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## A Legal-empirical Study of the Unauthorized Use of Credit Cards

Daniel E. Murray

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# A LEGAL-EMPIRICAL STUDY OF THE UNAUTHORIZED USE OF CREDIT CARDS

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## I. INTRODUCTION

Assuming the defendant were to have lost some currency, he, alone bears the risk of loss, and his loss is fixed by the amount of currency he lost. Should he, however, lose his credit card, the amount of loss would not be fixed, and the risk of loss is not only borne by him, but also by the Company when he actually complies with the conditions of the issuance of the card to him.<sup>1</sup>

The Great Credit Card Society of the sixties has come a long way from the modest department store charge plate society of the early nineteen hundreds. The cashless customer in the department store who used (and still uses) his credit card or charge plate to purchase goods on a revolving line of credit has come full circle: he now uses credit cards to obtain cash. The pun that "cash is a poor man's credit card"<sup>2</sup> now has validity.

With all of the increase in the availability and use of the credit card, there has been little change in the conceptual and business framework underlying their use. In the two-party credit card arrangement—exemplified by the department store credit card or plate—the customer agrees to pay for his credit purchases in one lump sum at the next regular billing date, or he may place his charges on a revolving line of credit basis. There

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\* Professor of Law, School of Law, University of Miami. The author would like to express his appreciation to the many credit managers and attorneys for their labor in answering the author's questionnaire. I am sure that it has been as exasperating an experience for them as it has been a frustrating experience for me. Anyone contemplating empirical research in law should abandon the notion unless some foundation is willing to underwrite the task.

1. *Texaco, Inc. v. Goldstein*, 229 N.Y.S. 2d 51, 55 (N.Y. City Mun. Ct. 1962).

2. *NEWSWEEK*, Aug. 22, 1966, at 84-86.

may be, of course, a combination of these payment plans. These credit cards are then used by the customer in making purchases at the store of the issuer and the store's salesman may be required to telephone the credit department on each sale in order to ascertain if the purchase is within the limit of credit set by the store for this particular customer; the card may contain a symbol which indicates the credit limits of this customer, but the telephone call is used to ascertain if the credit limit has been expended by prior purchases.<sup>3</sup>

The three-party credit card system—exemplified by American Express, The Diner's Club, Carte Blanche, etc.—involves a contract between the issuer of the card and the holder; it also involves a series of contracts between the issuer and numerous retail merchants, motels, restaurants, etc. The holder of the card agrees to pay the issuer for all of his credit purchases (in one lump sum at the next regular billing date or on a time payment basis) made at retail merchants, motels, restaurants, etc., by means of his credit card. Prior to this contract, the issuer has entered into numerous contracts with retail merchants, hotels, restaurants, etc., agreeing to purchase the amount of their credit card sales—sometimes known as charges—on a weekly or monthly basis. If the issuer is an independent credit card company it may purchase these “charges” at discounts ranging from three to as high as ten percent depending upon the nature of the retail establishment, its volume of sales, etc. If the issuer issues credit cards as part of its promotional efforts to increase sales of its products—for example the oil companies—it will purchase (or allow a credit against purchases from the oil company) the “charges” at the full retail price, at “par.”

The latest development in the use of credit cards has been to obtain cash or a line of credit. Hundreds of banks have issued hundreds of thousands of credit cards which enable the holder to secure an installment loan from the bank, to cash bank checks (which resemble a hybrid of postal money order and a cashier's check) and to overdraw his checking account and cover it by a loan.<sup>4</sup>

Responsible authorities visualize the day when credit cards will not only take the place of cash but of checks as well. The credit card will be used in conjunction with computers which will be connected with

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3. For a brilliant legal and conceptual analysis of the credit card, see Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459 (1960). Unfortunately, the courts citing this pioneering work have decided the cases in a rather pedestrian manner. See also Comment, *Applicability of Exculpatory Clause Principles to Credit Card Risk Shifting Clauses* 22 LA. L. REV. 640 (1962) and 30 ALBANY L. REV. 79 (1966). The revolving credit arrangement is discussed in a Comment, *Regulation of Consumer Credit—The Credit Card and the State Legislature*, 73 YALE L.J. 886 (1964); TIME, Apr. 27, 1967, at 91-92. Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 VALPARAISO U.L. REV. 218 (1967) which was published after the completion of this article.

4. *Supra* note 2.

computers in the customer's bank. The salesman will record the sale on his computer and the checking account of the customer will be debited automatically. This system, or something like it, will be needed to reduce the amount of check "float" between banks—over fifty million checks a day are now "floating" between banks and the flood of paperwork will soon become overwhelming.<sup>5</sup>

In addition to the obvious danger of the unwise use of credit cards by the holder resulting in debts that he is unable to pay, there is the less obvious danger that a thief or finder may impersonate the holder and use his card to incur charges which will be assessed against the holder.<sup>6</sup> Virtually all credit cards today attempt to shift the risk of unauthorized purchases to the holder until he gives the issuer written notice of the loss or theft of the card. This risk shifting process goes through three stages in the three-party credit card arrangement. The card holder is supposed (in the view of the issuer) to bear the risk of loss for all purchases made by an imposter between the date of loss of the card and the time that written notice is received by the appropriate office of the issuer. The issuer then bears the risk of loss between this date and the date that it gives written notice to all of its affiliated merchants, hotels, etc. The risk of loss then passes to the affiliated merchant if it should honor a credit card after it has been notified that the card has been cancelled because it was lost or stolen.

In the two-party credit card arrangement, the risk of loss shifting process is abbreviated: the risk of loss is on the holder until he gives written notice of the loss of the card, and, inasmuch as the issuer and the honoring store are the same, there should be no loss falling on the issuer.

In spite of the fact that there are approximately sixty million credit cards in use in the United States today,<sup>7</sup> there are only a handful of reported cases involving suits by the issuers of credit cards against the holders for charges incurred by unauthorized users. Legislative attention to the holder's liability for the unauthorized use of his credit card has also been scanty. It has seemed to the author that this judicial and legislative inaction could not be truly reflective of the magnitude of the problem. As a result, the author prepared questionnaires which were sent

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5. Dunne, *Variation on a Theme by Parkinson or Some Proposals for the Uniform Commercial Code and the Checkless Society*, 75 YALE L.J. 788 (1966). See also Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. IND. & COM. L. REV. 485 (1967) which was published after the completion of this article.

6. The Miami Herald, Dec. 21, 1966, § C, at 11, col. 5; *Crime and the Credit Card*, NAT'L. BETTER BUSINESS BUREAU, SERVICE BULLETIN, Dec. 1966; *Spotlight on Schemes*, NATIONAL BETTER BUSINESS BUREAU, SPECIAL NEWS REPORT, Oct., 1966.

7. *Crime and the Credit Card*, *supra* note 6. No one really knows how many credit cards are in force. This survey covers companies which reported approximately 50,057,000 outstanding credit cards, and this figure is increasing daily because of the fantastic increase in the number of issuers—particularly banks—and holders.

to a more or less representative sampling of credit card issuing companies in an attempt to ascertain financial data and business practices which might account for the lack of litigation. The results of this empirical investigation are discussed in a separate section of this article immediately following the discussion of the reported cases, which will be grouped into the two-party and the three-party credit arrangements because they fall into these natural conceptual and chronological classifications.

## II. THE CREDIT CARD IN THE COURTS

### A. *The Two-Party Credit Arrangement*

The ubiquitous plastic credit card of today apparently evolved out of the metal charge coin or plate issued by department stores in the early nineteenth hundreds. These department store charge plates or coins usually had the name and charge number of the customer imprinted on the face of the coin, and they were effective only in the store of the issuer. These plates or coins were designed to encourage sales by enabling the customer to purchase on credit without the necessity of visiting the credit department for each sale. From the wording of the few decisions involving these coins, it would appear that these coins did not bear the legend that the customer would be responsible for all purchases made on the presentation of the coin until the store was advised that the coin had been lost or stolen. It would also appear from these cases that the customer did not sign any contract purporting to bind him for the amount of all unauthorized purchases. As a result, the courts had to treat cases of unauthorized use in somewhat of a factual-legal vacuum. In *Wanamaker v. Megary*,<sup>8</sup> the first reported case dealing with these charge coins, the department store-issuer had issued a coin which merely contained the name and credit number of the customer. The customer lost the token along with other identification papers and the token was used by an unauthorized user. The court stated that "the coin is in effect an order upon the plaintiff [department store] to deliver goods to the person presenting it, and to charge the said goods to the defendant's account. It is similar to a check, a bill of exchange or other negotiable instrument payable to bearer."<sup>9</sup> Inasmuch as the coin or token did not contain any of the usual words of negotiability, it is difficult to agree that the coin itself should have been treated as if it were a negotiable instrument. However, the court may have considered testimony (which it did not choose to discuss in the opinion) that the customer had agreed to be bound for all unauthorized purchases until she notified the store of the loss or theft of the coin. Any agreement of this nature would not convert a non-negotiable "instrument" into a negotiable one, but if the customer does agree to be bound for all unauthorized purchases the legal effect of the agreement

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8. 24 Pa. Dist. 778 (Phil. Mun. Ct. 1915).

