WHAT IS MONEY IN TODAY'S FINANCIAL SYSTEM?

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I. INTRODUCTION

Over the last decade new payment methods such as electronic money, prepaid cards, mobile payments and internet payment services have become widely used and accepted as alternative methods to initiate payment transactions.[1] Some of these new payment methods have even begun to emerge as viable alternatives to the traditional financial system in a number of countries including the United States. This technological movement has led to "a general consensus in the academic and professional community that the U.S. financial markets are in the midst of enormous change."[2] Some of this change has come in the form of new products being designed to challenge the use of tangible currency in millions of routine consumer transactions.[3]

This article will discuss the evolution of the definition of "money," as defined under fidelity bonds and crime insurance policies, the risks that new electronic payment methods pose to businesses, financial institutions and their clients and the insurance coverage issues being raised as a result of these new payment methods.

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[1] *See* John J. McDonald, Jr., Joel T. Wiegert, Jason W. Glasgow, *Computer Fraud and Funds Transfer Fraud Coverages*, XIV FID. L.J. 1 (2008).

[2] Christopher Whalen, *Hard Money & Cyber Cash: Bankers vs. Bureaucrats in the Changing Payments System & Money Markets*, Committee for Monetary Research and Education, Inc., January 1997, at 1 ("*Hard Money*").

[3] Alan Greenspan, *Individual Liberty, Free Markets, and Peace: Regulating Electronic Money*, Cato Policy Report, March/April 1997, *at* www.cato.org/pubs/policy_report/cpr-19n2-1.html.

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A. Evolution of Money

1. The Ethos of Money

Money is an information system used to value, record and track economic transactions. There are various forms of money, including coins, currency, checks, demand deposits, certificates and time deposits, bonds and shares of stock, credit and debit cards and, more recently, electronic funds and mobile payments. Moreover, "[f]inancial systems are emerging which allow economic value to be represented digitally by electronic patterns."[4] Electronic money is one such system.

"Electronic money (e-money) is electronically (including magnetically) stored monetary value, represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a person other than the electronic money issuer."[5] In these transactions, the mobile payments or e-money take the place of cash or credit based payments at the point of sale or transfer. No physical or tangible asset is exchanged, only electronic information.

Generation Y (generally defined as those individuals born in the 1980s) has shown significant attraction to the development of this new financial system. In an effort to hold onto and attract this vast section of the population, financial institutions are attempting to adapt to this electronic movement by creating e-money platforms and financial systems. These technological advancements have two significant effects: (1) attracting and retaining customers; and (2) lowering transactional costs. Electronic payments and transactions have fewer costs associated with them than typical credit cards or in store cash purchases. "It is estimated that an ATM transaction costs about $.027, a teller generated transaction in a financial institution costs about $1.07, and the average cost of swiping a credit card rangers from $0.08 to $0.15. While the costs of reading a smart card, which requires no closed propriety or open

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[4] Solicitor General Canada, *Electronic Money Laundering: An Environmental Scan*, Department of Justice Canada, October 1998 at 4.

[5] *Electronic Money Regulations*, FSA, *at* www.fsa.gov.uk/about/what/international/emoney.

network to transmit its electrons from chip to chip, is less than $0.01. . . ."[6]

Along with these new benefits to the financial system, e-money poses serious risks to financial institutions and retail business. "Anyone c[an] manipulate technology to create a card or electronic balance that was not actually commodity backed. . . ."[7] As a result, businesses must be prepared to guard against these risks and insure against the potential losses.[8] In an effort to identify and safeguard against e-money risks, "[a]n assembly of bankers from financial institutions across the country have come together to form a joint task force led by the ABA (American Bankers Association). The Payment Systems Task Force will work toward developing safe and efficient payment technologies provided by banks that will afford enhanced security for consumers."[9]

The methods used to protect financial institutions and businesses' assets and customer information are much different today than they were just ten years ago. Financial institutions and businesses are no longer solely brick and mortar institutions protecting their clients' tangible money, but now must be electronic fortresses protecting their customers' personal information. These institutions must create firewalls, intrusion detection systems, intrusion prevention systems and access control lists in order to adequately protect money and the sensitive personal information. E-money contains an account holder's account numbers, passwords, personal identifiable information (such as name,

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[6] *Hard Money*, at 1.

[7] Susan M. Sullivan, *Electronic Money and Its Impact on Central Banking and Monetary Policy*, Boston University Economics, *at* http://econc10.bu.edu/Ec341_money/Papers/Sullivan_paper.htm (A lack of security arises from the fear that network money balances can be controlled, stolen or manipulated by online hackers.").

[8] *See also* Federal Deposit Insurance Corporation, *Financial Institution Letters: Guidance on Payment Processor Relationships*, Nov. 10, 2008, *at* www.fdic.gov/news/news/financial/2008/fil08127a.html ("Risks associated with this type of activity are heightened when neither the payment processor nor the financial institution performs adequate due diligence on the merchants for which payments are originated.").

[9] Bankers Online Tech Talk, *Payment Security Task Force*, March 9, 2012, *at* www.bankersonline.com/technology/techtalk2012/techtalk030912.html.

address, telephone and social security number) and the value of the money stored, which is patently different from paper currency or coins, which contain no identifying qualities of its account holder.[10]

These new challenges require financial institutions and other businesses to be more vigilant in establishing or maintaining relationships with its customers, merchants or other third parties because these parties may gain inappropriate access to the financial institution's customers' deposit accounts."[11] In order to understand these new risks brought on by e-money, we have provided a general overview of the development of money from a physical form to its current electronic state.

2. Forms of Money

Throughout history, people have been using as money any physical object that had value to purchase goods or services. "All sorts of things have been used as money at different times in different places," including "[a]mber, beads, cowries, drums, eggs, feathers, gongs, hoes, ivory. . . ,".[12] In the 17th century, merchants and traders attempted to standardize money, "the most common forms [being]metal coins, paper notes, and bookkeeping entries."[13] The common thread of each of these items appears to be value and a system of tracking that value. One

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[10] Maria E. de Boyrie, Darlene Nelson and James A. Nelson, *The Future of Electronic Money*, World Academy of Science, Engineering, and Technology, March 15, 2007, at 158, *at* www.waset.org/journals/waset/v27/v27-28.pdf ("*Future of Electronic Money*") ("Every customer with an Internet banking account has the electronic keys that allow them access to the bank. The customer's user ID and password or credit card numbers are the keys to their accounts. If the customer does not protect those keys or voluntarily gives them to others through phishing or other social engineering schemes the customer's identity and money can be compromised.").

[11] *Id.* ("Banks that had physical control of a very limited number of access points now allow access from millions of personal computers, PDA's, and cell phones.").

[12] Glyn Davies, Origins of Money and of Banking, excerpt from *A History of Money*, 3rd ed. Cardiff: University of Wales Press, 2002, *at*, http://projects.exeter.ac.uk/RDavies/arian/origins.html.

