

Private Legislation and the Duty To Read— Business Run by IBM Machine, the Law of Contracts and Credit Cards

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I. INTRODUCTION

"It will not do for a man to enter into a contract, and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."¹ This rallying cry often is sounded in contracts and restitution opinions. Sometimes it makes such good sense that it is axiomatic. Yet in common with all grand slogans, there are situations where it just doesn't fit. For example, where the one who signs cannot read and has reason to trust another who tricks him by misreading the document, most courts have thought that the limits of the duty to read and understand have been reached.² Undoubtedly courts would find other boundaries to the principle, if asked to do so. For example, a company that manufactures paper uses a purchase order form printed on gray paper. On the back are a number of terms and conditions printed in such light gray ink that they can be seen only by holding the paper at an angle to the light.³ Clearly, if a court were ever to enforce any of these terms and conditions, it would be marching to some other ideology than "choice," even "choice" in one of its more extreme definitions. More difficult are the cases where the words are there in a form more easily read and understood but where the probabilities are very great that only the most suspicious will discover and translate them correctly. This is often true of printed form "contracts" and procedures for using them which are produced by large corporations to govern what to them are routine transactions.⁴ As we know, often these organizations attempt to use contract ideology to legislate privately; sometimes successfully, sometimes not. How then should we decide that one does or does not have a duty to read and understand?

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1. *Sanger v. Dun*, 47 Wis. 615, 620, 3 N.W. 388, 389 (1879).

2. See, e.g., *Bixler v. Wright*, 116 Me. 133, 100 Atl. 467 (1917).

3. I obtained this purchase order in my survey of business practices related to contracts problems. See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963).

4. See generally Note, 63 HARV. L. REV. 494 (1950).

This comment⁵ will consider the "duty to read"—and understand—and attempt to highlight many of the important policy considerations that hide behind this slogan. I will look at some of the common situations where the idea is found, at the wide variety of possible goals that the legal system might pursue in these situations, and at some of the consequences of the choices that are made. Finally, I will consider a specific case—the responsibility for misuse of lost or stolen credit cards in light of the typical lack of warning given by issuers of these cards—as an example of the analysis suggested.

II. EXAMPLES OF THE DUTY TO READ IN RESTITUTION AND CONTRACT

The duty to read and understand can appear in many areas. When we survey some of them and note that courts at times require this kind of self-reliance to uphold written documents while at other times forget any such duty and overturn writings without a complete explanation, we have good reason to suspect a complex policy decision is lurking in this simple slogan. Most clearly of interest in a symposium on restitution is the operation of the duty to read as a defense to rescission or reformation for fraud or various types of mistake. For example, in *The Dowagiac Mfg. Co. v. Schroeder*,⁶ a manufacturer sued a farm equipment dealer for the price of machinery that had been delivered. The dealer sought to defend by asserting he was induced to sign the written contract by fraudulent representations as to its contents. The jury found for the dealer, but its judgment was set aside by the trial court and judgment was entered for the manufacturer. The Supreme Court of Wisconsin affirmed, stressing the failure of the dealer to read the contract when there had been nothing to prevent him from doing so. On other occasions, that court has stressed its counter-rule—one need not read where he has been tricked or "lull[ed] . . . into a feeling of security."⁷ Even without stressing such a counter-rule, in *Journal Co. v. General Accident Fire & Life Assurance Corp.*,⁸ the Supreme Court of Wisconsin affirmed an order overruling an insurer's demurrer to a bill for reformation of an insurance policy filed by the publisher of the *Milwaukee Journal*. The newspaper alleged it had asked the insurance company for a policy which would cover accidents when the *Journal's* trucks were carrying newspapers and also when they were

5. I view this as a comment rather than as an article. Cases are cited as illustrations and examples rather than exhaustively. Moreover, most of the examples are Wisconsin cases. I gathered them for teaching purposes, and so they are available. Also they are the law of a particular state rather than cases picked at random to prove a point. As such they illustrate the tensions between policies that exist in this area.

6. 108 Wis. 109, 84 N.W. 14 (1900).

7. *Lotter v. Knospe*, 144 Wis. 426, 429, 129 N.W. 614, 615 (1911).

8. 188 Wis. 140, 205 N.W. 800 (1925).

used to take newsboys to recreational events. The actual policy issued covered the trucks only when they were used to haul newspapers. There was an accident where several newsboys were injured and the insurance company asserted it was not liable. The insurance company argued that the *Journal* had a duty to read the policy issued, and relied on the long line of Wisconsin duty-to-read-and-understand cases. The court distinguished them, stressing that (1) the assured has little or nothing to say concerning the form of the insurance contract, (2) in common practice the assured informs the agent of the coverage needed and leaves it to the agent to obtain the right policy, and (3) in many cases a reading of the policy would not be enlightening to the assured because of the technical language used. While we can see a number of differences in the facts of the two cases, the attitudes toward self-reliance reflected in the opinions are not consistent.

One can also view these problems in the context of the parol evidence rule. The "model" parol evidence case involves an attempt by one party to show that his view of the agreement is not reflected in a written contract "intended by the parties" to be the final expression of their bargain. Sometimes the reason that the document fails to correspond to the view of one party as to the deal he actually made is that he failed to read or understand the writing. For example, in another Wisconsin decision,⁹ a seller of nursery stock sued the buyer on a written contract. The buyer attempted to show that the actual agreement between him and the seller's salesman was that the buyer need not take all of the stock if he did not want it and that the salesman would plant the stock. The printed form contract which the buyer signed mentioned neither of these things. The court found that there was insufficient evidence of fraud to provide the exception to the parol evidence rule that would allow proof of the oral agreement. The buyer was an instructor at Lawrence College and the court commented, "we have here the simple and altogether too frequent case of an intelligent man asking the court to protect him against the wrong of another merely because he failed to take the few moments of time that would have enabled him to protect himself."¹⁰ More recently, the Wisconsin court reached the opposite conclusion where a seller had attempted to draft its form contract to gain the protection of the parol evidence rule against liability for the statements of its representatives.¹¹ Seller sold home siding to buyer, and seller's president said it would not rust or crack. Three years later the siding rusted and cracked. The written contract contained no warranty and provided

9. *Knight & Bostwick v. Moore*, 203 Wis. 540, 234 N.W. 902 (1931).

10. *Id.* at 543, 234 N.W. at 903.

11. *Anderson v. Tri-State Home Improvement Co.*, 268 Wis. 455, 67 N.W.2d 853 (1955).

"The Company prohibits the making of any promises, or representations, unless it is inserted in writing in this agreement before signing."¹² The court refused to give effect to the "integration clause" and quoted a Massachusetts opinion:

As a matter of principle it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. In obedience to the demands of a larger public policy the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it. No one advocates a return to outworn conceptions. The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.¹³

Again one can supply possible factual distinction between the nursery stock and the home-siding cases, but the entire thrust of the two opinions is inconsistent. Certainly the buyer of home-siding could have protected himself by getting a guaranty in writing while the buyer of nursery stock probably had no particular reason to distrust the salesman who promised a lot in order to close the deal. Why then did the home-siding buyer win and the nursery stock buyer lose?

We can find other examples of the presence or absence of the duty to read in the area somewhat grandly called contracts against public policy. For example, in *O'Callaghan v. Waller & Beckwith Realty Co.*,¹⁴ an injured tenant tried unsuccessfully to overturn an exculpatory clause in a standard form apartment lease that relieved the landlord from liability for damages for personal injury caused by its negligence. The majority opinion, in effect, stressed that the tenant had not recognized the risk allocation made by the lease and had not tried to bargain for a modification.¹⁵ Again, one can produce a counter-example. In the famous *Henningsen* case,¹⁶ the Supreme Court of New Jersey held

12. *Id.* at 459, 67 N.W.2d at 856.

13. *Bates v. Southgate*, 308 Mass. 170, 182, 31 N.E.2d 551, 558 (1941).

14. 15 Ill. 2d 436, 155 N.E.2d 545 (1959).

15. *Id.* at 439-40, 155 N.E.2d at 547.

16. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

that a buyer of a new car was not bound by Automobile Manufacturers Association Uniform Warranty which, if read carefully and properly translated, disclaims all liability for personal injury for breach of warranty. One of the grounds of the opinion was that it was unreasonable to expect a new car buyer to see the limitation and understand it. The buyer had not read the critical two paragraphs on the back of the purchase contract, but his failure here was not fatal.

Finally, one can produce an example of a potentially harsh duty to read from the Uniform Commercial Code. As a practical matter, section 2-207 appears to require the sales departments of manufacturers to read all purchase orders carefully or be bound to a sweeping warranty obligation far beyond that typically assumed in manufacturing industry. If a seller fails to read and understand that the quotation form and the purchase order have conflicting provisions on warranties, as is very likely, the Code provides that conduct by the parties that recognizes a contract will create one—for example, by starting production. Then the terms of the contract as to those items on which they disagree will be filled in by the Code. Unfortunately for sellers, the Code grants much broader warranty protection to the buyer than almost any industrial seller will ever offer. Such sellers only expect to replace or repair defective goods; the Code talks of consequential damages. This problem is critical in many industries where the quantity of the daily flow of purchase orders and the burden of hiring people trained to analyze warranty provisions make the impact of the statute serious.¹⁷ This too is a duty to read with a vengeance; one can only wonder if its imposition is anything more than a mistake prompted by a lack of data on the battle of the forms problem.

III. THE UNDERLYING FACTORS

A. General Considerations

It is fairly easy to spin out examples of where the duty to read and understand does and does not take hold. Moreover, some of the relevant dimensions seem obvious. Assuming an arms-length bargain between businessmen who are experienced risk-takers, one of them should not be able to disappoint the other's expectations and likely or actual reliance by asserting, "Oh, but I didn't read the contract." The signed document is too useful a form for signaling the closing of a deal to allow such a defense without very strong reasons for upsetting the transaction. Moreover, the magic of the act of signing is

17. I discussed this problem in Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, 9 PRAC. LAW. 13, 19-27, 35-36 (Nov. 1963).

well-known; and usually there is reason to assume that the deal was set as written since typically the one does not know of the other's failure to read and understand. On the other hand, at some point there seems good reason to ignore a written contract procured by trickery. Rational planning and risk assumption would not be served by enforcing the part of a contract written in lemon juice which could only be read over the heat of a candle when the one signing had not been informed of the secret. Some business forms and the ways they are used are almost this bad. There is some danger that a judge, temporarily bereft of his common sense, could apply the duty-to-read slogan to what really is close to an invisible ink case and enforce the document as written. It is easy to be swept up in the moralistic attitude of self-reliance in situations where this is demanding conduct more properly classified as paranoid.

B. An Organization of Substantive Contract and Legal System Policies

1. *The Dimensions of the Substantive Policies.*—While it is hard to disagree with this quick explanation of the duty to read and understand, I think much more is involved in the kinds of cases that were offered as examples. The first step toward judgments about the proper results in these cases is to make explicit the major policy considerations necessarily involved. An analytical scheme I find helpful calls for first separating out the substantive policies that contract and restitution may serve and then identifying at least some of the goals related to the proper or efficient operation of the legal system.¹⁸ For example,

18. These classifications were first worked out in Macaulay, *Restitution in Context*, 107 U. PA. L. REV. 1133 (1959); Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961). Recently my colleague John Hetherington refined these classifications in his article, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, which is to appear in the *Stanford Law Review*. I learned much from his article.

My colleague Lawrence M. Friedman has dealt with the problem of more or less generalized rules in FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965), and in Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U.L. REV. 751 (1965). In *Contract Law in America*, he describes a continuing trend from abstract to rules toward standards that allow the judges to look at the nuances of each case. In my terms, this progression is from rigorous market functioning rules to either transactional or relief-of-hardship approaches. In *Law, Rules, and the Interpretation of Written Documents*, he discusses "mandatory" and "discretionary" rules which is one of the dimensions of my classification. Both of the Friedman pieces are of major importance. Both of us owe a good deal to Max Weber.

Social planning policy tends to be carried out by legislation removing a whole area from the domain of contract law—areas "spin off" for special treatment such as labor law or occupational licensing. This process is the major theme of the Friedman book, and one that is developed brilliantly. For my comments on the possible relevance of contracts ideas after an area has been removed and given special treatment, see Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System—Part II*, 1965 WIS. L. REV. 740, 848-50.

we might want our legal system to aid the operation of the insurance industry in order to minimize premium costs (a substantive policy), but we also might want our legal system, insofar as reasonably possible, to reflect the policy choices of a community consensus or those made by an elected legislature rather than those of an appointed judge (a system policy).

Substantive policies primarily can be classified on two dimensions. The first concerns a choice of a market or non-market orientation, in which contract law and restitution can either (a) be tools to facilitate the operation of a market economy—focusing on the needs of those exchanging goods, services, labor and capital or (b) serve to blunt the impact of the unregulated market by refusing to recognize some socially undesirable business practices or by giving aid to people or groups seeking to get out from under onerous contracts. The second dimension concerns the approaches by which contract law and restitution can proceed, tending *toward* either (a) relatively precise general rules or (b) a case-by-case approach.¹⁹ This classification yields four primary categories which must be explained in some detail. The categories, and their somewhat arbitrary names, can be represented as follows:

	market goals	other than market goals
Generalizing approach ("rules")	market functioning policy	social (or economic) planning policy
Particularistic approach ("Case-by-case")	transactional policy	relief-of-hardship policy

a. *Market functioning policy* calls for rules of general application in relatively specific terms which minimize (but never eliminate) the creative role of judge and jury or administrators. Predictable law is to be preferred to results that satisfy in particular cases. Thus the parties can consider the impact of contract law both in planning

19. Of course, my transactional and market functioning categories differ from the orthodox learning about the meeting of the minds (subjective theory) and the objective theory of contracts. I would view a meeting of the minds approach as entirely a non-market approach; it usually operates as a rationalization for relief-of-hardship. Moreover, there are many kinds of objective theories which fall on the scale that ranges from transactional to market functioning. At one extreme, an objective theory can mean that a contract neither party intended but both appear to have made will be enforced. At the other extreme, transactional policy can call for imposing liability on one who has, without using due care, misled another by his language and conduct, even though the careless person did not "intend" to make a contract. As is apparent from this discussion, my categories are not dichotomies but extreme points on a range: a given rule or standard is *more or less*, say, transactional or market functional, or *more or less*, say, transactional or based on relief-of-hardship.

their bargains and in settling disputes. Legal results will not turn on vague abstractions such as "good faith" but on specific conduct such as signing a contract. In addition to certainty, the rules should tend to reward rational assessment of risks in the market and penalize unbusiness-like conduct. One can usefully identify at least three products of market functioning policy: increased self-reliance, rewards to the crafty, and advantages to the operation of bureaucratic organizations.

The duty to read in a fairly strict form carries out the substantive goal. The legal system should enforce contracts "as written" and ignore pleas that one party did not read or understand, that the parties agreed that some of the written terms would not apply or that additional ones which were never reduced to writing would apply, and that the words used should be read in some unusual fashion, or in light of some general abstraction such as "reasonableness." On the basis of common sense but not much evidence, some have assumed that this tack will promote self-reliance. If one knows he will be legally bound to what he signs, he will take care to protect himself (or so it is said). And this would be a good thing. People will recognize risks, allocate them in their bargains and plan to deal with them rationally. As a result, more bargains will approach the economists' ideal where both leave the bargaining table in a better position than when the negotiations began. Moreover, disputes during the life of the transaction should tend to be minimized since the process of reading and understanding should make clear who is to do what and who is to take what loss if a particular risk occurs. Also where the legal result is clearly that documents will mean what they say, there is less chance that in settlement negotiations one party's rights must be discounted because of the risk of what a jury might do or because of delay.

Such rules reward those who plan and are careful. In one view those who can drive the best bargains, short of gross fraud, are entitled to their winnings. Perhaps one who can slip into a contract with terms highly favorable to himself which are undetected by the other party, is to be praised for his skill rather than censured. This is just good salesmanship. In this view, a bargain is not an exchange of mutual advantage but a game where each party is to maximize his own gains at the expense of the other. Some may feel that the ability to do well in this game is a skill to be rewarded. A strict duty-to-read rule often will help supply this reward.

Another product of market functioning policy—advantages to the operation of bureaucratic organizations—often derives from people being treated as if they had read and understood a written contract

even when it is probable they have not done so. Large economic organizations frequently promulgate rules to govern their exchanges with other organizations and individuals. Typically these rules are cast, or can be cast, in the form of a contract. The other unit's representative or the other individual signs a printed form document or accepts a contractual symbol (say, delivery of a document or goods) although he has little chance or incentive to read, understand, bargain to change the rules or do any or all of these things. Larger firms operate this way for a number of reasons. They must deal through a corps of agents in a myriad of transactions. As a result, there is a need to standardize and formalize procedures. On one hand, the large organization must control its agents who deal with the outside world and limit their power to "give the company away." These agents are under many pressures to treat their customers as individuals and tailor the particular deal to suit their customers' needs; most obvious is the pressure to make sales to earn commissions or promotions. Also, "the customer is always right" in the salesman's world. A rigid form contract which the customer must sign without alteration often is thought to be an efficient way to exercise control over salesmen. The customer is "on notice" of the salesman's limited authority, and the firm wants to avoid being legally bound to expectations its salesman has created by his conduct that are inconsistent with company policy. On the other hand, the written document signed by the customer becomes the obligation within the larger organization because of the problems of internal communication. It specifies what must be produced or shipped, and it indicates the full extent of future payments to be received and contingent obligations assumed. If a salesman has made a promise inconsistent with the formal written contract which is highly standardized, it is difficult to communicate this to those who must perform and to those who must make plans based on cash flow and risk assumption. Even if the inconsistent promise is communicated, it poses a problem for a rational bureaucratic organization which tends to thrive on routine. Large organizations are helped if they can control and plan their exposure to risks; if they can do so, their accounting and pricing will be more accurate, and they will not have to set up large reserves to cover a host of unpredictable contingencies. Arguably, this kind of certainty will foster their activities in the market which in turn should yield more jobs and more products at lower prices. A rather strict duty to read, rather than attacking the balance of economic power in the society, supports the operations of large organizations that have this power. This tends to promote rational business affairs, whatever the impact on the individual who assumed he could rely on what he was

told rather than what he signed. Thus, the farm machinery dealer and the college instructor buying nursery stock in two of the cases we discussed, were asking for individual treatment where relatively large organizations on the other side of the transactions wanted to standardize. The two judicial opinions insisting on a duty to read and understand are consistent with this kind of bureaucratic policy. The reformation of the *Milwaukee Journal's* insurance policy is not; it turned on fault and the risk of reliance—transactional ideas.

Usually these bureaucratic considerations are coupled with the self-reliance idea—the large organization can deal through standardized forms and the prudent individual will protect himself by reading and taking appropriate action—although at times the likelihood of self protection is slim indeed. Occasionally, bureaucratic policy is coupled with a requirement designed to help self-reliance. For example, a Virginia statute demands that a written contract be set in a certain size type to be legally enforceable,²⁰ the Uniform Commercial Code requires some warranty disclaimers to be conspicuous to be effective.²¹

b. *Transactional policy*, the second policy category, also seeks to aid the operation of the market, but with a case-by-case strategy rather than by rules that ignore particular circumstances. The courts ought to take steps to carry out the particular transaction brought before them—they should discover the bargain-in-fact and enforce it with appropriate remedies cut to fit the facts of the case. If this discovery is not possible, the court should work out a result involving the least disruption of plans and causing the least amount of reliance loss in light of the situation at the time of the dispute. In short, courts should seek to implement the “sense of the transaction,” and thus solve the problem in the particular case in market terms—assumption of the risk, reasonable reliance, and so on.

Transactional policy calls for a duty to read and understand only where the one who has failed to do this is responsible for misleading the other into believing that the document has been read and approved or that the careless one is willing to sign and assume the risk of whatever might be found in the document. Suppose seller sends buyer an offer quoting a price in a letter which also very clearly spells out a number of conditions the seller says are most important to him. The buyer reads the first few sentences of the letter and the price quoted but not the seller's important conditions. The buyer writes on the bottom margin of the seller's letter, “We accept your offer,” and signs it; he then mails this back to the seller

20. VA. CODE ANN. § 11-4 (1950).

21. UNIFORM COMMERCIAL CODE § 2-316(2).

who begins production of the items in question. The buyer later wants to back out and asserts he did not read the seller's conditions and would not have agreed to them if he had. The buyer has been negligent in conveying his agreement, resulting in disappointed plans and at least the probability of a good deal of reliance loss. A court following a transactional approach would treat the buyer *as if* he had read and understood the seller's letter. But the decision would turn on the rather extreme facts of the case—the buyer's communication was careless and caused either very probable or actual injury.

