

Spring 3-1-1970

## Credit Card Liability: No Express Risk-Allocation Provision Or Negligence

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### Recommended Citation

*Credit Card Liability: No Express Risk-Allocation Provision Or Negligence*, 27 Wash. & Lee L. Rev. 164 (1970), <https://scholarlycommons.law.wlu.edu/wlulr/vol27/iss1/14>

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asset." The transactions giving rise to the losses in *Seed* and *Finch* were neither sales nor exchanges.

It appears, however, that the particular line of reasoning adopted will have no limiting effect upon the amount of loss to be deducted. Under both explanations the deduction, if allowed, will be allowed in full as an ordinary loss in the year of abandonment. Thus it seems that the question as to the type of loss raised no problem, and was properly ignored in the opinions.

As a consequence of *Seed*, there should be a relaxation of the stringent requirements of *Parker*. A taxpayer, with proper advice, should be less apprehensive from the tax standpoint about entering into a bona fide transaction for profit. For, if careful investigations are undertaken, detailed plans prepared, certain tentative commitments procured, and the only remaining condition prior to actual operation is beyond the taxpayer's control, then it seems that a subsequent failure of the final condition to materialize should allow the taxpayer to take a loss deduction under section 165(c)(2). Such a policy should ultimately result in increased revenues by encouraging and stimulating sound investment and commercial and industrial growth, when expensive preparation losses can be partially offset by this tax loss relief.

JOHN COOPER LANE

#### CREDIT CARD LIABILITY: NO EXPRESS RISK-ALLOCATION PROVISION OR NEGLIGENCE

The advent of our credit card economy has created a troublesome problem for the courts in that they must determine who should bear the loss for unauthorized purchases as between the credit card issuer and the authorized cardholder. In the past, courts have assessed liability on the bases of either an express risk-allocation clause in the credit agreement or the failure by one of the parties to perform a duty imposed by the credit card relationship.<sup>1</sup> In the recent case of *Sears, Roebuck & Co. v. Duke*,<sup>2</sup> which involved the issue of liability for unauthorized purchases, the Supreme Court of Texas was faced with a

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<sup>1</sup>For a detailed discussion of the relationships involved see Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1965); Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811 (1967); Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554 (1960); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459 (1960).

<sup>2</sup>441 S.W.2d 521 (Tex. 1969).

novel factual situation. There was no risk-allocation clause in the bipartite credit agreement.<sup>3</sup> Furthermore, negligence could not be attributed to either party.

Duke, a Texas resident, had received his Sears "identification card"<sup>4</sup> in 1960. He had never signed the card in the space provided for the authorized signature.<sup>5</sup> While Duke was in New York on a business trip in December, 1965, his card was stolen without his knowledge. It was then used to make purchases at Sears stores in New York and New Jersey.<sup>6</sup> Two weeks after the theft, Duke discovered that his card was missing<sup>7</sup> and promptly sent a written cancellation notice to Sears. Thereafter he refused to pay for the unauthorized purchases of more than \$1,300. Sears then filed suit against Duke based on the "Sears Revolving Charge Account Agreement," signed by him, which in part provided:

In consideration of your selling merchandise to me on Sears revolving Charge Account, I agree to the following regarding all

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<sup>3</sup>A bipartite credit card arrangement involves a contract or agreement between the issuer-seller and the cardholder. An example is the department store credit card agreement whereby the issuer's card is valid only for charges at the issuer's stores. By comparison, a tripartite credit card arrangement is one which involves a contract between the issuer, who may or may not be a seller, and the cardholder. Such an arrangement also involves contracts between the issuer and various retail merchants, or dealers, whereby the issuer agrees to purchase the amount of their credit card sales on a weekly or monthly basis. This arrangement is exemplified by the oil company credit cards, The Diner's Club, Carte Blanche, etc. For a more thorough analysis of the credit card system see Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1965); Murray, *A Legal-Emperical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811 (1967); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459 (1960).

