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CREDIT CARDS IN AMERICA

by DAVID A. SZWAK†

I. INTRODUCTION

The United States credit industry is rapidly moving toward replacing cash with a credit and debit card system which would electronically transact our financial affairs and track our every move.¹ With this rapid movement, smart cards, the financial information superhighway, and complete absence of privacy all appear to be in our future. It is estimated that each American possesses an average of six credit card accounts,² and there are over 590 million credit cards in circulation at the present time.³ Furthermore, "it is estimated that Americans spend more than 16 billion dollars a year through credit card purchases."⁴ Determining liability for credit card fraud is largely misunderstood. Attorneys must have a working knowledge of the credit system and its rapidly changing face. This article presents an overview of credit cards, their usage, the liability of cardholder and card bearers, as well as related topics.

II. WHAT IS A CREDIT CARD?

As a general concept, credit is merely a contract between the cardholder and the credit issuer that results from an offer and an acceptance.⁵ A "credit card" is merely an indication to merchants that the person who received the card or template has a satisfactory credit rat-

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1. AUGUST BEQUAI, *THE CASHLESS SOCIETY: EFTS AT THE CROSSROADS* 1-12, 121-133 (1981).

2. Federal Reserve Bulletin (Dec. 1984). In 1984, it was estimated that 48% of families had credit cards with a national retailer, 42% with a bank, 37% with other retailers, 28% with gasoline companies and 10% had travel and entertainment cards. *Id.* Those figures have increased dramatically in the last ten years. *Id.*

3. *Credit Cards and Charge Accounts*, AMERICAN JURISPRUDENCE 4 (1993).

4. *Id.*

5. *Feder v. Fortunoff, Inc.*, 494 N.Y.S.2d 42 (1985); IRVING J. SLOAN, *THE LAW AND LEGISLATION OF CREDIT CARDS: USE AND MISUSE* 5-13 (1987).

ing.⁶ If credit is extended, the issuer of the card will pay or insure that the merchant receives payment for the merchandise delivered, and that the debtor intends to pay the card issuer.⁷ The issuance of credit constitutes an offer of credit which may be withdrawn by the issuer at any time prior to the acceptance of the offer through the use of the card by the cardholder.⁸ Moreover, use of a credit card by the cardholder is an implied, if not actual, representation that the debtor intends to pay for the charges.⁹

III. NECESSARY INVESTIGATION BY CREDIT ISSUER

Credit issuers usually rely upon applications to perpetuate their business and they may receive anywhere from a few applications to thousands of credit applications a day.¹⁰ In this high volume setting, one can only wonder what procedures are in place to insure that the application is truthful and not fraudulent. American courts have consistently held that credit issuers have a duty to exercise reasonable care and diligence in performing a necessary investigation of each credit application received.¹¹ As part of the investigation, the issuer must verify the underlying information on the application, including the applicant's identity and authority, prior to the issuance of credit.¹² After all, credit issuers are in a superior position to prevent and stop credit fraud, particularly, "application fraud," where the cardholder listed on the application never applied for or received the charge card or template.¹³ In

6. *Williams v. U.S.*, 192 F. Supp. 97, 99-100 (S.D. Cal. 1961) (holding that a charge slip is "evidence of indebtedness" and, as such, is a form of security).

7. *Id.* See also *In re Cloud*, 107 B.R. 156, 159 (N.D. Ill. 1989) (holding that credit card issuer's complaint to have debtor's credit card debt ruled nondischargeable was justified).

8. *Feder*, 494 N.Y.S.2d at 42. In that case, the plaintiff brought an action to recover damages for conversion and tort when a store refused to return his credit card because his name appeared on a list of people whose charges exceeded their credit limits. *Id.* The court held that once the credit card issuer revoked the plaintiff's credit privileges, he no longer had the right to possession of the card. *Id.* The court further ruled that the store properly retained the plaintiff's card. *Id.*

9. *In re Cloud*, 107 B.R. at 158; see also *In re Brawner*, 124 B.R. 762 (N.D. Ill. 1991).

