

The Liability of the Holder of a Credit Card for Unauthorized Purchases under Swiss Law: Shall we Follow the American Model?

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With the constant growth of the credit card business, the liability of the cardholder in the case of unauthorized purchases is becoming a real concern. In Switzerland, there is no statute dealing with this issue. Courts simply apply general rules of contract law whenever problems arise. And the different standard terms of issuance still do not sufficiently protect cardholders. More specifically, the consequences of the cardholder's negligence remain unclear and the rules governing the cardholder's liability in case of unauthorized purchases via the tele-

phone or via the Internet is not clearly defined. By contrast, the American legislator has strongly protected cardholders against unauthorized use of the credit card for thirty years. The Truth in Lending Act imposes strict conditions on the cardholder's liability. This article argues that Swiss cardholders deserve better protection and that legal regulations, following the American model, might become necessary unless credit card issuers take further positive steps to deal with consumer liability concerns in the near future.

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Introduction¹

Cash is a poor man's credit card²

Swiss law is silent on the question of the cardholder's liability for purchases made by another person on his credit card. No specific statute addresses this issue. Courts simply apply general rules of contract law whenever problems arise. Until now, very few cases have been reported in this field, either in the *cantonal* Courts or in the federal

Court³. Swiss law on this issue remains at a relatively early stage of development. This is partially because credit cards have only become broadly used in the last fifteen years.

By contrast, the use of credit cards has been important in the United States for many years and has reached enormous proportions the last two decades. Credit cards are an American creation. The legal rights, duties, and obligations of both the issuer and the holder of credit card have been at issue for many years in American law. The Truth and Lending Act and Regulation Z⁴ provide specific answers to these questions, and both the State and federal courts have had several occasions to discuss the content and limits of the rights and obligations of the parties to a credit card agreement.

¹ The author acknowledges the helpful comments on early drafts received from *Elizabeth Warren*, Professor of Law, Harvard University, and from *Oran Doyle*.

² *Newsweek*, August 22, 1966, at 84-86.

³ The first mention of a credit card in a federal case was, *M. v. Ministère public du canton de Vaud*, ATF 110 IV 20, dates from September 28, 1984 and concerned a criminal offence. Only one federal case about the unauthorized use of a credit card has been reported, *Diners Club (Suisse) SA v. Firma X*, ATF 113 II 174, from March 31, 1987. It deals exclusively with the relationship between the credit card issuer and the merchant. See also, on the credit card's field, a recent case, ATF 124 III 305.

⁴ The Truth in Lending Act is Title I of the Consumer Credit Protection Act, 15 U.S.C. (*United States Code*) §§ 1601 et seq. Regulation Z is the implementing regulation promulgated by the Board of Governors of the Federal Reserve System, 12 C.F.R. (*Code of Federal Regulations*) § 226 (drawing its authority from 15 U.S.C. § 1604). For an introduction to Consumer Credit Legislation, see *Ralph C. Clontz, Jr. & James H. Pannabecker*, *Truth-in-Lending Manual 1-1 et seq.* (rev. ed., 1999).

This article discusses the liability of the cardholder in the case of unauthorized purchases. This issue has been chosen because, as stated above, the Swiss legislator has not yet intervened on this question. Other problems, such as disclosures about credit terms and costs or privacy have already been treated in specific statutes in both countries⁵. Moreover, with the constant growth of the credit card business in Switzerland, the liability of the cardholder in the case of unauthorized purchases, particularly on the Internet, is becoming a real concern.

This article is divided into three parts. Part I provides a short survey of the credit card history in the United States and, developing this, presents the American approach concerning the liability of the cardholder in the case of unauthorized purchases. Part II mirrors part I: it discusses briefly the credit card industry in Switzerland and offers some comments on its legal regime. Part III turns from description and critic to prescription. It argues (i) that the Truth in Lending Act provides some useful answers concerning the issue at stake and (ii) that legal regulation might become necessary in Switzerland in the near future, if all credit card

issuers do not take further positive steps to deal with consumer liability concerns. Part IV concludes.

I Credit Cards in the United States

A Definition

The Truth in Lending Act, as amended on October 26, 1970, states that the credit card means «any card, plate coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit»⁶. This definition allows us to distinguish credit cards from other cards which do not have a credit component, such as offline debit cards, and online debit cards (ATM cards), which are designed for the transfer of money from the account of the cardholder to the supplier, provided that his account will cover the transaction, and for drawing cash from a machine (Automated Teller Machine, ATM), by using the card and, in the case of ATM cards, a personal identification number (PIN). It also distinguishes credit cards from cheque-guarantee cards, the only goal of which is to assure the acceptance of checks⁷.

