1983

Walker Bank & Trust v. Betty Jones : Brief of Appellants in Support of Petition for Rehearing

Utah Supreme Court

Utah Legal Services, Inc; Attorneys for Appellants;
Roy Williams; Jones, Waldo, Holbrook & McDonough; Attorneys for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF OF APPELLANTS IN SUPPORT OF PETITION FOR REHEARING

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WALKER BANK & TRUST, Plaintiff/Respondent, vs. BETTY JONES, Defendant/Appellant.	:	PETITION FOR REHEARING Case No. 18110
WALKER BANK & TRUST CO., Plaintiff/Respondent, vs. GLORIA HARLAN, Defendant/Appellant.	:	Case No. 18111

Defendants/Appellants Gloria Harlan and Betty Jones hereby petition this court, pursuant to Rule 76(e), Utah Rules of Civil Procedure, to rehear this cause on the following grounds:

1. The majority opinion failed to properly defer to the expertise of the Federal Trade Commission of the administrative agencies delegated by Congress to enforce the Truth in Lending Act.

2. The majority opinion failed to abide by the clear intent of Congress in placing the burden of risk of loss on card issuers rather than on card holders.

3. The majority opinion improperly characterizes the terms of the Cardholder Agreement and the law of apparent authority.

DATED this 28th day of September, 1983.

UTAH LEGAL SERVICES, INC.
Attorneys for Appellants

By: Bruce Plenk
BRUCE PLENK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Petition for Rehearing, postage prepaid, to Roy Williams, Esq., Attorney for Respondent, at 800 Walker Building, Salt Lake City, Utah 84111, this 28th day of September, 1983.

Bruce Plenk

IN THE SUPREME COURT

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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 BELOW

The District Court granted summary judgment to Plaintiff against each Defendant. This was affirmed by this Court in its opinion issued on September 8, 1983.

RELIEF SOUGHT HEREIN

Defendants/Appellants seek rehearing and reversal of this Court's decision of September 8, 1983.

STATEMENT OF FACTS

The facts of these cases are set out in Appellants' initial brief.

ARGUMENT

POINT I

THE MAJORITY OPINION FAILED TO PROPERLY DEFER TO THE EXPERTISE OF THE FEDERAL TRADE COMMISSION, ONE OF THE ADMINISTRATIVE AGENCIES DELEGATED BY CONGRESS TO ENFORCE THE TRUTH IN LENDING ACT.

Both this Court and the United States Supreme Court have stated time and time again that in the interpretation of statutes great deference should be given to the construction of statutes made by the administrative agencies charged with enforcing those statutes. Concerned Parents of Stepchildren v. Mitchell 645 P.2d 629 (Utah 1982); New York Dept of Social Services v. Dublino 413

U.S. 405 (1973). The Truth in Lending Act (TILA) provides that the Federal Reserve Board (FRB) has interpretive powers regarding banks while the Federal Trade Commission (FTC) has similar powers regarding other credit card issuers. 15 U.S.C. §1607(a) and (c). The U. S. Supreme Court has specifically stated that agency interpretation of TILA is dispositive unless "demonstrably irrational" Ford Motor Credit Co. v. Milhollin 444 U.S. 555 (1980).

Yet given this analytical background, this court chose, in its majority opinion, to totally disregard the FTC analysis and order in In the Matter of Shell Oil Co. 95 F.T.C. 357 (1980). This case is the only post-TILA case which specifically addresses the issue in the present case, whether a previously authorized spouse's use of a credit card can become unauthorized use by cardholder notice to the issuer. The FTC considered the analysis utilized by the majority and explicitly rejected it.