10. GERRI DETWEILER, *THE ULTIMATE CREDIT HANDBOOK* 50-51 (1993); JAMES J. JURINSKI, *CREDIT AND COLLECTIONS* 27-30 (1994).

11. See *TransAmerica Ins. Co. v. Standard Oil Co.*, 25 N.W.2d 210, 214 (N.D. 1982); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200-201 (D.C. App. 1991); *First Nat'l City Bank v. Mullarkey*, 385 N.Y.S.2d 473 (1976).

12. *TransAmerica Ins. Co.*, 325 N.W.2d at 214.

13. *American Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196, 201 (2d Cir. 1974); *First Nat'l Bank of Mobile v. Roddenberry*, 701 F.2d 927 (11th Cir. 1983); *Humble Oil & Ref. Co. v. Waters*, 159 So. 2d 408 (La. Ct. App. 1963); *Walker Bank & Trust Co. v. Jones*, 672 P.2d 73, 76 (Utah 1983) (Durham, J., dissenting); John C. Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 MICH. L. REV. 1475, 1509-10 (1972).

Humble Oil & Ref. Co. v. Waters,¹⁴ the Louisiana Appellate Court found the credit issuer to be careless and negligent in sending a credit card through the mail on the authority of an anonymous telephone caller.¹⁵ In that case, the credit issuer failed to use any reasonable procedures to verify the identity of the caller.¹⁶

In resulting fraud instances, courts have not held credit issuers strictly liable for approving fraudulent applications, but issuers must exercise reasonable diligence and care to prevent such losses as it adversely affects all consumers and, specifically, the targeted victim of fraud.¹⁷ Credit card issuers frequently have meager, automated procedures to investigate and evaluate applications and place greater emphasis on collection.¹⁸ Others have procedures in place, but employee incentive or laxity results in routine deviation from the guidelines.¹⁹ At least one court has held that a credit issuer's failure to follow its own proclaimed standards does not, of itself, prove negligence of the credit issuer, unless the erroneous information in the application would have placed a reasonably prudent credit issuer on notice that the credit application was fraudulent.²⁰

IV. INVESTIGATION AT THE POINT OF SALE

One can only wonder why retailers and other merchants do not verify the identity of credit card users at the point of sale.²¹ This is especially puzzling considering that it is reckless conduct to tender merchandise to a card bearer without any verification or recordation of personal identification.²² In fact, courts have ruled that retailers have a duty to exercise reasonable care to inquire about the identity of a purchaser using a charge card, to examine the charge card or template and

14. 159 So. 2d 408 (La. App. 1963).

15. *Id.* at 410.

16. *Id.* at 409.

17. *TransAmerica Ins. Co.*, 325 N.W.2d at 210; *Beard*, 587 A.2d at 195.

18. Jeffrey Marshall, *Documentary on Brooklyn Teen's Fraud Method Shows Credit Card Issuers are the Systems Weaknesses*, THE AMERICAN BANKER, August 6, 1986, at 16; JURINSKI, *supra* note 10 at 31-32; Mark Gaynor, *Consumer Credit Reporting*, THE MAGAZINE OF BANK MANAGEMENT, May 1989, at 44; Richard H. Gamble, *Automated System Gives Cheap Cure to Credit Headache*, CORPORATE CASHFLOW MAGAZINE, May 1993, at 22; Harry Gambill, *Is Automated Application Processing For You?*, CREDIT WORLD, April 1991, at 10.

19. See Marshall, *supra* note 18, at 16.

20. *Beard*, 587 A.2d at 195.

21. See, e.g., *Union Oil Co. v. Lull*, 349 P.2d 243 (Or. 1960) (finding stolen credit card used fifty-five separate times in one month period to charge over fourteen hundred dollars worth of merchandise); *Gulf Ref. Co. v. Williams Roofing Co.*, 186 S.W.2d 790 (Ark. 1945) (finding employee of credit card issuer used stolen card over three month period for purchases at several of issuer's stores where employee was known).