B History

According to the number of parties involved in the transaction, credit cards can be divided into two types, the two-party and the three (sometimes four) -party cards⁸. The two-party cards appeared around 1910, responding to the need for credit arising from the widespread sale of new consumer products, such as automobiles, washing machines and vacuum cleaners. Retailers, oil companies and airlines issued progressively specific credit cards. Their purposes were to identify a customer through a charge account and to provide merchants with a

⁵ In the United States, privacy and disclosures about credit terms and costs are set out in the Truth in Lending Act, from May 29, 1968, 15 U.S.C. §§ 1601 et seq. and its following amendments, in particular the Fair Credit Reporting Act, from October 26, 1970, and the Fair Credit Billing Act, from October 28, 1974. In Switzerland, the question of privacy is treated in the federal statute on the protection of data from June 19, 1992 (*Loi fédérale sur la protection des données, LPD*); Credit term and costs in the federal statute on consummation credit, from October 8, 1993 (*Loi fédérale sur le crédit à la consommation, LCC*). Amendments (dated 14 December 1998, FF 1999 2879) are currently examined by the Swiss parliament. However, in Switzerland, credit cards function first as a mechanism for making payment and not as a device for extending credit (this kind of credit card is generally described as a charge card in the United States, see *Helmut Merkel, Das Recht der Kreditkarte in den USA 60* [Berlin, 1990]). Thus, the federal statute on consummation credit (see art. 6 al. 1g LCC) generally does not apply to the credit card agreements. Most issuers require the cardholder to pay off each account in a single payment. According to *Hans Giger, Kreditkartensysteme 148* (Zürich 1985), we cannot even speak of credit in such cases, because a thirty-day delay of payment has now become the rule.

⁶ 15 U.S.C. § 1602(k). See also the substantially similar definition in the implementing Regulation Z, 12 C.F.R. § 226.2(a)(15).

⁷ For more details, see 12 C.F.R. § 226.2(a)(15); *Ralph C. Clontz, Jr. & James H. Pannabecker*, supra note 4, 4–11.

⁸ For a detailed analysis of the credit card and the relation between the issuer, merchant, and holder, see *Donald H. Maffly & Alex C. McDonald*, Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 *California Law Review* 459 (1960).

mechanism for keeping a record of customer purchases⁹.

The two-party cards were the forerunners of the three-party cards issued by major oil companies since the 1920s¹⁰ and by the independent «universal» credit card companies. The goal of the three-party card is to offer to its holder the possibility of purchasing goods and services at a large number of establishments across the country. Diners Club launched the first universal credit card in 1949, followed nine years later by American Express, the traveler's check number one, and by Carte Blanche. The convenience of a single card that could be used for a variety of good and services considerably stimulated consumer interest. In the 1960's, the credit card industry took a new dimension with the creation of two national networks of bank credit cards, one licensed by Bank of America and its BankAmericard – called Visa since 1976 –, the other by the Interbank Card Association and its Master Charge – known as MasterCard since 1980. Growth of the bank credit cards also brought concentration: in the late 1970's, fifty banks issued over half of all bank credit cards – usually a Master Charge or a Visa – in the United States¹¹. Hence, the tripartite relationship became often a four-party relationship, including an affiliate bank in addition to the issuing bank¹², serving as a central agency for the billing and collecting of cardholder's accounts. Since then, the credit card market has not stopped to expand. There are now over a billion credit cards in circulation, which represents a dozen credit cards for every household in the United States¹³. Thus, despite the proliferation of both

ATMs since the 1980's¹⁴ and offline debit cards since the mid-1990's¹⁵, the use of credit cards continues to grow. A new trend has been to develop credit cards which can double as debit cards¹⁶. Recently, the Internet has brought a new and extremely profitable market for universal credit cards, by some distance the primary mode of payment on the web¹⁷. The online shopping is growing: the Strategis Group found that average monthly spending on online purchases was \$68.50 in 1999¹⁸.

C The Liability of the Holder of a Credit Card for Unauthorized Purchases

1) *The Truth in Lending Act regime*

Because of the increase in the volume of credit card transactions and thus of unauthorized purchases, most credit card issuers inserted a specific

¹⁴ See *Lewis Mandell*, supra note 9, at 129; *David A. Balto*, Can the Promise of Debit Cards be Fulfilled, 53 *Business Lawyer* 1093 (1998).

¹⁵ Visa and MasterCard became involved in the offline debit card market in or around 1979. The offline debit networks (Visa check and MasterMoney) have existed for more than a decade but offline debit card transactions have begun to grow since the mid-1990s. In 1998, there were approximately sixty million offline debit cards in circulation, see *David A. Balto*, supra note 14, at 1097.

¹⁶ See *Barkley Clark & Barbara Clark*, *The Law of Bank Deposits, Collections and Credit Cards*, vol. 2 15–3, 15–31 (rev. ed., 1999); *Helmut Merkel*, supra note 5, 62.

¹⁷ See *Janine S. Hiller & Don Lloyd Cook*, From Clipper Ships to Clipper Chips: The Evolution of Payment Systems for Electronic Commerce, 17 *Journal of Law and Commerce* 53 (1997). Offline debit cards, which function in the same way as credit cards (the use of a personal identification number is not required; transactions flow over the credit card network, and access to the consumer's account is not immediate), are also widely used, see *Brian W. Jones*, The Risk of Paying over the 'Net', 12-Dec. *Utah Bar Journal* 8 (1999).

¹⁸ See *Internet Heads for 1 Billion Users* (visited June, 2000), <http://cyberatlas.internet.com/big_picture/geographics/article/0.1323.5911_326181.00.html>. Transactions conducted on the Internet – both by consumers and between businesses – represented about 1% of Visa's transaction volume in 1998, or about \$6 billion in spending. Though electronic commerce is «a blip» in Visa's statistics right now, a Visa's representative predicted it would amount to \$300 billion of the projected \$1 trillion spending in the US in a few years, see *Jennifer Kingdon Bloom*, Double Digit Gains for 1998 In Spending On Bank Cards, *American Banker* 1, 14 (Vol. 164, No. 62; Apr. 1, 1999).