Perhaps more often transactional policy will call for overturning or modifying a written document (by reforming or construing it) in the light of the bargain-in-fact of the parties.²² While a case can be made for self-reliance, part of decent social and business conduct is trust. In many negotiation situations all of the pressures push for friendly gestures rather than a suspicious line-by-line analysis of the writing. The buyer of home siding can believe the president of the home remodeling company when he says his siding will not rust or crack; the buyer does not have to parse the text of the lengthy and technical printed form and spot the integration clause at his peril. In cases such as this, the writing was drafted to run counter to the likely agreement-in-fact. If a court is seeking the actual sense of the transaction, it will not let such a writing get in its way.

It seems to me that the growing English doctrine of fundamental breach²³ is an expression of transactional policy. There, judicial enforcement of clauses limiting liability is denied when enforcement would be inconsistent with the “core” or primary purposes and obligations of the contract. For example, a seller cannot agree in the typed part of a contract to deliver a machine which will produce so many units a minute to a certain tolerance and then successfully disclaim all liability for the failure of his machine to perform by printing boiler-plate clauses on the back of a form he uses. From the standpoint of the particular transaction, assertion of the disclaimer clause is little more than trickery. In this kind of case, market functioning policy would call for enforcing the contract as written; transactional policy demands enforcement of the contract-in-fact so that the buyer's reasonable expectations are honored.

22. Comment 1 to UNIFORM COMMERCIAL CODE § 2-302 states, “The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.” This clearly pushes for a transactional approach in applying the concept “unconscionable contract or clause.” It is highly ambiguous as to whether or not it contemplates also a relief-of-hardship approach. The “superior bargaining power” reference indicates that it does not, but then what is the meaning of “oppression”?

23. See Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964).

c. *Social planning policies* can be reflected in contracts and restitution, as well. In one sense, rather than enforcing the bargain that was made, in this third type of policy the courts will enforce the bargain which the parties should have made. Conversely, the courts may refuse to take any action when the actual bargain is found offensive. This policy is something of a catchall, as social planning can call for a variety of things ranging from wealth redistribution to the regulation, or even promotion, of particular types of people, industries or transactions. The most obvious examples involve a change in the market context by removing certain types of bargains from the kinds that will be enforced by the legal system or by requiring or prohibiting particular terms in some bargains. Again, this is a generalizing approach stressing specific rules, so it parallels market functioning policy in strategy—but the goals of the two are very different since social planning policies, by definition, seek to blunt the impact of the market.

A social planning rule relevant to our topic would be one that said certain classes of people could not be held to contracts they signed or accepted, despite their careless failure to read and protect themselves. One could conceive of a rule protecting such people as consumers, illiterates, those of limited mental ability or minors. In effect, the power of a minor to disaffirm even contracts that he has read and understood is such a rule.²⁴ Since, in theory, the minor cannot guard his own interests, the legal system protects him from his own carelessness and improvident bargains. Consumers may get some of the same treatment under Uniform Commercial Code section 2-719's provisions on limiting remedies for breach of warranty; perhaps consumers need not read and protect themselves since limitations of liability for personal injury caused by a breach of warranty are prima facie unconscionable. It is difficult to offer many examples of this kind of social planning rule since the legal system has preferred a more case-by-case (relief of hardship) approach, rather than letting a whole class of people out of certain kinds of contracts. On the other hand, social planning goals often enter as the price for following the bureaucratic type of market functioning policy. For example, the standard fire insurance policy is set by statute in many states.²⁵ One side of the coin involves the setting of terms deemed fair to the consumer by the legislature—removing the insurance contract from the area of self-reliance and the exercise of market power. The other side of the coin, however, involves telling insurance companies that if they follow the statute, certain practices have been

24. See, e.g., RESTATEMENT (SECOND), CONTRACTS §§ 18, 18B (Tent. Draft No. 1, 1964).

25. See, e.g., WIS. STAT. § 203.01 (1963).

validated. An insurance company can know where it stands, and this certainty may be extremely important to it. The insurers get certainty at the cost of following fair terms imposed by the legal system.

d. *Relief-of-hardship* is the fourth policy. It calls for the legal system to let one party out of his bargain in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it. This case-by-case approach is based not upon considerations of market functioning or protecting actual expectations but upon ethical ideals and emotional reactions to the plight of the underdog, to pressing an advantage too far, to making too much profit, or to inequality of resources. To a great extent, this is the policy that is not expressed openly in contract doctrine, but courts can construe language and stretch the innocent misrepresentation or mistake doctrines to help out when the facts are particularly appealing. When done with a deft hand, a relief-of-hardship approach will leave little trace of a precedent to embarrass the court in the next case, where the facts are not quite so appealing.

It is hard to offer a pure example of this policy in operation, but it can be suggested that a good deal of it lurks in the insurance release cases where a duty to read and understand sometimes is and sometimes is not applied.²⁶ Also the Supreme Court of Wisconsin in several cases has stressed the lack of education of the person seeking to be relieved from a written contract he signed or accepted.²⁷ On one hand, this factor tracks with transactional policy and the degree of care one could expect from a particular individual. Arguably, an illiterate is not responsible for misleading one who knows the illiterate cannot read the document he signed. But on the other hand, the party seeking to uphold the contract, especially the home office of a corporation that deals through salesmen in the field, may have no way accurately to gauge the education and literacy of the man who signed the printed form. Its expectations and potential reliance remain despite the literacy of the man it dealt with. Still the factor may lead to the overthrow of the written treaty. We can speculate that the inability to read and understand is correlated with a generally low

26. One of my favorite notes in any casebook is Dawson and Palmer's historical survey of the Minnesota insurance release cases. In Minnesota, as in other states, sometimes insurance releases stick, but often they do not. See DAWSON & PALMER, CASES ON RESTITUTION 686-88 (1958). See also *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946).

27. See, e.g., *Engel v. Van Den Boogart*, 255 Wis. 81, 37 N.W.2d 852 (1949); *Lefebvre v. Nickolai*, 205 Wis. 115, 236 N.W. 684 (1931). But see *Institute of Commercial Art v. Maurice*, 272 Wis. 499, 76 N.W.2d 332 (1956).

socio-economic status, and such people may be the best candidates for relief-of-hardship in the eyes of many.

e. *Overlaps and Interrelationships.*—Of course, a great deal of overlap among these policies is possible because they refer to tendencies rather than pure categories. A particular decision may be justified by reference to several different policies, both market and non market in orientation. For example, in *Miller v. Stanich*,²⁸ a tenant had a right to renew his lease for five years. He wanted to renew it for that term, and, in addition, get a right to renew for another five years after the first renewal term had expired. The landlord's agent told the tenant that the landlord was unlikely to agree to an additional renewal term. The tenant, following the adage that "there is no harm in asking," sent two lease forms to the landlord. One called for the five-year term to which the tenant was entitled; the other called for that five years plus an option to renew for an additional five years. The landlord, who could read only German, took both leases to his lawyer since they were written in English. The landlord, as predicted, did not want to give the tenant an option to renew for an additional five years after the next five year term expired. However, by oversight, the landlord's lawyer filled in the date on the lease form that contained the option to renew. The landlord took the forms home, signed the dated lease and sent it to the tenant. Undoubtedly, the tenant was delighted at his good fortune, but his joy was shortlived. The landlord discovered his error and demanded that it be corrected. If we were to apply a strict self-reliance duty to read approach consistent with functional policy, the result would be clear—the landlord would be bound. And indeed, this was the view of three Justices of the Supreme Court of Wisconsin. But four Justices joined in an opinion reforming the lease to strip it of the additional option for a five-year term,²⁹ arguing that the tenant had not "taken any steps whatever in reliance upon the provision for a five-year extension."³⁰ On one hand, transactional policy claims are weak because of the unusually low risk of reliance; it seems unlikely that the tenant could not have found good alternative premises for a term to begin five years in the future. On the other hand, the balance of hardship and fault favors the landlord. The majority thought the facts called for relief, despite the landlord's failure to read and understand.

Even though these policies are interrelated and overlap, the classification suggested here has proved useful. It serves to clarify the

28. 202 Wis. 539, 230 N.W. 47, *rev'd on rehearing*, 233 N.W. 753 (1930).

29. *Miller v. Stanich*, 202 Wis. 539, 233 N.W. 753 (1930). The court granted rescission on the condition that the landlord execute and file a lease in the form and terms of the lease he intended to deliver.

30. *Miller v. Stanich*, *supra* note 28, at 545, 230 N.W. at 49 (dissent).

issues and separates distinct arguments so that they reinforce each other rather than confuse matters. The classification also serves as a checklist to lessen the chance that a relevant argument will be neglected.

2. *The Dimensions of Some Legal System Policies.*—In addition to these substantive goals of contract and restitution, there are also a number of goals related to one's view of the proper or efficient functioning of the legal system.

a. *Pressure on the Docket.*—The simplest example is the goal of preventing the dockets from becoming overcrowded. To the extent that a person could easily reopen an insurance release, for example, because he did not read or understand it, and try his claim, an already crowded personal injury docket could be increased. This would obviously produce problems: the courts would be faced with even more personal injury cases—a type that in many cities is not handled well or quickly. More personnel might be required to prevent the courts from falling even further behind. Moreover, the condition of the court dockets is a key ploy in the settlement process. Those that can afford to wait have great advantages in cities where there are great delays. A claimant's legal rights are less valuable if he does not have sufficient assets to await trial or cannot borrow. Obviously, it does not make sense to incur costs of this sort unless the gains in terms of substantive policies are thought to be great.

b. *Accurate Fact Finding.*—Another legal system policy clearly wrapped up in the duty to read and understand is the goal of accurate fact-finding. Often when a court announces a sweeping duty to read and confines counter-rules narrowly, one senses that the court is concerned with the likelihood of perjury and the difficulties of adjudicating facts. It is easy to make up a story about one's assumptions that are contradicted by a written contract. Moreover, appellate judges might be concerned about jury sympathy playing a role which would undercut substantive policies calling for the enforcement of written contracts. For example, several of the Wisconsin duty-to-read cases involve a buyer who spoke or read only German, seeking to overturn a contract written in English before a jury that probably was composed of his neighbors and friends. The seller was an outsider to the community. One can seldom prove that the risk of jury bias was influential in a court's decision, but one can be suspicious.³¹ A promi-

31. In a number of cases decided between the 1870's and the early 1900's, the Supreme Court of Wisconsin dealt harshly with the defense that the party who wanted to avoid a written contract spoke or read only German and not English, the language in which the contract was written. See *Deering v. Hoeft*, 111 Wis. 339, 87 N.W. 298 (1901); *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N.W. 14 (1900); *German Bank v. Muth*, 96 Wis. 342, 71 N.W. 361 (1897); *Albrecht v. Milwaukee & S. Ry.*, 87 Wis. 105, 58 N.W. 72 (1894); *Fuller v. Madison Mut. Ins. Co.*, 36 Wis.

nent Wisconsin lawyer from a smaller city told me that he feels he can break most printed-form contracts by inviting the national organization seeking to enforce one to come to his city and face a local jury. As we move from relatively general rules to case-by-case standards involving particulars, we may increase this jury factor and promote bargaining at the settlement stage based on jury risk. Some might think this undesirable. On the other hand, a duty to read coupled with exceptions largely in the court's control can be useful in allowing the court to deal with perjury without being forced to label it as such. But while this tactic may be useful, it carries the costs of most case-by-case approaches—a loss of predictability and an increased risk of arbitrariness.

c. *Efficacy and Efficiency: What Can Be Done and at What Costs?*—On another level, the four substantive policies place differing demands upon the capacity of the legal system to gain information about the nature of particular problems with which it must deal—the “input” stage—and the consequences of the existing legal situation and possible alternative courses of action—the “feedback” stage. First, the problem of inputs of information: a case-by-case approach increases the demands on the fact-finding process. *Transactional policy* calls for a careful assessment of expectations created by the entire exchange situation and of possible reliance losses from opportunities that might have been taken had the contract in question not been made. Often one would have to work with tacit assumptions and implicit understandings based on practices in particular industries. This is not easy, and there is a great risk of error. Rather than take this chance, a judge can follow the safety of the written word and preach about the duty to make it correspond with the bargain in fact. *Relief-of-hardship policy* calls for a careful weighing of such factors as who can best bear the loss, decisions loaded with implicit value judgements as well as factual issues. From the feedback standpoint a case-by-case approach can be administered to have a relatively less serious impact than a “rules” approach. Each decision need go no further than handling the dispute between the particular parties. However, the chance of winning in a decision system based on particular nuances can influence the settlement negotiation process, and all “legal rights” then have to be discounted by this factor. Inso-

599 (1875). But see *Walker v. Ebert*, 29 Wis. 194 (1871). On one hand, these seem rigorous market functioning policy opinions, but it is likely that there is a good deal of social planning too. The rule was that the German population of Wisconsin during that period could not escape written contracts they signed by testifying before a jury composed of fellow German speaking neighbors that the oral deal was different. This served the social policy of integration—the cases were one more incentive for the German immigrants to learn English and become “Americanized.” By 1930, things were different. See the discussion of *Miller v. Stanich* in the text at notes 28-30 *supra*.

far as there are types of business transactions where the legal enforceability of contracts is important, uncertainty is increased and claims with some plausibility become worth more. Of course, it is most difficult for either courts or administrative agencies to assess the impact of their actions on private dispute settlement. There is little, if any, systematically obtained knowledge about such matters, and it would not be easy to study this process if one set out to do so.

An approach based upon rules of relatively specific content makes a different set of demands on the legal system. One can adopt *market functioning policy* as the primary strategy and assume that once the rules are known it matters little what they are; if the consequences of their application are substantively offensive to some, the relations between people and organizations can be arranged by the parties to avoid the situations covered by the rule or an appeal to the legislature can be made to carve out a special area to protect a deserving class of people. Thus, a court could routinely hold a man to a written contract he signed, overturning only the most extreme forms of deception. Of course, sometimes one can prompt a heated political discussion by exploring the assumptions involved in this line of argument. Perhaps some people need protection or relief of hardship. On the other hand, if the legal system is going to do some *social planning*, several most difficult, and fairly obvious, input and feedback problems are presented. Case-finding often is accidental; a court lacks the chance to legislate about problems not brought before it, and even a legislature is hampered in discovering some social problems because of pressure of major issues such as taxation and budgets. (An administrative agency sometimes can do better if it is not blocked by political pressure or limited resources.) Moreover, even when a problem is presented for solution, the entire legal system, and particularly a court, lacks tools to produce data about both the likely consequences of proposals for change as well as the community consensus on the right mix of values relevant to the problem. Moreover, both courts and legislatures often have no way of discovering the full range of consequences of their past actions; if a result is sufficiently bad, someone may bring up a new case to the court or may appear before the legislature. But some attempts at planning can have impacts that are hard to see or impacts on those not able to use the legal system effectively. It is difficult to know exactly what will happen if people need not read certain contracts or if they must read others as far as the legal system is concerned. Sometimes the impact would be great; sometimes no one would care.

d. *Democratic Ideals as Related to Who Makes Policy and How.*—Furthermore, the ideal of a democratic government poses some re-

straint on how free courts or agencies are or should be to decide cases based upon reaction to particular circumstances or to create rules based upon social policies not enacted by legislatures and not endorsed by a wide public consensus. Of course, the practical problem is not one of the right to base decisions on whim or the duty to apply hard and fast rules that allow no "leeways." The problem is one of proportion—few if any people call for a judge to decide by taking bribes or flipping coins ("discretion" doesn't mean this), or for judges to apply mechanically set doctrines of fixed content where the rule just does not fit. (We also can deny that any such mechanically pure rules exist. It seems doubtful that the duty to read, unless there is a good excuse, is such a rule.)

Judges are more removed from the electorate than legislators, and judges have some obligation to remember this before they undertake social reform through case law. However, given the need to decide cases, the very nature of law forces the decision-maker to choose between one policy and another in many situations. Our traditions impose some limits on the frame from which a judge may choose—for example, he is not to reward his friends and punish his enemies. Yet these limitations often are not decisive. Within the area of acceptable decisions there are judgments to be made. This is particularly true of the duty to read and understand situations. Within the common law tradition one can hold a man to precisely what he signed or turn in the other direction and talk of his actual expectations and construe a duty of good faith into the contractual language. Moreover, there is no manifest, strongly-held public consensus on such questions. Nonetheless, the allocation of functions within the United States legal system counsels those officials whose policy choices are more removed from approval or disapproval by an electorate to remember the nature of their place in the system. Perhaps this calls for making judgments, other things being equal, so that the burden of getting them changed by another unit of government rests on the one practically best able to present his case there. For example, organized interest groups usually can take care of themselves before a legislature; individuals often cannot.

When, then, should there be a duty to read? The problem is one of balancing the capabilities of and the values we hold about the legal system against our substantive goals. The Uniform Commercial Code suggests that it may be helpful to make a rather crude division into contracts between merchants and all others. It is true that one's judgment about a duty to read and understand *may* differ in various kinds of cases involving various kinds of people. An exchange of written documents between parties advised by lawyers perhaps calls

for different treatment than a printed form used by a large corporation and accepted by a consumer under circumstances where he is unlikely to read and understand. One can subdivide the categories even further. Perhaps the documents involved in multi-party financing transactions should be given far more deference than the conflicting purchase order and acknowledgement forms so typical of the sale of "shelf" goods by one manufacturer to another. Perhaps a printed form used in dealing with relatively high socio-economic status consumers which reflects a reasonable or customary allocation of risks should be treated differently from a printed form designed to aid in the exploitation of the poor. On the other hand, while such a case-type approach has immediate appeal to most law teachers who cut their teeth on realistic jurisprudence, it does have real costs if we assume that the legal enforceability of any large number of contracts really makes a difference to anyone. Instead of supporting the existing allocation of power in the society, courts, in some if not all of the examples given, are being asked to protect individuals from the exercise of that power. Moreover, courts are being asked to plan without much more than common sense and hunches about the nature of the problem they are confronting or the likely consequences of their decisions. And a court's choice may be what we think is the wrong policy in an area where it has the last word because the doors to the legislature are closed as a result of the balance of economic and political power in the situation. No solution is cost free; the best that can be asked is that our judges and legislators proceed with caution to avoid any unnecessary costs.

IV. AN EXAMPLE: THE STOLEN CREDIT CARD AND THE DUTY TO READ AND UNDERSTAND

Obviously, the analysis presented to this point does not yield a clear answer to the question of when should a duty to read and understand be imposed. My own preference is for an approach treating different kinds of situations differently with a decided bias towards transactional policy where it is not clearly outweighed by the other factors. Given this imprecision, an example considered in some detail seems called for. The one selected is not an earth-shaking problem, but it involves manageable factual and legal materials and has some interesting aspects. Thus we turn to the application of the analysis suggested as applied to the duty to read and understand the information given the holder of a credit card about his responsibility for its unauthorized use.³² Here we have a statute and cases that

32. The holder's liability for charges made with his lost or stolen credit card has been very popular with the law reviews. See Claffin, *The Credit Card—A New Instrument*,

differ in approach, as well as the institutionalized practices of large organizations that attempt to use the law of contract to allocate the risk of loss caused by lost or stolen cards.³³ Moreover, the individual dealing with the large corporation is not likely to be so poor or illiterate as to present an extreme limiting case.

How does the use of a lost or stolen credit card raise the duty to read problem? Credit cards are issued by various kinds of large organizations. Almost all of them today attempt to place the risk of a misuse of a card on the one to whom it is issued until he notifies the issuer that the card has been lost or stolen. But the duty to read and understand takes center stage when we look to see how corporations that issue cards notify the holder of this allocation of risk. In the past, and even in some cases today, this "term of the contract" was or is decidedly soft-peddled. For example, until the early 1960's most oil companies placed a clause to this effect on the back of the credit card in microscopic type and in language that was not easy to understand. Another clause proclaimed that retention or use of the credit card constituted acceptance of a contract based on the conditions printed on the card. Of course, no hint of such terms appeared on the application for the card the holder filled out and signed. There have been relatively few cases, but the courts have differed on whether or not the large organizations that issue credit cards should be allowed to impose their system on credit card holders by playing with contract concepts in this manner. Originally, those firms that issued credit cards acted in the context of general common law principles. The legal and competitive systems have interacted to pro-

33 CONN. B.J. 1 (1959); Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 567-74 (1960); 30 ALBANY L. REV. 79 (1966); 48 CALIF. L. REV. 459 (1960); 12 DE PAUL L. REV. 150 (1962); 9 KAN. L. REV. 325 (1961); 22 LA. L. REV. 640 (1962); 18 N.Y.U. INTRA. L. REV. 47 (1962); 43 N.C.L. REV. 416 (1965); 35 NOTRE DAME LAW. 225 (1960); 13 STAN. L. REV. 150 (1960); 109 U. PA. L. REV. 266 (1960); 23 WASH. & LEE L. REV. 125 (1966); 2 U. PITTS. L. REV. 117 (1936); 67 W. VA. L. REV. 145 (1965); 73 YALE L.J. 886 (1964).

