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Consumer Protection -- Credit Card Protection Under the Truth in Lending Act

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Porcelli will have little actual impact beyond the third circuit and the situation as it existed in Newark.

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Consumer Protection—Credit Card Protection Under the Truth in Lending Act

On October 26, 1970, in response to widespread complaints, Congress amended[1] the Truth in Lending Act to expand consumer protection into the area of credit cards.[2] The legislation outlaws further issuance of unsolicited credit cards[3] and imposes stiff criminal penalties for the fraudulent use of cards to charge more than five thousand dollars.[4] The most important provision limits the liability of the consumer for a lost or

[1] Pub. L. No. 91-508, §§ 501-03 (Oct. 26, 1970), *amending* 15 U.S.C. §§ 1601-64 (Supp. IV, 1965-69).

[2] The tremendous upsurge in credit cards has brought an increased awareness of the abuses associated with their use. From Dec. 31, 1967, to June 30, 1969, the Federal Research Board found that credit outstanding on bank credit cards increased from 800 million dollars to 1.7 billion dollars. The year-to-year increase on oil company cards is 200 million dollars. *Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 30 (1969) [hereinafter cited as *1969 Hearings*]. The abuses are more often related to unsolicited cards which (1) have encouraged some consumers to spend beyond their means possibly to the point of becoming bankrupt, (2) have been burdensome to some consumers because they were hard to destroy, (3) have been an unwarranted intrusion into consumers' personal lives, (4) have encouraged crime because they were easily stolen and quite negotiable, and (5) have had a potentially inflationary impact upon the economy. Another factor common to all cards has been the possibility of unlimited liability in the event that the card was lost or stolen. S. REP. No. 91-739, 91st Cong., 2d Sess. 3-5 (1970) [hereinafter cited as 1970 S. REP.]. The statistical impact of this last point was measured in Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811 (1967).

[3] Pub. L. No. 91-508, § 502(a) (Oct. 26, 1970). This provision is far-reaching because it also concerns renewals of existing credit cards. Renewals can be automatic, *i.e.*, without request by the holder, only if the card had been specifically requested initially. Unsolicited cards that were issued prior to the act may not be renewed unless the holder so requests. *Id.*; 1970 S. REP. 6. What impact will this have upon the firms who have used both solicited and unsolicited cards in the past and are unable to distinguish the accounts of holders using solicited cards from those using unsolicited cards? 1970 S. REP. 13. Another argument of those opposed to outlawing the unsolicited card is that this prohibition makes it impossible for new enterprises in the credit card field to get off the ground and compete since the sending of unsolicited cards is the only practical way to build up a large backlog of customers. *1969 Hearings* 24-26.

[4] Maximum of ten-thousand-dollar fine and five years in prison. Pub. L. No. 91-508, § 502(a) (Oct. 26, 1970).

stolen card to fifty dollars if the use of the card occurred after January 24, 1971.[5]

Prior to the act, according to the terms on most cards, the cardholder was to be liable for unauthorized use unless he notified the company of the loss or the theft of the card in advance of the unauthorized use.[6] In a typical case,[7] a holder of a Texaco credit card was assessed with liability for 570 dollars in automotive bills which had been charged to his card without his knowledge or consent. The first time that he used the card he neglected to retrieve it from the service station attendant. He failed to notify the company of the loss and four months later was billed for the unauthorized use. The court reasoned that the sending of the card to the individual by the oil company was an offer to contract according to the terms printed on the card, and the individual's retention and subsequent use of the card constituted an acceptance of the offer and its terms.[8] Hence, the holder was contractually[9] bound to pay the bills.[10]

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[5] *Id.* §§ 502(a), 503(2).

[6] The data of notice would vary depending on the specific wording of the contract and interpretations of notice appearing in state law. Several possibilities are the date notice is sent, the date notice is received, or some artificial date such as ten days after receipt, if the contract terms so specified.

[7] Texaco, Inc. v. Goldstein, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (Mun. Ct. N.Y. City 1962), *aff'd per curiam*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (Sup. Ct. 1963).