22. See *supra* note 21.

to only extend credit as the card or template authorizes and not merely disregard responsibility for resulting fraud.²³

V. WHO IS A CARDHOLDER?

A "cardholder" is generally defined as the person whose identity is listed on the credit application made to the issuer.²⁴ The cardholder is not liable for fraud perpetrated through the use of his identity.²⁵ The Truth-In-Lending Act defines "cardholder" as "any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person."²⁶ Furthermore, the cardholder is not liable for fraud committed through the misuse of his account number, card or template.²⁷ The cardholder, as a party to the contract with the issuer, is responsible for his charges only.²⁸ The cardholder is not liable for charges made on the account, provided the cardholder notifies the card issuer that authority to use the card has been withdrawn.²⁹

Only cardholders are contractually liable for debts incurred by use of a credit card.³⁰ Mere card users, bearers or holders of related cards, even if authorized to use the card, are not liable for such debts.³¹ The same may not be true for co-applicants or subsequently added cardholders on the account which result in the creation of a joint account.³² Attempts to argue that a cardholder does not have authority to use the account have been unsuccessful.³³ One court held that a corporation's liability was not limited based upon alleged unauthorized use by an individual where the individual was the cardholder to whom the card was

23. *Union Oil*, 349 P.2d at 249; *Gulf Ref.*, 186 S.W.2d at 794; see also *Credit Cards and Charge Accounts*, *supra* note 3 at 7.

24. See *Cleveland Trust Co. v. Snyder*, 380 N.E.2d 354 (Ohio Ct. App. 1978).

25. *First Nat'l Bank of Commerce v. Ordoyne*, 528 So. 2d 1068, 1070 (La. Ct. App. 1988), *cert. denied*, 532 So. 2d 179 (La. 1988); *Union Oil Co.*, 349 P.2d at 254.

26. 15 U.S.C. § 1602(m) (1995).

27. *First Nat'l Bank of Findlay v. Fulk*, 566 N.E.2d 1270, 1273-74 (Ohio Ct. App. 1989) (holding that making payments on account from husband and wife's joint checking account could not be interpreted as an agreement by the wife to accept responsibility for debt); *State Home Sav. Card Ctr. v. Pinks*, 540 N.E.2d 338, 340 (Fostoria Mun. Ct. 1988) (ruling that where a credit card agreement is unclear regarding the parties' intent, the contract will be construed against the party who drafted it).

28. *Fulk*, 566 N.E.2d at 1273-74; *Pinks*, 540 N.E.2d at 340.

29. *Id.*

30. *Id.*

31. *Id.*

32. See *Bank One, Columbus v. Palmer*, 579 N.E.2d 284, 285 (Ohio Ct. App. 1989) (holding that a cardholder contract did not exist between a cardholder's ex-wife and a bank, therefore, no joint liability existed).

33. *Id.*

issued.³⁴ A cardholder always has actual authority.³⁵ This holding blurred the distinction between a cardholder and a card bearer and may have been more properly decided upon a failure by the cardholder (corporation) to provide adequate notice of potential or real misuse of the account by a formerly authorized card bearer.³⁶ This blurred distinction has also occurred in cases where the person who received a credit card in his name used the card and received the billings for the charges and later argued he was not a cardholder.³⁷ At least one court found such a person to be a cardholder and imposed liability for charges.³⁸

VI. TRUTH-IN-LENDING ACT DOES NOT APPLY IF USE FOR AUTHORITY EXISTED

The Truth-In-Lending Act provides the consumer certain protections when fraud or unauthorized use of his credit card(s) occurs.³⁹ If the court finds that the card bearer has "actual, implied or apparent authority," the Truth-In-Lending Act has no application, per 15 U.S.C. sections 1602(o) and 1643, and state law applies.⁴⁰ The defense of unauthorized use may be used in situations where the issuer sues the cardholder in an attempt to collect.⁴¹ In such situations, the credit issuer has the burden of proving that the particular use of the card was "authorized."⁴²

VII. "AUTHORIZED USE" vs. "MISUSE" vs. "UNAUTHORIZED USE"

As a general principle, when a cardholder voluntarily permits the use of his credit card or account by another person, the cardholder has "authorized use" of that card and account and is thereby liable for the resulting charges, even if the cardholder verbally told the other person not to charge over a certain limit.⁴³ As to the creditor, once it gives authority to the third person, regardless of the scope, it is liable under the

34. *Web, Inc. v. American Express Travel Related Servs. Co.*, 399 S.E.2d 513 (Ga. Ct. App. 1990), *rev'd on other grounds*, 405 S.E.2d 652 (Ga. 1991).