It is, or may be, in various jurisdictions a crime to use another's credit card without authorization. See Katz, *Federal Prosecution for the Interstate Transportation of Stolen Credit Cards*, 38 U. COLO. L. REV. 323 (1966); 57 NW. U.L. REV. 207 (1962); 7 ST. LOUIS U.L.J. 158 (1962).

33. Much, but not all, of what is said in the following discussion was said some time ago. See, e.g., Isaacs, *The Standardization of Contracts*, 27 YALE L.J. 35 (1917); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 869-71 (1941); Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919). It is significant that most of the ideas in these articles are still relevant and worth emphasizing again. Professor Fuller began one of his classic articles with an apt reference: "Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomforting relevance to legal science." Fuller & Perdue, *The Reliance Interest in Contract Damages*: I, 46 YALE L. J. 52 (1936).

duce the present situation, both in terms of today's business practices and today's law. Our substantive contract and legal system variables can help us sort out the policy threads in the response of the legal system, and this exercise in turn will highlight the major themes in the duty to read problems.

A. Context of the Problem

As with any problem it helps to know something of the context in which it arises. The general history of the credit card can be sketched rather briefly; its rise probably reflects a basic change in widely-held values about going into debt, culminating with the charge account society of the 1960's. Before World War I, some department stores gave customers a credit coin to identify them as people entitled to buy on credit. The oil companies introduced credit cards in the 1920's and 1930's. The Airline Travel card was started in 1936, but its boom came in the 1950's. In 1950, the general travel and entertainment card was created by the Diners Club and followed by American Express in 1958 and Carte Blanche in 1959.³⁴ The use of credit cards has grown tremendously in the last 10 years and has become widespread. Some measure of the size of the credit card business can be indicated. In July of 1966, American Express cards were held by 1,700,000 people and firms;³⁵ Diners Club cards by about 1,500,000.³⁶ About 556 million dollars was charged on American Express cards in 1965;³⁷ about 400 million dollars on Diners Club cards.³⁸ American Express cards are honored by about 6,400 hotels, 10,800 motels, 11,400 restaurants, 16,600 shops and 55,000 gas stations.³⁹ In 1960, it was reported that there were 19,423,000 oil company credit cards outstanding,⁴⁰ and that about a quarter of the United States' car-owning households had one or more oil company cards.⁴¹ Standard of Indiana, alone, had 3.6 million cards outstanding in 1963.⁴²

Obviously, a complex system had to be developed to handle all this business. On the seller's side, a service station attendant or a restaurant cashier has to fill out a charge slip, stamp it with the card, get the customer's signature and send it off to a "home" office. There the

34. For a history of credit cards, see generally N.Y. Times, May 10, 1959, § 3, p. 1, col. 8, p. 11, cols. 1-3; Wall St. J., July 7, 1960, p. 1, col. 1, p. 4, col. 2; *id.*, Nov. 17, 1958, p. 1, col. 1. See also Aviation Week, Dec. 15, 1958, pp. 38-39, for a history of the Airline Travel card.

35. Wall St. J., July 15, 1966, p. 5, col. 1.

36. *Id.*, cols. 1-2.

37. *Id.*, col. 1.

38. *Id.*, col. 2.

39. N.Y. Times, Feb. 8, 1965, p. 38, cols. 2, 4.

40. *Id.*, Dec. 19, 1960, p. 38, col. 6.

41. *Ibid.*

42. Milwaukee J., July 29, 1963, part 2, p. 15, col. 2.

seller's account must be credited and the card holder's account must be charged. Periodically, statements must be compiled and mailed. Finally, in some cases, efforts must be made to collect the bills. Standard of Indiana, in 1963, estimated that on a routine day over 2 million dollars in credit transactions were handled by its office, 75,000 checks were processed, 85,000 statements were mailed, 30,000 credit cards were issued and 4,000 address changes were made. Six hundred and fifty people ran the credit center, working in three shifts to keep up with this flood of paper.⁴³ Obviously, great use of data processing machinery is made by all issuers of credit cards to help battle the great number of transactions. But what about the other side of the system? Who holds a credit card? Airline cards tend to be held by large corporations which then hand them to their executives. Large corporations also often hold the general travel and entertainment cards, giving them to their employees who operate on expense accounts. American Express has described the individual who will be issued a card, as follows: "Generally speaking, we prefer incomes over 7,500 dollars, evidence of steady employment, a favorable bank reference and a favorable report from a local credit bureau in the area where the applicant resides."⁴⁴ The *New York Times* reports that the "average card holder is male, married, earns between 10,000 and 20,000 dollars a year, travels frequently and is a college graduate."⁴⁵ On the other hand, there are cards for the less wealthy and less well-educated. Many banks run local or regional credit card plans for those with generally lower income than the holders of American Express, Diners Club or Carte Blanche cards.⁴⁶ Moreover, in 1960 a survey run for *Look* magazine indicated that 53 per cent of the holders of oil company credit cards had household incomes of 7,000 dollars a year or less.⁴⁷

Finally by way of background, let us turn to the problems of lost or stolen cards. Lost or stolen cards are misused by individuals who see them as a ticket to all the affluent society can offer and by professional criminals who have set up systems of their own to take advantage of the credit card system.⁴⁸ A wallet stolen in New York can yield a fine set of cards that can be in use in Chicago, Miami or Los Angeles the next day. In 1964, *Time* reported, "of the 70 million

43. *Ibid.*

44. N.Y. Times, Feb. 8, 1965, p. 38, col. 2.

45. *Id.* at col. 5.

46. Business Week, Sept. 4, 1965, p. 54; *id.*, Nov. 3, 1962, pp. 65-66.

47. N.Y. Times, Dec. 19, 1960, p. 38, col. 6.

48. See Angus, *Don't Lose Your Credit Cards*, The American Legion Magazine, May 1964, p. 17; Wylie, *Hold On To That Card!*, N.Y. Herald Tribune, Mar. 12, 1961, § 6, pp. 6-7; N.Y. Times, May 15, 1966, § 3, p. 1, col. 1; *id.*, May 6, 1966, p. 62, col. 4; *id.*, Mar. 18, 1960, p. 1, col. 2; Wall St. J., April 26, 1960, p. 1, col. 1, p. 12, col. 3.

credit cards in circulation in the U.S., no fewer than 1,500,000 are lost each year, and of these 60,000 have been stolen. Illicit charges run up on a stolen card are estimated to average 500 dollars. Stealing credit cards is an increasingly popular crime; dollar losses from their misuse increased eightfold from 1958 (\$266,850) to 1962 (\$1,915,000).⁴⁹ *Time* apparently took its figures from two interviews with oil company credit managers reported a month before in the *American Legion Magazine*.⁵⁰ However, there the average amount charged on stolen credit cards was reported as 3,500 dollars.⁵¹ Whatever the consequences, obviously it is easy to lose a credit card. Pockets can be picked, and one enjoying an evening of the sort made available by the travel and entertainment cards is likely to be a good target.

How do the large organizations that issue credit cards attempt to get the holder-is-liable-for-misuse-until-notice-is-sent-to-the-issuer term into their contract? There is a fairly common pattern. First, a person who wants a card fills out an application blank, signs it and sends it to the company. Then if his credit rating satisfies the company, he is sent a 2 inch by 3½ inch plastic card along with some literature welcoming him to the "family." Sometimes the holder of the card is instructed to sign it; sometimes there is no place for signature on the card. As late as 1963, the most common approach to creating a contract was to say nothing about any liability for misuse on the application but to print a clause on the back of the credit card in exceedingly tiny type stating, for example: "2. Customer agrees to pay for all purchases made by any person, whether authorized or not, using this card unless and until Shell Oil Company has received notice that it has been lost or stolen." The contract was formed, or so the companies would like us to believe, by another

49. *Time*, June 19, 1964, p. 53. The figures are *Time's*. If there are 60,000 stolen cards and the average illicit charge run up on a stolen card is \$500, one wonders why the dollar losses from misuse are only \$1,915,000. In 1962, it was reported that "Hilton officials say that in the past two years losses to forgers have been reduced from \$4,000 per week to about \$800." (Emphasis added.) Scalza, *Strictly on the Cuff*, *Barons*, Nov. 12, 1962, p. 5. At that time Hilton ran Carte Blanche.

50. See Angus, *supra* note 48. There are a number of parallels between the *Time* and *American Legion Magazine* articles. Moreover, a credit card insurer mailed out reprints of the *American Legion Magazine* article along with its advertising shortly before the *Time* article appeared. The *Time* article discussed the policy offered by the insurer. I assume the *Time* writer was on the mailing list of the insurer.

51. In order to get an estimate of the number of stolen credit cards that have been reported to the three travel and entertainment card companies, my research assistant counted those indicated as stolen in the weekly cancellation bulletins of American Express (bulletin of June 24, 1966), Carte Blanche (bulletin of July 22, 1966), and the Diners Club (bulletin of May 1, 1966). By sampling pages, he arrived at the following totals: American Express—2,827; Carte Blanche—2,422; Diners Club—2,817; Total—8,066. All three bulletins are supposed to be confidential, presumably because they list the names of people whose cards are being cancelled for non-payment of bills. As soon as those indicated as stolen were counted, the bulletins were destroyed by me.

clause printed in equally obscure type: "5. Retention of this card or use thereof constitutes acceptance of all the terms and conditions hereof." Of course, one who read, understood and remembered what was on the back of the card could minimize any liability under this system by sending notice to the issuer. One suspects that not all credit card holders, or even most of them, would read, understand and remember. Has a holder who fails in any of these respects committed a breach of contract?

B. *The Legal Response: What Has Happened Before the Legislatures and the Courts*

The response of the legal system to the various patterns of issuing credit cards has been inconsistent, what with legal agencies making different judgments as to the proper mix of substantive contract and legal system policies to pursue. While the situation may look chaotic from the offices of the general counsels of major credit card issuers, it is a fine one for purposes of this article. First we will look at some legal history that will help explain both modern legal results and business practices. Then we will turn to the three major cases and the New York statute and appraise them in terms of substantive and system policies.

The first three relevant cases involved department store "credit coins" which were misused. There were no holder-is-labile-until-notice clauses on these credit cards, but the approaches taken by the courts set the pattern for later cases where such clauses appeared. *Wannamaker v. Megary*⁵² and *Lit Brothers v. Haines*⁵³ reached conflicting results in situations where the credit coin had been stolen. In *Wannamaker*, a Pennsylvania court said that the holder had made the misuse of the credit identification symbol possible by losing it and the store was without notice of the misuse. Thus the holder had to take the loss. In *Lit*, the loss was placed on the issuer by a New Jersey court since there was no contract to assume such liability. *Jones Store Co. v. Kelly*⁵⁴ concerned a dispute about whether or not the holder had entrusted his credit coin to a housekeeper who had made unauthorized purchases. A Missouri court said that had the coin been stolen, there would be no liability, but if the holder entrusted the coin to another, the holder would be liable for unauthorized purchases.

The oil companies did not move to the holder-is-labile-until-notice system until sometime after World War II, but the three decisions

52. 24 Pa. Dist. 778 (C.P. Phil. 1915).

53. 98 N.J.L. 658, 121 Atl. 131 (Sup. Ct. 1923).

54. 225 Mo. App. 833, 36 S.W.2d 681 (1931).

concerning their credit cards before then also reflect the search for a sensible basis for dealing with this defect in a useful business innovation. In *Gulf Refining Co. v. Plotnick*,⁵⁵ the holder left his card in the glove compartment of his car, and his car was stolen on August 27, 1933. The holder did not give Gulf notice until mid-October, according to his testimony, or mid-November, according to Gulf. The thief used the card during this period. A Pennsylvania court said that there was a constructive contract, based *not on assent* but on "reason and justice," that the card would "be used or honored properly and with due care." The holder had failed to use it with care and had failed to give notice "so the plaintiff would then have been enabled to have invalidated his courtesy card in all of its respective service stations . . ." A Texas court in *Magnolia Petroleum Co. v. McMillan*,⁵⁶ placed its decision that the holder was responsible for the misuse of the card by agents to whom he had entrusted it, squarely on language printed on the back of the card. The fine print imposed a much harsher liability than is common today, asserting that the holder was responsible for "all purchases made by use of this card, prior to its surrender to the issuing company, whether or not such purchases are made by the named holder . . ." However, the opinion is weakened slightly when it departs from its "a contract is a contract is a contract" approach to observe that the holder had never given the issuer notice that the agents lacked authority to use the card. The last case in our historical recapitulation is *Gulf Refining Co. v. Williams Roofing Co.*,⁵⁷ decided by the Supreme Court of Arkansas. In this case the credit card contained language very similar to that found on the *Magnolia* card. Here Gulf's dealers were so grossly careless (and some even seemed to be knowing parties to the fraudulent misuse of the card) that it is surprising that Gulf decided to sue and prompt an adverse precedent. The holder had written on the cards "Good for Truck Only." The thief, an employee of a Gulf dealer, used it for purchases for his car in a "90 day orgy of buying from Gulf dealers in Mississippi towns." In the court's words:

Some of the dealers knew the forger and he had lived in several of the towns where purchases were made. Tires were sold for a passenger automobile and in some cases of a different size than was required by the vehicle the forger was driving. One dealer sold him two radios, one for his car and the other for his house, which were charged as tires and gasoline and the house radio was never delivered. Charges were made for 20 gallons of gasoline when the capacity of the car the forger was driving was only 15 gallons. In several instances cash was delivered upon false

55. 24 Pa. D. & C. 147 (C.P. Lancaster 1935).

56. 168 S.W.2d 881 (Tex. Civ. App. 1943).

57. 208 Ark. 362, 186 S.W.2d 790 (1945).

invoices made out for merchandise. Most of the invoices had a fictitious license number written in by the dealer which was different from the license number upon the automobile driven by the imposter.⁵⁸

The court refused to follow the *Magnolia* decision and the language printed on the card in the face of the conduct of Gulf's dealers and held that the holder was not liable.

Thus we see just about the whole catalogue of common law approaches to a new problem: Some courts looked for what could be labelled fault, another for a real contractual assumption of risk, another sought a fair allocation of risk in light of business practices by way of a "constructive contract," and still another treated fine print as if a contract had been made—and then qualified its abstract approach to square the case with its feeling about justice. A general counsel of an issuer of credit cards could not be sure where he stood in light of all this precedent. Probably this line of cases was one of the factors that prompted the switch to the now almost standard holder-is-liable-until-notice system; it could be defended as fair, and it squared with the approach taken in *Gulf Refining Co. v. Plotnick*.⁵⁹

The holder-is-liable-until-notice system has been tested in three significant cases and is affected by a statute passed in New York that applies to cases arising after January 1, 1962. In *Union Oil Co. v. Lull*,⁶⁰ fifty-five unauthorized purchases, amounting to 1,454.25 dollars, were made in a month by a person who had stolen the card. The following appeared on the back of the card: "customer . . . guarantees payment . . . guarantee to continue until card is surrendered or written notice is received by the company that it is lost or stolen."⁶¹ Union Oil sued, but the jury found for the defendant card holder. This decision was reversed by the Supreme Court of Oregon, and the case was remanded for a new trial. The court observed that the defendant had not raised the argument that he was unaware of the conditions printed on the back of the credit card and so he was bound by them. It noted that juries could pass on whether or not "the terms of the contract were put in deceptive form which would mislead a reasonable person, and that the defendant was so misled . . ."⁶² Unfortunately a mistake in trial strategy dropped this issue from the case. However, the court found that the defendant was "essentially a gratuitous indemnitor."⁶³ It then observed that in "a variety of business transactions out of which the liability of the

58. *Id.* at 365, 186 S.W.2d at 792-93.

59. *Supra* note 55.

60. 220 Ore. 412, 349 P.2d 243 (1960).

61. *Id.* at 416, 349 P.2d at 245.

62. *Id.* at 420, 349 P.2d at 247.

63. *Id.* at 426, 349 P.2d at 249.

surety, guarantor or indemnitor could arise, the courts have imposed upon the indemnitee a duty to act in such a way as to protect the indemnitor to the extent that it was reasonable to do so under the circumstances."⁶⁴ From this premise, the court reasoned that the plaintiff oil company must use "due care . . . to ascertain the authority of the customer who presents the card."⁶⁵ It noted that the "imposter was driving an automobile bearing an Idaho license plate; the credit card showed that Mr. Lull was a resident of Halfway, Oregon It would be reasonable for a jury to conclude that this fact should have prompted the service station attendants to make inquiry concerning the customer's identity."⁶⁶ The court held that due care was a jury question and that the burden of proof was on the oil company. Moreover, it also held that the oil company had to show that "the goods for which charges are made were in fact delivered to the customer using the credit card."⁶⁷ Perhaps it was thinking of the Gulf dealers in the *Williams Roofing*⁶⁸ case.

On the other hand, in *Texaco, Inc. v. Goldstein*,⁶⁹ an oil company won a clear-cut victory in the lower New York courts. There the court distinguished the *Union Oil* case because it involved a credit card which stated that the holder "guaranteed" payment of all charges until notice was given while the Texaco card stated that the holder "assumes full responsibility for all purchases made hereunder by anyone . . . prior . . . to giving the Company notice in writing that the card has been lost or stolen." At the time Mr. Goldstein applied for his card, there was no mention of the liability-until-notice requirement on the application form issued by Texaco, and the clause quoted was buried in the middle of a paragraph printed in five or five and one-half point type. Goldstein raised the fine-print-on-the-back point, but the court brushed it aside and said that the application was only an invitation to do business and the credit card was an offer.⁷⁰ Thus, when Goldstein used the card, he accepted that offer on its terms. The court seemed to assume without discussion that Goldstein had a duty to read, understand, and remember his obligation to give notice.

64. *Id.* at 428, 349 P.2d at 250.

65. *Id.* at 433, 349 P.2d at 252.

66. *Id.* at 435, 349 P.2d at 253-54.

67. *Id.* at 437, 349 P.2d at 254.

68. *Supra* note 57.

69. 34 Misc. 2d 751, 229 N.Y.S.2d 51 (Munic. Ct. N.Y. 1962), *aff'd* 39 Misc. 2d 552, 241 N.Y.S.2d 495 (Sup. Ct. 1963).

70. *Id.* at 754, 229 N.Y.S.2d at 54. This reasoning might startle the members of a first year contracts class that had worked its way through offer and acceptance. Counter-offers to be accepted by silence are close to a form of deception. The situation fits even more poorly into an offer and acceptance model when the issuer sends out cards to people who have not applied for them and, in fine print, says that retention or use of the card constitutes acceptance.

Once the court had side-stepped the nasty issue about Texaco's tiny type, it got down to business and candidly explained why Mr. Goldstein should be treated as if he had made a contract:

The agreements expressed in the provisions of the credit card in the case at bar, are not unreasonable. The plaintiff assumes the risk of all loss after it receives notice of the loss or theft of the credit card; the defendant assumes the risk of loss prior to such notice.

With the increasing use of the credit card and its growing importance to the economy, the imposition of a high duty of diligence upon the major oil companies in general, most of whom use the same or similar systems of credit card transactions would result in an impairment of an important segment of our economic structure. We must take into consideration that for the most part, the dealers to whom the cards are presented are independent contractors engaged in private enterprise. The plaintiff undertakes to honor credit card purchases by persons presenting them to the individual dealers for credit. In each such transaction however, the plaintiff is in no way involved; it had previously agreed to purchase from the dealer, such charges at par and the plaintiff has no control of either the dealer or the purchaser using the card,⁷¹ until the credit charge invoice actually reaches the company for payment to the dealer on presentation by him. Accordingly, the negligence of the card holder becomes most important. The intent of the parties is that in the event of the issuee's or obligor's loss of his card, or it having been stolen, that he be required to treat his credit card with at least the same importance, or perhaps greater importance than he would with his currency. Assuming the defendant were to have lost some currency, he alone bears the risk of loss, and his loss is fixed by the amount of currency he lost. Should he, however, lose his credit card, the amount of loss would not be fixed, and the risk of loss is not only borne by him, but also by the Company when he actually complies with the conditions of the issuance of the card to him. This is a risk the company is apparently willing to assume, and the only requirement by the company is that the card holder exercise a proper degree of care in the handling of his card. Unless actual notice of loss is given to the company, it can have no way of knowing of such loss, and to require some thirty thousand dealers to suspect the loss of any particular credit card and use diligence against its abuse, is not within the requirements of plaintiff as the issuer of the credit card. Unlike credit cards used in the restaurant and hotel fields, where personal use to the issuee is usually restricted, any holder of the credit card can use the same . . .⁷²

Obviously, the court is most candid about assuming the role of a regulatory agency.