[13] Freedictionary.com, definition of "money," *at* http://encyclopedia2.thefreedictionary.com/p/Money.

author has stated that "[i]t is almost impossible to define money in terms of its physical form or properties since these are so diverse. Therefore any definition must be based on its functions."[14] Those functions are identified as follows:[15]

Specific functions of money—

- Unit of account;
- Common measure of value;
- Medium of exchange;
- Means of payment; and
- Store of value

General functions of money—

- Liquid asset;
- Framework of the market allocative system;
- A causative factor in the economy; and
- Controller of the economy.

Every form of money does not include each of these functions, but will encompass many of them. Money's transformation over time from a physical object containing value (from coin to paper) embodies the intellectual characteristics of society of the time. "The use of paper to represent money was a move to the idea that a symbol could be used to represent gold or silver and could be 'on-demand' converted to the precious metals. Paper currency was much easier to transport and use than heavy and bulky metals. The acceptance by the public of paper money depended on the public's trust or belief that the issuing authority

[14] *Id.*

[15] *Id.; see also* Freedictionary.com ("money is held to have four functions: to serve as a medium of exchange universally accepted in return for goods and services; to act as a measure of value, making possible the operation of the price system and the calculation of cost, profit and loss; to serve as a standard of deferred payments, the unit in which loans are made and future transactions are fixed; and to provide a means of storing wealth not immediately required for use.").

was stable, reliable and available."[16] However, generally the characteristics have remained the same. Specifically, money is something that can be counted, transferred and used to store value.[17]

E-money also has these characteristics. E-money allows value to be stored and transmitted electronically and provides consumers with easy transferability.[18] An e-money account provides its owners with the accessibility to their deposit accounts at any time without the burden of carrying large amounts of money or accruing interest and fees on overdue credit and debit card accounts. E-money simply involves the transfer of electronic information from one computer or access terminal to another. As a result, the only pertinent or significant difference between e-money and paper money is the tangible qualities associated with the latter.

B. History of Money In the Insurance Context

1. Legal Definition of Money

Black's Law Dictionary[19] defines money as:

1. The medium of exchange authorized or adopted by a government as part of its currency. UCC § 1-201(24);
2. Assets that can be easily converted to cash;

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[16] *Future of Electronic Money*, at 158 ("In the past the asset was physical; gold, paper money, or checks. Today the asset is information (usually electronic) . . .").

[17] *See* Malte Krueger, *Innovation and Regulation—The Case of E-Money Regulation in the EU*, Institute for Prospective Technological Studies, Background Paper No. 5, Electronic Payment Systems Observatory, January 12, 2002, at 7, *at* ftp://139.191.159.34/pub/EURdoc/eur20153en.pdf ("all money in modern economies is [] credit money. Thus, bank notes and central bank reserves can be interpreted as credit to the central bank.").

[18] *Id.* ("Once value consists of electronically stored information that can be transferred via electronic networks, it becomes obvious that payment has many similarities with other processes involving storage and transmission of information.").

[19] BLACK'S LAW DICTIONARY 455 (2nd Pocket Ed. 2001).

3. Capital that is invested or traded as a commodity; and
4. Funds; sum of money.

Despite the simplicity of this definition, courts and other commentators have disagreed for decades on what constitutes "money" for purposes of insurance coverage. For example, the definition of "money" under the Financial Institution Bond, Standard Form No. 24, has been modified several times since its inception in order to meet the financial structure of modern society.[20] The following is a brief summary of the changes to the definition of "property"[21] and "money" under the financial institution bond since 1969.

Standard Form No. 24 (revised to April, 1969) defined "Property," as follows:

> "Property" means money (i.e., currency, coin, bank notes, Federal Reserve notes), postage and revenue stamps, U.S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry watches, necklaces, bracelets, gems, precious and semiprecious stones, bonds, securities, evidences of debts, debentures, notes, checks, withdrawal orders, money orders, travelers' letters of credit, bills of lading, abstracts of title, insurance policies . . . and other valuable papers, including books of account and other records used by the Insured in the conduct of its business . . . in which the Insured has an interest or in

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[20] Financial Institution Bonds, American Bar Association, (3d Ed., Duncan L. Clore ed.2008), "The [Surety & Fidelity Association of America] introduced revisions to Standard Form No. 24 in 1946, 1951, 1969, 1980 and 1986 to clarify insuring agreements, add commonly used riders, and generally ensure that the bond conformed to the current banking practices of the day."

[21] It is important to analyze the changes to the term "property" as defined under the Financial Institution Bond because it encompasses the word "money."

> which the Insured acquired or should have acquired an interest . . .[22]

The definition of "Property" was revised again in the 1980 version of Standard Form No. 24 to read as follows:

> Property means Money, Securities, Negotiable Instruments, Certificates of Deposit, Documents of Title, Acceptances, Evidence of Debt, Security Agreements, withdrawal orders, Certificates of Origin or Title, Letters of Credit, insurance policies, abstracts of title, deeds and mortgages on real estate, revenue and other stamps, tokens, unsold state lottery tickets, books of account and other records whether recorded in writing or electronically, gems, jewelry, precious metals in bars or ingots, and tangible items of personal property which are not hereinbefore enumerated.[23]

Specifically added to the definition of "property" was the last item, which states "and tangible items of personal property which are not hereinbefore enumerated." This is an important change, because in analyzing coverage under earlier banker's blanket bonds, the Seventh Circuit Court of Appeals held that "[w]e find this list [under the definition of "Property"] broad enough to include intangible as well as tangible property."[24] The addition of the last item evidences the drafters' intent to include only tangible items under the umbrella of "property."

"The words 'money, currency, coin, bank notes, Federal Reserve notes' as previously contained in the definition of 'Property' has been

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[22] Bankers Blanket Bond, Standard Form No. 24, revised to April, 1969, *reprinted in* Annotated Financial Institution Bond, Second Supplement, American Bar Association, 1988.

[23] Bankers Blanket Bond, Standard Form No. 24, revised to July, 1980, *reprinted in* Annotated Financial Institution Bond, Second Supplement, American Bar Association, 1988.

[24] *First Nat'l Bank of Decatur v. Ins. Co. of N.A.*, 424 F.2d 312, 315 (7th Cir. 1970) ("It may be worthy of note that this bond has been revised since the decision of these cases and the insurer has made no effort to further restrict the definition of property.").

given different treatment in the interest of clarity . . ."[25] "Money" was revised to state, "[m]oney means a medium of exchange in current use authorized or adopted by a domestic or foreign government as part of its currency."[26] This revised definition appears to have been taken from the Black's Law Dictionary as a way to uniformly apply that term.