⁹ See *Lewis Mandell*, *The Credit Card Industry: A History* xii (Boston 1990).

¹⁰ See *id.* at xii; *Eric E. Bergsten*, *Credit Cards: A Prelude to the Cashless Society*, 8 *Boston College Industrial & Commercial Law Review* 485 (1966).

¹¹ See *Lewis Mandell*, supra note 9, at xv-xvi; *John C. Weistart*, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 *Michigan Law Review* 1476, 1477 et seq. (1972).

¹² See *Edward W. Reed & Edward K. Gill*, *Commercial Banking* 337–342 (4th ed. 1989). For an early example of this type of arrangement, see *Franklin Nat. Bank v. Kass*, 19 *Misc.2d* 280 (1959).

¹³ Estimates from 1996 *Statistical Abstract*, Table 793, *Credit Cards – Holders, Numbers, Spending and debt, 1990 and 1994, and Projections, 2000*; *Statistical Abstract*, Table 66, *Households, Families, Subfamilies, Married Couples, and Unrelated Individuals 1960–1995*.

provision intended to shift much of the burden for fraud losses onto consumers. These provisions held the customer liable for all purchases until the card was surrendered to the issuer¹⁹ or until he had given the issuer written notice of the loss or the theft²⁰. At common law²¹, courts' reactions were mixed: some courts were reluctant to enforce these provisions, others were not. The confusion created by the common law decisions indicated a need for uniform legislation in this area, realized through the 1970 amendments of the Truth in Lending Act²².

Section 1643 of the Truth in Lending Act specifically protects cardholders against unauthorized use of their card and limits their liability. According to that disposition, the cardholder is liable for the unauthorized use only if the card is an accepted one, if the unauthorized use of the card has occurred or may occur as the result of loss, theft, or other²³ and only to the extent of fifty dollars²⁴. Moreover, the card issuer must give adequate notice to the cardholder of the potential liability, and

must provide the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or the theft of the credit card. The card issuer is also required to provide a method whereby the user of such card can be identified as the person authorized to use it. Thus, the liability of the cardholder depends on some level of security being adopted by the card issuer²⁵. Finally, section 1643 (b) provides that the burden of proof in establishing cardholder liability is on the issuer. Thus, the American legislator has strongly protected cardholders against unauthorized use of the card and invalidated former issuer's provisions.

The federal credit card statute clearly frustrates the card issuer who is seeking recovery when the card has fallen into the hand of an unauthorized user. The policy argument is that it is preferable for the issuer to bear the losses arising from fraudulent use of credit cards²⁶. The US Congress seems to have reached its goal – to limit the cardholder liability without increasing the economic and social cost resulting from unauthorized use of credit cards –: consumer use of credit cards has never stopped to expand since the beginning of the 1970's.

2) Authorized and unauthorized use

Under the federal legislation, the only way for the card issuer to avoid the limitation on the

²⁵ If the issuer fails to provide such a method, the cardholder does not bear the fifty dollars' responsibility in case of unauthorized use. See *Crestar Bank, N.A. v. Cheevers*, 744 A.2d 1043, 1049 (D.C. Cir. 2000). Thus, the cardholder does not bear any responsibility in case of unauthorized purchases without use of the tangible card itself, e.g. on the phone or on the Internet, because no means of identification is currently provided. See Official Staff Interpretation, Commentary 226.12(b)(2)(iii)-3; *Ralph J. Rohner*, supra note 23, 10–16; *Elizabeth Renuart & Kathleen E. Keest*, *Truth in Lending* 316 (4th ed., 1999). VISA and MasterCard have been teaming together since 1996 to develop their own protocol for safe credit card transactions over the Internet. The Secure Electronic Transaction (SET) protocol is designed to establish an open industry standard to enable secure credit card transactions over the Internet. See *Visa and MasterCard Select Certco/Spyrus to Create Root Certificate Authority System for SET Electronic Commerce* (visited June, 2000), <<http://www.visa.com/cgi-bin/vee/av/news/PRelco051397.html?2>>.

²⁶ See *Minskoff v. American Express Travel Related Services Company, Inc.*, 98 F.3d 703, 709 (2d Cir. 1996).

amount of liability is to allege and to prove that the use of the card was authorized²⁷. As a general principle, the cardholder who is not under any compulsion by fraud, duress or otherwise, is responsible for any charges as a result of a voluntary permitted use of a credit card by another person²⁸. Once he has given authority to another person, the cardholder is responsible under agency principles even when the agent has exceeded the authority granted by the cardholder and made charges which were not contemplated by him. However, the question of whether the particular use was unauthorized remains subject to argument. It has been – and still is – the main issue under the new regime²⁹.

3) The question of negligence

For our discussion, one important point is that, in American law, under the regime of the Truth in Lending Act, the negligence of the cardholder is not directly relevant³⁰. If the cardholder does not notify promptly the loss or theft of his card to the issuer, his responsibility is still limited to fifty dollars. However, negligence can play a role in the sense that a court could in certain circumstances consider that by his negligent behavior the cardholder has created «apparent authority» or ratified the charges. In a recent case³¹, the Court of Appeals for the Second Circuit expressly refers to cardholder's negligent acts to estopp him from denying apparent authority. The court held that the credit card holder's failure to examine credit card statements that would reveal fraudulent use of the card constitutes negligent omission that creates

apparent authority that would otherwise be considered unauthorized³².