[8] 34 Misc. 2d at —, 229 N.Y.S.2d at 56. Although the initial use of the card would normally be the act of acceptance, under some circumstances retention of the card without use might be sufficient. See Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 481 (1960). Generally, for acts of acceptance in this context see RESTATEMENT OF CONTRACTS §§ 21, 72 (1932); 1 A. CORBIN, CONTRACTS §§ 62, 70, 72 (1963). In situations where the acceptance of the instrument containing the terms constitutes acceptance of the contract, the weight of authority holds this to be assent to all the terms printed therein, whether or not they are actually read. Kergald v. Armstrong Transfer Express Co., 330 Mass. 254, 113 N.E.2d 53 (1953), and cases collected therein. Nonetheless the language of the terms should be conspicuous and understandable. See Macauley, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

[9] Some courts analyze the credit card transaction using theories of guaranty and assignment. The holder is a guarantor for others using his card while the issuer is the assignee of the merchant for collection of the claims. This preserves defenses which the holder has against the merchant, such as for defective goods, when the issuer attempts to collect on his assignment. Gulf Refining Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945). For difficulties with the assignment theory see South, *Credit Cards: A Primer*, 23 BUS. LAW. 327, 331-32 (1968).

[10] *Accord*, Read v. Gulf Oil Corp., 114 Ga. App. 21, 150 S.E.2d 319 (1966); Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521 (Tex. 1969). There has been a tendency in some jurisdictions to exact a standard of due care upon the merchant and the issuer if the holder is to be held liable. Allied Stores of N.Y., Inc. v. Funderburke, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (Civ. Ct. N.Y. City 1967) (issuer violated standard of due care by permitting 237 sales slips bearing false signatures

The new federal legislation does not change the basic cause of action when the card issuer seeks to collect on unpaid bills. State courts[11] will try to ascertain the exact contractual obligations of the holder in determining what, if anything, he must remit to the issuer. These obligations are now, however, limited by the new law, and the card issuer is induced to change its tactics in order to minimize the limitations. It can allege that the use of the card was authorized, carry the burden of proof on this issue,[12] and avoid the limitation on the amount of liability. Unauthorized use is defined in the act as "a use of a credit card by a person other than the cardholder who does not have *actual, implied, or apparent authority* for such use and from which the cardholder receives no benefit."[13] Clearly, the initial test for authorized use is agency, and state law[14] must be consulted in order to resolve the issue.

Under traditional agency concepts, the cardholder is the principal and the merchant is the third party; the issuer is superimposed in the merchant's place as the collector of the account. The issuer must show that the person who used the card had the authority to bind the cardholder to obligations with third parties. *Actual* authority is created by a manifestation of consent to the agent by the principal that he may act for the principal.[15] When the act is specifically mentioned, there is express

to accumulate in thirty days because of inadequate data processing procedures); Union Oil Co. v. Lull, 220 Ore. 412, 349 P.2d 243 (1960) (question for jury on due care of merchant when address on card was in one state and the license plates on the car of user indicated another). See Note, *Contracts—Credit Cards—Liability of Holder for Unauthorized Use—Issuer's and Merchant's Duty of Due Care in Accepting Charges*, 43 N.C.L. REV. 416, 422 (1965), and Note, *Credit—Issuer's Recovery from Bona Fide Credit Card Holder for Purchases Made by Unauthorized Person Requires Showing That Due Care Was Exercised in Honoring Card*, 109 U. PA. L. REV. 266, 268 (1960), for competing policies behind such decisions.

[11] State courts handle lawsuits based on contract. Conceivably it could be tried in federal court in the event of diversity of citizenship, but a case in which the liability alleged is in excess of the ten-thousand-dollar jurisdictional amount would be unusual. 28 U.S.C. § 1332(a) (1964).

[12] This burden of proof is required by the statute. Pub. L. No. 91-508, § 502(a) (Oct. 26, 1970).

[13] *Id.* § 501 (emphasis added).

[14] If the case were tried in the federal courts, a problem could arise, at least theoretically, in the choice of federal or state law. It is highly unlikely that federal law would be applied since there is no substantial federal interest involved. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938); C. WRIGHT, FEDERAL COURTS §§ 55-60 (2d ed. 1970).