Exhibits A and B are excerpted from the public comment record maintained by the FTC to allow interested parties to comment on the proposed consent order which was eventually adopted in the Shell Oil case. Letters from various credit card issuers were received, all of whom took the position that either the card use once authorized continued to be authorized until the account was closed, that apparent authority existed so long as the non-cardholder spouse had the credit card, or that the risk of loss should be on the cardholder not the issuer. Exhibit A is a representative letter from the president of the Consumer Bankers Association. Exhibit B is the official formal reply to

these arguments issued by the FTC in response. The key points of the response, to which this Court should defer, are that notification to the card issuer is sufficient to terminate apparent authority of the "errant" card user both with respect to the issuer and to merchants, that Congress has made a policy determination that the risk of loss in all situations, including revocation of previously authorized use, should be on the issuer, and that the FRB staff has concurred with the FTC analysis and conclusion in this matter. This analysis and response to the specific points raised by the majority opinion requires this Court rehear and reconsider its analysis, particularly since the primary case relied on by the majority, Martin v. American Express, Inc. 361 So 597 (Ala. Civ. App. 1978), is addressed by the FTC and rejected as not on point.

POINT II

THE MAJORITY OPINION FAILED TO ABIDE BY THE CLEAR INTENT OF CONGRESS TO PLACE THE BURDEN OF RISK OF LOSS ON CARD ISSUERS RATHER THAN ON CARD HOLDERS.

There can be no question that Congress intended the card issuer to bear the risk of loss for unauthorized use of credit cards. This position had been articulated by the FTC in its analysis of TILA. See Exhibit B. Commentators have uniformly agreed that this policy choice was clearly demonstrated by Congress and, given the workings of the credit industry and the economics therein, such a policy choice is correct. See Note - Consumer Protection - Credit Card Protection Under the Truth in Lending Act 49 N.C. L.Rev 775 (1971) and Weistart, Consumer Protection in the Credit Card Industry: Federal Legislative

Controls 70 Mich. L.. Rev. 1475 (1972). Given this legislative history it is inappropriate for this Court to revise, reverse, or second guess a clear policy decision of Congress.

POINT III

THE MAJORITY OPINION IMPROPERLY CHARACTERIZES THE TERMS OF THE CARDHOLDER AGREEMENT AND THE LAW OF APPARENT AUTHORITY.

The majority opinion improperly characterizes the Cardholder Agreement. While either Appellant could have, in theory, returned "the cards" as required and terminated the Agreement, neither chose to do so. However Respondent bank, by virtue of the same paragraph 10 of the Agreement could have terminated the Agreement at any time, yet also chose not to do so. Since it was impossible for the cardholders to return all cards given the lack of knowledge of their husbands' whereabouts, this provision may well be unconscionable and unenforceable; it is certainly not good public policy and must fall when set up against clear Congressional intent.

Likewise, the majority opinion mistakes the law regarding apparent authority. The FTC analysis found in Exhibit B establishes that notification to the issuer ends apparent authority as to both issuer and merchants. Weistart, supra, at 1522 also points out that "appropriate action" taken by the cardholder could terminate the apparent authority. Here the notification was the necessary and appropriate action to end any apparent authority. Once the bank was notified apparent authority was ended as to the bank and its failure to take action to notify merchants should result in the loss being placed on the

issuer.

In a similar context, the North Dakota Supreme Court recently held that an issuer was liable for unauthorized charges made on a company card until the company had passed up a reasonable opportunity to notify the issuer that the charges were in fact unauthorized. When no notice was received after that time, the company and its insurer became liable. Transamerica Insurance Co. v. Standard Oil Co. 325 N. W. 2d 210 (N.D: 1982). Here, where notice was given, the issuer should be fully liable. The discussion in Transamerica regarding the end of apparent authority clearly points to reasonable action by the principal as necessary to avoid liability. Here such action was taken. After such notice the bank's failure to take reasonable steps to reduce any loss are another policy indicator that should explain the end of apparent authority. See Standard Oil Co. v. State Neon Company, Inc. 171 S. E. 2d 777 (Ga. App 1969).

