1982

Walker Bank & Trust v. Betty Jones : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WALKER BANK & TRUST, Plaintiff/Respondent, v. BETTY JONES, Defendant/Appellant.	Case No. 18110
WALKER BANK & TRUST CO., Plaintiff/Respondent, v. GLORIA HARLAN, Defendant/Appellant.	Case No. 18111

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court

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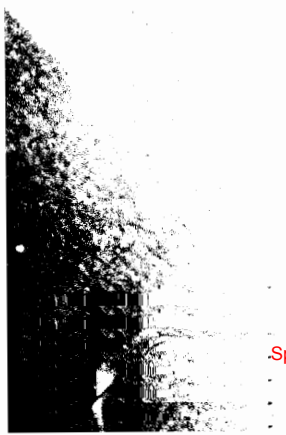

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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NATURE OF THE CASE

This is an action to recover money for purchases made with credit cards issued by Respondent to Appellants. Appellants allege that their rights under the Federal Truth in Lending Act have been violated. The two cases involve nearly identical facts and the same "Cardholder Agreement".

DISPOSITION IN LOWER COURT

The court granted Respondent summary judgment against each Appellant.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the District Court's judgments or modification of the judgments to limit Appellants' liability for unauthorized use to $50.00 each.

STATEMENT OF FACTS

A. Appellant Harlan

In July, 1979, Appellant Harlan, who was prior to that time a VISA cardholder at Respondent bank, requested that John Harlan be added to the account as an authorized user. Respondent honored this request and issued Mr. Harlan a VISA card. (Harlan R. 32, 35) On or about October 11, 1979, Appellant Harlan wrote Respondent stating that as of that date, she would no longer be

responsible for charges made by John Harlan, thus making any further charges on the account by him unauthorized. Appellant Harlan cancelled her account by the same letter. (Harlan R. 33, 36). Appellant Harlan's husband continued to make charges on the account, which were unpaid, resulting in this lawsuit by Respondent.

B. Appellant Jones

Appellant Jones and Respondent have entered into a Stipulation regarding the facts of her case, found at Jones R. 74-80. The facts are essentially similar to those of Appellant Harlan.

ARGUMENT

POINT I

NOTICE TO THE BANK ENDED AUTHORIZED USE BY APPELLANTS' HUSBANDS; AFTER SUCH NOTICE APPELLANTS' LIABILITY IS LIMITED BY TRUTH IN LENDING LAW

The essential issue in this case is whether the use of the credit cards by Appellants' husbands after notice to the bank was unauthorized use. If the use was unauthorized, then both Appellants are protected by the provisions of the Truth in Lending Act which limit liability for unauthorized use to $50.00.

The Truth in Lending Act (TILA) and Regulation

Z, 12 CFR §226 define and distinguish a "cardholder" from a card user and explain unauthorized use. A cardholder is defined as

> any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person. 15 U.S.C. §1602(m),

while unauthorized use

> means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit. 15 U.S.C. §1602(o).

TILA and Regulation Z are designed to assist consumers. The Act "is to be liberally construed in favor of the consumer. Its terms are to be strictly enforced." Martin v. American Express, Inc., 361 So.2d 597, 600(Ala. Civ. App. 1978). Given the facts of the present cases it is clear that Appellants are the only cardholders and thus entitled to the statutory limitation on liability. In addition, common law agency principles compel the same conclusion.

While there are no reported cases on point on the issue of cardholder versus authorized user in the

husband-wife context, this Court can and should rely on interpretations of the Truth in Lending Act and Regulation Z issued by the Federal Reserve Board (FRB), the administrative agency issuing the regulations and responsible for their enforcement, to clarify the meaning of "cardholder." The U.S. Supreme Court has held that FRB comments are entitled to great deference. "This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion.'" Ford Motor Co. v. Milhollin, 444 U.S. 555 at 565 (1980).

