DePaul Law Review

Volume 12
Issue 1 *Fall-Winter 1962*

Article 14

Contracts - Credit Card Liability Resulting from Unauthorized Use - Texaco v. Goldstein, 229 N.Y.S.2d 51 (Munic. Ct. 1962)

DePaul College of Law

CONTRACTS–CREDIT CARD LIABILITY RESULTING FROM UNAUTHORIZED USE

Texaco, Inc., an oil company having dealers operating gas stations throughout the United States, issued credit cards enabling the holders to purchase its products at any authorized Texaco station. The face of the card contains a signature block, and above that block, the words "Issued subject to conditions on reverse side, Texaco, Inc." are inscribed. On the reverse side of the card the agreement between the customer and the company is contained, and the relevant portion appears as follows:

> whose name is embossed on the reverse side . . . assumes full responsibility for all purchases made hereunder by anyone 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 not been lost or stolen. Retention of this card or use thereof constitutes acceptance of all the terms and conditions thereof.

Subsequently, defendant was deprived of the card by theft, but failed to report the loss to plaintiff. A dealer marketing plaintiff's products picked up the card at Chicago, Illinois, where it had been tendered by the thief. The dealer notified the plaintiff, and plaintiff in turn notified defendant. From the date the card was missing to the date of notification by plaintiff to defendant, some $569.98 in charges were made with the credit card, which charges constitute the subject of this action. The question presented to the court was whether the defendant was liable pursuant to the terms and conditions on the reverse side of the credit card, for unauthorized purchases made by another, prior to notification to the plaintiff by the defendant of the loss of the card. The Municipal Court of New York City held defendant was liable, and that his liability arose out of the contract contained on the card itself. *Texaco v. Goldstein*, 229 N.Y.S.2d 51 (Munic. Ct. 1962).

The use of the "credit card" system in the United States today is very common, yet the contractual relationship in this type of transaction involves a relatively new area of law. Credit systems employing the use of some type of token are divided into two classifications. The first is the two-party agreement, whereby the issuer of the token deals directly with the holder, thus creating a personal relationship. The second classification is the three-party agreement, which finds the issuer dealing not only with the holder, but also a third-party dealer who dispenses the issuer's merchandise and then assigns to the issuer the debt of the holder, thus creating an impersonal relationship. Only eight states have considered the "imposter" problem, and of these only six have dealt with the three-party agreement. The earlier cases concerned two-party agreements.[1] In the

[1] For a more detailed discussion of the difference between two and three-party agreements see, Comment, The Tripartite Credit Card Transaction: *A Legal Infant*, 48 CALIF. L. REV. 459 (1960).

case of *Wanamaker v. Megary*,[2] the defendant lost the credit "coin" which had been issued by the plaintiff, and prior to notice being given to plaintiff, an imposter charged several purchases against defendant's account. The "coin" contained no terms except to have defendant's account number imprinted on its face. The court likened the device to a negotiable instrument, and pointed to defendant's negligence by saying "as between two innocent parties, 'he who makes the loss possible should bear it.' "[3]

Eight years later, in *Lit Bros. v. Haines*,[4] the Supreme Court of New Jersey was presented with substantially the same set of circumstances. It refused to accept the coin as a negotiable instrument, and went on to hold no contract in fact existed.[5] The last of the two-party cases was *Jones Store Co. v. Kelly*.[6] The issue of contract arose in connection with defendant's objections to the instructions, i.e. that the court assumed a perfect contract of sale, but the Appellate Court held the instructions erroneous for reasons not assigned. The court went on to say the defendant would be liable only for authorized purchases.[7] The significance of these early cases is that they represented the only precedent available to the courts in future three-party controversies. It is also interesting to note that even though the contract relationships in the two types of problems are basically different, the early two-party cases failed to deal with the issue of contract directly as did the three-party cases later. The net result of these first three cases were three separate and distinct approaches to the placing of liability in two-party cases.

The evolution into the three-party agreement only seemed to aggravate an existing problem. Where and how was liability to be placed? In the first case, *Gulf Refining Co. v. Plotnick*,[8] it was decided that in the absence of an express contract, each party owed the other a duty of care. The court said of the credit card that: "To carry into effect its intended use there is an implied contract that it will be used or honored properly and with due care."[9] The court then denied the existence of a proper contract, and resorted to a fiction of law to enforce the legal duties.

The contract problem seemed to be solved at last in *Magnolia Petroleum Co v. McMillan*,[10] when defendant was held bound to the terms on the

[2] 24 Pa. Dist. 778 (Munic. Ct., Phila. 1915).