9. *Id.* at 779.

would be to protect the issuer of the card in the same way that a drawee of a check would be protected if the customer should draw her check payable to cash (or indorsed it in blank as payee) and it was presented for payment by a thief or finder.<sup>10</sup>

*Lit Brothers v. Haines*<sup>11</sup> involved the unauthorized use of a credit coin similar in wording to the one involved in the *Wanamaker* case; however, the parties stipulated that the "defendant [customer] was ignorant of the fact that any one producing her coin at plaintiff's store and giving her correct name and address could obtain goods. . . ."<sup>12</sup> The court held therefore that this admission negated any inference of a contract between the parties that the customer was to be responsible for any unauthorized purchases, and that the coin could not be considered negotiable because it lacked the requisite wording of negotiability. The court was careful to note that "the coin was for the purpose of identification, and in the absence of any proof of an agreement between the parties that it was to have any other effect it is limited to that purpose . . . ."<sup>13</sup> Although the court rejected the reasoning of the *Wanamaker* case as to the negotiability of these coins or tokens, it is submitted that the court might have followed the *Wanamaker* rationale if the customer had contracted with the department store issuer to assume responsibility for unauthorized purchases.

In *Jones Store Co. v. Kelly*<sup>14</sup> the court, after stating that it was the "custom"<sup>15</sup> of the department store issuer to sell goods to the person producing a charge coin, held that "if another wrongfully and without his [the customer's] knowledge gained possession of and used the coin in making purchases, then defendant is not liable."<sup>16</sup> It would appear that the court might have upheld the validity of an agreement by the customer to pay for all unauthorized charges if the store had proven its existence; however, the seemingly unilateral "custom" of the store to sell goods to whomever presented the coin would not satisfy this burden.

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10. UNIFORM COMMERCIAL CODE §§ 3-202, 3-204.

11. 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923).

12. *Id.* at 659, 121 A. at 131.

13. *Id.* at 660, 121 A. at 132. This same theory is advanced in the more recent case of *Thomas v. Central Charge Serv., Inc.*, 212 A.2d 533 (Dist. Ct. App. 1965), noted in 23 WASH. & LEE L. REV. 125 (1965). Central Charge Service issued charge plates to Thomas and his wife. Central Charge received accounts receivable from retail stores growing out of purchases at these stores by holders of its charge plates. Unauthorized purchases were made on the husband's charge plate. Thomas did not sign the plate (as was required) and made only one purchase with it prior to the unauthorized purchases. Thomas did not notify Central Charge that his charge plate was missing. The contract between the Thomases and Central Charge did not provide that the holders were to be liable for all purchases made on the strength of the charge plates. The court, therefore, held that the Thomases were not liable on any kind of a contractual basis, and that there was no implied promise by them to pay for unauthorized purchases because of the relationship of the parties. The court also refused to apply the rule that as between two innocent parties the one who made the loss possible should bear it.

14. 225 Mo. App. 833, 36 S.W.2d 681 (1931).

15. *Id.* at 835, 36 S.W.2d at 683.

16. *Id.* at 836, 36 S.W.2d at 683.

Judicial hostility to department store credit cards or plates was again manifested in the very recent case of *Allied Stores, Inc. v. Funderburke*.<sup>17</sup> A customer applied for and received a credit plate under a flexible charge account. The application stated that the holder agreed:

To pay for all purchases made by any person presenting the identification plate which Seller will lend me, until Seller receives my notice by certified mail that same has been lost or stolen.<sup>18</sup>

The court noted that this wording was in accordance with a New York statute which provides:

A provision to impose liability on an obligor . . . for use of a credit card after its loss or theft is effective only if it is conspicuously written or printed in a size at least equal to eight point bold type either on a card or on a writing accompanying the card when issued or on the obligor's application for the card, and then only until written notice of the loss or theft is given to the issuer.<sup>19</sup>

The holder left the City of New York for approximately one month, and during her absence someone made 237 purchases using her credit plate. Two hundred thirty purchases were for less than \$15, while the remaining seven purchases were for more than this amount. Total purchases amounted to \$2,460. The store rules provided that for credit purchases of more than \$15, the clerk was to make inquiry of the credit department; seemingly this rule was not obeyed.

The court first held that both the contractual provision and the statute were ambiguous in that neither one expressly provided that the holder assumes all risk occasioned by loss or theft "where the credit card holder is unaware of such facts [loss or theft] and thus is unable to give the required notice."<sup>20</sup> The court then said that the case must be decided upon common law tort concepts rather than contractual or statutory liability. The court noted that 237 charge slips were allowed to accumulate in a thirty-day period, and under the data-processing system in use in the issuer's store if the sales slips totaled more than \$200, a "spill/out"<sup>21</sup> was to occur. It would appear that this "spill/out" did occur, but only after \$2,460 worth of purchases had been made. The store asserted that it took time to collect all of the charge slips and that it was unable to do so before all of these purchases were made. The court

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17. 277 N.Y.S.2d 8 (Civ. Ct. N.Y. City 1967).

18. *Id.* at 10.

19. N.Y. GEN. BUS. LAW § 512 (McKinney 1962). See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machines, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966) for a brilliant analysis of the lack of warning given by issuers of credit cards.

20. *Allied Stores of N.Y., Inc. v. Funderburke*, 277 N.Y.S.2d 8 (Civ. Ct. N.Y. City 1967).

21. *Id.* at 14.

refuted this argument by stating that the issuer could not shift the burden of its inadequacies or failures to the innocent consumer-holder. While there was a duty on the part of the holder to exercise reasonable care over the card, there was also a concurrent obligation on the part of the issuer to protect its customer from the imposition of unjust charges and the issuer failed to meet that obligation.

The major holding in this case that the holder is not liable under the contractual and statutory provisions unless he is aware that his card has been stolen or lost is a troublesome one in that it seems to encourage perjury. If a holder admits that he knew his card was lost or stolen and he has failed to notify the issuer, liability will follow. On the other hand, if he denies that he had this knowledge, he will stand a good chance of escaping from any liability unless the issuer can prove that it is free from fault. It does not require the gift of clairvoyance to predict what future holders will assert in their defense. It is a matter of some conjecture whether this court would have held in favor of the defendant if the contractual clause had stated clearly that the holder was to be liable for the improper use of this plate whether or not she had knowledge that it had been lost or stolen. This decision has virtually nullified the effectiveness of the New York statutes in bipartite situations. Inasmuch as the court was careful to limit the holding of this case to its bipartite factual setting, its impact may be rather limited. But, regardless of the bipartite or tripartite nature of the credit plate arrangement, it is difficult to agree with the court's rather strained interpretation of the wording on the credit application—an interpretation that was not drawn by the Municipal Court of City of New York on similar wording of a contract and the same statute in the case of *Texaco, Inc. v. Goldstein*,<sup>22</sup> which is discussed in the next section of this article.

### B. *The Three-Party Credit Card Arrangement*

The two-party department store credit plate cases of the first one-third of this century were succeeded by the three-party oil company credit cards cases.

In *Gulf Refining Company v. Plotnick*<sup>23</sup> the oil company issued its "charge-a-plate" to a customer who kept it in his automobile. The automobile was stolen, and the thief used the plate in making purchases at service stations owned by the oil company and at other authorized independent dealers. The holder of the card was billed for the unauthorized purchases, but failed to notify the oil company of the theft for a period of approximately four months. The trial court instructed the jury to confine its deliberations to the sales made at the oil company's own stations and eliminated those purchases made at other authorized stations. The

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22. 229 N.Y.S.2d 51 (N.Y. City Mun. Ct. 1962).

23. 24 Pa. D & C 147 (C.P. Lancaster County 1934).



court failed to mention if the customer had agreed expressly to pay for unauthorized purchases, and stated that ordinarily the holder should not be held liable for a debt created by a thief or one not authorized to obtain credit by using the card. However, the court held in favor of the oil company on the particular facts and circumstances of the case. The court apparently based its decision on the fact that the customer had been careless in the custody of his card and negligent in failing to report its loss, although this reasoning was not clearly articulated.

