: List, at* http://www.onlinepaymentsystems.com/list.html (last modified Apr. 13, 2001).

because it never takes possession of either the goods or the payment.[7] Thus eBay characterizes itself as merely a venue, rather than an auctioneer, and disclaims any responsibility for ensuring that the transaction is consummated properly once the auction, itself, has been completed.[8]

In a typical online auction transaction, the parties are strangers to one another and do not anticipate engaging in future transactions with one another.[9] The seller dictates the conditions of sale in the auction listing.[10] Normally, the buyer is expected to pay first and then the seller delivers the goods.[11] Auction listings frequently specify the methods of payment that the buyer will accept, although the parties may negotiate

7. *But see* Snyder, *supra* note 1, at 471 (suggesting that online auction sites should be required to physically inspect items and provide escrow services in order to combat fraud).

8. eBay, *User Agreement,* § 3.1, *at* http://pages.ebay.com/help/community/png-user.html (last visited Mar. 30, 2001). The Agreement states:

Although we are commonly referred to as an online auction web site, it is important to realize that we are not a traditional "auctioneer". Instead, our site acts as a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of formats, including a fixed price format and an auction-style format commonly referred to as an "online auction". We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items. We cannot ensure that a buyer or seller will actually complete a transaction.

Id. See also Selis, *supra* note 4, at 7-8 (noting that auction sites invariably disclaim responsibility for transactions).

In January 2001, a California state court dismissed a class action suit against eBay brought by people who bought counterfeit sports memorabilia through eBay. EBay argued that it was not liable because the items were sold by individual eBay members, not by eBay itself, and eBay was therefore merely a service provider, immune from liability under federal law. *See* Victoria Slind-Flor, *eBay Denies Auctioneer Status,* NAT'L L.J., July 17, 2000, at B9; Troy Wolverton, *Judge Dismisses Suit Against eBay,* CNET News.com (Jan. 18, 2001), *at* http://news.cnet.com/news/0-1007-200-4528023.html. This view seems consistent with efforts by some states to require sellers of items in online auctions to obtain auctioneer licenses, based upon the premise that the seller, not the auction site, serves as the auctioneer. *See, e.g.,* Hiawatha Bray, *Discounting the Internet,* BOSTON GLOBE, Feb. 1, 2001, at D1; Stacy Collett, *States to Require Licenses for Online Auctioneers,* COMPUTERWORLD, Dec. 6, 1999, at 4.

Although it does not take responsibility for malfeasance by auction participants, eBay does offer mediation assistance through SquareTrade, an online dispute resolution service. *See* SquareTrade, *Working with eBay, at* http://www.squaretrade.com/eb/ebay_020801.html (last visited Apr. 11, 2001).

9. Katsh, *supra* note 4, at 714, 728. Auction sites enable participants to obtain information about other members' past transactions with a particular person, but this information is of limited value. A recent survey of online auction participants indicated that only half of bidders always check a seller's feedback when it is available. National Consumers League, *supra* note 2.

10. eBay, *User Agreement, supra* note 8, § 4.

11. DENNIS L. PRINCE, ONLINE AUCTIONS AT EBAY 391 (2d ed., Prima Tech 1999); Katsh, *supra* note 4, at 711 (noting that buyers thus are more likely than sellers to encounter problems).

this and other terms (such as shipping charges) via e-mail either before or after the auction is completed. Most auction transactions involve relatively small sums, usually under $100, but the average loss in cases of fraud is somewhat higher.[12]

A number of problems can arise in online auction transactions. The most widely reported problems involve outright fraud such as the father-and-son team that sold two hundred nonexistent PlayStation machines for over $100,000,[13] or the three men who sold hundreds of fake paintings for more than $400,000.[14] Also common are deceptive representations that border on fraud, such as the $425 "PlayStation 2 Original Box And Receipt" listing that bidders failed to interpret literally.[15] The Federal Trade Commission received over 10,000 complaints of Internet auction fraud in 2000, or roughly half of the total number of Internet fraud complaints.[16] Despite this seemingly high number, the relative incidence of fraud in online auctions is quite low, considering the enormous overall number of transactions that take place.[17]

Misunderstandings and delivery problems are probably much more common than outright fraud, although buyers and sellers can often sort out such problems amicably; for example, by agreeing to rescind a

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12. According to a recent survey, 75% of purchases were under $100, and 21% were between $101 and $500; the average loss per fraud victim was $326. National Consumers League, *supra* note 2; *see also* Selis, *supra* note 4, at 19 (noting that 90% of auction purchases are under $200). The small size of most transactions makes many antifraud measures impracticable. For example, one commentator has suggested that auction sites should be required to physically inspect and authenticate all items and provide free escrow services. *See* Snyder, *supra* note 1, at 471. Clearly such procedures would not make sense for items selling for only a few dollars (which is not unusual on eBay and other auction sites), and might well be prohibitive even for higher-priced items.

13. Press Release, U.S. Department of Justice, New York Father and Son Are Accused in Playstation 2 Internet Auction Scam (Feb. 14, 2001), *at* http://www.cybercrime.gov/garay.htm.

14. John Schwartz & Judith H. Dobrzynski, *3 Men Are Charged with Fraud in 1,100 Art Auctions on EBay,* N.Y. TIMES, Mar. 9, 2001, at A1. For earlier reports of the scam, see Mark E. Wojcik, *Lawyers Who Lie On-Line: How Should the Legal Profession Respond to EBay Ethics?,* 18 J. MARSHALL J. COMPUTER & INFO. L. 875 (2000); Dennis Prince, *Dirty Tricks: Online Auction Scams: Shilling*, AuctionWatch.com, (Aug. 16, 1999), at http://www.auctionwatch.com/awdaily/features/dirtytricks/shillingindex.html.

15. Linda Harrison, *Empty PlayStation Box Sold for $425,* The Register (Jan. 29, 2001), *at* http://www.theregister.co.uk/content/6/16450.html.

16. Troy Wolverton, *Online Auction Fraud Rate Dips,* CNET News.com (Apr. 16, 2001), *at* http://news.cnet.com/news/0-1007-200-5631683.html.

17. For example, the fraud rate on eBay reportedly was one in 40,000 transactions in 2000, down from one in 35,000 the previous year. *See* Troy Wolverton, *Consumers Indifferent to Auction Fraud*, CNET News.com (Apr. 20, 2001), *at* http://news.cnet.com/news/0-1007-200-5682384.html. *See generally* Selis, *supra* note 4, at 2-4 (discussing incidence of and factors contributing to online auction fraud).

transaction or filing a postal insurance claim. Since the buyer pays first, buyers tend to experience more problems than sellers,[18] but sellers also face various risks, including bad checks and credit card chargebacks.

II. TRADITIONAL PAYMENT METHODS

Most online auction transactions involve the use of checks, money orders, and other traditional means of payment. These mechanisms are generally less efficient than online payment methods, primarily because they require physical delivery of a payment instrument from the buyer to the seller. The cost of using traditional payment mechanisms varies from trivial to substantial, and they also involve varying levels of risk. The continuing popularity of these mechanisms is probably the result of a combination of general satisfaction with current practices, switching costs and inertia, and lack of knowledge and possible distrust of new mechanisms.

Personal checks and money orders are the most commonly used payment mechanisms for online auction transactions.[19] In particular, personal checks are inexpensive and convenient for both buyers and sellers. Their main disadvantage is the risk that a buyer's check will bounce, and the delay that occurs if a seller waits for a check to clear before shipping the goods. Many sellers address this risk by declining to accept personal checks or accepting them only from selected buyers (for example, those with high "feedback" ratings). In addition, personal checks often are not well-suited to international transactions because of the high fees that many banks charge for processing checks drawn on foreign banks or in foreign currencies.

Money orders are slightly more expensive and less convenient than checks, but they virtually eliminate the payment-related risks for sellers, and international money orders are available (albeit at higher cost) for international transactions.[20] For extremely low-value transactions the cost of a money order may be prohibitive, and sellers who insist on

18. Katsh, *supra* note 4, at 711.

19. *See supra* note 5.

20. The United States Postal Service charges $0.90 for a domestic money order (up to $700), and at least $3.25 for an international money order. U.S. Postal Service, *Ratefold*, Notice 123, at 4 (effective July 1, 2001), *available at* http://www.usps.com/ratecase/not123.pdf; U.S. POSTAL SERVICE, INTERNATIONAL POSTAL RATES AND FEES, PUBLICATION 51 (Jan. 2001), *available at* http://pe.usps.gov/cpim/ftp/pubs/pub51/pub51.pdf. For some buyers, the inconvenience of having to wait in line at a post office in order to purchase a money order is a much greater deterrent than its price. Privately issued money orders can be somewhat less expensive and more convenient than postal money orders, and to most sellers the two are functionally equivalent.

payment by money order may find fewer bidders participating in their auctions as a result.

Surprisingly, cash is another popular payment mechanism for online auction transactions.[21] The main risks of using cash are loss or diversion in the mail, and fraud on the part of the seller.[22] For low-value international transactions, mailing cash may be the only practical way to send payment without incurring transaction costs that exceed the value of the transaction. United States currency has value throughout the world and seems unlikely to be replaced by the Euro, partly because paper currency is easier to mail than coins.[23] Another advantage of cash is anonymity because it eliminates the need for parties to disclose their bank account numbers, other personal information, and perhaps even their names.