The definition of "property" was again revised in the 1986 edition of the Standard Bond form No. 24 by slightly changing the first sentence. The revised definition of "property" states in part as follows:

> Property means Money, Certified Securities, Uncertified Securities of any Federal Reserve Bank of the United States, Negotiable Instruments, Certificates of Deposit . . .[27]

However, the definition of "Money" remained the same.[28] The 2004 edition Standard Bond No. 24 also did not further modify these definitions.[29]

Similar revisions have taken place with the Commercial Crime Policy, which was first drafted in 1940.[30] "The current versions of the Commercial Crime Policy have been etched by history. They are the result of a chronicle that has developed over a [72]-year period, though [sic] the dual processes of drafting and judicial construction and interpretation."[31] The 1940 Comprehensive Dishonesty, Disappearance and Destruction Policy—Form B (otherwise known as the 3-D Policy) defined Money as follows:

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[25] Annotated Financial Institution Bond, Second Edition, American Bar Association, Michael Keeley Editor, 2004.

[26] *Id.*

[27] Financial Institution Bond, Standard Form No. 24, revised to January, 1986, *reprinted in* Financial Institution Bonds, 3rd Ed., p. 983.

[28] *Id.*

[29] Financial Institution Bond, Standard Form No. 24, revised to April 1, 2004, Form TSB 5018e, The Surety Association of America, 2004.

[30] Cole S. Kain, Lana M. Glovach, Editors, <u>Annotated Commercial Crime Policy</u>, American Bar Association, at 5-6 (2nd Ed. 2006).

[31] *Id.*

> Money means currency, coins, bank notes and bullion; and travelers' checks, register checks and money orders held for sale to the public.[32]

Also relevant to the 3D policy is the definition of "Securities," which means:

> . . . all negotiable and non-negotiable instruments or contracts representing either Money or other property and includes revenue and other stamps in current use, tokens and tickets, but does not include Money.[33]

Almost thirty years later, the 1970's edition of the Blanket Crime Policy[34] made significant changes to the definition of "money," but did not revise the definition of "Securities." The Blanket Crime Policy defined "Money" as follows:

> Money means currency, coins, bank notes and bullion.[35]
>
> Securities means all negotiable and non-negotiable instruments or contracts representing either Money or other property and includes revenue and other stamps in current use, tokens and tickets, but does not include Money.

Most notably missing from the definition of "money" are items identified as "travelers checks, register checks and money orders held for sale to the public." Interestingly, those same items were re-inserted into the definition of "money" in the 1986 version of the Commercial Crime

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[32] Comprehensive Dishonesty, Disappearance and Destruction Policy—Form B (1940), *reprinted in* Study Kit for Students of Insurance, James S. Kemper, Institute for Insurance Training, Alliance of American Insurers (1976).

[33] *Id.*

[34] *See Annotated Commercial Crime Policy*, at 13 ("The roots of the 3-D Policy and the Blank Crime Policy are themselves traceable to financial institution bond forms.").

[35] Blanket Crime Policy, Revised to 1970, *reprinted in* Adjusters' Reference Guide, Blanket Crime Policy.

Policy. This description remains the same today. "Money" under the 1986 Crime Policy is defined as follows:

> Money means:
>
> a. Currency, coins and bank notes in current use and having a face value; and
>
> b. Travelers checks, register checks and money orders held for sale to the public.[36]

"Given the requirement that currency, coins, and bank notes must be in current use and have a face value, the definition is clearly limited to items used as a circulating medium of exchange and does not embrace notes, bonds, or evidences of debt."[37] The 1986 Commercial Crime Policy also revised the definition of "Securities," as follows:

> Securities means negotiable and non-negotiable instruments or contracts representing either 'money' or other property and includes:
>
> a. Tokens, tickets, revenue and other stamps (whether represented by actual stamps or unused value in a meter) in current use; and
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> b. Evidences of debt issued in connection with credit or charge cards, which cards are not issued by you; but does not include 'money'.[38]

In addition, for the first time, the 1986 Commercial Crime Policy introduced another item of property that was provided coverage, which was labeled "Property Other Than Money and Securities." This item was defined as follows:

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[36] Commercial Crime Policy, revised to 1986, *reprinted in* Annotated Commercial Crime Policy, Second Edition (2006).
[37] *Annotated Commercial Crime Policy*, at 246.
[38] *Id.*

> Property Other Than Money and Securities means any tangible property other than 'money' and 'securities' that has intrinsic value but does not include any property listed in any Crime Coverage Form as Property Not Covered.[39]

The "other property" definition "limits the policy's coverage to losses of tangible property." Accordingly, in order to fall within this definition the item must have "intrinsic value."[40]

As is seen from the changes to the Financial Institution Bond and Commercial Crime Policy over the years, society's use of certain forms of property changes over time. As property evolves, so too does the insurance available to cover theft or disappearance. The development and use of e-money will likely lead to additional revisions of these insurance products as our interpretation of the policies change and case law further develops.

2. Case Law

When presented with a fidelity bond or crime policy claim for a specific loss, the Claim professional must determine whether the loss is covered. This analysis begins with a determination as to whether the loss is covered within the enumerated items listed under the definition of "property." Within that definition is the capitalized word "Money," which means that it is also defined under the bond. This analysis remains the same when determining whether a loss relating to e-money falls within the bond's coverage. In order to fully perform this analysis, a review of the most recent and pertinent decisions defining "money" and "property" under a Fidelity Bond or other related insurance policies are required.

The difficulty in ascertaining whether a loss is covered under a fidelity bond can be best evidenced by Federal Reserve Board Chairman Ben Bernanke's recent remarks. In a recent policy report to Congress on July 13, 2011, Chairman Bernanke was asked whether gold was money,

[39] *Id.*

[40] *Annotated Commercial Crime Policy*, at 248.

to which he plainly responded, "No."[41] Certainly if gold is not money, then what is? What seems like a simple concept actually connotes many different meanings. The following is a compendium of case law defining "property" and "money" under fidelity bonds and commercial crime policies.[42]

a. ***Check Kiting Losses***

(i) ***Clarendon Bank & Trust v. Fidelity and Deposit Co. of MD***[43]

In *Clarendon*, the insured bank sought recovery under its Bankers' Blanket Bond for a loss sustained as a result of allowing its customer, a used car dealer, to draw on deposited items which were ultimately dishonored following discovery of a "check kiting" scheme.[44]

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[41] Agustino Fontevecchia, *Bernanke Fights Ron Paul In Congress: Gold Isn't Money,* Forbes, July 13, 2011, *at* http://www.forbes.com/sites/afontevecchia/2011/07/13/bernanke-fights-ron-paul-in-congress-golds-not-money/.

[42] The following cases are not meant to create a complete list of all cases analyzing these definitions, but rather illustrate the breadth of pertinent case law on this issue and to apply that case law to a hypothetical claim below.

[43] *Clarendon Bond & Trust v. Fidelity and Deposit Company of Maryland,* 406 F. Supp. 1161 (E.D. Va 1975).

