

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-01659

No. 2007-CA-01749

**NATIONAL BANK OF COMMERCE
and
NBC CAPITAL CORPORATION
Appellants**

v.

**JUSTIN SHELTON
Appellee**

**BRIEF OF MISSISSIPPI BANKERS ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANTS/APPELLANTS
NATIONAL BANK OF COMMERCE
and
NBC CAPITAL CORPORATION**

**Appeal from the Circuit Court
of Lowndes County, Mississippi
Honorable James T. Kitchens, Circuit Judge**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

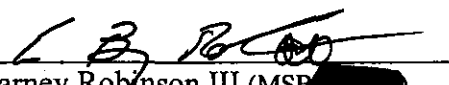
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal. In addition to those persons identified by Appellants National Bank of Commerce ("NBC") and NBC Capital Corporation ("NBC Corp.") in their Certificate, the Mississippi Bankers Association further identifies the following:

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**STATEMENT OF THE ISSUES AND
STATEMENT OF THE CASE**

The Mississippi Bankers Association ("MBA") incorporates by reference, adopts and realleges the "Statement of the Issues" and the "Statement of the Case" set forth by NBC and NBC Corp. and in their Brief of the Appellants. MBA would supplement Appellants' Statement of Issues with the following additional or restated issues:

A. Whether the trial court erred by failing to follow *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 839 (Miss. 1999), when the trial court found Miss. Code Ann. § 75-4A-204 (1972)(governing unauthorized payment orders) - instead of Miss. Code Ann. § 75-4A-205 (1972)(governing erroneous payment orders) - to control the rights and liabilities of the Parties in the funds transfer transactions at issue.

B. Whether the trial court committed plain error in failing to find that pursuant to Miss. Code Ann. § 75-4A-505 (1972), which is a jurisdictional statute of repose, Plaintiff/Appellee Justin Shelton is precluded from recovering any payments to which Shelton failed to object within one year after receipt by Shelton of account statements reflecting the erroneous funds transfers by NBC.

C. Whether the trial court erred in failing to find Plaintiff/Appellee Justin Shelton's common law negligence claim displaced by the applicable provisions of the UCC.

205 erroneous payment
vs
204 unauthorized payment

Reeves -

Justin was not a
sender for 2 payments b/c
that he was not

Risk imp. by transfer

Justin initiated transfers -
dupl. erroneous
is an erroneous payment?
vs unauth. payment

SUMMARY OF ARGUMENT

In our increasingly interconnected world, the use of electronic funds transfers as a means of funds remittance has increased exponentially. In an effort to provide commercial certainty, as well as to clearly define rights and liabilities that correspond with well-considered public policy objectives, the Mississippi Legislature, like those of most other states, has adopted UCC Article 4A¹ – which regulates in great detail the world of funds transfers, to the extent not preempted by federal law.²

As this Court has recognized, “[t]he UCC facilitates financial transactions, benefiting both consumers and financial institutions, by allocating responsibility among the parties according to whomever is best able to prevent a loss.” *Union Planters Bank, Nat’l Ass’n v. Rogers*, 912 So.2d 116, 121 (Miss. 2005). This public policy objective is implemented through the UCC’s detailed statutory scheme for loss allocation with respect to funds transfers.

The MBA respectfully submits that the trial court’s decision, if left undisturbed, will have the effect of harming Mississippi consumers and commerce. It further will discourage our citizens from responsibly attending to their own affairs, by sanctioning inattentiveness to almost five years of bank statements revealing banking errors that could have been corrected if brought to the bank’s prompt attention. See *Hollywood v. First Nat’l Bank of Palmerton*, 859 A.2d 472, 480 (Pa. Super. Aug. 2004)³ (“As tempting a choice as [it] may be in an individual case [i.e.

¹ In the interest of brevity, MBA often cites herein using the official UCC citation-format, e.g., UCC 4A-205, instead of the full Mississippi Code citation, e.g., Miss. Code Ann. § 75-4A-205.