II Credit Cards in Switzerland

A Definition

There is no specific civil statute devoted to credit cards in Switzerland, nor is there a legal definition of the term. However, Swiss law has developed a general concept of «papier-valeur» (which covers both securities and negotiable instruments) defined at article 965 of the Code of Obligations, and legal writers have examined whether credit cards fall under this definition. The conclusion they have reached is that the credit card is not a «papier-valeur», because it is not negotiable³³. As the «papier-valeur» concept is a tricky one, much attention has been devoted to the question of whether a credit card was a «papier-valeur»; less attention has been paid to the overall regime. It is admitted that the credit card is the proof of the existence of a credit card agreement³⁴ and evidences the right of the cardholder to access the network created by the issuer³⁵, as well as the obligation of the issuer to compensate the merchants

³² See *id.* at 709. See also *Transamerica insurance company v. Standard Oil Company (Indiana)* 325 N.W.2d 210, 215 (N.D. 1982).

³³ See *François Bohnet*, *La théorie générale des papiers-valeurs: passé, présent, futur*, N° 456 (Ph.D. dissertation, Neuchâtel 1999, forthcoming), and the references. It is worth noting that in the first reported American case about a lost credit card, *Wanamaker v. Megary*, 24 Pa. Dist. 778, 779 (Pa. Munic. Ct. 1915), the court compared a credit coin (the first credit card, see *Larry Weber*, supra note 21, at 220) to a «negotiable instrument payable to bearer». However, some years later, in *Lit Bros. V. Haines*, 98 N.J.L. 658 (Sup. Ct. 1923), a New Jersey court rejected the negotiable instrument theory and ruled that the «coin» was simply an identification card. American legal writers do not consider the credit card as a negotiable instrument, see *Edward O. Spain*, supra note 21, at 87.

³⁴ For the equivalent description in an old American case, see *Gulf Refining Co. v. Plotnick*, 24 Pa.D. & C. 147, 150 (C.P. 1935): the credit card is an identification card representative of the contractual relationship between the parties.

³⁵ As stated by US courts, a credit card gives the holder the privilege of charging items at establishments associated with the issuer. See *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974); *United States v. Kasper*, 483 F.Supp. 1208, 1210 (1980).

²⁷ The statute, 15 U.S.C. 1602(1), contemplates that a holder may authorize another to use the card. See *United States v. Kasper*, 483 F.Supp. 1208, 1210 (1980).

²⁸ See *Martin v. American Express, Inc.*, 361 So. 2d 597 (Ala. Civ. App. 1978).

²⁹ For an overview of how the American judiciary dealt with the issue, see *Mary Elizabeth Matthews*, *Credit Cards: Authorized and Unauthorized Use*, 13 Annual Review of Banking Law 233, 252 et seq. (1994).

³⁰ See *John C. Weistart*, supra note 11, at 1525 et seq. According to *Ralph J. Rohner*, supra note 23, 10–16, «negligence is simply irrelevant». See also *Hal S. Scott*, *New payment systems: a report to the 3–4–8 Committee of the Permanent Editorial Board for the Uniform commercial code 79* (1978). As it transpires, we will see that negligence is indirectly relevant.

³¹ *Minskoff v. American Express Travel Related Services Company, Inc.*, 98 F.3d 703 (2d Cir. 1996).

generally³⁶ on the basis of the sale slips signed by the cardholder³⁷.

B History

In the 1960's, Swiss retailers began to offer credit cards to their clients³⁸, in order to stimulate sales. In that period, Diner Club first appeared in Switzerland, through a franchise agreement with Diner Club Suisse SA, in Zurich. This card was first used by American tourists, and then, in the late 1960's, by an equal proportion of European tourists³⁹. American Express also moved into Switzerland during that time and signed an agreement with four major Swiss banks in 1968⁴⁰. After the American travel and entertainment cards, the American bankcards, Visa and MasterCard (the latter through an interchange agreement with Eurocard⁴¹) started their expansion in the 1970's. Bank and T & E credit cards⁴² have been widely used in Switzerland since the 1980's and have expanded constantly since then⁴³. Debit cards made their

appearance in the 1980's and now proliferate, in particular the ec card⁴⁴. They have developed more quickly in Europe than in the United States⁴⁵. In Switzerland, debit cards are a real competitor to credit cards because both function as a mechanism for making payments. But it seems that the credit card market has not yet reached its limit and will continue to develop. And as in the United States, the Internet has brought a new and extremely profitable market for credit cards⁴⁶.

C The Liability of the Holder of a Credit Card for Unauthorized Purchases

Credit cards are a kind of «titre de créance»⁴⁷ (document acknowledging a debt), distinguished by its approach to identification («légitimation») of the holder. The standard terms of Eurocard-MasterCard and Visa state that identity papers *may be* required to prove the lawful title of the holder, a less constraining means for identifying the cardholder may therefore be judged sufficient. The means is the presentation of the card and the correspondence of the signatures figuring on the back of the card and on the sale slip⁴⁸. Thus, the credit card is a «titre de créance» with a signature's identification clause («clause de légitimation à la signature»). The clause is considered «simple», because other means for identifying the cardholder

³⁶ There is no charge slip when the purchase occurs on the phone or on the Internet. The cardholder communicates the card number and authorizes a draft that instructs the card issuer to pay the vendor.

³⁷ The charge slip is a «titre d'assignation» (order chit).