The last case decided was the *Diners Club, Inc. v. Whited*,⁷³ which

71. Apparently, the judge did not know about the control petroleum companies exercise over their dealers or the list system described in the text accompanying pages 1108-13 *infra*.

72. *Texaco, Inc. v. Goldstein*, *supra* note 69 at 754-55, 229 N.Y.S.2d at 55.

73. Civil No. A 10872, App. Dep't Cal., Aug. 6, 1964. Apparently the case is unreported. My description of it is based on the comments in 43 N.C.L. REV. 416 (1965); 67 W. VA. L. REV. 145 (1965). The case was mentioned in N.Y. Times, Aug. 7, 1964, p. 31, col. 6. Apparently, the two reviews sent for the unpublished opinion. I applaud such industry.

appeared in 1964. The Diners' Club sued a television director for 1,622.29 dollars charged on his stolen card before he gave Diners Club notice that his card had been stolen. The back of the credit card had a clause reading, "If this credit card is lost or stolen, original holder is liable and responsible for all purchases charged through use of this card until . . . [he gives] written notice of its loss or theft."⁷⁴ The trial court found for The Diners Club because of the language of the contract. The California Appellate Department reversed and found for the holder. It said that the issuer owed the holder a duty of care to see that "irregular charges . . . [were] not unnecessarily incurred,"⁷⁵ and had the burden of proving that it had been exercised. That court further found a lack of proof of damages since under the contract between Diners Club and the various restaurants and other establishments that had accepted the card, Diners Club only had to pay for "valid charges" and charges made by a thief were not valid ones. The case is very similar to *Union Oil Co. v. Lull*,⁷⁶ but the court here indicated that the result did not turn on the language of guaranty or on an assignment theory but was to be the rule governing all credit card cases.

Finally, we have the New York statute that was introduced about a year after the *Lull* case and went into effect in 1962 after the facts in *Goldstein* had taken place. It says that:

A provision to impose liability on an obligor for the purchase or lease of property or services by 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 type either on the card, or on a writing accompanying the card when issued or on the obligor's application for the card, and then only until written notice of the loss or theft is given to the issuer. Such a provision either in a credit card issued prior to the effective date of this article, or in a writing accompanying such a card when issued, or in the obligor's application for such a card is effective, on or after the effective date of this article, only if the issuer mails to the obligor, properly addressed, written notice of the provision conspicuously written or printed in a size at least equal to eight point bold type.⁷⁷

For purposes of interpreting the statute, it will be noted that the text of this article is set in eleven point type and the footnotes in eight point type. The New York Legislative Committee on Commerce and Economic Development explained the statute as follows: "It would protect holders of credit cards against the unknowing assumption of liability for purchases, etc., by use of a credit card after its loss or theft . . . [by making] ineffective the fine print provisions found on the backs

74. Comment, 43 N.C.L. REV. 416, 417 (1965).

75. *Id.* at 418.

76. *Supra* note 60.

77. N.Y. GEN. BUS. LAW § 512.

of many credit cards by which the issuers of cards attempt to impose liability on holders . . . provisions of which the holder is not made aware."⁷⁸ "The Committee believes that the bill if enacted will protect both the consumer and issuers of credit cards."⁷⁹

C. The Legal Response in Terms of Substantive and System Policies

We can highlight the kinds of value choices being made in these opinions and in the statute by considering them in view of the substantive contract and legal system policies which I have suggested. Let us start with the market oriented substantive policies.

1. *Substantive Contract Policies.*—*Transactional policy* has not been emphasized. None of the opinions, with the possible exception of the *Williams Roofing*⁸⁰ case, turn on the likely actual expectations of the parties, and for good reason. At the time all of these opinions and the statute were written the issuers of credit cards used systems with the effect, if not the purpose, of hiding the liability-until-notice requirement from the prospective holder of their cards. The applications made no mention that there might be dangers in the convenience of having a credit card; the cards contained clauses printed on the back in unbelievably hard-to-read type. One could not say that officials of the oil companies or other firms issuing credit cards were misled by the holder's retention or use of a card and really believed that he accepted their system. Even under this lesser degree of the objective theory of contracts, the companies would have no case as long as the legal system focused on likely or probable expectations involved in any particular situation. Only in the *Lull*⁸¹ case did the court notice this problem, but there the holder of the card had failed to raise the point at trial. The *Goldstein*⁸² opinion slides off this point without ever resolving it in the judge's eagerness to act as a regulatory agency. Apparently, in light of the needs of a mass marketing system the reasonable expectations of an individual have not counted for much.

The New York statute⁸³ stands at the borders of *transactional* and *market functioning* policies. It calls for the liability-until-notice clause to be "conspicuously written." It calls for eight point type on the card, on a writing accompanying the card or on the application. The New York courts could interpret this to mean that they should ask

78. N.Y. STATE LEGISLATIVE ANNUAL 59 (1961).

79. *Ibid.*

80. *Gulf Ref. Co. v. Williams Roofing Co.*, *supra* note 57. It is possible to read this case as resting on an imposed obligation of due care quite apart from the expectations of either party to the credit card arrangement; it is possible that the parties had no expectations about such a flagrant situation since they had not thought about it at all.

81. *Union Oil Co. v. Lull*, *supra* note 60.

82. *Texaco, Inc. v. Goldstein*, *supra* note 69.

83. N.Y. GEN. BUS. LAWS § 512.

whether or not in a particular case the warning about the notice requirement was sufficiently conspicuous so that a reasonable man would have noticed it. Such a question could be taken as indicating the likely actual expectations of both the holder and the issuer, and thus as reflecting implementation of transactional values. Of course, the answers to this question will not show whether or not a reasonable man, however defined, should have *understood* a particular clause even if he discovered it. On the other hand, the New York courts could view the statute as calling only for a determination that eight point type was used. This reading would equate "conspicuous" with a particular type-size and change the question before the court so that it no longer would be likely to tap the actual expectations of the parties. Now it would be a market functioning rule. Holders would have to protect themselves by reading and understanding the eight point type. Issuers would be helped in their need to standardize credit transactions and avoid the details of particular cases. If an issuer used eight point type on the back of his card (and probably if it did not adopt a card design in which even eight point type was hard to discover so that a court would be pushed to stress the term "conspicuous"), it could forget about problems of legal enforceability of its liable-until-notice clauses.

The *Magnolia*⁸⁴ and *Goldstein*⁸⁵ cases represent much the same market functioning approach without even the bow to the holder's expectations that may flow from the statute's demand for eight point type. Both cases implicitly apply a flat duty to read and understand rule even though, at least in *Goldstein*, it seems unlikely that the statement on the back of the card afforded warning to any but the super-cautious. The *Goldstein* opinion rests squarely on the need for handling masses of credit transactions in routine ways from the pump to the computer. It views the allocation as fair to the holder and as based on the need for notice to trigger telling service stations not to honor the lost or stolen card. Viewed realistically, the *Goldstein* and *Magnolia* opinions are very similar to *Gulf Refining Co. v. Plotnick*⁸⁶ where the court talked of a constructive contract based not on assent but on "reason and justice."⁸⁷ Constructive contracts are not an innovation, nor are they necessarily bad; yet candor as in the *Gulf* case helps prompt an appraisal of the reasons for treating people *as if* they made a bargain when they are not likely to know that they did.

One also can find traces of non-market social planning rules in the legal response to credit cards. The New York statute requires issuers

84. *Magnolia Petroleum Co. v. McMillan*, *supra* note 56.

85. *Texaco, Inc. v. Goldstein*, *supra* note 69.

86. *Supra* note 55.

87. *Id.* at 150.

to take the loss caused by misuse once they are given notice; the kinds of terms found on the cards in the *Magnolia*⁸⁸ and *Williams Roofing*⁸⁹ cases are no longer legally enforceable in New York. Moreover, the provision still used in the Airline Travel Card that says that the holder is responsible for *thirty days after he gives notice* also is legally unenforceable in New York. The legislature of that state has removed this question from the control of the large organizations that issue cards and has made its own allocation based on its view of fairness.

*Union Oil Co. v. Lull*⁹⁰ also may represent social planning about the proper allocation of the risk of loss or theft, but social planning that arrives at a different conclusion. That case imposes a burden on the oil company to show that in each transaction involving misuse of the card its station attendants used care in checking the authority of the one presenting the card and that goods and services as indicated on the invoice were actually furnished. It has been suggested that practically these are impossible burdens to carry since station attendants cannot possibly remember a particular transaction and do not have sufficiently standardized routines to show the usual practice as a basis for inferring that it was followed in a given case.⁹¹ If this is true, the *Lull* case actually is a flat rule of social planning that the issuers must take all losses caused by the misuse of credit cards. Certainly the issuers can best spread these losses over all transactions (and thus, perhaps, raise the price of gasoline, motel rooms and other items to those who do not lose their credit cards), and such a rule may be the proper reward for an industry that has managed to hide the liability-until-notice practice in the interstices of the many details on the backs of credit cards. Whatever the actual goals of the Oregon court, the argument on the impact of these burdens of proof is at least plausible.

Also on the non-market side we have a legal response on the border between a flat rule and a case-by-case approach. In *Gulf Refining Co. v. Williams Roofing Co.*,⁹² the court refused to enforce a clause on the back of the card that said the holder was liable for all purchases until the card was returned. There the Company's dealers had participated in the misuse of the card and helped the theft along. The oil company had not agreed to assume liability for the acts of its dealers, and, under classical agency law, many probably were "independent contractors" rather than agents so that Gulf would not be

88. *Magnolia Petroleum Co. v. McMillan*, *supra* note 56.

89. *Gulf Ref. Co. v. Williams Roofing Co.*, *supra* note 57.

90. *Supra* note 60.

91. 109 U. PA. L. REV. 266, 268 (1960). "It would be highly improbable that a service station attendant would be able to recall his actions in regard to any particular transaction, whether or not due care was in fact exercised; and the costs of locating the proper witnesses and taking depositions would exceed the amount in controversy."

92. *Supra* note 57.

responsible for their misdeeds. Nonetheless, the Arkansas court was unwilling to impose this liability on the holder. On one hand, this could be viewed as a rule requiring the oil company to be responsible for its dealers' misconduct concerning credit cards; on the other, the decision reflects a case-by-case balance of whether the issuer or the holder should suffer the loss caused by the thief.

The *Lull* case may involve elements of relief-of-hardship policy if one concludes that its burdens of proof do not impose absolute liability on the company. The Supreme Court of Oregon stressed that the issues of due care on the part of the holder and the service station attendants are issues for the jury. The court may be counting on the jury to provide the case-by-case relief to the needy called for by this policy. As usual, one cannot be sure that relief-of-hardship is the courts' goal. This policy is seldom discussed openly since it runs counter to the market economics theories most dominant in contracts doctrine. And, of course, the Oregon court could be moving only to a fault test to be supervised strictly by the judiciary.

2. *Legal System Policies.*—A number of legal system values are involved in this duty-to-read area. We must consider first the possible pressure on dockets. Then there are problems of discovering the truth as we stray from honoring the credit card as written. Next we must look at efficiency in light of the ability of the legal system to get inputs of information about problems and likely consequences of solutions and to get feedback on the consequences of its law making—i.e., how well has it done in dealing with the lost or stolen credit card. Finally, there is the value of democratic control. What legal agency should decide whether to favor individual expectations, the needs of large organizations or impose obligations of care? How should it make its decision?

a. *Pressure on the Dockets.*—At the outset we can dismiss any burden on the system in terms of unmanageable loads caused by the approaches taken. There have been few reported cases, and there is good reason to think that there are not many unreported actions at the trial level. Other-than-legal sanctions probably deter issuers from using their rights against holders in many instances. Litigation would not pay unless the amount of the bills run up by the one who was using the card without authority was substantial. Lawyers and litigation are not free, and there are costs such as the time of officials of the oil company who must attend a trial rather than work at their desks. Moreover, an issuer who sues a holder for charges made on a stolen card is doing little to promote or retain the good will of that individual. One seldom sues his customers if repeated business is important. In fact, one can suspect that some of the customers sued

might be those that the company thinks are not telling the truth when they disclaim certain bills and say their cards have been stolen.⁹³ To borrow the term of my colleague, Professor Klein, the liability-until-notice rule may be a "surrogate issue"⁹⁴ for the difficult-to-prove fraud claim of an issuer against its holder.⁹⁵ Of course, this surrogate technique will work better if holders do not know of their right to cut off liability by giving notice; the issuer can then decide whether or not to use its rights based on its assessment of the honesty of its holder as well as other considerations such as the amounts involved, the importance of the particular holder to the issuer, and the likely adverse impact of suits against holders on those thinking of applying for credit cards. The more the courts adopt relatively flat rules such as a strict duty to read or that a clause is binding if it is in eight point type, the more they will support such a surrogate issue system and avoid difficult problems of determining the facts in particular cases. *Magnolia* and *Goldstein* do this; *Lull* opens up difficult factual issues; and one cannot be sure of the approach that may be taken under the New York statute.

b. *Discovering the Truth.*—Two approaches avoid most questions of accuracy of fact-finding. There is little problem if a liability-until-notice system is enforced whether or not the holder knew or should have known of it. The only issues would be whether or not the holder was a holder of the card, when he gave notice, and when the charges

93. The possibility is suggested by the following news story: "Some unsavory Pittsburgh gamblers have come up with a new idea on how to painlessly pay off the bookie for those losses on the ponies last summer. Give him a couple of credit cards, let him run up bills equal to the debt, then report the cards as lost or stolen Generally, a charge plate owner is liable for all purchases on his plate, at least until he reports it missing. In practice, however, most stores don't press claims against a customer whose plate was lost or stolen. For most purchases, most stores do not ask the purchaser for further identification. They say they don't because of the time involved and because they figure most cheats generally would be able to produce a false driver's license, too." Wall St. J., Oct. 12, 1965, p. 1, col. 6.

94. "What cannot be determined directly may, however, be determinable indirectly. It may be possible to pose some other question that is answerable and verifiable and that, once answered, will permit an inference as to the proper answer to the basic question. In other words, we may be able to find some question or issue, or a group of questions or issues, that is a good surrogate for the ultimate question." Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis*, 18 STAN. L. REV. 1099, 1103 (1966).

95. Professor Fuller has suggested that large businesses will often use a surrogate issue technique to reserve for themselves power to decide the good faith of another's claim. "The practice actually followed in the settlement of claims by companies which employ a standard form for transacting business is often much more liberal than might be inferred from the terms of the contract they ask their customers to sign The companies, in other words, prefer to reserve to themselves a determination of the question of good faith instead of having that issue submitted to a jury; they seek a contractual margin of safety within which they can exercise their own discretion free from the threat of litigation." FULLER, BASIC CONTRACT LAW 213-14 (1947).

were made. These seem exceedingly straight-forward questions. Almost as easy, from this viewpoint, is the opposite rule. It is hard to think of many questions of fact if the issuer is liable for all charges made with a lost or stolen card. Of course, there would have to be proof that the card was lost and that the charges in question were not made by the holder. In most instances, this probably would not be difficult—signatures could be compared and one could check to be sure that the holder had not used the card after he claimed to have lost it. However, standards calling for balancing the amount of care exercised by holder and issuer, for enforcing liability-until-notice clauses if "conspicuous," or for seeking the best balance of the expectations and reliance of the parties call for difficult factual determinations. For example, due care might turn on what a station attendant did in a particular transaction. Can he remember any one car, driver and business procedure after some time has elapsed? Can he sufficiently show a regular pattern of conduct to allow proof of routine as a substitute for knowledge of the actual case? Clearly, the substantive goal that poses questions of this order, with their inherent uncertainty that tends to lead to settlement rather than judicial solutions, must be deemed important enough to warrant the effort and the difficulties involved in answering the questions and the risk of believing the wrong person. Written documents and signatures make things easy and ease of administration is not the least of the values in any system, including the legal.

c. *Efficacy and Efficiency: Rule Making and the Access to Data.*—Another important legal system policy is that a legal agency should hesitate before it attempts a task it is unlikely to do very well. For example, courts may be thought to lack inputs needed to regulate well. They cannot go out and seek problems to solve but must make their mark on society through the accident of the demands made upon them. Even when they get a problem they may lack information about its precise nature or the likely consequences of the possible solutions open to them. They may also lack feedback, that is, information about the intended and unintended consequences of past solutions enabling them to learn through a trial and error process. Legislatures and administrative agencies often have the same difficulties; theoretically they can do much better on data gathering, but practically they frequently are no better off than courts. In this section, I will attempt to assess the impact of the legal system, if any, on the practices of those who issue and accept credit cards and those who hold them. This calls for data on these practices and on the role played by the legal response to the lost or stolen card. Then the impact will be evaluated in terms of the legal system's difficulties

with inputs and feedback. At various times and places the legal system has attempted to promote warning and knowledge, to impose a duty of due care on both holder and issuer, to impose liability without fault or choice on issuers and to impose that same kind of liability on holders. To what extent has it achieved these goals? To what extent are its failures caused by shooting in the dark?

(1) *Market Functioning and Transactional Goals of Warning and Knowledge about the Liability-Until-Notice System.*—The New York statute was aimed, in part, at giving the credit card holder more warning of the liability-until-notice system. To be effective in New York such clauses now must be "conspicuously written or printed in a size at least equal to eight point type. . . ."⁹⁶ Moreover, in *Union Oil Co. v. Lull*,⁹⁷ the Supreme Court of Oregon indicated that juries could pass on whether or not "the terms of the contract were put in deceptive form which would mislead a reasonable person, and that defendant was so misled. . . ." To what extent did this part market-functioning, part transactional-legal response prompt greater warning of the liability-until-notice system to holders of credit cards in 1966 than existed in the early 1960's and late 1950's?

First, what changes in warning, if any, have occurred from the time of the statute and the case to the present? I obtained applications and credit cards in the summer of 1963; also I have the materials gathered in late 1959 for a note in the *Notre Dame Lawyer*.⁹⁸ In the summer of 1966, once again I collected applications and credit cards for comparison. Just by looking at these applications and cards one can make many intuitive judgments about the amount of warning of the liability-until-notice system given by the various issuers before 1963 and in 1966. However, it seems appropriate to be more systematic.⁹⁹ What

96. N.Y. GEN. BUS. LAW § 512.

97. *Supra* note 60.

98. See Note, 35 NOTRE DAME LAW. 225 (1960). I want to thank Professor Edward J. Murphy for his help in obtaining this material.

99. The description of the advertising, application blanks, credit cards and literature used by various companies is based partly on my impressions but primarily on the ratings given all of this material by Mr. Allan Blank, a third year law student and an editor of the *Wisconsin Law Review*. Ideally, one would use several raters more representative of credit card holders, but this was not feasible because it took over seven hours to rate all of the material. A rough check of the reliability of Mr. Blank's ratings was made by having my wife, Jacqueline Macaulay, rate the 1963 materials, and Professor William Whitford, a contracts teacher at the University of Wisconsin Law School, rate the 1966 materials. These ratings were compared with Mr. Blank's, and while the absolute scores given particular items varied a good deal from rater to rater, the raters agreed, for example, that the liability-until-notice clause on one of the 1966 Texaco cards plus the literature that is sent with it, is the most visible and the clause on the Phillips 66 card is the least visible, etc. Thus, I have some confidence in Mr. Blank's ordering of these materials in terms of their visibility and understanding. It should be pointed out, however, that all three raters are more accustomed to working

with written documents than the average holder of credit cards—a factor which may bias all ratings in some consistent way which cannot be detected. My guess is that it made the judgments favor the issuers by finding items more visible and more understandable.