Checks, money orders, and cash are all problematic from a buyer's perspective because a buyer who uses these payment methods is left with little or no recourse against the seller if the goods are not delivered or do not meet the buyer's expectations. Stopping payment on a check is rarely possible since the check will normally have been cashed by the time the buyer realizes that there is a problem with the transaction.[24] Therefore, buyers would do well to consider payment methods that provide them with some form of recourse in the event of nondelivery or nonconformity. Of course, while buyers are better protected by retaining such recourse, sellers can minimize their risk by insisting on a payment method that affords finality.[25]

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21. Six percent of online auction transactions reportedly involve cash sent through the mail. National Consumers League, *supra* note 2. EBay itself mentions (but does not recommend) the use of cash for low-value international transactions. eBay, *International Trading: Payment Methods, at* http://pages.ebay.com/help/buyerguide/global-buy-3.html (last visited Apr. 1, 2001).

22. The seller may deny having received the payment, or may falsely claim that an insufficient sum was received. Of course, a buyer could also make similar fraudulent claims, but sellers normally specify that buyers who choose to send cash do so at their own risk.

23. For domestic transactions involving fractional dollar amounts, unused postage stamps can be used in conjunction with dollar bills. For international transactions, it may be more practical to round the amount to the nearest dollar rather than sending heavy and conspicuous coins or stamps that are unlikely to have significant value in a foreign country.

24. National Consumers League, *supra* note 2.

25. It is of course possible to reduce the risks experienced by both parties by obtaining insurance that is independent of the payment mechanism. For example, insurance coverage provided by the U.S. Postal Service and private delivery services can cover the cost of goods lost or damaged in transit. Private shippers may include insurance in the delivery charge, and postal insurance for domestic shipments starts at $1.10 for up to $50 coverage. U.S. Postal Service, *Ratefold*, *supra* note 20, at 4. Auction sites also may provide limited insurance to cover transaction-related risks; eBay, for example, provides buyers with $200 in insurance coverage against fraud by a seller, with a $25 deductible. eBay, *Fraud Protection Eligibility Checklist and Claims Process, at*

Using C.O.D. ("cash on delivery" or "collect on delivery") service is one way that buyers can reduce their transaction-related risks. The mail carrier, or other delivery agent, obtains payment from the buyer upon delivering the goods and then forwards the payment to the seller.[26] However, C.O.D. service does not seem to be used very frequently for online auction transactions because of its inconvenience, its relatively high cost,[27] and its inability to eliminate the risks experienced by buyers and sellers.[28]

Generally, credit cards are extremely popular for Internet commerce and are favored by consumer protection officials and advocates because of the protections that they provide.[29] Yet credit card payments enjoy a much smaller market share in online auctions,[30] largely because many sellers are individuals rather than businesses, and it is difficult and often impractical for individuals to obtain merchant accounts that enable them to accept payments by credit card.[31]

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http://pages.ebay.com/help/community/ins-guide.html (visited Mar. 7, 2001).

26. U.S. Postal Service, *Domestic Mail Manual: S921, Collect on Delivery Mail, available at* http://pe.usps.gov/cpim/ftp/manuals/Dmm/S921.pdf (including changes through Mar. 8, 2001).

27. The fees charged by the U.S. Postal Service for its C.O.D. service vary depending upon the amount to be collected, starting at $4.50 for amounts up to $50. U.S. Postal Service, *Ratefold*, *supra* note 20, at 4.

28. While C.O.D. service addresses the risk of nondelivery, the recipient cannot open or inspect a package before making payment. In 1987 the U.S. Postal Service responded to C.O.D. fraud by requiring senders to accept payment by check as well as by cash or money order, thereby providing recipients with the ability to stop payment in the event of a dispute. U.S. Postal Service, *Customer Support Ruling: Collect on Delivery (COD) Mail,* PS-197 (S921), July 1993, *available at* http://pe.usps.gov/cpim/ftp/manuals/csr/PS-197.PDF. Thus the seller still bears the risk that the buyer's check will bounce, while the buyer still bears the risk of receiving nonconforming goods or having to stop payment on a check in order to maintain any leverage against the seller.

29. *See, e.g.,* GREG HOLDEN, INTERNET AUCTIONS FOR DUMMIES 262 (IDG Books Worldwide 1999); Prince, *supra* note 11, at 395; Consumer Protection Working Group, ABA Section of Business Law, *Safeshopping.org: How Are You Paying for the Item? at* http://www.safeshopping.org/payment/ (last visited Mar. 30, 2001); Katsh, *supra* note 4, at 730; Selis, *supra* note 4, at 7, 10-12; National Consumers League, *supra* note 2.

30. In a recent survey, 17% of online auction buyers reported giving their credit card number directly to a seller. National Consumers League, *supra* note 2. Most of the transactions reflected in that statistic are probably business-to-consumer sales, since few individuals accept direct credit card payments. On the other hand, the use of intermediary services such as PayPal that accept credit cards on behalf of sellers is increasing rapidly. *Id.* (reporting that 44% of buyers have used such services); *see also infra* P.2.

31. In addition to meeting creditworthiness and other qualification requirements for a merchant credit card account, a seller who wishes to accept credit cards may also have to pay substantial startup and periodic costs. The per-transaction costs are relatively low—typically $0.35 plus 2.3% to 2.9% of the transaction amount, but for low-volume sellers the other costs may be prohibitive. *See* Andy Roe, *Merchant Beware: AW's Investigation into Credit Card Merchant Accounts,* AuctionWatch.com (Feb. 18, 2000), *at*

Moreover, some people are reluctant to use credit cards for online transactions for fear that their account numbers may fall into the wrong hands.[32]

Paying by credit card affords much greater protection to a buyer than do other traditional payment mechanisms largely because of the credit card dispute rights provided by Federal Reserve Regulation Z[33] and, in some instances, by credit card issuers voluntarily.[34] Regulation Z provides credit card holders with two related dispute rights: (1) the right to dispute and withhold payment for "billing errors," including charges for merchandise not actually delivered,[35] and (2) the right to assert against the card issuer any other claims or defenses arising out of a transaction after having made a good faith effort to resolve the matter with the merchant.[36] This latter right is limited to transactions occurring in the cardholder's home state or within 100 miles of the cardholder's address, and applies only when the amount of the transaction is more than $50.00.[37] However, a card issuer may process a "chargeback"

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http://www.auctionwatch.com/awdaily/features/beware/.

32. See Selis, *supra* note 4, at 12 n.30 (noting consumers' fears of buying from a stranger and transmitting a credit card number online). Even Amazon.com permits customers who place orders via the Internet to pay by mailing a check or providing a credit card number by telephone or fax. Amazon.com, *Payment Methods We Accept: Checks & Money Orders, at* http://www.amazon.com/exec/obidos/tg/browse/-/518222/ (last visited Apr. 1, 2001); Amazon.com, *Payment Methods We Accept: Credit Cards & Check Cards, at* http://www.amazon.com/exec/obidos/tg/browse/-/518224/ (last visited Apr. 1, 2001).

33. Truth in Lending, 12 C.F.R. § 226.13 (2001).

34. In addition to waiving some or all of the restrictions that Regulation Z imposes on eligibility for chargebacks, some credit card issuers provide other sorts of purchase protections, such as warranty extension and insurance against loss or damage. Prince, *supra* note 11, at 395.

35. Billing Error Resolution, 12 C.F.R. § 226.13(a)(3), (d)(1) (2001).

36. Special Credit Card Provisions, 12 C.F.R. § 226.12(c) (2001) (implementing 15 U.S.C. § 1666i (1994)). This regulation is analogous to the Federal Trade Commission's requirement that consumer credit contracts include a statement preserving the consumer's claims and defenses against any subsequent holder of the obligation. *See* Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 16 C.F.R. § 433.2 (2001).

37. 12 C.F.R. § 226.12(c). A rationale for these limitations is that they limit the application of the rule to circumstances in which the use of a credit card is akin to an extension of credit (rather than merely a convenient substitute for cash), and in which the card issuer is more likely to have effective recourse against the merchant. *See* BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS, vol. 2, ¶ 15.07 (A.S. Pratt & Sons, rev. ed. 1999) (listing various arguments for and against preservation of cardholder defenses); Izraelewitz v. Manufacturers Hanover Trust Co., 465 N.Y.S.2d 486, 488 (Civ. Ct. N.Y.C. Kings County 1983) ("The geographical limitation serves to protect banks from consumers who may expose them to unlimited liability through dealings with merchants in far-away states where it is difficult to monitor a merchant's behavior."). In practice, the issuer always has effective recourse, since the ultimate liability for a chargeback falls on the merchant or its acquiring bank. *See* Jane Kaufman Winn, *Couriers Without Luggage: Negotiable Instruments and Digital Signatures,* 49 S.C. L. REV. 739,

request voluntarily even if the transaction does not qualify under Regulation Z. The mere threat of a chargeback may be sufficient to induce a seller to resolve a dispute to the buyer's satisfaction because chargeback fees imposed by credit card servicers can be substantial.[38]

Debit cards operate in much the same manner as credit cards, but lack many of the buyer protection features of credit cards. For example, the buyer does not have the right to assert transaction-related claims against the card issuer.[39] Consumers in the United States traditionally have resisted debit cards, especially for online transactions, in part because of fears of fraud.[40]

III. ONLINE PAYMENT SYSTEMS

A great number of new Internet-based payment mechanisms have been created in recent years, although some of the pioneering efforts disappeared after failing to gain sufficient acceptance.[41] Most of these mechanisms require the use of a third party to serve as an intermediary to the transaction. Depending on the mechanism, the intermediary may have a contractual relationship with the buyer, the seller, or both. In some instances, one party may not even be aware that an intermediary is

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757 n.96 (1998), *cf.* Singer v. Chase Manhattan Bank, 890 P.2d 1305, 1306 (Nev. 1995); *Lincoln First Bank, N.A. v. Carlson,* 426 N.Y.S.2d 433 (Sup. Ct. Chautaqua County 1980) (discussing continued viability of geographic limitation).
In any event, most credit card issuers waive the geographical limitation, if not also the $50 minimum, since they can readily submit a chargeback request through the credit card association. JANE K. WINN & BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE § 7.02[B] (4th ed., Aspen L. & Bus. 2001). To further complicate the matter, it is not always clear where a transaction takes place; that issue is determined under state law. Izraelewitz v. Manufacturers Hanover Trust Co., 465 N.Y.S.2d at 488.