CONCLUSION

Congress and the appropriate federal administrative agencies have established a clear policy regarding unauthorized use of credit cards and who should bear the risk of loss for such use. The majority opinion impermissibly ignored these policy determinations and held to the contrary by substituting a different policy judgment. Likewise the majority opinion incorrectly analyzed agency law and the agreement between the cardholder and the bank. These actions are incorrect and should be remedied by granting rehearing to Appellants.

DATED this 28th day of September, 1983.

UTAH LEGAL SERVICES, INC.
Attorneys for Appellants

By: Bruce Plenk
BRUCE PLENK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Brief of Appellants in Support of Petition for Rehearing, postage prepaid, to Roy Williams, Esq. at Jones, Waldo, Holbrook & McDonough, Attorneys for Respondent, 800 Walker Building, Salt Lake City, Utah 84111, this 28th day of September, 1983.

Jan Lewis

CONSUMER
BANKERS
ASSOCIATION

EXHIBIT A

January 4, 1980

Office of the Secretary
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20580

Re: Shell Oil Company Consent Agreement--File #7923260

Dear Ms. Secretary:

The Consumer Bankers Association (CBA), which represents the retail banking departments of over 335 commercial banks holding over 55% of the total consumer credit outstandings held by such institutions, submits the following comments concerning the above-captioned consent order as published in the Federal Register of November 5, 1979, 44 F.R. 63550. Although not under the jurisdiction of the Commission, the membership of CBA, as national credit card issuers, is greatly concerned over the proposed consent order. We believe the order is based on an incorrect interpretation of the Truth in Lending Act and Regulation Z and is fundamentally unfair to credit card issuers.

The Analysis of the Proposed Consent Order to Aid Public Comment, 44 F.R. 63552, states the complaint focuses on instances where a cardholder at one time authorized the card's use by a third person (such as a spouse) but at a later date notified Shell that the formerly-permitted use was no longer authorized. In such situations, according to the Order, Shell violates §226.13(b)(2) of Regulation Z by refusing to terminate the liability of the cardholder immediately after notification of unauthorized use in accordance with §226.13(e).

Section 226.13(e) concerns the notification of the card issuer "...with respect to loss, theft, or possible unauthorized use of any credit card...." §226.13(b)(2) deals with the conditions of liability for unauthorized use of a credit card. The term "unauthorized use," however, is defined only in the section on definitions and rules of construction, §226.2(ii). "Unauthorized use" means the use of a credit card by a person other than the cardholder (1) who does not have actual,

implied, or apparent authority for such use, and (2) from which the cardholder receives no benefit. This definition does not appear directly or by reference anywhere in the Proposed Consent Agreement or accompanying Analysis. For the provisions of §226.13(b) to be triggered, however, there must first be an "unauthorized use." CBA believes that the practice in question does not come within this definition.

According to §226.2(ii), an unauthorized user is one who does not have actual, implied, or apparent authority. Under the rules of Agency, apparent authority is "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement of Agency 2d, § 8 (1958). The cardholder, by providing another user with his card, clearly manifests to third persons (merchants) that user's apparent if not actual, authority to bind the cardholder. The indicia of the authority is the card itself. As long as the agent of the cardholder, in this case the spouse, continues to possess the card and present it to third parties, apparent authority exists.

It is the cardholder, or principal, who bears the burden of terminating the user's apparent authority.

> "Although the principal is entitled to have indicia of authority returned to him upon termination of the relation, if he is unsuccessful in accomplishing this the risk of the deception of third persons who have otherwise no notice of the termination rests upon the principal." Restatement of Agency 2d, § 131 (1958).

Giving notice to the card issuer of termination of a user's authority is not sufficient to terminate the user's apparent authority with respect to hundreds of thousands of merchants nationwide.