² See Miss. Code Ann. § 75-4A-108 (1972) (“This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. 1693 et seq.) as amended from time to time”). This exclusion does not apply here as it is undisputed that the transfers in question are not electronic fund transfers within the meaning of the Electronic Fund Transfer Act. Rather, the transfers at issue here were initiated by phone call to NBC from Susan Nolan on behalf of Justin Shelton and were not part of any pre-arranged plan for the bank to honor periodic or recurring transfers. E.g., (R.56-57 & 110.)

³ (Quoting *Menichini v. Grant*, 995 F.2d 1224, 1230 (3rd Cir. 1993))(bracketed language present in quoted case)(internal citation omitted).

favoring 'the rights of unsuspecting victims ...over the broader interest of the commercial world'], we think the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping away from those in the best position to monitor accounts").

Here, the trial court applied the wrong section of Article 4A, failed to follow a controlling Mississippi Supreme Court case, departed from the UCC to impose common law liability and ignored a jurisdictional statute of repose. By doing the foregoing, the trial court shifted liability for erroneous duplicate funds transfers to the wrong party – all contrary to the carefully crafted risk allocation scheme set forth by the Mississippi Legislature governing these transactions.

For the following reasons, the MBA respectfully submits that the summary judgment below should be reversed and rendered in NBC's favor, due to its position at odds with this Court's precedent, Mississippi statutory law and persuasive case authority from other jurisdictions:

Applied the Wrong UCC Article 4A Provision

- The trial court mistakenly applied UCC 4A-204, which addresses *unauthorized* payment orders, as opposed to UCC 4A-205, which addresses *erroneous* payment orders, such as duplicates of an authorized order, despite the fact that Shelton admits the original orders were authorized and this Court's holding in *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 838 (Miss. 1999) that UCC 4A-205 governs in "a case to recover funds sent in error by a duplicate wire transfer."

Failed to Enforce Article 4A's Statute of Repose and the Parties' Customer Agreement

- The trial court ignored Article 4A-505 – a statute of repose that courts have found to be a jurisdictional attribute of the rights and obligations contained in Article 4A. Had the trial court applied that statute of repose, liability would have properly rested with Shelton for all erroneous transfers to which he failed to object within one year of receipt of an account statement reflecting the transaction.

- The trial court failed to enforce the Parties' customer agreement which required Shelton to advise NBC of any erroneous transfers within 60-days; one which Miss. Code Ann. § 75-1-102(3) effectuates as a matter of statute.

***Improperly Varied the UCC's Careful Allocation of Responsibility
By Employing a Common Law Tort Standard***

- The trial court erroneously employed a common law negligence standard for liability – at least in part – despite UCC Article 4A's complete displacement of common law tort claims in with respect to liability for erroneous funds transfers.

For these reasons, and as explained in more detail below, *amicus curiae* the MBA respectfully joins in NBC's request that the summary judgment below be reversed and rendered in NBC's favor.

ARGUMENT

MBA adopts and reasserts the arguments offered by NBC and NBC Corp.,⁴ but would supplement and emphasize those as follows:

I. AS RECOGNIZED BY THIS COURT IN *KOVAL*, UCC 4A-205 - NOT UCC 4A-204 - CONTROLS THE RIGHTS AND LIABILITIES OF THE PARTIES IN THE CASE OF ERRONEOUS DUPLICATE FUNDS TRANSFERS WHEN THE ORIGINAL TRANSFER WAS AN AUTHORIZED PAYMENT ORDER OF THE CUSTOMER

The trial court “f[ound] that Miss. Code Ann. § 75-4A-204 controls this matter.” (R.309.) This holding – which shifted liability from Shelton to NBC for the erroneous duplicate funds transfers - was contrary to both the carefully crafted UCC 4A statutory scheme, as well as this Court's decision in *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 839 (Miss. 1999).

In addition to being a mistaken application of the law, this holding further upsets the important public policy decisions the Mississippi Legislature made in allocating risk in the context of funds transfers.⁵ As recognized by a federal district court:

⁴ For the reasons explained *infra* in section II, MBA does not join in NBC and NBC Corp.'s alternative argument for application of Miss. Code Ann. § 15-1-49 (1972), as MBA believes Miss. Code Ann. § 75-4A-505 (1972) is the correct statute in this context.