35. *Id.* The cardholder could not make unauthorized use of the card under 15 U.S.C. § 1643 (1995). *Id.*

36. *Pinks*, 540 N.E.2d at 338.

37. *Id.*

38. *Id.*

39. *Martin v. American Express, Inc.*, 361 So. 2d 597, 600 (Ala. Civ. App. 1978).

40. *Walker Bank & Trust Co.*, 672 P.2d at 76; *American Express TRS Co. v. Web, Inc.*, 405 S.E.2d 652, 654 (Ga. 1991); *Harlan v. First Interstate Bank of Utah*, 672 P.2d 73, 75 (Utah 1983), *cert. denied*, 466 U.S. 937 (1983).

41. *See Fifth Third Bank/Visa v. Gilbert*, 478 N.E.2d 1324, 1326 (Ohio App. 1984); *Cities Serv. Co. v. Paillet*, 452 So. 2d 319, 321 (4th Cir. 1984); *Michigan Nat'l Bank v. Olsen*, 723 P.2d 438, 442 (Wash. App. 1986).

42. *Id.* *See also* 15 U.S.C. § 1643(b) (1995).

43. *Martin*, 361 So. 2d at 599.

principles of agency law.⁴⁴ "Misuse" occurs when the card bearer exceeds the authority granted by the cardholder and particular charges are eventually made which were not contemplated by the cardholder.⁴⁵ "Unauthorized use," for purposes of determining liability of a credit cardholder, is 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 whom the cardholder receives no benefit.⁴⁶

Courts are split on whether a cardholder can "after the fact" limit his exposure for charges attributable to a card bearer who has gone astray and begun to misuse the card.⁴⁷ The use was initially "authorized" with actual authority granted.⁴⁸ In response, however, one court stated that the user of a credit card to whom the cardholder has voluntarily given permission to use the card has "apparent authority" to use the card even after actual authority ceases to exist.⁴⁹

VIII. THE IMPORTANCE OF NOTIFICATION TO THE CREDIT ISSUER IF MISUSE OCCURS

There is conflicting law as to whether notice to the credit issuer that a card bearer exceeded his granted authority and is in possession of a charge card will terminate the cardholder's responsibility for the charges occurring thereafter.⁵⁰ The dissent in *Walker Bank & Trust Co. v. Jones*⁵¹ argued that notification should cut off liability for three main reasons.⁵² First, credit issuers are in a superior position, once notified of potential misuse, to limit losses to the cardholder, itself (credit issuer) and third parties (retailers, etc.).⁵³ Second, 15 U.S.C. section 1643 and

44. *Id.* at 600.

45. *See Towers World Airways, Inc. v. PHH Aviation Sys., Inc.*, 933 F.2d 174 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 87 (1991).

46. 15 U.S.C. §§ 1602(o), 1643(a)(1) (1995); *see also* Mastercard, Consumer Credit Div. of First Wisconsin Nat'l Bank of Milwaukee v. Town of Newport, 396 N.W.2d 345, 346 (Wis. App. 1986); *Michigan Nat'l Bank*, 723 P.2d at 442; *Standard Oil Co. v. Steele*, 489 N.E.2d 842, 843 (Ohio 1985); *Harlan*, 672 P.2d at 75.

47. *See Martin*, 361 So. 2d at 597.

48. 15 U.S.C. § 1602(o) (1995); *Standard*, 489 N.E.2d at 842; *Selber Bros., Inc. v. Bryant*, 406 So. 2d 251 (La. Ct. App. 1981).

49. *See Standard*, 489 N.E.2d at 844. *See also* 15 U.S.C. § 1602(o) (1995).