38. A typical chargeback fee is about $35. Roe, *supra* note 31.

39. Debit card transactions and other electronic funds transfers are governed by Regulation E. 12 C.F.R. § 205 (2001). The protections afforded by Regulation E are significantly weaker than those available for credit card transactions under Regulation Z. *See* Winn & Wright, *supra* note 37, § 7.03; Gregory E. Maggs, *New Payment Devices and General Principles of Payment Law,* 72 NOTRE DAME L. REV. 753, 794 (1997).

40. Melissa Allison, *Debit Cards Get More Credit from Public,* CHICAGO TRIBUNE, Feb. 20, 2001, § 3, at 1. The risk of having one's entire bank account emptied, even only temporarily, is presumably given much more weight by most people than the right to assert transaction-related claims against a card issuer.

41. *See generally* Winn & Wright, *supra* note 37, § 7.04 (discussing DigiCash, First Virtual, and other early payment technologies); Jane Kaufman Winn, *Clash of the Titans: Regulating the Competition between Established and Emerging Electronic Payment Systems,* 14 BERKELEY TECH. L.J. 675, 691-95 (1999); Maggs, *supra* note 39, at 759-63. Some of the new payment devices do not rely on the Internet at all, such as stored value cards, check-by-fax services, and 900-number telephone billing systems.

being used.

The primary advantages of online payment methods are convenience and efficiency. For example, an online payment service may enable a buyer to purchase goods from another individual by credit card, causing the seller to ship the goods immediately rather than in several days or weeks later. Some of these services charge fees that are comparable to or much higher than credit card processing costs,[42] but others are less expensive and sometimes free. However, because online payment services are largely unregulated, the rights of buyers and sellers are generally controlled by the terms of each provider rather than by law.[43]

The payment mechanisms discussed in this section include PayPal and Billpoint, which seem to enjoy the largest popularity for online auction transactions, along with several competing systems that represent different approaches to online payments. PayPal is an independent payment service, while Billpoint is owned by eBay, the largest auction site. Amazon.com and Yahoo!, eBay's primary competitors, operate their own payment services, though they generally function in a manner similar to PayPal and Billpoint.[44] There are also commodity-based electronic currencies,[45] incentive currencies,[46] barter currencies,[47] and informal factoring services,[48] all of which can function

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42. *See supra* note 31.

43. Roe, *supra* note 5 (quoting an FTC official). *See generally* Maggs, *supra* note 39. The recently proposed Uniform Money Services Act (UMSA) would provide for state licensure of Internet payment services and other nonbank financial institutions. UNIFORM MONEY SERVICES ACT (Aug. 9, 2000), *at* http://www.law.upenn.edu/bll/ulc/moneyserv/ms00ps.htm; *see also* UNIFORM MONEY-SERVICES BUSINESS ACT, 2000 ANNUAL MEETING DRAFT, WITH PREFATORY NOTE AND REPORTER'S NOTES (July 28, 2000), *at* http://www.law.upenn.edu/bll/ulc/moneyserv/msb0620.htm. The UMSA focuses on security and soundness issues, however, rather than the legal effects of online payments. It thus would address some but not all of the risks discussed in this Article.

44. *See, e.g.,* Amazon.com, *Paying with Amazon.com Payments,* http://payments.amazon.com/ (last visited Apr. 4, 2001); Yahoo!, *Yahoo! PayDirect, at* http://paydirect.yahoo.com/ (last visited Apr. 4, 2001).

45. *See, e.g.,* E-gold, *Better Money,* http://www.e-gold.com/unsecure/qanda.html (last visited Apr. 4, 2001); GoldMoney, *How GoldMoney Works, at* http://www.goldmoney.com/public/getting_started/goldmoney.html (last visited Apr. 12, 2001).

46. *See, e.g.,* MyPoints, *at* http://mypoints.com (last visited Sept. 30, 2001); S&H greenpoints.com, *About greenpoints, at* http://www.greenpoints.com/shinfo/in_AboutGreenpoints.asp (accessed Apr. 12, 2001).

47. *See, e.g.,* All Business, *How Trade Dollars Work, at* https://www.bigvine.com/help/howTradeDollarsWork.jsp (last visited Apr. 12, 2001); ibart, *About Ibart, at* http://www.ibart.com/?PageID=4 (last visited Apr. 12, 2001); isolve.com, *iSolve Currency, at* http://www.isolve.com/currency.jsp (last visited Apr. 12, 2001); Ubarter.com, *ITEX, at* http://www.ubarter.com (last visited Apr. 4, 2001).

as payment mechanisms.[49]

Introduced in late 1998, PayPal is the leading online payment service, with over 7 million registered users.[50] PayPal operates in 26 countries. Its daily transaction volume is over $7 million.[51] PayPal advertises its services as "free to consumers,"[52] although moderate and high-volume users are required to upgrade to fee-based accounts.[53] PayPal can be used for fund transfers and purchases unrelated to auction sites, but its most common application is for online auction purchases.[54]

A seller must be registered with PayPal in order to receive payments through the service.[55] If the buyer is also a registered user, he or she may initiate a payment by logging into PayPal's web site and entering information about the purchase, including the amount and the seller's e-mail address. The payment is deducted from the buyer's PayPal account if it contains sufficient funds; otherwise, the buyer may charge the payment to a credit card (as a purchase, with PayPal as the merchant), or authorize an ACH transfer from a checking account.[56] If the buyer is not a registered user, the seller can still refer the buyer to PayPal's site for a one-time payment. In either case, the payment is then credited to the seller's PayPal account, after applicable fees are

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48. *See, e.g.,* Larry Pieniazek, *Larry Pieniazek's LEGO Factoring Service, at* http://my.voyager.net/lar/factor_desc.html (last visited Apr. 1, 2001).

49. *See generally* David E. Sorkin, *Online Payment Systems: List, at* http://www.onlinepaymentsystems.com/list.html (last modified Apr. 13, 2001).

50. PayPal, *About Us, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/about-outside (last visited March 30, 2001).

51. Matt Duffy, *PayPal Secures $90 Million,* AuctionWatch.com (Mar. 7, 2001), http://www.auctionwatch.com/awdaily/dailynews/march01/1-030701.html.

52. *Id.*

53. A "personal" account holder may receive up to $100 in payments charged to other members' credit cards per month. PayPal, *Fees for U.S. Accounts, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/fees-outside (last visited Apr. 4, 2001). PayPal's user agreement requires those who "use the Service for the purpose of conducting e-commerce on a regular basis" to obtain a "premier" or "business" account. PayPal, *User Agreement for PayPal Service,* § I(1), *at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/terms-outside (last modified Apr. 19, 2001).

54. Duffy, *supra* note 51.

55. PayPal's "Help Center" provides an overview of the company's services. PayPal, *Help Center, at* http://www.paypal.com/cgi-bin/webscr?cmd=_help-ext&eloc=0&loc=1 (last visited Apr. 1, 2001). If a PayPal user sends a payment to someone who is not a registered user, the recipient will receive an e-mail message inviting him or her to visit PayPal's web site in order to join and claim the payment. *Id.* The sender can cancel the payment upon discovering the error only if the recipient has not yet registered and collected the money. *Id.*

56. The automated clearing house (ACH) network enables credits and debits to be posted to consumer deposit accounts electronically. Winn & Wright, *supra* note 37, § 7.06. An ACH payment is treated as an electronic funds transfer subject to Regulation E. *Id.*

deducted.[57] The seller can leave the funds in his or her PayPal account,[58] or may direct PayPal to transfer them into a bank account.[59] The seller never sees the buyer's credit card or bank account number, and PayPal provides the parties with little or no information about one another other than that which they choose to disclose.

Billpoint is another major online payment service, currently available for use in 37 countries.[60] Billpoint was founded in 1998 and was acquired by eBay in 1999.[61] As eBay's in-house online payment service,[62] Billpoint has an inherent advantage over competing payment services, although PayPal still seems to enjoy greater popularity even on eBay.[63]

Billpoint operates in much the same manner as PayPal, except that Billpoint does not have individual accounts where users' funds are held. Buyers therefore pay by credit card or ACH transfer, and payments (less Billpoint fees[64]) are automatically credited to the seller's bank account immediately in the case of credit card payments, or after three business

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57. A fee is assessed for receiving credit card and ACH payments if the seller is a "premier" or "business" member. For transactions under $15, the fee is $0.30; for transactions of $15 or more, it is $0.30 plus 2.2%. PayPal, *Fees for U.S. Accounts, supra* note 53.

58. PayPal's initial business model was to offer all of its services for free, and earn revenues solely from the float on members' positive balances.

59. PayPal even offers an "auto-sweep" service, which automatically transfers any positive balance into a user's bank account on a daily basis for a fee of 0.35%. PayPal, *Auto-Sweep, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/autosweep-outside (last visited Apr. 4, 2001).

60. Billpoint, *What's New, at* http://www.billpoint.com/about_bp/news.html (last visited Apr. 4, 2001).

61. Billpoint, *About Us at* http://www.billpoint.com/about_bp/aboutbp.html (last visited Apr. 4, 2001).

62. *See, e.g.,* eBay, *What Buyers Should Know About Payment Options Available on eBay, at* http://pages.ebay.com/help/buyerguide/paymenttips.html (last visited Apr. 1, 2001).