³⁸ For instance the *Globus-Kontokarte*, see *Gerd Joseph Weisensee*, *Die Kreditkarte – ein amerikanisches Phänomen* 158 (Bern and Stuttgart 1970); *Alfred Keller*, *Kreditkarten* 5 (Diessenhofen 1981).

³⁹ See *Gerd Joseph Weisensee*, supra note 38, 154.

⁴⁰ See *id.*

⁴¹ Eurocard appears in Switzerland in 1976, see *Hans Giger*, supra note 5, 107; *Alfred Keller*, supra note 38, 4. On the subject of Eurocard, see *Heinz Reyer*, *Eurocard* (Stuttgart, 1976).

⁴² A significant portion of Eurocard-MasterCard and Visa cards are issued by the two major Swiss banks, UBS and Crédit Suisse. More recently, the latter also offers the American Express card. On «Eurocard-MasterCard», see New contractual basis for the repositioning of the Telekurs Group and the banks in the credit card business (visited June, 2000), <<http://www.europay.ch/infocenter/pressarchive/msg-tk-1299-en.html>>.

⁴³ According to Europay, 1 650 000 people possessed a Eurocard-MasterCard at the end of 1999, while 1 161 000 people possessed a different credit card at the end of 1997. At the end of 1984, the total number of credit card holders was 485 000, and at the end of 1981, 260 000, see *Hans Giger*, supra note 5, 63, and *id.*, *Kreditkarten im Prüfstand von Wirtschaft und Recht, Innominatverträge, Festgabe zum 60. Geburtstag von Walter R. Schlupe* 262 (Zürich 1988); <<http://www.europay.ch/infocenter/facts/facts-en.html>> (visited June, 2000).

⁴⁴ Which has replaced the bancomat card. For historical developments, see *Albisetti/Boemle/Ehrsam/Gsell/Nyffeler/Rutschi*, *Handbuch des Geld-, Bank- und Börsenwesens der Schweiz* 65–66 (4th ed., Thun 1987); *Eduard Straub*, *Electronic Banking, die elektronische Schnittstelle zwischen Banken und Kunden* 358 et seq. (Ph.D. dissertation, St Gallen 1990).

⁴⁵ See *David A. Balto*, supra note 14, 1094. In Switzerland, however, offline debit cards which do not require the use of a personal identification number (PIN) and which are sent via a credit card system, as the ones sold by Visa and MasterCard in the United States, have not been developed.

⁴⁶ All the more since offline debit cards which do not require the use of a personal identification number (PIN), which are used on the Internet in the United States, do not exist in Switzerland.

⁴⁷ This is the general understanding, see *Hans Giger*, supra note 5, 159. The opinion of *Alfred Keller*, supra note 38, 206, 238, is more qualified.

⁴⁸ In Switzerland, Visa cards have been able to bear the photograph of the holder since 1998. In such a case, there is a third means of identification, even if the standard terms of Visa do not specify anything about it.

may be required⁴⁹. Thus, the debtor or his agent is free when he has performed his obligation in favour of a holder identified through the presentation of the card and the correspondence of the signatures figuring on the back of the card and on the sale slip⁵⁰, even if he has performed his obligation in favor of an unlawful holder, for instance a thief. Hence, the cardholder is contractually bound to pay the bill. The identification clause derogates to the fundamental rule of the law of identification («droit de la légitimation»), according to which a debtor does not pay validly if he is not paying to his creditor or his agent⁵¹. The signature's identification clause⁵² permits quick contacts between contracting parties who do not know each other. Because the merchant can limit his inquiry to a formal identification of the holder, the lawful cardholder bears the risk of the loss or the theft of the card⁵³. However, the standard terms of Visa, Eurocard-MasterCard and American Express specify that the cardholder is not liable for any purchase made after the announcement of the loss or the theft⁵⁴, and that his liability is limited to one hundred Swiss francs liability (the new standard terms of certain banks, in particular those of Crédit Suisse for its Visa, Eurocard-MasterCard and American Express cards now go so far as to exclude any

liability⁵⁵) for the case of unlawful uses made between the loss or the theft of the card and the notification to the issuer, provided that the cardholder had fulfilled some obligations of diligence, in particular not having let others have access to the card and having notified immediately the issuer of the loss or the theft of the card. Thus, the liability of the cardholder during the period preceding the notification to the issuer remains somewhat vague because these two obligations of diligence are not easy to circumscribe: what does it mean exactly not to let anybody have access to the card? What must be considered an immediate notification – a notification made directly after the loss took place, or an announcement made promptly after the discovery of the loss? If legal writers can propose some schemes⁵⁶, only a detailed case law could bring clear guidance on these questions. However, until now no federal case has been reported in this field, perhaps because of the bad publicity that suits could bring to the issuer⁵⁷. Another reason could be that in unclear cases issuers might propose to cardholders that they bear a limited part of the loss, propositions that they might accept in fear of being held liable for the total loss. Thus, there is virtually no authority, judicial or statutory, that directly controls these legal problems. The new standard terms of Crédit Suisse for its Visa, Eurocard-MasterCard and American Express cards⁵⁸ seem more precise concerning the notification require-

⁴⁹ An identification clause is considered «double» when the debtor can require no other means for identifying the creditor than the one specified. For example, a check is a «titre de créance» with a «double» identification clause (at the holder or at the order of the holder).

⁵⁰ The correspondence of the signatures must be «reasonable». The check should be quick in view of the custom in this field, see *Hans Giger*, supra note 5, 160, footnote 83; *Alfred Keller*, supra note 38, 228.