The first case clearly involving an express promise by a credit card holder to pay for all purchases made through use of his card was *Magnolia Petroleum Co. v. McMillan*.<sup>24</sup> The card provided that:

The named holder shall be responsible for all purchases made by use of this card, prior to its surrender to the issuing company, whether or not such purchases are made by the named holder or into the car described . . . . This card is not transferable . . . .<sup>25</sup>

The holder lent the card to two men who made some purchases for the benefit of the holder, but one of these men made additional unauthorized purchases for his own benefit and the holder refused to pay for these latter charges. The court held in favor of the petroleum company by upholding the validity of the contractual provision. It is interesting to note that the court made no attempt to reconcile the provision that the card was not transferable with the fact that it was holding the holder liable for the purchases of the borrower of the card who might be broadly described as a transferee. The case can be justified on the fact that the holder made the loss possible by his lending the card and then failing to notify the oil company that the borrower had failed to return it to the holder and was continuing to use it. On the other hand, the contractual clause required the surrender of the card, and it would be interesting to speculate what the court would have held if the holder had notified the oil company to cancel the card and had advised it that he was unable to return the card because of the refusal of the borrower to return it.

A modified version of the contractual provision in the *Magnolia* case appears in *Gulf Refining Co. v. Williams Roofing Co.*<sup>26</sup> wherein the holder assumed "full responsibility for all merchandise, deliveries or service obtained on credit by any person by its presentation."<sup>27</sup> The defendant-holder received eight cards bearing the provision. The holder had the words "Good for Truck Only"<sup>28</sup> typed on the face of each card and then distributed them to its truck drivers for use in the course of their

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24. 168 S.W.2d 881 (Civ. App. Tex. 1943).

25. *Id.*

26. 208 Ark. 362, 186 S.W.2d 790 (1945).

27. *Id.* at 364, 186 S.W.2d at 792.

28. *Id.*

employment. One driver used his card at a Gulf authorized station; the gas station employee failed to return the card and used it in purchasing goods and cashing checks in a number of gas stations. There was definite evidence of collusion between the unauthorized user of this card and the employees in many of the gas stations, and the holder refused to pay Gulf. The court held that the holder had the right to type the words "Good for Truck Only" upon the face of the card and that each gas station that extended credit on the strength of this card did so subject to the limitation. The court then held that the holder's agreement to "assume full responsibility" was in fact a guaranty of payment to anyone extending credit in good faith upon the strength of the card and upon the limitation placed there by the holder, and that the holder-guarantor cannot be held liable beyond the strict terms of his contract. As dicta, the court stated that the forged invoices representing purchases by the unauthorized user were assigned to Gulf which could not claim any greater rights in the assigned charges than were held by the assignor-gas stations. If the gas-stations could not recover against the holder, then neither could Gulf. It is submitted that if the holder had not typed the restrictive limitation upon the cards, the court would have come to the same conclusion based upon this assignment theory.

The assignment and guaranty theories of *Gulf Refining Co. v. Williams Roofing Company* were used in *Union Oil Co. v. Lull*.<sup>29</sup> In *Union* the credit card bore the unfortunate language that "the customer to whom this card is issued guarantees payment . . . of price of products delivered or services rendered to anyone presenting this card, guarantee to continue until card is surrendered or written notice is received by the company that it is lost or stolen."<sup>30</sup> The card was lost or stolen, and an unauthorized person used it while driving a stolen automobile. The holder's card gave his residence as being in Oregon, while the unauthorized user was driving an automobile with Idaho license plates. Most of the impostor's charge slips recorded the Idaho license number, and the court stated that the disparity between the Oregon residence on the card and the Idaho license plates should have prompted the service station attendants to make inquiry relative to the identification of the unauthorized user and that this might have prevented the unauthorized sales. The court then held that the issuer's rights "cannot transcend those of the dealer,"<sup>31</sup> and the issuer's right to recover under the guaranty agreement is "conditioned upon the exercise of reasonable care in making inquiry concerning the identity of the impostor using the card."<sup>32</sup> The court was careful to note that if the unauthorized user had possessed identification showing that he was the true holder of the card and that this evidence was sufficient to

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29. 220 Ore. 412, 349 P.2d 243 (1960).

30. *Id.* at 416, 349 P.2d at 245.

31. *Id.* at 436, 349 P.2d at 254.

32. *Id.*

convince a reasonable man to conclude that the impostor was the true holder, the holder would be liable for the purchases made by the impostor. It would seem that *Union* adopted the guaranty-indemnity theory of *Gulf Refining*.

The guaranty agreement found present in the *Union Oil* case was distinguished in *Texaco, Inc. v. Goldstein*<sup>33</sup> wherein the credit card provided that:

Such person, corporation or firm [the holder] assumes full responsibility for all purchases made hereunder by any one through the use of this credit card prior to surrendering it to the company or to giving the company notice in writing that the card has been lost or stolen.<sup>34</sup>

The court noted that the above language constituted an "original undertaking in which the defendant [the holder] made it his own responsibility for any use of the card,"<sup>35</sup> while the contract in the *Union Oil* case created a suretyship contract between the parties making the holder a gratuitous indemnitor. The court, after reviewing the business background surrounding the use of credit cards in the oil industry, refused to place any burden of care upon the issuer, but placed the entire duty of care in the custody of the card on the holder. This holding is a flat rejection of any assertion that the retail gas stations have any duty of due care as articulated in the *Union Oil Co.* case.

It is submitted that the court ignored one vital aspect of the credit card which was seemingly not involved in any other of the prior cases: the card bore the signature of the holder and this was designed to furnish an additional means of identification. Although it was not stated in the case, it would appear that credit card holders were required to sign their charge slips when making purchases at gasoline stations and a simple comparison of the signature on the credit card with the signature on the charge slips should have been sufficient to indicate that the presenter of the card was an impostor, unless he happened to be an expert forger. If gas stations do not have any responsibility to compare these signatures, then this means of identification has been denied any practical efficacy.

It is also submitted that the court was misled by the fact that Texaco Company purchased the charge slips from the gas stations "at par" without profit to itself and that the gas stations are, for the most part, independent dealers. The fact that Texaco did not make a profit on each charge sale by purchasing the charge slip at a discount should be an irrelevant factor because Texaco did make a profit on the sale of its

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33. 229 N.Y.S.2d 51 (N.Y. City Mun. Ct. 1962), noted in 12 DE PAUL L. REV. 150 (1962).

34. *Id.* at 53.

35. *Id.* at 54.

products and these sales are supposedly increased by the use of the credit cards—the court ignored the totality of the economic arrangement. Secondly, Texaco can and does regulate the use of credit cards by its dealers even though they are classified as “independent contractors.”

Finally, it is submitted that the court placed too much reliance on a recent statutory enactment in New York which has been previously discussed:

A provision to impose liability on a obligor for the purchase or lease of property or services by use of a credit card after its loss or theft is effective only if it is conspicuously written or printed in a size at least equal to eight point bold type either on the card, or on a writing accompanying the card when issued or on the obligor's application for the card.<sup>36</sup>

The court stated that the “Legislature acknowledged the validity of the agreement between the parties . . .”<sup>37</sup> by this enactment. The fact that the legislature has validated these provisions (if printed in eight point type) does not also imply that the legislature has destroyed any defenses which the holder may have arising out of acts in the credit-sale process which are aliunde the original provision. To take an extreme example, if the issuer of the credit card should conspire with retail merchants to charge the holder for fictitious sales, the holder could admit the validity of the original contract and defeat recovery by raising the affirmative defense of fraud. In a more realistic vein, compliance with this statute should not result in the holder's being denied the right to assert defenses arising out of the misconduct of retail merchants who have honored his card in the hands of an impostor.

The only known Florida articulation governing the responsibility of the holder for the unauthorized use of his credit card is the unreported case of *Shell Oil Co. v. Krusen*,<sup>38</sup> which was an appeal from the Civil Claims Court to the Circuit Court of Hillsborough County. The holder received a card which provided that “If a customer fails to promptly notify Shell in writing of the loss or theft of this card it shall be conclusively presumed its use by the bearer is with the customer's permission.”<sup>39</sup> The card was stolen from the holder's boat “although apprised of the theft within a few days of its occurrence, he was not conscious of the disappearance of the card until notified . . . by the law enforcement authorities of . . . Arkansas, that they had taken it from the thief.”<sup>40</sup> The holder then advised Shell of the theft and the recovery of the card by the police in Arkansas.