[15] RESTATEMENT (SECOND) OF AGENCY § 7 (1957); W. SEAVEY, LAW OF AGENCY § 8A (1964) [hereinafter cited as SEAVEY]. The term "actual authority" is generally shortened to "authority" for purposes of clarity. *E.g.*, SEAVEY § 8A. *Contra, e.g.*, Coblentz v. Riskin, 74 Nev. 53, 57, 322 P.2d 905, 907 (1958).

actual authority to do that act; when the instructions state the general nature of the status of the agent, there is *implied* actual authority to do acts consistent with this instruction.[16] There is no distinction in the powers bestowed by express and implied actual authority—the legal effect is the same.[17] In the credit card context the former is demonstrated by the principal's command to his agent "take my card and fill the car with gasoline." An example of the latter is the situation where an employee who travels for a firm is allowed the use of a company car with a gasoline credit card in the glove compartment.

Apparent authority differs from actual authority in that it depends on manifestations by the principal to the third party rather than to the agent.[18] This authority arises when the principal leads the third party to reasonably believe that the professed agent is acting in his behalf.[19] The usual application of apparent authority is where a prior relation of principal and agent is terminated and the principal has made no effort to repudiate the status after it has in fact ceased.[20] This failure to reveal is conduct which might cause third parties to reasonably believe that the agency relationship still exists. Thus, a discharged employee might continue to use the firm's misappropriated credit card at businesses with which he had formerly dealt, and apparent authority would bind the former employer absent notification that the employee had been discharged.

Implied actual authority and apparent authority are often confused despite being based upon different types of behavior on the part of the principal. The sufficiency of the manifestations made to either the agent or to the third party is the chief concern of the court, but this is not determined through strict rules; rather, it depends upon the exact conduct of the principal and upon present and prior relations between all parties. Both doctrines might operate on the same fact situation. For example, opponents of the new law were concerned about the situation where the holder "purposely refrained from informing the issuer of misuse about which he had actual knowledge."[21] Yet this could be considered apparent authority if the card user had previously possessed actual authority, the revocation of which had not been communicated by the principal to concerned third parties such as the issuer. This behavior might also be

[16] RESTATEMENT (SECOND) OF AGENCY § 7, Comment c (1957); SEAVEY § 8C.
[17] SEAVEY § 8C.
[18] RESTATEMENT (SECOND) OF AGENCY § 8 (1957); SEAVEY § 8D.
[19] RESTATEMENT (SECOND) OF AGENCY § 8, Comment c (1957); SEAVEY § 8D.
[20] RESTATEMENT (SECOND) OF AGENCY § 8, Comment a (1957).
[21] 1970 S. REP. 11.

classified as implied actual authority if the card user knew of the principal's continued failure to object to the misuse, since he could infer consent from the principal's actions. Liability would be premised on the idea that "a reasonable person in the position of the principal knowing of unauthorized acts and not consenting to their continuance would do something to indicate his dissent."[22] However, it remains for the courts to backlog a large number of such situations upon which the presence or absence of liability is predicated before clarity will emerge.

Other doctrines, such as estoppel and inherent agency power,[23] might also be utilized by the court in identifying an agency relationship. In addition, even though agency cannot be found, the use is still characterized as authorized if it is beneficial to the holder,[24] and this possibility should not be overlooked.

In the event that the card issuer fails to establish that the use was authorized, the fifty-dollar limitation on liability becomes effective. Yet even to assure this lessened recovery the issuer must prove compliance with other parts of the act. The issuer must show that the use preceded any notification from the cardholder of the loss or theft, that it had provided the holder with a prestamped, self-addressed notification form which would be mailed if there were loss or theft, that it had provided adequate notice to the holder as to potential liability, and that the card was not an unsolicited card.[26] As of January 24, 1972, there will be added the requirement that there be a method of identifying authorized users incorporated into the transaction.[27]

It should be noted that the issuer is required to carry the burden of proof as to lack of notification prior to unauthorized use. Normally, the party taking the position that notice *was* given must produce evidence on this point and a showing, for example, that a correctly addressed letter was put in the mail creates a presumption in his favor.[28] The other party