[3] *Id.* at 780.

[4] 98 N.J.L. 658, 121 Atl. 131 (1923).

[5] The Supreme Court of New Jersey held no contract existed because of the absence of terms on the coin, but went on to indicate that if the terms were proven by being on the face of the coin defendant would have been liable. (Dictum) *Id.* at 661, 121 Atl. at 132.

[6] 225 Mo. App. 833, 36 S.W. 2d 681 (1931).

[7] *Id.* at 836, 36 S.W. 2d at 683.

[8] 24 Pa. D. & C. 147 (1934).

[9] *Id.* at 150.

[10] 168 S.W. 2d 881 (Tex. Civ. App. 1943).

credit card. The case, however, was not decided on the contract issue directly, but rather on the question of whether the unauthorized use was a valid defense.[11] Similarly, a very unique situation arose in *Gulf Refining Co. v. Williams Roofing Co.*[12] The defendant admitted he was bound by the terms on the credit card, but in addition, he claimed that the plaintiff was bound by the restrictive term he placed on the card after he received it, even though plaintiff was unaware of the change. The case was complicated by the fact that there was substantial evidence of "bad faith" on the part of plaintiff's dealers, and also the fact that it was a suit in equity. The result was that no question of legal significance was answered, and plaintiff's suit was dismissed for want of equity.[13]

The most comprehensive analysis of the problem was undertaken in *Union Oil Co. v. Lull.*[14] Although the court devoted itself to deciding the case on the lone term "guaranty,"[15] it made two significant observations as far as the question of a contract relationship was concerned. The first was dictum, because the issue of contract was not properly raised in the pleadings. The court said that if the question, whether or not the terms on the credit card constituted part of the contract, was properly raised, it would have been a question for the jury. The second observation merely amounted to a citing of secondary authority in support of why the terms should be binding.[16]

The decisions, so far, reflect primarily two lines of reasoning for the placing of liability, (1) the negligence of the parties involved, and (2) the striking down of defenses not related directly to the contract issue, when there is an assumption by the parties that the terms on the credit card are

[11] Here defendant admitted liability if the purchases were authorized, but claimed that he had a good defense because they were not. Compare, Jones Store Co. v. Kelly, 225 Mo. App. 833, 36 S.W. 2d 681 (1931). The Appellate Court reasoned that since defendant admitted being bound to some of the terms he was bound by all the terms, and since the terms expressly excluded his defense of unauthorized use he was liable. Magnolia Petroleum Co. v. McMillan, 168 S.W. 2d 881 (Tex. Civ. App. 1943).

[12] 208 Ark. 362, 186 S.W. 2d 790 (1945).

[13] The Supreme Court of Arkansas held that plaintiff's dealers were bound by the restrictive term "For truck use only," and since plaintiff was an assignee of the dealers he had no better rights than they had. Therefore, plaintiff took the assignment subject to the defense of collusion or "bad faith." *Id.* at 367, 186 S.W. 2d at 794.

[14] 220 Ore. 412, 349 P. 2d 243 (1960).

[15] It was argued that the term "guaranty" made the defendant a gratuitous indemnitor, thus giving rise to a duty of mutual due care. The Supreme Court of Oregon went on to place the burden of proving due care solely on the plaintiff. 220 Ore. 412, 349 P. 2d 243 (1960). The Court also expressed its approval of the "mutual due care" doctrine that was stated in Gulf Refining Co. v. Plotnick, 24 Pa. D. & C. 147 (1934).

[16] The secondary authority concerned basic principles of contract law. See, 1 CORBIN § 67 (1950); 3 CORBIN § 607 (1950); RESTATEMENT, CONTRACTS Sec. 29, 52, 70, and 72 (1) (a) (1932); 1 WILLISTON § 90A (3rd ed.).

binding. The *Texaco* case finds its importance then, in that it deviates from the above two precedent patterns.

The deviation from negligence was not so all encompassing in the *Texaco* case. The Court covered the role of negligence in its discussion of public policy and the importance of the credit card to the economy. In short, since the plaintiff had no control over the dealer or the purchaser, "the negligence of the card holder becomes most important."[17] Conversely, since the plaintiff did lack control and the fact that there were thirty thousand dealers, it would be absurd to impose a standard of due care. It is worth noting here that this latter discussion of the court did in effect amount to negation of the need for negligence in order to place liability in situations similar to this. The truth of the matter is that the absence or presence of negligence in the conduct of the card holder has no effect on his liability if he is bound by a formal and binding contract. This would not be so if it were a question of an implied contract[18] or a contract of indemnity.[19]