<sup>4</sup>Throughout the record the cardholder's stolen credit card was referred to as his Sears "identification card." No attempt at a distinction between the two will be made in this comment. However, when the case was before the court of civil appeals, Justice Moore in his dissent protested to the majority's use of the term "credit card" when there was no mention made of such an instrument in the Sears credit agreement. *Duke v. Sears, Roebuck & Co.*, 433 S.W.2d 919, 927 (Tex. Civ. App. 1968).

<sup>5</sup>Duke could not recall at the trial whether or not he had ever used his unsigned card to make purchases at Sears. *Id.* at 921.

<sup>6</sup>While several minor items were charged, numerous expensive purchases were also made. However, only four of the sixty-four charge slips in evidence indicated that any identification other than the presentation of the credit card might have been required of the imposter. *Id.* at 924-25.

<sup>7</sup>Duke did not discover that his card was missing until the Sears store in Lubbock, Texas, where his account was located, called to inquire about the "excess activity" of his account. *Id.* at 922.

purchases made by me or on my Sears revolving Charge Account identification. . . .<sup>8</sup>

In the trial court, judgment was rendered for Sears after the jury had absolved both Sears and Duke of any negligence.<sup>9</sup> When the judgment was appealed to the Court of Civil Appeals, that court, relying on the terms of the credit agreement, also held Duke liable for the unauthorized purchases,<sup>10</sup> and the Supreme Court of Texas affirmed the appellate court's decision in the present action.<sup>11</sup>

Sears bases Duke's liability for the unauthorized purchases upon "the construction of the words of the credit agreement. . . ."<sup>12</sup> The court construed the agreement to mean that "Duke will pay for *all* sales made by Sears to a purchaser identifying himself by the use of the credit card. . . ."<sup>13</sup> Duke took the position that this interpretation was unwarranted. He argued that if Sears had wanted to bind him to

<sup>8</sup>Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521, 522 (Tex. 1969). The credit application then set forth certain terms and conditions with respect to the amount of monthly payments, together with a schedule of an interest charges thereon. As of September, 1969, the credit application had changed somewhat. It is now entitled "Sears Revolving Charge Account and Security Agreement" and provides:

In consideration of your selling merchandise and services for personal, family or household purposes to me on my Sears Revolving Charge Account, I agree to the following regarding all purchases made by me or on my Sears Revolving Charge Account Identification . . .

<sup>9</sup>On the basis of the evidence, the jury found that: (1) all the charges in question were made on Duke's credit card, but not by him personally and not upon his authorization; (2) Duke's card was either lost or stolen; (3) he had failed to sign it, but this was not negligence; (4) Duke did not fail to use ordinary care to prevent the loss or theft of his card; (5) Duke did not fail to discover and report the loss or theft of the card within a reasonable time; (6) Sears did not fail to use ordinary care in ascertaining the identity and authority of the person using Duke's card; and (7) the reasonable charge for the merchandise in question was \$1,335.77. Duke v. Sears, Roebuck & Co., 433 S.W.2d 919, 922 (Tex. Civ. App. 1968).

<sup>10</sup>Duke v. Sears, Roebuck & Co., 433 S.W.2d 919 (Tex. Civ. App. 1968). The court of civil appeals reversed and remanded the case for a new trial on an evidence question. The court did not believe sufficient evidence existed to support the jury's finding that Sears discharged its duty of care in regard to all of the unauthorized purchases. *Id.* at 925. The court of civil appeals also held that Sears had failed to carry the burden of proving that it did not fail to use ordinary care to ascertain the identity and authority of the person presenting Duke's credit card. *Id.*

<sup>11</sup>The supreme court, however, reversed the court of appeals on the evidence question, stating:

[T]hat court has incorrectly placed the burden of proof upon Sears and has further enlarged the burden on Sears by holding that it could not discharge its duty of care by accepting the credit card as the only proof of identity.

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

<sup>12</sup>*Id.* at 523.

<sup>13</sup>*Id.*

pay for unauthorized purchases, it should have expressly stated this either in the credit agreement or on the card.<sup>14</sup> The court briefly dismissed Duke's contention by holding that the language of the credit agreement did, in fact, bind him to pay for unauthorized purchases. It then added that "we do not regard this result to be so surprising in this credit card age."<sup>15</sup> On the contrary, such a result seems somewhat surprising in comparison with other pertinent credit card cases.

