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The decision in the principal case has little to recommend it since it was not compelled by valid Virginia precedents, draws a false distinction between negligence liability and strict liability, and results in an unjust loss allocation. Further, the court failed to approach the problem logically by first determining a basis of liability and then determining whether immunity would relieve the defendant from this liability. It is submitted that a better result would have been to impose strict liability upon contractors who engage in blasting and to refuse to extend governmental immunity to state blasting contractors.

JON A. KERR

CREDIT CARDS: THE LIABILITY OF THE CARD HOLDER FOR UNAUTHORIZED PURCHASES

The increasing use of credit cards[1] requires solving definitively whether the issuer or holder is ultimately liable for credit card purchases not authorized by the holder.[2] The question of liability for unauthorized purchases most frequently arises when a credit card is lost or stolen and an unauthorized party makes purchases with the holder's card. When the holder refuses to pay the unauthorized charges, the issuer brings suit against him to recover the amount of the unauthorized purchases. The law concerning liability for these purchases divides into two categories: (1) no risk-allocation provision in the issuer-holder contract, (2) liability for unauthorized purchases expressly provided for in the issuer-holder contract.

A typical case in which the contract had no express risk-allocation provision is *Thomas v. Central Charge Serv., Inc.*,[3] where the issuer sought to recover the amounts charged to the holder's account by an

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his apportioned share of the cost of constructing the highway, and as a result he would be irrationally discriminated against as compared with other taxpayers. No authority on this point has been found, and one can only speculate as to the outcome of such an argument, but such a contention seems feasible.

[1]See generally: Toward a Cashless Society, Time Magazine, Vol. 86, No. 19, Nov. 5, 1965, p. 97a.

[2]For a detailed discussion of credit cards and the relationship between the issuer, seller, and holder, see Robinson, New Developments in Retail Financing, 8 Kan. L. Rev. 554, 567-74 (1960); Comment, the Tripartite Credit Card Transaction: A Legal Infant, 48 Calif. L. Rev. 459 (1960).

[3]212 A.2d 533 (D.C. Ct. App. 1965).

unauthorized user. Having made a single purchase with his credit card, the holder realized the card was missing. However, he failed to notify the issuer of its disappearance, and sellers continued to honor the card when used by one subsequently discovered to be an unauthorized user.

On appeal, the court held that a holder who had not expressly agreed to pay for unauthorized purchases and who had not expressly bound himself to report its disappearance is not liable for unauthorized charges. *Thomas* further held that the holder's failure to exercise due care in the use of the card was insufficient to support an action to recover damages on a theory of an implied promise to pay for purchases made after the credit card had been lost or stolen.

Prior to *Thomas*, there were only four reported cases[4] which entertained the issue of the holder's liability in the absence of an express risk-allocation provision.[5] Three views of risk-allocation emerged from these cases. The first view arose from *Wanamaker v. Megary*,[6] a case of first impression, in which the court held that the card was an order upon the creditor-seller to deliver goods and to charge the holder's account upon the presentation of the card by any person. The holder was held absolutely liable for all the purchases because he had made the unauthorized purchases possible by his failure to keep the card in a secure place. The court reasoned that the one making the loss possibly should be liable for its consequences despite the hardship this rule might have upon the holder.[7]

The second view, now supported by *Thomas*, was set forth in *Lit Bros. v. Haines*.[8] The Supreme Court of New Jersey expressly rejected both the result and reasoning[9] in *Wanamaker*, and held that, absent express agreement to the contrary, a credit card is merely a means of identification; hence, the holder is not liable for any of the unauthor-

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[4]Jones Store Co. v. Kelly, 255 Mo. App. 833, 36 S.W.2d 681 (Kan. City Ct. App. 1931); Lit Bros. v. Haines, 98 N.J.L. 658, 121 Atl. 131 (1923); Gulf Ref. Co. v. Plotnick, 24 Pa. D. & C. 147 (C.P. 1934); Wanamaker v. Megary, 24 Pa. Dist. 778 (C.P. 1915); Annot., 158 A.L.R. 762 (1945).

[5]The lack of cases may be attributed to the low percentage of defaults or misuses as well as the reluctance of the issuers for reasons of good will and avoidance of bad publicity to sue. Note, 35 Notre Dame Law. 225, 230 (1960). Also, from a practical standpoint, the small size of the individual accounts of holders makes profitable collection by suit difficult. See generally, Claflin, the Credit Card—A New Instrument, 33 Conn. B. J. 1 (1959).

[6]Supra note 4.

[7]The court drew an analogy between the card and a negotiable instrument payable to bearer. Id. at 763.

