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BANK CREDIT CARDS AND THE UNIFORM COMMERCIAL CODE

WILLIAM B. DAVENPORT*

The issuance, beginning in late 1966, of credit cards by member banks of the Midwest Bank Card System has generated keen, widespread interest in the subject of credit cards. Probably no banking service has ever before been so widely publicized.

BANK CREDIT CARDS: A DEVELOPMENT SINCE ADOPTION OF THE UNIFORM COMMERCIAL CODE

Credit cards have existed as commercial instruments for approximately fifty years, although major developments with respect to them have occurred only within the past ten to seventeen years.

The first credit cards were issued about 1914 by oil companies to their customers for the purchase of gasoline, oil and accessories at the companies' stations. A forerunner of the credit card was the credit coin, issued principally by department stores to their customers as a convenience for prompt service on credit sales. These coins appeared before 1915 and apparently became obsolescent in the 1930's.¹ Local department stores, like nation-wide oil companies, began the practice of issuing single-purpose credit cards to their customers for purchases in the store or any of its branches. The advent of air travel brought with it the airline credit card. The rail travel credit card also came into existence.

In 1950, independent credit card companies began to emerge with an all-purpose card. In that year, The Diners' Club, Inc., which did not (and still does not) sell merchandise, began a credit and collection service for members of its plan. Members of the plan were of two kinds—cardholder members and establishment members. A directory of establishment members was issued to cardholder members to advise cardholders

* Member of the Illinois Bar. The views expressed herein are those of the author in his individual capacity. The author expresses his gratitude to counsel for the Chicago member banks of the Midwest Bank Card System and counsel for the Bank of America, San Francisco, who have graciously supplied him with factual materials which were invaluable in the preparation of this article.

1. Credit coins were small metal discs stamped with the merchant's name and customer's account number. Decisions involving the credit coin are *Jones Store v. Kelly*, 225 Mo. App. 833, 36 S.W.2d 681 (1931). *Lit Bros. v. Haines*, 98 N.J.L. 658, 121 Atl. 131 (Sup. Ct. 1923); *Wanamaker v. Chase*, 81 Pa. Super. 201 (1923); and *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Phil. Munic. Ct. 1915). These decisions are reviewed in several of the articles cited in notes 16-19 *infra*.

of establishments which would honor the card. Diners' Club executed one form of agreement with an establishment member and another form of agreement with a cardholder member. Each of the two agreements was independent of the other. Subsequent credit card plans have followed this pattern. In 1958 the American Express Company, an issuer of traveler's checks (whose function, like that of the credit card, was to avoid the necessity of carrying large sums of cash on the person), commenced operation of its system. In 1959 Hilton Credit Corporation initiated Carte Blanche.² These three companies were the major independent issuers of credit cards until the entry of major banks into the credit card field in 1959. Users of credit cards issued by these three companies have been primarily businessmen for the purposes of travel and entertainment, and the practice of the issuer has been to transmit a monthly statement of credit card purchases for the preceding month payable on receipt.

In the late 1950's the nation's two largest banks, the Bank of America and the Chase Manhattan,³ entered the credit card field. Their credit card plans, like those of the three issuers mentioned, were tripartite arrangements. The bank card, however, served the needs of consumers and offered them an all-purpose credit card for consumer items under which statements for credit card purchases would be transmitted monthly, but would be payable, at the option of the cardholder, in full upon receipt or upon an installment, revolving basis. More than 1,000 banks in all parts of the nation now issue credit cards under a similar plan.⁴ The issuance of credit cards by member banks of the Midwest

2. In January, 1966, First National City Bank, New York, acquired Hilton's Carte Blanche credit card business pending the outcome of an antitrust action against the acquisition. The Department of Justice agreed to the acquisition on the stipulation that First National City operate Carte Blanche as an independent business to facilitate disposition in the event of an order of divestiture. Wall St. J., May 24, 1966, p. 32, col. 3. The business is presently operated by Carte Blanche Corporation, headquartered in Los Angeles.

3. In 1962 Chase Manhattan sold its credit card business, called Uni-Serv Corporation. In December, 1965, American Express Company bought Uni-Serv. Chase Manhattan has since tried to re-enter the credit card field by the acquisition of Diners' Club. However, the threat of antitrust action by the Department of Justice chilled this endeavor early in 1966. Wall St. J., May 24, 1966, p. 32, col. 2-3.

The major banks embarking on credit card programs in the late 50's drew on the experience of smaller banks that had pioneered in this field of banking since the early 50's. The Franklin National Bank, Franklin Square, New York, was the first bank in the United States to adopt a credit card plan in 1951. It did so on the basis of a ruling of the Comptroller of the Currency concerning the acceptability of a sales slip as a legal instrument. See Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 567 (1960). In 1952 banks in Kalamazoo and Lincoln Park, Michigan, followed the lead of Franklin National Bank. By late 1958 about 100 smaller banks had credit card programs. Wall St. J., Jan. 17, 1967, p. 1, col. 1.

4. Wall St. J., Jan. 17, 1967, p. 1, col. 1, p. 12, col. 2-3. This number includes the 700 banks in the Midwest Bank Card System, the Bank of America and other banks in

Bank Card System (currently some 700 participating banks located in Illinois, Indiana and Michigan) is one of the most recent developments in the credit card field.⁵ Expansion of such a regional system to a nation-wide plan is the next logical step and is currently under study by banks.⁶ Major issuers are also franchising banks to issue their cards.⁷ The credit card as a commercial instrument is definitely on the scene to stay.

The volume of business transacted by the use of credit cards is gigantic. The American Express Company, which has issued over 2,000,000 cards, honored by more than 140,000 establishments on a world-wide basis, does an annual business of about \$780,000,000.⁸ The Diner's Club, which has issued some 1,500,000 cards, honored by approximately 150,000 establishments on a world-wide basis, does an annual volume of about \$400,000,000.⁹ The Bank of America, which has issued nearly 2,000,000 cards on a state-wide basis, honored at some 64,000 establishments, does an annual volume of business of approximately \$228,000,000.¹⁰ The first quarter-year estimate of the vol-

California, and banks in New York, Georgia, Maryland, Virginia, Pennsylvania, Wisconsin, Arizona, Washington, Oregon, Utah, Idaho, Nevada, Hawaii, Texas, Massachusetts, North Carolina and Ohio. The Maryland National Bank recently acquired Charge-It of Baltimore, Inc., a fourteen year old credit card company with about 150,000 cardholders and 1,200 merchants. Wall St. J., March 30, 1967, p. 4, col. 5. Valley National Bank in Phoenix even has a student credit card program not involving parental responsibility. Chicago Daily News, March 30, 1967, p. 53, col. 3-7.

5. Time, April 21, 1967, p. 91; Wall St. J., Jan. 17, 1967, p. 1, col. 1, p. 12, col. 2-3. Thirteen banks in the Midwest System are card issuers.