In the brief history of credit card liability<sup>16</sup> less than a score of reported cases exist.<sup>17</sup> In most of these cases the liability for unauthoriz-

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<sup>14</sup>There was no contractual language on the Sears credit card. On the front of this card appeared Duke's name in raised letters, his account number, and the code number assigned to the issuing store in Lubbock, Texas. On the back of each card was a space for the holder's signature under which was the statement: "Valid When Signed By Authorized Purchaser." Also, at various places on the back of the cards were the statements: 'Property of Sears, Roebuck And Co.'; 'Returnable Upon Request'; and 'Report Loss Or Theft Of Card To Credit Office.' "Duke v. Sears, Roebuck & Co., 433 S.W.2d 919, 921 (Tex. Civ. App. 1968).

<sup>15</sup>Sears, Roebuck & Co. v. Duke, 441 S.W.2d 521, 523 (Tex. 1969).

<sup>16</sup>The first case was *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Phila. Mun. Ct. 1915), where a credit "token" rather than a credit card was actually involved. These early tokens or coins did not contain the contractual language now on most credit cards. Usually only the name and account number of the customer were imprinted upon the token. Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811, 814 (1967).

<sup>17</sup>*Sinclair Ref. Co. v. Consolidated Van & Storage Cos.*, 192 F. Supp. 87 (N.D. Ga. 1960); *Reed v. Sears, Roebuck & Co.*, 44 Ala. App. 506, 214 So. 2d 857, cert. denied, 293 Ala. 717, 214 So. 2d 861 (1968); *Gulf Ref. Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790 (1945); *Thomas v. Central Charge Serv., Inc.*, 212 A.2d 533 (D.C. Ct. App. 1965); *Read v. Gulf Oil Corp.*, 114 Ga. App. 21, 150 S.E.2d 319 (1966); *Humble Oil & Ref. Co. v. Waters*, 159 So. 2d 408 (La. Ct. App. 1963); *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762 (La. Ct. App. 1962); *Jones Store Co. v. Kelly*, 225 Mo. App. 833, 36 S.W.2d 681 (Kansas Ct. App. 1931); *Lit Bros. v. Haines*, 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923); *Socony Mobil Oil Co. v. Greif*, 10 App. Div. 2d 119, 197 N.Y.S.2d 522 (1960); *Uni Serv Corp. v. Vitiello*, 53 Misc. 2d 396, 278 N.Y.S.2d 969 (N.Y. City Civ. Ct. 1967); *Allied Stores, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967); *Texaco, Inc. v. Goldstein*, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (N.Y. City Mun. Ct. 1962), *aff'd per curiam*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (App. T. 1963); *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960); *Gulf Ref. Co. v. Plotnick*, 24 Pa. D. & C. 147 (C.P. Lancaster County 1934); *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Phila. Mun. Ct. 1915); *Magnolia Petroleum Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943).

The relatively small number of cases is attributable to several factors: (1) the low percentage of defaults or misuse in the past; (2) the small size of most individual credit accounts would make profitable collection by suit very difficult, thus credit card suits usually involve relatively large amounts; (3) the issuers want to maintain good will with the public and attempt to avoid a suit which would or could result in bad publicity. Claffin, *The Credit Card—A New Instrument*, 33 CONN. B.J. 1 (1959); 35 NOTRE DAME LAW. 225 (1960).

ed purchases has been determined by a finding of negligence,<sup>18</sup> lack of good faith,<sup>19</sup> or by application of the doctrine of estoppel.<sup>20</sup> Only two cases before *Sears* have placed liability upon the cardholder merely by a strict interpretation of a credit agreement.<sup>21</sup>