50. *Towers World Airways, Inc.*, 933 F.2d at 174 (holding notice to issuer is ineffective); *American Express Travel Related Serv.*, 405 S.E.2d at 652 (holding notice does not convert misuse into unauthorized use); *Walker Bank & Trust Co.*, 672 P.2d at 73; *Harlan*, 672 P.2d at 73 (holding notice to issuer is ineffective); *Martin*, 361 So. 2d at 597 (holding notice to issuer may cut off future liability); *Cities Services*, 452 So. 2d at 319 (holding notice cuts off liability); *Standard Oil Co.*, 489 N.E.2d at 842 (holding cardholder not liable for unauthorized use of the card after the credit issuer has been notified).

51. 672 P.2d 73, 76 (Utah 1983) (Durham, J., dissenting).

52. *Id.*

53. *Id.*

state laws of "agency" dictate that agency ends upon termination of authority by the cardholder as to the card bearer, and apparent authority vis-a-vis the credit issuer cannot be argued once the credit issuer is on notice.⁵⁴ Finally, the dissent states that holding the cardholder liable is unrealistic and promotes a divorcing spouse, who knows that the law would hold the cardholder (other spouse) liable, to usurp the other spouse's credit cards or account numbers for misuse.⁵⁵

Once the credit issuer receives notice of the potential misuse of an account, the issuer has the sole power to terminate the existing account, to refuse to pay any charges on the account, to list the credit card as stolen or lost on national/regional warning bulletins, to transfer all existing, valid charges to a new account and to send the cardholder a new card bearing his new account number.⁵⁶ The credit issuer's situation is far better as a result of notification that a card has been lost, stolen or misused, as opposed to situations where the card is stolen without notice.⁵⁷ This is because the issuer is on notice of possible problems and may even be alerted as to the whereabouts and identity of the card bearer.⁵⁸

Some courts have addressed situations where the misuser (card bearer) was still in possession of the card and where no notice was provided to the credit issuer.⁵⁹ One court found the charges made by the cardholder's ex-husband were authorized, and but for the failure of the cardholder to explain the situation, the credit issuer would have prevented further misuse.⁶⁰ Another court applied an estoppel theory to preclude an employer's defense to liability for charges where the employer had provided charge cards to his employees for their use and then failed to notify the credit issuer when he transferred the company.⁶¹ Yet another court held that the cardholder (husband) was not liable when he notified the creditor that he wanted his account closed, that his ex-wife

54. *Id.*

55. *Id.*

56. *Walker*, 672 P.2d at 77; *Standard Oil Co.*, 171 S.E.2d at 662; *Weistart*, *supra* note 13, at 1509-10.

57. *Socony Mobile Oil Co. v. Greif*, 197 A.D.2d 522, 523-24 (N.Y. App. Div. 1960). (decided prior to enactment of 15 U.S.C. § 1643 (1995)).

58. *Id.*

59. *See, e.g., Oclander v. First Nat'l Bank of Louisville*, 700 S.W.2d 804, 804-07 (Ky. 1960).

60. *Id.* at 806. The plaintiff notified the bank that issued her and her husband credit cards that they were now separated. *Id.* at 805. The bank blocked their account and informed the plaintiff to fill out a separation affirmation form which would allow the bank to restore her credit. *Id.* The plaintiff returned the completed form and notified the bank that she had destroyed one of her cards but still had the remaining one. *Id.* Her husband, however, did have a card and proceeded to make charges on the card. *Id.*

61. *Sinclair Ref. Co. v. Consol. Van & Storage Cos.*, 192 F. Supp. 87 (Ga. 1960).

had a charge card, the exact location where his ex-wife continued to make purchases and where the creditor failed to act.⁶²

IX. IMPLIED OR APPARENT AUTHORITY

Courts have also imposed liability upon a cardholder who clothes another with apparent authority to use his account or charge template.⁶³ Generally, "apparent authority" exists when a person has created such an appearance of things that it causes a third party to reasonably and prudently believe that the second party has power to act on behalf of the first person.⁶⁴ Prior, unrelated occasions in which a cardholder allowed a third party to use credit card had no bearing on specific subsequent circumstance of unauthorized use.⁶⁵