6. *Id.* In January, 1967, Interbankard, Inc. was organized by eight banks that issue cards locally to put such a plan into operation. Negotiations have occurred between Interbankard and the Midwest Bank Card System.

7. BankAmerica Service Corporation, a subsidiary of Bank of America, has franchised several banks around the country to issue its BankAmericard. Wall St. J., Jan. 17, 1967, p. 1, col. 1. The American Express Company, Carte Blanche Corporation, controlled by First National City Bank, New York, and Diners' Club have also announced franchising programs for banks to issue their cards. Wall St. J., July 15, 1966, p. 5, col. 2-3.

8. The quoted figure on volume is for the calendar year 1966. Kidder, Peabody & Co., Inc. report, American Express Company, April 20, 1967, p. 11. The quoted figure for cards issued is as of the week of April 17, 1967. N.Y. Times, April 26, 1967, p. 63, col. 2-4, p. 71, col. 7. The corresponding figure on volume for calendar 1965 is \$556,000,000. Wall St. J., July 15, 1966, p. 5, col. 3.

9. Wall St. J., July 15, 1966, p. 5, col. 3. No figures were quoted for Carte Blanche, which was operated by Hilton Credit Corporation in 1965, but which was sold to First National City Bank, New York, effective January 1, 1966, and has since been operated by Carte Blanche Corporation. See note 2 *supra*. A letter to stockholders dated April 15, 1966, disclosed the volume of business for 1965 at \$106,000,000. The number of Carte Blanche card holder members exceeds 550,000, and the number of establishments at which the card is honored approximates 170,000.

10. Time, April 21, 1967, p. 91. The quoted figures are from the Bank's annual statement for calendar 1966. The corresponding figures for calendar 1965 were \$186,000,000 in volume, nearly 1,500,000 cardholders, and 55,000 member establishments. Wall St. J., May 24, 1966, p. 32, col. 1-3.

ume of business transacted by the Midwest Bank Card System, with about 6,000,000 cardholders and 60,000 establishments, is between \$30,000,000 to \$40,000,000. It is estimated that presently 10,000,000 Americans hold bank credit cards.¹¹ Because of the rapid and widespread use of bank credit cards and the huge volume of business transacted by means of them, the Federal Reserve Board, characterizing this type of credit as "becoming one of the more important and dynamic components of consumer credit," recently announced the institution of a study of recent developments in the bank credit card field "to stay on top of it."¹²

Despite the astronomical number of credit cards (and before them credit coins) which have been issued by all issuers—department stores, oil companies, independent credit card companies, banks and others¹³ there have been, since 1915, apparently less than twenty reported civil cases involving credit cards or credit coins.¹⁴ For the most part, these cases have involved the liability of the customer or cardholder for unauthorized purchases made through the use of the card (or coin).¹⁵ There have also been an increasing number of law review articles, comments and notes dealing with the subject. For the most part, the law review publications have considered the nature of the credit card or the body of law applicable to it,¹⁶ the liability of the customer for unauthor-

11. Wall St. J., Jan. 17, 1967, p. 1, col. 1, p. 12, col. 2.

12. Wall St. J., March 2, 1967, p. 11, col. 4-6. The Board intends to extend the study to credit cards outside the banking area because of their impact on the whole consumer credit field. The study also includes check credit. The national bank examiners of the Comptroller of the Currency are giving special attention to credit card plan operations. Wall St. J., May 5, 1967, p. 3, col. 3.

13. In addition to the estimated ten million holders of bank credit cards, there are estimated 70 million holders of oil company credit cards. Wall St. J., Jan. 17, 1967, p. 1, col. 1, p. 12, col. 2. An estimated total of 140,000,000 credit cards is currently in circulation. *Study Shows Need for Credit Card Crime Act*, 21 PER. FIN. L.Q. 44 (1967).

14. Nearly all of these reported cases are cited or discussed, and many of them frequently, in the law review publications hereinafter cited. See notes 15-19 *infra*. The reported criminal cases involving the credit card may slightly outnumber the civil ones. These are cited or discussed in the articles cited in note 18 *infra*. Principal reasons for the relative dearth of cases involving credit cards include the low percentage of defaults and misuse, the reluctance of the issuer to sue by reason of attendant publicity and possible loss of good will, and the small size of the individual account and the corresponding disproportionate expense of collection. Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 572 (1960); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME LAW. 225, 230 (1960). As one writer has aptly observed, "It is only because experience has shown that ultimate defaults are negligible percentage-wise that the plans have been able to flourish in recent years." Claflin, *The Credit Card—A New Instrument*, 33 CONN. B.J. 1 (1959); Note, 22 WASH. & LEE L. REV. 125, 126 (1966).

15. See cases discussed in articles cited at note 17 *infra*. More recent cases, not covered therein, are *Read v. Gulf Oil Corp.*, 114 Ga. App. 21, 150 S.E.2d 319 (1966), and *Uni-Serv Corp. v. Frede*, 50 Misc. 2d 823, 271 N.Y.S.2d 478 (N.Y. City Civ. Ct. 1966); and *Allied Stores, Inc. v. Funderburke*, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967).

16. Claflin, *The Credit Card—A New Instrument*, 33 CONN. B.J. 1 (1959); Hart, *Credit Cards and the Virtual Acceptance*, 1 B.C. IND. & COM. L. REV. 209 (1960); Com-

ized purchases made through use of the card,¹⁷ the criminal law applicable to fraudulent use of lost or stolen credit cards¹⁸ and, more recently, the consumer credit aspects of credit card purchases.¹⁹

This article will explain the mechanics of a bank credit card plan and discuss the body of law applicable to credit cards. It is the premise of this article that the credit card is a commercial instrument²⁰ and that the body of law which the courts should apply, and which they will begin to apply,²¹ either directly or by analogy, to the solution of credit card

ment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 465-78 (1960); Note, *Regulation of Installment Credit Cards*, 35 U. CINC. L. REV. 424, 428-33 (1966); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME LAW. 225, 226-30 (1960).

17. Clafin, *The Credit Card—A New Instrument*, 33 CONN. B.J. 1 (1959); Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Shapiro, *Credit Cards: Instant Purchasing Power*, 18 N.Y.U. INTRA. L. REV. 47 (1962); Comment, *The Lost Credit Card: The Liability of the Parties*, 30 ALBANY L. REV. 79 (1966); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 479-88 (1960); Note, 12 DEPAUL L. REV. 150 (1962); Note, 9 KAN. L. REV. 325 (1961); Note, *Applicability of Exculpatory Principles to Credit Card Risk-Shifting Clauses*, 22 LA. L. REV. 640 (1962); Note, 43 N.C.L. REV. 416 (1965); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME LAW. 225, 230-35 (1960); Note, 13 STAN. L. REV. 150 (1960); Note, 109 U. PA. L. REV. 266 (1960); Note, 23 WASH. & LEE L. REV. 125 (1966); Note, 67 W. VA. L. REV. 145 (1965); Note, 2 U. PITT. L. REV. 117 (1936).