The Texas case of *Magnolia Petroleum Co. v. McMillan*<sup>22</sup> was the first to base its decision on a strict interpretation of the credit agreement. The defendant-cardholder loaned his card to two men for the purpose of making purchases on his behalf. The card was used by one of the men to make additional purchases for which the holder refused to pay. The court held the cardholder liable on the basis of the contractual provision printed on the card. The provision stated that the holder would be "responsible for all purchases made by use of this card, prior to its surrender to the issuing oil company, whether or not such purchases are made by the named holder. . . ."<sup>23</sup> The court concluded the holder's retention and use of the card constituted an acceptance of its terms, and, therefore, he was bound by its express provisions.<sup>24</sup>

A similar contractual provision was present on the holder's credit card in *Texaco, Inc. v. Goldstein*.<sup>25</sup> It provided that the cardholder "assumes full responsibility for all purchases made hereunder by any one through the use of this credit card" prior to surrendering the card to the issuer or giving written notice of its loss or theft.<sup>26</sup> The New York court noted that this risk-allocation provision satisfied the re-

<sup>18</sup>*E.g.*, *Gulf Ref. Co. v. Plotnick*, 24 Pa. D. & C. 147 (C.P. Lancaster County 1934).

<sup>19</sup>*E.g.*, *Gulf Ref. Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790 (1945); *cf.* *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960).

<sup>20</sup>*E.g.*, *Sinclair Ref. Co. v. Consolidated Van & Storage Cos.*, 192 F. Supp. 87 (N.D. Ga. 1960); *Neiman-Marcus Co. v. Viser*, 140 So. 2d 762 (La. Ct. App. 1962).

<sup>21</sup>*Texaco, Inc. v. Goldstein*, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (N.Y. City Mun. Ct. 1962); *Magnolia Petroleum Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943). *Cf.* *Uni Serv Corp. v. Vitiello*, 53 Misc. 2d 396, 278 N.Y.S.2d 969 (N.Y. City Civ. Ct. 1967).

<sup>22</sup>168 S.W.2d 881 (Tex. Civ. App. 1943).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 881-82. It is generally held that acceptance of a document which purports to be a contract constitutes assent to the terms contained therein. 3 A. CORBIN, CONTRACTS § 607 (1960); 1 S. WILLISTON, CONTRACTS § 90 A (3d ed. 1957); RESTATEMENT OF CONTRACTS § 70 (1932). *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 S. WILLISTON, CONTRACTS § 90 C (3d ed. 1957).

<sup>25</sup>34 Misc. 2d 751, 229 N.Y.S.2d 51 (N.Y. City Mun. Ct. 1962), *aff'd per curiam*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (App. T. 1963).

<sup>26</sup>229 N.Y.S.2d at 53.

quirements of an applicable state statute<sup>27</sup> and constituted "an original undertaking in which the [cardholder] made it his own responsibility for any use of the card."<sup>28</sup> In placing liability upon the cardholder, the court observed that the contract provisions were not unreasonable. The cardholder assumed the risk of all loss before giving notice of the loss or theft of the card, and the issuer assumed the risk after receipt of notice.<sup>29</sup>

It should be emphasized that tripartite credit arrangements were involved in the *Magnolia* and *Texaco* cases. Therefore, it might be considered whether the existence of a bipartite credit arrangement, such as that in *Sears*, would lead the courts to a different conclusion. It would appear that a bipartite credit arrangement should impose a higher standard of care upon the issuer since he, and not an intermediate dealer or agent, is directly involved in all transactions.<sup>30</sup>

Prior to *Sears*, only one bipartite credit card case discussed the issue of contractual liability for unauthorized purchases.<sup>31</sup> The New York court in *Allied Stores, Inc. v. Funderburke*<sup>32</sup> dealt with facts very similar to those in *Sears*. The defendant-cardholder signed a credit application in which she agreed:

1.—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 the same has been lost or stolen.<sup>33</sup>

<sup>27</sup>N.Y. GEN. BUS. LAW § 512 (McKinney 1968):

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 the 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>28</sup>229 N.Y.S.2d at 54.

<sup>29</sup>*Id.* at 55.