⁵¹ See *François Bohnet*, *La théorie générale des papiers-valeurs: passé, présent, futur*, N° 422 (Ph.D. dissertation, Neuchâtel 1999, forthcoming), and the references.

⁵² Signature and photograph's identification clause in some cases for Visa.

⁵³ See *Heinrich Honsell*, *Schweizerisches Obligationenrecht, Besonderer Teil*, § 41 III 3 (5th ed., Bern 1999); *Jäggi/Druey/von Greyerz*, *Wertpapierrecht unter besonderer Berücksichtigung von Wechsel und Check* 84 (Basel and Frankfurt, 1985).

⁵⁴ After the announcement made to the issuer, it might in any event be difficult for him to rely on the identification clause because the principle of good faith requires him to inform the merchants of the loss or the theft. On this question, see also *Alfred Keller*, supra note 38, 142, 265.

⁵⁵ For some comparisons, see COOP Bank's standard terms, art. 16 (edited in January 2000), <http://www.viseca.ch/1g/de/products/eurocard/coopbank_ecasilber/> (visited June, 2000); Kantonalbank's standard terms, art. 16 (edited in January 2000), <http://www.viseca.ch/1g/de/products/eurocard/kantonalbank_ecasilber/> (visited June, 2000); Crédit Suisse's standard terms, art. 1.11 (edited in July 1999), <http://www.credit-suisse.ch/form/en/cards/download/bedingungen_visa_dt.pdf> (visited June, 2000), <http://www.credit-suisse.ch/form/en/cards/download/bedingungen_amex_dt.pdf> (visited June, 2000); UBS' standard terms, art. 6 (edited in April 2000), <<http://www.ubs.ch/e/pcc/cards/credit.html>> (visited June, 2000).

⁵⁶ See in particular *Alfred Keller*, supra note 38, 269 et seq.

⁵⁷ The scarcity of litigation involving misuse of credit cards prior to 1970 in the United States has been attributed, among others, to practical business reasons, see *R. David Lester*, *Unauthorized Use of Credit Cards and Some Related Questions: What Problems Remain?*, 62 *Ky. L.J.* 881, 885 (1974); *Daniel E. Murray*, supra note 21, 829.

⁵⁸ Edited in July 1999.

ment: they provide that the loss must be announced as soon as discovered, but at the latest within thirty days after receipt of the statement showing the fraudulent charges⁵⁹. Because the position of the cardholders stays partially unclear, there still exists a popular assumption that the possession of a credit card does not go without risk.

That assumption is all the more justified since the standard terms of Visa and Eurocard-MasterCard provide that purchases can result from the transmission of the name, number and expiration date figuring on the card⁶⁰, purchases which, in case of misuse, do not seem to be covered by the provisions prevailing in case of loss or theft of the card, when there is no actual loss or theft of the card⁶¹. Thus, according to that identification clause, the debtor or his agent is free once he has performed his obligation in favor of a person identified through the transmission of the name, number and expiration date figuring on the card. With the increasing number of transactions occurring on the phone or on the Internet, the risks for the cardholder are not merely theoretical⁶², even though for business reasons the credit card issuers are inclined to keep the risk. Part. III of this paper argues that credit card issuers are in the best position to bear these risks and that legal regulation along the lines of the American model could be useful.

⁵⁹ In the precedent standard terms (from Apr., 1997), this precision was only given in the special conditions applying to cards authorized for commission-free cash withdrawals.

⁶⁰ This is a new category of identification clause, independent of a document.

⁶¹ One speaks of «identity theft»: the thief learns the credit card number and expiration date of the consumer's card and shops on the Internet or on the phone and charges purchases to the consumer's account, see *Mark E. Budnitz*, Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate, 49 South Carolina Law Review 858-859 (1998).

⁶² It is worth noting that, last year, according to Price-WaterhouseCoopers, fraudulent e-commerce transactions made up half the annual fraud total in the United States, see *Neil McIntosh*, Fear of Fraud Deters Most Europeans from Buying Online: Consumers Credit Cards Are not Designed to Stop Web Theft, The Guardian, Thursday, February 10, 2000.

III A Solution for Switzerland?

Not only credit cards are an American creation but also the Swiss major credit card issuers are affiliates of the American giants or collaborate with them. Nowadays, the same credit cards are accepted all over the world. It is thus not surprising that American law has already had some influence on Swiss credit card agreements. In particular, the cardholder's limited liability in case of unauthorized purchases is the result of the American legal framework. Because they feared judicial hostility to liability-shifting clauses or legislative intervention as in the United States, the Swiss issuers decided to limit on their own initiative the cardholder's liability in case of unauthorized use of the card. The situation was different in the beginning of the 1970's: the standard terms of Diners Club and Eurocard did not limit the cardholder liability, and those of American Express only if the loss was superior to 425 Swiss francs⁶³. However, if the American precedent has persuaded the Swiss issuers to limit the cardholder's liability, the protection is weaker than in the United States. As stated above, the 1970 amendments of the Truth in Lending Act have created a strict limitation to the cardholder's liability. The difference between the Swiss common contractual regime and the American legal regime do not lie in the maximum amount of liability (zero liability or 100 francs depending on the issuer / 50 dollars⁶⁴). It rather lies in three other facts. First, the American issuer must provide a method whereby the cardholder can be identified as the person authorized to use it. This requirement completely excludes the cardholder's liability in case of unauthorized use through the phone or the Internet, because such a means is not currently procured (the SET system, if available, is not yet widely used,

⁶³ These standard terms are reported by *Gerd J. Weisensee*, supra note 38, 271 et seq. In the United States, American Express had decided to limit the cardholder's liability to a maximum of \$100 in 1965, prior to the enactment of the Fair Credit Reporting Act. See *Ahmed A. Al-Melhem*, The Legal Regime of Payment cards: A comparative Study between American, British and Kuwaiti Law, with Particular Reference to Credit Cards 189-190 (Ph.D. dissertation, Exeter 1990).