How did they rate the materials? Each item was ranked on all of the factors listed in the text as components of visibility by sorting all of the items under scale numbers that ran from one (e.g., smallest type, least contrast between type and background, etc.) to seven (e.g., largest type, most contrast, etc.). Each item was ranked for understandability by rating it on a six-place scale in terms of how clearly the idea was stated. Points were then given for sequence. The result was a more systematic measure of visibility and understandability, and it was made by people who had no hypothesis to "prove" since Mr. Blank was working for me on an unrelated project and Professor Whitford and Mrs. Macaulay did not know my conclusions about specific items.

The ranks (first place is the most visible or the most clear) with tied positions averaged are as follows:

1963			
Visibility		Understandability	
Credit cards	Applications	Credit cards	Applications
1 Sinclair	1 Shell	4 Deep Rock	1.5 Avis
2 Texaco	2 Cities Service	4 Enco	1.5 Texaco
3 Cities Service	3 Avis	4 Phillips	3 Conoco
4 Mobil	4 Phillips	4 Pure	4.5 Standard
5 Shell	5.5 Conoco	4 Shell	4.5 Cities Service
6.5 Deep Rock	5.5 Texaco	4 Sinclair	11 Clark
6.5 Pure	7.5 Enco	4 Texaco	11 DX
8.5 Standard*	7.5 Standard	8 Skelly	11 Enco
8.5 Enco	9 Hertz	9 Mobil	11 Gulf
10.5 Skelly	13 Clark	10 Standard	11 Mobil
10.5 Phillips	13 DX	11 Cities Service	11 Phillips
	13 Gulf		11 Pure
	13 Mobil		11 Shell
	13 Pure		11 Sinclair
	13 Sinclair		11 Skelly
	13 Skelly		11 Hertz
1966			
Visibility		Understandability	
Credit cards	Applications	Credit cards	Applications
1 Texaco	1 Avis	1 Citgo	1 Texaco
3.5 Shell	2 Shell	2 Standard 63+	2 Avis
3.5 Sinclair	4 Enco	4 Standard 66	10 Citgo
3.5 Mobil	4 Skelly	4 Hertz	10 Clark
3.5 Avis	4 Gulf	4 Skelly	10 Conoco
6 Gulf	7 Citgo	11.5 Clark	10 DX
7.5 Pure	7 Phillips	11.5 Conoco	10 Deep Rock
7.5 Clark	7 Texaco	11.5 DX	10 Enco
9.5 Hertz	10 Mobil	11.5 Deep Rock	10 Gulf
9.5 Conoco	11 Conoco	11.5 Enco	10 Mobil
11 Citgo	12 Standard	11.5 Mobil	10 Phillips
13.5 Skelly	13.5 Pure	11.5 Phillips	10 Pure
13.5 Enco	13.5 Hertz	11.5 Pure	10 Shell
13.5 Deep Rock	15.5 Clark	11.5 Shell	10 Sinclair
13.5 DX	15.5 DX	11.5 Sinclair	10 Skelly
17 Standard	15.5 Deep Rock	11.5 Texaco	10 Standard
63+*	15.5 Sinclair	11.5 Avis	10 Hertz
66*		18 Gulf	
17 Phillips			

* Standard had three cards that were rated. One was used from 1961 to 1963, another from 1963 to 1966 (63+), and the last one was issued in 1966.

kind of printed information is likely to give warning; what kind is likely to fail? The New York statute mentions eight point type as a minimum, but it seems obvious that a good deal more is involved. I would argue that the relevant bit of information must be *visible* so that attention is drawn to it; it must be *understandable*, and things are more understandable when they are spelled out explicitly in simple and precise language; and the information should come *nearer the beginning* of a transaction than the end so that it can be considered when deciding whether or not to enter a bargain rather than after one has ceased thinking about the matter.

All of the available 1963 and 1966 applications, cards, and literature have been rated on a series of scales designed to reflect those things that make up visibility, understandability and sequence. What is involved in *visibility*? I would expect people to be able easily to read a clause printed in large, bold type in contrasting color where there was little distraction from other things such as trade marks printed in color, where the clause was not buried in a mass of type, where there was adequate spacing between letters and lines and where there was no distortion caused by embossing a name across the matter to be read. I would expect a clause to be progressively harder to read as we subtracted any of these items. Assuming one can find the particular clause without undue effort, can he be expected to *understand* it? This is a question of the effort a holder must exert to read or imply any relevant bit of information out of what the issuer printed on his applications, cards or literature. Things can be remotely possible inferences, clearly implied, or clearly, precisely and simply stated. What ideas should a holder get out of a

These tables can be read as follows: take Mobil, for example. In 1963, its application was in a tie for most invisible because it said nothing about the risk of loss, and its card was a little better than in the middle in terms of visibility. Since the application was silent, it was not at all understandable, and the card was less understandable than most. In 1966, Mobil's clause on its application was near the middle in terms of visibility, but its card was near the top in this regard. (The clause is now printed in red type). Its application was tied for the bottom in terms of understandability, but its card was no more but no less understandable than most of the others.

I had the others rank the material available at the time when they did the rating. As a result, the ratings for some issuers, such as the three travel and entertainment cards, were incomplete since I had only some of their material then. My judgments on these issuers reported in the text were made by comparing their materials with others and seeing where what I thought were comparable items ranked. Some items such as the Diners Club flyer reproduced in the text and the American Express literature on its \$100-deductible system were ranked by Mr. Blank and Professor Whitford, and so my judgments about them have a sounder basis.

I wish to thank Professor Burton R. Fisher of the University of Wisconsin Department of Sociology and my wife, Jacqueline R. Macaulay, for their help in setting up and carrying out these ratings and Professor Whitford and Mr. Blank for their many hours of judging credit cards and the like.

liability-until-notice clause? I would argue the following are all necessary:

(1) If the credit card issued to you is lost or stolen, you may save a large amount of money by notifying us immediately.

(2) A person who finds your card or gets it from a thief might use it to make purchases at our stations because our station attendants often cannot discover that a card does not belong to a person who presents it to them. [substitute for "our stations" and "station attendants," the phrases "places that accept our cards," and "the people who write up charge slips" where appropriate.]

(3) You must pay us for the charges made with your card by any person after it has been lost or stolen until you give us notice that this has happened. You do not have to pay for purchases made with a lost or stolen credit card which are made after you have given us notice.

(4) Make a record of your credit card number and the following address_____. If your card is lost or stolen, tell us and report your number to this address.⁽¹⁰⁰⁾

Finally, there is the question of sequence. A visible and understandable provision can aid a prospective holder if he can read it before he decides to apply for a card; then he can decide not to apply if he thinks the risks are too great or he can apply and get insurance or exercise an extra measure of care in using his card. If the notice comes later, the holder is already committed to the transaction and may have learned a pattern of conduct that is careless. Now the notice must really be jarring to affect his behavior.

Using these standards, to what extent has the warning of the liability-until-notice system changed from 1963 to 1966? First, let's look at the earlier materials. The general credit cards are the most dangerous ones since an unauthorized use can run up large bills so quickly. Yet there was no warning of a liability until notice on three different application forms of the Diners Club which were found

⁽¹⁰⁰⁾ People can differ about how much a prospective holder of a credit card must be told about the liability-until-notice system. If someone disagrees with my bits of information listed in the text, he might get very different results as a rater if he compared the provisions used by the issuers with a different list. However, the issuers were so bunched on the understandability rating that I doubt significant differences would appear as long as the alternative list of items included a clear statement that one must pay for charges until, but not after, he gives notice of loss or theft.

Most issuers leave the first, second and fourth components of a liability-until-notice clause as listed in the text unstated explicitly; the third is always stated. One major problem faced by one who has lost his credit card, and who knows about the liability-until-notice system, is finding the address to which to send his notice. The very cautious make records of such things; a few issuers send their holders a separate piece of paper to keep as a record of the card number and the address. It seems to me that if the issuers really want notice, they ought to make it as easy as possible to give it.

in airports and restaurants in Madison, Wisconsin and Chicago, Illinois during 1963. The applications appear to be the same as those collected in 1959. On the other hand, Carte Blanche managed to turn the notice requirement into an attraction for holding one of its cards in a series of advertisements that appeared in 1963:

Q. Is there protection against credit card loss?

A. Credit cards are safer than cash. If you lose your card, as soon as you notify us, you are free from liability. What's more, our computer is so sensitive to erratic spending that we may surmise your loss even before you realize it.¹⁰¹

Carte Blanche's liability-until-notice requirement is printed on the back of its 1963 application as the fifth of ten clauses. It was not given particular emphasis. There was no such provision on the 1959 form.

American Express was distributing several inconsistent versions of an application form. One picked up in 1963 does not mention the liability-until-notice requirement. Another states it without emphasis. A third states this requirement in bold print above the signature line. A 1959 form states above the signature line that the holder agrees to "the conditions printed on the reverse side of this application." The third of five clauses printed in fairly small type says that the "holder . . . will be responsible for the payment of any amounts charged by the use of the card until such notice is given."

In 1963, the two leading car rental agencies provided a neat contrast. The Hertz application is silent on the loss or theft of a card. Avis tried harder and printed a warning in bold type above the signature line and elsewhere explained in bold type what should be done in case of loss or theft.

Application blanks were obtained from the following oil companies in 1963: American Oil Company (Standard in the Midwest; Amoco in the East); Cities Service (now Citgo); Clark; Continental (Conoco); Sunray DX; Enco (Standard of New Jersey in the Midwest); Gulf; Mobil; Pure; Phillips; Shell; Sinclair; Skelly and Texaco. The Clark, Sunray DX, Gulf, Mobile, Pure and Skelly applications said nothing about liability-until-notice. The provisions on the Cities Service and Shell applications were highly visible; those on the American, Conoco, Enco and Phillips applications were much less visible. Yet all of them required real imagination if a reader were to infer that he was liable until he gave notice. Shell asked for a blank check: "I desire the convenience of a Shell Credit Card to be issued

101. See, e.g., Wall St. J., July 25, 1963, p. 4, cols. 4-6; *id.*, June 27, 1963, p. 5, cols. 4-6.

under your usual terms and conditions upon your approval of this application." Continental stated the idea for a student of this subject but probably not for others: ". . . I agree to pay *all* charges . . . [Emphasis added]" Phillips was less clear, ". . . I agree to pay my account . . ." Enco was slightly misleading: ". . . I agree to pay *my* monthly charges . . . [Emphasis added]."¹⁰² Only the Texaco form explicitly mentioned liability-until-notice to applicants for credit cards, but it did so with some emphasis:

My credit is established at: (List account number if available)

1.	_____	_____
	(Name)	(Address)
2.	_____	_____
	(Name)	(Address)
3.	_____	_____
	(Name)	(Address)

Terms: Full payment upon receipt of monthly statement. Deferred payment plan available on purchases of Firestone or B. F. Goodrich tires, tubes, batteries and accessories of \$30.00 or more, if requested at time of purchase.

FORM S-86C
11-SOM SHTS.

IT IS UNDERSTOOD THAT LIABILITY FOR ALL PURCHASES MADE THROUGH THE CREDIT CARD, PRIOR TO SURRENDER TO TEXACO INC. OR WRITTEN NOTICE TO TEXACO INC. OF ITS LOSS, RESTS UPON APPLICANT.

Signature:

FOR COMPANY

INDIVIDUAL APPLICANT _____

ACCOUNT _____

Signature of Executive

Title

ALL APPLICATIONS ARE HANDLED PROMPTLY AND IF CREDIT IS APPROVED, YOUR TEXACO NATIONAL CREDIT CARD(S) SHOULD BE MAILED TO YOU WITHIN 20 DAYS.

CONFIDENTIAL INFORMATION—FOLD AND SEAL HERE

Turning from applications to cards, when a holder received his card before 1963,¹⁰³ he might or might not be warned that if his card was lost or stolen, he had to give notice to escape responsibility for unauthorized purchases. This fact was prominently stated on the back of the IBM card American Express sent with its credit card in 1963. On the face of the IBM card the following message appeared: "Important: Should you lose your card report the loss immediately to American Express. Keep the card with you at all times. Never leave it in auto glove compartments or your hotel room."¹⁰⁴ In contrast in 1959, a Diners Club card was the outside front cover of a small booklet that contained about 125 pages of listings of places where the card could be used. On the inside of the front cover were nine clauses in

102. And thus *not* those made by another?

103. In 1963, I collected credit cards from my colleagues and made copies of them. As a result, I do not have a complete set since not all companies were represented on the University of Wisconsin Law Faculty.

104. Almost exactly the same form was used to send a renewal card to me in August of 1966. The major differences are that the following is printed in red ink across the top of the card: "This Card Is Your Most Valuable Credential—Guard It Carefully," and the terms and conditions are now referred to on the face of the IBM card in red ink.

very small type, and the liability-until-notice provision was the fourth. As for oil company credit cards, all those surveyed used liability-until-notice clauses but opinions could differ about whether or not a reasonable man would notice the clauses on some of them. All were about equally as visible or invisible, depending on the descriptive term one preferred. For example:

This card confirms the authorization of credit, during the period shown, to the person, corporation, or firm whose name is embossed on the reverse side hereof. Such person, corporation, or firm assumes full responsibility for all purchases made hereunder by any one through the use of this card prior to surrendering it to the Company or to giving the Company notice in writing that the card has been lost or stolen. Retention of this card or use thereof constitutes acceptance of all the terms and conditions hereof.

This card will be honored in the United States by dealers selling Texaco Gasolines, for the following merchandise and services:

1. Texaco Petroleum Products, Marfak Lubrication Service, and washing and polishing service for passenger cars and trucks.
2. New or retreaded Firestone or B. F. Goodrich passenger car and truck tires, new tubes, batteries, and accessories, plus installation charges, if any, also tire and tube repairs, provided at time of sale the merchandise purchased is mounted on or attached to motor vehicle operated by holder of card. Such items as general repairs or mechanical work of any nature are not authorized.
3. Texaco Petroleum Products for aircraft and marine vessels.

It will also be honored in Canada for credit purchases of similar merchandise and services, by dealers of Texaco Canada Limited, selling Texaco Gasolines.

Amounts due on purchases made by use of this card are payable, without discount upon receipt of monthly statement. The Company reserves the right at any time to cancel or to nullify the authorization of credit hereunder.

Form-S-87 F

TEXACO INC.

TERMS AND CONDITIONS

1. Customer named herein is recommended for credit to authorized dealers in the United States and Canada of any company listed below, in the purchase of: Petroleum products delivered into bearer's vehicle, small pleasure boat, or airplane; Lubrication, tire, battery and radiator service, washing and polishing transient daily parking and overnight storage; Tires, tubes, batteries and automotive lamp and muffler assemblies when mounted on or attached to bearer's passenger car or private airplane at time of sale; Accessories or small repairs to passenger cars and private airplanes not to exceed \$50.00.

2. Customer agrees to pay for all purchases made by any person,

whether authorized or not, using this card unless and until Shell Oil Company has received written notice that it has been lost or stolen.

3. Shell Oil Company may revoke or cancel this card or modify its terms at any time without notice, and customer agrees to surrender this card upon demand.

4. Customer agrees to pay for all purchases made with this card upon receipt of monthly statement and reasonable charges for statements showing past-due balances.

5. Retention of this card or use thereof constitutes acceptance of all the terms and conditions hereof.

ALSO PRESENT THIS CARD FOR PURCHASE OF AVIATION AND MARINE PRODUCTS



IN CANADA: Shell Oil Company of Canada, Limited
Irving Oil Company Limited in Maritime Provinces,
North Star Oil Limited in Prairie Provinces.

IN THE UNITED STATES: Shell Oil Company, Continental Oil Company, or Westcott Oil Corporation.

Things appear to have improved by 1966, but the advances are not great in some cases, and things remain the same in others. By and large, those companies concerned with giving visible and understandable warning at the early stages of the relationship continue to do so in 1966. All three travel and entertainment cards mention liability-until-notice in their advertising for new holders or on their application blanks. The literature sent to people who ask for a Diners Club

application blank now is the most visible and understandable of all. It looks like this:

don't worry if your card is Lost

You enjoy unlimited credit card protection at absolutely no cost for any unauthorized charges over \$100 in the event of loss or theft of your Diners Club Card. In addition, your responsibility for any fraudulent charges stops the moment you notify Diners Club of loss or theft of your card. Thus if you notify Diners Club before your card is fraudulently used, you are protected against all liability.

However, in the unlikely event that you should ever require additional protection against the loss or theft of your card, the Beneficial Standard Life Insurance Company offers Diners Club members a low cost group policy that covers in full the first \$100 of fraudulent charges on a Diners Club Card. The policy also covers 7 other credit cards for up to \$2,500 for one card or \$5,000 for all cards, with the first \$50 of any loss being deductible.

It's the finest credit card protection insurance available. The cost? Only \$2.40 per year . . . and the premium may be charged to your Diners Club account.

It will be noted that the Diners Club, following the lead of American Express which acted in November of 1965, now has changed the system so that one who fails to give notice before his card is misused is liable only up to 100 dollars. Both Diners Club and Carte Blanche sell insurance covering lost or stolen cards, and these changes have prompted much of the advertising of the problem. Despite this improvement in warning, it should also be noted that all accent the positive in a way that might be misleading. For example, American Express which acted in November of 1965, now has changed the system your card is fraudulently used, you are protected against *all* liability.¹⁰⁵ The most noticeable case of backsliding is Carte Blanche:

105. The quotation is from material sent to holders of American Express cards in November of 1965 to announce the new "\$100-deductible" system. American Express has continued to mention the risks of lost cards in its advertisements. The following appeared, but was not emphasized, in eight advertisements: "If your American Ex-

it went from an application that spelled out the clause in detail in 1963 to one in 1966 that talked of accepting the terms and conditions (whatever they might be) that accompanied the card. However, Carte Blanche did mention lost cards in its 1965 advertising.¹⁰⁶

Hertz and Avis car rental agencies continue to use the same applications today as in 1963—Avis gives very clear warning and Hertz gives none. There has been some change in the warning given by the oil companies on their applications. Most of those surveyed in 1963 continue to say nothing about liability-until-notice. Texaco's application form that was introduced in 1963 gives less emphasis to the provision than its 1961 form did—the type is less bold and it now has other matter in the same large type competing for attention. Gulf and Pure both print a statement above the signature line that says that the applicant agrees to the terms and conditions printed on the card, without specifying what they are. Shell talks of its "usual terms and conditions" without telling the applicant what they are or where to look for them. Pure speaks of agreeing to the "terms and conditions of use printed on credit card." Citgo and Standard of Indiana both tell the applicant in small type that he is responsible for *all* purchases made through presentation of the card but do not mention lost or stolen cards.

The credit cards and the material sent with them vary much more

press Card is ever lost or stolen, you don't have to worry about a stranger running up a big bill in your name. If you call American Express right away, the company assumes all charges. But even if you can't call, you're automatically covered with \$100-deductible liability protection. It's free." This statement in each advertisement is in a column of type two inches wide along the left border about seventeen inches from the top of the page. It is set off by a small headline. The emphasis in the advertisement is on such catchy slogans as, "Cash is the curse of the traveling class." See N.Y. Times, Aug. 2, 1966, p. 68; *id.*, July 26, 1966, p. 15; *id.*, July 12, 1966, p. 17; *id.*, June 28, 1966, p. 19; *id.*, June 21, 1966, p. 29; *id.*, June 14, 1966, p. 29; *id.*, June 7, 1966, p. 27; *id.*, May 31, 1966, p. 23.

106. See Wall St. J., Oct. 8, 1965, p. 11. Despite this advertising, it should be noted that Carte Blanche is the only one of the three travel and entertainment cards that does not limit claims against its holders to \$100 for charges made by one without authority before notice of loss or theft. Notice of the terms and conditions comes on a leaflet enclosed with the card. The leaflet is called "13 Facts You Should Know About Carte Blanche." Thirteen items are numbered, and then the conditions are set out. The fifth is the liability-until-notice provision. Some emphasis is given by the words "LOST or STOLEN" which are capitalized. It is not a very visible warning.

Carte Blanche's most recent advertising campaign makes no mention of the risk of lost or stolen cards. See, e.g., N.Y. Times, June 17, 1966, p. 25, cols. 2-8; *id.*, June 13, 1966, p. 31, cols. 2-8; *id.*, June 9, 1966, p. 33, cols. 2-8. Probably, Carte Blanche has given progressively less notice than its two larger competitors because it alone still has an unlimited liability-until-notice system rather than limiting its claim to \$100 as do its two larger competitors. It would be interesting, but almost impossible, to test whether or not the greater liability under a Carte Blanche card has had any affect on its recruiting of new holders.

in 1966¹⁰⁷ than they did in 1963. The three travel and entertainment cards mention the liability-until-notice system on the literature accompanying the card. The Hertz card prints its liability-until-notice clause on the back of the card at the end of one and one-fourth inches of fairly small but widely spaced type. The card is sent to holders in a folder that certainly distracts one's attention from terms and conditions—a gentleman is showing an attractive young lady the Mustang he rented from Hertz. Avis is a model, providing a place to record the number of the card on a folder, without the distractions of attractive women and automobiles, that gives both warning and the address to write if a card is lost or stolen.