<sup>30</sup>Three recent cases suggest that a bipartite credit arrangement may impose higher standards upon the issuer than would be the case in a tripartite situation. See *Rayor v. Affiliated Credit Bureau, Inc.*, — Colo. —, 455 P.2d 859 (1969); *Allied Stores, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967); *Uni Serv Corp. v. Vitiello*, 53 Misc. 2d 396, 278 N.Y.S.2d 969 (N.Y. Civ. Ct. 1967).

<sup>31</sup>*Allied Stores, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967). Bipartite credit arrangements have confronted the courts in early credit card cases, but no contractual agreement was present between the issuer-seller and the cardholder. See *Jones Store Co. v. Kelly*, 225 Mo. App. 833, 36 S.W.2d 681 (Kansas City Ct. App. 1931); *Lit Bros. v. Haines*, 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923); *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Phila. Mun. Ct. 1915).

<sup>32</sup>52 Misc. 2d 872, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967).

<sup>33</sup>277 N.Y.S.2d at 10.

The card was subsequently stolen without the knowledge or negligence of the cardholder. Since she was unaware of the theft, the holder was unable to give the notice required by the credit application and the applicable New York statute.<sup>34</sup> Upon these facts the court refused to hold the cardholder liable for the unauthorized purchases which resulted. It held that both the bipartite credit agreement and the statute were ambiguous and did not "expressly provide that the holder assumes all risk occasioned by loss or theft of the credit card where the credit card holder is unaware of such facts and thus is unable to give the required notice."<sup>35</sup>

It is significant that the statute<sup>36</sup> held to be ambiguous and inapplicable to the bipartite agreement in *Allied* was the same statute which was invoked to place liability on the cardholder in the tripartite arrangement in *Texaco*. The *Allied* court's refusal to be constrained by the *Texaco* precedent was apparently based upon the fact that "a modest two-party arrangement" was involved, as opposed to the broad tripartite arrangement in *Texaco*.<sup>37</sup> Thus, it seems that *Allied* imposes a higher standard upon the bipartite issuer, at least in the drafting of the credit agreement.

*Sears* cannot easily be reconciled with the decisions in *Magnolia*, *Texaco*, or *Allied*. Both *Magnolia* and *Texaco* required only that the cardholders read the *express* risk-allocation clauses in the agreements to be informed of the extent of their liability. Since neither the *Sears* agreement nor the credit card<sup>38</sup> contains a similar express provision, *Sears* places an additional duty on the cardholder to construe correctly his liability from the comparatively ambiguous wording of the credit agreement.<sup>39</sup> Furthermore, the wording of the agreement fails to meet

<sup>34</sup>N.Y. GEN. BUS. LAW § 512 (McKinney 1968).

<sup>35</sup>277 N.Y.S.2d at 11-12. The court went on to hold that while the cardholder must meet the duty of reasonable care in retaining and using the card, a concurrent obligation existed on the part of the issuer-seller to protect the holder from the imposition of unjust charges, and that the issuer had failed to meet this obligation.

It has been argued that the *Allied* court's holding concerning the contractual liability of the parties has virtually nullified the effectiveness of the New York statute in bipartite situations. Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811, 817 (1967).

<sup>36</sup>N.Y. GEN. BUS. LAW § 512 (McKinney 1968).

<sup>37</sup>277 N.Y.S.2d at 14.

<sup>38</sup>As to the language on the credit card, see note 14 *supra*.

<sup>39</sup>Compare the following pertinent contract provisions which have confronted the courts in several other credit card cases *with* the language of the *Sears* agreement:

Acceptance by [the holder] implies responsibility for all service and mer-



the stringent criterion laid down in *Allied*. The extent of the liability imposed by the Sears agreement is left unclear by the omission of an express risk-allocation provision concerning loss, theft, or liability-until-notice.<sup>40</sup>

In denying the liability of the cardholder for unauthorized purchases, the *Allied* court did not stray from well-established contract principles. It strictly adhered to the rule that the courts will not attempt, under the guise of construction or interpretation, to make a new contract for the parties.<sup>41</sup> Neither will they change a written contract so as to make it express an intention of the parties different from that expressed in the words of the instrument.<sup>42</sup> In *Sears* the court appears to ignore these contract principles. By implying promises of liability on the part of the cardholder which are not expressed, the

chandise obtained thereby. Loss or theft hereof must be reported in writing immediately to avoid responsibility for unauthorized use.