The drafting committee made “a deliberate decision ...to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than rely on broadly stated, flexible principles.” *Id.* [As noted in the] official commentary....

In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment....

...The[se] rules ...represent a careful and delicate balancing of [competing] interests....

Sheerbonnet, Ltd. v. American Exp. Bank, Ltd., 951 F.Supp. 403, 407 (S.D.N.Y. 1995)(quoting UCC § 4-A-102, Off. Cmt. at 559);⁶ accord *Union Planters Bank, Nat’l Ass’n v. Rogers*, 912 So.2d 116,121 (Miss. 2005)(“The UCC facilitates financial transactions, benefiting both consumers and financial institutions, by allocating responsibility among the parties according to whomever is best able to prevent a loss”).

UCC 4A-204, which governs unauthorized payment orders,⁷ and UCC 4A-205, which governs erroneous payment orders (such as erroneous duplicates of an authorized order), are part and parcel of this balancing of competing interests, by presumptively⁸ allocating liability for

⁵ “[T]he function of creating a public policy is primarily one to be exercised by the Legislature and not by the courts.” *Watts v. Tsang*, 828 So.2d 785, 792-793 (Miss. 2002)(quoting *Mississippi Baptist Hosp. v. Holmes*, 214 Miss. 906, 931, 55 So.2d 142, 152 (1951)).

⁶ This Court has long afforded persuasive weight to the UCC’s Official Comments. *E.g.*, *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 840 (Miss. 1999)(examining the UCC “statutory scheme and the language of various pertinent sections, as amplified by the Official Comments to the UCC”); *Great Southern Nat’l Bank v. McCullough Environmental Servs., Inc.*, 595 So.2d 1282, 1287 (Miss. 1992)(“Because the Mississippi Legislature has adopted the Uniform Commercial Code (UCC), perusal of the official ‘Comments’ to the corresponding UCC section would shed further light on the notice requirement”); see also *Holifield v. BancorpSouth, Inc.*, 891 So.2d 241, 248 (Miss. App. 2004)(“The [UCC Official] comments were not adopted by the Mississippi legislature.... Still, we look to official comments about uniform laws, when those laws have been adopted all but verbatim by the legislature, as the most informed source explaining provisions of the original enactment”).

⁷ See *Schlegel v. Bank of Am., N.A.*, 271 Va. 542, 553, 628 S.E.2d 362, 368 (Va. 2006)(“The provisions of Code § 8.4A-204(a) address a receiving bank’s liability if it accepts a payment order that is not authorized and not effective as the order of the customer. The alleged unauthorized payment orders are a ‘situation covered by the particular provisions’ of § 8.4A-204(a)”).

⁸ MBA uses the word “presumptively” because many UCC statutes, including the ones at issue here, have specified exceptions to these general rules.

unauthorized payment orders to the bank, while presumptively allocating liability for *erroneous* - (authorized, but mistaken in execution) - payment orders to the customer, unless the customer notifies the bank of the error within a period not exceeding 90-days. There are sound public policy reasons for this distinction.

In contrast to an unauthorized payment order, in the case of an erroneous payment order, the customer in fact authorized one or more initial funds transfers that were authenticated by a security procedure for the detection of error – but there were ~~subsequent erroneous duplicates~~ of the authorized payment order. For example, UCC 4A-205 cites errors with respect to the identity of the beneficiary, the amount of the payment order or in the case of unintended duplication of the transfer. In these instances, the UCC shifts the burden to the customer to “advise the bank of the relevant facts within a reasonable time, not exceeding (90) days, after the bank’s notification was received by the sender.” Miss. Code Ann. § 75-4A-205(b).

