The Lost or Stolen Credit Card - A New Burden Imposed on the Card Holder

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tions of various undesirable activities will be seriously hindered. Any required self-recognition of an illegal activity through registration for a tax can easily be found to be self-incriminatory as it requires the individual to classify himself as a participant in contraband activities. The only prospects for federal prosecution and control seem to rely upon new legislation unrelated to control through registration and taxation. *Leary* does not specifically outlaw such methods. However, it definitely makes it extremely difficult to continue regulations. New legislation based upon governmental regulation through the power to regulate interstate commerce has been proposed.[42] Apart from the possibilities of success of this bill, it might be well to question the necessity of federal control of substances such as marijuana beyond that involved with strict interstate commerce.

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Duke was issued a credit card by Sears after he had signed a "Sears Revolving Charge Account Agreement" which purportedly bound him to pay for all purchases made on his Sears credit card. Subsequently, Duke's credit card, which he had not signed, was stolen.[1] Duke was unaware of the theft, and from December 13, 1965, to January 12, 1966, the thief charged over $1,200 to Duke's account. Duke refused to pay for the unauthorized purchases and Sears brought suit.

The jury found that neither Duke nor Sears was negligent,[2] and the trial court held that Duke was liable under the contract for the amount of the unauthorized purchases. The court of civil appeals ordered a new trial on the grounds that Sears had failed to offer sufficient proof of exercise of care, on the occasion of each sale, to ascertain the identity of the card holder.[3] *Held, reversed and remanded*: Unless circumstances present cause for further inquiry, a seller is entitled to rely on a credit card alone as identification, and the burden of proof is on the card holder to show that the seller failed to exercise ordinary care. *Sears, Roebuck & Co. v. Duke*, 441 S.W.2d 521 (Tex. 1969).

I. Allocating the Loss From Unauthorized Purchases

The lost or stolen credit card problem is unique to the twentieth century. There have been few cases decided in this area, and thus no consistent

[42] "The Controlled Dangerous Substances Act of 1969," known as S. 2637, and as the "Dirksen Bill."

[1] The court accepted an inference that the thief signed the card in his own handwriting. Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521, 523 (Tex. 1969).

[2] The jury found that Duke was not negligent in failing to sign his credit card, and this point was not in issue on appeal. *Id.*

[3] Sears, Roebuck & Co. v. Duke, 433 S.W.2d 919 (Tex. Civ. App. 1968).

body of law has been established. In *Wanamaker v. Megary*,[4] decided in 1915, a lost coin which was issued for the same purpose as a credit card was equated with a negotiable instrument. The Pennsylvania court held that an innocent seller who issued credit in reliance on the coin had the same rights as a holder in due course. Thus, an innocent seller could recover from an innocent card holder in the same manner that a holder in due course could recover from a drawer or maker of a negotiable instrument. However, this theory has not been followed, even in Pennsylvania.[5]

In 1923 the New Jersey supreme court in *Lit Bros. v. Haines*[6] refused to hold a coin holder[7] liable for unauthorized purchases because there was no agreement by the coin holder to be liable for purchases made by persons other than himself. Since that decision, practically all lost or stolen credit card cases have involved an agreement by the card holder to pay for all purchases made by anyone presenting the card.[8] However, it remained to be decided how strictly such agreements were to be interpreted. One court held that the agreement applied only to authorized purchases,[9] while a Texas court in a later case, *Magnolia Petroleum Co. v. McMillan*,[10] held the card holder strictly liable under the agreement. In the latter case the card holder had loaned his credit card to a third party for the purpose of making certain authorized purchases, and the authority was exceeded to the extent of $431. The court said that the card holder was liable for the purchases until such time as notice was given or the card was surrendered.

Queries have been made as to whether such agreements are unconscionable or of the "adhesion contract" class.[11] The adhesion contract characterization is not as apt to be applied to a credit card agreement because it does not concern the sale of products but only the privilege to buy on credit, and the customer still has the option to buy the products on a cash basis.[12] No state has prohibited this type of agreement. However, Illinois and Massachusetts limit maximum recovery by the card issuer to $75 and $100 respectively,[13] and New York has a statute which requires that the print containing the credit card agreement be of a prescribed minimum size before a credit card holder may be held liable for the amount of un-

[4] 24 Pa. Dist. 778 (Philadelphia Mun. Ct. 1915).

[5] Gulf Ref. Co. v. Plotnick, 24 Pa. D. & C. 147 (C.P. 1935). This case was decided under rules of negligence, and the court refused to apply the rules of negotiable instruments to a lost credit card.

[6] 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923).

[7] *Id.* The coin was issued for the same purpose as a credit card.

[8] Gulf Ref. Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945); Diners Club, Inc. v. Whited, Civil No. A10872 (Los Angeles Super. Ct., App. Dep't, Cal., Aug. 6, 1964); Jones Store Co. v. Kelly, 36 S.W.2d 681 (Mo. Ct. App. 1931); Allied Stores v. Funderburke, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. Civ. Ct. 1967); Union Oil Co. v. Lull, 220 Ore. 412, 349 P.2d 243 (1960); Magnolia Petroleum Co. v. McMillan, 168 S.W.2d 881 (Tex. Civ. App. 1943).

[9] Jones Store Co. v. Kelly, 36 S.W.2d 681 (Mo. Ct. App. 1931).

[10] 168 S.W.2d 881 (Tex. Civ. App. 1943). The agreement read: "The named holder shall be responsible for all purchases made by the use of this card . . . whether or not such purchases are made by the named holder."

[11] Comment, *Applicability of Exculpatory Clause Principles to Credit Card Risk Shifting Clauses*, 22 LA. L. REV. 640 (1962).