*Read v. Gulf Oil Corp.*, 114 Ga. App. 21, 150 S.E.2d 319, 320 (1966).

This credit card confirms the authorization of credit during the period shown, to the person... whose name is embossed on the reverse side thereof. Such person... 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 give the company notice in writing that the card has been lost or stolen. Retention of this card or use thereof constitutes acceptance of all terms and conditions thereof.

*Texaco, Inc. v. Goldstein*, 34 Misc. 2d 751, 229 N.Y.S.2d 51, 53 (N.Y. Mun. Ct. 1962), *aff'd per curiam*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (App. T. 1963).

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.

*Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243, 245 (1960).

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.

*Magnolia Petroleum Co. v. McMillan*, 163 S.W.2d 881 (Tex. Civ. App. 1943).

<sup>40</sup>*Compare Allied Stores, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8, 12 (N.Y. City Civ. Ct. 1967) with *Sears, Roebuck & Co. v. Duke*, 441 S.W.2d 521, 522 (Tex. 1969).

<sup>41</sup>*E.g.*, *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891); *Haltom Oil Co. v. Phillips Petroleum Co.*, 304 F.2d 95 (5th Cir. 1962); *Pennsylvania Fire Ins. Co. v. Malone*, 217 Ala. 168, 115 So. 156 (1928); *Spry v. Williams*, 82 Iowa 61, 47 N.W. 890 (1891); *Chaffer v. Chaffer*, 19 Wash. 2d 607, 145 P.2d 244 (1944).

<sup>42</sup>3 A. CORBIN, CONTRACTS § 541 (1960). See *National Foundation, Inc. v. First Nat'l Bank*, 182 F. Supp. 919 (W.D.N.C. 1960); *Sass v. Hank*, 108 Cal. App. 2d 207, 238 P.2d 652 (Dist. Ct. App. 1951); *Washington Constr. Co. v. Spinella*, 8 N.J. 212, 84 A.2d 617 (1951); *Temple v. Clinton Trust Co.*, 1 N.J. 219, 62 A.2d 690 (1948).

The decision in *Allied*, that the words of the credit agreement were too ambiguous, has nonetheless been criticized as being a "strained interpretation." MURRAY, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811, 817 (1967).

court may be guilty of an unauthorized variance or reformation of the contract.<sup>43</sup> In effect, this interpretation of the credit agreement renders the cardholder a guarantor<sup>44</sup> for unauthorized purchases made on his card.

If *Sears* can be interpreted as placing the cardholder in the position of a guarantor, it can be argued that the decision contradicts the frequently stated principle that in contracts of guaranty, the promises of an uncompensated guarantor must be strictly construed, and therefore, the guarantor cannot be held liable beyond the strict terms of his contract.<sup>45</sup> This principle has been recognized and applied in two credit card cases, *Gulf Refining Co. v. Williams Roofing Co.*<sup>46</sup> and *Union Oil Co. v. Lull*,<sup>47</sup> with interesting results. In both cases express risk-allocation provisions were held to place the cardholder in the position of a guarantor for unauthorized purchases.<sup>48</sup> The respective courts reasoned that agreements of this type imply a reciprocal promise on the part of the issuer to exercise reasonable diligence to protect the guarantor-holder. *Lull* supported this conclusion by recognizing that such

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<sup>43</sup>When the *Sears* case was before the court of civil appeals, that court refused to make an "unauthorized variance or reformation" of the terms of the *Sears* credit agreement in favor of the cardholder by reading the proviso "with my authority" into the agreement after the word "identification." *Duke v. Sears, Roebuck & Co.*, 433 S.W. 2d 919, 923 (Tex. Civ. App. 1968). Neither the court of civil appeals nor the supreme court appeared to realize, however, that by implying an obligation on the part of the cardholder for unauthorized purchases, they might be making an unauthorized variance or reformation of the credit agreement in favor of *Sears*.