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36. N.Y. GEN. BUS. LAW § 512 (McKinney 1962).

37. *Texaco, Inc. v. Goldstein*, 229 N.Y.S.2d 51, 56 (N.Y. City Mun. Ct. 1962).

38. Appeal No. 26479-L (1951). It may be of interest to note that the circuit court of appeal consisted of three judges.

39. *Id.* at page 3 of the opinion.

40. *Id.* at 2.

The card provided a space for the signature of the holder, but he failed to sign it. The court held that the provisions of the contract on the card did not expressly or impliedly require the holder's signature to validate its use, and his retention of it for more than thirty days prior to the theft with the intention of using it was an acceptance of it and he was bound in the absence of a requirement that his signature was necessary to validate its use.

The court expressly upheld the condition requiring the holder to give prompt notice to the issuer of the fact of loss or theft: "in this case if such notice had been promptly furnished, the thief's fraudulent use of the card could have been foiled."<sup>41</sup>

As an additional ground for its holding, the court stated:

For like reasons, we think the term 'it shall be conclusively presumed its use by the bearer is with the customer's permission' in the event of the failure to notify the company is reasonable and enforceable. Consequently, we hold the defendant is bound by such terms and conditions and must be held liable for the merchandise secured by the thief under the circumstances reflected in this record. His inadvertence cannot absolve him.<sup>42</sup>

It seems implicit that if the holder had promptly notified Shell of the theft of his card, the court would not have imposed liability upon him. This implicit holding would seem to be supported by the very recent case of *Read v. Gulf Oil Corp.*,<sup>43</sup> a case of first impression in Georgia. The holder of a Gulf Oil card had applied for and used it. The card was lost or stolen and an imposter used it. The card provided that "Acceptance by the party named on the front [the holder] implies responsibility for all service and merchandise obtained thereby. Loss or theft hereof must be reported in writing immediately to avoid responsibility for unauthorized use."<sup>44</sup> The holder notified Gulf in writing of the fact of loss, and all purchases by the imposter were made subsequent to this written notice. The appellate court first held that the issuance of a credit card operates as a mere offer on the part of the issuer, and when the holder accepts it by retaining and using it, a contract is formed. The court held finally that it was the duty of the trial court to direct a verdict in favor of the holder when her uncontradicted testimony showed that she gave written notice to the issuer prior to the date of the purchases made by the imposter.

The muddled juridical credit card picture has been further muddled by the equivocal, unreported California case of *The Diners' Club, Inc. v. Whited*.<sup>45</sup> The cardholder applied for and received a card which stated

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41. *Id.* at 4.

42. *Id.*

43. 114 Ga. App. 21, 150 S.E.2d 319 (1966).

44. *Id.* at 23, 150 S.E.2d at 320.

45. Civil No. 10872, App. Dep't. Cal., Aug. 6, 1964, Trial Ct. No. 32274, noted in 43 N.C.L. REV. 416 (1965) and 67 W. VA. L. REV. 145 (1965).

that "If this Credit Card is lost or stolen, original holder is liable and responsible for all purchases charged through use of this card until . . . written notice of its loss or theft."<sup>46</sup> In addition to this statement on the card, the Listings Directory, which was incorporated by reference by a statement on the back of the card, stated that "The Credit Card is not transferable and will be honored only when properly signed and presented by the authorized holder."<sup>47</sup> An unknown imposter obtained possession of this card and incurred charges of \$1,622.99 before written notice was received by the issuer. The Diners' Club paid these charges to various restaurants pursuant to contracts which provided that "We [the issuer] undertake to purchase, and you [the merchant] undertake to sell, all valid charges of the amount of the check. The obligation to collect from the CLUB member from that point on will be upon us."<sup>48</sup> Most of these contracts also provided that "The CLUB card must bear the signature of the person whose name is embossed on the face of the card. The signature of the cardholder signed on our charge forms . . . or on your bill or check must be the same as that appearing on the face of the card."<sup>49</sup> The Diners' Club brought suit against the cardholder upon his refusal to pay these charges incurred by the imposter; the trial court ruled in favor of The Diners' Club and the appellate court reversed.

The court cited the *Gulf Refining Co.*<sup>50</sup> and *Union Oil Co.*<sup>51</sup> cases with approbation for the proposition that a cardholder is not absolutely liable, but that the issuer and the merchant each owe a duty of reasonable care so that irregular charges are not unnecessarily incurred. The court then stated that the contracts between The Diners' Club and the respective merchants provided for assignments of the credit card holder's charges to The Diners' Club, and that under the assignment theory of the *Gulf* and *Union* cases "any negligence of the merchants would be chargeable to The Diners' Club."<sup>52</sup> The court then found that the issuer had not shown that it and its merchants were free from negligence; in fact there was no showing that any of the merchants required the impostor to identify himself at any time.

Despite all of these statements as to the negligence of the merchants and the rule governing the assignments of accounts receivable, the court chose to base its order of reversal on the basis that The Diners' Club had not proved the "damage issue."<sup>53</sup> The court noted that the two different forms of contracts in existence between The Diners' Club and the various merchants did not have the same wording. In all of the contracts,

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. 208 Ark. 362, 186 S.W.2d 790 (1945).

51. 220 Ore. 412, 349 P.2d 243 (1960).

52. *Supra* note 45, at 2.

53. *Id.* at 3.

The Diners' Club agreed to purchase only "valid" charges. In addition, most of the contracts provided that the account must contain the "signature" of the cardholder and it must be "the same" as that on the card. The court then seemingly held that the payments which The Diners' Club made on these forged accounts were made on a "voluntary"<sup>54</sup> basis and therefore they would not constitute items of legal damage. As dicta, the court noted that it would be possible for The Diners' Club to bind itself with its merchants to purchase accounts made by forgery if due care were exercised by the merchant and to pass on these charges to the cardholder, but that these contracts did not impose this liability between Diners' and its merchants. In addition to this judicial suggestion to The Diners' Club as to how to escape the "damage" issue question by redrafting its contracts with its merchants, the court also offered another escape-hatch suggestion as a means of circumventing the forgery question by redrafting the Diners' contract with its cardholders and also by eliminating the signature on the card and by not restricting the use of the card to the issuer-holder in accordance with the practice in the oil company contracts. One difficulty with this case remains: assuming that Diners' contracts were redrafted in accordance with the court's suggestions, would Diners' still have to prove that its merchants used due care in identifying the possessor of a credit card as the legal holder of it in order to enforce liability on a holder for the use of his card by an impostor? The opinion is not entirely clear on this point.

### III. EMPIRICAL INVESTIGATION

The results of any empirical investigation are subject to question because of numerous variables which may be encompassed under the ability of the interviewer and the knowledgeable candor of the interviewee. The ability of this interviewer may be judged by the quality of the questions in the questionnaire. An evaluation of the answers to the questionnaire indicating the knowledgeable candor of the interviewees becomes more difficult. With only minor exceptions, it is submitted that the answers given to the questionnaire were fully candid in the sense that there did not seem to be any intentional concealment or flavoring of the answers. However, it is impossible to know the degree, if any, of the subconscious slanting of the answers. For example, a credit manager's answers to the author's questions might be affected by the fact that he would hate to admit (even in the anonymity of a questionnaire) that there was a high rate of incidence of use of credit cards by impostors or that the monetary loss rate had reached alarming proportions. It is interesting to note, in response to this suggestion, that the incidence of the improper use of credit cards and the monetary loss from this improper use were surprisingly uniform among issuers of the same class, *i.e.*, there was little

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54. *Id.* at 4.

variation among various oil company issuers or among department store issuers, etc. In fact, the questionnaire disclosed that there was a surprisingly high rate of uniformity in the incidence of loss between issuers of different classes.

On a more objective level, the answers of many interviewees seemed to indicate either that data processing was not being used or that it was being used improperly because phrases such as "estimated," "approximate," or "we believe" were used when answering the questions dealing with the number of cards lost during an average year, or the percentage of lost cards improperly used during the year or the average monetary amount of purchases made by the average improper user. It seems incomprehensible to the author that any large credit card issuer can survive today without having statistics immediately available. For example, how can an issuer decide on a massive drive to induce the public to become credit card holders without knowing what its incidence of loss has been on bad debts, improper use, etc.? How can the issuer make the decision whether or not to sue its holders for improper use of lost or stolen cards without knowing the loss rate and the improper use rate?<sup>55</sup>

The reader may have additional objections to the validity of the author's attempt to ascertain what credit card issuers are doing about the improper use of credit cards, but, for what it is worth, the remainder of this article will attempt to throw some light on a business activity which has been lightly touched upon by the courts.