63. EBay does not release Billpoint usage data. However, searching for the words "paypal" and "billpoint" in eBay auction listings illustrates the relative popularity of the two competing payment services. On April 4, 2001, for example, approximately 100 items were listed with "billpoint" in the title, compared to well over 10,000 with "paypal." Within the "Books" category, approximately 70,000 item listings contained the word "billpoint" in either the title or the description, versus 170,000 for "paypal." Of course, the proportion of eBay buyers who choose to pay by Billpoint may be higher than for PayPal.

64. Billpoint's fees for receiving credit card payments are slightly higher than PayPal's. "Standard" Billpoint account holders pay $0.35 to receive credit card payments of up to $15, and $0.35 plus 3.0% for higher amounts. (The latter fee includes a 0.5% "deposit fee" for transferring the funds into the seller's bank account.) For "merchant" accounts, the fee for amounts over $15 is lower: $0.35 plus 2.25%, including the "deposit fee." Additional fees apply to non-U.S. credit cards and bank accounts. Billpoint does not charge transaction or deposit fees for receiving ACH payments. eBay, *Online Payments by Billpoint Fee Schedule, at* http://pages.ebay.com/help/sellerguide/bp-fees.html (last visited Apr. 4, 2001).

days for ACH transfers.[65] Credit card charges are posted as purchases with Billpoint as the merchant of record. However, an abbreviated form of the seller's e-mail address also appears on the buyer's credit card statement. As is the case with PayPal, the seller must be a registered Billpoint user. If the buyer is not also a registered user, he or she is required to provide credit card or bank account information at the time of the payment.

ProPay takes a different approach than PayPal and Billpoint. Instead of serving as an intermediary to the transaction, ProPay enables sellers to obtain their own credit card merchant accounts so that payments are charged to a buyer's credit card as purchases from the actual seller, rather than from a payment service. Unlike traditional credit card merchant account service providers, ProPay does not impose startup or periodic fees or minimum volume requirements, although ProPay does hold a portion of payments received in a reserve account to cover potential chargebacks. ProPay's transaction fees are slightly higher than the fees for PayPal, Billpoint, and traditional merchant credit card merchant accounts.[66]

CCNow is yet another online payment service. CCNow acts as the retail seller in an auction or other online transaction by purchasing the goods from the original seller and then reselling them to the buyer using the original seller as a drop shipper.[67] CCNow collects a credit card payment from the buyer, and pays accumulated amounts to sellers (less CCNow's commission) twice per month.[68]

BidPay differs from the payment services discussed thus far in that only the buyer need enter into a relationship with BidPay.[69] To make an online auction purchase using BidPay, a buyer accesses BidPay's web

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65. eBay, *Seller Introduction to Electronic Check, at* http://pages.ebay.com/help/sellerguide/echeck-seller.html (last visited Apr. 4, 2001).

66. ProPay's transaction fee for credit card payments is $0.35 plus 3.5% of the transaction amount. ProPay, *Payment Services Agreement*, http://www.propay.com/agreement.pdf (on file with Author). ProPay also supports other types of payments, such as transfers between two registered users' ProPay accounts.

67. CCNow, *Overview*, at http://www.ccnow.com/overview.html (last visited Apr. 4, 2001).

68. CCNow's fee is 9% of the transaction amount, or 8% during November and December. CCNow, *Service Details,* http://www.ccnow.com/details.html (last visited Apr. 4, 2001). This is significantly higher than the fees charged by competing services. However, CCNow advertises as a benefit of its service that buyers need not pay sales tax no matter where they are located, because CCNow is based in Delaware, which has no state sales tax. *See id.*

69. A seller who is located outside the United States must register with BidPay in order to receive payments. BidPay, *Seller Frequently Asked Questions, at* http://www.bidpay.com/SellerFaq.htm (last visited Apr. 4, 2001).

site and provides a credit card number and the relevant transaction information. BidPay charges the transaction amount plus a fee to the buyer's credit card and then mails a Western Union money order to the seller.[70] (A similar service is offered by a competing firm, EnergyFlow.[71]) Because BidPay notifies the seller by e-mail when it deposits the money order in the mail, the seller may choose to ship the goods at that time or may wait until receiving the money order.[72] BidPay claims to be the largest issuer of Western Union money orders in the United States, sending hundreds of thousands of money orders to tens of thousands of sellers annually.[73]

In addition to the payment-only services, there are several online escrow services, the best known of which is Tradenable (formerly i-Escrow).[74] Escrow services generally operate like PayPal and Billpoint, except that an escrow service holds the buyer's payment until after the goods have been shipped and the buyer has had an opportunity to inspect them. Escrow services generally charge a higher fee than payment-only services[75] and their tracking and insurance requirements can also add significant costs to a transaction.[76] However, because

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70. *Id.* BidPay's basic fee is $5.00 for amounts up to $100, and $5.00 plus 2.25% for amounts between $100 and $500. Additional fees apply if the buyer wishes to have the payment sent via Priority Mail or Express Mail. BidPay, *Pricing Information, at* http://www.bidpay.com/pricing.htm (last visited Apr. 4, 2001).

71. EnergyFlow sells both money orders and, for a slightly lower fee, "unbounceable" checks. Its fees are comparable to those charged by BidPay. *See* EnergyFlow.com, *Help: Pricing, at* http://www.energyflow.com/help/Pricing/ (last visited Apr. 13, 2001).

72. BidPay, *supra* note 69.

73. *Id.*

74. Other online escrow services include Escrow.ca, Escrow.com, eClearing, SafeBuyer, and TradeSecure, along with several that appear no longer to be in operation (Internet Clearing Corporation, itrustyou.com, SecureTrades, Trade-direct, and TradeSafe). *See* Sorkin, *supra* note 49. FairMarket's ASAP payment service, offered by MSN Auctions and several smaller auction sites, also acts as an escrow service, releasing funds to a seller only after the buyer has received and had an opportunity to inspect the goods. *See* Selis, *supra* note 4, at 15; MSN Auctions, *ASAP FAQ, at* http://auctions.msn.com/Scripts/FPFaqs.asp (last visited Apr. 26, 2001).

75. Tradenable charges 4% for credit card payments and 2% for other forms of payment with a minimum charge of $7.95. Tradenable, *Services: Buyers and Sellers, at* http://www.tradenable.com/forms_of_payment.html (last visited Apr. 11, 2001). Other escrow services typically charge similar or higher fees. Escrow.ca, *Fee, at* http://www.escrow.ca/Fee.lasso (last visited Apr. 11, 2001); Escrow.com, *Escrow Fees, at* http://www.escrow.com/solutions/vehicle/fees.asp (last visited Apr. 4, 2001); SafeBuyer.com, *Fees, at* http://www.safebuyer.com/fees.html (last visited Apr. 4, 2001); TradeSecure, *Fees, at* http://www.tradesecure.com.au/fees.htm (last visited Apr. 11, 2001).

76. Escrow services generally require that goods be shipped using a carrier that provides insurance and tracking information and insurance, which can add substantially to shipping costs, especially for relatively inexpensive items that otherwise might be sent via regular mail. For

escrow services provide substantially more protection for the buyer, their fees are more likely to be paid by the buyer,[77] while payment-only services (and credit card association rules) generally prohibit sellers from imposing a surcharge to offset fees.[78]

IV. PAYMENT-RELATED RISKS AND BENEFITS

Efficiency and convenience appear to be the primary motivations for buyers and sellers to use online payment systems and, albeit to a lesser extent, the factors that differentiate the systems from one another. Other relevant intrinsic characteristics include reliability, security and finality.[79]

Online payments enable transactions to be completed more quickly and often with less effort. A buyer who has bid on and won an item at an online auction site can submit payment via the web rather than by mail. The seller immediately receives payment or, in the case of BidPay and online escrow services, notification that payment has been made and authorization to proceed with the transaction. Thus the seller can ship the goods promptly rather than waiting a few days to receive payment or possibly much longer for a check to clear.

Online payment services are particularly well-suited to international transactions where mailing a payment instrument would take even longer and would likely involve additional transaction and conversion costs. However, while acceptance of traditional payment devices is nearly universal,[80] many buyers and sellers do not use online payment

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example, the U.S. Postal Service charges $0.40 for Delivery Confirmation service, but requires that an item be sent via Priority Mail, at a minimum cost of $3.50, to be eligible for that service; postal insurance adds another $1.10 or more, bringing the total to at least $5.00. U.S. Postal Service, *Ratefold*, Notice 123, at 4 (effective Jan. 7, 2001), *available at* http://pe.usps.gov/cpim/ftp/notices/Not123/Not123.pdf. Even that may not be sufficient for some escrow services—Escrow.com, for example, requires shipments via the U.S. Postal Service to use Express Mail service, at a minimum cost of $12.45. Escrow.com, *Customer Support: Shipment,* http://www.escrow.com/support/shipment.asp (last visited Apr. 4, 2001); U.S. Postal Service, *Ratefold*, *supra,* at 1.

77. An exception to the buyer-pays rule for escrow services is Fairmarket's ASAP payment service, for which the seller pays. *See* MSN Auctions, *supra* note 74.

78. *See, e.g.,* Billpoint, *Seller Help, at* http://www.billpoint.com/help/sellerguide/policies.html (last visited Apr. 11, 2001); PayPal, *supra* note 53, § I(13). *See generally* Matt Duffy, *Charging Buyers for PayPal?,* AuctionWatch.com (Feb. 28, 2001), *at* http://www.auctionwatch.com/awdaily/dailynews/february01/1-022801.html**.**

79. Extrinsic characteristics of various payment methods, including their effect on transaction-related risks, are discussed in Part V.B. *infra*.

