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The Law of Consumer Auto-Payments and Auto-Payment Failure: *Reducing the Costs of Carelessness*

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ABSTRACT

This article describes the problem of consumers missing autopayments when, for instance, an account is overdrawn or a credit card has been changed without the payee's knowledge. It analyzes the potentially severe consequences of such mistakes by consumers both theoretically and with reference to relevant case law, especially in the insurance context. The article further suggests that companies should be required to provide electronic notification of autopayment failures if they do not already do so. In making this suggestion, the virtues of electronic notification are compared to the problems that can arise for some types of consumers when, as currently permitted in many cases, they are provided with written notification alone.

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I. INTRODUCTION

In light of the enormous amount of commerce taking place online,[1] some efforts have been made to consider the legal regime that surrounds electronic commerce.[2] One important kind of activity that has become increasingly electronic, but which has received very little independent attention, is bill payment by consumers to recurring payees. Indeed, many consumers use automatic bill payment features that—following initial setup by the consumer—automatically pay various payees using either a bank account (directly or through a debit card) or credit card.[3] Such automatic payment systems can be used to pay rent or mortgage payments, utility bills, insurance bills, club memberships, and so forth. One market research firm found that as of 2006 fifty-six percent of Americans had paid at least one bill through an auto-payment option.[4]

Despite the volume of such payments throughout the United States and the world, the entire area has received virtually no scholarly attention.[5] It has appeared, however, in

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[1] The total value of E-commerce in 2009 was more than $3.3 trillion. *See E-Stats*, U.S. Census Bureau 2 (May 26, 2011), *available at* http://www.census.gov/econ/estats/2009/2009reportfinal.pdf.

[2] *See, e.g.*, JANE K. WINN & BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE (4th ed. 2001 & Supp. 2003–2); Ethan Katsch et. al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705 (2000).

[3] Of course, direct deposit is also a very important form of electronic payment, but less relevant for the purpose of this article. Total electronic transactions dwarf the value of e-commerce. *See infra* at Section III.

[4] Kelli B. Grant, *Mistakes Can Happen with Automatic Billing*, SMART MONEY (Jun. 11, 2007), *available at* http://www.smartmoney.com/spend/family-money/Mistakes-Can-Happen-With-Automatic-Billing-21395/ (citing research by eMarketer).

[5] Some scholars have addressed the issues raised by new electronic payment systems generally but without specifically considering auto-payments. *See* Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEX. L. REV. 681 (2004). Another scholar noted auto-payments should not be relied upon in California leases to inoculate a renter against the consequences of late payments caused by the

reported cases.[6] Although there are many issues to explore, this paper focuses on the possibility of reforming the notice requirements for companies to customers who use automatic payment systems and miss payments. It suggests that electronic notice should be provided, and ought to be legally required, immediately after a missed payment (e.g. one not made by an initial due date and well before the expiration of the grace period). Mandatory electronic notice would provide for consumers who are better stewards of their inboxes than their postboxes the notice they need to respond in time to avoid service disruptions. Where consumers can, at a very low cost, be protected from inadvertent mistakes that are regularly made it is a sensible step for businesses to take. In the absence of voluntary industry action, it is also a sensible objective for the government to mandate.

The paper also identifies a puzzle as to why banks have not already begun providing their customers with better notice following attempted auto-payments to cancelled credit cards or accounts. Although there are no clear answers, it may be that banks are generally happy to keep their customers' funds for a longer period, even though they may be able to inform customers that they have made an inadvertent mistake. They may also have simply decided it would not be worth the trouble to invest in developing whatever system is necessary to provide consumers with such notification.

The Article is organized as follows. Section II describes the nature of the problem of auto-payment errors in light of the scope and scale of auto-payments in the United States. Section III describes some scenarios in detail in which the current approach to dealing with auto-payment errors can create serious problems for consumers. Section IV suggests possible easy-to-implement changes that could prevent such problems and addresses potential challenges to those solutions. It also discusses some of the reasons banks may not have already begun to warn their customers about auto-payment mistakes. Finally, Section V concludes.

II. GROWTH IN AUTO-PAYMENT USAGE AND THE NATURE OF THE PROBLEM

This section describes the problem presented by consumer auto-payment mistakes. It first considers the potential scale of the problem in light of the volume of auto-payments. Next, the problem is described and contextualized by noting the various costs and benefits of auto-payments. Finally, this section identifies the kinds of consumers who might be most at risk.

A. Growth in Auto-Payment Usage

The use of auto-payment features appears to be growing from an already enormous base, although because it is decentralized, it is hard to pinpoint precisely.[7] The survey cited above, finding that as of five years ago fifty-six percent of Americans had used an auto-payment feature, is indicative of how broadly accepted such arrangements

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bank. Judith J. Rentschler, *California Retail Leases Line by Line: A Detailed Look at California Retail Leases and How to Change Them to Meet Your Needs*, 2009 WL 3334636, at *161 (2009).