18. Katz, *Federal Prosecution for the Interstate Transportation of Stolen Credit Cards*, 38 U. COLO. L. REV. 323 (1966); Shapiro, *Credit Cards: Instant Purchasing Power*, 18 N.Y.U. INTRA. L. REV. 47, 54-57 (1962); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 488-94 (1960); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME LAW. 225, 235-39 (1960); Comment, *Credit Card*, 57 NW. U.L. REV. 207 (1962); Comment, *Criminal Liability for the Unauthorized Use of a Credit Card*, 7 ST. LOUIS U.L.J. 158 (1962). See also *Study Shows Need for Credit Card Crime Act*, 21 PER. FIN. L.Q. 44 (1967).

19. Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 567-74 (1960); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 494-98 (1960); Note, *Regulation of Installment Credit Cards*, 35 U. CINC. L. REV. 424, 434-57 (1966); Comment, *Regulation of Consumer Credit—The Credit Card and the State Legislature*, 73 YALE L.J. 886 (1964).

20. The credit card itself is not a negotiable instrument. *Gulf Ref. Co. v. Plotnick*, 24 Pa. D. & C. 147, 150 (C.P. Lanc. 1935), commented upon at 2 U. PITT. L. REV. 117 (1936); *Lit Bros. v. Haines*, 98 N.J.L. 658, 660, 121 Atl. 131, 132 (Sup. Ct. 1923) (credit coin). Neither is a letter of credit a negotiable instrument. *Orr & Barber v. Union Bank of Scotland*, 1 Macq. 513, 523 (H.L. 1854). The character of instruments drawn under or pursuant to these instruments is another question. See notes 66-95 *infra* and accompanying text.

21. To the extent, of course, that such is not excluded by another overriding statute. Most legislation enacted to date concerning credit cards is on the criminal side and deals with the theft of a card or the fraudulent use of a stolen or lost card or both. At the end of 1966, forty states had criminal laws expressly covering credit cards. The ten that did not were Alaska, Arizona, Arkansas, Connecticut, New Hampshire, New Jersey, North Dakota, South Dakota, Vermont and Washington. The District of Columbia also belongs in this latter class. See statutes cited in articles cited in note 18 *supra* and in CREDIT MANUAL OF COMMERCIAL LAWS 395-96 (1965). In 1961 the legislature of New York added a new article numbered 29A to its

problems, is the Uniform Commercial Code.

The Code was promulgated by its draftsmen, the National Conference of Commissioners on Uniform State Laws and the American Law Institute, in 1952. Now, fifteen years later, it has been adopted by the District of Columbia, the Virgin Islands, and every state except Louisiana.²² The evolution of the credit card as a commercial instrument on such a vast scale is a development postdating the promulgation of the Code. The Code does not, therefore, expressly deal with the credit card as a commercial instrument. It is only natural, however, that courts will look to it in resolving credit card problems.

The credit card plans established by many bank issuers find a very close parallel in the letter of credit, covered in Article 5—Letters of Credit.²³ To the extent that sales slips generated by a bank credit card

General Business Law entitled *Credit Cards and Credit Identification*. N.Y. GEN. BUS. LAW §§ 511-13 (McKinney Supp. 1966). Section 512 thereof provides in part as follows:

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 bold 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.

With 47 legislatures in session in the current year 1967 (all but those of Kentucky, Mississippi and Virginia) and with such widespread interest in credit cards, initiated by the distribution of thousands of such cards, in many instances unsolicited, enactment of additional credit card legislation, both civil and criminal, seems inevitable. For example, one bill pending currently in the 75th General Assembly of Illinois, S.B. 190, provides that no person in whose name a credit card is issued, without his having requested or applied for the card, is liable for any purchases made or other amounts owing by a use of that card which he has not authorized, unless he has signed his name to the card, or, where the card has no signature line, has otherwise indicated his intention of and desire to use the card; further, that a mere failure to return an unsolicited card is not such an indication. Whether this bill will become law is, of course, problematical at this date. In any event, it seems that a court applying common sense as well as common law would reach the same result.

22. The Uniform Commercial Code, hereinafter cited merely by section number, is presently (i.e., April 1, 1967) effective in all of the adopting jurisdictions except Arizona, Delaware, Idaho, Mississippi, North Carolina, South Carolina, South Dakota and Washington. It will be effective in all of these by April 1, 1968. As often predicted, the civil law tradition has left Louisiana as the last state to enact the Code. None of the prior uniform commercial acts—Uniform Negotiable Instruments Law, Uniform Sales Act, Uniform Conditional Sales Act, Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, Uniform Trust Receipts Act and Uniform Stock Transfer Act—has enjoyed anything near the success of the Code in so short a time. Of these, only the Uniform Negotiable Instruments Law and the Uniform Warehouse Receipts Act were enacted by all the present fifty states. The Uniform Negotiable Instruments Law was promulgated by the Commissioners in 1896, and Georgia was the last state to enact it in 1924. The Uniform Warehouse Receipts Act was promulgated in 1907, and Oklahoma was the last state to enact it in 1955.

23. Several writers have made similar observations: Shapiro, *Credit Cards: Instant Purchasing Power*, 18 N.Y.U. INTRA. L. REV. 47, 58 (1962); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 465-70 (1960); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudu-*

plan or system are (and perhaps will be) handled through banking processes (including the Federal Reserve System, if a nation-wide bank card system is established), Article 4—Bank Deposits and Collections is directly involved. Article 9—Secured Transactions holds the answer to at least one key question. In the solution of credit card problems, courts may also draw upon portions of the Code, particularly Article 1—General Provisions and Article 3—Commercial Paper.

Unarguably, the same considerations that prompted the drafting and the nation-wide enactment²⁴ of the Uniform Commercial Code favor uniformity in the law applicable to credit cards.²⁵ To the extent that the development of statutory²⁶ and decisional²⁷ law does not attain this end, it is predictable that a request will be made to the draftsmen of the Code and the Permanent Editorial Board of the Uniform Commercial Code²⁸ to modify the Code to include credit cards within its coverage.

With this background and these preliminary comments, this article will first explain the operation of a bank credit card plan and system, make some observations concerning bank credit cards, consider how the Code may be expanded to cover credit cards, and discuss Code and Code-related problems which have been raised to the present time.

MECHANICS OF A BANK CREDIT CARD PLAN AND SYSTEM

The basis of a single bank credit card plan is a tripartite arrangement involving: (1) an agreement between the issuing bank ("issuer") and the cardholder; (2) an agreement between the issuer and the merchant seller of goods or services or both ("merchant"); and (3) a sales agreement between the cardholder and the merchant.²⁹ In a transaction

lent Use, 35 NOTRE DAME LAW. 225, 226-30 (1960); Note, *Regulation of Installment Credit Cards*, 35 U. CINC. L. REV. 424, 428-33 (1966).