[44] For ease in draftsmanship, the term "check kiting" will be defined as follows and will be referred to in all applicable cases, rather than detailing the actual check kiting facts asserted in the following decisions. The Eighth Circuit defines "check kiting" as:

> [A] series of acts which together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the banks involved into a feeling of confidence and security. The bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. If credit is taken, that credit is usually drawn on immediately. The check kiter then deposits a check in the bank upon which the first check is drawn before the first check arrives there. The second check is drawn on the bank from which the first money or credit is received. Credit is taken for it and that credit covers the first check when it comes in and possibly additional credit. Then the process is carried on, back and forth, until the scheme is discovered.

The bond provided coverage under Insuring Agreement B (On Premises) for "Loss of Property . . . through false pretenses."[45] The Court was asked to determine whether the customer knowing that the deposits were ultimately not payable amounted to false pretenses and if the exchange of bad checks was the exchange of "property" as defined under the bond. "Property" was defined under the Bankers' Blanket Bond as "money (i.e. currency, coins, bank notes, federal reserve notes) . . . certificates, receipts, warrants, rights, transfers, coupons, drafts, bills of exchange , acceptances, notes, checks, withdrawal orders . . . including books of account and other records used by the insured in the conduct of its business and all other instruments similar to or in the nature of the foregoing in which the insured has an interest. . ."[46]

The insurer argued that property under the bond was limited to tangible items and that check kiting losses did not fit within that definition. Conversely, the Plaintiff argued that if the bond was solely limited to tangible items it would have stated as much. Plaintiff further contended that its "argument is especially compelling in the light of the 1969 bond agreement revisions, which accordingly afforded defendant an opportunity to specify whether the property definition referred only to tangible items."[47]

The Court held that "[t]he definition in the bond does not address only tangible items covered under the definition. The Court finds that the definition of property is broader than mere tangible items and may include the type of losses suffered in this matter."[48] The Plaintiff's characterization of its losses included "evidences of debt," and "rights," which fall under the definition of "property" under the bond. The Court agreed and reasoned that losses resulting from bad checks in a check kiting scheme "were items of value and may be construed as 'evidences of debt,' 'right(s)' and ultimately resulting in the making of 'note(s)' and 'checks.'"[49]

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[45] *Clarendon*, 406 F.Supp. 1161.
[46] *Id.* at 1168.
[47] *Id.*
[48] *Id.* at 1169.
[49] *Id.*

(ii) ***Fidelity and Cas. Co. of N.Y. v. Bank of Altenburg***[50]

In this case, the insured, the Bank of Altenburg filed an action against its fidelity bond insurer for losses resulting from false pretenses. A customer of the insured bank deposited personal checks into his account. The bank gave the customer immediate credit, which the member immediately exhausted by drawing on his account. His personal checks were then dishonored by the issuing bank. The insurer argued that the definition of "property" under the bond required that the loss be tangible. In finding for the bank, the Court held that the "term 'Property' was defined to include a multitude of types of assets of the bank, including 'money, currency, coin, securities, evidences of debt . . .' it is not conceivable to us that any disinterested banker, insurance underwriter, or lawyer would construe' this bond as not covering assets of the bank lost through a 'check kiting' scheme practiced upon it."[51]

b. ***Miscoding***

(i) ***Aetna Cas. and Surety Company v. Louisiana Nat'l Bank***[52]

In this case Aetna Casualty and Surety Company ("Aetna") brought suit against its insured Louisiana National Bank seeking a declaration of non-coverage under a Bankers Blanket Bond. Louisiana National Bank suffered a loss as a result of miscoding a deposit of one of its customers. The miscoding resulted in a credit to another customer's account, which went unnoticed for some time. Thereafter, the good-fortuned customer to whom the credit was given withdrew the funds before the Bank learned of its error. The ill-fortuned customer subsequently demanded its rightful funds, which was honored by the Bank. As a result of the loss, the Bank submitted a claim under its Bankers Blanket Bond.

[50] *Fidelity and Cas. Co. of New York v. Bank of Altenburg*, 216 F.2d 294, 302-303 (8th Cir. 1954).

[51] *Id.* at 304.

[52] 399 F. Supp. 54 (M.D. La 1975).

Aetna moved for summary judgment arguing "mistaken 'credits' to an account do not constitute misplacement of 'property' as that term is defined in the bond."[53] The insured argued that money was misplaced when it was credited to its account holder by an erroneous credit and then lost by theft when the customer, knowing the money was not his, withdrew it.[54] The bond defined "property" in relevant part as "money" and "evidences of debt."[55] The Court held that the definition of "property" in the bond was "certainly broad enough to include credit." Finding for the bank, the Court went on to hold that:

> [A]lthough the misplacement occurred through the use of modern computerized banking techniques, the misplacement was just as real as though cash dollars had been taken from a pigeon-hole designated for City-Parish funds and misplaced into a pigeon-hole designated for Hamilton funds.[56]

c. ***Consequential Losses***

(i) ***Imperial Ins., Inc. v. Employers' Liability Assurance Corp.***[57]

The insured insurance company sought to recover under its Commercial Crime policy by reason of consequential losses resulting from payments it made under surplus risk polices as a result of fraudulent or dishonest acts of its general manager. Imperial Insurance Company ("Imperial") had made payments under three fire and casualty policies issued by it allegedly by reason of the fraudulent acts of its president and general manager. The Insurer argued that the consequential loss suffered by Imperial was not covered by the policy because coverage was provided only against the physical loss of "Money, Securities and Other Property" due to the dishonest conduct of Imperial's employees. The insurer argued that Imperial's loss was a consequential pecuniary loss

[53] *Id.* at 56.
[54] *Id.*
[55] *Id.* at 55.
[56] *Id.* at 56.
[57] 442 F.2d 1197 (D.C. Cir. 1970).

measured by payments it made to third parties under Imperial policies and, thus, was not covered.

"Money" under the policy was defined as "currency, coins, bank notes and bullion; and travelers checks, register checks and money orders held for sale to the public."[58] Finding for the insured, the Court reasoned that the "loss here was a pecuniary depletion of Imperial's monetary assets. In that sense, it was a loss of property."[59] The Court held that the definition of money as "currency, coins, bank notes and bullion, when followed by the general expression "other property" does not clearly exclude liability to compensate for payments made from the insured's funds, if due to the misconduct described."[60] The Court further reasoned "[i]t is true this gives meaning to the policy not explicitly expressed. But it obtains support from the general purpose of the policy to protect against loss due to the fraudulent or dishonest conduct of an employee."[61]

d. *Loss of Interest*

(i) ***Empire of Carolina, Inc. v. Continental Cas. Co.***[62]

Insured brought suit against its insurer seeking coverage for lost interest on sums stolen by its former president. The policy defined "money" as "currency, coins, bank notes and bullion, and travelers' checks, register checks and money orders held for sale to the public."[63] The Court held that "[I]nterest on stolen currency, coins, etc. is not included in the definition of 'money.'"[64] Accordingly, the Court reasoned that the fidelity policy only provided coverage for the principal amount stolen by the plaintiff's former president.