[6] *See infra* Section III.

[7] *See* Mann, *supra* note 5, at 682 n.4.

have become. Other statistics that are related to forms of ecommerce that can be used for automatic payment suggest the enormous scale on which such features are used. For example, the Automated Clearing House processes automatic payments made through banks (this may exclude some payments made through credit cards but include payments made from debit cards), and it reported over 19.4 billion transactions in 2010.[8] Those payments were worth almost $32 trillion.[9] This is an increase from 10 billion transactions in 2003.[10] As another indication, Paypal, an Internet payment service, generated approximately $92 billion in transactions in 2010.[11]

B. The Costs and Benefits of Auto-Payment

Overall, the increasing automaticity of payment systems is largely beneficial in that it saves consumers time and helps them avoid the hassle of paying monthly bills by check or by telephone. It also saves money and resources because less mail is sent and automatic payments are likely processed at a lower cost than conventional checks.[12] There is a good chance that in aggregate the use of automatic payments prevents late payments and missed payments relative to a system in which customers paid each of their numerous bills by paper check; as long as an automatic payment is linked to a working account with adequate funds or credit, there is no chance of missing a payment. Consumers are also able to easily consolidate their tracking of various bills by looking at one statement online.

Despite these advantages, there are some potential drawbacks to the use of auto-payment systems. For one thing, customers using automatic bill pay may fail to adequately keep track of their finances and not notice that they are spending more than they thought they were, either on individual bills or collectively.[13] Disputes can also arise about whether automatic payment continues past the point it was authorized.[14]

Another possibility is that malevolent companies can "cram" extra charges on bills that are made through auto-payment in ways consumers fail to notice. This is a

[8] *See* Overall ACH Volume Exceeds 19.4 Billion in 2010, NACHA: The Electronic Payments Association, *available at* https://www.nacha.org/userfiles/File/ACH_Rules/Year-End%202010.pdf (last visited May 26, 2011).

[9] *Id.* at 3. It is not precisely clear how this number was reached given that the U.S. GDP is approximately $14 trillion, and it is not clear how different transactions are counted. Nevertheless, it is clear that the total quantity of electronic transactions is enormous.

[10] *See ACH Network Statistics*, NACHA: The Electronic Payments Association, http://www.nacha.org/c/ACHntwkstats.cfm (last accessed February 4, 2012).

[11] *Annual Report, Form 10-K*, eBay Inc. 11 (Jan. 27, 2011) (the figure is calculated based on the fact that PayPal generated $34.7 billion from eBay transactions, representing approximately 38% of Paypal's total transactions).

[12] *See* Paul W. Bauer & Joanna Stavins, *The Effect of Pricing on Demand and Revenue in Federal Reserve ACH Payment Processing*, 16 J. FIN. SERV. RES. 27, 27 (1999) ("[T]he unit cost of an ACH transaction has been found to be significantly below that of a check . . . .").

[13] *See The Perils of Automatic Bill Pay*, MSN MONEY, *available at* http://articles.moneycentral.msn.com/Banking/BetterBanking/ThePerilsOfAutomaticBillPay.aspx. This is the flip-side of the identified benefit of making it easier to track one's bills in a consolidated manner.

[14] *See e.g., Gonzales v. Comcast Corp.*, No. 1:10–cv–01010–LJO–SKO, 2011 WL 1833118 (E.D. Cal. May 13, 2011).

problem in the telecom industry, where telecommunications companies take a cut of third-party crammers' payments. The issue has drawn the attention of the Senate Commerce Committee and the Federal Trade Commission.[15] Moreover, cramming cases have also reached the courts. For instance, the District Court for the Northern District of California recently refused full summary judgment to AT&T, which was accused in a class action lawsuit based on the RICO Act of permitting cramming by conspiring with third parties.[16]

As indicated, however, the focus of this paper is on mitigating the harm of missed automatic payments. This is a problem because consumers who use automatic payment systems can become complacent and make mistakes when, for instance, a credit card is lost or stolen. It is easy to overlook updating account information for a single payee when consumers may have numerous payees.[17] Where payments are missed without the consumer's knowledge, the consumer may face negative or potentially disastrous repercussions, like the cancellation of an insurance plan.