<sup>44</sup>For purposes of this comment, it is immaterial whether the term surety, guarantor, or indemnitor would most accurately describe the relationship between *Sears* and *Duke*. The cardholder will be referred to as the guarantor. It has been held that no specific language is necessary to create a guaranty contract. *Everts v. Matteson*, 21 Cal. 2d 437, 132 P.2d 476, 483 (1942); *Beck v. Shepard Fruit Co.*, 19 Cal. App. 2d 590, 66 P.2d 188, 191 (Dist. Ct. App. 1937); *General Phoenix Corp. v. Cabot*, 300 N.Y. 87, 89 N.E.2d 238, 242 (1949).

<sup>45</sup>*E.g.*, *Dunkirk Trust Co. v. Schmitt*, 316 F.2d 537 (2d Cir. 1963); *Puerto Rico Indus. Dev. Co. v. John H. Miller Mfg. Corp.*, 170 F. Supp. 918 (S.D. Ill. 1959); *First Bank & Trust Co. v. Siegel*, 36 N.J. Super. 207, 115 A.2d 152 (Monmouth County Ct. 1955); *Garfield Trust Co. v. Teichmann*, 24 N.J. Super. 519, 95 A.2d 18 (Super. Ct. Div. 1953); *W. T. Rawleigh Co. v. McCoy*, 96 Ore. 474, 190 P. 311 (1920). It has been said that uncompensated sureties, guarantors, and indemnitors are favorites of the law. *Burkhardt v. Bank of America Nat'l Trust & Sav. Ass'n*, 127 Colo. 251, 256 P.2d 234 (1953); *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960); *Hagey v. Massachusetts Bonding & Ins. Co.*, 160 Ore. 132, 126 P.2d 836 (1942).

<sup>46</sup>208 Ark. 362, 186 S.W.2d 790 (1945).

<sup>47</sup>220 Ore. 412, 349 P.2d 243 (1960).

<sup>48</sup>In *Gulf*, a provision on the card itself stated that the holder "assumes full responsibility for all merchandise, deliveries or service obtained on credit by any person by its presentation," and that loss or theft of the card should be reported immediately. 186 S.W.2d at 792, 794. For the contractual language on the card in *Lull* see note 39 *supra*.

agreements usually expose the guarantor to liability through the acts of others over which he has little or no control.<sup>49</sup> As a result, the cardholders in these cases were relieved of liability because the facts showed that the issuer or its dealers had failed to meet either the standard of care imposed by the guaranty nature of the credit agreement,<sup>50</sup> or to sustain their burden of proving that they had met the required standard.<sup>51</sup>

Assuming that the credit agreement in *Sears* did contain an express clause which operated to make the cardholder a guarantor, the *Gulf* and *Lull* rationale, applied to the bipartite arrangement, would impose a high standard upon the issuer in credit transactions. The "ordinary care" requirement of *Sears* would not be sufficient.<sup>52</sup> Rather, the criterion should be whether the issuer exercised reasonable diligence to *protect* the cardholder-guarantor from unauthorized purchases. Such reasonable diligence would require more than mere possession of an ordinary credit card as identification. This is not an unreasonable requirement since the issuer is directly involved in all credit card transactions and not subject to liability because of the failures of an agent or dealer as in a tripartite arrangement.<sup>53</sup> However, this reasoning can only be speculative since no express provision exists in the *Sears* agreement which can be strictly construed to place liability on the cardholder. On the contrary, the court has placed the cardholder in a position analogous to that of a guarantor merely by *implying* terms in the credit agreement.

<sup>49</sup>349 P.2d at 250.

<sup>50</sup>*Gulf Ref. Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790, 794-95 (1945). Nor was there any sound or valid reason found in *Gulf* for invoking the rule of *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Phila. Mun. Ct. 1915), that as between two innocent parties the one who made the loss possible should bear it. *Id.* at 795. This contention has been rejected in other credit card cases. *See Thomas v. Central Charge Serv. Inc.*, 212 A.2d 533 (D.C. Ct. App. 1965); *Lit. Bros. v. Haines*, 98 N.J.L. 658, 121 A. 131 (Sup. Ct. 1923); *Gulf Ref. Co. v. Plotnick*, 24 Pa. D. & C. 147 (C.P. Lancaster County 1935).