80. Very few eBay listings specify that only online payments are accepted, although some sellers may request or require buyers located in other countries to pay online in order to minimize

services. Unless both parties agree to use an online payment service and agree upon which particular service to use,[81] a transaction is likely to be completed using a traditional payment device.[82]

Cost is another concern, but, surprisingly, it does not seem to be as major a factor as convenience, for online auction participants, in deciding whether to switch from traditional payment devices to their online counterparts.[83] For most online payment services, the seller typically contracts with the service and pays the transaction fee.[84] While the buyer is normally aware that a third-party payment service is being used, the buyer generally need not be a registered user of the service and may not even be familiar with its transaction fees. The fees tend to be approximately the same as those payable by merchants for accepting traditional credit card payments; for example, under $1 for a $10 sale, or about $3 for a $100 sale. Sellers may view these costs as comparable to the costs of processing other forms of payment, or, perhaps more likely, may believe that accepting online payments increases the demand by potential bidders for their goods. Most sellers apparently understand the fees charged by online payment services and seem to be somewhat sensitive to differences in fees charged by competing services.[85]

With BidPay, the buyer, rather than the seller, contracts with the payment service and pays its fee. The seller may not even be familiar with the service. From both parties' perspective, a BidPay transaction is effectively equivalent to a buyer purchasing a money order and mailing it to a seller, except that BidPay makes this process more convenient for

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delays and transaction costs. Nearly all sellers will accept money orders, and many will also take cash (at the buyer's risk) or personal checks (though often with a hold period).

81. The need for agreement between the parties as to the particular payment service to be used, together with the widespread acceptance of PayPal and marketplace-specific services such as eBay's Billpoint, serves as a possible explanation for the failure of several competing payment services, including ExchangePath, payMe.com, and PayPlace.

82. *See supra* note 5.

83. If online payments are posted to the buyer's credit card account as cash advances or quasi-cash transactions rather than as purchases, however, the buyer may incur costs high enough to deter him or her from using online payments in the future. *See infra* note 124 and accompanying text. On the other hand, both buyers and sellers may be induced to use online payment mechanisms by the substantial cost savings that they afford for international transactions. *See supra* text accompanying notes 19-23.

84. As used here, "transaction fee" includes both the basic transaction fee and any additional fees that the seller must pay in order to obtain access to funds received, such as Billpoint's 0.5% "deposit fee." Payment services also may impose fees for other occurrences, including credit card chargebacks and unsuccessful ACH transfers. *See, e.g.,* ProPay, *supra* note 66.

85. *See* David Baranowski, *PayPal's Plea for Honesty,* AuctionWatch.com (Sept. 13, 2000), *at* http://www.auctionwatch.com/awdaily/dailynews/september00/2-091300.html.

a buyer. Especially for small transactions, BidPay's minimum fee of $5 may seem high, but most buyers who choose to use BidPay are presumably willing to pay for the convenience that it offers, at least where the seller does not accept payments through other online payment services.

Generally, online escrow services also receive their fee from the buyer, either directly or indirectly, and escrow fees usually are higher than the fees for payment-only services. Shipping and related expenses may also be higher when an escrow service is used and these costs also are likely to be borne by the buyer. Buyers who elect to use escrow services for the protection offered by such services will pay a premium, often a substantial one. On the other hand, an escrow service may be no more expensive than C.O.D. service, and buyers' reasons for selecting escrow or C.O.D. are probably very similar.

Reliability is another important concern. Online payment system outages can frustrate buyers and sellers, preventing them from sending or receiving payments, confirming transactions and accessing their funds.[86] It is not inconceivable that more severe problems could result in the loss of transaction or account data. Yet traditional payment devices are not immune from reliability problems: for example, checks sometimes bounce or get lost in the mail, and the real-time verification that is possible with most online payment systems may give them the edge in reliability. Furthermore, online auction participants are accustomed to dealing with temporary site outages; eBay itself is notorious for its unplanned downtime.[87]

The security of online payment systems is also a key issue. Generally, online payment services use encryption and passwords, and in some instances they verify users' personal data before accepting or making payments (or before lifting a low transaction cap). However, these services must strike a balance between security and ease of use in

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86. *See, e.g.,* Greg Sandoval, *Holiday Traffic Jam Leaves PayPal Users Honking Mad,* CNET News.com (Nov. 28, 2000), *at* http://news.cnet.com/news/0-1007-200-3894107.html; Greg Sandoval, *PayPal's Outages Disrupt eBay Auctions,* CNET News.com (May 18, 2000), *at* http://news.cnet.com/news/0-1007-200-1896323.html.

87. *See, e.g.,* Michelle Dennehy, *11-Hour Outage Strikes eBay,* AuctionWatch.com (Jan. 4, 2001), *at* http://www.auctionwatch.com/awdaily/dailynews/january01/1-010401.html; Melanie Austria Farmer, *eBay Goes Back Online After Prolonged Outages,* CNET News.com (Jan. 4, 2001), *at* http://news.cnet.com/news/0-1007-200-4366844.html; Nancy L. Hix, *During the Auction: Dealing with Site Outages,* AuctionWatch.com, *at* http://www.auctionwatch.com/awdaily/tipsandtactics/sel-outage.html (last visited Apr. 4, 2001); Troy Wolverton, *eBay Says System Upgrade Tied to Recent Outages,* CNET News.com (Oct. 24, 2000), *at* http://news.cnet.com/news/0-1007-200-3276880.html.

order to gain acceptance.[88] There has been at least one scam in which PayPal users were directed to a fake version of the PayPal web site that captured their usernames and passwords,[89] and it is certainly conceivable that someone could hack into PayPal or a competing service in order to divert transactions, steal account balances, or gain access to confidential personal and financial data, just as has happened with other e-commerce firms.[90] It is true that low transaction limits and federal law can provide some degree of protection against these risks, but consumers (as well as businesses) generally seem to pay attention to security issues only in the breach.

A more common security risk involves diversion of payment when a user accidentally directs a payment to the wrong recipient—for example, mistyping the intended recipient's e-mail address—along with the related risk that a user may enter the wrong amount.[91] Some online payment systems have features designed to reduce these risks.[92] However, the likelihood that an online payment will be sent to the wrong e-mail address still seems greater than the chance that a check will be mailed to the wrong physical address, especially with services that permit online payments to be sent to those who are not yet registered users.[93]

Finality of payment is another intrinsic concern, and one that is closely related to issues extrinsic to the payment process.[94] Finality is obviously important to sellers; just as a seller who accepts a personal check may wait for it to clear before shipping the goods, a seller may resist accepting an online payment if there is a substantial risk that the payment may be reversed for reasons beyond the seller's control.[95] On

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88. Elliot Zaret, *Don't Bank on E-Payments Yet,* MSNBC (Jan. 4, 2001), *at* http://www.msnbc.com/news/511209.asp.

89. Bob Sullivan, *Scam Artist Copies PayPal Web Site,* MSNBC (July 21, 2000), *at* http://www.msnbc.com/news/435937.asp (describing fraudulent site located at "www.paypai.com").

90. *See, e.g.,* John Borland, *British Police Charge Teens with Online Credit Card Thefts,* CNET News.com (Mar. 24, 2000), *at* http://news.cnet.com/news/0-1007-200-1583595.html; Robert Lemos & Troy Wolverton, *Egghead Silent; Customers Angry,* CNET News.com (Jan. 2, 2001), *at* http://news.cnet.com/news/0-1007-200-4349567.html.

91. PayPal specifically disclaims responsibility for these risks. *See* PayPal, *supra* note 53, § II(2)(b).

92. Most payment services, for example, display the recipient's name or e-mail address and the transaction amount, and require confirmation by the user before the payment is finalized.

93. *See supra* note 55.

94. A payment is final when it is no longer subject to revocation. Winn, *supra* note 41, at 679.

95. Buyers as well as sellers may benefit from finality: A seller may be willing to accept a lower price (or starting bid), or to ship an item more quickly, in exchange for the certainty afforded

the other hand, buyers may hesitate to forego any remedies until they have received and are satisfied with the goods. Thus, buyers may prefer payment mechanisms that provide them with the ability to dispute or reverse the payment after it has been made.[96]

By providing the seller with a money order before the seller is obligated to deliver the goods, BidPay resolves this question in favor of finality. At the other extreme are PayPal and CCNow, which offer their own refund or investigation procedures as well as recognizing credit card purchasers' chargeback rights. Some payment services even reserve the right to debit a seller's bank account in order to cover chargebacks.[97]

Most of the other online payment services fall somewhere in between these two extremes, as do the online escrow services; although finality is not as major an issue for escrow services given the other protections they provide.[98] PayMe.com, a now-defunct payment service that only accepted credit cards, required buyers to agree that all payments were final and not reversible,[99] although it is not clear what effect this provision had on chargebacks initiated through a buyer's credit card issuer.[100] Billpoint also generally favors sellers by limiting involuntary refunds to situations in which a buyer's credit card issuer initiates a chargeback. Therefore, ACH transfers through Billpoint are apparently final.[101] PayPal originally took a similar approach, but in mid-2000 altered its policies and began to provide buyers with limited protection against fraud. Sellers no longer enjoy as strong an assurance

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by an irreversible payment, and a buyer may face less competition in bidding if other potential buyers view the seller's payment terms unfavorably.

96. See Winn, *supra* note 41, at 679. This analysis considers the effects of reversibility on the payment itself, rather than its extrinsic effects on transaction risks, which are considered in the following section. *See infra* Part V.