[8]Supra note 4.

[9]Id. at 132.

ized purchases.[10] In accord with this view is a decision[11] which held that the holder's liability depended upon whether he had authorized another to use the card. Otherwise the holder would be absolved of all liability.[12]

The third view arose from *Gulf Ref. Co. v. Plotnick*[13] which held that there is an implied obligation on the part of each party to exercise due care, the holder in using the card and the issuer in honoring it.[14] In essence, the court resorted to a balancing process which weighed the care of the respective parties. As a result of this balancing process the defendant-holder was held liable after it was determined that his lack of care primarily contributed to the unauthorized purchases. The court added that absent any negligence on the holder's part the issuer would have to bear the risk because there was no risk-allocation clause in the contract.

In weighing the equities of the three views, the strict holder liability view of *Wanamaker* is inequitable because it imposes such a high degree of care upon the holder in his use and custody of a credit card that it makes the holder a virtual insurer since he would be liable even though the issuer was notified promptly of the loss.[15] The second view, expressed in *Thomas*, works an undue hardship upon the issuer who must absorb the risk for all unauthorized purchases regardless of the holder's failure to use due care.

Both the *Wanamaker* and *Thomas* views fail to discuss whether reasonable care should be required of the parties involved.[16] Instead, *Wanamaker* and *Thomas* base their reasoning on whether an absolute contractual obligation to pay for the unauthorized purchases should be implied from the issuer-holder relationship.

Gulf Ref., where the negligence of the parties was considered,[17] is

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[10]The decision in Lit Bros. v. Haines must be viewed in the light of the fact that evidence indicated negligence on the part of the issuer. Id. at 131; Comment, The Tripartite Credit Card Transaction: A Legal Infant, 48 Calif. L. Rev. 459, 482 (1960).

[11]Jones Store Co. v. Kelly, supra note 4.

[12]Id. at 683.

[13]Supra note 4.

[14]The court noted that the holder had neglected to give notice of theft to the issuer so that the issuer could prevent the subsequent use of the card. This fact permitted the court to hold that liability was a jury question and that the jury should consider defendant's contention that the dealer had not exercised due care when extending credit. Annot., 158 A.L.R. 762, 763 (1945).

[15]9 Kan. L. Rev. 325, 326 (1961).

[16]Thomas brought the issue of due care into its opinion but stated that nothing should turn on this issue. 212 A.2d 533, 534 (D.C. Ct. App. 1965).

[17]The case is supported in Union Oil Co. v. Lull, 22 Ore. 412, 349 P.2d 243, 249 (1960), in which the court states: "The theory of liability expressed in Gulf Ref.

the most equitable approach in view of the benefits derived by each party to the credit card contract. The arrangement primarily benefits the issuer as a sales promotion device through the extension of credit to potential customers. The holder benefits both by obtaining short term credit and by avoiding the necessity of carrying large amounts of cash.[18] Since the benefits of the credit card accrue to both parties, the risk of loss should also be apportioned by requiring each party to exercise due care to protect the other.

Although none of the foregoing cases dealt with credit cards containing risk-allocation clauses, they represent the development to date of the basic theories of liability allocation. Most credit card arrangements now have a contract provision[19] in which the issuer seeks to impose the risk of unauthorized purchases upon the holder until notice of loss or theft is reported to the issuer.[20]

The jurisdictions which have interpreted the risk-allocation clauses are in conflict. One view interprets such clauses literally and renders the holder liable for all purchases prior to notice;[21] moreover, this view permits the issuer to recover even though the seller has not inquired into the purchaser's authority to use the card.[22] In support of

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Co. v. Plotnick ... appeals to us as basically sound, i.e., that both the card owner and the card issuer must show the exercise of care, the former in the custody of his card and the latter in making reasonable inquiry when it is used."

[18]It is arguable that the issuer derives a greater benefit by the increased patronage. Further the cost of processing the invoices and the collection process is undoubtedly shifted back to the consumer in the form of higher prices. In Union Oil Co. v. Lull, supra note 17, at 249-50, the court said that the issuer "received a benefit consisting of adding another potential customer for the sale of its products by facilitating purchases through the convenient use of credit." The court apparently concluded from this that the holder benefited less from the arrangement than did the issuer.

[19]E.g., Humble Oil & Refining Co. credit card: "By acceptance of this card, customer named hereon agrees to the terms of issue, and assumes responsibility for purchases made through its use prior to its surrender to Humble, or prior to the receipt by Humble of written notice of its loss or theft." With the exception of the principal case, all the reported cases since 1931 have contained a risk-allocation provision. See Annot., 158 A.L.R. 762 (1945).