Of course, some payees will likely send the consumer a notice (sometimes called a "dunning" letter) when there is such a problem because they have an interest in doing so. Payees such as mortgage servicers and other creditors, have every interest in successfully informing their customers of missed payments because the best that they can hope to do if the consumer ends up failing to pay indefinitely is to have their loan repaid from a foreclosure or other legal proceeding. Similarly, fitness clubs, utility providers, and other companies that are periodically paid in return for the continuation of a tangible service will be incentivized to remind a consumer to keep paying a bill if an auto-payment is missed. For example, Verizon Wireless allows customers to sign up to receive a text or email message confirming the receipt of an auto-payment.[18] On the other hand, even these kinds of companies might take advantage of short-term missed payments if, under their contract with the consumer, missed payments allow them to tack on late fees and extra charges. In that case payees might have an incentive to delay sending effective forms of notice temporarily, though not permanently.[19]

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[15] Press Release, *Rockefeller Probe Into Bogus Charges on Consumer Phone Bills Expands*, Commerce Committee, U.S. Senate (Mar. 31, 2011), *available at* http://xxdaili4.appspot.com/EjryZvhqdwhZfrpphufh/http/public/index.cfm?p=PressReleases&ContentRecord_id=991b1bfc-f160-48b6-883c-c38e2079ff9c&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=505cc3fa-a767-40f4-8ac2-4b8326b44e94&MonthDisplay=3&YearDisplay=2011; *Cramming: Mystery Phone Charges*, Fed. Trade Comm., *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro18.shtm.

[16] *Nwabueze v. AT & T Inc.*, No. C 09–1529 SI., 2011 WL 332473 at *1-9 (N.D. Cal. Jan. 29, 2011).

[17] For example, *see Automatic Payment Plan Doesn't Prevent Late Fees*, KJRH (Mar. 23, 2011), *available at* http://www.kjrh.com/dpp/news/problem_solvers/automatic-payment-plan-doesn%27t-prevent-late-fees.

[18] Grant, *supra* note 5. Of course, a notification that is only issued when there was a problem may also be desirable for some consumers.

[19] For example, see *Automatic Payment Not Problem Free, Consumer Complains*, JUST ASK ASA (Aug. 24, 2006), *available at* http://www.justaskasa.com/wp/?p=508. It is likely that companies in industries in which consumers have low switching costs and pay attention to their monthly bills would be less likely to opportunistically charge extra fees based on late payments. Thus, it is reasonable to predict that utilities or cable companies would be more likely to charge extra fees than a fitness club.

In contrast, some payees might actually prefer not to receive a payment. For example, a health or life insurance company restricted from cancelling a policy by law so long as it is current may be able to take advantage of an accidental missed payment in order to cancel an insurance plan.[20] Health insurance companies would prefer to cancel the policies of the bad risks, and life insurance companies would prefer to cancel the policy of *any customer* for whom the actuarial value of expected future premiums is below the value of the expected payout and the policy can be cancelled for lapsed payment.[21]

Likely for this reason, there are legal requirements that payees, such as insurance companies, must provide some notice of the potential cancellation of a consumer's service in light of a missed payment.[22] The question is whether the notice is properly calibrated to provide *actual* notice when the mandate is for written and not electronic notice. Federal law, although generally attempting to support online commerce, specifically states that electronic notice *alone* is insufficient in several areas, including the cancellation of life and health insurance plans.[23] However, that does not mean that electronic notice cannot be required in addition to other forms of notice. Virginia, for instance, requires electronic notice in some contexts, though not directly to the consumer. Specifically, Virginia requires that certain kinds of auto or property insurance cancellation threats be electronically provided to "the agent of record of the named insured, if the named insured has an agent of record."[24] It remains unclear why electronic notice directly to the consumer is not required, nor why this law should not be extended to all automatic payments where late fees may be at issue. Indeed, it is ironic that in an increasingly electronic world,[25] in which companies correspond frequently over email with their customers about their business relationship, they would fail to notify their

[20] It is unclear whether it would be a problem for an insurance company to treat high and low-risk individuals differently after a missed payment even if they had legal grounds to cancel the policies of all of them. This might be operationalized by completely cancelling the policies of everyone who misses a payment and then require them to reapply as new customers, at which point the company may screen out the bad risks.

[21] *See generally* Kelvin H. Dickinson, *Divorce and Life Insurance: Post Mortem Remedies for Breach of a Duty to Maintain a Policy for a Designated Beneficiary*, 61 MO. L. REV. 533, 535 n.7 (1996) (describing basic kinds of insurance).

[22] *See, e.g.*, VA. CODE ANN. §38.2-232 (West 1991) ("Every insurer, health services plan, or health care plan . . . shall provide . . . written notice prior to the date that the policy, contract, or plan will lapse for failure to pay premiums due."); *See generally The Insurance Industry and Insurance Relationship: Lapse for Nonpayment*, 1A COUCH ON INS. § 8:27 (Nov. 2010).

[23] *See* Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7003(b) (2006).