97. ProPay, *Payment Services Agreement, supra* note 66, § 4(B); Yahoo! PayDirect, *Yahoo! PayDirect Terms of Service,* § 12, *at* https://paydirect.yahoo.com/PD/app/pd/header-drv.pd?what=tos&Sid=Deleted (last visited Mar. 9, 2001).

98. Interestingly, one escrow service, eClearing.com, did not accept credit card payments, even though it was operated by a large financial institution, Bank of America. Instead, the buyer was required to remit funds to eClearing.com by check, EFT, or wire transfer; buyers who wished to pay by credit card were advised to obtain a credit card cash advance and then remit the funds by one of the required methods. *eClearing.com FAQs, at* http://www.eclearing.com/faqs.html (on file with Author).

99. Ed Ritchie, *Payment Processor Wars,* AuctionWatch.com (Aug. 18, 2000), *at* http://www.auctionwatch.com/awdaily/dailynews/august00/1-081800.html.

100. The applicability of Regulation Z to credit card purchases made using payment intermediaries is not entirely clear. *See infra* text accompanying notes 123-25.

101. Billpoint, *User Agreement,* § 4, *at* http://www.billpoint.com/policies/user-agreement.html (last modified June 30, 2000).

of finality for most transactions.[102] In recent months, PayPal has faced strong criticism from users whose accounts have been frozen in response to disputes by buyers or suspicion of fraud, even if the disputed amount is only a small portion of the user's PayPal account balance.[103] Even if payments are deemed final under the terms of a payment service, a seller may be vulnerable to chargebacks and other disputes submitted through credit card issuers for transactions funded by credit card, just as merchants who accept credit cards in a traditional manner are vulnerable to such risks.

On balance, the intrinsic characteristics of online payment methods offer advantages over traditional payment methods, especially the ones used most commonly in online auctions. Online payments provide auction participants with convenience and efficiency, and in most instances do so at relatively little cost.

V. EXTRINSIC RISKS AND BENEFITS

In addition to the intrinsic payment-related characteristics of online

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102. Ritchie, *supra* note 99. PayPal's actions apparently are based upon a provision in its user agreement that gives PayPal "the right to hold funds beyond the normal distribution periods for transactions it deems suspicious to ensure integrity of the funds." PayPal, *supra* note 53, § II(2)(a), and a general provision that denies users any protection against reversal of transactions except in limited circumstances, *id.,* § I(8). The latter provision reads in full as follows:

8. Receipt of Payments; Risk of Reversal of Transactions; Collection of Funds you owe PayPal. When you receive a payment through the Service, unless you follow the steps necessary to qualify for our Seller Protection Policy described in Part IV of this User Agreement, you are not protected against a subsequent reversal of the transaction. In the event that the sender's transaction is reversed for any reason and you do not qualify for the Seller Protection Policy for that transaction, you will owe PayPal for the amount of the reversed transaction plus any fees imposed on PayPal as a result of the reversal. Examples of such a reversal include, but are not limited to, a credit card charge-back by the sender of the payment, and a reversal of the transaction because the sender of the payment was using a stolen credit card or unauthorized checking account. PayPal will seek to recover the funds from you by debiting your PayPal balance and, if there are not sufficient funds in your PayPal balance, PayPal reserves the right to collect your debt to PayPal by any other legal means. You authorize PayPal to charge your credit card or debit card in the amount of any debt to PayPal.

PayPal, *supra* note 53, § I(8). The "Seller Protection Policy" applies only if the seller has a "business" or "premier" account, has shipped the goods to the buyer at a U.S. address previously confirmed by PayPal, and can provide proof of shipment and delivery of the goods. *Id.* at § IV(3).

103. *See, e.g.,* Damien Cave, *Losing Faith in PayPal,* Salon.com (Feb. 23, 2001), *at* http://www.salon.com/tech/feature/2001/02/23/pay_pal/; Alexis D. Gutzman, *ECommerce-Guide, PayPal* (Aug. 28, 2000), *at* http://ecommerce.internet.com/reviews/article/0,1467,3691_382831,00.html; Greg Sandoval, *PayPal, BBB Come to Terms on Customer Service Rating,* CNET News.com (Jan. 23, 2001), *at* http://news.cnet.com/news /0-1007-200-4578975.html; Bob Sullivan, *PayPal No Friend to Scam Victims,* MSNBC (July 18, 2000), *at* http://www.msnbc.com /news/434192.asp.

payment methods, various extrinsic factors are also relevant to online auction participants in deciding whether to employ online payments. Among these are the risk of loss due to fraud, nonperformance or default by a payment service, the privacy implications of selecting a particular payment method, and the effects of a payment mechanism on the risks involved in the underlying transaction.

A. Payment Service Failure

One of the risks faced by users of online payment services is the possibility that a payment service will commit an inadvertent error, intentionally misappropriate funds or go out of business altogether. The last of these possibilities seems most likely. In fact, several online payment services have already ceased operations.[104] Nonetheless, all three possibilities warrant concern given the unregulated status of online payment services and the fact that the remote location of a payment service may reduce an injured party's prospects for a remedy.[105]

In most instances, buyers and sellers probably have little basis for appraising the likelihood that a systemic problem will arise. People probably rely upon well-known brand names[106] and auction site affiliations[107] in deciding whether to trust a particular payment service.

The potential magnitude of the risk is also important. Sellers who receive payments through PayPal and keep the funds on deposit with PayPal may face greater exposure than those who withdraw their funds promptly or those who receive payments through Billpoint, which automatically transfers any payments received to the recipient's bank account.[108] Sellers who engage in a high volume of transactions may be at greater risk than those who are in a position to monitor transactions more carefully. Also, a payment service that has the ability to access a

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104. Online payment and escrow services that appear to be defunct include ExchangePath, payMe.com, PayPlace, Internet Clearing Corporation, itrustyou.com, SecureTrades, Trade-direct, and TradeSafe. *See* Sorkin, *supra* note 49.

105. *See generally* Winn, *supra* note 41, at 680-82 (discussing systemic risk).

106. PayPal presently has the strongest brand name among online payment services; other services may benefit from the well-known banks or other companies with which they are affiliated, such as Bank of America (eClearing.com), Bank One (eMoneyMail), Citibank (c2it), and Western Union (MoneyZap).

107. Users thus may be apt to trust Billpoint (eBay's proprietary payment service) and other payment services operated by or in affiliation with auction sites.

108. PayPal offers automatic insurance to cover unauthorized withdrawals, but the coverage does not appear to protect against other risks to a user's account balance PayPal, *PayPal Account Insurance, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/travelers-outside (last visited Apr. 22, 2001).

consumer's bank account[109] poses a greater potential risk than one that merely has the consumer's credit card number because it is easier to withhold payment on fraudulent credit card charges than to recover funds fraudulently transferred from a bank account.[110]

For low and moderate-volume buyers and sellers who do not maintain high balances on account with a payment service, these risks are probably not substantial enough to be of great concern. Additionally, regulation of online payment services under the proposed Uniform Money Services Act would likely reduce the risks attributable to payment service failures.[111] On the other hand, these risks may be exacerbated by changes in the online payments market and the increasing use of payment services in international transactions.

B. Privacy Implications

A second set of extrinsic risks relates to the use and potential misuse of personal information by online payment services. Because they are largely unregulated, online payment services are generally free of legal constraints on collection and use of personal data,[112] unlike banks and other financial services providers.[113] Generally, online payment services provide at least some privacy protections voluntarily, either in their general terms of service or in a separate privacy policy.[114]

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109. *Compare* PayPal, *supra* note 53, § I(10) ("PayPal will never make electronic transfers from your checking account without your explicit permission."), *with* ProPay, *Payment Services Agreement, supra* note 66, at § 6(E) ("You authorize ProPay, or their vendors or agents, to initiate debit/credit entries to the Commerce Account, the Reserve Account or any other account maintained by you at any institution that is a receiving member of ACH.") *and* Yahoo! PayDirect, *supra* note 97, at § 17 ("You authorize the Bank, without notice to you, to charge any credit card, ATM/check card or deposit account you have used to fund your PayDirect Account in the amount of any such negative balance.")

110. Buyers as well as sellers incur risks by giving a payment service access to their bank account. *See, e.g.,* Brian Livingston, *When Internet Convenience Costs a Bundle,* CNET News.com (Apr. 6, 2001), *at* http://news.cnet.com/news/0-1278-210-5509285-1.html.

111. *See supra* note 43.

112. Even the proposed Uniform Money Services Act would not impose confidentiality rules or other privacy requirements on payment services. *See* UNIFORM MONEY SERVICES ACT (Aug. 9, 2000), *at* http://www.law.upenn.edu/bll/ulc/moneyserv/ms00ps.htm; *see also* UNIFORM MONEY-SERVICES BUSINESS ACT, 2000 ANNUAL MEETING DRAFT, WITH PREFATORY NOTE AND REPORTER'S NOTES (July 28, 2000), *at* http://www.law.upenn.edu/bll/ulc/moneyserv/msb0620.htm.

113. Users of online payment services that are operated by or co-sponsored by financial institutions thus may enjoy stronger privacy protections, at least to the extent that regulations applicable to financial institutions apply to their payment service operations.