Almost a decade ago, this Court held that UCC 4A-205 governs in “a case to recover funds sent in error by a duplicate wire transfer.” *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 838 (Miss. 1999). In fact, “[t]he specific issue in [the *Koval*] appeal [was] how does Article 4A adjust the equities when funds are mistakenly wired twice.” *Id.* at 839. This Court answered that question by holding that “Article 4A contains a specific provision applicable to this situation- *to-wit*: § 75-4A-205.” *Id.*

Koval alone should be dispositive of this case. Yet even setting aside *Koval*’s holding that 4A-205 is the correct statute controlling the allocation of liability for erroneous duplicative funds transfers, the conclusion that UCC 4A-205 – as opposed to UCC 4A-204 - controls this case, is apparent from a straightforward march through Article 4A of the UCC.⁹

⁹ UCC Article 4A governs the funds transfers at issue in this case and clearly defines and delineates the respective rights and liabilities of the parties to the transaction. Miss. Code Ann. § 75-4A-102 provides in part that “[e]xcept as otherwise provided in Section 75-4A-108, this chapter applies to

Under UCC 4A-103, the telephone request by Susan Nolan to NBC - on behalf of Justin Shelton - to transfer funds from Shelton's account to the account of Sonny Shelton was a "payment order." Here, NBC was both "Receiving Bank" and "Originator's Bank," under 4A-103(a) and 104. As Justin Shelton admits that Susan Nolan was acting on his behalf and with his authority when she telephoned the bank and asked that funds be transferred from Justin Shelton's account to Sonny Shelton's account, the payment order was an authorized order under 4A-202 and Justin Shelton was both a "customer" and "sender" under 4A-105(a) and 103(a). (Tr.13.)

Shelton's instructions in December of 1999 were for NBC to make two individual transfers. (*Id.*) In an admitted error, NBC mistakenly established the transfers as repetitive transfers, with erroneous duplicate transfers being effectuated each month. (R.111.) This error was easily susceptible of detection by Shelton, as NBC sent him monthly account statements reflecting each and every one of the erroneous transfers. (R.108-09.) Despite receipt of these statements, Shelton admits he did not review them and further did not complain about the erroneous transfers until March of 2005. (R.40-41.)

Once it accepted Shelton's original payment orders, under Miss. Code Ann. § 75-4A-302(a), NBC had a statutory duty to comply with the sender's (Shelton's) instructions and bore *initial* liability for the erroneous transfers.¹⁰ However, Shelton, as the customer and sender, also had a responsibility under Article 4A to exercise ordinary care in examining his account statements and to report any erroneous transfers to the bank within a reasonable time not exceeding 90-days after receiving the account statements:

funds transfers defined in Section 75-4A-104." Under Miss. Code Ann. § 75-4A-104, "[f]unds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order...."

¹⁰ Under UCC 4A-205(a), NBC may look to Sonny Shelton, the beneficiary of the duplicate payments, for recovery. To the extent of such recovery, NBC may then reimburse Shelton.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

Miss. Code Ann. § 75-4A-205(b).

Shelton admitted he did not timely perform this statutory duty. *E.g.*, (R.40.) Had Shelton timely notified the bank of the erroneous duplicate transfers, the situation would have been earlier corrected and additional losses prevented. Seeking to establish finality, the Mississippi Legislature has provided that in situations such as this, the risk of additional losses occurring more than 90-days after a customer received account statements showing the erroneous payments is shifted to the customer -- due to failure to examine his account statements.

This Court has previously enforced an analogous statute in *Union Planters Bank, National Association v. Rogers*, 912 So.2d 116 (Miss. 2005). In *Rogers*, this Court applied and enforced the so-called Statement Rule of UCC 4-406 and found a bank customer precluded from recovering for forged checks that could have easily been detected had the customer examined his monthly bank statements. *Rogers*, 912 So.2d at 121-122.

Thus, the trial court's holding that "Miss. Code Ann. § 75-4A-204 controls this matter" (R.309), is simply mistaken. The payment order was issued in the name of Justin Shelton, NBC's customer. It was authorized and effective as the order of Justin Shelton, the customer, under 4A-202. NBC's error was not in effectuating an unauthorized payment order – a situation governed by 4A-204 – but rather, in having "an accepted payment order ...transmitted pursuant

to a security procedure for the detection of error¹¹ and [then] ...erroneously transmit[ting] duplicate[s] of [that] payment order previously sent by [Shelton]." Miss. Code Ann. § 75-4A-205(a). Under these circumstances, "the following rules apply," *id.*:

[T]he sender [Shelton] has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

Miss. Code Ann. § 75-4A-205(b).