The only reported case that addresses the issue presented by this order is Martin v. American Express, Inc., 361 So. 2d 597 (Ala. Civ. App. 1978). In Martin, the cardholder had given his card to a business associate, McBride, with instructions not to charge over $500. Furthermore, Martin wrote to American Express asking that it limit total charges on his account to $1,000. The court correctly framed the issue in this case as whether "unauthorized use" occurred when McBride exceeded the limits set by Martin. The court specifically decided this issue by stating:

> "We hold that in instances where a cardholder, who is under no compulsion by fraud, duress or otherwise, voluntarily permits the use of his (or her) credit card by another person, the cardholder has authorized the use of that card and is thereby reponsible for any charges as a result of that use." Id at 599.

that McBride had apparent authority and the limits set by Martin and therefore the issuer, American Express, was not bound by the limitation set by Martin. In addressing the limitation proposal of Martin, the court stated:

> "Such a policy would place a difficult and potentially disastrous burden on the issuer. We know of no authority which requires a card issuer to perform services of this nature and Martin has provided us with none." Id at 600.

CBA fully concurs with the conclusion reached by the court; it would be almost impossible for many three-party credit card issuers to stop use of a card upon receipt of notification from the cardholder. While it may be possible to control card usage for large purchases requiring authorization, we doubt there is any feasible method to control numerous small transactions occurring nationwide or abroad.

The issue in both the Martin case and in the proposed order is whether a user of a card retained apparent authority to use the card after notification of the card issuer. This issue has been specifically addressed by the staff of the Federal Reserve Board in Public Information Letter Number 822, July 23, 1974, by then Chief of the Truth in Lending Section, Jerauld C. Kluckman. In that letter, the staff stated "if there is actual, implied or apparent authority under state law for such use of the credit card, it is the staff's opinion that the use cannot be unauthorized for purposes of limited liability provisions of Section 226.13(c)." We concur with this interpretation by the staff of the agency charged by Congress with implementing the Act.

Further, we believe that if the consent order is approved in its present form, the Commission will be engaging in creating a federal common law. This concept has been explicitly rejected by the Federal Reserve Board in drafting Regulation Z. The Supreme Court has also rejected the notion of creating a body of federal common law, directing federal courts to rely on applicable state law. Butner v. United States, 440 U.S. 48 (1979). See also United States v. Kimbell Foods, Inc., __U.S.__, 995 Ct. 1448 (1979). We strongly urge the Commission to not further complicate this area by creating a rule of law which is contrary to the position of the Federal Reserve Board, the United States Supreme Court, and the intent of Congress to apply state law tests to the issue of "authority" of credit card users.

That the interpretation proposed in the consent order is an enlargement of both the Act and Regulation can further be

P.L. 95-630 (1978). Section 90 [illegible]ed electronic fund transfer" as one initiated by a person other than the consumer without actual authority...." (emphasis added). This does not include (A) a transfer by a user who was furnished with the means of access to the consumer's account by the consumer, unless the consumer has notified the financial institution that transfers by such other person are no longer authorized. Here, Congress clearly stated that situations like the one at issue in the proposed order would be an "unauthorized use" in the EFT area. Congress did not so state, and did not so intend, with regard to credit cards.

Because of the overwhelming concern of the bankcard industry that the standard set by this order might be used to judge all creditors and will thus place an unwarranted and substantial burden on the industry, we believe the Federal Trade Commission should seek a formal Federal Reserve Board interpretation on the issue presented. In order to expedite this consideration, The Consumer Bankers Association is in the process of preparing a petition to the Federal Reserve Board requesting a formal Board interpretation. We urge the Commission to suspend any further consideration of this consent order at this time and join us in seeking a Board interpretation.

If the Commission feels that it is unable to accommodate this request, we ask that the order be amended to clarify the fact that this order is applicable only to Shell Oil Company and should not be considered as a standard to be followed by the credit industry. We believe that such a disclaimer would assure that no court or other agency would be misled, construing this order as an industry standard.

The Consumer Bankers Association appreciates the opportunity to comment on this consent order and looks forward to hearing from your staff as to the suggestions proposed in this comment.