[24] VA. CODE ANN. §38.2-325(B) (West 2009); *See also* LA. REV. STAT. ANN. § 22:987(A)(5) (2011); N.Y. INS. LAW §3211(a)(1) (McKinney 2008).

[25] Devin Leonard, *The U.S. Postal Service Nears Collapse*, BLOOMBERG BUSINESSWEEK (May 26, 2011) ("With the rise of e-mail and the decline of letters, mail volume is falling at a staggering rate, and the postal service's survival plan isn't reassuring."), *available at* http://www.businessweek.com/magazine/content/11_23/b4231060885070.htm. Indeed, total mail volume fell twenty percent between 2006 and 2010. *Id*. Leonard also contrasts the business model of the U.S. Postal Service with the digitally-oriented paths being pursued by postal services in European countries. *Id.*

customers *electronically* of missed payments that could lead to significant additional fees or the cancellation of their service entirely.[26]

C. Potential Losers from the Absence of Electronic Notice

For many people written notice is insufficient, especially from payees who may have old addresses on file. For example, students often move each year and may forget to forward their mail and change their address with various payees with whom they use automatic payment. Indeed, the case of young people is particularly problematic in terms of traps for the unwary. Students likely have the least experience paying bills and managing their finances and may never have become sensitized to keeping track of bills in the first place. They may also be less aware of the repercussions to their credit score or the continuity of their insurance coverage of missing a single payment. Requiring electronic notice would be a low-cost way to ensure that many of these potential losses could be avoided.

Not only do students frequently move, but so do older Americans. One survey found that more than twenty-five percent of Americans had lived in their current home less than two years and the median duration of residence was 5.2 years.[27] Unsurprisingly, the median duration for those between the aged 15-19 and 20-24 was lower at only 2.6 and 3.4 years respectively. However, senior citizens were only in their residences on average 4.6 years, also less than the median.[28]

The use of auto-payments could desensitize consumers to the rhythm of their monthly, quarterly, semi-annual, and annual payments such that they do not remember with whom they need to modify their accounts. Although consumers ought to be responsible in tracking their bills, common mistakes that can be foreseen by businesses and remedied at essentially no cost should be adopted. If these remedies – such as setting up automatic email notifications – are not adopted by business, the government should possibly mandate them.

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[26] It is interesting to note that a decade ago one article expressed concern that electronic notice might be used to undermine effective notice by having consumers sign form contracts consenting to electronic notice even if they did not have good access to the Internet. *See* Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 538–39 (2001). While even today many consumers do not have such access—and this article is not proposing to replace written notice requirements with electronic notice requirements entirely—it is clear that the world has changed in the past decade and for a growing number of people electronic notice is more effective than paper notice.

[27] *See* CENSUS BUREAU, P70-66, CURRENT POPULATION REPORTS HOUSEHOLD ECONOMIC STUDIES, SEASONALITY OF MOVES AND DURATION OF RESIDENCE 4 (1998), *available at* http://www.census.gov/prod/3/98pubs/p70-66.pdf.

[28] *Id*. at 5. Of course, senior citizens do not have to worry about health insurance problems because of Medicare, but there are many other benefits on which they rely that could be suspended because of auto-payment problems.

III. AUTO-PAYMENTS GONE WILD: EXTREME CONSUMER EDITION

This section presents some hypothetical and actual situations of how consumers may suffer unexpected losses as a result of using auto-payment and failing to keep account information current. Each of the patterns described here is in the area of insurance, which is one of the industries in which companies may have little independent incentive to notify certain customers of missed payments.[29] The first situation is loosely based on the author's own experience, although fortunately the disastrous consequences alluded to at the end of the paragraph did not actually occur. Other experiences described in the case law are also discussed. These kinds of situations are the basis for the suggestion, described in more detail in Section IV, that electronic notice ought to be required when consumers miss auto-payments.

To get a sense of the basic fact pattern this paper is attempting to describe, consider a student who is about to graduate but finishes his schoolwork several weeks before graduation and moves away from his university address for the summer. Neglectfully, the student waits two weeks to forward his mail. Two months before the same student had cancelled a credit card, which he had misplaced and reported lost, and then proceeded to not update his auto-payment information with his health insurance company. While he was gone, the health insurance company sent him several paper notices that their attempts to bill his cancelled card had failed. A third paper letter notified him that his coverage had been cancelled. The insurance company has his telephone number and e-mail on file. Though the insurer indicated *by e-mail* two weeks before he left his university address that it would make a scheduled payment to his credit card on file, and though it corresponds about new claims over e-mail, the student is sent nothing but paper notices regarding the cancellation of coverage.[30] That summer, after two months and the creation of a significant break in coverage, the student has a hiking accident that causes him to badly fracture his leg and requires major reconstructive surgery. He learns at that point that he is no longer covered by insurance and that complications from the break may be considered uncovered pre-existing conditions even once he obtains new insurance.