⁶⁴ In April 2000, Visa has eliminated cardholder liability for unauthorized charges in the United States, see supra note 24.

and not mandatory)⁶⁵. In contrast, we have seen that the Swiss credit card agreements do not expressly address this point and seem to shift the entire burden of unauthorized use to the cardholders, if the card has been neither lost nor stolen. One could possibly argue that on this question the standard terms of the credit card issuers are formulated in an abusive way in the sense of art. 2 al. 2 CCS (Swiss Civil Code), and also that they violate art. 8 LCD (Federal Law Against Unfair Competition), because the «identity theft» does not follow the common regime of loss and theft of the card⁶⁶. However, it would not even be satisfactory for a court to apply the standard regime provided in the case of loss or theft⁶⁷, because a cardholder is provided with no means of identification⁶⁸ in the case of purchases on the phone or on the Internet and so cannot control the risk. Second, negligence is not directly relevant to the operation of the American statutory rule, and third, the issuer has the burden of proving all the preconditions to liability. Thus, the issuer must prove that the use was authorized or, if unauthorized, that the conditions of liability have been met. In Switzerland, because negligence is directly relevant according to the issuer's standard terms and because the absence of negligence must be proven by the cardholder if he wants to take advantage of the limited liability provision, the cardholder's protection is imperfect, all the more so since negligent behavior is difficult to define precisely.

Some will argue that the American solution is too harsh on the credit card issuers. The dramatic

⁶⁵ See supra, 25.

⁶⁶ On this point, see *François Bohnet*, Achats sur Internet: quelle protection pour le titulaire d'une carte de crédit?, PJA 10/2000, at 1207.

⁶⁷ Also in the case of the Eurocard-Mastercard, Visa and American Express cards of Crédit Suisse, for which there is no liability in the case of loss or theft, because of the condition of due care.

⁶⁸ In total, 18 countries are participating in the European SET programs. See SET emerging worldwide (visited June, 2000), <<http://www.visa.com/nt/ecomm/security/emerging.html>>. SET has been introduced in Switzerland in October 1998, see 7 October 1998: In Switzerland, all SET Components have the SET Mark (visited June, 2000) <<http://www.set.ch/news/news-en.html>>. The number of SET-compliant shops will rapidly increase, but as long as online shopping will be allowed without requiring the SET identification, risks will still exist for the cardholder.

expansion of the credit card business in the United States since the enactment of the Fair Credit Reporting Act shows the weakness of this argument. The strict limitation of the cardholder's liability has not resulted in a diminution of the credit cards' offer. Credit card usage has never stopped to grow in the United States for the last thirty years⁶⁹.

Because they are well protected for thirty years, Americans do not fear fraud for a long time and thus have widely solicited credit cards. The cardholder protection is certainly one of the key of the prosperity of any credit card business. And the most profit they get, the better are the issuers to bear the losses due to fraud. The new standard terms of Crédit Suisse for its Visa, Eurocard-MasterCard and American Express cards follow this line of reasoning.

Moreover, the issuers can establish the most effective means of identification and thus are in the best position to minimize losses. They design the security systems and can choose the system which assures them the optimal profit. Issuers expend money in order to minimize the loss as long as the amount expended is inferior to the loss avoided. In particular, because their optimal margin of benefit seems to be assured that way, American credit card issuers allow transactions which

⁶⁹ See *Jennifer Kingson Bloom*, supra note 18, at 1 et seq. We should stress that in the United States, most of the bank credit cards are a device for extending credit, which is not the case in Switzerland, see supra note 5. Issuers earn about 75% of their revenue from the interest paid by borrowers who do not pay in full each month, see *David S. Evans & Richard L. Schmalensee*, The Economics of Payment Card Industry Fig. 3 (1993). Credit cards are now twice as profitable as all other lending activities in the United States, see Federal Reserve Board, The Profitability of Credit Card Operations of Depository Institutions (August 1997). However, Credit cards are also a very profitable business when used as a mean of payment, as demonstrated by the American Express Card. Moreover, Visa and MasterCard have also limited the off-line debit card holder liability in case of unauthorized uses at a maximum of \$50 (for more details, see *David A. Balto*, supra note 14, at 1104-1105), and this market is in constant growth, see supra note 15. Visa and MasterCard attributed their recent gains to targeted marketing efforts and the rising popularity of debit cards and charge cards for businesses, see *Jennifer Kingson Bloom*, supra note 18, at 1 et seq.

take place on the phone⁷⁰ or on the Internet without having yet imposed a mandatory means⁷¹ to identify the cardholder (the card is not presented, thus the signatures cannot be compared, and there is no secret code) and thus bear the risk of unauthorized use under the Fair Credit Reporting Act.