24. Except Louisiana, as noted in preceding text.

25. The need for uniformity has been noted by other writers. Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 500 (1960); Note, 23 WASH. & LEE L. REV. 125, 131 (1966).

26. See note 21 *supra*.

27. The conflicts in the decisional law are thoroughly discussed in articles cited at note 17 *supra*.

28. Section 7 of the agreement between the American Law Institute and the National Conference of Commissioners on Uniform State Laws dated August 5, 1961, which established the Permanent Editorial Board for the Uniform Commercial Code, provides in part as follows:

SEVENTH: It shall be the policy of the Board to assist in attaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code. Amendments shall be approved and promulgated when. . . .

(c) *New commercial practices* shall have rendered any provisions of the Code obsolete or *have rendered new provisions desirable*. . . . (Emphasis added.)

29. Sample forms of the first two agreements will be found as Appendices B and C hereto.

involving only a cash advance, the second agreement is one between the issuer and a bank participating in the plan, and this agreement is similar in form to the issuer-merchant agreement. In establishing a plan, a single bank has the initial promotional task and expense of obtaining thousands of both merchant and cardholder members.³⁰

The joint participation of numerous banks, cardholders and merchants in a plan whereby the card of an issuer member may be honored by any merchant member without regard to which bank has brought them into the plan is the key to the Midwest Bank Card System. A member bank is one which has signed the system agreement. A bank, generally a correspondent of an issuer, which participates in the plan but has not signed the system agreement, is termed a participating bank. We shall consider in turn the single bank plan and the system. The description made is of the single bank plan and the system as it exists with respect to the Midwest Bank Card System, and it may or may not be applicable to other plans or systems.

The Issuer-Cardholder Agreement

Bank credit cards are issued without charge to cardholders.³¹ They may be issued either with or without application. In either case the bank has approved the credit of the cardholder to a maximum limit, which may be \$300 to \$1,000 or more. One difference between the situation in which a card is issued upon application and that in which it is transmitted on an unsolicited basis is in establishing the existence of an issuer-cardholder agreement. If the cardholder executes a written application for the card, he, of course, agrees to the terms set forth in the application, and they form the agreement. When an issuer transmits a credit card to a person, whether or not he has signed a written application for the card,³²

30. The initiation of a credit card program, of course, requires a tremendous outlay. See Wall St. J., Jan. 17, 1967, p. 1, col. 1, reporting the expectation of one bank that it would lose \$5,000,000 on its system in the first year. A substantial amount of time will pass before the operation becomes a profitable one. The plan of the Bank of America, started in late 1958, did not emerge from the red until 1962. Wall St. J., May 24, 1966, p. 32, col. 2-3.

31. This may be contrasted with the annual membership fee charged by some independent credit card companies.

32. Volume is obviously required for a profitable credit card operation. Volume is achieved more rapidly by a mass mailing of cards to a bank's customers and friends than it is by conducting a written application program. Of course, many addresses are obsolete. In one extreme instance 6,000 out of 21,000 cards mailed to one area were returned. Banks assume the risks of fraud inherent in such a distribution. They also assume the risk of customer irritation involved therein. There is room to believe that computers, which process the distribution lists, are no nearer perfection than humans (or, more accurately, than the humans who feed them the necessary information). Numerous customers have received several cards each. Minors, and even infants, have received cards. Wall St. J., Jan. 17, 1967, p. 12, col. 3.

the issuer also transmits with it a copy of its issuer-cardholder agreement. If a person who has not requested the card receives it along with a copy of the issuer-cardholder agreement, signs his name on the signature pad on the reverse side of the card and uses it, it seems clear that he has assented to the terms of the enclosed issuer-cardholder agreement.³³

The bank credit card itself is a plastic card with standard dimensions of 3-3/8 inches by 2-1/8 inches.³⁴ In the case of cards issued by members of the Midwest Bank Card System, the face side of the card displays in the upper left-hand corner the chartreuse and blue symbol of the system and in the upper right-hand corner the name and/or trade style of the issuer on a uniform blue field. The lower half of the face side contains three lines of embossed printing. Unlike that of the upper portion of the card the material in the lower half may be individualized as to color and arrangement in accordance with the desires of the particular issuer. Typically, the first line contains a ten digit account number of the customer, the first two of which identify the issuer within the system. The second line contains the customer's name. The third line contains the American Banker's Association and Federal Reserve routing symbol of the issuer³⁵ and the expiration date of the card.³⁶ The initials MBC (for Midwest Bank Card) appear on the first or third lines. The reverse side contains a space for the cardholder's signature³⁷ and printed matter, which includes statements that the cardholder agrees to comply with all provisions of the issuer-cardholder agreement transmitted with or accompanying the card when delivered, that the card remains the property

A bank customer named "Luse" reportedly received three cards with his name imprinted on each as "Louse," the last two after complaint about the first one. Such are some of the problems involved in the launching of any credit card program.

33. The "unsolicited newspaper" cases offer a comparable situation. One receiving the paper and using it is liable for the subscription price. *Austin v. Burge*, 156 Mo. App. 286, 137 S.W. 618 (1911); *Fogg v. Portsmouth Athenaeum*, 44 N.H. 115 (1862); *Weatherby v. Banham*, 5 C. & P. 228 (1832).

34. A sample form appears as Appendix A hereto.

35. This feature of the card indicates anticipation of expansion of the Midwest System to a nation-wide one.

36. The credit cards of many oil companies presently in use contain no expiration date. Though sometimes styled "lifetime" cards, they, of course, remain subject to revocation.

37. The credit cards of many oil companies now in use contain no space for the signature of the cardholder. It is thus impossible to detect an impostor on a reasonable commercial standard of care consisting of a comparison of signatures. The courts, however, have imposed the requirement of due care. In *Union Oil Co. v. Lull*, 220 Ore. 312, 349 P.2d 243 (1960), the court indicated that the facts (1) that the presenter of the card was driving a car bearing an Idaho license plate and (2) that the credit card showed a residence for the customer in Halfway, Oregon, should have alerted the station attendants to inquire further into the presenter's identity. For more on oil company credit cards, with photographic illustrations, see Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

of the issuer, and that the issuer may revoke the card at any time. In some cases this printing also restates the terms of the agreement that the cardholder will pay the issuer for all purchases made and credit obtained by any person using the card prior to its destruction or surrender or receipt by the issuer of written notice of its loss or theft.