Unfortunately, similar situations are available without resort to hypothetical fact patterns. In *Scott v. Hartford Life and Accident Ins. Co.*,[31] the plaintiff obtained a credit card and insurance policy from a credit card company and insurance marketer (selling policies underwritten by Hartford Life), respectively, that co-marketed their products and emphasized the peace of mind that the auto-billing of premiums would provide.[32] Unfortunately for the plaintiff, the policy lapsed when the plaintiff lost the card and received a new one because there was no method in place for the bank to notify the insurance company of the new card number. After the unexpected death of the plaintiff's husband and the insurer's refusal to pay the policy benefits, the plaintiff brought suit

[29] *See supra* notes 20–21 and accompanying text.
[30] Fortunately, this is where the author's story departs from the facts.
[31] No. 09-912-JJB-SR, 2011 WL 90109 (M.D. La. Jan. 11, 2011).
[32] *Id*. at *1.

against the credit card company and the insurance company that billed the premiums for, among other things, negligence, breach of contract, and detrimental reliance.[33]

The court noted that "there is a strong public policy that the insured receive adequate prior notice before their insurance is cancelled in order that they might be afforded time to obtain new coverage."[34] It found issues of material fact as to the sufficiency of notice provided by the insurance marketer that precluded judgment as a matter of law against the plaintiff.[35] However, the plaintiff's negligence theory was rejected because the court "could not find any jurisprudence supporting" a duty for the insurance biller to contact the credit card company in "the event that a charge was denied to uncover the reason for denial and to obtain her new account number."[36] The court permitted the case to proceed to the jury on a detrimental reliance theory on the grounds that there were many representations by the credit card company and insurance marketer and that because "[p]laintiff is not a sophisticated business actor, a reasonable jury could conclude that her reliance on Defendants' representations was justified under the circumstances."[37]

Scott clearly demonstrates the vicissitudes of auto-payments in the insurance context. However, *Scott* is relevantly distinguished from the fact pattern of the "hypothetical" that introduced this section because the promotional materials specifically marketed the automaticity of the insurance payments by the credit card company. Nevertheless, if the plaintiff had e-mail access, it would likely be easier to have notified her electronically, and the burden of proof issues would not have been as severe for either side if there were an electronic record.

The kind of marketing emphasis on automaticity in *Scott* appears to have been absent in *Russell v. Nationwide Life Insurance Co*.[38] In that case, the estate of a deceased consumer of life insurance lost its suit for payment of a policy after the insurance company refused to pay out on the policy due to lapsed premium payments. The confusion on the part of the decedent may have resulted from the fact that his employer automatically deducted his premiums from his salary, and when he left his job he did not immediately change his address on file with the life insurer.[39] The Fourth Circuit found that although the burden is on the insurance company to show actual receipt of cancellation notice by the policyholder, in order to satisfy the Virginia Code section requiring "written notice" (as opposed to "mailed notice"), "actual receipt can be demonstrated through the presentation of evidence that the notice was properly addressed, stamped, and mailed, coupled with 'application of the presumption that correspondence properly mailed is received by the addressee.'"[40] The fact that the mail was sent inconsistently to the payor's address rather than the owner and beneficiary

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[33] *Id*. at *2.
[34] *Id*. at *4.
[35] *Id*. at *5.
[36] *Id*. at *6.
[37] *Id*. at *8.
[38] 401 F. App'x. 763, 765–66 (4th Cir. 2010).
[39] *Id*. at 765.
[40] *Id*. at 768.

address was immaterial.[41] Evidence of mailing can, in turn, be based on auto-generated computer records.[42] In essence, this case was fundamentally about assigning the risk of loss from the inherent problems in mail delivery in a world where people regularly change their addresses. In the absence of the sort of circumstances found in *Scott*, the risk of loss is on the consumer.

In some cases, auto-payment actually reduces the amount of notice required to a consumer. In the Second Circuit case of *Wilson v. Northwestern Mutual Insurance Co.*,[43] the plaintiff was denied recovery on the proceeds of her husband's life insurance policy because there is an exception to the written notice requirement of the New York Insurance Law when an insurance policyholder uses auto-payment. For normal scheduled premium policies ex ante notice is required before cancellation is allowed.[44] However, New York law permits ex ante notice to be waived for any life insurance policy that is paid on a monthly or shorter interval—which is often the case with automatic monthly payments—instead only requiring notice within six months after termination.[45]