[20]Whether the card holder has accepted the contract will depend on his manifestation of assent to the terms on the card. Goltra v. United States, 96 F. Supp. 618 (Ct. Cl. 1951); Restatement, Contracts § 20 (1932); see Williston, 1 Contracts § 90 (3d ed. 1957). Generally such acceptance of a document which purports to be a contract constitutes assent to its terms. 3 Corbin, Contracts § 607 (rev. ed. 1960); Restatement, Contracts § 70 (1932); 1 Williston, Contracts § 90 A (3d ed. 1957); see 63 Harv. L. Rev. 494 (1950). The criterion for invoking this general rule is whether a reasonably prudent man would have seen the fine print terms. 1 Williston, Contracts § 90 C (3d ed. 1957).

[21]Texaco, Inc. v. Goldstein, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (1962); Magnolia Petroleum Co. v. McMillan, 168 S.W.2d 881 (Tex. Civ. App. 1943).

[22]Texaco, Inc. v. Goldstein, supra note 21.

this literal interpretation, *Texaco, Inc. v. Goldstein*[23] held that when the terms of the contract were reasonable and represented an agreement to share the risk, the holder will be responsible for all purchases that occur prior to notification, while the issuer will be responsible for all purchases that occur after receipt of notice. With this analysis the holder was held liable for the purchases made with his card, because the risk-allocation clause[24] is "an original undertaking in which ... [the holder] made it his own responsibility for any use of the card."[25]

Texaco rejected the argument that the sellers must inquire into the purchaser's authority to use the card before extending credit. The court reasoned that "with the increasing use of the credit card and its growing importance to the economy, the imposition of a high duty of diligence upon the major oil companies ... would result in an impairment of an important segment of our economic structure."[26] This impairment would result from requiring collateral identification, rather than relying upon the card itself as the sole identification.[27]

A second view, in which the courts refuse to inquire into the operation of risk-allocation clauses, permits the holder to avoid liability under certain circumstances, notwithstanding the provisions of the contract.[28] This approach, as illustrated by *Union Oil Co. v. Lull*,[29] suppresses the reliability characteristic of the credit card by requiring that both the issuer and creditor-seller[30] use a high degree of care[31]

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[23] 34 Misc. 2d 751, 229 N.Y.S.2d 51 (1962).

[24] The Texaco card provided that "the person ... whose name is embossed on the reverse side ... 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." Id. at 53.

[25] Id. at 54.

[26] Id. at 55. "Unless actual notice of loss is given to the company, it can have no way of knowing of such loss, and to require some thirty thousand dealers to suspect the loss of any particular credit card and use diligence against its abuse is not within the requirements of plaintiff as issuer of the credit card." Id.

[27] See Model Penal Code § 224.6, status of section (Proposed Official Draft, 1962).

[28] Gulf Ref. Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945); Union Oil Co. v. Lull, 220 Ore. 412, 349 P.2d 243 (1960); 43 N.C.L. Rev. 416 (1965).

[29] Union Oil Co. v. Lull, supra note 28.

[30] The courts applying this approach state that the issuer, after paying the seller the charges, becomes an assignee of the seller and under general assignment law the holder may assert all defenses against the issuer that he could against the seller. Cases cited note 28 supra. Diners' Club, Inc. v. Whited, Civil No. A 10872 App. Dep't Cal. Aug. 6, 1964, has been interpreted to imply that both the issuer and the dealer have to use due care regardless of the contractual provisions and regardless of whether there is an assignment situation. 43 N.C.L. Rev. 416, 421 (1965).

The assignment theory overlooks the real nature of the contract between the parties. As a rule the card holder promises to pay the issuer for unauthorized in extending credit before the holder will be bound by the risk-allocation provision. *Union Oil Co.* further limited the holder's obligation by holding that the issuer had the burden of proving that the seller did in fact exercise the necessary care.[32] Such care demands that the dealer obtain additional identification before extending credit.[33] If this care cannot be proved, the seller and issuer extend credit at their own risk.

Union Oil Co. reasoned from the risk-allocation language of the contract that the "defendant is essentially a gratuitous indemnator...."[34] Through this analysis the court implied a promise on the seller's part "to exercise reasonable diligence... in transactions which may create indemnity liability."[35] A Texas decision[36] held that a risk-allocation clause need not be strictly construed: "It is necessarily implied from this broad guaranty that the person extending credit must

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purchases, and the issuer promises to credit the sellers' accounts for the respective amounts. The sellers have no claim against the holder because his promise runs only to the issuer. It would appear that a direct obligation theory is more realistic. See Comment, The Tripartite Credit Card Transaction: A Legal Infant, 48 Calif. L. Rev. 459, 499 (1960); Note, 35 Notre Dame Law. 225, 229 (1960). This theory views the issuer's claim as arising directly from the holder's promise rather than from the individual sales by the dealer. The same result would occur by holding that the card holder's promise is subject to a constructive condition that the dealers exercise due care. See 13 Stan. L. Rev. 150, 153 (1960).