Sincerely,

Leslie R. Butler

Leslie R. Butler
President

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

EXHIBIT B

19 MAR 1980

Mr. Leslie R. Butler, President
The Consumer Bankers Association
1725 K Street, N.W.
Washington, D.C. 20006

Re: Shell Oil Company
File No.: 792-3260

Dear Mr. Butler:

Thank you for your recent letter commenting on the Federal Trade Commission's consent order in the Shell Oil proceeding. Your letter was placed on the public record pursuant to Section 2.34 of the Commission's Rules and was given serious consideration. After carefully evaluating all the comments received, including yours, the Commission has decided to issue the order contained in the agreement. The following is a reply to the points you raised in your letter.

With respect to the definition of "unauthorized use" in Regulation Z, the Commission believes that previously-authorized use by a third person becomes "unauthorized" when the cardholder revokes the authorization and so notifies the card issuer. This position is consistent with the definition of "unauthorized use" because the third person no longer has apparent authority to use the card after notification of revocation. Notification to the card issuer is sufficient, not only to terminate the third-person's apparent authority with respect to the card issuer, but also with respect to merchants that are the agents of the issuer in the use and acceptance of the issuer's credit cards. This position is consistent with the statutory theory of Regulation Z, as shown by §226.13(e), that notice to the issuer is also notice to the issuer's agents for purposes of the safeguards set forth in §226.13.

The case of Martin v American Express, Inc., 361 So. 2d 597 (Ala. Civ. App. 1978), cited in your comment, involved a different factual situation from the facts alleged in the Shell complaint. In Martin there was not an absolute revocation but instead an attempt by the cardholder to set a maximum limit on the holder's liability for third-

party use. Without either implying concurrence or disagreemen with the Martin holding, the Commission notes that the facts in that case are different from the unconditional and complete revocation as alleged in Shell.

Your letter states that this order, if generally followed in the credit card industry, would place too great a burden on the credit card issuer as opposed to the cardholder. Congress through the Truth in Lending Act and Regulation Z has made a public policy determination that, after notificat to the issuer of loss, theft, or other unauthorized use, the risk of loss for the third-party use is placed on the issuer. After notification it is the responsibility of the issuer to take whatever steps it deems appropriate to minimize or eliminate any loss. As shown by this order, The Commission interprets Regulation Z to place this burden after notification on the credit card company rather than on the cardholder regardless of whether the unauthorized use was a result of loss, theft, or revocation of previously-authorized use.

It is in the public interest that the cardholder be relieved of liability for third-party use after notification to the issuer of revocation of previously-authorized use rather than to continue to hold the cardholder liable until the card is returned to the issuer. In many instances, as with lost or stolen cards, it may be impractical or impossible for the holder to retrieve the card and return it to the issuer, and continuing to hold the cardholder liable would subject the holder to possibly unlimited charges by the third person that the holder is powerless to control. The card issuer, on the other hand, can protect itself through merchant notification and other loss-prevention measures. Further, the order specifically does not aid the cardholder if the cardholder has committed fraud or received benefit from the third-person use, thus protecting the card issuer from unscrupulous holders. Finally, nothing in this order prohibits the issuer from attempting to hold the third party liable for these charges.

Finally, you suggest that consideration of this order be deferred until a formal Federal Reserve Board interpretatio can be obtained. However, this matter was referred to the Commission from the Board staff, and the Commission has been informed by Board staff that the Commission's legal interpretations of this matter is correct. Thus, the Commission believes that nothing would be gained by such a delay for formal interpretation.

Your other points raised in your comment have been considered. However, for the reasons stated in this letter, the Commission believes this order is appropriate and is based upon a correct interpretation of Regulation Z.

In sum, the Commission has decided that it is in the public interest to issue the agreed-upon order.

Your interest in bringing your comments to the attention of the Commission is appreciated.

By direction of the Commission.

Carol M. Thomas
Secretary