<sup>51</sup>*Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243, 254 (1960). The court admitted that there was no direct authority for placing the burden of proof on the issuer. *Id.* However, the rules of evidence suggest that the holder should bear the burden of proving the seller's negligence. *See C. McCORMICK, EVIDENCE* § 318 (1954).

<sup>52</sup>*Sears, Roebuck & Co. v. Duke*, 441 S.W.2d 521, 524 (1969).

<sup>53</sup>This is essentially the reasoning and conclusion reached in *Allied* although no guaranty considerations were discussed in that case.

A similar principle, applied to contracts and promises which are aleatory in character, holds that one who has incurred some degree of hazard or risk by entering into a contract has a right that the other party to the contract will do nothing to materially increase the degree of that hazard or risk. 3A A. CORBIN, *CONTRACTS* § 732 (1960). *See American Cas. Co. v. First Nat'l Bank*, 328 F.2d 138 (9th Cir. 1964); *J. A. Fay & Co. v. James Jenks Co.*, 93 Mich. 130, 53 N.W. 163 (1892).

In addition to analyses of credit provisions and application of basic contract principles, it seems that courts have also been guided by social policy considerations in relieving cardholders of liability. In this respect, *Allied*, *Gulf*, and *Lull* all appear to exhibit some measure of social conscience on behalf of the courts. These cases can be said to reflect a realization that the issuer can best bear the burden of loss by spreading those losses over all its transactions.<sup>54</sup> Furthermore, the benefits derived<sup>55</sup> and the bargaining power of a credit card applicant are small compared to that of the issuer, particularly where the applicant has little or no choice of credit provisions.<sup>56</sup> While social policy considerations are seldom expressly stated in a court's opinion,<sup>57</sup> they

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<sup>54</sup>This rationale has been suggested as the underlying consideration in some courts' refusals to interpret risk-allocation clauses literally. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1063 (1966); 23 WASH. & LEE L. REV. 125, 131 (1966).

<sup>55</sup>The holder benefits by obtaining short term credit and instant purchasing power with the issuer. He is thus relieved of carrying large amounts of cash. However, the benefits derived from the relationship by the issuer seem greater because the credit card arrangement facilitates increased patronage, and the cost of processing and accounting can be shifted back to its customers in the form of higher prices.

The *Allied* court pointed out that an issuer "issues credit in order to enlarge its reservoir of prospective sales." *Allied Stores, Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8, 15 (N.Y. City Civ. Ct. 1967). In *Lull* the court noted 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." *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243, 249-50 (1960). These statements by the courts appear to suggest that the issuer derives the greatest benefit from the credit card relationship.

<sup>56</sup>The cardholder must accept the credit card under the issuer's terms or not at all. In this respect a credit card contract or agreement is similar to an adhesion contract. See Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). A risk-shifting clause could easily be construed as being in the same category as an exculpatory provision. See 22 LA. L. REV. 640 (1962). The courts are reluctant to uphold agreements containing exculpatory clauses where the bargaining position of the party burdened with the risk is relatively small compared with that of the exculpated party. 6A A. CORBIN, CONTRACTS § 1472 (1962); RESTATEMENT OF CONTRACTS § 575 (1932).

It could be argued, however, that there is no great disparity of bargaining power in the *Sears* situation, since a failure to sign the credit agreement would not preclude a prospective cardholder from purchasing merchandise from Sears, but only from buying on a revolving charge account.

<sup>57</sup>The *Allied* court did not choose to conceal its feelings in this regard when it noted that "it is manifestly unfair to shift the burdens of [the issuer's] inadequacies or failure to the innocent consumer..." 277 N.Y.S.2d at 15. When the facts of a case are particularly appealing, a court guided by social policy considerations could deftly apply contract principles, to reach the most equitable result, and yet not be heavily burdened by precedent in a following case where the facts may not be so appealing. Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1063 (1966).