The author promised each of the subject companies that this article would not disclose in identifiable form the answers given to the author. Hence, this article has grouped the various issuers under the "two-party credit card arrangement" (the department stores), and the "three-party credit card arrangement" (which is further divided into the oil company issuers and the independent issuers such as American Express, The Diner's Club, Carte Blanche, etc.). Of course, these groupings are not entirely accurate because, for example, many of the oil company credit cards may be used at hotels and motels; some of the airline credit cards may also be used at hotels and motels, etc. In effect the original two-party card may also be used in a three-party transaction. The lines of demarcation are constantly being blurred by the ingenuity of the issuers; however, a grouping by "industry" was necessary in order to arrive at some workable method of presenting the statistics.

#### A. *Two-Party Credit Card Arrangements*

##### 1. THE DEPARTMENT STORE

Four department stores, Burdines of Miami, Jordan Marsh of Florida (covering the South Florida Area mainly), Richards Department

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55. Data processing is being used in an increasing degree by credit exchanges, *see* The Miami Rev. and Daily Record, Vol. 41, No. 69, Sept. 14, 1966, at 1, col. 1.



Store of Miami, and Sears, Roebuck & Co. (Southern Territory) answered the author's questionnaires. These companies reported a total in excess of 8,340,000 outstanding credit or charge cards. With reference to the number of outstanding cards, one company reported a high of 7,500,000 while the low was slightly in excess of 200,000.

Only two of the four companies reported the amount of average annual charges incurred by the average credit card holder: the high was \$240 while the low was \$160.

Three of the four companies reported the percentage of lost or stolen credit cards during the average year. The company with the least number of outstanding credit cards reported that "15 to 25 per week" were reported lost or stolen; this amounts to a percentage of approximately .4 percent. The company with approximately 100,000 cards more than the latter company reported a loss percentage of approximately .5, while the company with the greatest number of outstanding credit cards reported a loss percentage of 1 percent. Although the sampling may be too small for accurate appraisal, it appears that the percentage of loss increases with relationship to the number of cards issued. On the other hand, the company with the lowest percentage of lost or stolen credit cards reported that approximately 10 percent of the lost or stolen cards are used improperly, while the company with the highest percentage of lost or stolen credit cards reported that only .5 percent of these cards are used improperly. Somewhat surprisingly, the store which had 100,000 credit cards more than the smallest (in a credit card sense) issuer, reported that approximately 1 percent of its lost or stolen cards are used improperly. If these three stores are representative, there would seem to be no correlation between the number of cards outstanding and the incidence of improper use.

Only two stores supplied any information as to the approximate amount of goods which were obtained by the average unauthorized user of a lost or stolen card. The high figure reported was \$275 while the low was \$150. It is interesting to note that these figures do not vary considerably from those reported by the oil industry, which are discussed in the next section of this article.

Three of these department stores asserted that their holders were liable for all charges made as the result of an unauthorized use of their credit cards until written notice was received by the issuer, while one asserted the contrary. However, of the three stores asserting liability against the holder, two stated that they had not instituted suit, while the third stated that it instituted suit

only where we felt the account holder had knowledge of the charges, and was responsible. Charges resulting from marital problems or those incurred by unauthorized relatives or friends fall into this category.

Within the narrow area of this article, it appears that not one of these four stores had instituted suit against a holder whose card had been lost or stolen. It is interesting to note that the credit cards or charge plates of these companies contain the signature of the holder. Two of the companies stated their policy regarding identification of holders. One company stated:

We require charge plate holders to identify themselves on large purchases, especially of luxury type merchandise . . . . Where further identification is required, our clerks request a driver's license, voter's registration card, employer identification card or other form of identification showing the customer's name, address and signature.

The second company stated that its identification procedures are accomplished

by comparison of signatures on charge card and salescheck . . . . If we have reasonable reason to believe the person presenting the card is not the person whose account the card represents, we could require such identification as driver's license, military ID cards, other credits, etc.

It may be suggested that if a thief should steal the wallet of the average man, he would have sufficient "identification" cards to "prove" his identity to the average sales clerk. The answer to this problem rests in the issuance of tamper-proof credit cards which bear the color photograph of the holder.

## B. *Three-Party Credit Card Arrangements*

### 1. THE OIL COMPANIES

Nine oil companies, Shell, Gulf, American, Phillips, Standard Oil of Kentucky, Sinclair, Atlantic, Citgo and Pure Oil submitted answers to the author's questionnaires. These nine companies listed a total of approximately 31,200,000 credit cards outstanding. The actual figure is considerably larger because one of the largest companies reported that the number of its credit card holders was "classified information, but I can tell you that we have in the hands of our customers in excess of one million credit cards." These companies presented a rather dramatic difference in the number of cards outstanding for each company. Of those eight companies reporting a specific figure, the high was 8,000,000 and the low was 1,300,000. The mean (midpoint between the extremes) was 4,633,000, the median figure was 4,000,000, and the average was 3,775,000.

Although there was a vast disparity in the number of credit cards outstanding among these oil companies, there was little difference as to

the amount of the charges for goods and services incurred annually by the average credit card holder regardless of which company card he held. The average credit card holder for eight of the above companies charged \$271.87 annually. The mean amount of annual charges incurred by the average holder of a card issued by eight of the above companies was \$245, and the median figure was \$300. One company reported that its average holder charged from \$300 to \$400 per year, while at the low end of the spectrum one company reported \$90 per year. The latter company had 1,400,000 cards outstanding while the "high" company had 8,000,000 cards outstanding. If these two companies are considered in isolation, it would appear that the greater the number of credit cards the greater the amount of annual purchases per card. This appearance is deceiving. One company with only 1,300,000 outstanding cards, 100,000 less than the company reporting \$90 per year, reported that its average holder charged \$300 per year—while a competitor which reported 7,000,000 cards outstanding also reported average annual charges of \$300. There would seem to be little, if any, correlation between the number of credit cards and the amount of annual charges per card. Of course, the greater the number of active credit card users the greater will be the gross income of the issuer.

All of the above oil companies reported the approximate percentage of their credit cards which were reported lost or stolen during the average year. The percentage rate of losses reported among the various companies varied considerably. The highest percentage rate of losses reported was 3.4 percent while the low was .7 percent. The average percentage was 1.24, the mean was 2.05 and the median was 1.00. It is again impossible to draw any correlations between the number of outstanding cards and the percentage of losses reported. The company which reported the largest number of outstanding credit cards reported a loss percentage of 2.00 while its next largest competitor (in a credit card sense) reported a loss percentage of 3.4. One of the larger companies reported a loss percentage of .33 while one of the smaller competitors reported a percentage of 1.00. The most that can be said is that holders lose cards, or have them stolen, without any relationship to the size of the company issuing them.

The empirical investigation becomes even more complex when one attempts to present a percentage pattern of improper use of credit cards by finders or thieves. In response to the question "approximately what percentage of the lost (or stolen) credit or charge cards are improperly used during the average year?", eight of the companies reported an average of 2.45 percent with a mean of 2.3 percent and a median of 2.7 percent. Two of the companies stated that approximately 5 percent of their lost or stolen credit cards are used improperly while one company reported a low improper use rate of .4 percent. One of the largest as well as one of the smallest (in a credit card sense) had 5 percent of their lost or stolen cards used improperly. It would appear that the dishonest ele-

ment of our population is nondiscriminatory. In order to breathe life into these somewhat sterile percentage amounts, the following table portrays the number of outstanding credit cards for each company, the percentage of lost or stolen credit cards improperly used and the average dollar amount obtained as a result of the improper use:

Company	No. of Credit Cards	Percentage Lost Each Year	Percentage of Lost Cards Used Improperly	Monetary Amounts
A	7,000,000	3.4	1.7	\$ 95.00
B	4,000,000	1.0	.4	200.00-250.00
C	8,000,000	2.0	2.3	161.00
D	3,000,000	1.3	3.75	141.00
E	1,000,000 (plus)	.33	5.00	214.00
F	4,000,000	1.0	.5	75.00
G	1,300,000	1.00 ( $\pm$ )	5.00 (or less)	150.00
H	1,500,000 (plus)	.5	N/A	N/A
I	1,400,000	.7	1.00 (or less)	125.00

This table indicates that the average unauthorized user incurs charges amounting to \$151.37 when he uses a lost or stolen credit card; the mean figure is \$150 and the median is \$162.50. If one should take Company "C" as an example, it would appear that approximately 3,680 of its cards are used each year by unauthorized users who obtain merchandise and services worth \$592,480 which must be borne by the issuer, the holders and the service stations in varying amounts.