The terms of the issuer-cardholder agreement adopted by different banks are very similar. The cardholder authorizes the issuer to pay in his behalf all items reflected by purchases or cash advances made or obtained through the use of his card upon presentment of the items to the issuer and promises to pay the issuer for all credit thereby extended. He also agrees that he will pay monthly statements furnished by the issuer for all purchases made and cash advances obtained with the card by remitting to the issuer within twenty-five days from the date of the statement either (a) the full amount billed, or (b), at his option, an amount equal to a percentage (generally 5 per cent or 10 per cent) of the total amount billed, or a designated minimum, generally ten dollars, whichever is greater. The cardholder also agrees, if he elects to pay in monthly installments, to pay interest, service charges and credit investigation fees not exceeding a certain percentage per month (generally 1-1/2 per cent) of the outstanding principal balance.³⁸ He usually further agrees that he will make no credit purchases or cash advances which bring the outstanding balance to an amount exceeding his approved credit line³⁹ and to pay the issuer for all purchases made through use of the card, even though he may have a dispute with the merchant. Finally, the cardholder agrees to reimburse the issuer for all payments made by the issuer on account of purchases made and credit obtained by any person using the card prior to its destruction, surrender or receipt of written notice by the issuer that it has been lost or stolen.⁴⁰

38. This aspect of the credit plan necessitates consideration of applicable consumer credit legislation. See Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 567-74 (1960); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 494-98 (1960); Note, *Regulation of Installment Credit Cards*, 35 U. CINC. L. REV. 424, 434-57 (1966); Comment, *Regulation of Consumer Credit—The Credit Card and the State Legislature*, 73 YALE L.J. 886 (1964).

39. The breach of this provision by the cardholder results in what is termed in bank jargon a "wild card" and, of course, subjects the cardholder to revocation of his card. The holder of a "wild card" is notified by registered mail, return receipt requested, of the fact of revocation by the issuer. The credit line is a revolving one. A cardholder with a credit limit of \$300 who receives a monthly statement for \$250 has \$50 of unused credit; and if he makes a payment of, for example, \$150 plus charges, his available credit line is restored by that amount.

40. As mentioned in preceding text, this type of provision in the cards of other types of issuers has generated most of the civil litigation in regard to credit cards. See cases discussed in articles cited at note 17 *supra* and cases cited at note 15 *supra*. A bank credit card whose loss or theft has been reported to the issuer is termed a "hot card" in the Midwest Bank Card System. "Hot card" lists (which may contain as many as 1200

The Issuer-Merchant Agreement

The second of the three agreements is that between the issuer or the participating bank and the merchant. Its provisions are likewise fairly standard. The merchant agrees to sell goods or services at his regular cash prices to cardholders and reflect the sale on a sales slip form furnished the merchant by a bank participating in the plan.⁴¹ This sales slip⁴² must show the total sales price, be signed by the purchaser and imprinted with the basic information on the credit card, together with the merchant's name and number. Many issuer-merchant agreements obligate the merchant to compare the signature on the reverse side of the credit card with that on the sales slip.⁴³ If the amount of the proposed sale exceeds what is called a "floor limit"—e.g., fifty dollars—the merchant must obtain authority for the sale from the issuer's authorization center.⁴⁴ The agreement contemplates that the merchant will deliver the sales slip to the issuer within three business days following the sale in a special envelope furnished by the issuer for that purpose. The issuer will then credit the merchant's account with a designated percentage (generally from 95 per cent to 99 per cent) of the aggregate amount of all sales slips which the issuer accepts for deposit. In some cases the merchant receives credit for 100 per cent of the sales slips and is billed for the agreed discount periodically.⁴⁵ The merchant agrees to make no cash re-

system card numbers) are distributed periodically (weekly or every other week) to merchant members. Rewards are offered by an issuer for the retrieval of a "hot card" (\$50) or a "wild card" (\$25). As to the latter, see note 39 *supra*. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1108-13 (1966), for discussion generally on the subject.

41. Most issuer-merchant agreements expressly require the merchant to honor the issuer's or the system's card. The issuer-cardholder agreement exempts the issuer from liability if the merchant refuses to do so. Few merchants are likely to dishonor a valid card; and if they do so unjustifiably, the issuer can easily remedy the situation.

42. A sample form appears as Appendix D hereto. This slip qualifies as an "item" under § 4-104(1)(g). See note 96 *infra* and accompanying text.

43. Observance of this requirement will obviously not thwart the clever and skilled forger; but it is a reasonable commercial standard of care whose observance will materially diminish the risk of loss through fraudulent use. Cf. § 3-406.

44. If the proposed sale is approved by the authorization center, the merchant is given an authorization code number which is entered on the sales slip. If the proposed sale is disapproved, the authorization center will, if requested, discuss the reasons therefor directly with the cardholder. In this connection note may be taken that a bank is under an obligation not to disclose confidential information concerning a customer's account to a third party. *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

45. The discount is often predicated upon volume over a monthly or quarterly basis. Sometimes it is based upon the average ticket amount for sales slips in the merchant's line of business. See Wall St. J., May 24, 1966, p. 32, col. 2, which states the discount of the Bank of America as follows: for most retailers, 3%; for hotels, motels and restaurants, 4%; and for grocery stores, beauty salons, barber shops, gasoline serv-

funds but instead to prepare a credit slip on a standard form⁴⁶ and to include the slip in his next deposit as a charge against his account. Acceptance by the participating bank of sales slips from the merchant for deposit to the latter's account is without recourse to the latter except generally in the following situations: (1) a dispute between the merchant and the cardholder; (2) where the sales slip exceeds the floor limit per purchase in effect at the time unless the merchant has previously contacted the issuer's authorization center and obtained approval for that specific sale; (3) the expiration of the card prior to the date of the sale; (4) the receipt by the merchant prior to the date of the sale of written notice of revocation of the card by the issuer; (5) a counterfeit card; (6) a failure to obtain the cardholder's signature on the sales slip or obtaining an illegible signature; or (7) a failure to imprint the sales slip with the required data from the face side of the credit card. The merchant also agrees that he will accept no cash, checks or other obligations of a cardholder in payment therefor until after the issuer has declined to honor the sales slip or has charged it back to the merchant's account.⁴⁷ An important provision of the agreement from the standpoint of the merchant's bank is the merchant's warranty that it has not created a security interest in its accounts receivable or its inventory and that none shall be created during the period of the agreement in favor of any other person without prior notice to the bank.⁴⁸ The merchant may also warrant that there are and will be no setoffs or counter-claims in favor of the cardholder against the merchant that may be asserted in defense to an action to enforce payment against the cardholder for goods and services purchased through use of the card.⁴⁹ In recognition of practical

ice stations and liquor stores, 5%. The cost of processing a slip is the same regardless of the amount of the sale, and that cost must be at least recouped by the issuer.

46. A sample form appears as Appendix F hereto.

47. As an "item" (see note 96 *infra*) the sales slip would also be subject to the right of charge-back for which § 4-212 provides, subject to contrary agreement found in the issuer-merchant agreement and the Midwest Bank Card System rules. § 4-103.