Although 4A-205 establishes a maximum window of 90 days for a customer to notify his bank of any erroneous funds transfers, in the instant case Shelton's deadline was 60 days, as that was the time limit established by his account agreement with NBC (R.17), which the UCC effectuates as a matter of statute. *See* Miss. Code Ann. § 75-1-102(3) ("The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable"). The trial court's opinion simply ignores these provisions of the account agreement, UCC 1-102(3) and 4A-205, which together would have barred all of Shelton's claims.

¹¹ Shelton admits that NBC utilized an "appropriate security procedure[]...." *E.g.*, (R.110.)

II. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO FIND THAT PURSUANT TO MISS. CODE ANN. § 75-4A-505 (1972), WHICH IS A JURISDICTIONAL STATUTE OF REPOSE, JUSTIN SHELTON IS PRECLUDED FROM RECOVERING ANY PAYMENTS TO WHICH HE DID NOT OBJECT WITHIN ONE YEAR FROM RECEIPT OF NOTIFICATION OF THE ERRONEOUS TRANSFERS

A. The Trial Court Failed to Apply 4A-505 – The One Year Statute of Repose

In addition to the not-to-exceed 90-day notice provision in 4A-205, UCC Article 4A contains a one-year statute of repose with respect to claims concerning any unauthorized or erroneous payment orders:

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one (1) year after the notification was received by the customer.

Miss. Code Ann. § 75-4A-505 (1972).

Here, NBC accepted the payment orders in the name of Justin Shelton as its customer. The bank received payment from Shelton's account for each of the erroneous transfers. The bank notified Shelton of each of the erroneous transfers by transmitting periodic account statements. (R.40 & 108-09.) Under 4A-505, Shelton may not now recover for any erroneous payments to which he did not object within one year of his receipt of account statements reflecting the transactions. *See Zengen, Inc. v. Comerica Bank*, 41 Cal.4th 239, 256, 158 P.3d 800, 810, 59 Cal.Rptr.3d 240, 251 (Cal. 2007)(quoting UCC Off. Cmt.)(The "[Uniform Commercial] Code Comment notes that [UCC 4A-]505 "is in the nature of a statute of repose for objecting to debits made to the customer's account"). As a result, even if 4A-205 allowed Shelton to recover any erroneous funds transfers made more than 60-days prior to his first notice

to NBC, he would still be precluded from recovering any transfers to which he did not object within one year of the date of receipt of notice of the transactions.¹²

B. Miss. Code Ann. § 75-4A-505, Not Miss. Code Ann. § 15-1-49, Controls in this Case

As this Court suggested in *Credit Lyonnais New York Branch v. Koval*, 745 So.2d 837, 838 (Miss. 1999), UCC cases are rare and do not often present themselves for review. When they do, they may “present[] an application of a rarely used doctrine....” For that reason, although not addressed by the trial court below, MBA believes it important to explain why the one-year statute of repose set forth in UCC 4A-505, as opposed to the three year statute of limitations found in Miss. Code Ann. § 15-1-49 (1972), controls in this matter.¹³

First, section 15-1-49 expressly limits its application to “[a]ll actions for which no other period of limitation is prescribed.” Here, Miss. Code Ann. § 75-4A-505 does proscribe a different period of limitation; rendering section 15-1-49 inapplicable *ex visceribus verborum*.

Second, Miss. Code Ann. § 75-4A-102 makes clear that the provisions of Article 4A specifically govern funds transfers,¹⁴ rendering claims related to such transfers subject to its

¹² Cf. *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.I. 558, 563, 368 A.2d 1227, 1231 (R.I. 1977)(“The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends”).