Eight of the above oil companies answered "yes" to the question "Are the holders of your credit or charge cards liable for all amounts obtained as the result of an unauthorized use of your card until written notice is received by your office?" The ninth oil company was more realistic when it answered "Theoretically, yes." One of the eight companies qualified its answer by stating "By the terms of the credit card, yes. However, for practical business reasons, we do not as a matter of good customer relations enforce it." Of the seven oil companies which gave a categorical "yes" to the notion of the holder's liability, three stated (in the succeeding question) that they have not attempted to enforce the alleged liability by bringing suit. Hence, out of nine oil companies only four have a policy of bringing suit against a holder for charges incurred by an unauthorized user after the loss or theft of a card. It may be interesting to note that the companies which have relatively fewer outstanding credit cards display a much more benevolent attitude towards their credit card holders than their larger (in a credit card sense) competitors.

In response to question "7b" of the questionnaire, only two answers were received as to the average amount sued for in an action by the issuer against the holder: one company reported \$466 as the average amount while the other reported \$300. Of the four companies which had instituted suit against holders, only one claimed that it had been successful

in all cases in the trial and the appellate courts and this statement was supported by one citation to an unreported case. One company which answered "no" to the question presented in 7C added the following observation:

We wish to point out that most of the adverse rulings have been due to lack of sufficient proof, due to difficulties of getting witnesses before the court and other reasons. However, there are one or two isolated cases which attempt, as a matter of law, to completely immunize the credit card holder—usually a person of moderate means who is confronted with a sizable indebtedness from which he reaped no benefit—even where he has failed to give timely notice of loss or where he has entrusted the card to another person who refuses to return it. The rationale of these cases is that . . . [the issuer] is or should be a quasi-insurer, since . . . [the issuer] is in position to set up a reserve fund to cover this type of loss.

In response to the author's inquiry as to what percentage of holders have paid voluntarily and what percentage did so after suit was filed for charges incurred from an unauthorized use of the card, only two companies attempted an answer. One company reported that approximately 30 percent of its holders made payment for unauthorized charges without suit being filed, while the other company said that 2 percent of its holders paid without suit being filed and less than 1 percent did so after suit was filed.

One company reported on a facet of the unauthorized user problem which, although outside of the scope of this article, seemingly was of more importance to the company's attorney than the "simple" case of a thief or finder using a credit card:

Even as to subsequent charges [charges made after notice of loss of the card is given by the holder to the issuer], suit against the holder may be brought in those instances where the user contends that he is not an unauthorized user but was given the card by the holder. This type of situation arises most frequently as between estranged husbands and wives, parents and children, and employers and employees. Some users have contended that they have given cards to pay off gambling debts, and . . . [the issuer] recently lost a case . . . where the court accepted testimony of a reputed prostitute that she was given the card in question.

In these disputed situations . . . [the issuer] tries to bring both parties before the court, so that they can resolve their conflicting positions between themselves, with the court imposing liability upon the responsible party. This is not always possible, however, because the parties may be in different jurisdictions where they are not amenable to comment process. In such latter cases . . . [the issuer] must elect which of the two parties to sue.

## 2. THE AIRLINES

At first blush, the legal and business arrangement between an airline issuer of a credit card and its holder would appear to be a two-party arrangement, and in many common transactions it will be just that—the holder purchases a ticket from the issuing airline by presenting his credit card. However, over 120 airlines operate under The Universal Air Travel Plan whereby 48 “contractor” airlines issue credit cards which will be honored by all 120 carriers. In addition, travel agents will often issue airline tickets through the use of an airline credit card. Finally, airline credit cards may also be used to rent automobiles from car rental agencies, etc. The “contractor” airline which issued the credit card collects from the individual cardholder or from a “subscriber”—corporations or business firms which have instructed the “contractor” to issue cards to designated officers and employees of the “subscriber.” The “contractor” is ordinarily liable to the ticket-issuing airline for the value of the ticket, but this liability may be shifted to the ticket-issuing airline in certain instances, *e.g.*: the ticket-issuing airline honors a card after receipt of notice that the card has been reported lost or stolen or fails to use reasonable care to prevent unauthorized use of the card by accepting a “Transportation Receipt” (invoice form signed by the recipient of the ticket) with no signature or with a signature obviously unlike the one of the cardholder. In short, the two-party airline credit card arrangement may commonly slip into a three-party arrangement.

The airline credit card presents unique opportunities for the thief or finder to obtain large amounts of cash. In most credit card situations the finder or thief is limited to purchasing goods and services of relatively small monetary value—he has to make repeated purchases within a relatively short period of time in order to make his wrongdoing worthwhile. The thief or finder of an airline credit card is not so handicapped; he merely has to purchase a large number of expensive airline tickets at travel agencies and at airline counters and then cash them at another counter of the same airline. A skilled operator may obtain many thousands of dollars within a matter of a few days or even hours by this process. The circulation of a list of stolen or lost credit cards by the airlines to their offices cannot effectively stop this operation because of the speedy work by the criminal element. It has been estimated that over one billion dollars worth of tickets a year are charged by use of credit cards, hence the opportunity for illicit gain is tremendous.

There is one obvious way in which the airlines may reduce, if not eliminate, the purchase and cashing of airplane tickets by unauthorized users of credit cards: all airline tickets purchased with credit cards should have a statement stamped on them by the issuing agent to the effect that “this ticket was purchased under XYZ Credit Card Number 723597.” All ticketing agents would then be instructed that all tickets bearing

this legend could not be cashed, but that holders would be permitted to exchange them for other tickets (also bearing this legend) or exchanged for a credit memo which would be sent to the issuer of the credit card. A similar system has been inaugurated by at least some of the airlines.

Four airlines, Delta, Eastern, National and United, answered the author's questionnaires. These four companies listed a total of 485,000 outstanding credit cards. There was a phenomenal difference in the respective company's issuance of these cards, with the low being only 4,000 and the high being 300,000. The mean and median were 160,000 and the average was 121,250; however, with the sampling being limited to four companies with such a disparate rate of issuance, it is doubtful if the average, mean and median figures have any real significance.

In the oil industry there was little difference as to the amount of charges incurred by the average credit card holder; this correlation was not found in the airline industry. One company reported that the average user incurred charges of \$5,800 per year per card. One of its competitors reported a low of \$350 and the average was \$1,903.12, while both the mean and the median were \$900. Again the limited sampling may enervate any meaning from these figures. It is interesting to note, however, that the company issuing only 4,000 credit cards reported that the holders incurred charges of \$5,800 per card while a competitor with over 300,000 cards outstanding reported an annual average use of \$900 per card. On the other hand, a company which reported 160,000 outstanding cards reported annual charges of \$562.50—a total of \$90,000,000 a year of annual billing to credit card holders. This is big business indeed.

It is difficult to group the airlines as to their reported percentage of lost or stolen cards during the average year. The airline which had only 4,000 credit cards issued reported that 10 percent of these cards are reported lost or stolen each year, while the airline with 300,000 cards reported a loss or theft ratio of approximately .83 percent, and its nearest competitor—with 160,000 cards—reported a ratio of .20 percent. On the other hand, one airline which has only 21,000 cards reported a percentage of only .5 percent. With three airlines reporting a loss or theft ratio of under 1 percent and one reporting a ratio of 10 percent, it would appear that the latter airline ought to reexamine its policies regarding issuance of these cards.

Only three of the four airlines submitted information as to what percentage of the lost or stolen credit cards are used unlawfully each year. If these three airlines are any indication, the incidence of improper use of these cards is much lower in the airline industry than in the oil industry. The three companies reported respective improper use ratios of .78 percent, 1 percent and 2 percent. The fourth airline reported that it had made "no count."

The four airlines in answering the question dealing with the approximate amount of goods and services obtained by the average unauthorized user of each lost or stolen credit card, failed to arrive at any real averages. One airline said that the amount "varies considerably, but "loss in 1966 will be approximately \$50,000." Another said, "In the last year we had two cards, one for \$113,000 and one for \$1,200." A third airline reported an average of \$27,000, but then qualified it by stating "The \$27,000 figure is the *average* amount of air transportation purchased by unauthorized users. Four cards were used by unauthorized persons for the purchase of air transportation tickets amounting to \$108,000 in the year ended . . . 1966." The most that can be said concerning these figures is that four airlines will have suffered an initial loss of \$172,200 as the result of the unauthorized use of their respective credit cards, and it is probable that the total figure will be much greater.