Appellants Harlan and Jones both requested that Respondent issue credit cards to their husbands and were thus the only persons who agreed to pay the obligations arising from use of the card. In neither case did Respondent have any contact with the husbands. In the case of Appellant Harlan, an account had been established in her name for several years prior to her application for a card for her husband as an authorized user. In fact, Respondent's own form required Appellant Harlan, as "primary cardholder" to be fully liable for charges made by the newly authorized user on her account. See Harlan

R. 10, 35. In the case of Appellant Jones, an account was established solely at the request of Mrs. Jones, authorizing use by Mr. Jones only through her, even though denominated a joint account. Respondent took the position below, and the trial court apparently agreed, that Mr. Jones was a cardholder, since his use of the card after the notice of November 11, 1977 was certainly not with implied, actual or apparent authority nor for the benefit of Appellant Jones. This analysis is incorrect.

First, Walker Bank has apparently recognized that only Betty Jones and Gloria Harlan are contractually liable on these actions, i.e. are the only "cardholders", by the very nature of these lawsuits naming only Appellants. If Respondent claimed that Richard Jones or John Harlan were "cardholders" and thus their use could not be unauthorized, they would obviously have been jointly liable, indispensable co-defendants. Respondent clearly concluded to the contrary when this action was filed.

Second, 15 U.S.C. §1642 and 12 C.F.R. §226.13(a) provide that no credit card shall be issued to any person except in response to a request or application therefor or as a renewal of or substitution for an already accepted

card. This provision was interpreted by the Federal Reserve Board in light of facts similar to those of Appellant Jones in FRB Official Staff Interpretation, No. FC-0070, May 11, 1977, 42 Fed.Reg. 25,491 (1977) (Jones R. 136A). The FRB held that credit cards sent in response to a request from one spouse will be proper (i.e. not unsolicited), "provided that only the requesting spouse is the cardholder...regardless of the name(s) in which the cards are issued.... [T]his practice is consistent with the requirements of §226.13 of Regulation Z and U.S.C. §§1642 and 1643 all of which contemplate that card issuers may issue cards to authorized users (who are not contractually liable on the account) at the behest of a cardholder." Therefore, since Mr. Jones neither requested a credit card from Respondent, nor gave authorization to Mrs. Jones to act as his agent to do so, Mr. Jones cannot be a cardholder and can only be an "authorized user" on his wife's account. Any construction which resulted in Mr. Jones being a cardholder without having requested a card or entering into an agreement would mean a violation of 15 U.S.C. §1642, prohibiting the issuance of unsolicited credit cards, and would absolve Appellant Jones of any liability for charges made by Mr. Jones at

any time, or at least entitling her to a set-off against money owed. This analysis leads to the inescapable conclusion that the two cases herein are identical in that the husbands are no more than authorized users whose authority to use the cards was terminated by notice to the bank from the cardholder, their wives.

By requesting credit cards for their husbands, Appellants bestowed upon their husbands the status of "authorized user" of the credit account. With no express procedures for revoking such authorization, Defendants each notified Plaintiff that they no longer had any control over the charges made by their husbands and that these charges were, from the dates of notification, "unauthorized." 15 U.S.C. §1643 sets out the criteria for cardholder liability for the unauthorized use of the credit card:

> (a) A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of $50.00...and the unauthorized use occurs before the cardholder has notified the issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise.

> ...For the purposes of this section, a cardholder notifies the issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information.
>
> (d) Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

See also 12 C.F.R. §226.13(b) and (e). Both Appellants notified the Respondent in writing of the unauthorized use. (Jones R. 75, 79, 80, Harlan R. 33, 37). Nowhere in the statute or in the regulations is surrender of any existing credit cards necessary to limit liability. Nor is such surrender a requisite to limited liability as provided for in Paragraph 8 of the cardholder agreement. Return of the credit cards is required to terminate the account and the credit agreement with Respondent under paragraph 10 of the agreement, but not to limit liability for unauthorized use. Appellants thus took all reasonably required steps to notify Respondent of the unauthorized use.

The remaining issue is when the Appellants' liability for their husbands' charges ended - when the bank was notified or when Appellants' own cards were

finally returned. Respondent takes the position that only return of the cards terminates liability, relying on the provision of Paragraph 10 of the agreement, but this agreement must fall before the higher authority of federal statute and regulations when there is a conflict.