The oil companies show great variation. The 1966 Texaco liability-until-notice clause on its card and the material sent with it is the most visible. They have high contrast between the figure and the background, little distraction because of emphasis given to things other than the terms and conditions, good emphasis because of their position among all the type, and good emphasis because of type size and boldness. The Texaco card and the material sent with it looks something like this:

This credit card will be honored by dealers selling Texaco gasoline in the United States and Canada for purchases of Texaco products and other merchandise and services that Texaco has authorized such dealers to sell on credit when delivered into or installed upon MOTOR VEHICLES, BOATS and AIRCRAFT.

THE PERSON, CORPORATION OR FIRM WHOSE NAME IS EMBOSSED HEREON, BY RETAINING OR USING THIS CARD, AGREES TO PAY, UPON RECEIPT OF EACH MONTHLY STATEMENT, FOR ALL PURCHASES MADE BY ANYONE USING THIS CARD. THIS OBLIGATION SHALL END ONLY UPON THE SURRENDER OF THIS CARD TO TEXACO OR UPON TEXACO'S RECEIPT OF WRITTEN NOTICE THAT THIS CARD HAS BEEN LOST OR STOLEN.

Texaco reserves the right to cancel or modify this authorization of credit at any time and to demand the surrender of this card.

Form 5-67 H

TEXACO INC.

107. In 1966, I applied for, or had friends apply for, the credit cards of the three travel and entertainment issuers, the automobile rental companies, Northwest Orient Airlines, and all petroleum companies represented in Madison, Wisconsin. I received cards from all the oil companies, the car rental companies, and Carte Blanche. After waiting six weeks my colleague on the Wisconsin Law Faculty who applied for the American Express Card gave up in disgust—he was leaving on a trip to California during which he had hoped to use the card. My Diners Club card was forwarded to me in California after I left Madison, too late for use in the ratings described in note 99 *supra*. I have some of their materials that I obtained from other colleagues who held their cards. I made a great tactical error in dealing with Northwest Orient. Their application reads, "I agree to and accept the terms of the applicable tariff regulations." I wrote Northwest Orient asking for an explanation of what those regulations might be but they failed to reply. A judge that enforced this arrangement as a contract would be a true believer in magic.

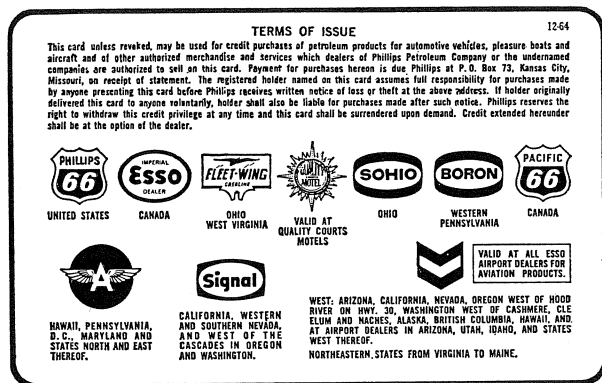
We are pleased to enclose your Texaco National Credit Card. It is the only Petroleum Credit Card Honored under one sign in all 50 States — and in Canada, Puerto Rico and the U.S. Virgin Islands.

We hope you will start using your card immediately for credit purchases of Texaco quality products and services for your car, boat or airplane. Your Texaco Credit Card may also be used for purchases of authorized tires, batteries, accessories and Texaco authorized Motor Tune-up service and, if desired, on a deferred payment plan. More details on Texaco's easy payment plan appear on the back.

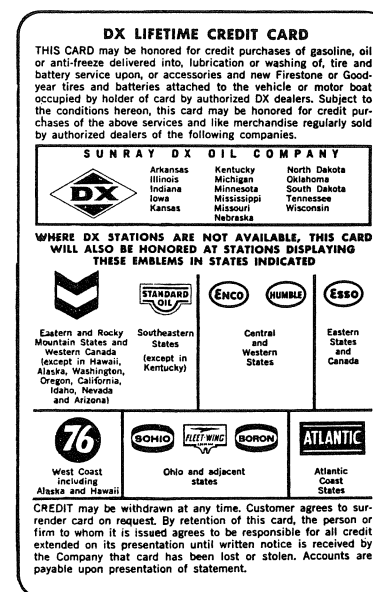
Texaco employs the widely used cycle billing system which provides for mailing statements throughout the month on approximately the same date each month. Payment is due when statement is received. Your statement will include all purchases and payments received by the billing office up to the date shown on the statement.

IMPORTANT: If your Credit Card is lost or stolen, notify immediately the Texaco office from which your statements are issued to avoid credit responsibility for fraudulent use of your card.

Citgo (Cities Service in 1963), Mobil, Shell and Sinclair also all made efforts to provide visible and understandable warning on cards and on literature included with the cards. Phillips 66 held a firm grip on last place among those I obtained because of its cluttered card with tiny type buried in the middle of a paragraph and distorted by embossing. It looks like this:



The Sunray DX, Deep Rock [Keer-McGee], and Enco cards were not much better. Deep Rock's clause is not particularly easy to find. Enco's card features a thick red border and screaming trade marks to distract the holder. The DX clause is hard to find at the bottom of the back of the card:



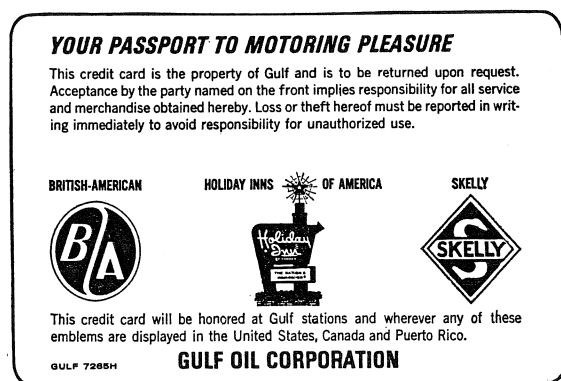
American Oil Company's card uses thick type but crowds clauses at the bottom under a display of trade marks and distorts all of them by embossing. Conoco buries its clauses in a mass of type although it is nicely spaced and not too invisibly small.

A court that enforced any of these last five, and perhaps some of the others, would not be a court concerned with giving the holder a chance to discover the liability-until-notice system. What is worse, Standard, Conoco and Phillips 66 also hide clauses that say that the notice cut-off of liability does not apply if the holder entrusted the card to another; "If holder originally delivered this card to anyone voluntarily, holder shall also be liable for purchases made after such notice."¹⁰⁸ On both the Standard and the Phillips cards sent to me the embossing of my name and account number further obscured this clause.

108. As a result of a trip west, I can report that Standard Oil of California also uses an entrusting clause hidden in a mass of tiny type crowded at the bottom of the back of its card. In *Socony Mobil Oil Co. v. Greif*, 10 App. Div. 2d 119, 197 N.Y.S.2d 522 (3d Dep't 1960), the court refused to impose liability on a husband who had entrusted a card to his wife who later separated from him and kept the card. The court commented that Mobil's "contention as to the necessity of the surrender of both cards has no support in any of the contract provisions and there seems to us no sufficient basis for inferring such a condition." *Id.* at 120, 197 N.Y.S.2d at 523. Standard, Conoco and Phillips seem to have taken the court's language as an invitation. University professors who hold Standard credit cards, in an informal survey of my friends, are shocked and annoyed by this clause. Only the greatest respect for bureaucratic policy could justify

Several issuers also furnish warning of liability-until-notice on literature sent after the card is issued. For example, all three travel and entertainment cards mention it in their guide books of places that accept their credit cards. Shell, in the first part of 1966, sent its credit card holders a leaflet telling them "Your Shell Credit Card should be protected with the same care you'd give currency." It also contained a space to record the credit card number, the address to send notice of loss and spaces to record other credit card numbers.

Most of the liability-until-notice clauses were about the same when rated for understandability. All could be more explicit and could stress the risk and the urgency of giving immediate notice, but all could be worse. The least understandable liability-until-notice clause was Gulf's, but not by much.



A reader must draw many inferences to extract the necessary information from this language. However, it should be noted that it does use the word "immediately"¹⁰⁹ to connote urgency which is not common in these clauses.

enforcing such a clause except in the joy ride case—"Here, take my card, run up bills and I'll tell the Company that it is stolen." The three oil companies may be trying to set up another surrogate for having to prove that this happened whenever they are sure but cannot prove it has. On the other hand, taken literally, if a man gave a card to his wife (Phillips even sends two without a special request) and she lost it, then even notice to the company would not stop the holder's liability. This bothered my friends.

109. When I reported to Gulf that my card was lost in order to check whether or not it issued new numbers, see note 129 *infra*, it sent the new card with the same number in a folder that on a perforated section stated: "IMPORTANT: Detach and retain this card in a safe place. If your travel card is lost or stolen, the Gulf office from which you are billed should be advised immediately, giving your account number and name. A new card will be issued promptly." On another part of the folder, the following appeared, "It is our policy to provide you two travel cards so that other members of your family may enjoy the convenience of saying 'charge it.' If at present

In sum, there has been some improvement in visibility and understandability but there is room for more.

So much for the warning given by the various issuers. What do people actually know? Is there a general awareness of the liability-until-notice system, and if there is, what conclusions should be drawn from this fact? Ideally, to answer these questions, one should survey a random sample of people who hold different kinds of credit cards and a random sample who hold none at all. I did not have the resources to run anything close to such a study, but I tried to get some idea of the answers by a simple survey of customers coming into five service stations. Seventy-two people, an average of almost fifteen a station, were interviewed while an attendant was filling their tank. Forty-three held oil company credit cards, and twenty-nine did not. Only two persons refused to answer.

The twenty-nine people who *did not hold cards* were asked, "Suppose a person loses a credit card. What should he do about it?" All but one said that he should notify the company. And they all knew why: "So nobody runs up bills"; "Pretty darn important—otherwise somebody could pick it up and start charging on your account"; "Very important—otherwise you can lose money if someone else gets his hands on it"; "Right away so nobody could charge"; "If it's lost, it's the first thing I would do"; "Important so that you don't get billed for extra gas." Because I was afraid I was leading the witness after the first day's results, I added two questions to the interview. First, I asked, "Suppose a man didn't know he was supposed to notify the company that his card was lost or stolen; do you think that he should be liable for charges made by someone who used his card"? Nine people thought our hypothetical card holder should be held. One commented that "ignorance of the law is no excuse." Seven disagreed, and two had no opinion. Second, I asked, "Suppose a person doesn't use his card often, say once every two weeks. After using it on May 1st, he doesn't try to use it until May 15th, at which time he finds it missing and immediately reports it to the company. Do you think he should be liable for charges made by a thief or finder during the period from May 1st to May 15th?" Seven people who did not have oil company credit cards thought he should be liable. One commented, "if the card reads you're liable, then you should be liable." But eight disagreed and four replied that they had no opinion.

Those forty-three people who *held oil company credit cards* were

you do not need the extra card, it will be readily available should you lose or damage the card you're using." Certainly, apart from the word "immediately" on the card, Gulf is not doing much to impress me with the urgency of giving notice to stop liability for lost or stolen cards.

asked a similar set of questions. Only four said they would do nothing if they lost a credit card, and all the rest said they would give notice. Twelve of them commented that it was of extreme importance to give notice quickly so that the company would not accept any more charges. Twenty-seven thought that *most people* would notify the company to stop liability for misuse of a lost card. Sixteen thought that most people would do something else such as "panic," "forget about it," "start paying cash," or "ask the gas station what to do." Twenty-four of those with cards also were asked the two hypothetical questions about the man who had lost his card. Thirteen thought it fair that a holder would be liable although he did not know of the requirement of giving notice to escape responsibility. One commented that "ignorance of the law was no excuse." Another said he did not think that "knowledge has anything to do with it," and another said that "not knowing is your own fault." Seven disagreed and three had no opinion. Nine thought it fair to hold the man who did not know his card was stolen, nine thought it was not fair and five had no opinion. Three gave no answers for various reasons.

In order to get an impression of practices in dealing with credit cards, interviews were also conducted with operators of sixteen service stations in Madison, Wisconsin. Only two sold the same brand of gasoline, and an attempt was made to talk with men who ran small local stations, large stations on the major streets that run through the city, stations that specialize in repair work, and stations located on super-highways carrying traffic from Chicago to Minneapolis. Also a restaurant manager and two managers of hotels that run popular restaurants were interviewed to obtain information on the credit card systems used by American Express, Carte Blanche, and the Diners Club. All of these draw many customers from out of town—particularly on football weekends—and are moderately expensive places to eat or stay.

All nineteen of these men were well aware of the liability-until-notice system. On the basis of these interviews, I am willing to guess that knowledge of the liability-until-notice system is very widespread among those who run places that honor credit cards. Yet, the responses in my interviews with customers at service stations indicate that knowledge of that system and appreciation of the risks in not giving notice, although widespread, are something less than universal among card holders. All but two of the service station operators interviewed said that several times a year holders of credit cards asked them what to do about a lost card. Seven of the forty-three service station customers who held oil company cards had at some time lost one. Four had sent notice to the company. Of the three who did not, one waited a day and his card was returned.

Another said she thought that her children had pushed it down between the back and the seat of the rear seat so she had not done anything although this had happened three months before the interview. The final person who had lost a card waited for two weeks and then called his Standard station to find out what to do.

From this we can guess that there are several common situations where holders of credit cards may delay in giving or fail to give notice when their cards are lost or stolen:

(1) While some knowledge of the liability-until-notice system may be fairly widespread, there are some card carriers who do not know about it. They have not read and understood the small type on their credit cards, or, if they have, they do not remember what it said.

(2) While most people who have lost a credit card may be aware of its disappearance and know of the system, some people do not give notice because they are preoccupied with other affairs, careless, or just lazy.

(3) Some may know of the system and that their card has been lost or stolen but not appreciate the magnitude of the risk of misuse or the urgency in giving notice. Such a person may delay because he is busy with other things, or because he hopes he will find what he assumes to be a misplaced card, or because he thinks he must have left it at the last establishment where he used it.

(4) Some may know of the system, the magnitude of the risk and the urgency of giving notice, but they may not know that they have lost their card until the next time they want to use it or until they receive a bill from the issuer that includes the charges of a thief.

Finally, there is another situation suggested by several of the service station operators. A card holder who is short of cash may sign invoices with an atypical signature. Then when the bill comes, he can fraudulently claim that his card was stolen and the invoices in question were signed by another.¹¹⁰ If there were no liability-until-notice system, this plot might have real possibilities for one willing to rob from the rich (the oil company or one of the travel and entertainment card companies) and give to the poor (himself).

Thus, even given the high awareness of the system that I found in my spot check of service station customers, there are a number of issues raised by an issuer who gives little, or almost no, warning of the importance of giving immediate notice of a lost or stolen card. First, what should be done with those who do not know what "everyone else" knows? Essentially, this is the common problem of imposing custom on those unaware of the folkways. Of course,

110. See note 93 *supra*.

society makes many such impositions.¹¹¹ Should the legal system treat those who don't know about liability-until-notice as if they did? To do so would be to regulate in the service of both market functioning and social planning policies—we could stress the needs of large organizations and calm our qualms about the costs to some individuals by assuming that since nearly everybody knows, not too many people will be hurt. However, before we accept this as a fact we should have better data than that provided by my quick and unreliable survey. My survey suggests that there may be widespread knowledge or that people can figure out the proper response when asked a question about lost credit cards; it gives us no precise measure of the prevalence in the population of knowledge of the system, the risks, and the reasons for giving immediate notice. Moreover, there is also a value question to face: Do the benefits to the issuers in assuming, or pretending, that everyone knows about the system, appreciates the risks and understands the urgency outweigh the burdens on the issuers if the legal system insisted that they give clear warning that was understood by holders? One can appreciate the high values of routine and standardization and the potential difficulties in dealing with holders who try to defraud issuers by falsely claiming to have lost their cards. Still, what are the costs of giving meaningful warning? On the one hand, if people knew of the liability-until-notice system, and the risks and urgency involved, some would decide that the convenience of using credit cards was not worth the potential costs. Of course, we have no idea how many people would react this way today as compared to how many would assume the risk or would buy the insurance that is readily available.¹¹² Some

111. "Business goes on much better if the law in effect guarantees the usual, and that guarantee is the more weighty and the law is more conveniently administered if we are required to adhere to the usual in favor of all persons informed or uninformed, except the black-hearted who know our private exceptional methods and seek to take advantage of us." Wright, *Opposition of Law to Business Usages*, 26 COLUM. L. REV. 917, 921 (1926). Of course, Wright's statement leaves open the problem of classifying people as blackhearted or not. Where should we put the issuers of credit cards who use tiny clauses on cluttered cards?

112. Insurance against losses caused by misuse of a lost or stolen credit card became available in 1964. See e.g., Time, June 19, 1964, p. 53; N.Y. Times, Aug. 7, 1964, p. 34, col. 3. There are several types. One is a kind of forgery and fidelity policy usually sold to businesses that give credit cards to executives and salesmen. The policy language, as filed in Wisconsin, reads that coverage is as follows: "Loss which the insured shall sustain through forgery or alteration of, on or in any written instrument required in conjunction with any Credit Card issued to the Insured or to any partner, officer or employee of the Insured or to the Insured's spouse or any child residing permanently in the residence of the Insured; provided, however, that the Insured shall fully comply with the provisions, conditions and other terms under which such Credit Card shall have been issued."

(The last clause is somewhat ambiguous. Suppose a holder fails to give notice to the issuer and is billed for charges made by an unauthorized user. Can the insurance

issuers might prefer to see the public less sophisticated about the dangers of credit cards. On the other hand, it is not easy to give effective warning to all holders and potential holders. You can only cram so much on the back of a credit card that will fit in a wallet. Even if the warning is printed on other material sent with the card or on the application, it is hard to be sure that it will be read. Yet the practices of some issuers indicate that much can be done, and some imagination undoubtedly could be applied to improve on the practices of even the best issuers in this regard. It is every man for himself in weighing such things, of course, but I am not convinced that such improvement would cost the issuers much. I suspect that those issuers who give little warning have not made a policy decision to hide the notice requirement from the public but just have failed to think carefully about what they are doing. I see no reason for the legal system to support this kind of carelessness on the part of officials of large organizations.

When we move from the few who *do not know* about the liability-until-notice system and consider those who are careless, those who do not appreciate the risks and urgency and those who have no easy way of discovering they have lost their card until it may have been misused for a long time, the balance of card holders' and issuers' interests may change. I think that better warning by the issuers might

company defend against liability by asserting that the holder has not complied with the terms of the credit card? If so, what is the holder getting for his premium?) Suppose a business had twenty employees with credit cards and wanted \$5,000 coverage for three years. What would it cost? It would pay \$22 as a base price plus \$11.50 plus \$1.15 as the loading factors to cover the twenty employees or a total of \$34.65. \$10,000 coverage would cost \$47.05. Clearly, this is not much of a charge, remembering its tax treatment, for all but the smallest businesses that are not likely to have much need for credit cards.

Another significant kind of coverage available is an endorsement to a person's homeowner's package policy. One common form of coverage excludes liability "Unless the Insured shall have fully complied with all terms of his credit card agreement which deal with loss of the card." Of course, this raises similar questions to those asked in connection with the forgery policy. In Wisconsin, and the situation in other states should be similar, a holder can buy this endorsement for \$5,000 coverage for three years for himself for \$18.00. \$10,000 coverage costs \$24.00. Again, clearly, this is not particularly expensive insurance. In a letter, A. Kent Shamblin, Assistant Regional Director of the Insurance Information Institute comments, "We regret that we have no information on how much of this coverage is being written. However, one company executive we spoke to said that most businessmen who have homeowners policies are purchasing the coverage. Businessmen would probably be more conscious of the need for such coverage and also probably constitute most of the credit card holders."

It seems likely that the amount of coverage will turn on the industry of a businessman's insurance agent when he puts together the package involved in a home owner's policy.