All four airlines asserted that their respective holders were liable for unauthorized charges made on the strength of their credit cards; however, three of them stated that they had not sued their holders, while the fourth declined to furnish any information regarding this point. One airline reported that approximately 50 percent of its card holders voluntarily paid for unauthorized charges without any suit being filed. The other three airlines might be advised to use the same tactic in recouping part of their losses.

### 3. THE INDEPENDENT ISSUERS

Four independent issuers, American Express Company, General Electric Credit Corp., Carte Blanche Corp., and The Diners' Club answered in varying degrees of completeness, the author's questionnaire. Playboy Clubs International, Inc., has been grouped with the independent issuers, even though its cards are usually honored for credit only in establishments which are franchisees or wholly owned subsidiaries of Playboy Clubs International, Inc., because its arrangement is difficult to equate with any other grouping and because it is believed that holders of the Playboy credit cards might be inclined to have one or more of the cards issued by other independent issuers in this group.

These five companies reported a total of 4,312,000 cards outstanding; the actual figure is probably greater than this because one of the larger companies listed the word "plus" after its submitted figure. Of these companies reporting a more or less specific figure, the high was 1,800,000 and the low was 12,000; the mean was approximately 894,000 and the median was 500,000. Because of the vast difference between the high and the low figures, it would appear that the mean figure would have little statistical validity.

Only two companies reported the annual charges for goods or services incurred by the average credit card holder; one company reported in



excess of \$200 per year and the other stated it was approximately \$12 a year.

Four companies reported on the percentage of cards which are reported lost or stolen each year. One company reported the rather appalling fact that 12 percent of its cards are reported lost or stolen, while another reported a low figure of .019 percent. Another company said that from 1 to 5 of its cards were reported lost or stolen each week, and the remaining company reported its loss rate at .05 percent.

Despite the rather wide divergence among these companies as to the annual percentage of credit cards reported lost or stolen, there seemed to be a rather close correlation in the percentage of lost or stolen credit cards which were improperly used by finders or thieves. Three companies furnished percentage figures which were respectively: less than 1 percent, .05 percent and .025 percent. The fourth company reported that only two of its lost or stolen cards had been improperly used during the last fifteen years.

Three of these five companies reported the amount of goods and services obtained by the average unauthorized user of each lost or stolen credit card; one company reported a high figure of \$500; the others both reported an average figure of \$200.

Three of these five companies asserted that their credit card holders were liable for all amounts obtained as the result of unauthorized use of their cards until notice was received by the company. Another company reported that its holders were not liable, but because of other information contained in its report it is obvious that this "no" should have been "yes." Only one company stated that its holders were responsible for a limited amount—the first \$100.

Three of these companies reported that they had brought suit against their holders for charges incurred as a result of unauthorized use. One company did not furnish any information regarding this point, and the fifth company stated that it had not brought suit. Two of the three companies which had brought suit reported as to the average amount claimed; one reported a figure of \$500; the other reported a \$200 amount. The same three companies which reported bringing suit also reported on their degree of successful prosecution. Two companies reported that they had prevailed in every case, while the third said it had prevailed with "only one exception." Two of these companies stated that approximately one half of their holders paid for unauthorized charges made against their cards before trial and the remaining one half after trial.

In contrast to the department store, oil company and airline issuers, many of the independent issuers have made credit card insurance available to their holders. One company gives automatic insurance protection to all

cardholders covering all charges made with a stolen or found credit card exceeding the first one hundred dollars. Another issuer offers insurance protection which costs a premium of two dollars and sixty cents per year. A third company offers insurance but it failed to state the amount of the premium. A fourth company said it did not offer insurance protection, but it was "often available as a rider to home owners' policies." The fifth company offered no insurance, but inasmuch as this particular company has never instituted suit against a holder for unauthorized charges the omission of insurance protection would not seem dangerous insofar as the holder is concerned.

The following table may place the above discussion in better perspective:

Company	No. of Credit Cards	Percentage Lost Each Year	Percentage of Lost Cards Used Improperly	Monetary Amounts
A	1,800,000	(+)	—	—
B	1,500,000	.019	.05	\$500
C	500,000	12.0	.1 (-)	—
D	500,000	.05	.025	200
E	12,000	1-5 weekly	2 cards	200

#### 4. THE AUTOMOBILE CREDIT CARD ISSUERS

Inasmuch as only two nationally known automobile rental agencies, National Car Rental System, Inc. and Avis Rent A Car System, Inc., responded to the author's questionnaire, no detailed discussion will be made because it would be rather difficult to disguise the identity of the companies with relationship to the statistics. It would appear, however, from this rather incomplete sampling that despite the fact that these two companies have approximately 4,000,000 credit cards outstanding, their total loss from the improper use of credit cards is so minor that it would not have any statistical relevance with other types of credit card issuers. The fact that both these companies require the holder of a credit card to identify himself before he rents an automobile would seem to have a deterrent effect, although it is not completely effective.<sup>56</sup>

#### 5. BANK CREDIT CARD ISSUERS

As mentioned in the beginning of this article, banks are now issuing credit cards which enable the holder to receive "instant credit" up to a specified amount, or to receive a specified dollar amount of checks which may be cashed immediately. Because of the relative newness of this system, it would appear that most banks are not in a position to supply

56. See, e.g., *Richardson v. State*, 193 So.2d 637 (Fla. 3d Dist. 1967). For the crime of obtaining goods by use of a false, expired or unauthorized credit card, see *FLA. STAT.* 817.481 (1967).

statistics relative to unauthorized use. The author sought information from the Detroit Bank and Trust Company, BankAmericard Center in California, the Valley National Bank of Phoenix, Arizona and the Mellon National Bank and Trust Company of Pittsburgh, Pennsylvania. Two of these banks reported that they were unable to answer the questionnaire because of insufficient experience with this new system. Two others reported tentative figures. One reported that approximately 1,400 cards were reported lost or stolen each month and that approximately 25 to 30 of these cards were used by unauthorized persons each month. The average unauthorized user obtained \$250. The other bank reported that 10 percent of its cards were reported lost or stolen during the average year, and that approximately .1 percent of these cards were used by unauthorized users. For some unexplained reason, unauthorized users of this bank's credit cards only obtained an average of \$38. One bank stated that its credit card holders were liable for unauthorized use while the other stated that they were not.

### C. *Suggestion and Conclusion*

It is believed that most people carry credit cards because they want to avoid carrying large amounts of cash rather than because they desire to purchase goods and services on a time payment plan. If this is true, the holder is not really getting what he bargained for because his possible loss of cash may be outweighed, in many cases, by the monetary loss suffered in the loss or theft of his credit cards. The underworld "market" value of a stolen credit card is currently \$250;<sup>57</sup> how many people carry a like sum in cash in their wallets? Those companies which attempt to shift the burden of unauthorized use to the holder want the best of all possible worlds: they may obtain a fee from the holder, they may buy the accounts receivable from the retailer at a discount, in some cases they can lend money at interest from the collections, and they place the burden of unauthorized use upon the holder. If the incidence of suits by issuers against holders becomes widespread, people will be disinclined to use credit cards.

On the other hand, those companies which do not, as a matter of policy, attempt to shift the burden of loss to the holder suffer a large economic loss as the result of unauthorized use.<sup>58</sup> In brief, although the interests of the holder may appear to be different from the interests of the issuer, depending upon the recoupment policy of any particular issuer, it is believed that there is a mutuality of interest among holders and issuers in decreasing the incidence of unauthorized use. It is hoped

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57. *Spotlight on Schemes*, NATIONAL BETTER BUSINESS BUREAU, SPECIAL NEWS REPORT, Oct., 1966.