This issue was addressed in a recent case before the Federal Trade Commission which is the only reported case on the subject. There, the Commission found an oil company in violation of 12 C.F.R. §226.13(b) for failing to limit the liability of a cardholder where the cardholder had notified the creditor that authorized use of the credit card had been revoked. The oil company had refused to limit liability until the card had been returned to the issuer. In the Matter of Shell Oil Company, 95 F.T.C. 357 (1980). (Jones R. 136B). The FTC is granted authority similar to that of the FRB regarding credit cards and TILA violations, but is limited to merchant credit, including oil companies, while the FRB regulates banks. This decision should also be afforded great deference.

The continued use of the credit card by Appellant Jones has no impact upon the statutory limit of her liability for unauthorized use of the card. She had no desire to terminate the charge account, nor did she

wish to terminate liability for the authorized charges which she placed upon the account. Nowhere in the statute, regulations, or the cardholder agreement is it stated that limited liability for unauthorized use is contingent upon the cardholder terminating the account. Respondent certainly could have terminated Appellants' account at will in accordance with paragraph 10 of the agreement, but apparently chose not to do so.

Appellant Harlan's responsibility was the same. It is disputed whether or not her card was destroyed in an AM/PM Teller machine, but her liability does not hinge on this fact. She was liable for the charges made by her husband because she had made him an authorized user. It was upon her authority that he used her account and it was within her control to revoke his "authorized user" status. Again, nowhere is it stated that to do this she must terminate her account. Given this apparent conflict between the cardholder Agreement and federal law and regulations, the law and regulations must prevail.

Three other courts have considered similar but not identical situations regarding unauthorized use. In Martin, supra, a cardholder was found liable for debts incurred by a business partner when the partner was given the use of, and misused, the Defendants' credit card.

There, the Defendant notified the bank only after the partner's unauthorized use of the card and relied only upon an earlier instruction to the bank that no more than $1,000 was to be charged to his account. The court found him liable, stating that its holding was an attempt to avoid collusion where the "unscrupulous and dishonest cardholder" would "defraud the card issuer." It is clear that these are not such cases. Both Appellants Jones and Harlan notified the bank before the unauthorized use began. Respondent at that time had more control over the use of the cards than did either Appellant. Respondent could have cancelled the accounts and had the cards confiscated by a merchant in Portland (in the case of Jones) or in Denver (in the case of Harlan), much more easily than could the Appellants. In Socony Mobil Oil Co. v. Greif, 197 N.Y. 2d 522 (N.Y. App. 1960), the court felt this extra control by the creditor was a major factor when the cardholder had reported the unauthorized use of a credit card held by his estranged wife. The court held the cardholder husband not liable for his wife's charges after notification to the oil company. A similar result is found in Cleveland Trust Co. v. Snyder, 380 N.E.2d 354 (Ohio App. 1978).

15 U.S.C. §1643 declares limited liability is

warranted where the unauthorized use may occur as a result of "loss, theft, or otherwise". The unauthorized use of Appellants' credit cards, although not resulting from loss or theft, did result from a wrongdoing similar to that found in Socony Mobil Oil, supra. Where the language is clear in the Truth in Lending Act and in the implementing regulations, as well as in Plaintiff's own cardholder agreement, the act must be strictly enforced. No additional terms can be imposed contrary to the interests of the consumer.

Finally, Respondent has utterly failed to meet its burden of proof in showing that use was authorized or that if the use was unauthorized the conditions of liability of 15 U.S.C. §1643(a) have been met. In neither Appellant Harlan or Appellant Jones' case has the required showing been made. Without this showing, Respondent is not entitled to judgment, the District Court's summary judgment findings are inappropriate and should be reversed. This is particularly true regarding Appellant Harlan where Respondent's own affidavit (Harlan R. 33) is inconsistent as to the date when usage became unauthorized.

CONCLUSION

Since notice to Respondent bank ended the

authorized use of Appellants' credit cards by their husbands, their liability for charges after the notice is limited to $50.00 by federal law and regulations. Any contrary language or implication of the cardholder agreement is superceded by statute. The summary judgments of the District Court should be reversed.

DATED this 3rd day of February, 1982.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two copies of the foregoing Brief of Appellant to Roy Williams, Esq., and Suzanne West, Esq., attorneys for Respondent, 800 Walker Building, Salt Lake City, Utah 84111 on this 5th day of February, 1982.

Peggy Eggen