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[58] *Id.* at 1198.
[59] *Id.* at 1199.
[60] *Id.* at 1199.
[61] *Id.*
[62] 105 N.C. App. 675 (1992).
[63] *Id.* at 678.
[64] *Id.*

e. ***Bank Checks***

(i) ***Owens, Schine & Nicola, P.C. v. Travelers Cas. and Surety Co. of Amer.***[65]

The Plaintiff, Owens, Schine & Nicola, P.C. ("Owens"), was a law firm that purchased a commercial crime insurance policy from Travelers Casualty and Surety Company of America ("Travelers"). The crime policy included coverage for computer fraud. Owens allege that it was the victim of a computer fraud during September, 2008 and that Travelers refused to pay the claim for the loss. Owens suffered a loss by way of an e-mail scam in which Owens thought it was retained by a Chinese company to collect on a debt from a Connecticut Company. After retaining Owens, the Chinese company informed Owens that the Connecticut business would be sending Owens a bank check for the funds allegedly owed. Owens received from the alleged debtor what appeared to be a bank check, deposited the check into its bank and immediately wired the funds to its Chinese client. After doing so, Owens was informed by its bank that the deposited check was fraudulent and, thus, the bank was required to debit the same amount out of Owens' IOLTA account.

Travelers denied the claim on the grounds, *inter alia*, that the alleged loss fell within policy exclusion F, for a loss resulting directly or indirectly from the plaintiff's acceptance of money orders or counterfeit money. The policy defined "counterfeit money" as " an imitation of money that is intended to deceive and to be taken as genuine."[66] "Money" under the policy was defined as "a medium of exchange in current use and authorized or adopted by a domestic or foreign government, including currency, coins, bank notes, bullion, travelers checks, registered checks and money orders held for sale to the public."[67] Travelers also argued that the bank check fell within the definition of "money" as it was a medium of exchange in current use. As such, the fraudulent bank check is counterfeit money and excluded from the policy.

[65] 2010 WL 4226958 (Conn. Super. 2010).
[66] *Id.* at *9.
[67] *Id.*

The Court disagreed with Travelers and held that the "bank check does not fall within the recognized definition of money as listed in the policy or in the recognized definitions of money in its usual and ordinary meanings."[68] Therefore, the fraudulent bank check did not constitute a "money order" or "counterfeit money" as provided in the exclusion. The Court reasoned that "a 'money order'" does not naturally encompass a bank check issued by a private banking institution . . .".[69]

f. ***Assignment of Account***

(i) ***Metropolitan Savings and Loan Assoc. v. Hanover Ins. Co.***[70]

In *Metropolitan Savings*, a savings and loan association filed a loss under its Bankers' Blanket Bond as a result of erroneously turning over an account of one of its depositors to an execution creditor, despite receiving prior notice that the account had been assigned. The assignee of the account recovered a judgment against the bank in the amount wrongfully turned over to the execution creditor. Thereafter, the savings and loan association, sought to recover from its insurer the amount of the judgment together with attorney's fees incurred in defending the prior suit. The plaintiff contended that it was required to pay the prior judgment because the information the savings and loan association had received about the prior assignment had been lost, misplaced or had mysteriously disappeared. The question for the Court was whether plaintiff's files and records were "property," as defined under the bond, the unavailability of which requires the bonding company to indemnify it for any consequential loss.

The bonding company argued that the bond is not broad insurance guarding against risk of loss in its banking operations, but rather is designed to protect the financial institution against dishonesty. The Court held that "[i]t should be abundantly clear that the failure of an employee to make a notation or otherwise perform a clerical act could

[68] *Id.*
[69] *Id.*
[70] 286 N.Y.S.2d 129 (1967).

not, by any semantic torturing of the insuring language, be considered a "'loss of property.'"[71] The Court reasoned that:

> In this comprehensive cataloguing of the type of property insured, it is clear that the common characteristics of the items listed [under the definition of property] is that each of them has a value, intrinsic or symbolic. Either they are of value in and of themselves—as currency, bullion, precious metals and jewelry, or they are papers which evidence ownership of property of value—papers which are transferable, assignable or negotiable, conferring the ownership of the underlying items of value upon a proper transfer.[72]

A ledger card was found not to be a deposit property of value. "It confers no rights of ownership upon the holder, it cannot be transferred, and its loss or disappearance does not change in the least the status of the debtor-creditor relationship it purports to record. It is a mere notation, a recorded description of property value with no inherent value of its own."[73]

g. ***Tangible Property***

(i) ***Brightpoint, Inc. v. Zurich American Ins. Co.***[74]

Plaintiff, Brightpoint, Inc. ("Brightpoint"), was an insured under a Crime Policy issued by Zurich American Insurance Company ("Zurich"). Brightpoint claims that it is entitled to coverage for a loss stemming from a scam involving prepaid telephone cards in the Philippines. The scam resulted from Brightpoint's sale of prepaid phone cards to one of its dealers in the Philippines. Brightpoint usually accepted payment from its dealer by a post-dated check. In exchange for the post-dated check, the dealer would provide bank guaranties, which certified the sufficiency of funds in the dealer's accounts and committed to honoring the post-dated checks. In this case, after receiving the

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[71] *Id.* at 596.
[72] *Id.*
[73] *Id.*
[74] 2006 WL 693377 (S.D. Ind. 2006).

guaranties from the dealer's financial institution, Brightpoint purchased the prepaid cards from its telecom provider and sent them to its dealer in the Philippines.

On two separate occasions, Brightpoint received purchased orders from its dealer and then sent the prepaid cards to its dealer's Philippine's representative. However, subsequent to those purchases, its dealer requested a meeting at which it told Brightpoint that it had not requested those purchase orders or receive the prepaid cards. As a result, the dealer would not pay Brightpoint for the 300,000 phone cards in the amount of $1.5 million. Brightpoint submitted a claim to Zurich for its loss.