58. *Id.* It is estimated that approximately twenty million dollars a year is lost through the illegal use of credit cards.

that some of the following suggestions will be feasible in satisfying this mutual interest:

- A. All credit cards should contain the signature of the holder. It is interesting to note that only one of the oil companies included in this survey reported that it requires the signature of the holder on the card, while only two of the other twenty non-oil companies followed a similar policy. A simple comparison of the signature on the credit card with the signature of the presenter on the credit invoice would be sufficient in many cases to prevent unauthorized use. Of course, a signature system would not be a panacea, but the present system of honoring charge invoices without any possibility of checking signatures is an invitation to steal.
- B. All credit cards should bear a colored photograph of the holder imbedded in tamper-proof plastic. The objection may be made that it would be expensive to produce these cards. However, on a mass production basis the cost per card should be less than thirty cents exclusive of the cost of the colored photograph which would be furnished by the applicant for the card.<sup>59</sup> It is believed that applicants would be happy to furnish a colored photograph of the required size because these cards could then be truly described as identification cards. Thousands of high schools and colleges in the United States have been issuing credit-card size identification cards with photographs for years, hence the technical details are not insurmountable. If one considers that one improper use of an existing card for \$10,000 is equal to what it would cost to produce over 33,000 cards, the advantages would seem obvious. Finally, if a credit company can charge as much as \$15 per year for a credit card, it should be able to devote thirty cents of this fee to the production of a card which will protect both parties.
- C. If neither of the above suggestions are adopted, credit card issuers (particularly in the oil industry) should abandon the promiscuous give-away credit card system whereby cards are mailed to people who have not solicited them. At least one oil company uses large print on the envelope to advise the addressee that the envelope contains valuable credit cards; this is an invitation to thieves who pilfer letter boxes.
- D. Larger rewards should be offered to employees of retail establishments which honor credit cards for the recovery of lost or stolen cards. Some oil companies offer graduated rewards for the recovery of stolen or lost cards. Employees of these companies' retail gas stations have informed the author that they memorize the names on those cards which carry the

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<sup>59</sup>. Information supplied to the author by the purchasing department of the University of Miami.

greater reward; as one employee put it: "I memorizes (sic) the \$25 cards and the heck with those \$5 cards." The present practice of issuing bulletins each month, or every fifteen days or every week to retail establishments notifying them of lost or stolen credit cards is rather ineffectual because virtually all employees of motels, restaurants, gas stations, etc., who were interviewed by the author stated that they were unable to compare a credit card against the "hot-list." Their reasons, or excuses if you will, were that during the press of business they did not have time to do it and if they had time, "the customer would be insulted if he saw me do it." The "insult" aspect can be obviated in restaurants, etc., where the customer gives up his card to a waiter who takes it to the cashier who may possibly compare the card with the "hot-list" out of the presence of the customer. However, a similar approach may not be used in gas stations and retail shops where everything transpires within the view of the customer. It is believed that if the credit card companies instituted an educational campaign to encourage their holders to get used to the idea of a comparison of their cards with a list for their own benefit, the "insult" aspect would be eliminated. After all, a stranger who asks to cash a check at a retail store expects that he will have to prove his identity; why should a holder of a credit card expect any less?

It may be argued that the author has a rather academic knowledge of people, and that this suggestion would alienate people and cause disenchantment with credit cards. A very popular independent credit card company in the Miami, Florida area has a policy requiring its contracting retail establishments to telephone the credit company and receive an approval on each purchase before extending credit on a card. This telephone credit check, which is often made in the presence of the card-holder, is designed to ascertain the credit status of the holder's account rather than his identity. It would seem that an inquiry into a credit card holder's credit standing would be much more offensive than a check into the status of the card itself, but this company has not seemed to suffer from adverse public feeling. The credit card industry is turning to computerized stolen credit card lists as a speedy means of centralizing and communicating knowledge of stolen cards;<sup>60</sup> however, until credit card holders and employees of retail establishments become adjusted to the notion that cards must be compared with lists, the speedy dissemination of information will be futile.

- E. Credit card issuers should offer inexpensive loss of credit card insurance to their holders. The American Express Company insures its holders against loss exceeding \$100 without

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60. Note 6 *supra*.

any additional charge. The Diner's Club offers a policy for \$2.40 per year covering losses up to \$5,000 with a \$100 deductible clause. Private insurance companies are issuing policies covering losses of up to \$5,000 at a premium of \$5 per year, while others give protection limited to \$1,000 per year at a cost of \$6 for a three-year policy. Only three companies of the twenty-eight which answered the author's questionnaire reported that they issued any form of insurance against unauthorized use. Of course, these rates will probably increase if the present spiral in the unauthorized use of cards continues to climb.

F. The credit card industry should make a thoughtful reappraisal of some basic questions. For example, is the present proliferation of credit cards in the oil industry really necessary? Do credit cards really increase the loyalty of a holder to a particular oil company? The author holds credit cards from four oil companies, but he does not trade at a gas station selling products manufactured by these issuers, preferring a gas station which gives him good service and which bills him directly each month. Of course, the answer to this proliferation problem may be similar to the problem confronting the grocery industry regarding the use of trading stamps—if one store in the area gives stamps, then all of them must do so (or think they must do so) to meet competition.

Some writers have advanced the view that new penal legislation is need to curb the illegal use of credit cards.<sup>61</sup> These advocates of "there ought to be a law" overlook the fact that the legislation dealing with burglary and robbery has not seemed to reduce the use of safety deposit boxes and burglar-proof safes; the remedy in this field does not lie in punishing the misuser but rather in eliminating, or at least reducing, his opportunity to misuse.

#### APPENDIX

##### QUESTIONNAIRE

1. Name of issuer of credit or charge card. \_\_\_\_\_.
2. Approximate number of credit or charge cards presently in force. \_\_\_\_\_.

61. Katz, *Federal Prosecution for the Interstate Transportation of Stolen Credit Cards*, 57 *COLO. L. REV.* 323 (1966); Comment, *Credit Cards*, *Nw. U. L. REV.* 207 (1962); Comment, *Criminal Liability for the Unauthorized Use of a Credit Card*, 7 *ST. LOUIS U.L.J.* 158 (1962); *The Miami Herald*, April 7, 1967, § A, at 11, col. 1; *id.*, Feb. 7, 1967, at 14, col. 1. More prosecutions under the existing laws might really be the answer, *see The Miami Herald*, June 4, § D, at 11, col. 1.

In July, 1967, Florida enacted the State Credit Card Crime Act, Ch. 67-340, S.B. No. 1002, 1967 Reg. Sess. This Act is a comprehensive attempt to punish the fraudulent procurement of credit cards from issuers, the theft and fraudulent retention of credit cards, and the fraudulent use of credit cards. If the legislation has the deterrent effect of other criminal legislation, this article will continue to be timely.

3. What are the annual charges (for goods and services) incurred by the average credit or charge card holder? \_\_\_\_\_
4. Approximately what percentage of your credit or charge cards are reported lost or stolen during the average year? \_\_\_\_\_
5. Approximately what percentage of the lost (or stolen) credit or charge cards are improperly used during the average year?  
\_\_\_\_\_
6. What is the approximate amount of goods and services obtained by the average unauthorized user of each lost or stolen credit or charge card? \_\_\_\_\_
7. Are the holders of your credit or charge cards liable for all amounts obtained as the result of an unauthorized use of your card until written notice is received by your office? \_\_\_\_\_
- 7a. Have you had occasion to institute suit against your card holders in order to recover for charges made by unauthorized users (finders or thieves)? \_\_\_\_\_
- 7b. If you have instituted suit against your holders for charges made by unauthorized users, what has been the average amount claimed by you in the legal action? \_\_\_\_\_
- 7c. Have the trial and appellate courts ruled in your favor in all cases?  
\_\_\_\_\_
- 7d. When charges have been incurred as the result of unauthorized uses of your credit cards or charge cards, what percentage of your holders have paid these charges voluntarily and what percentage did so after suit was filed? \_\_\_\_\_
- 7e. Do you offer some form of theft insurance to the holders of your cards? And, if so, what is the annual premium for this insurance?  
\_\_\_\_\_
8. Upon whom does the loss fall when a business establishment honors your credit or charge after its loss has been reported to you but before the establishment receives notice of the card's cancellation?  
\_\_\_\_\_
9. How often and by what means do you notify business establishments of the cancellation of lost or stolen credit or charge cards?  
\_\_\_\_\_
- 9a. In instances where the national home office of a chain is not directly involved in the billing of accounts (i.e., where a local office handles the credit records of the card holder) how is official notification of loss of the credit card handled?
  - (a) Reported in writing to national office. \_\_\_\_\_
  - (b) Reported in writing to nearest local office. \_\_\_\_\_

(c) Reported in writing to local office containing the card holder's records. \_\_\_\_\_

10. Do you require business establishments which honor your cards to require that users identify themselves before goods or services are rendered upon the strength of your cards? \_\_\_\_\_
- 10a. Does your charge or credit card carry the signature of the holder on it? \_\_\_\_\_
- 10b. Does your credit or charge card carry the photograph of the holder on it? \_\_\_\_\_
- 10c. If your card carries neither the photograph nor the signature of the holder, how does the business establishment honoring your card identify the holder? \_\_\_\_\_