Courts have tended to find apparent authority when a cardholder requests a credit card, in a spouse's name, with the card bearing a spouse's signature.⁶⁶ Such a representation to third persons, such as merchants, to whom the card might be presented, is tantamount to apparent authority that the spouse is authorized to use the card and make charges.⁶⁷ Some courts have held that the mere transfer of the charge template to a spouse or other third party created apparent authority and that the cardholder was estopped from denying liability.⁶⁸ One court has questioned the existence of apparent authority if a credit issuer has been notified of the potential misuse of a credit account.⁶⁹ How can any apparent authority exist between the cardholder and the ultimate retailer, to whom the card is presented, when the credit issuer has been placed on notice of the card's theft or loss?⁷⁰

X. CARDHOLDER'S LIABILITY FOR UNAUTHORIZED USE

As a general rule, a cardholder is not liable for unauthorized use.⁷¹ An exception exists when the card is an "accepted credit card," when the liability is not in excess of \$50.00 and when \$50.00 is due; however, this exception exists only if and when: (1) the issuer provided the cardholder with adequate notice of the limited liability; (2) the issuer provided the cardholder with a description of the means by which the issuer may be notified of the loss or theft of the activated card; (3) the unauthorized use

62. *Socony Mobil Oil Co.*, 197 N.Y.S.2d at 522.

63. *See, e.g., Towers World Airways, Inc.*, 933 F.2d at 178.

64. *Wynn v. McMahon Ford Co.*, 414 S.W.2d 330, 336 (Mo. App. 1967).

65. *Vaughn v. U.S. Nat'l Bank of Oregon*, 718 P.2d 769, 770-71 (Or. App. 1986).

66. *See Harlan*, 672 P.2d at 75; *Walker*, 672 P.2d at 75.

67. *Id.*

68. *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762, 765 (La. App. 1962).

69. *Harlan*, 672 P.2d at 75; *Walker*, 672 P.2d at 75.

70. *Walker*, 672 P.2d at 78.

71. 15 U.S.C. § 1643(a)(1) (1995).

occurred before the card issuer had been notified that the cardholder no longer possessed the card or template; and (4) the issuer provided a method whereby the user of such card can be identified as a person authorized to use the charge template.⁷²

XI. FORGERY AND FRAUD

A cardholder is not liable for charges when another person forged the cardholder's name on a credit card application and when the cardholder knew nothing about the credit card until he received the bills.⁷³ Courts have acknowledged that cardholders have little or no control over the fraudulent conduct of third persons who come into possession of charge cards bearing the cardholder's identity.⁷⁴ In such cases, the cardholder is not liable for fraud-related charges unless the fault of the cardholder is proven.⁷⁵

In *American Nat'l Bank v. Rathburn*,⁷⁶ the court held that the defendant, to whom an unsolicited bank card was issued, but who never used it, was not liable for purchases made with the card by a woman the defendant subsequently married who took the card without his knowledge when they separated several weeks later.⁷⁷ The defendant never expressly or impliedly authorized her use of the card.⁷⁸ It appears the issuer would have violated 15 U.S.C. section 1642, if it had been in effect at the time the card was sent to defendant.

XII. DISSOLUTION OF MARITAL PROPERTY REGIMES AND JOINT ACCOUNTS

When joint credit account holders divorce, they should obtain consent of their creditors before attempting to enter a dissolution of property decree wherein one spouse accepts responsibility for the former joint account.⁷⁹ At least one court has rejected claims by a joint cardholder against a creditor, where the joint cardholder, a divorced woman whose report listed bad joint debt by a credit bureau on the basis of her ex-husband's credit rating, attempted to recover against a creditor on the

72. *Id.* See also *Fifth Third Bank/Visa*, 478 N.E.2d at 1324.

73. *First Nat'l Bank of Commerce*, 528 So. 2d at 1069-70.

74. See, e.g., *Union Oil Co.*, 349 P.2d at 243. TRW, the nation's largest consumer reporting agency and an entrenched mainstay in the credit industry, reported that "[A]s many as 100,000 fraudulent credit transactions take place daily, and businesses lose up to \$4 billion a year . . . [and] . . . only 1% of those committing credit fraud are ever caught." Marshall, *supra* note 18, at 16.