114. *See, e.g.,* PayPal, *Privacy Policy, at* http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/privacy-outside (last visited Apr. 22, 2001); Billpoint, *Privacy Policy, at* http://www.billpoint.com/policies/privacy.html (last visited Apr. 22, 2001). Even if such

But the desire to maximize revenues (especially revenues from sources other than transaction fees) gives payment services an incentive to engage in secondary uses of personal information, including the sale of contact data, transaction records, and other information to third parties for marketing purposes. Furthermore, payment services may share personal data with one another and with other financial service providers for other purposes, such as minimizing credit risk and preventing fraud.[115] Finally, a payment service may cause personal information about the seller to be revealed to the buyer, or vice versa, beyond that which the parties disclose directly to one another.[116]

Nonetheless, the most likely privacy concern for online auction participants is the confidentiality of their bank account and credit card account information. It appears that online payment services provide relatively strong protection for such information. In fact, one of the primary advantages of making a credit card payment through a trusted intermediary instead of directly is that the buyer need not disclose his or her credit card number to the seller. This way, the payment service's security is likely to be stronger than that offered by a seller who accepts direct credit card payments.[117] On balance online payment services may actually provide auction participants with more confidentiality than they would have with traditional payment methods.[118]

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undertakings are legally binding, however, the damages available for breach are probably quite limited in most situations.

115. *See, e.g.,* Bob Sullivan, *They Know Where You're Shopping,* MSNBC (Aug. 3, 2000), *at* http://www.msnbc.com/news/441058.asp (describing how PayPal and other sites share transaction data in order to prevent fraud).

116. Billpoint, for example, says that it will provide a seller with the buyer's name, e-mail address, telephone number, shipping address, and shipping address telephone number. Billpoint, *supra* note 114. ProPay's terms expressly authorize ProPay to disclose a user's name and address to anyone upon request. ProPay, *Payment Services Agreement, supra* note 66, at § 15(B)(ii).

117. For example, some sellers who accept credit cards advise buyers to send the credit card number via insecure e-mail, and they may store credit card numbers and other transaction data on insecure computers. ProPay requires sellers to use approved encryption systems for electronic commerce transactions, and to store account numbers and other data securely, ProPay, *Payment Services Agreement, supra* note 66, at §§ 5(D), 15(B), though it is not clear how consistently these requirements are enforced, and other merchant account service providers may not impose comparable requirements.

An analogous comparison exists for ACH transfers processed by online payment services, as compared to payments made directly to a seller by personal check, since the former prevents the seller from learning the buyer's checking account number.

Personal checks afford even greater privacy benefits than credit cards, largely because of the limited amount of personal data they contain. *See* Winn, *supra* note 41, at 683 n.23.

118. Most of the advantage goes to buyers, since their account data is held only by the intermediary, but sellers too may be afforded additional privacy protection by online payment

C. Transaction Risk

Some consumers are familiar with the use of payment devices as a means of insuring against risk in an underlying transaction, either because they are familiar with legal protections[119] or because they believe that the ability to stop or withhold payment may provide them with practical leverage in the event of a dispute.[120] This awareness is probably rising as credit card providers and consumer advocates promote increased use of credit cards as a means of reducing the risks of engaging in online commerce.[121] While competing online payment mechanisms may appear to share similar characteristics, the protection they offer against transaction-related disputes and other extrinsic risks varies greatly. Typically, this variation is not negotiated by parties[122] and, indeed, may not even be apparent to them.

The chargeback rights that consumers normally can assert against credit card issuers[123] are not necessarily available for transactions that involve a payment service intermediary. First, if a transaction is classified as a cash advance or quasi-cash transaction rather than as a purchase, then the dispute rights available for purchases under Regulation Z do not apply. The classification decision apparently is made, at least in part, by the buyer's credit card issuer.[124] Even if the

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services. If a buyer is willing, a seller can normally receive an online payment without even disclosing his or her physical location to the buyer—something that would not be possible if the buyer had to mail payment to the seller. (Of course, the seller ordinarily would still need to know the buyer's location, unless the buyer accepted delivery of physical goods though an intermediary, or of electronic goods via the Internet.) Cash is often considered the most anonymous payment method, but online payments can provide some privacy protections that are not available even with cash, as in this instance.

119. The federal regulations that preserve consumers' defenses against creditors also require relevant disclosures, presumably increasing public awareness of dispute rights. *See supra* notes 35-37 (discussing the federal regulations).

120. Most people are probably aware that it is possible to stop payment on a personal check that has not yet been presented.

121. *See supra* note 29.

122. *See generally* Maggs, *supra* note 39, at 768-72 (discussing shortcomings of contracts as a source of law for payment transactions).

123. *See supra* text accompanying notes 35-37.

124. Some online payment services warn that a buyer's credit card issuer may post transactions as cash advances or quasi-cash transactions rather than as purchases. *See* eMoneyMail, *Frequently Asked Questions,* https://www.emoneymail.com/Default.asp?WCI=FAQ (last visited Apr. 17, 2001); Western Union MoneyZap, *Frequently Asked Questions: Using My Credit or Debit Card,* https://www.moneyzap.com/static/faq/creditdebit.html (accessed Apr. 17, 2001); Yahoo! PayDirect, *Yahoo! PayDirect Terms of Service, supra* note 97, § 7(A). Citibank apparently posts payments made using its c2it payment service as purchases, but warns that other card issuers may classify such transactions differently. Telephone interview with c2it Customer Service Representative (Apr.

payment is classified as a purchase or is considered to be a separate transaction from the underlying sale of goods, then the consumer's chargeback rights may apply only to payment disputes and not to disputes involving delivery or conformity of the goods.[125] Finally, even if the consumer is able to assert transaction-related defenses against his or her credit card issuer, those defenses may be effectively foreclosed by the terms of the payment service agreement.[126] As a result, a chargeback request that an issuer initially allows may later be rejected on the merits.

On the other hand, using an online payment service may provide the buyer with additional protection in the event of a dispute. For example, a payment service may investigate and intervene in disputes,[127] reimburse dissatisfied buyers,[128] or provide insurance against fraud.[129] These protections are particularly important where credit card chargeback rights are unavailable; for example, where a payment is funded by debit card, ACH transfer, or a transfer of an existing account balance.

Paying via BidPay offers a buyer very little protection against transaction-related risks because using BidPay is comparable to mailing a money order directly to the seller. The payment is final for all practical purposes, and an unsatisfied buyer must look elsewhere for recourse, just as if the payment had been made in cash. Although BidPay does accept credit cards, its terms (to which buyers must agree) clearly state that BidPay's obligation is limited to delivering a money order and that the buyer assumes all liability for fraud.[130]

17, 2001). On the other hand, credit card purchases made via PayPal, Billpoint, and BidPay apparently are all posted as purchases, although it is not clear whether or how these payment services are able to ensure that individual card issuers classify the transactions appropriately.

125. *See infra* note 135.

126. *Cf.* Izraelewitz v. Manufacturers Hanover Trust Co., 465 N.Y.S.2d 486, 488 (Civ. Ct. N.Y.C. Kings County 1983) (enforcing merchant's "no refund" policy in dispute asserted against credit card issuer).

127. PayPal will investigate buyers' complaints and may attempt to recover funds from a seller in order to reimburse a dissatisfied buyer. PayPal, *supra* note 53, at § IV(2)(i).

128. CCNow requires that sellers accept returns, and offers refunds to dissatisfied buyers as a matter of course. CCNow, *Client Agreement,* § 6(d), *at* http://www.ccnow.com/agreement.html (last visited Mar. 3, 2001).

129. In some instances, PayPal will augment eBay's insurance coverage with up to $200 in "additional protection" if it is unable to recover funds from a seller who cannot provide proof of delivery. PayPal, *supra* note 53, at § IV(2)(ii).

130. A buyer who prefers to pay by credit card in order to limit transaction-related risks, and who is unfamiliar with BidPay, might be induced to bid on an item by a seller's representation that he or she accepts credit card payments through BidPay—only to discover, after winning the auction and attempting to make payment, that paying via BidPay fails to afford the protection to which the buyer is accustomed. Most sellers who accept credit cards only though intermediary payment

BidPay's failure to protect buyers from transaction risks seems appropriate for a number of reasons. A money order, whether or not obtained through BidPay, serves as a close substitute for cash, and once it has delivered the money order to the seller, BidPay would normally have no means of recovering the payment.[131] Buyers who choose to use BidPay probably do so for convenience rather than as a means of protecting themselves from transaction risks.[132] Finally, BidPay acts as an agent of the buyer unlike other payment and escrow services,[133] and, thus, ought not be responsible for a seller's breach.

Where a credit card purchase is processed through an intermediary like PayPal or Billpoint that has a contractual relationship with the seller, a buyer has two potential avenues of recourse in the event of a dispute: (1) to seek a refund or other resolution through the payment service, or (2) after exhausting the first avenue,[134] to withhold payment or request a chargeback through his or her own credit card issuer. Most online payment services specifically disclaim any responsibility for the underlying transaction,[135] although PayPal and CCNow will often

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services do identify the payment services prominently in their auction listings. However, it seems reasonable to expect a buyer to investigate the advertised payment service before placing a bid. On the other hand, if the seller implies that he or she accepts credit card payments directly and then discloses, after the auction closes, that such payments are accepted only through BidPay, then the buyer should have the option of canceling the contract (or, perhaps, using an escrow service at the seller's expense).

131. In these respects a BidPay purchase is similar to the low-value and long-distance transactions that are exempt from the special rule in Regulation Z. *See supra* note 37 and accompanying text.

132. On the other hand, BidPay's $5 minimum fee makes it more likely (compared to services like PayPal and Billpoint) to be used for larger-value transactions, in which buyers may be more interested in protection against transaction-related risks. Many auction sellers accept BidPay but not other online payment methods. It is certainly plausible that a seller who intends to defraud buyers might choose to insist on payment via BidPay or by cash or money order, specifically because of the lack of recourse that these payment methods afford buyers. However, most sellers who accept BidPay and decline other online payment methods probably do so either because BidPay fees are paid by the buyer, whereas the fees for other payment services generally must be paid by the seller or because accepting BidPay payments does not require sellers to deal with ACH transfers or other payment devices with which they may not be familiar or comfortable. *See supra* text accompanying note 78 (discussing seller payments).