48. There is no point here in attempting to solve possible priority problems under Article 9—Secured Transactions if the merchant were to breach this provision. The situation would rarely occur. If it did, a situation of unwanted trouble would exist for the issuer, whether the secured party claimed inventory and proceeds or whether he claimed accounts receivable and proceeds, although the trouble would be more serious in the first situation. The sales slip qualifies as an "instrument" within § 9-105(1)(g) (see note 101 *infra* and accompanying text), but the obligation evidenced thereby runs to the issuer, not the merchant.

49. This is a desirable, not a necessary, warranty. The issuer-cardholder agreement obligates the cardholder to pay for purchases made through use of the card without regard to any dispute with the merchant. This warranty provides the issuer with leverage to induce the merchant to adopt a fair and reasonable policy with respect to returns and adjustments requested by cardholders. An issuer is understandably solicitous of its good will and public image. From this concern springs the provision next mentioned in the text. See also notes 111-12 *infra* and accompanying text.

difficulties in this area and in an effort to maintain its good will with cardholder members, some banks have included provisions in their merchant agreements requiring the merchant to establish a fair policy for the exchange or return of or adjustment on goods and services sold on credit card sales.

A cardholder may also obtain a cash advance from a participating bank.⁵⁰ Each cash advance must generally be cleared with the issuer's authorization center by telephone. The cardholder merely signs a cash advance slip,⁵¹ which has been inserted in the bank's imprinter.

As the issuer furnishes the credit card to its cardholder members, so does it furnish imprinters (on a lease basis), sales slips, credit slips and promotional material to its merchant members. To participating banks it of course furnishes the same, except for cash advance slips in lieu of sales and credit slips.

The Sales Agreement

The third agreement in the plan is the one between the cardholder member and the merchant member—i.e., the sales agreement. The cardholder presents his card to the merchant and purchases goods or services. The merchant enters the sale on a multi-copy sales slip which the customer signs after the card has been placed in the imprinter and the data on its face side has been imprinted on the sales slip (together with the merchant's name and account number, which are already on the imprinter). At some moment before all of this is completed, the merchant observing his agreement with the issuer will have checked the card number against a list (furnished him at regular intervals by his participating bank) and compared the signature on the card with that on the sales slip.⁵² This sales slip evidences the transaction between the merchant and the cardholder.⁵³

The merchant encloses his sales slips (including any credit slips for returned merchandise) in a deposit envelope and forwards them to the

50. A ceiling amount of \$100 presently exists in the Midwest Bank Card System. In the case of a cash advance, an interest charge of 1 to 1-1/2% per month is made without regard to payment within 25 days. The Bank of America permits its cardholders a cash advance not exceeding \$500.

51. A sample form appears as Appendix E hereto. In this use the credit card performs the identical function of the traveler's letter of credit. See note 72 *infra* and accompanying text.

52. The list checked, of course, is the "hot card" list mentioned in note 40 *supra*. This feature of the system understandably on occasion produces customer irritation, both cardholder and merchant, during busy hours with waiting lines.

53. I.e., from the standpoint of the issuer. Other documents may, and often will, evidence the sales transaction between the merchant and the cardholder. If goods are the subject of the sale, Article 2—Sales applies to sale aspects of the transaction, just as it applies to a sale of goods in a transaction handled under a letter of credit.

participating bank, which then credits the merchant's account with the proceeds of the sales slips, after deducting the credit slips. Under many plans, the merchant is required to maintain a commercial bank account with the participating bank, subject to its customary charge.

The foregoing details most of the major aspects of the credit card plan of a single bank issuer. While major banks in the Chicago area were considering credit card plans, it became clear that an interchange arrangement among banks with competing cards would benefit each issuing bank since it would enhance the value of any individual card, which would thereby gain wider use and acceptance. The Midwest Bank Card System, a non-profit Illinois corporation, is the result. A system like this is established when a number of bank issuers of credit cards agree with each other and with any other bank signing the system agreement to pay for sales slips or cash advance slips generated by the use of its credit cards which are deposited with the participating bank.⁵⁴ Each participating bank in turn agrees with each of its merchants to accept for deposit to the latter's account all sales slips generated by use of any system credit card at the merchant's place of business. A cardholder in the plan of any issuer member of the system thus has full access to all merchants participating in the system.

The System

The system is essentially a mechanical device for the clearance of credit card transactions among the participating banks. The system must, and does, establish certain compatibility requirements for participation. Certain features must be standardized throughout the system: for example, size, thickness and data content of the card; specification of forms (sales, cash advance and credit slips); style and type of the imprinter; account number structure for cardholders and merchants; floor limits for all merchant categories; inter-bank chargeback rules; and transaction codes to describe the various types of slips which pass between presenting banks and issuing banks. Sales slips, credit slips and cash advance slips generated by system cards are thus processed by participating banks and cleared through a Midwest Bank Card clearing house operation. As (and if) the system progresses to a nation-wide

54. An issuer and its correspondents who issue the issuer's card to their customers constitute a sub-system within the Midwest Bank Card System. Credit responsibility for the correspondent's customers as between the issuer and the correspondent depends upon the arrangement between them. (By reason of interlocking contractual arrangements such credit responsibility, of course, lies with the issuer vis-à-vis any merchant in the system.) All credit responsibility may rest with the issuer or it may be divided. Options may be offered by the issuer which vary with allocation of credit responsibility. The arrangement is similar to that offered by independent issuers—i.e., Bank of America, American Express Company, Diners' Club and Carte Blanche Corporation—to banks on a franchise basis. See note 7 *supra*.

one, it is contemplated that these slips may be cleared through the Federal Reserve System along with checks and other items.⁵⁵

Upon receipt from the clearing house of items generated through the use of its card, an issuer conducts the bookkeeping operation of sorting the slips and posting the amounts of all slips and all payments to its cardholders' accounts. In the larger banks this bookkeeping is now a computerized operation. Indeed, it may be said that the recent spread of electronic technology has enabled banks to undertake and maintain an operation which they could not have done on a profitable basis at an earlier time. Many banks have established procedures whereby they routinely obtain current information in the form of computer print-outs which enable them to maintain reasonably close supervision and control over a truly gigantic operation. Computers may be programmed to compile information, for example, concerning: (1) unusual activity with respect to a cardholder's account number;⁵⁶ (2) the approach of the credit limit of a cardholder;⁵⁷ and (3) unusual activity with respect to credit slips in a merchant's account number.⁵⁸

55. See note 35 *supra* and accompanying text. The question of clearance of bank credit card slips through the Federal Reserve System is presently under study. Wall St. J., May 9, 1967, p. 8, col. 3-4.

56. Such activity may indicate to the issuer that the card has fallen into the wrong hands—i.e., it has been lost by or stolen from the cardholder. The information may consist of frequent purchases beyond normal needs or purchases without regard to quality, size or style, anything which establishes a pattern of erratic spending. The issuer can then compare its information with the cardholder and verify its suspicion. The period of fraudulent use of a card may thus be shortened appreciably.