75. *Id.*

76. 264 So. 2d 360 (La. App. 1972).

77. *Id.* at 363

78. *Id.* at 362.

79. *Moore v. Credit Info. Corp.*, 673 F.2d 208, 210 (8th Cir. 1982).

basis that the dissolution of property decree freed her from liability for the joint credit charge account debts which her ex-husband agreed to assume in the dissolution.⁸⁰

XIII. FAIR CREDIT BILLING ACT: A WEAK EFFORT TO ASSIST CONSUMERS IN RESOLVING CHARGE DISPUTES

The Fair Credit Billing Act ("FCBA")⁸¹ sets forth an orderly procedure for identifying and resolving disputes between a cardholder and a card issuer as to the amount due at any time.⁸² The FCBA only applies to transactions under open-end credit plans.⁸³ The consumer has a right to challenge a creditor's statement of an account in the consumer's name.⁸⁴ The FCBA provides protection to the consumer from the "shrinking billing period" which is the time within which to avoid the imposition of finance charges by payment of the balance or portion of the debt.⁸⁵ The consumer has a right to make the creditor promptly post payments and credits to his account, and if the creditor fails to comply, it is subject to forfeiture of its right to collect the disputed amount.⁸⁶ Additionally, the consumer has the right to assert all claims and defenses against the credit card issuer that the cardholder has against the merchant honoring the card.⁸⁷

The consumer has an action for actual damages sustained from the creditor who violates the FCBA, and the creditor must pay a civil penalty of twice the finance charge (minimum of \$100.00, maximum of \$1,000.00), plus court costs and reasonable attorney's fees.⁸⁸ Class actions also may be instituted.⁸⁹

Ordinarily, a consumer must notify a creditor of an alleged billing error before bringing action under the FCBA.⁹⁰ However, the consumer is not required to send written notice of the billing error to the creditor when the creditor continues to report the account as delinquent, when in fact it had been satisfied and the creditor had failed to send a periodic statement to consumer.⁹¹ The debtor must file a written dispute within

80. *Id.*

81. 15 U.S.C. § 1666, et seq. (1995).

82. *Id.* See also *Gray v. American Express Co.*, 743 F.2d 10, 13-14 (1984).

83. 15 U.S.C. § 1602(i) (1995); *Jacobs v. Marine Midland Bank, N.A.*, 475 N.Y.S.2d 1003, 1004 (1984).

84. 15 U.S.C. § 1666(a) (1995).

85. 15 U.S.C. § 1666(b) (1995).

86. 15 U.S.C. §§ 1666(c)-(e) (1995).

87. 12 C.F.R. 226.12; 15 U.S.C. §§ 1666(i), 1666(j) (1995).

88. 15 U.S.C. § 1640(a) (1995).

89. *Id.*

90. See, e.g., *Payne v. Diner's Club Int'l*, 696 F. Supp. 1153, 1156 (Ohio 1988).

91. 15 U.S.C. §§ 1637(b), 1666(a), 1666(b)(6) (1995); *Saunders v. Ameritrust of Cincinnati*, 587 F. Supp. 896, 899 (U.S.D.C. Ohio 1984).

sixty days from the date the disputed statement is received by the debtor.⁹²

XIV. LIMITATIONS OF PROTECTION OF FCBA

The FCBA has certain limitations that may apply under various circumstances. As stated earlier, the consumer must provide the creditor with written notice within sixty days of the date the consumer receives the erroneous, or disputed, billing.⁹³ The notification must contain certain items of information, such as a complete identification of the consumer, the account, bill or charges in question and a clear explanation of the dispute (explaining to the best of the consumer's ability why he thinks the bill is in error).⁹⁴