In contrast, another New York court in *Tracy v. William Penn Life Insurance Co.* reached a more favorable conclusion for the beneficiary of an insurance policy who sued for payment of the policy's benefits.[46] The court found that the consumer's mistaken belief that a preapproved checking plan was in place that would automatically draw premiums from a checking account may have been justified; therefore, the court denied the defendant insurance company judgment as a matter of law.[47] The insurance company's marketing behavior in *Tracy* was like that of the company in *Scott*, the Louisiana case discussed above. The court noted that the insurance company's promotional material advertised the "preauthorized checking plan as a 'convenient,' 'easy,' and 'automatic' method of paying premiums that would give the insured 'peace of mind knowing that [he or she will] never forget to pay a premium on time.'"[48]

One way to make sense of the varying results of these auto-payments cases is by noticing the distinction between cases in which the insurer had created a reasonable expectation of automaticity and those in which the insurer had not. Thus, in *Scott* and in *Tracy*, the insurance companies' own promotional materials created a reasonable expectation of automaticity that justified the denial of summary judgment for the insurer.

[41] *Id*. Additionally, the plaintiff brief acknowledged that the decedent had been reminded by his former employer to pay his life insurance premium. Brief for Appellant Russell at 15–16 (Oct. 19, 2009).

[42] 401 F. App'x at 769–70.

[43] 625 F.3d 54 (2d Cir. 2010).

[44] *Id*. at 63–64 (citing and comparing N.Y. Ins. Law. § 3211(a)(1) (McKinney 2008) ("No policy of life insurance or non-cancellable disability . . . shall terminate or lapse by reason of default in payment . . . in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due."), and § 3211(f)).

[45] The policy rationale for this exception is hazy; it does not seem clear why auto-payment customers should receive less notice than customers who pay quarterly by check.

[46] 234 A.D.2d 745, 746–47 (N.Y. App. Div. 1996).

[47] *Id*.

[48] *Id.*

In contrast, in *Russell* and in *Wilson*, where such promotional materials were absent, the consumers were essentially held responsible for keeping track of their own payments.

IV. Proposals to Improve Consumer Access to Information about Auto-Payment Problems

The common law rule most consistent with the cases described in the previous section is that poorly notified auto-payment failures are only a predicate for reversing an insurer's cancellation of a policy when the insurer's marketing has created a reasonable consumer expectation of automaticity. This section argues that the emerging common law rule identified in the previous section does not go far enough and that a statutory or regulatory requirement of electronic notice should augment it. The basis for such a requirement is that many consumers probably expect automaticity every time they set up auto-payment and are not fully aware of potential pitfalls. Since those pitfalls can be remediated by business at low cost, they ought to be. It also considers whether private legal remedies might be available in the event that government does not act. In addition, this section considers the reasons that industry might resist such regulations.

A. Electronic Notice of Auto-Payment Failure

The most straightforward proposal for dealing with the issue of auto-payment failure is to require companies to send electronic notice as well as paper notice when a customer misses an automatic payment.[49] Some companies and payees have already done this.[50] The case is simple insofar as the cost is not likely to be high, given that any vendor permitting auto-payment has already set up an electronic billing system and these programs frequently appear to include e-mail features included as an option.[51]

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[49] Procedurally, these regulations could be issued by the Federal Reserve Board ("Fed"). The Fed's Regulation E governs the use of electronic fund transfers by banks including pre-authorized electronic fund transfers. For background, see BRIAN W. SMITH, E-COMMERCE: FINANCIAL PRODUCTS AND SERVICES 7-47 –7-50 (2001).

[50] For instance, in response to a FOIA request, the Department of Commerce released information regarding how much it spent on access to the PACER litigation system. The FOIA response included several e-mails that informed the Department that its billing had been unsuccessful. *See* Response to Freedom of Information Act Request CRAFT 09-233, U.S. Department of Commerce (Oct. 7, 2009), *available at* http://ftp.resource.org/courts.gov/foia/gov.doc_20091007_from.pdf (See e-mails from Meghan Grimes). Additionally, at least one bank in New Zealand informs its customers when there has been a failure of an automatic payment the consumer set up. *See* Email and Text Alerts, kiwibank, *available at* http://www.kiwibank.co.nz/business-banking/ways-to-bank/email-and-txt-alerts/. The apparent obscurity of these sources, it should be noted, is likely not based on the fact that such e-mail notifications are uncommon, but rather because such e-mails are not generally publicly available.

[51] SAP, for instance, appears to make the process of sending dunning letters electronically through its Enterprise Resources Planning (ERP) software relatively straightforward. *See Dunning Wizard*, SAP HELP, *available at* http://help.sap.com/saphelp_sbo2005b/helpdata/en/d5/b8749451b94c93a9e40dbbea032bf3/content.htm; Bulletin Board Posting, *Sending E-mail as a Dunning Activity*, SAP COMMUNITY NETWORK (Dec. 21, 2007), *available at* http://forums.sdn.sap.com/thread.jspa?threadID=1695479. It is likely that other software providers have similar features. *See, e.g.*, *Dunning*, CHARGIFY DOCUMENTATION, *available at* http://docs.chargify.com/dunning#dunning-emails.