¹³ In fact, litigants have in the past mistakenly argued the wrong statute of limitations to this Court in UCC cases. For example, in *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 147-48 (Miss. 1998), the parties engaged this Court in deciding whether the discovery accrual provision of Miss. Code Ann. § 15-1-49 applied to a claim for conversion of a negotiable instrument. Apparently no party brought to the Court’s attention that a specific UCC statute of limitations, Miss. Code Ann. § 75-3-118(g), which does not even contain a discovery accrual provision – not section 15-1-49 – governs claims for conversion of a negotiable instrument. See Miss. Code Ann. § 75-3-118(g)(“an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues”); see also *Hollywood v. First Nat'l Bank of Palmerton*, 859 A.2d 472, 473 (Pa. Super. Aug. 2004)(collecting cases and holding that “the plain language of the UCC [3-118(g)] counsels mechanical application of the respective statutes of limitation, making no allowance for importation of the discovery rule or any other principle of equitable tolling”).

¹⁴ See Miss. Code Ann. § 75-4A-102 (1972)(“Except as otherwise provided in Section 75-4A-108, this chapter applies to funds transfers defined in Section 75-4A-104”).

detailed provisions.¹⁵ Thus, as explained below in section III, Article 4A displaces all state law – whether common or statutory – that stands in conflict with its specific allocation of rights and liabilities. *E.g., Fitts v. AmSouth Bank*, 917 So.2d 818, 824 (Ala. 2005) (“Because the situation made the basis of the Fittses’ common-law claims—that AmSouth made an improper funds transfer—is unequivocally addressed in the particular provisions of Article 4A, we conclude that those common-law claims are displaced by Article 4A and that the Fittses’ exclusive remedy for that claim must be found in Article 4A”).

Third, “the period of repose in § 4-A-505 [is] ‘essentially a jurisdictional attribute of the ‘rights and obligations’ contained in UCC 4-A-204(1).’”¹⁶ *Mendes Regatos v. North Fork Bank*, 431 F.3d 394, 394 (2nd Cir. 2005)(quoting *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 403, 838 N.E.2d 629, 633, 804 N.Y.S.2d 713, 717 (N.Y. 2005)); *see also Fitts*, 917 So.2d at 824-825)(enforcing 4A-505’s one year statute of repose with respect to intra-bank funds transfers). As a result, 4A-505 cannot be severed from the interdependent Article 4A statutory scheme.

¹⁵ See Miss. Code Ann. § 75-1-106 (1972) (“Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect”).

¹⁶ NBC adequately invoked 4A-505 in its Answer, by pleading an affirmative defense of “the provisions set forth in Title 75 of the Mississippi Uniform Commercial Code...” and pleading the statute of limitations; albeit the wrong one -- (section 15-1-49). (R.15.) Under the law governing notice pleading, these invocations should suffice to preserve the issue. See *Theunissen v. GSI Group*, 109 F.Supp.2d 505, 509 (N.D. Miss. 2000)(citing *Marine Overseas Servs., Inc. v. Crossocean Shipping, Inc.*, 791 F.2d 1227, 1233 (5th Cir. 1986)) (“The affirmative defense pleading requirement in Rule 8(c) has been generally interpreted under the same liberal standards as those for a complaint”). Admittedly, however; NBC did not move for summary judgment on the basis of 4A-505. Regardless, as explained in *Regatos*, 4A-505 is “‘essentially a jurisdictional attribute of the ‘rights and obligations’ contained in UCC 4-A-204(1).’” *Regatos*, 431 F.3d at 394 (citation omitted). This “jurisdictional attribute” is important, as this Court has repeatedly held that a trial court’s failure to address jurisdictional matters constitutes “plain error” -- allowing the issue to be considered on appeal even if not explicitly argued below. *E.g., Mississippi Mun. Liability Plan v. Jordan*, 863 So.2d 934, 941 (Miss. 2003)(collecting cases)(finding chancery court’s lack of jurisdiction to constitute “plain error...”).

III. THE TRIAL COURT ERRED BY FAILING TO FIND SHELTON'S COMMON LAW NEGLIGENCE CLAIM DISPLACED BY THE SPECIFIC RISK ALLOCATION PROVISIONS OF UCC ARTICLE 4A

The trial court held in part “that Justin has successfully set forth a claim against defendants for negligence.” (R.309.) This finding that common law tort claims can govern liability associated with a duplicative funds transfers subject to UCC Article 4A is error.