[22] RESTATEMENT (SECOND) OF AGENCY § 26, Comment d (1957).
[23] *Id.* §§ 8A, B; SEAVEY §§ 8E, F.
[24] Pub. L. No. 91-508, § 501 (Oct. 26, 1970).
[25] *Id.* § 502(a).
[26] *Id.*
[27] *Id.*
[28] Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25, 36 (1891). If the evidence which creates the presumption is not disputed by the other party, then, depending on its strength, either a prima facie case is established for the jury or the presumption is transformed into a conclusion as a matter of law. C. MCCORMICK, EVIDENCE § 308 (1954). When a presumption arises in favor of notice, it is conclusive when evidence to the contrary is not introduced. 9 J. WIGMORE, EVIDENCE § 2519(B) (1940).

then presents evidence showing lack of receipt, and the issue becomes one for the jury.[29] However, the statute puts the onus on the party alleging no receipt to carry the burden of proof on the issue. Ideally, there will be a jury instruction to this effect and the ultimate result will be that it will become easier for the sender to estabilsh notice. The precise issue, according to regulations[30] promulgated by the Federal Reserve System, is whether the holder took "such steps as might be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information . . . ."[31] The notice is "considered given at the time of receipt or, whether or not received, at the time ordinarily required for transmission, whichever is earlier."[32] This definition plainly anticipates the situation where the issuer claims not to have received notice but the finder of fact disagrees.

The issue of notice is simplified if the issuer can show the second of the requirements—the fact that the holder had been provided with the prestamped notification form. The expectation is that the holder will use this form in event of loss or theft, and thus the possibility of misaddressed letters is minimized. The presumption of receipt operates in favor of the issuer if he presents evidence such as a mailing list containing the holder's name and the testimony of an employee to the effect that all the members of the list were sent the notification form.[33] The same presumption exists on similar evidence when the issuer attempts to show compliance with the third requirement that the cardholder is to be given adequate notice[34] of his potential liability. This might have been printed on the billing statement or on the credit card; if it were sent as a printed notice then it must be followed by another notice each succeeding two years.[35]

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[29] Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25, 37 (1891).

[30] FEDERAL RESERVE SYSTEM PRESS RELEASE (Jan. 20, 1971) contains amendments to Regulation Z, Part 226, the present version of which appears in 12 C.F.R. § 226 (1969) [these amendments hereinafter will be cited as Reg. Z, § 226.13].

[31] Reg. Z, § 226.13(f).

[32] *Id.*

[33] See discussion in note 28 *supra.*

[34] The act requires that the notice must set "forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning." Pub. L. No. 91-508, § 501 (Oct. 26, 1970).

[35] Reg. Z, § 226.13(c)(3). The recommended form, assuming the italicized hypothetical facts, is set out in the regulations: "You may be liable for the unauthorized use of your credit card. You will not be liable for unauthorized use which occurs after you notify *Plastic Card Company* at *Windborn, N.Y. 00000,* orally or in writing of loss, theft, or possible unauthorized use. In any case liability shall not exceed *$50.*" *Id.* § 226.13(e).

To satisfy the fourth requirement, the card issuer would simply produce the request of the cardholder in order to show that the card was requested. If the card were previously unsolicited but changed in status by a requested renewal, then this renewal form would be presented as evidence. To comply with the requirement of an identification procedure, the issuer should have no difficulty in showing that his system had been revamped in order to produce a signature card or a card with the picture of the holder appearing on it.[36]

The overall scheme of legislation reveals that Congress has erected many hurdles in order to frustrate the card issuer who is seeking recovery when the card has fallen into the hands of an unauthorized user. The strict limitation to a maximum fifty-dollar recovery obviously deters litigation when the issuer weighs the expenses of a lawsuit against expected recovery. Since arguably "[m]ore strict or complicated identification procedures . . . will discourage cardholders and merchants,"[37] it is questionable whether issuers will bother to comport with the standards necessary for even the limited recovery, for fear of losing business. The end result, perhaps justifiable, is to shift the burden of risk to the card issuer. The issuer charges interest on its accounts and assesses a collection fee against the merchant; as a matter of economics it would appear to be the party on whom the risk should fall.[38] Since in the future issuers might charge an issuance fee to offset the risk, consumers might think twice before requesting cards, thus leading to a more responsible decision on their part. Consumer costs for liability insurance are virtually wiped out by the limited liability provision,[39] although one who possesses numerous cards might seek insurance due to the increased risk factor.[40]