Purchases grossly exceeding the credit limit of the cardholder are sufficient to apprise an issuer of a probable loss of the card by the cardholder or its theft from him. See *Allied Stores, Inc. v. Funderburke*, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967), discussed in the following note; and *Uni-Serv Corp. v. Frede*, 50 Misc. 2d 823, 271 N.Y.S.2d 478 (N.Y. City Civ. Ct. 1966). The latter case involved an apparently misdirected card which never reached the cardholder. The credit line maximum was \$250. After 70 days of non-use the card was used on 98 separate occasions during a 20-day period for an "avalanche of purchases" aggregating \$2,342. The court held, *inter alia*, that the issuer neglected its duty to inquire under the circumstances.

57. An issuer can thus warn a cardholder that he is about to overspend his credit limit and the possible consequences thereof.

The existence of such a procedure probably also places upon the issuer a duty to inquire when the credit limit is exceeded. In *Allied Stores, Inc. v. Funderburke*, 277 N.Y.S.2d 8 (N.Y. City Civ. Ct. 1967), the court observed that inadequacies of electronic data-processing equipment could not be shifted to a department store cardholder. In a four-week period 237 sales slips bearing the forged signature of the cardholder and totalling \$2,460 accumulated despite the existence of a "spill out" procedure if the account exceeded \$200. Moreover, seven of the 237 unauthorized purchases exceeded the \$15 floor limit per purchase, which required advance approval of the store's credit department. The court entered judgment dismissing the complaint of the issuer. See also note 56 *supra*.

58. Such activity may indicate merchant dishonesty or abuse of the credit card plan. The percentage of cardholder complaints may be such as to warrant the issuer's reconsideration of retaining the merchant in its plan.

OBSERVATIONS ON BANK CREDIT CARDS

As with everything else, credit cards have their advantages and their disadvantages. A cardholder may take advantage of special seasonal opportunities (for example, clearance sales) offering substantial savings without cash and make deferred payments at a more convenient time. A cardholder need not carry large amounts of cash or be concerned about the reluctance of merchants to accept personal checks. Credit card purchasing may simplify his personal bookkeeping and thereby save time, since payment is made for all charge purposes upon a single monthly statement with a single check. The merchant benefits by obtaining immediate cash for credit sales upon deposit of sales slips at his bank. To the extent of credit card sales he is liberated from bookkeeping, collection and bad debt problems and he has fewer receivables and more cash to invest in current inventory. The issuer or participating bank benefits to the extent that it establishes new sources of income from the discount percentages on merchant sales slips and from the monthly charges on cardholder purchases where the cardholder elects to pay on an installment basis spread over two or more months. The issuer also benefits from the merchant's bank account opened with it, and it may benefit from other business originating from the cardholder.

There are likewise disadvantages to all three parties. The two most frequently voiced complaints on the part of merchants have concerned the amount of the issuer's service charge and the lessening of customer contact. A possible disadvantage to the cardholder is that he may tend to overspend, since unlike an account kept in a check book, he may maintain no current record of his spending and his remaining balance. The issuer absorbs almost all risks of fraud and misuse of the card from all sources—the cardholder, a stranger into whose hands the card may come, and the merchant.⁵⁹ Its share of fraudulent losses is probably greater

59. The issuer absorbs the credit losses attributable to "wild cardholders," whose credit it has approved (see note 39 *supra*); losses from risks of fraud inherent in mass distribution of cards on an unsolicited basis (see note 32 *supra*); losses from fraudulent use of a card after loss by or theft from the cardholder during the lag period between the time it learns of the fact (from the cardholder or other sources) and the time it can circulate the card number among merchants on the "hot card" list; in the cases of some issuers, losses over a specified amount (\$50 to \$100) from fraudulent use of a lost or stolen card, regardless of whether the loss occurs before or after notice to the issuer (see note 119 *infra* and accompanying text); and losses from merchant dishonesty—whether in collusion with cardholders or otherwise. The estimated losses from fraud committed through the use of credit cards are \$30,000,000 annually. *Study Shows Need for Credit Card Crime Act*, 21 PER. FIN. L.Q. 44 (1967). While this figure standing alone is staggering, it is small when placed alongside the figure representing the total volume of business done through credit cards. The principal, if not only, risk of the alert merchant is a counterfeit card; and some issuers absorb even this type of fraud loss. The only risk to the cardholder, of course, is from an unauthorized use after a

than in instances involving checks and other negotiable instruments.⁶⁰

There are several legal problems with respect to bank credit cards. The answers to many may depend on the body of law found applicable to credit cards.⁶¹ One is the applicability of Article 9—Secured Transactions of the Uniform Commercial Code to the transaction between the issuer and the merchant.⁶² Another is the availability in an action by an issuer against a cardholder of a defense the cardholder may have against the merchant.⁶³ A third, the principal one to date to occupy the attention of courts in the credit card field, is the liability of the cardholder for unauthorized purchases made with his card prior to notice to the issuer of its loss or theft.⁶⁴ Some of these are present Code problems; some may be problems under a future Code expanded to include credit cards. All are governed by or related to the Code, and their resolution will be influenced by the Code. To be sure, there are other legal problems,⁶⁵ but these are the most noteworthy, pertinent ones at the moment.

ARTICLE 5—LETTERS OF CREDIT: AN APPROPRIATE SLOT FOR CREDIT CARDS

As noted previously, the bank credit card is a development subsequent to promulgation of the Uniform Commercial Code in 1952 and is not, therefore, expressly covered by the Code. The closest parallel of the credit card in the existing structure of commercial law represented by the Code is the letter of credit, the subject matter of Article 5. This suggests that letter of credit law is the logical slot for credit cards.⁶⁶ This conclusion does not, however, require that *all* rules applicable to letters of credit be applied to credit cards, for there are differences which warrant modification of some of these rules when applied to credit cards. Let us compare the letter of credit with the credit card and explore the logic and feasibility of this treatment.

loss or theft occurring before notice of the fact to the issuer; and many issuers have minimized this risk. See note 119 *infra*. Of the total of 140,000,000 credit cards currently in circulation, over 1,000,000 were reported lost or stolen in 1965. See *Study Shows Need for Credit Card Crime Act*, 21 PER. FIN. L.Q. 44 (1967).

60. In negotiable instrument cases some of the risk is allocated to other parties. See §§ 3-406 and 4-406.

61. See notes 66-95 *infra* and accompanying text.

62. This problem under pre-Code law is briefly noted in Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 470, 478-80 (1960).

63. *Id.* at 471-78.

64. See notes 15 and 17 *supra* and accompanying text.

65. These include questions under the antitrust law, under the general law involving the concept of doing business in a state, under laws regulating consumer credit (including usury laws) and under the criminal laws dealing with the fraudulent use of credit cards. With respect to problems arising under laws regulating consumer credit see articles cited at note 19 *supra*.

66. Of both bank and non-bank issuers. Cf. § 5-102(1), which applies Article 5 to "credits" (as defined) issued by banks and persons other than banks.