The Internet is a very profitable market for credit card issuers, and Swiss cardholders should be free of any liability in the case of unauthorized uses online, because they cannot control the risk. The Internet's promise of consumer benefits is coupled with the potential for fraud and deception. Issuers could procure a secure and mandatory means to use credit cards online⁷², and they have superior access to information about fraud loss. For instance, the shipment address can give some information to the issuer⁷³. Moreover, once the issuers have borne the loss, they can pass it on to cardholders or merchants in the form of increased service costs. Thus, the impact on each cardholder would be limited. The aggregate credit card fraud should be a system expense rather than the burden of individual cardholder. As stated above, an accurate cardholder's protection is in the interest of the issuers: once the cardholders will be certain that they bear no liability in case of misuse on the Internet, online purchases will certainly increase⁷⁴.

⁷⁰ For transactions occurring on the phone, the issuer can limit his risk by requiring merchants to verify the client's phone number and call him back.

⁷¹ On «SET», see *supra*, note 25.

⁷² The Secure Electronic Transaction (SET) is not yet mandatory, see *supra* note 68.

⁷³ However, as noted above, «thieves» use credit cards anonymously, often to buy «virtual» goods like software and pornography which can be downloaded rather than posted to a real address, see Neil McIntosh, *supra* note 62.

⁷⁴ Neil McIntosh, *supra* note 62, gives a good summary of the situation in Europe: «According to a Forrester research report last week, only 4% of internet users in France, Germany, Sweden, the Netherlands and Britain have bought anything online, and 40% of users say they do not intend to buy anything online in the next six months. Consumers imagine anonymous computer geeks stealing personal information and credit card details as they travel across the internet, or cracking website defenses and extracting them directly from the web trader's computers [...]. In face-to-face transactions, signatures and the card's magnetic strip and hologram act as protection against fraud. Online, a hacker need only have the card's number – and take a guess at its expiry date – to make purchases».

As we have seen, negligence still plays an indirect role in American law. Thus it is wrong to say that a cardholder could disregard both credit card and bank statements indefinitely without bearing any responsibility for the unauthorized purchases⁷⁵. The cardholder is liable, under the theory of apparent authority, for the charges taking place after he has received the first statement containing fraudulent charges plus a reasonable time to examine that statement⁷⁶. This solution could be adopted in Swiss law. The theory of apparent authority should replace the vague concept of «due care» used in credit card's standard terms. The cardholder would be liable up to an amount of one hundred Swiss Francs for the unauthorized uses made prior to notification to the issuer or at the latest, prior to the reception of the first statement containing fraudulent charges plus a reasonable time to examine that statement⁷⁷, and then, until announcement to the issuer, for the total amount of purchases forthcoming. Such a solution suppresses the difficult question of the immediate notification to the issuer and operates as an incentive to give the issuer prompt notice of loss. The cardholder may limit his liability to less than one hundred Swiss Francs, and must verify diligently his statements in order not to be responsible for subsequent unauthorized purchases. An alternative could be to follow the new standard terms of Crédit Suisse for its Visa, Eurocard-MasterCard and American Express cards by requiring the cardholder to notify the issuer within a definite number of business days of learning that the card is lost or at the latest within a definite number of business days after reception of the statement showing the fraudulent charges. Moreover, the cardholder will

⁷⁵ See Helmut Merkel, *supra* note 5, 104–105.

⁷⁶ See *Minskoff v. American Express Travel Related Services Company, Inc.*, 98 F.3d 703, 710 (2d Cir. 1996).

⁷⁷ On the condition that for these purchases, the cardholder would have been provided with a means of identification, which is currently not the case of the unauthorized uses on the phone or on the Internet. Moreover, the identification requirement must be met in each purchase (e.g. actual correspondence of the signatures, see in the US, *Stieger v. Chevy Chase Saving Bank*, F.S.B., 666 A.2d 479, 484 (D.C. 1995); *Blaisdell Lumber Co. v. Horton*, 575 A.2d 1386 (App. Div. 1990)).

also be responsible for the misuse if he had first authorized⁷⁸ the use by somebody.

IV Conclusion

For some years, credit cards have been a standard mode of payment in Switzerland. Moreover, they are *the* mode of payment on the Internet. Transactions online will increase dramatically this decade. As the possession of a credit card is becoming more and more necessary for an effective access to consumer products, it is necessary to assure an optimal protection to the consumers against unauthorized use of their credit cards. The strict conditions which the credit card issuers must have complied under American law in order to engage the limited cardholder's liability seem to achieve this goal perfectly. And if such a protection has shown its virtue in the credit card's most fervent country, it should also be efficient in the

Swiss context. Moreover, such a protection is certainly one of the key of the prosperity of any credit card business. The new standard terms of Crédit Suisse for its Visa, Eurocard-MasterCard and American Express cards go in the right direction and should be followed by all credit card issuers, also because the fact that the liability regime differs for the same credit card, depending who is issuing it, is very confusing for the consumers. Moreover, rather than saying that the cardholder should not let anybody have access to the card, standard terms should say that the cardholder will be responsible for the misuse if he had first authorized the use by somebody. Finally, the absence of liability of the cardholder in the case of misuse on the Internet should be clearly stated in the standard terms. If all credit card issuers do not take further positive steps to deal with these consumer concerns on a voluntary basis, legal regulation should be adopted.

⁷⁸ We should note that the standard terms of Eurocard-MasterCard, Visa and American Express prohibit the use of the card by anybody other than the cardholder.