Zurich denied Brightpoint's claim on the grounds that a loss of or to covered property resulting directly from computer fraud was not demonstrated. The Court disagreed with Zurich's contention that the prepaid phone cards were not "covered property, "as defined in the policy. The Court held that "[t]he only requirements for property to fall under the []definition of 'Property Other than Money and Securities' is that it be 'tangible,' have 'intrinsic value' and not be money, securities or a property specifically listed as not covered."[75] Zurich argued that the loss was purely the economic value of the phone cards and not the cards themselves and therefore the cards were not "tangible" property. In disagreeing with Zurich's contention, the Court reasoned that the phone cards at issue have a specific value assigned to them and the cards are tangible and can be physically transferred to another with an ascribed intrinsic value. The Court stated that "[w]hile a cellular phone is engineered to extract the specific value from each prepaid telephone card, we do not regard that technological feature to detract from the intrinsic monetary values assigned to the cards."[76]

(ii) *Hartford Insurance Company of the Midwest v. Mississippi Valley Gas Company*[77]

In this case, the insurer brought a declaratory judgment action on insured gas company's coverage claim under property insurance policies

[75] *Id.* at *5.
[76] *Id.* at *6.
[77] 2006 WL 1489249 (5th Cir. 2006).

covering natural gas produced by certain designated wells. The insured's loss arose from the wrongful metering of gas it purchased. The insured determined that its gas provider was charging it twice for its gas consumption under a scheme where the gas was being rerouted through the meter twice. The policies at issue "expressly exclude mere monetary losses from the definition of 'covered property.'"[78]

The insurer argued that the result of the recirculation scheme only caused the insured a loss of "money." The Court agreed holding that the "recirculation scheme merely resulted in an uncovered loss of money."[79] The Court reasoned that "the gas from the Watson Wells was not physically lost or damaged in any way before it was eventually returned to [the insured] after multiple passes through the meter . . . Therefore, [the insured's] proof of loss claim lacked the requisite 'direct physical loss of or damage to' the covered property under the insurance policies."[80]

(iii) *Avery Dennison Corp. v. Allendale Mutual Insurance Company*[81]

The insured Avery Dennison Corporation ("Avery") filed a declaratory judgment action against its insurer Allendale Mutual Insurance Company seeking coverage under its Commercial Crime policy for losses suffered from its employees' criminal misconduct. The insured's employee allegedly disclosed Avery's trade secrets to a third-party in exchange for a cash payment. Thereafter, the insured notified its insurer of losses incurred from the criminal conduct.

The Court was asked to determine whether the loss of "trade secrets" was covered under the policy. The policy provided coverage for "money, securities, and property other than money and securities."[82] The policy further defines "property other than money and securities" to mean "any tangible property other than 'money' and 'securities' that has intrinsic value but does not include any property listed in any Coverage

[78] *Id.* at 469.
[79] *Id.* at 471.
[80] *Id.* at 470-471.
[81] 2000 WL 33964136 (C.D. Cal. 2000).
[82] *Id.* at *3.

Form as Property Not Covered."[83] The Court reasoned that generally tangible means corporeality. Further, in finding for the insurer, the Court held that "Tangible property does not encompass trade secrets."[84]

h. Intangible Property

(i) *Peoples Telephone Co., Inc. v. Hartford Fire Ins. Co.*[85]

Peoples Telephone Co., Inc. ("Peoples") sued its insurer under a crime policy seeking to recover under the employee dishonesty clause for losses attributed to its employee's misappropriation of mobile telephone serial and identification numbers. Peoples provides cellular phones for rental car fleets. One of its employees stole lists containing combinations of electronic serial numbers and mobile telephone identification numbers which are necessary to activate and use cellular phones. The employee sold the stolen list of numbers to a third party who allegedly used the number combinations to program other cellular phones. As a result, Peoples suffered a significant loss for charges incurred for unauthorized telephone usage, plus deactivation/reactivation charges incurred to disconnect the stolen number and install new numbers on its cellular phone directory.

In filing cross-motions for summary judgment, the parties agreed that the lists were neither money nor securities as defined in the crime policy. However, the policy defines property other than money and securities as "any tangible property other than money and securities that has intrinsic value." In analyzing whether the telephone identification numbers falls within the foregoing category, the Court reviewed the definition of "tangible property" from Black's Law Dictionary, which states that it is "that which may be felt or touched, and is necessarily corporeal, although it may be either real or personal."[86] Holding that there was no intrinsic value in the lists because the numbers contained in the list could not be used without reference to cellular phones the Court found that the number combinations were not tangible property under

[83] *Id.*
[84] *Id.* at *4.
[85] 36 F. Supp. 2d 1335 (S.D. Fla 1997).
[86] *Id.* at 1337.

the policy, but rather "a set of instructions which has no value other than as a guide to construct a device."[87]

i. *Coins*

(i) ***DeBaise v. Commercial Union Ins. Co.***[88]

Plaintiff was insured under a theft insurance policy on his residence. He suffered a loss resulting from a theft of his rare coin collection and sought recovery from Commercial Union who denied the claim because collectable coins were not "money" as defined in the policy. The question presented to the Court was whether "coins," as an item of collection, is a separate and distinct entity apart from money in its common usage. The Court found that "[m]oney is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin."[89] Moreover, "money" is any matter, whether metal, paper, beads, shells, rocks, etc., which has currency as a medium in commerce."[90]

Finding for the insurer, the Court reasoned that the essential and natural functions of money are: (1) a commodity having a value of its own; (2) a common measure of value; (3) as having a general exchangeability and (4) as having a general medium of exchange.[91] The Court held that "coins,' "removed from circulation as a medium of exchange and collected and saved by a numismatist concerned with their commercial numismatic value, establishes those 'coins' as articles of commerce."[92] The stolen coins were not intended to be used as a medium of exchange. Accordingly, the rare coin collection was not money for purposes of a limitation of liability provision.

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[87] *Id.* at 1340.
[88] 53 Misc. 2d 45 (N.Y.S. 2d 1967)
[89] *Id.* at 46 (internal quotations and citation omitted).
[90] *Id.*
[91] *Id.* at 47.
[92] *Id.*

(ii) *McKee v. State Farm Fire & Casualty Company*[93]

An insured brought an action against his homeowner's policy insurer for a loss resulting from a burglary of his silver coin collection. The insurance policy contained an exclusion limiting the insurer's liability to $100 for loss by theft of "money, bullion, numismatic property and bank notes."[94] In order to implicate the exclusion, the Court had to determine whether the stolen silver coins fell within the definition of "money," under the policy. The plaintiff argued that his silver coins were not money because they were taken out of circulation and were an investment on his part. The Court disagreed holding that "silver coins are most reasonably regarded as 'money', and whether kept from circulation by plaintiff or not, retain their monetary character."[95]

(iii) *Cornblath v. Fireman's Fund Ins. Co.*[96]

In this action, the insured department store sought recovery under an insurance policy for the value of rare coins stolen from its premises. The coins had a certain monetary value but were not used in the insured's trade or business. The policy defined "money" as "currency, coins, bank notes and bullion; and travelers checks, register checks and money orders held for sale to the public."[97] In analyzing the insured's claim, the Court held that "[m]oney in business is a medium of exchange passing at its face value. Here the rare coins constituted money which could be sued in the conduct of the business."[98]

[93] 145 Cal. App. 3d 772 (1983)
[94] *Id.* at 775.
[95] *Id.* at 776.
[96] 392 S.W. 2d 648 (St. Louis Ct. of App. 1965).
[97] *Id.* at 649.
[98] *Id.* at 651.