Upon reviewing the decision in the *Texaco* case, the words of the court are unmistakably clear as to whether a formal and binding contract existed. "The issuance of the card to the defendant amounted to a mere offer on plaintiff's part, and the contract became entire when defendant retained the card *and* thereafter made use of it. The card itself then constituted a formal and binding contract."[20] A general principle of contract law is that although an offeror has the power to specify the manner in which his offer is to be accepted,[21] he does not possess the power to make the offeree's silence operate as an acceptance merely because the terms of the offer purport to attach that effect to it.[22] But if the offeree makes one credit purchase with the card, his behavior would indicate an acceptance.[23] This is what the *Texaco* case found, because there was not only retention of the card but also the use of the card according to its intended purpose. Also, one who manifests acceptance of the terms of a writing which can be reasonably understood to be a contract is bound by the contract even

[17] Texaco v. Goldstein, 229 N.Y.S. 2d 51, 55 (Munic. Ct. 1962).

[18] Gulf Refining Co. v. Plotnick, 24 Pa. D. & C. 147 (1934).

[19] Union Oil Co. v. Lull, 220 Ore. 412, 349 P. 2d 243 (1960). The *Texaco* case did not reverse the Court's holding in the *Lull* case concerning a duty of mutual due care, because it distinguished the two cases on the basis of the term "guaranty." Therefore, negligence would be a basis for liability if a contract of indemnity could be found. See discussion in note 15 supra.

[20] Texaco v. Goldstein, 229 N.Y.S. 2d 51, 54 (Munic. Ct. 1962). (Emphasis added.)

[21] 1 Corbin Sec. 67 (1950); Restatement, Contract, Sec. 52 (1932).

[22] RESTATEMENT, CONTRACTS Sec. 72 (1932).

[23] RESTATEMENT, CONTRACTS Sec. 72 (1) (a) (1932).

though ignorant of the true meaning of those terms.[24] The facts of the *Texaco* case and the Court's holding come directly within these principles, thus finding justification for a formal and binding contract.

In conclusion, the court in holding that a formal and binding contract existed, did so without any explicit reference to existing authority. Clearly, previous decisions implied there was a contract, if only from an assumption or an admittance on the part of the parties of its existence.[25] Also, the court cited the *Lull* case in its decision which gave full consideration to basic principles of contract law.[26] Finally, it was pointed out that the Legislature of the State of New York took cognizance of the problem by enacting section 512 of the General Business Law.[27] It should be noted here that there was a recent New York case dealing with a substantially analogous situation, where the defendant received a restaurant credit card subject to the terms on the reverse side. The Supreme Court of New York held that since the defendant retained and used the card, he is charged with notice of the terms on the reverse side. The court further stated that his retention and use also amounted to a manifestation of assent to those terms, thus constituting an acceptance and binding him to the conditions of the contract. The *Texaco* case used the same reasoning in its decision, and therefore inadvertently or otherwise placed itself in agreement with the highest court of the State of New York.[28]

The Texaco case does seem to settle the question of how and where is liability to be placed in factual situations such as this. A slight change in the facts could and would probably vary the result. If the term "guaranty" were incorporated into the contract, would the *Lull* holding of an implied duty of care persist? If there was mere retention of the card without its ever being used, could there be found a manifestation of assent to the terms on the card? If the card was non-transferable without the term "guaranty" included, would the courts return to imposing a duty of care? These and many more questions will have to be settled before the liability from issue of a credit card can be predicted with some degree of accuracy.

[24] 3 CORBIN, sec. 607 (1950); RESTATEMENT, CONTRACTS Sec. 70 (1932); 1 WILLISTON Sec. 90A (3rd Ed.).

[25] Assumption cases, see Wanamaker v. Megary, 24 Pa. Dist. 778 (Munic. Ct., Phila. 1915); Jones Store Co. v. Kelly, 225 Mo. App. 833, 36 S.W. 2d 681 (1931). Admittance cases, see Magnolia Petroleum Co. v. McMillan, 168 S.W. 2d 881 (Tex. Civ. App. 1943); Gulf Refining Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W. 2d 790 (1945).

[26] See note 16 supra.

[27] Section 512 provides: "to impose liability . . . 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. . . ." NEW YORK GENERAL BUSINESS LAW Sec. 512.

[28] Franklin National Bank v. Kass, 19 Misc. 2d 280, 184 N.Y.S. 2d 783 (Sup. Ct. 1959). This case was not cited by the Court so it cannot be considered as really having any influence on the Court's decision in the *Texaco* case.