I wish to thank the Wisconsin Insurance Department, and my agent, Mr. Robert Boylan, as well as Mr. Shamblin for help in compiling the information in this note. See generally N.Y. Times, July 12, 1965, p. 40, cols. 2, 4-5, indicating that rates in Wisconsin are comparable to those elsewhere.

have a desirable impact on all of these problems. Some holders, at least, might be less careless and would appreciate the risks. I am not sure, however, that even with better warning the issuers' interests would look more appealing. In any event, before the legal system moves to favor issuers who do not give clear warning behind a duty-to-read rationale, much more needs to be known. Just what are the advantages to the issuers in a system where little or no warning is given? How many of the issuers' advantages would be lost if fair warning were required and given? Fortunately, most of the data needed to answer these questions could be assembled by the issuers today by comparing the results of the practices of some of their number; we only need insist that the right questions are asked and that the issuers carry the burden of proof to establish that holders should be treated as if they had made a contract.

To sum up at this point: One legal system policy is that the legal system pursue its goals effectively and hesitate before trying to do what it cannot do well. I asked whether or not the legal system may have prompted more warning to holders from issuers. This led to an examination of the amount of warning given in 1966 as compared to that given in 1963 and to comparative evaluation of the warning systems of different issuers. Now we can ask what part the legal response played in prompting the changes which are apparent from this study.

Certainly other-than-legal sources have played an important part in the increase in warning that has taken place. The mass media has publicized both the liability-until-notice system and the risks involved. The number of magazine articles and stories in the *New York Times* and the *Wall Street Journal* has run to about three or four a year since 1959, but before then there were very few. The publications range widely in their readership: *The American Legion Magazine*, the *Commonweal*, *Consumer Reports*, *Life*, *Newsweek*, the *Reader's Digest*, *Time* and *U.S. News and World Report* as well as *Banking* and *Credit World* have all run articles on this subject.¹¹³ Moreover, an editor of a business magazine lost his Air Travel card and wrote an

113. The articles and stories mentioning the risk of misuse of lost or stolen cards are:

1955

Newsweek, Jan. 3, 1955, p. 53.
Changing Times (The Kiplinger Magazine), July 1955, pp. 37, 38.

1958

American Mercury, June 1958, pp. 91, 97.
U.S. News & World Report, Oct. 24, 1958, pp. 38, 39.

1959

The Commonweal, Nov. 13, 1959, pp. 206, 207.
Consumer Reports, Mar. 1959, pp. 140, 143.
Life, June 1, 1959, pp. 120, 123-24.

account of the over 4,000 dollars worth of charges that were run up by someone misusing the card.¹¹⁴ This story was privately circulated to about 100 or 150 editors of business magazines¹¹⁵—part of the credit card issuers' public. The ideas were there to see; we can assume that many credit card holders read these stories and were warned. A number of insurance companies began issuing policies covering losses from misuse of a lost or stolen credit card, and in their advertising they probably warned a lot of people.¹¹⁶ The credit card issuers also provided some warning through publicity. Good warning given by one issuer may splash over and educate people about the system used by issuers that specialize in obscure phrases. Moreover, in the early 1960's, Carte Blanche tried to reassure the public by pointing to its

1960

N.Y. Times, July 17, 1960, p. 47, col. 3.
Wall St. J., April 26, 1960, p. 1, col. 1, at 10, cols. 3-4.

1961

Banking, Feb. 1961, p. 60.
N.Y. Herald Tribune, Mar. 12, 1961, § 6, pp. 6-7, reprinted in *Reader's Digest*, April 1961, p. 63.

1962

Horizon, May 1962, pp. 118, 119.
N.Y. Times, June 19, 1962, p. 37, col. 6; *id.*, Sept. 14, 1962, p. 2, col. 4.

1963

The Credit World, Nov. 1963, pp. 9, 10-11.
N.Y. Times, July 2, 1963, p. 15, col. 1.
Wall St. J., July 2, 1963, p. 20, col. 2.

1964

The American Legion Magazine, May 1964, p. 17.
Time, June 19, 1964, p. 53.
N.Y. Times, Aug. 7, 1964, p. 31, col. 6; *id.* at 34, col. 3.

1965

N.Y. Times, July 12, 1965, p. 40, col. 2; *id.*, Feb. 8, 1965, p. 38, cols. 2-3.
Wall St. J., July 8, 1965, p. 16, cols. 6-7.

1966

N.Y. Times, May 15, 1966, § 3, p. 1, col. 1.
San Francisco Chronicle, Oct. 4, 1966, p. 51, col. 1.

114. Spector, *Credit Cards Revisited or What to Do Until the FBI Comes*, *Banking*, Feb. 1961, p. 60.

115. Interview with Mr. Spector.

116. Aetna's leaflet is entitled "The Case of the Missing Credit Cards," and it states in big type that "Personal Credit Card Forgery Protection Can Save You Hundreds of Dollars . . ." The St. Paul Insurance Companies' leaflet states, "Loss of Your Credit Cards Can Mean a Serious Financial Loss to You." (Interestingly, the Aetna leaflet says, "Of the 70 million credit cards in the U.S. at least 1,500,000 are lost each year, and of these 60,000 are stolen. It is estimated that purchases charged with a stolen credit card average \$500." This is a paraphrase of the *Time* magazine paraphrase of the article in *The American Legion Magazine*. See notes 49-50 *supra*. These figures were an estimate by the manager of the American Oil Company's Central Credit Office in Chicago. Since I have repeated the numbers, I suppose that now I can be cited for the proposition.)

During the time this article was being written, in the summer of 1966, a Madison insurance agency broadcast a commercial, advertising credit card insurance, on a local radio station at a time when many businessmen were driving to work.

computers that could detect unusual patterns of spending.¹¹⁷ Carte Blanche later went into the business of selling insurance against losses caused by misuse of cards and the Diners Club soon followed suit. Finally, American Express, then followed by Diners Club introduced its 100-dollars-deductible system and began advertising it as a selling tool for its cards. It looks as if the increase in warning from other sources may have presented the possibility that potential holders might be scared off. In the attempt to turn this problem to their competitive advantage, Carte Blanche, the Diners Club and American Express further increased the total level of warning.

What then was the contribution of the legal response? It is impossible to be sure, but we have some clues. *Union Oil Co. v. Lull*¹¹⁸ was decided in 1960, and left the issuers in a most uncertain position because of its intimation that a jury might find that the fine print on the back of a card was not part of a contract and its placing on the issuers the burdens of proving due care and that goods were actually delivered to the man who misused the card. The New York statute was passed in April of 1961. By November of that year, Texaco, in response to the statute, had changed its application blanks to advertise its liability-until-notice system.¹¹⁹ Somewhere between 1962 and 1964, Texaco, Sinclair, Mobil and Shell all made changes in the type face or color contrast of the liability-until-notice provisions on their cards. All do a great deal of business in New York, and have good reason to comply with its statute. For the most part, those oil companies surveyed that give less warning do not market in New York. Even the three travel and entertainment cards' interest in selling insurance or providing a 100-dollars-deductible system may flow from a legal response. In 1964, the Diners Club sued a television director for 1,622.29 dollars, charged on his stolen card.¹²⁰ Despite the language on the card and material accompanying it, the court, in effect, followed the *Lull* case and imposed a duty of care to see that "irregular charges . . . [were] not unnecessarily incurred."¹²¹ This case could have convinced the three that their efforts to put liability on card holders were not worth the costs. Certainly, the parallels in time could be just coincidence. Nonetheless, it seems likely that the general ambiguity of the legal response outside of New York and the lack of certainty that resulted plus the demands of the New York statute that held out the promise of increased certainty, were an influence

117. See note 101 *supra*.

118. 220 Ore. 412, 349 P.2d 243 (1960).

119. I have reason to believe that Texaco wanted to have its legal position clear in New York where it has many card holders and thought that if other states were to pass statutes that they would be similar to the New York legislation.

120. Diners Club, Inc. v. Whited, *supra* note 73.

121. *Ibid.*

in prompting the greater degree of warning that exists today as compared to the situation in the early 1960's. House counsel for American Express commented,

As long as the creditor or the issuer gives notice in the manner prescribed in the [New York] statute, the cardholder will be liable for all charges until he gives the creditor or issuer notice of the loss or theft of the card. There is no more speculation on this point. However, this is a statute and must be literally complied with in all respects, if we are to hold the cardholder liable.¹²²

In a sense, then, the legal response had impact on warning both when it was extremely uncertain and when it provided certainty of sorts (the New York statute can be read to require only eight point type or to require "conspicuousness" tested on a case-by-case basis). One must decide which goal—protecting the expectations of the parties in the particular transaction or providing a rule of fair warning—is best in order to evaluate these impacts. However, in the absence of much by way of input of information about the problems and little feedback about the consequences of past cases, it is striking that an ambiguous legal response prompted officials of the issuers to police themselves. In other words, it is not always necessary for the legal system to set out to regulate to provide leverage for change. Telling large organizations no more than that they must be fair sometimes works. Inputs and feedback caused no long-run problems when the goal was warning or even affecting the likely expectations of holders. Yet the haphazard process has not produced perfection. Some applications and cards still hide the liability-until-notice clause, and not everyone has full knowledge about the system, the risks and the urgency involved. Probably more can be done through giving issuers incentives to tell people about these things.

(2) *Regulation in the Service of Relief-of-Hardship and Social Planning.*—Continuing our discussion of the legal system policy of efficacy and efficiency, now we will shift our focus from the goal of maximizing warning and knowledge to regulating for other than market ends. Some judges who decided lost or stolen credit card cases wanted to decide cases or make rules in light of relief-of-hardship or social planning policies. How effective were they? To what extent were they troubled by insufficient inputs of information about the problem and the lack of feedback on the consequences of the legal response that had gone before?

(a) *Good Faith, Due Care and the Balance of Negligence.*—The most conventional approach is to construe some additional terms into

122. O'Connor, *The Triple Threat to Credit—Frauds—Overloads—Bankruptcies*, *Credit World*, Nov. 1963, pp. 9, 11.

the contract. Impliedly both issuers and holders can be held to have promised to deal with each other in good faith and to use reasonable care in handling credit card transactions and in protecting the credit card against loss or theft. Such a construction may come close to the actual sense of the agreement between the parties. If so, then this is a transactional approach. But even if one or both parties failed to consider the matter, the courts favoring such a construction would probably impose it. Finding the proper policy "pigeon hole" then would depend on how these vague standards were applied. Such a rule could be thought to aid the functioning of the market or to blunt it by imposing an unwanted burden on large organizations that have attempted to avoid anything beyond a liability-until-notice system.

It is difficult to evaluate the impact of cases that seem to want to solve the lost or stolen card problem on the basis of good faith and due care. The holder of the card could take a number of steps. He could record his card numbers and the addresses of the issuers so he would be prepared to give notice if he lost his cards. He could develop habits of care concerning the cards—he could be sure to check to see he had his card after each time he used it and he could avoid carrying unnecessary cards in crowds or other places where his wallet was likely to be stolen. But all of this requires an awareness of the risks of being a holder of a credit card and of the magnitudes of those risks. That, in turn, depends on warning from the companies, a problem with which I have already dealt. The issuers know all about the risks and their magnitude. Too many have been careless or timid in letting the holders of their cards in on this information.

What about the other side? How much care do the issuers use and could more be demanded? In order to get an impression of practices in dealing with credit cards, it will be recalled that interviews were conducted with the operators of sixteen service stations in Madison, Wisconsin, one restaurant manager and two managers of hotels with popular restaurants.

The primary leverage device used by most credit card issuers to control the practices of the man who accepts the card and writes an invoice is the circulation of a list of numbers of invalid cards. If the service station or restaurant accepts a card on the list, the issuer will not pay the station or restaurant for the charge—thus if the issuer has no right to hold the man who lost the card because he has given notice, it can move the burden of this loss to those who take the cards. For example, Carte Blanche, the smallest of the three travel and entertainment card companies, in June of 1966 issued a thirty-nine page booklet of credit card numbers not to be accepted. Of course, not

all numbers represented stolen cards as issuers cancel cards for non-payment of bills. Shell Oil Company, in June of 1966, issued ten legal size pages with a list of 578 invalid card numbers to its Chicago area (including Madison, Wisconsin) dealers. The travel and entertainment card issuers send out such bulletins as often as once a week. The oil companies tend to send them only monthly but also send special letters when they know a card is being used in a particular area. All of the issuers represented in my interviews used this general kind of system. In addition, almost all of them offer a reward to employees of the places that take their cards if they pick up an invalid one. The rewards range from five to one hundred dollars, but ten to twenty-five dollars seems to be the most common amount.

In most cases where you find a formal system, it is wise to find out whether or not anyone pays any attention to it, and if so, when. How does the list system work? Although it may not be a typical case, the list system seems to work beautifully at the Madison restaurant. When a customer gives a waitress a card, she takes it to the hostess who looks at the person presenting it and makes a judgment based on his appearance and checks to see that the card has not expired. The cashier then takes the card, checks it against the list of invalid numbers and writes out the charge invoice. The waitress takes the card and the invoice to the customer who signs. The signature on the card and the invoice are compared and the transaction is over. If there is any question, the cashier can telephone New York or Chicago where the issuer has someone on duty twenty-four hours a day. While the customer awaits the waitress' return, the issuer can call Madison police to come and make an arrest. In all cases, except the use of a card at the bar, the cashier is supposed to check the list of invalid numbers. Transactions at the bar are too chaotic for the use of the list but only relatively small amounts are involved. The cashier does use the list except for occasional lapses which are said to be rare. The cashier at this restaurant recently spotted a forged signature. One of the hotel and restaurant managers said his establishment followed similar procedures, but his answers indicated that the lists were not checked quite so often. The other hotel and restaurant manager told a different story:

The type of people we deal with aren't usually the type that try to pass off phony cards We never [have] had a lost or stolen card come through here to my knowledge. . . . The most important thing, as far as I'm concerned, is that we would embarrass our clients too much by . . . checking their cards against the lost and stolen list

People who are checking out are usually in a hurry for one reason or another.

Apparently, this establishment seldom checks cards against the list.

Ten of the sixteen service station operators indicated that they checked the list of invalid numbers only when they were suspicious or ignored it entirely and took the risk of any losses caused by accepting a card mentioned on it. The comments of those who said they checked when they were suspicious indicated that they did not look very often. One confessed, after saying he checked when suspicious, that he regularly threw away the lists since he never looked at them. Four complained that the lists were long and hard to use. Three gave incorrect answers as to the amount of reward by their companies and two said they did not know. In *Union Oil Co. v. Lull*,¹²³ the Oregon court thought that a jury could say that an attendant should be suspicious when a card with an Oregon address was offered by a man driving a car with Idaho license plates. However, oil company credit cards no longer bear addresses.¹²⁴ One dealer said he knew his company's code for areas in the credit card number and that he could check this way. However, another dealer said that in a university town one gets many students driving cars with Wisconsin plates but using credit cards issued to their parents living in other areas. Eight of the sixteen stressed how busy they were in rush periods and that the other customers would not wait if an attendant took any extra time with one customer. Since none had experienced any significant losses as a result of accepting invalid cards, they had little incentive to be extra-cautious. Finally, ten of the sixteen seldom, if ever, recorded a customer's license number on the charge invoice.¹²⁵ Only the Shell, Enco and Sunray DX dealers said their companies insisted on this. Texaco requires it on charges over ten dollars.

A few dealers seemed to use more care than the others. One recently had lost about eight dollars because he had accepted a bad card, and he was keenly aware of the problem. The employees of the Standard dealer interviewed said they looked at the list often since they were eager to collect the twenty-five dollars reward. Conversely, the employees of the Consolidated station¹²⁶ where we asked questions

123. *Supra* note 118.

124. Most no longer bear signatures, and so the station attendant cannot compare what is written on the card with the signature on the charge slip. "One protection which many card holders feel they have is their signature on their cards. Not so, say the issuing companies. We can't ask every gas station attendant, waitress and store clerk to be a handwriting expert. . . . The purpose of the signature is mainly to deter amateurs, since professionals generally come up with a pretty acceptable forgery." Angus, *Don't Lose Your Credit Cards*, *The American Legion Magazine*, May 1964, p. 17.

125. If a dealer records the license number, it may be easier to find the person using the lost or stolen card. It is my impression that stations on major highways are more likely to record license numbers.

126. Consolidated has stations only in Wisconsin and has far fewer credit card holders than the major oil companies.

always look, since company policy is that the attendant pays for any invalid cards he accepts, and this policy is enforced rigorously. Moreover, Consolidated's list is shorter than any of the other companies', and there is only one imprinter at the station and the invalid numbers are prominently displayed near it. A Texaco dealer pointed out that dealers could take a little more time to check lists since before plastic credit cards and imprinters were used in stations, dealers had to write out much more on the charge invoices.¹²⁷

The picture is not one of a great deal of care at all establishments; those places that accept American Express, Diners Club or Carte Blanche cards probably are more careful than the service stations, but even in the case of hotels and restaurants, one suspects practices often are lax because of a desire not to offend customers or because of unwillingness to take the extra time to check signatures and lists coupled with an absence of bad experiences. Certainly issuers could increase rewards and devise ways of making the lists easier to use. They also could establish a continuing campaign to keep awareness of the problem at a high level.

However, the problem may not seem like one worth all this trouble to some issuers of cards. Some oil companies do not even put out lists of lost or stolen cards to be checked by their dealers. In 1958, the *Wall Street Journal* reported that some oil companies had ended "stop orders" that tell their stations that a card is being misused.

One oil company that dropped stop orders insists it's cheaper to take losses. 'It's basically a matter of cost,' explains a credit man. 'Shrewd operators that know the ins and outs of this game sometimes nail us for a card. But it would cost too much to button up these areas.'¹²⁸

127. The imprinter that is now used by all issuers and those that accept their cards apparently was introduced by Standard Oil Company of California in 1952. See *Business Week*, April 26, 1952, p. 44.

128. *Wall St. J.*, Feb. 21, 1958, p. 1, col. 1, p. 17, cols. 2-3. See also the following: "To keep better track of lost and stolen credit cards, and to make this information known quickly to those in a position to grant credit, some companies are beginning to turn to electronic data processing. The initial steps are being taken in the retailing industry, where a single store or a closely knit store division can be linked with a computer, but some experts foresee the time when large numbers of service stations or airline reservation desks can all be linked to the same system."

"One credit executive at a major oil company explains that 'right now the cost would be prohibitive to connect all of our thousands of stations throughout the country to a central computer. If all of our service stations were in one little building, we could do what the stores are doing.'"

"Companies have traditionally used lists of numbers of 'bad' or 'wild' cards that were sent to service station owners or clerks at retail counters. Theoretically, these people were supposed to check these cancellation lists on every credit-card transaction—at least those above a specified amount, such as \$10 or \$15—to make sure that the cards were still to be honored."

"For instance, in the oil industry as soon as a company discovers its card is being used fraudulently, it will usually circulate that particular number to its dealers in that

Apparently, Clark, Enco, Gulf, Mobil, Phillips, Shell, Sinclair and Skelly follow this practice. All respond to a notice from a holder that he has lost his card by issuing the customer another credit card with the same number.¹²⁹ Thus there is no way to track down the stolen one. Along with the replacement card, all of these companies send a letter written in remarkably similar language. Mobil's version of this standard letter reads:

Thank you for telling us about the loss of your Mobil Credit Card. A replacement card with the same number is enclosed.
In our experience, only rarely is a lost or stolen credit card used fraudulently. If this should happen, however, you are relieved of responsibility for payment from the date of your notification.
In your own interest, if any fraudulent charges appear in your future monthly billings, you should return them to us promptly so that we may investigate and issue proper credit to your account.
Again, our appreciation for calling this to our attention.

Standard of Indiana formerly followed this system, but sometime after the fall of 1963 changed its procedure and now issues new numbers when it receives notice. Texaco issues the same number but marks the replacement cards as "DUPLICATE." The number is put on the list, and stations are to accept only the duplicate cards. Kerr-McGee and Pure issue a new number and put the old one on the list sent to their dealers. Clearly, where companies reissue the same number, care in checking the list at their stations is irrelevant to the problem

area. Some companies offer service station owners a \$25 reward if they come up with a lost or stolen credit card being used improperly.

"However, in busy periods—or even in not-so-busy periods when a lazy person is involved—gas station employees or salesgirls may not take the time to check their lists. . . . In any event, some cards that for one reason or another should not be used are re-used time after time, at great expense to the issuer." N.Y. Times, May 15, 1966, § 3, p. 1, col. 1.