j. Loan Losses

(i) ***Portland Federal Employees Credit Union v. Cumis Insurance Society***[99]

The Portland Federal Credit Union brought an action against CUMIS seeking to recover under its fidelity bond, losses suffered because of its loan officer's disbursement of proceeds from an improper loan on the construction of a new building. The Court was asked to determine whether the insured's loan loss was covered under the definition of "money" under the bond. The bond defined "property" as "money, securities, bullion, gold nuggets, gold dust, gold . . ."[100] Under the bond, "money" was further defined as "currency, coin, bank notes, Federal Reserve notes, revenue stamps and postage stamps."[101] The Court held that the loan loss did not qualify as a loss of money because it did not involve loss of "currency, coin, bank notes, Federal Reserve Notes, revenue stamps or postage stamps."[102]

C. Risks In the Electronic World

The creation of e-money and the financial platforms that they operate on pose new and significant challenges to banks, businesses and their customers. Because e-money is electronic, it can be accessed through almost any computerized database. Therefore, financial institutions are not just facing the threats of yesterday (robbery, burglary, embezzlement) of cold hard cash, but are also facing the risk of loss by the touch of a button. A few of the most typical risks may include operational risks at the point of initial capture and/or transfer, faulty equipment, which may lead to inappropriate data processing or inaccurate electronic data transfer.[103] In addition, ineffective controls at the deposit or point of sale may lead to the intentional or unintentional

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[99] 894 F.2d 1101 (1990)
[100] *Id.* at 1104.
[101] *Id.*
[102] *Id.*
[103] *See* Federal Financial Institutions Examination Council, *Risk Management of Remote Deposit Capture, at* http://www.ffiec.gov/pdf/pr011409_rdc_guidance.pdf.

alteration of electronic payment information or resubmission of an electronic file leading to a financial institution's loss.[104]

As a result, businesses, financial institutions and their customers need to guard against such potential risks. In light of these new age risks, a claims professional must know the various forms of e-money systems being used globally today. The following is a brief overview of those systems, as well as a description of the risks associated with each.

1. Cashless payments

An Internet Payment Service allows financial institution customers to send payments electronically from their financial institution to a creditor, such as a utility provider, mortgage holder or credit card company. This system presents some risks including (i) many online vendors require credit card or banking information which has the potential to be hacked; (ii) hackers may use illegal information they have obtained about a financial institution's customer to send the customer a phony email which asks for the customer's personal or banking information. If the customer clicks on the email and the hyper-attachment inside, they may be at risk for financial data hijacking.

2. Cell Phone Payments

Mobile Payments refer to payment services performed from or via a mobile device. There are four primary types of mobile payments: (1) premium short message services ("SMS") based transactional payments; (2) direct mobile billing; (3) mobile web payments (WAP); and (4) contactless near field communication (NFC). SMS transactions allow the consumer to send a payment request via an SMS text message which is then charged a fee from their phone provider or online wallet. The merchant involved is informed of the payment success and can then release the paid for goods. Direct mobile billing allows consumers to use the mobile billing option during checkout at an e-commerce site—such as an online gaming site—to make a payment. After two-factor authentication involving a PIN and One-Time-Password, the consumer's mobile account is charged for the purchase. It is a true alternative payment method that does not require the use of credit/debit cards or pre-

[104] *Id.*

registration at an online payment solution such as PayPal, thus bypassing banks and credit card companies altogether.

The WAP system allows consumers to use web pages displayed or additional applications downloaded and installed on the mobile phone to make a payment. Finally, the NFC system is used mostly in paying for purchases made in physical stores or transportation services. A consumer using a mobile phone equipped with a smartcard waves his/her phone near a reader module. With an NFC-enabled smartphone, users can tap or swipe the phone at check-out instead of using a credit or debit card. Most transactions do not require authentication, but some require authentication using PIN, before the transaction is completed. The payment could be deducted from a pre-paid account or charged to a mobile or bank account directly.

Each of these systems creates certain risks to the customer, financial institution or merchant. Some of the risks include interception of data at point of sale, inadvertent installation of malicious software on the mobile phone by its user, poor data protection controls at the merchant/financial institution, and the absence of two-factor authentication allowing for easier interception of financial information.

3. Electronic Currency

Electronic currency or "e-currency" is precious metal-backed internet currency.[105] To open an e-currency account, individuals deposit money with an online e-currency company that then converts the deposited amount into gold bullion.[106] The customer may make the deposit by sending a check directly to the online e-currency company or transferring funds via the internet from the customer's online bank account.[107] Once the account is open, the account holder can then transfer ownership of some or all of the gold into another individual's e-currency account. The transfers take place via the internet. There does not appear to be restrictions on transferring gold and, thus, ownership can be repeatedly transferred.

[105] Anti-Defamation League, E-currency Fact Sheet, *at* http://www.adl.org/internet/e_currency.asp ("E-Currency Fact Sheet").

[106] *Id.*

[107] *Id.*

Law enforcement agencies are concerned about the wide spread use of e-currency because of the likelihood that it will be used for money laundering. E-currency has been widely used by perpetrators of pyramid scams. E-currency is preferable for these schemes because swindlers demand payment from unknowing victims in e-currency because, "unlike with checks or credit cards, the charges clear instantly and cannot be canceled." Experts estimate that about half of e-currency transactions are related to scams or online games.[108]

II.
THE CLAIM

In order to demonstrate a potential loss resulting from the theft of e-money, we have presented a hypothetical example to demonstrate the use of e-money, how a loss may occur and whether that loss is covered under a financial institution bond.

A. Facts

Beginning in late 2005, Diane Swindle was hired by Dr. John Hubris to work as the bookkeeper/administrative assistant for Dr. Hubris' medical practice, known as Healthy Bones. The medical practice was located in a small town in Idaho, where honesty and virtue were the pillars of the community. Many of Dr. Hubris' patients at this institution had their medical bills paid by medical insurers, workers' compensation insurers, Medicare and/or Medicaid. As part of the process, the patient was usually required to make some type of co-payment. To accommodate his patients, Dr. Hubris accepted co-payments in almost any form including by cash, check, or credit cards. As a result, numerous forms of payments from the patients and their insurers flowed through Dr. Hubris' very successful practice on a regular basis. Ms. Swindle was responsible for all banking activities for the practice, including deposits, withdrawals, distributions, lender payments and payroll. She was also responsible for the bookkeeping activity at the practice, including account balances and account reimbursements.

Dr. Hubris, was an educated and knowledgeable physician; however, he knew very little about technology. In fact, his office

[108] *See* E-currency Fact Sheet, *supra*.

computer still had a dial-up modem until Ms. Swindle arrived on the scene. As a result, he placed a lot of his trust in his employees and required them to be informed with the latest technological trends in order to modernize his medical practice. One change that Ms. Swindle suggested making was installing mobile payment technology in the office. She told Dr. Hubris that many patients had inquired about the payment method and were urging Healthy Bones to acquire such technology. After weeks of incessant pleading, Dr. Hubris acquiesced to Ms. Swindle's request.