[31]In many transactions analogous to credit card sales, the courts have imposed the duty of reasonable inquiry before honoring the instrument involved. E.g., National Bank of Commerce v. Mechanic's Am. Nat'l Bank, 148 Mo. App. 1, 127 S.W. 429 (1910) (drawer bank cannot recover for payment on a forged check where it was negligent in accepting the check and holding it for 30 days). Kummel v. Germania Sav. Bank, 127 N.Y. 488, 28 N.E. 398 (1891) (negligent payment to imposter presenting a stolen passbook). Commisso v. National City Bank, 174 Misc. 409, 21 N.Y.S.2d 187 (Sup. Ct. 1939) (negligent bank was not relieved by an agreement of nonliability for unauthorized withdrawal when it was negligent in ascertaining the validity of the signature presented.)

[32]For this rule the court admitted that there was no direct authority. Union Oil Co. v. Lull, supra note 28, at 254. The basic rules of evidence suggest, however, that the holder should have the burden of proving the seller's negligence. See McCormick, Evidence § 318 (1954).

[33]Union Oil Co. v. Lull, supra note 28, at 254. Undeniably, the rule works a hardship upon the issuer. See Comment, 109 U. Pa. L. Rev. 266, 268 (1960). Yet, it would be a harsher rule to place the burden of proof upon the holder since he is not present when the charges are made. Unlike the issuer, the holder could not possibly sustain such a burden of proof. Moreover, by placing the burden on the issuer, the issuer could then protect himself and the holder by requiring that the seller develop accurate methods of recording the details of the credit transaction. This approach would also require that sellers use a uniform system of inquiry as to the purchaser's authority. By following these procedures the issuer could meet his burden of proof and also prevent many unauthorized purchases.

[34]Union Oil Co. v. Lull, supra note 28, at 249.

[35]Id. at 250.

[36]Gulf Ref. Co. v. Williams Roofing Co., supra note 28.

do so in good faith. . . ."[37] Yet failure to exercise reasonable diligence may not be the equivalent of failure to act in good faith.

Since the *Union Oil Co.* result seems directly contrary to the purport of the risk-allocation clause in the contract, the decision can only be justified on compelling extra-contract grounds.[38] But the courts that follow the *Union Oil Co.* approach have reached their decision through broad construction of the language of the risk-allocation clauses, rather than through use of any specific policy reasons.[39]

One possible reason the courts have not construed such risk-allocation clauses literally is their reluctance to uphold agreements where the bargaining power of the party on whom the risk is placed is small compared to that of the exculpated party.[40] In credit card arrangements the applicant's choice of contract provisions is limited. It is doubtful, for example, that credit card applicants can obtain an oil company credit card which does not contain a clause placing the risk of unauthorized purchases on the holder.[41]

Another possible reason for avoiding a literal interpretation of such risk-allocation clauses arises from the fact that the issuer is dependent upon a broad base of creditor-participants and should expect to absorb the risk of nonpayment as part of his business.[42]

Because the case law in this area is far from settled, and because there are many considerations involved in placing liability upon either party, the legislatures should create a more uniform and acceptable solution than the courts have done thus far.[43] With the aid of legislative resources the issues of risk-allocation may be more adequately decided.

Unless legislative or other investigation or experience shows rea-

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[37]Id. at 794.

[38]Comment, 109 Pa. L. Rev. 266, 269 (1960).

[39]In fact, Texaco distinguished its decision from Union Oil Co. on the basis of the wording on the respective cards. In Union Oil the words were such that the holder "guarantees payment" for any purchases, while in Texaco, he "assumes full responsibility" for them.

[40]6A Corbin, Contracts § 1472 (rev. ed. 1962); Restatement, Contracts § 575 (1932).

[41]Comment, Applicability of Exculpatory Clause Principles to Credit Card Risk-Shifting Clauses, 22 La. L. Rev. 640, 647 (1962).

[42]See Claflin, The Credit Card—A New Instrument, 33 Conn. B.J. 1, 3 (1959).

[43]Only the New York legislature has been cognizance of this problem. General Business Law § 512 provides in part as follows: "A provision to impose liability on an obligor for the purchase or lease of property or services by the 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. . . ."