[12] An "adhesion contract" is defined as "a term descriptive of standard form printed contracts prepared by one party and submitted to the other on a 'take it or leave it' basis. The law has recognized there is often no true equality or bargaining power . . . ." Standard Oil Co. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965).

[13] *See* note 25 *infra*.

authorized purchases made on his lost or stolen credit card.[14] This was obviously an attempt by the New York legislature to make a credit card holder aware of the risk he is taking, but it also reflects reluctance to prohibit this type of contract.

While the courts were applying the rules of contract in finding a credit card holder liable for unauthorized purchases, they were also applying rules of negligence. *Gulf Refining Co. v. Plotnick*[15] established the rule that the card owner and the card issuer-seller must exercise due care, the former in the custody of the card, and the latter in honoring the card. The requirement for exercise of due care continues to be a basis for determining responsibility for the loss which results from the unauthorized use of a credit card.[16]

Since 1960 the most frequently cited case involving a lost or stolen credit card has been *Union Oil Co. v. Lull.*[17] This case involved a credit card agreement which provided that the card holder would pay for purchases made by anyone presenting the card until notice of loss or theft. The card holder was found to be without negligence in his use of the card. The court placed on the card issuer-seller the burden of proving that the seller (service station dealers) exercised reasonable care in making credit card sales to the thief. In making this decision the court stated:

> If [proof of identity][18] cannot be shown and there are no other circumstances from which the dealer can reasonably infer that the customer is the person named on the credit card, the sale is made at the dealer's risk. . . . If the card is presented by a customer who does not claim to be the card owner but claims only that he is authorized to use the card, the dealer assumes the risk of loss on the sale unless he is furnished evidence that would lead a reasonable person to conclude that the claimed authority was given. . . . *The burden of proving that reasonable inquiry was made is upon the* [*seller*].[19]

This conclusion almost automatically places the loss on the dealer and card issuer. Store clerks, gas station attendants, and ticket agents are unlikely to remember one specific sale in sufficient detail to prove that they exercised due care, and present identification practices are too lax to support an inference that due care is usually exercised.[20]

II. Sears, Roebuck & Co. v. Duke

The Texas supreme court in *Sears* rejected the rule adopted in *Union Oil*, and held that the seller need not demand more identification than the credit card as a matter of normal procedure.[21] In its comparison of the two

[14] N.Y. Gen. Bus. Law § 512 (McKinney 1968).

[15] 24 Pa. D. & C. 147 (C.P. 1935).

[16] Gulf Ref. Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945); Diners Club, Inc. v. Whited, Civil No. A10872 (Los Angeles Super Ct., App. Dep't, Cal., Aug. 6, 1964); Allied Stores v. Funderburke, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. Civ. Ct. 1967); Union Oil Co. v. Lull, 220 Ore. 412, 349 P.2d 243 (1960).

[17] 220 Ore. 412, 349 P.2d 243 (1960).

[18] The court stated that adequate proof of identity would ordinarily be established by the possession of the usual cards carried in a billfold, such as driver's license, fishing license, social security card or the like, bearing the same name as that appearing on the credit card. 349 P.2d at 254.

[19] *Id.* (emphasis added).

[20] Comment, *Credit Cards: Distributing Fraud Loss*, 77 Yale L.J. 1418 (1968).

[21] Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521, 524 (Tex. 1969).

cases the court stated that the function of the credit card was proof of identity and that it should be considered satisfactory evidence of the identity of the holder or authorized user, unless the appearances or circumstances would raise a question in the mind of a reasonable seller. Also, the court took an opposite view as to the burden of proof and stated: "Proof that the seller did fail to use ordinary care in this respect is a defense to the liability of the holder of the card, *and the burden of proof should be placed on the [card holder]*."[22] In comparing the two cases the Texas court made no distinction of the fact that *Union Oil* involved a card without a signature block and that *Sears* did involve a card with a signature block. It appears that the court intended that its standard for identification be the same regardless of the presence or absence of a signature block.

The soundness of the decision in *Sears* is supported by the fact that it preserves the right of parties to a credit card agreement to form an enforceable contract of their own choosing, and also establishes a standard of care which is commensurate with prevailing credit card practices. The court's awareness of prevailing credit card practices was manifested when it stated: "When Duke himself made a purchase and presented his credit card, he would not expect to be questioned. He should not expect the disguised thief to be."[23] In effect the court considered the realities of the credit card business, and for that reason refused to follow the impractical requirements established by the Oregon court in *Union Oil*. However, it must be remembered that the Texas court did not imply a license for a seller to engage in careless or negligent credit card practices, and when "suspicious circumstances" are present, the duty to make further inquiry still exists.

III. Conclusion

Sears, Roebuck & Co. v. Duke may lead to new problems. Since a seller is now entitled to rely on the credit card alone as identification (unless cause is presented for further inquiry), and since the burden of proof for ascertaining the seller's lack of care is on the card holder, the issuers of credit cards may be encouraged to issue cards in a form which will present the least chance to raise a "suspicious circumstance." For example, if the card is printed without a signature block, there will be less chance to find a seller negligent in making credit sales to unauthorized persons on a forged signature. Conversely, there will be a higher probability of being found negligent if an unauthorized sale is made to a thief presenting a credit card having a photograph and signature of the card holder.[24]

Legislation governing the format of credit cards and the liabilities of card holders would give needed protection to the public. Otherwise, an innocent card holder whose credit card is stolen will be at the mercy of the card issuer-seller who, until notice of loss or theft is received, can

[22] *Id.* (emphasis added).

[23] *Id.* at 523.

[24] Massachusetts requires that the card issuer provide a place on the card for the identification of the card holder, which must include a space for a signature *or* a photograph. Mass. Ann. Laws ch. 255, § 12E (Supp. 1968).