In order to set up the mobile payment system, Ms. Swindle needed to create an online payment account. In this case, she opened an account with PayPal because of the low fees associated with business accounts. After setting up the online account, she installed a mobile payment device at the reception desk, which could accept mobile payments from patients. In order to make a payment, the patient would place their smartphone (installed with NFC technology) in front of the medical practice's mobile payment device which would then transmit e-money from the patient's online account to Healthy Bones' PayPal account.

Within weeks of setting up the new technology, hundreds of Dr. Hubris' clients began switching from cash, checks and credit cards to mobile payments. The reason for the switch was because of the convenience and lower fees associated with mobile payments versus credit cards. Because of the large amount of funds being transferred from the PayPal account to the medical practice's bank accounts, Ms. Swindle saw an opportunity to make a little extra cash, which she thought would go undetected. She decided to use her mobile payment device to accept patient's e-money payments on a regular basis. During the next month, Ms. Swindle utilized her phone to accept payments from certain patients. As a result, one out of every five mobile payments made at the office were transmitted into her mobile payment account, rather than the business's account. In order to complete the scam, she only needed to switch the mobile payment devices for each such transaction and devise an explanation for the resulting difference in the payments made.

At the end of the month when Dr. Hubris inspected the books, he asked Ms. Swindle why the balance sheet was off several thousands of dollars. Ms. Swindle explained that the PayPal account charged a 5% fee per month for all account transfers. This of course was not true, as the fees associated with the account were much less. However, because Ms. Swindle was able to manipulate the loss to equal 5% each month, Dr. Hubris believed Ms. Swindles' explanation.

This scheme continued for several years until Dr. Hubris retained an auditor to value his practice in connection with a possible sale of the business. After completion of the audit, Dr. Hubris learned that Ms. Swindle has stolen approximately $500,000 from his medical practice by way of e-money payments. Needless to say, Ms. Swindle was fired and later indicted by the U.S. Attorney's Office under several counts of embezzlement. Dr. Hubris then submitted a proof of loss to his insurer under his commercial crime policy.

B. The Analysis

The proof of loss identified a loss of $500,000 resulting from Ms. Swindle's theft of e-money mobile payments. Dr. Hubris sought coverage for the loss under insuring agreement 1. Insuring Agreement 1 provides coverage for Employee theft - loss of or damage to "Money," "Securities" or "other property" resulting directly from the "theft" committed by an "employee" . . .[109] For purposes of this hypothetical, there is no dispute that Ms. Swindle is an employee of the insured nor is there any dispute that her acts were dishonest. The analysis required is whether the loss of $500,000 loss of e-money is "money" or "other property" as those terms are defined in the policy.

"Money" is defined in the policy as:

a. Currency, coins and bank notes in current use and having a face value; and

[109] It should be noted that Dr. Hubris might have made claim for coverage under insuring agreement 6 — Computer Fraud. However, whether Ms. Swindle's phone is a computer is beyond the scope of this paper.

b. Travelers checks, registered checks and money orders held for sale to the public

"Other property" is defined to mean "any tangible property other than "money" and "securities" that has intrinsic value.

The e-money at issue was transmitted to Dr. Hubris' medical practice in lieu of cash, check or credit card as payments for patients' medical bills. "Loss in a fidelity crime bond means 'the deprivation or dispossession of money or property of [the insured] due to the dishonest, criminal or fraudulent acts' of the insured's employees."[110] Here, there is no dispute that a loss occurred as Dr. Hubris was deprived and/or dispossessed of payments into his business.

As an initial point, because electronic money is not tangible, but is rather electronic information, it would likely not fit into the definition of "other property," under the policy which requires that it be tangible and have intrinsic value.[111]

The question then is, does e-money fall within the definition of "money." Dr. Hubris will likely argue that e-money is "money" because it is a medium of exchange in current use authorized or adopted by the United States as a part of its currency. E-money has been recognized as a medium of exchange as provided by the Electronic Fund Transfers Act, 15 U.S.C. § 1693(b)(1988) (the "Act").[112] Under the Act, an "electronic fund transfer" means:

> [A]ny transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal,

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[110] *Sperry Assoc.'s Fed. Credit Union v. Cumis Ins. Society, Inc.*, 2012 WL 693046, *10 (D.N.J. 2012).

[111] *See Peoples Telephone,* 36 F. Supp. 2d 1337, 1340 (tangible means it can "felt or touched" and must have some intrinsic value).

[112] *See also* Kevin Coles, *Making The Case For Mobile,* Lloyds Bank, March 12, 2012, *at* http://www.gtnews.com/article/8649.cfm ("Currently banks in the UK are delivering millions of contactless enabled cards (estimates of around 20-25 million by the end of 2012), and these will be the precursors to the delivery of payment through mobile devices.").

> telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone.[113]

The Act "provides a basis framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems."[114] As such, any transaction governed by the Act has been either explicitly or implicitly adopted and/or authorized for use by the United States. Moreover, because the characteristics of e-money function as a medium of exchange, e-money has been described as the equivalent of the money it represents.[115]

E-money consists of the essential and natural functions of "money," which include (1) a commodity having a value of its own; (2) a common measure of value; (3) has the ability to be exchanged; and (4) has a general medium of exchange.[116] Thus, it is reasonable that the policy would provide coverage for the loss at issue.[117]

III.
CONCLUSION

The manner in which people pay for goods and services around the world is ever changing. Both customers and businesses seek to make transactions faster and easier. However, as technology develops that allows consumers to use new and more complex forms of electronic

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[113] *Curde v. Tri-City Bank & Trust Co.*, 826 S.W.2d 911, 911-912 (1992) (citing 15 U.S.C. § 1693(b)(1988).

[114] 15 U.S.C. § 1693(b)

[115] *Crunk v. State Farm and Cas. Co.*, 38 Wash. App. at 507. *See also Lopez v. First Union Nat'l Bank of Florida*, 129 F.3d 1186, 1192 (11th Cir. 1997) (the anti-laundering act applies not only to cash transactions but also to "electronic fund transfers and information held in electronic storage").

[116] *DeBiase*, 53 Misc. 2d at 46 (citing *United States v. Gellman*, 44 F. Supp. 360, 365 (D. Minn. 1942).

[117] *See First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 569 (7th Cir. 2009) ("in most jurisdictions, a loss is an 'actual depletion of bank funds . . . '").

payment systems, financial institutions and businesses will be presented with new risks. A review of the information provided above, should give insurers and their insureds a guidepost to the new technological risks present in our financial system and the potential claims may arise from the theft of e-money. We recommend that claims professionals review their current bond and crime insurance products to determine how they will respond to these new risks.