As noted by the California Supreme Court, UCC Article 4A provides “a detailed scheme for analyzing the rights, duties and liabilities of banks and their customers in connection with the authorization and verification of payment orders. Analysis of a funds transfer under these sections results in a determination of whether or not the funds transfer was ‘authorized,’ and provides a very specific scheme for allocation of loss.” *Zengen, Inc. v. Comerica Bank*, 41 Cal.4th 239, 251, 158 P.3d 800, 807-807, 59 Cal.Rptr.3d 240, 248 (2007). Further:

“Funds transfers involve competing interests—those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. *The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.*” (Code Com., reprinted at 23D West's Ann. Cal. U. Com.Code (2002) foll. § 11102, pp. 27-28, italics added.)

....

In light of these authorities, we agree with the Court of Appeal that “division 11 [Article 4A] provides that common law causes of action based on allegedly unauthorized funds transfers are preempted in two specific areas: (1) where the common law claims would create rights, duties, or liabilities inconsistent with division 11; and (2) where the circumstances giving rise to the common law claims are specifically covered by the provisions of division 11 [Article 4A].”

Zengen, 41 Cal.4th at 252, 158 P.3d at 807, 59 Cal.Rptr.3d at 248.

Quoting from the UCC's official commentary, a federal district court has reached the same conclusion:

The drafting committee made “a deliberate decision ... to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than rely on broadly stated, flexible principles.” *Id.* AEB relies heavily on passages selected from the official commentary to support its argument that Article 4-A is the exclusive remedy for claims like Sheerbonnet's arising out of funds transfers:

In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment....

... The[se] rules ... represent a careful and delicate balancing of [competing] interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.

Sheerbonnet, Ltd. v. American Express Bank, Ltd., 951 F.Supp. 403, 407 (S.D.N.Y. 1995)(quoting UCC § 4-A-102, Off. Cmt. at 559); accord *Schlegel v. Bank of Am., N.A.*, 271 Va. 542, 553, 628 S.E.2d 362, 368 (Va. 2006)(“In other words, to allow Schlegel to proceed on his common law claims with regard to the unauthorized payment orders would “create rights, duties and liabilities inconsistent with those stated in” Code § 8.4A-204(a). Code § 8.4A-102 cmt..... Therefore, his common law claims as they relate to the alleged unauthorized payment orders are preempted by the provisions of Code § 8.4A-204(a)”).

“Article 4-A was intended, in significant part, to promote finality of banking operations and to give the bank relief from unknown liabilities of potentially indefinite duration....” *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 403, 838 N.E.2d 629, 633, 804 N.Y.S.2d 713, 717 (2005)(citation omitted). Allowing – as the trial court did here – the application of tort law to an area of commerce highly regulated by specific statutes that implement a detailed and well-considered risk allocation scheme promulgated by the Mississippi Legislature is error.

As the Mississippi Court of Appeals has held, “[j]ust being an option is not the approach of the [MS Uniform Commercial] Code. Instead, the Code controls specific transactions and

issues, while other doctrines supplement at the interstices and margins.” *Hancock Bank v. Ensenat*, 819 So.2d 3, 8 (Miss. App. 2001); cf. *Union Planters Bank, Nat’l Ass’n v. Rogers*, 912 So.2d 116, 120-121 (Miss. 2005)(“The relationship between Rogers and Union Planters is governed by Article 4 of the Uniform Commercial Code, enacted in Miss. Code Ann. §§ 75-4-101 through 504 (Rev. 2002)”). The trial court’s award of summary judgment to Shelton, based at least in part upon a negligence tort, therefore justifies reversal.

CONCLUSION

For the reasons set forth herein, the Mississippi Bankers Association, *Amicus Curiae*, respectfully requests that this Court overturn the summary judgment of the trial court and render a summary judgment in favor of NBC and NBC Corp. on all counts. The MBA also prays for such alternative, supplemental or additional relief as may be appropriate in the premises.

THIS the 16th day of June, 2008.

Respectfully submitted,

MISSISSIPPI BANKERS ASSOCIATION

By:


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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, attorney for *Amicus Curiae* Mississippi Bankers Association, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via U.S. Mail, postage prepaid:

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