[36] These are the suggested methods. 1970 S. REP. 8. The regulations add fingerprint and electronic or mechanical confirmation to the possibilities. Reg. Z, § 226.13(d).

[37] Note, *Credit Cards: Distributing Fraud Loss*, 77 YALE L.J. 1418, 1429 (1968).

[38] The interest figure is set at eighteen per cent on bills not paid within thirty days and experience has shown that roughly one-half of the accounts are paid within this time. *1969 Hearings* 121. The average cost to retailers runs five per cent of purchase price. *Id.* at 138. The loss on accounts had been set at four per cent prior to the act, although some issuers had much better records. *Id.* at 120. Even with a shift in risk for unauthorized use, a carefully run credit card system would still appear to be a very profitable operation.

[39] *Id.* at 85.

[40] Obviously the fifty-dollar limitation is in effect for each card rather than for the whole lot. The term "unauthorized use" is defined as "a use . . . by a person . . . who does not have . . . authority . . . ." Pub. L. No. 91-508 § 501 (Oct. 26, 1970). The appearance of the article "a" as a modifier of "use" is unfortunate since

In short, it must be expected that very few cases will arise under the act, with the card issuer being content to bear the losses,[41] though passing them on in part to the consumer and the merchant through increased costs.

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Criminal Procedure—Double Jeopardy: In the Interest of Public Justice

The "universal maxim of the common law,"[1] that no one should be twice vexed for the same cause, was elevated to a position of constitutional dignity by the adoption of the fifth amendment.[2] Today, it is among the most fundamental guarantees of the Bill of Rights.[3] However, before a man can "be twice put in jeopardy of life or limb"[4] there must have been initial jeopardy. The Court of Appeals for the Seventh Circuit, in *United States ex rel. Somerville v. Illinois*,[5] recently considered the problem of when and under what circumstances jeopardy is deemed to have attached so as to bar a subsequent prosecution. Petitioner Donald Somerville was indicted for theft on March 19, 1964. On November 1, 1965, his case

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the immediate implication is that the definition can apply to only one transaction and not to a series of transactions. From a pragmatic point of view, this is untenable since it would wipe out effective limitation of liability and destroy the intent to protect the cardholder which is the basis of the act. Testimony before the committee that entertained the bill reveals that the spokesman for the American Bankers Association assumed the limitation to apply to a series of unauthorized uses rather than to each unauthorized use of the card. His statement was *not* contradicted. *1969 Hearings* 107. If this assumption is not borne out in the courts, the need for liability insurance will be renewed.

[41] According to a representative of the Federal Trade Commission, earliest indications under the act point to this result since most companies are not bothering to meet the requirements. Raleigh News and Observer, Jan. 28, 1971, at 35, col. 3.

[1] 4 W. BLACKSTONE, COMMENTARIES *335.

[2] "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. *See* J. SIGLER, DOUBLE JEOPARDY, THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 1-37, 226 (1969) [hereinafter cited as SIGLER].

[3] Benton v. Maryland, 395 U.S. 784, 793-96 (1969). This case applied the double jeopardy provision of the fifth amendment to the states through the fourteenth amendment.

[4] U.S. CONST. amend. V.

[5] 429 F.2d 1335 (7th Cir. 1970). The Supreme Court has recently vacated the seventh circuit's decision in *Somerville* and remanded the case for reconsideration in light of the decisions in *United States v. Jorn*, 91 S. Ct. 547 (1971), and *Downum v. United States*, 372 U.S. 734 (1963). 39 U.S.L.W. 3436 (U.S. Apr. 6, 1971). These cases are discussed generally *infra*.