One surprising fact is that at least some banks have not already taken it upon themselves to notify their customers when there are failed attempts at payments from cancelled cards or transitioned accounts. This is especially true of automatic payments from payees who have been successfully paid many times. In this case, it would make sense for the bank to assume, at least presumptively, that there had been a mistake. While such a presumption would probably not justify allowing a payment to be processed, it would certainly justify an email by the bank to its customer. The failure of banks to have done this is the mystery suggested in the title of this paper.

One reason that banks may have chosen not to do this is that they are able to make use of customer funds that the customer had expected would have been sent to an auto-payment payee. Although this is possible, the relatively minimal amount of funds in question for a given account would probably be weighed against the possibility that there could be damage to the customer relationship between a customer and a bank if something went wrong. It is also possible that the banks have never thought to do anything about the issue. That's not to say that the stray thought has never crossed the mind of some programmer in a large bank, but rather that it has never risen to the level of a business priority. A lack of consumer concern for the treatment of auto-payment failure notifications may not only be reflected in lackadaisical updating of payee account information, but also in the credit they will give to any particular bank in the selection of which bank's services to use. Banks may not invest any time or money in creating the kind of notification described if they do not think they can derive any business benefit from it.

B. A Possible Private Right of Action for Failure to Provide Electronic Notice

There is an argument from a product liability perspective that the current design of automatic payment systems suffers from a design flaw insofar as there is a cost-effective way for banks to make their automatic payment product safer without compromising the automatic payment system's usefulness in any way. Namely, the product can be made safer by implementing the kind of notification to customers suggested here. These requirements could be limited to payees who accept automatic payments, or it could be extended to banks that provide automatic payment services through credit or debit cards or through checking accounts.

In both cases, the argument for any costs besides the small costs of initially setting up the system (likely a small amount of programming time) and the very-low marginal cost of sending e-mails is tenuous. In the case of banks, they could argue that they are losing access to the value of customer deposits used to make payments and the profits they could earn from access to those funds. However, but for their customers' mistakes in failing to update their auto-payment information, they would not have access to those funds anyway. Some service providers may argue that there is a substantial cost if they provide more effective consumer notice because it can raise costs of providing services. For instance, if a health insurance or life insurance company were able to use auto-payment failures not recognized by consumers to have occurred in order to

disproportionately cancel the policies of bad risks, then if the company provided more effective notice they would lose a method of weeding out bad risks and could face a deteriorated risk pool. As a result, other consumers in the risk pool may face higher premiums. However, from a public policy perspective, providing better notice would only be furthering the risk-spreading goals of insurance; the potential adjustments in some people's premiums would be best seen not as a problem, but rather as salutary corrections accurately reflecting the nature of the full risk pool.

More problematic for creating such a private right of action is the general rule that there is no liability for negligently inflicted economic loss.[52] That rule may make it very difficult to recover against a bank merely offering third-party automatic bill-paying services. However, in the case of a payee that itself offers its own automatic payment system, such as an insurer, there may be a better argument for creating an exception to the general rule, due to the existing customer relationship and the fact that the negligence would be directly emanating from a presumed breach of duty inherent in that relationship. Moreover, in the case of insurance, the economic damages are the contracted benefits that the insurance company had agreed to pay and not secondary economic loss.

C. Reasons Companies Might Resist Electronic Notice

There are some reasons that there might be difficulty in changing some of the practices within industries that use auto-payments but not electronic notice of missed payments. The fact that the participants in these industries have not adopted these kinds of consumer-friendly regulations themselves, even though doing so would involve relatively minimal programming costs and the operation of such a system would probably have low marginal costs once implemented, suggests they either have not thought of them or are not interested in them. For the same reason that they are easy to implement, they are also easy to think of, which casts doubt on the first possibility.

However, there are other reasons besides having failed to think of sending electronic failure notices that they are not more widely used. As suggested in the introduction, companies might be interested in having the opportunity to use such missed payments as screening. They may lobby to keep the rules as they are currently. This would likely be done under the dross of keeping government regulation out of businesses' hair.

Alternatively, there could be an issue with government privacy laws that prevent companies from sending certain information by e-mail. Any such laws would be misguided. After all, is the motivating notion that physical mailboxes that receive paper notice are more secure than email inboxes? Many people conduct sensitive financial and personal business over email and are confident in their privacy. Although it is true that physical mail is protected by stiff statutory penalties,[53] so too, at least in theory, is prying

[52] *See* Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. R. 1513 (1985).