¹²⁹ Probably new numbers are not issued because of the demands of data processing systems. It is expensive to remove a number from a data processing machine tape, and there is always the risk that one will remove the wrong number or several numbers. The situation is similar to that of the large banks that no longer read endorsements or large firms that never have read the terms and conditions on the back of business forms. The costs of procedures attuned to the legal system's demands are too great to justify the gains.

I reported most of my collection of credit cards as lost to test the responses of the issuers. I had a number of responses to such reports from friends and students, but I thought it essential to see how widespread the reissuing of the same number was in light of my views about the consequences of this practice. Of course, my experiment involved deception, and this is troublesome. See, e.g., SHILS, *SOCIAL INQUIRY AND THE AUTONOMY OF THE INDIVIDUAL IN THE HUMAN MEANING OF THE SOCIAL SCIENCES* (Lerner ed. 1959). However, I was not manipulating individuals and there was little danger to the corporate personality of the issuers "tricked." I got what I wanted to know at less cost to them and me than had I written all of the top executives involved and asked. I was not the first to discover this practice. For a humorous account of being issued three cards with the same number as the result of leaving a card at a station, see the Wall St. J., July 8, 1965, p. 16, col. 6.

of lost or stolen cards. If one follows the Oregon court, such practices would entitle a jury to conclude that the issuer was doing nothing to minimize losses that turned on the holder's giving notice—in short, that it was not exercising due care.

Apart from the list system, the courts in both the *Lull*¹³⁰ and *Plotnick*¹³¹ cases were worried about a thief using a stolen card to run up a large bill with the help of obliging station attendants. An attendant can give one presenting a card money from the cash drawer and write up tires or repairs on a credit card. This may still go on fairly frequently. Ten of our sixteen Madison dealers said that they had been asked to make loans this way. Only two said they had done it, two thought it dishonest, and the rest made denials that did not always convince the interviewer. The two who had made credit card loans—those who admitted it—stressed they would do it only for well-known customers. Perhaps this is so; perhaps not. Of course, the vice in this practice is that it can drastically increase the amount of the bill run up by one misusing a credit card. One may well delay a day or two to see if he finds his "lost" credit cards before giving notice to the company if he thinks his exposure is only a few tanks of gas and perhaps some tires. Yet the bill can be a good deal more with the help of kindly station attendants. Moreover, the oil companies themselves have recently added to the risks involved in losing one of their cards by expanding their coverage. With a Standard of Indiana card one can now charge bills at Best Western Motels; with a Gulf card one can charge bills at the Holiday Inn chain; and with a Conoco card one can write checks for up to thirty dollars.

Thus, many issuers will have problems if a balance of negligence test is used since their control over those who take their charge slips has not been used to establish due care. Sympathetic juries could relieve the hardship of making a holder pay and dump the loss on the large and wealthy organizations, and this could be done with a clear conscience since one can rationally conclude that the loss is more the issuer's fault than the holder's. Is this a good thing? It comes close to the social planning policy position suggested earlier—the legal system should force issuers to swallow all or most of the loss, since they can spread the loss and can better absorb it than many individuals. It is useful to evaluate the negligence approach with this version of social engineering. By contrasting a balance of due care standard with a rule holding the issuer absolutely liable despite any clauses, we can better weigh the gains and costs of each.

(b) *Liability Without Choice or Fault on the Issuer.*—To what

130. Union Oil Co. v. Lull, *supra* note 118.

131. Gulf Ref. Co. v. Plotnick, 24 Pa. D. & C. 147 (C. P. Lancaster 1935).

extent has the legal system helped push the issuers to take losses from lost or stolen credit cards? Let us begin by asking to what extent the issuers themselves have done it. In November of 1965, American Express established a 100 dollars deductible system. The holder is liable for no charges after he gives notice and only for the first 100 dollars before he gives notice. The Diners Club now has the same system. In addition, it offers an insurance policy against loss or theft of other cards that members can buy. Both appear, at least in part, to be a response to lost credit card insurance offered by Carte Blanche in 1965. The Airline Travel card, the car rental cards and the oil company cards have made no such changes. Formally, they still tell the world that a holder must pay for misuse before he gives notice. However, *Time* reported, "Most major credit card companies grimly absorb these losses themselves."¹³² Another magazine reported that some companies attempt to collect from their holders but that others do not.¹³³ The *New York Times* reported a story where the finder of a lost card bought tires from stations and resold them to get cash. "The credit card thief was apprehended soon thereafter, the oil company decided to absorb the loss and so the story ended happily as far as the woman was concerned."¹³⁴ Two service station operators thought that their company would never enforce its right against a holder. Of course, some oil companies pursue holders vigorously; one of my students reports he had to pay Standard of Indiana over 100 dollars for charges made with his stolen card. Apparently, at one time at least, the Airline Travel card also stalked its holders vigorously to collect such charges.¹³⁵ In summary, while sometimes issuers attempt to collect from holders for charges made by misuse of a lost card, some issuers do not always assert what may be their legal rights and American Express and Diners Club have scaled down their claim to the first 100 dollars charged before notice is given.

What has been the relative role of the legal system in all this? On

132. *Time*, June 19, 1964, p. 53.

133. *The American Legion Magazine*, May 1964, p. 17.

134. *N.Y. Times*, May 15, 1965, § 3, p. 1, col. 1.

135. In one case, however, a man used a stolen Air Travel card to run up between \$4,000 and \$5,000 in charges. The holder settled with the air line involved for only \$150 because the signatures on the charge invoices were such poor forgeries that it was obvious that no one at the airline ticket offices or hotels had ever compared signatures. According to the terms of this contract the holder was liable for all charges for thirty days after notice was given. Apparently, the air line decided that its case looked too much like *Gulf Ref. Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790 (1945), to attempt to sue for more. Undoubtedly, the legal response to lost and stolen credit cards has had some impact on the settlement practices of the issuers, but this is an area that would be most difficult to investigate. Of course, this difficulty does not lessen its obvious importance.

one hand, there have been a number of non-legal factors involved since credit card issuers often have a perfectly good reason to absorb losses—that is, to keep customers. Moreover, if credit cards were known as ultra-hazardous, presumably fewer people would use them, and this would not please most issuers. As we have seen there has been a good deal of publicity, in magazines and newspapers often read by those who hold cards, about the risk of having to pay for a lost or stolen card. The insurance companies didn't help keep the secret either when they jumped in with their own policies covering losses from stolen cards and advertised them. Still the legal response may have been a factor in the decision to swallow some of the losses—the legal situation was ambiguous outside of New York and one writer says he was told that the mixed legal reaction to the liability-until-notice system influenced some issuers not to pursue holders.¹³⁶ Moreover, in 1964 the Diners Club sued one of its holders for 1,622.29 dollars charged by a thief on a lost card.¹³⁷ Despite the liability-until-notice clause on the card, the issuer was held to owe the holder a duty of due care to see that charges were not unnecessarily incurred. Coupled with the entire history of legal reaction outside of New York, this must have been discouraging to the attorneys for the credit card issuers. The drastic changes in the travel and entertainment cards and the attempts to turn them into merchandising ploys followed. Still we cannot be sure whether the business and legal responses reflect cause or coincidence.

In order to assess the costs of a lack of inputs and feedback, we must ask whether or not we like what has happened. Is liability without fault desirable or should we retain a negligence concept? One can argue for refusing to allow the issuers to dump this cost on holders. Issuers can absorb or spread the loss better than most individuals. Issuers benefit from the system, and their own practices may have created a false sense of security on the part of many holders who do not read fine print. But there are some things to be said on the other side. Issuers do not absorb all of the loss but move some of it to their dealers or those who accept their cards through the list system. Given the difficulties of using many of the lists and the fact that many places accepting cards are not much better loss spreaders or absorbers than individuals, is this a desirable result? If not, could the legal system prevent it short of using a high cost enforcement agency? Then, too, four of the Madison area service station operators interviewed expressed concern that holders would cheat by claiming a card was stolen when they found themselves in financial difficulty

136. *The American Legion Magazine*, *supra* note 133.

137. *Diners Club, Inc. v. Whited*, Civil No. A 10872, App. Dep't Cal., Aug. 6, 1964.

and did not want to pay the bill, or that holders would be even more careless with cards than they are now. Certainly many people keep credit cards in the glove compartments of their cars,¹³⁸ and this makes theft pretty easy. One cannot be sure that people would not be even more careless if they ran no risk of liability; certainly the glove compartment is a convenient place for oil company cards and it reduces a bulging wallet. Finally, some issuers do exert great efforts to catch those who misuse cards, and quick notice of loss or theft is important to them. Without some possible liability, what would be the incentive for writing the issuer when a card was lost? Perhaps rewards could be given for quick notice—but there is always a risk that the reward would not be worth the effort for many card carriers. If the issuers are going to announce that they will take responsibility, rather than just not enforce their rights except where they suspect fraud, perhaps the 100 dollars deductible approach of American Express and the Diners Club is best. Some incentives for quick notice are left, and it is hard to cheat, but an extremely burdensome potential liability is lifted. This would be a difficult solution for a court to reach, and a little unorthodox even for legislation. An ambiguous legal response, plus publicity, plus market pressures may be the only route to this destination. Yet, if we are left with this version of negligence in the service of social planning policy, much turns on the warning given the holder. Unless he knows about the risks, his duty to notify and his liability until he does, negligence should equal absolute liability for the issuers.

So much for negligence and liability on the issuer without choice or fault. What about inputs and feedback in this area? The first thing to be noticed is that the attempts to regulate in this direction have not resulted in disaster. The systems continue and the credit card issuers have prospered. At most, the cases have served to bring the problems to the attention of top decision-makers in these organizations who could work out their own solutions. Still one can be uneasy about attempts to influence practices at the service station or restaurant level where lists of invalid numbers often are not checked when cards are presented, where holders absent-mindedly leave credit cards to be picked up by the dishonest or where loans are made and written up as tires. What degree of suspicion can we demand of a gas station attendant or a cashier? What are the burdens as we increase the

138. My collection of 1963 credit cards largely came from one of my colleagues who then drove a Volkswagen bus which had an open bin instead of a glove compartment. He kept from five to ten cards scattered in this bin so that when he wanted to stop for gasoline while driving on an interstate expressway he would have the appropriate card handy. Undoubtedly, it was convenient but risky. But, then, it has long been clear that law professors are not reasonable men.

amount of care required? However, it is easy to talk of spreading losses and the "deep pocket" to justify liability without choice or fault on the issuers. Putting the question of political philosophy aside, will judges or legislators be able to predict the impact of such a rule on the attitudes and practices of card holders—can we be sure that the risk of liability is not significant in deterring fraud and promoting care? Can judges or legislators find out if they make the wrong guess? Perhaps they can make good guesses, but the probability of being right certainly increases if the guess is a conscious prediction made with at least some awareness of the problems.

(c) *Liability Without Choice or Fault on the Holder*.—Our last regulatory target to evaluate is the market functioning policy which imposes absolute liability on the holder as found in the *Magnolia*¹³⁹ and *Goldstein*¹⁴⁰ cases. There, bureaucratic considerations pushed the court to decide that the holder was bound by the fine print apart from any notion of warning to him. The duty to read served to justify the result. Why? First, we should recall that many firms do nothing with the notice once it is received and routinely reissue a card with the same number. If the legal system says, in effect, that the holder is responsible in those cases, then all we have is a crude and arbitrary form of loss splitting. The companies can rely on inattention to personal affairs, carelessness and lack of awareness of the system to cause many holders to fail to give notice until the first statement with charges by a thief is sent. After this, they almost always will hear from the holder. Roughly, it may equal the Airline Travel card's liability for thirty days after notice as a device to move a burden to the holder. But why allocate the loss this capriciously? Holder and issuer could share it equally or a jury could try its hand at a comparative negligence approach with more justification. Second, there is the argument of the *Goldstein*¹⁴¹ case. Issuers are big organizations with a need to standardize and to reduce complexity to routine. Undoubtedly there is truth in this. Moreover, those who accept cards—attendants and cashiers—cannot be held to an extremely high standard of care. They do not want to embarrass customers. They often are rushed, and they often are people not accustomed to bureaucratic routine and paper work. Moreover, they are not trained to be detectives. Nonetheless, why not insist that the issuers give the holders fair warning in a meaningful way? What are the costs of this warning? Would it be an idle gesture in our careless affluent society? I would think that the issuers would have the burden of proof on questions such as these.

139. *Magnolia Petroleum Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943).

140. *Texaco, Inc. v. Goldstein*, 34 Misc. 2d 751, 229 N.Y.S.2d 51 (Munic. Ct. N.Y. 1962), *aff'd*, 39 Misc. 2d 552, 241 N.Y.S.2d 495 (Sup. Ct. 1963).

141. The full argument is quoted in the text accompanying note 72, *supra*.

The court in the *Goldstein* case rushed past all of these issues in a zeal to promote the interests of large organizations. Maybe this was justified, but it is hard to see why. Perhaps more facts than I have been able to discover would justify dispensing with any requirement that issuers warn holders. Perhaps some would be convinced if a random sample of the adult population showed that the overwhelming proportion of the population knew of both the duty to give notice and the magnitude of the risks involved. Perhaps more would be convinced if a good study showed that the reasons most holders fail to give notice are that they are lazy, reckless or attempting to cheat the companies by running up large bills and claiming that the charges were made by another. But at this point, I am content to argue that the burden of going forward with such evidence should be on the issuers who have the time and resources to make such a case if it can be made. I doubt that it can be.

(3) *Conclusions About Efficacy and Efficiency.*—This discussion of consequences all began with the question of whether or not the legal system was operating effectively in this area—a reflection of the system policy that courts and legislatures ought to hesitate before they try to do what they do not do well. After all of this evaluation, what have we learned about this system policy? First, those decisions that tried to regulate seemed to be shooting in the dark. With a relatively primitive field survey, I was able to raise a host of questions about the consequences of various approaches. Yet, I had more time and resources than are available to most lawyers for holders. Unless as a matter of principle a holder wanted to spend 5000 to 10,000 dollars to fight a 2000 dollar charge, the judiciary would seem to lack much of the essential inputs for a regulatory decision either favoring issuer or holder. Perhaps the New York legislature had more information. Certainly members of the committee could contact representatives of the major issuers since most are based in New York City. Yet not all my conclusions are entirely pleasing to issuers. Unless the issuers' representatives were moved by an unusual degree of candor, I would not suppose that the legislative committee would have heard all that is reported here.

Moreover, the legal system suffers from a lack of systematic feedback. A rule is made, and it may or may not have desirable consequences. If the result is outrageous, there is likely to be a response. But if the result hits those not organized to make use of the legal system, we must depend on a case coming before a court (in the teeth of all the costs of litigation that reaches the appellate stage) or a legislative champion taking up the matter as a cause. Furthermore, when data are hard to come by, a trial and error approach is

probably the best we can expect. Over-generalizations and plain mistakes can be corrected in the next case. Yet often the odds are against a court getting enough cases to work out a sensible solution to a problem or a legislature getting a chance to reconsider the actions of a past session. Certainly in the credit card area one cannot find a line of cases building on one another in a way that would give one confidence that good solutions are being worked out by trial and error. Rather, each case seems to begin to regulate anew. There is no indication that the New York legislature has ever reconsidered the impact of its statute. The issuers of credit cards probably are happy, but those hit by the statute's provisions are individuals who hold cards and who are not organized in any well-defined interest group.

Another potential source of data and argument is legal scholarship, and credit cards have been a favorite of the law reviews. The introduction of American Express and Carte Blanche cards in the late 1950's and the *Lull*¹⁴² and *Goldstein*¹⁴³ cases prompted one flurry of law review comments. The *Diners Club*¹⁴⁴ case in 1964 prompted another. A few articles attempted to go beyond drawing analogies to other areas where large organizations issued formal documents and attempted to deal with the likely consequences of the legal response. Although a few indicated an awareness of some of the likely consequences of the various approaches,¹⁴⁵ the data gathered for these comments were not used to study the entire on-going systems involved in credit card relationships. Even if all the studies in the reviews had been examples of the kind of feedback needed, there is no regular channel whereby they will be drawn on by the system. We still rely on the accident of an attorney or a legislative staff member discovering an article that can be found in a not always reliable index. Thus, one can conclude that there is some feedback from the consequences of legal action, but it is pretty haphazard.

The input and feedback difficulties I have described prompt me to counsel caution in regulating in ways far removed from transactional policy. As long as we leave the individual with a fair and realistic chance to protect himself, at least some of the errors of a generally haphazard approach to facts about problems and consequences of solutions may not plague us as much as when we remove this safety valve. From this standpoint we are safest when our legal standard asks whether the people in question know about an obligation or have a good reason for not knowing, somewhat less safe when we set up rules designed to define arbitrarily when fair warning is

142. *Union Oil Co. v. Lull*, *supra* note 118.

143. *Texaco, Inc. v. Goldstein*, *supra* note 140.

144. *Diners Club, Inc. v. Whited*, *supra* note 137.

145. See 30 ALBANY L. REV. 79 (1966); 35 NOTRE DAME LAW. 225 (1960).

given, and in the most trouble when we begin imposing absolute liability blindly.

(4) *Democratic Control*.—The final legal system policy is that of democratic control. Those whose connection with an electorate is at best tenuous, such as judges, ought to hesitate before plunging into serious shifts of policy. But what is such a shift? Credit cards are a new area, and the open analogies are so numerous that a judge has wide choice. One can stress expectations and reliance, one can talk of unfair surprise from fine print, one can impose a strict duty to read, one can talk due care and good faith, and one can talk of the rules about a gratuitous indemnitor, an open letter of credit or exculpation clauses. The one case that stretches beyond tradition is *Texaco, Inc. v. Goldstein*,¹⁴⁶ if I am right that it represents liability without fault imposed on the holder. Of course, the negligence approach of *Union Oil Co. v. Lull*¹⁴⁷ could be manipulated to impose absolute liability the other way. One can say simply, who asked the judges to regulate this far from the common law tradition. Of course, there is the expedient answer: this problem is not the kind likely to be handled by legislation, it needs solution and each court had an opportunity to save time and effort by solving it. If the rule selected is poor, the legislature can veto it. Of course, if this tack is adopted, a judge must think about the burden of taking action. The legislature has no effective veto if a rule favors the powerful and hits those who are not organized to battle and lobby.

And what of legislation and democratic control? Is it a fiction here? If so, is a proper role of the judiciary to protect individuals against those with political power? But if this be deemed an appropriate activity, how does a judge decide when the representative system is or is not working? To some extent holders of credit cards are unorganized in the sense that they are not a recognizable voting block. Yet holders of Air Travel cards—the most dangerous cards in terms of exposure to risk of charges run up by a thief—have high socioeconomic status, and probably enough political influence to get legislative action against outrage cases. Holders of oil company cards are not necessarily so well off economically or politically. These questions are and can be only suggestive of the difficulty involved in deciding that drastic change through judicial legislation is called for because of defects in the legislative process. Conversely, we cannot blithely assume that because judges have less direct contacts with an electorate than legislators or because certain tasks adulterate the purity of some ideal conception of the judicial role, that our society is necessarily

better off if judges merely passively support the powerful. Perhaps some things need doing and inaction may have costs far higher than any judicially-centered theory is worth. Perhaps the search should be for the best possible, or least bad, allocation of necessary functions among all the units of the legal system in light of practical realities rather than the perfection of the judiciary. This is not the place for a complete examination of such issues, but one cannot often look at a problem effectively without some idea of such system policies and at least a working resolution of the difficulties.

V. CONCLUSION

The example of the kinds of things I see in the concept of a duty to read indicates what a complex problem is inherent in a simple slogan. I suspect that an equally lengthy essay would result if one were to look to the operation of the whole cluster of duty to read rules as they apply to the sale of residential real estate, insurance releases, personal injury disclaimers found in instruction manuals to consumer items, and the other areas where documents and actual understanding is alleged to conflict. I think it is clear that it will help to ask in each area to what extent standardization is valuable. Do we care about the actual or likely expectations of the one trying to avoid the written document or are we content if he had a fighting chance to protect himself? Do we want to aid those who promulgate form documents so much that notice is a minor value? The substantive contract policy scheme suggested—transactional, market functioning, relief-of-hardship, and social planning—helps focus attention on these crucial questions. Then we cannot forget the demands of our kind of legal system. Finally, we need data about the likely consequences of proposals and the actual consequences of legal action. If we lack this, we have to consider the risks of shooting in the dark. Sometimes this is the only sensible course open; often it is not. If it must be done, the risk can be minimized by adopting approaches that particularize rather than approaches that work like a shotgun.

146. *Supra* note 140.

147. *Supra* note 118.