Additional limitations also exist. Tort claims may not be asserted under the FCBA.⁹⁵ The consumer (obligor) must make a "good faith attempt" to satisfactorily resolve the disagreement with the person honoring the card.⁹⁶ The amount of the transaction must exceed \$50.00.⁹⁷ The transaction must occur in the same state as the cardholder's mailing address, or must occur within 100 miles of the cardholder's mailing address.⁹⁸ The amount of the claims or defenses asserted may not exceed "the amount of credit outstanding with respect to such transaction at the time the cardholder first notified the card issuer or person honoring the credit card."⁹⁹ Note that payments and credits to the cardholder's account are deemed to have been applied to the payment of:

- (a) late charges in the order of their entry to the account;
- (b) finance charges in the order of their entry to the account;
- (c) debits to the account (other than those above) in the order in which each debit entry to the account was made.¹⁰⁰

An exception to the aforementioned limitations exists when: (1) the amount of the transaction exceeds \$50.00 and (2) the transaction occurs in the same state as the cardholder's mailing address, or occurs within

92. *Pinner v. Schmidt*, 805 F.2d 1258, 1264 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987) and *cert. denied*, *Credit Bureau Serv.-New Orleans v. Pinner*, 483 U.S. 1032 (1987). *See also Gray*, 743 F.2d at 14-15.

93. 15 U.S.C. § 1666(a) (1995).

94. 15 U.S.C. § 1666(a)(1)-(3) (1995). *See also Himelfarb v. American Express Co.*, 484 A.2d 1013, 1018 (Md. 1984).

95. 15 U.S.C. § 1666i(a) (1995).

96. *Id.*

97. *Id.*

98. *Id.* *See also Plutchok v. European American Bank*, 540 N.Y.S.2d 135, 137 (1989); *Izraelewitz v. Mfr. Hanover Trust Co.*, 465 N.Y.S.2d 486 (1983). The question of where the transaction took place should be decided by the State law. *Plutchok*, 540 N.Y.S.2d at 137.

99. 15 U.S.C. § 1666(b) (1995).

100. 15 U.S.C. § 1666i(b) (1995).

100 miles of the cardholder's mailing address.¹⁰¹ In essence, those restrictions do not apply when the person honoring the credit card (retailer):

- (a) is the same person as the card issuer;
- (b) is controlled by the card issuer;
- (c) is under direct or indirect common control with the card issuer;
- (d) is a franchised dealer in the card issuer's products or services;
- (e) has obtained the order for such transaction through a mail solicitation made by or participated in by the card issuer; or
- (f) where the defense or claim can be classified as a "billing error" rather than an assertion of a claim or defense.¹⁰²

XV. TIGHTENING THE SCREWS ON THE CUSTOMER

Courts have recognized that a credit issuer's "ability to report on the credit habits of its customers is a powerful tool designed in part to wrench compliance with payment terms from its cardholder."¹⁰³ Thus, a creditor's "refusal to correct mistaken information can only be seen as an attempt to tighten the screws on a non-paying customer."¹⁰⁴ Furthermore, an erroneous or careless report serves no purpose but to substantially damage the target of the report who, after publication, can do little to correct the damage caused by the report.¹⁰⁵

XVI. CONCLUSION

Credit cards, smart cards and other electronic transactions will replace the cash medium in our near future. As attorneys, we must understand the current state of the laws governing credit and be ready to improve our laws in order to protect the general public while assisting industry. Few Americans have ever seen their credit report(s) and do not realize the impact that trade line reporting has on their ability to utilize their property rights in their reputation and credit worthiness. Protection of credit rights is an invaluable service to the client. Unfortunately, it is also an element of damage that is often overlooked by attorneys.

101. *Id.*

102. 15 U.S.C. § 1666i(a)(3) (1995). *See generally Izraelewitz*, 465 N.Y.S.2d at 486; *Gray*, 743 F.2d at 10; *Lachman v. Bank of Louisiana*, 510 F. Supp. 753 (U.S.D.C. Ohio 1981); *Lincoln First Bank v. Carlson*, 426 N.Y.S.2d 433, 470 (1980).

103. *Miranda-Riviera v. Bank One*, 145 F.R.D. 614, 623 (U.S.D.C. P.R. 1993).

104. *Id.*

105. *Bartels v. Retail Credit Co.*, 175 N.W.2d 292, 295 (Neb. 1970).