[53] *See* 18 U.S.C. § 1702 (1994) ("Whoever takes any letter, postal card, or package . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry

into someone's e-mail, both by private citizens[54] and the government.[55] It is mysterious why there would be a reason for prohibiting electronic communications about something so seemingly non-sensitive as a failed attempt to charge a bank account, credit card, or debit card when e-mail is used for communications between doctors and patients, between stockbrokers and their customers, between lawyers and their clients, and between the exact same businesses and customers that often receive their bills broken down by line item electronically. Indeed, contrast the possibility of privacy implications with the fact that one federal statute permits electronic notice as one form of satisfactory notice when an insurance company has taken adverse action based on negative information in a consumer credit report.[56]

V. CONCLUSION

This paper has proposed a requirement that businesses that accept automatic payments be required to promptly inform their customers by electronic means if there is a problem with an auto-payment. The requirement would likely put little additional burden on businesses that have already set up automatic payment systems, would make

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into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.").

[54] *See* Nathan Koppel, *Is Email Snooping a Crime?*, WSJ LAW BLOG (Dec. 27, 2010), *available at* http://blogs.wsj.com/law/2010/12/27/can-email-snooping-a-crime/; *Email Hacking is a Serious Crime*, LAWYERS.COM, *available at* http://communications-media.lawyers.com/privacy-law/Email-Hacking-Is-A-Serious-Crime.html (noting that the man who hacked Sarah Palin's email during the 2008 election campaign was charged with four felonies and convicted of two of them).

[55] The Sixth Circuit recently held in *U.S. v. Warshak*—a case with colorful facts stemming from a company that marketed "natural male enhancement" supplements—that the government could not search the emails of a citizen stored by the citizen's Internet Service Provider without a search warrant because there is a reasonable expectation of privacy in e-mail. 631 F.3d 266, 284–88 (6th Cir. 2010). *Cf.* U.S. v. Jacobsen, 466 U.S. 109, 114 (1984) (noting that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy."). Additional cases protected defendant's email privacy, such as *U.S. v. Cioffi*, which found that a warrant for an email search was overbroad and justified application of the exclusionary rule when the warrant allowed a search of e-mails that went beyond probable cause. 668 F. Supp. 2d 385, 396–97 (E.D.N.Y. 2009). *But cf. In the Matter of the Application of the UNITED STATES of America for a Search Warrant for Contents of Electronic Mail and for an Order Directing a Provider of Electronic Communication Services to not Disclose the Existence of the Search Warrant*, 665 F. Supp. 2d 1210, 1223–24 (D. Or. 2009) (finding that no notice is required to an email subscriber when notice has been provided to the subscriber's ISP and that there is no reasonable expectation of privacy against the government in email when stored by a third party with a privacy policy that states their information may be shared with government "under the appropriate circumstances."). *See also* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. R. 1005, 1007–10, 1029–31 (2010) (suggesting a model of application to the Internet protecting content but not non-content aspects of communications, so as to provide the same level of protection provided in non-electronic media, and further that the particularity requirement for warrants should be focused on individual suspects rather than individual accounts); Nathan Koppel, *Sixth Circuit Rules that Emails Protected from Warrantless Searches*, WSJ LAW BLOG (Dec. 15, 2010), *available at* http://blogs.wsj.com/law/2010/12/15/sixth-circuit-rules-that-emails-protected-from-warrantless-searches/; Jennifer Granick, *New York Court Scores Over Oregon In Recent Email Privacy Opinions*, Electronic Frontier Foundation (Nov. 2, 2009), *available at* https://www.eff.org/deeplinks/2009/11/new-york-court-scores-over-oregon-recent-email-pri.

[56] *See* 15 U.S.C. § 1681m(a) (2003).

consumer mistakes less feasible, and would likely conform to consumer expectations that they need not worry about auto-payments after they have set them up.

In terms of immediate next steps to better understand the nature of the problem, it would be very helpful to conduct a survey of consumers in order to get a sense of the extent of auto-payment failures and the nature of the companies that already provide their customers with electronic notice when such failures happen. Recall that this paper posited that notice would be prompt for service providers that provide month-to-month services like clubs and gym memberships, but less prompt for companies that can easily tack on late fees and other charges (for example, service providers with a quasi-monopoly over their customers' business such as utilities and cable companies) and least prompt for companies like health and life insurers constrained by law from dropping bad risks. Confirmation of this hypothesis through a consumer survey would bolster the case for this paper's argument, particularly if the survey could identify that email notice is, as suspected, more effective than written notice for some subset of the population.

This paper has also questioned why banks have not yet adopted such customer-serving policies. Although it is too early to come to a firm conclusion, some possible reasons are that they prefer to have access to their customers' money a little longer and that the issue simply does not rise to the level of the banks' attention because they do not think that it will come to consumers' attention. In other words, this may be a good case for government regulation to address a problem the market is not solving.