133. *See, e.g.,* PayPal, *supra* note 53, at § IV(4) (providing that PayPal does not act as an agent of either party); *cf.* Collins v. Heitman, 284 S.W.2d 628, 632-33 (Ark. 1955) (noting that an auctioneer is an agent of the seller, while an escrow agent is an agent of both buyer and seller).

134. Regulation Z of the Truth in Lending Act requires a consumer to make "a good faith attempt to resolve the dispute with the person honoring the credit card" before asserting a defense against the issuer. 12 C.F.R. § 226.12(c)(3)(i) (2001).

135. Yahoo! PayDirect's terms specifically provide that the credit card charge that funds a payment is a separate transaction from the related sale of goods:

> 9. Limits on Disputes. Please note that the funding of your PayDirect Account

intervene or provide a refund in the event of a dispute. In most instances, a dissatisfied buyer will need to fall back on any chargeback rights that the buyer's credit card issuer can assert. If the purchase was not funded by credit card or was not classified as a purchase, then the buyer will likely be left without a remedy.

The effectiveness of credit card chargebacks, as a remedy for buyers, depends on three factors: (1) whether the buyer's credit card issuer is willing to process a chargeback request; (2) how the payment service responds to the request; and (3) how the issuer ultimately resolves it.[136] Of course, the first of these factors is the threshold issue,[137] but credit card issuers generally seem to be receptive to consumers' disputes when online commerce is involved, even when they are not legally required to recognize a particular dispute.[138] The issuer's initial classification of a transaction as a purchase, cash advance, or quasi-cash transaction is probably more important in determining whether the issuer will consider a subsequent chargeback request. The trend seems to favor classifying intermediated online payments as purchases; in part because consumers will likely avoid using payment

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> is a separate transaction from any Payment you decide to make, even if you fund your PayDirect Account at the same time that you order a Payment. You may not dispute or charge back a transaction used to fund your PayDirect Account on the basis of any dispute you have with a Recipient over the amount owed, the quantity, quality and safety of goods or services purchased, whether or not goods or services have been shipped, received or performed, or any other aspect of your relationship with a Recipient.

Yahoo! PayDirect, *supra* note 97, at § 9. However, it is not clear that this provision is enforceable for purposes of Regulation Z. (If it were, then ordinary merchants might be able to impose similar terms, effectively eliminating the chargeback rights provided by the regulation.) *See* Selis, *supra* note 4, at 15 (expressing doubt as to viability of Yahoo! PayDirect's payment model). BidPay similarly attempts to limit the scope of its transactions to the sale and delivery of a money order, although BidPay's case seems stronger for the reasons previously discussed. *See supra* notes 131-33 and accompanying text.

136. It is not entirely clear what entity makes the ultimate decision on a chargeback request, although it appears to be the buyer's credit card issuer. *See* Billpoint, *supra* note 101, at § 4. If the issuer ultimately grants a chargeback request, the loss normally falls on the merchant or its acquiring bank. *See supra* note 37.

137. The sparsity of reported cases involving credit card chargeback disputes seems to demonstrate that most such cases are resolved between the consumer and the card issuer—probably because the amounts in controversy generally are too low to justify litigation, and the issues tend not to be susceptible to adjudication in a class action (unlike some other Truth-in-Lending issues—though perhaps a dispute over classification of purchases as cash advances might be susceptible to determination for a entire class).

138. Regulation Z provides that disputes over nondelivery of goods can be asserted against an issuer regardless of amount or location, but other disputes must meet specific amount and geographic requirements. *See supra* text accompanying notes 35-37.

services whose transactions are not classified by their card issuers as purchases.[139]

Payment services vary in their approach to chargeback requests. Most services will investigate a dispute upon receiving a chargeback request and may contest the chargeback if circumstances warrant.[140] Others may contest all chargeback requests based upon merchandise disputes, arguing that the payment represents a separate transaction and that the payment service is responsible only for the latter transaction.[141] No matter how the payment service responds, the buyer's credit card issuer ultimately decides on a chargeback. Therefore, payment services tend to protect themselves against excessive exposure to chargebacks by reserving the right to revoke payments, freeze a user's account, or take other actions to recover funds.[142]

Considered in isolation, leaving the ultimate decision to a buyer's credit card issuer hardly seems satisfactory. After all, both the auction site and the payment service seem to be in a much better position to resolve the dispute and neither ought to have any more particular bias toward the buyer or seller than does the buyer's credit card issuer. If the chargeback process includes a built-in bias toward buyers, that bias may be justified for traditional merchant-to-consumer credit card sales but seems questionable when applied to online auction transactions that tend

139. *See supra* note 124. There is rarely any benefit and often significant detriment to a buyer in having a particular transaction classified as a cash advance or quasi-cash transaction rather than as a purchase: the interest rate may be higher, and generally is imposed without a grace period; a lower credit limit may apply; and the dispute rights are more limited.

140. *See, e.g.,* Billpoint, *supra* note 78; PayPal, *supra* note 53, at § IV(4).

141. Presumably BidPay is among this group, for the reasons previously discussed. *See supra* notes 130-33 and accompanying text. Yahoo! PayDirect may be as well; its terms imply that it will fight chargebacks that relate to merchandise disputes. Yahoo! PayDirect, *supra* note 97, at §§ 9, 10. *But see id.* § 12 (reserving the right to recover payments in the event of a chargeback).

142. *See, e.g.,* PayPal, *supra* note 53, at § I(8) ("PayPal will seek to recover the funds from you by debiting your PayPal balance and, if there are not sufficient funds in your PayPal balance, PayPal reserves the right to collect your debt to PayPal by any other legal means. You authorize PayPal to charge your credit card or debit card in the amount of any debt to PayPal."); Western Union MoneyZap, *Terms of Service,* § 11, *at* https://www.moneyzap.com/application/terms_conditionsNS.asp (last visited Apr. 13, 2001) ("With respect to any transaction, we reserve the right to seek reimbursement from a Receiver if we receive a charge-back related to an instruction to send funds through the Service. We may obtain such reimbursement by deducting the charge-back amount from the Receiver's MoneyZap funds, reversing any credits to the Receiver's checking account, charging Receiver's bank card, or by seeking such reimbursement from Receiver by any other lawful means."); Yahoo! PayDirect, *supra* note 97, at § 17 ("You authorize the Bank, without notice to you, to charge any credit card, ATM/check card or deposit account you have used to fund your PayDirect Account in the amount of any such negative balance.").

to involve a more level playing field. On the other hand, as online payment services become more of a commodity from the buyers' perspective,[143] sellers will tend to select the payment services that benefit them the most. In many instances, this may include those services that provide the strongest protection against chargebacks and forced refunds.[144]

Thus, it makes sense to apply Regulation Z chargeback rights to payments made through third-party payment services, whether or not the payment service attempts to structure the payment as a separate transaction from the underlying sale. Online payments funded by means other than a credit card would still be exempt from chargebacks, although this is likely consistent with buyers' expectations.[145] An exception ought to be preserved for payment systems that act as the buyer's agent and by necessity have no recourse against sellers for chargeback liabilities, provided that buyers are fully informed of the risks that are involved in making such irreversible payments.

VI. CONCLUSION

Online auctions enable individuals to engage in a tremendous number of transactions that otherwise would not be practical. Fraud and related problems are relatively rare but do arise in a significant number of transactions, and victims frequently find themselves without a satisfactory remedy. Payment systems can play a role in reducing transactional and other risks in online auctions just as they do in traditional commerce, but relatively little attention has been paid to the effects of emerging online payment systems.

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143. Online payments on eBay are already a commodity in some respects: it probably does not matter much to a buyer whether the seller accepts payments via PayPal or via Billpoint, since either way, the seller pays the fees and the buyer can use a credit card to pay. And although BidPay offers considerably less protection to buyers than either PayPal or Billpoint (and costs much more), inexperienced buyers may not pay much attention to the distinction between an auction listing that says "I accept credit cards through BidPay" and one that references Billpoint or PayPal instead.

144. To a limited extent this is happening already—PayPal continues to grow, but anecdotal evidence suggests that many sellers have stopped accepting PayPal, and some accept PayPal payments only if they are funded by a PayPal account balance or ACH transfer rather than by credit card (though this is probably a consequence of PayPal's volume restrictions for personal accounts rather than because of exposure to chargebacks). *Cf.* Maggs, *supra* note 39, at 796 (suggesting that a rule allowing consumers to assert claims and defenses against issuers of stored-value cards might deter merchants from accepting such cards).

145. Also, payments that do not meet the amount and geographic requirements of Regulation Z would be eligible for chargebacks only at the card issuer's discretion, just as is the case for traditional credit card purchases. *See supra* text accompanying note 37.

Auction participants increasingly use online payment services in place of traditional payment devices, mainly for reasons of speed and convenience. Individuals appear to give little consideration to other relevant factors, including the effects of payment mechanisms on transaction-related risks. As a result, online escrow services have failed to gain much of a foothold because of their higher cost, despite the greater protections they offer. Even among payment-only systems, chargeback rights and dispute resolution procedures vary significantly. They are not necessarily parallel to the protections available for traditional credit card purchases, even when a buyer uses a credit card to make a purchase through an online payment service. With only narrow exceptions, applying chargeback rights to credit card-based online payments would reduce the effects of transaction risks and better balance these risks among auction participants.