Letters of credit are of two types—the traveler's (or clean) letter and the commercial (or documentary) letter.⁶⁷

The purpose of the traveler's letter of credit is avoidance of the necessity of carrying large sums of money on the person when traveling at a distance from one's community. A customer of a bank contemplating travel abroad may make a written application to a bank for a letter of credit.⁶⁸ If his credit is approved, the bank issues its traveler's letter of credit and a letter of identification (or indication).⁶⁹ In the course of his travels abroad, the customer draws a draft on the issuer at the office of a foreign correspondent in the presence of one of its officers, who notes the amount of the draft on the letter of credit.⁷⁰ The customer repeats the process from time to time as he needs currency until the letter is exhausted. In this function the traveler's letter of credit has now been largely replaced by the traveler's check and the credit card.⁷¹ In fact, the cash advance feature of the bank credit card plan performs the identical function of the traveler's letter of credit. An Illinois cardholder member of the system on vacation in northern Michigan may present his card at a local participating bank there, sign a cash advance slip and obtain cash

67. WARD & HARFIELD, *BANK CREDITS AND ACCEPTANCES* 10-11 (4th ed. 1958). Both are covered by Article 5. Section 5-102, captioned "Scope," provides in part as follows:

(1) This Article applies

(a) to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment; and

(c) to a credit issued by a bank or other person if the credit is not within subparagraphs (a) or (b) but conspicuously states that it is a letter of credit or is conspicuously so entitled.

68. The application forms of some issuers contain an indemnity clause with respect to unauthorized use of the letter of credit after loss and before receipt of notice thereof by the issuer which is very similar to those found in credit card application and agreement forms—*e.g.*,

In the event of loss of this letter of credit,
agree to pay all expense incurred in stopping payment on same and if any payments are made against the Credit, so lost or stolen, by any bank or bankers observing the usual precautions and before the receipt of any such notice, to indemnify and save harmless yourselves and your correspondents from any loss or liability incurred thereby.

69. The letter of identification (or indication) bears the issuer's certification of its customer's signature. The issuer may caution its customer on the desirability of carrying this letter separately from the letter of credit as an insurance measure against loss through forgery or fraud.

70. A traveler's letter of credit is a notation credit, covered by § 5-108. See Official Comment 2 thereto.

71. The credit cards of the major independent issuers—*i.e.*, American Express Company, The Diners' Club, Inc., and Carte Blanche Corporation—may be used in member establishments over the world. Each issuer offers a franchise plan to banks. See note 7 *supra*. The American Express Company is an issuer of traveler's checks as well as credit cards. First National City Bank, New York, which controls Carte Blanche Corporation, also issues traveler's checks. The credit card is a natural supplement to the traveler's check from the standpoint of the issuer.

in the same manner that he would if he presented a letter of credit and drew a draft thereunder.⁷²

The purpose of the commercial letter of credit is to substitute the financial responsibility of a bank of established financial repute for the less desirable financial responsibility of a party to a commercial transaction—generally a buyer of goods.⁷³ A seller,⁷⁴ generally one at a distance from the buyer (for example, a foreign country), may be wary of the buyer's credit.⁷⁵ If so, he insists upon a provision in the sale agreement obligating the buyer⁷⁶ to furnish a letter of credit issued by a bank of unquestioned financial repute.⁷⁷ The letter of credit contemplates that the seller will be paid by means of drafts drawn by him upon the issuer or the buyer and presented through banking channels to the issuer⁷⁸ and that the issuer will honor⁷⁹ the drafts provided certain conditions, generally the tender of documents complying with certain specifications in the letter,

72. His signature on the cash advance slip is compared with his signature on the reverse side of the credit card, just as would his signature on the draft be compared with that on the letter of identification in the case of a letter of credit. A draft would, of course, be drawn on the issuer. It would contain words of negotiability, which the cash advance slip, forwarded by the participating bank to the issuer for payment, does not. See Appendix E.

73. WARD & HARFIELD, *BANK CREDITS AND ACCEPTANCES* 10-11 (4th ed. 1958). Commercial letters of credit may be classified on the basis of several features: (1) method of transmission, either circular or specially advised; (2) duration, either revocable or irrevocable; (3) obligation, either confirmed or unconfirmed; (4) method of payment, negotiation or straight, sight or acceptance and local currency or foreign currency; (5) method of reimbursement of paying bank, either simple where account of issuer with paying bank is debited, or reimbursement by draft of paying bank drawn on issuer or correspondent of issuer; and (6) provision for renewal, either single transaction or revolving. *Id.* at 28-33. The revolving feature is identical to that of the credit card. See note 39 *supra*. For a case illustration of a revolving commercial letter of credit see *American Nat'l Bank & Trust Co. v. Banco Nacional de Nicaragua*, 231 Ala. 614, 166 So. 8 (1939).

74. In letter of credit terminology he is known as the "beneficiary" of the credit, defined in § 5-103(1)(d) as "a person who is entitled under its terms to draw or demand payment."

75. The business problem solved by the commercial letter of credit is more fully described in McCurdy, *Commercial Letters of Credit* (pts. 1-2), 35 HARV. L. REV. 539, 540-42, 715 (1922). See also Mentschikoff, *Letters of Credit: The Need for Uniform Legislation*, 23 U. CHI. L. REV. 571, 572-81 (1956); Miller, *Problems and Patterns of the Letter of Credit*, 1959 U. ILL. L.F. 162.

76. In letter of credit terminology he is known as the "customer," defined in § 5-103(1)(g) as "a buyer or other person who causes an issuer to issue a credit." The defined term also includes a bank procuring issuance or confirmation on behalf of that bank's own customer.

77. Under § 2-325 the term "letter of credit" or "bank credit" in a contract for sale means, unless otherwise agreed, "an irrevocable credit issued by a financial agency of good repute, and where the shipment is overseas, of good international repute."

78. The term "issuer" is defined by § 5-103(1)(c) as "a bank or other person issuing a credit."

79. The term "honor" is defined by § 1-201(21) as "to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit." A letter of credit may thus provide for drafts to be drawn on a correspondent of an issuer.

are met. On his part, the buyer protects himself in the sale transaction by requiring that several documents—a document of title (that is, a negotiable bill of lading or warehouse receipt)⁸⁰ controlling goods of a specific description, a consular invoice, an insurance policy or certificate, and perhaps a certificate of inspection of a third party—be submitted with the drafts to the issuer, who, before honoring them, will ascertain the compliance of the documents with the terms of the letter of credit. The buyer obtains the letter of credit by a written application to the issuer in which he agrees to reimburse the issuer for sums paid to the seller by the issuer in accordance with the letter of credit. Upon approval of the application, the issuer transmits the letter of credit to both the seller and the buyer. The credit is established vis-à-vis the customer-buyer as soon as the letter of credit is sent to him or the letter or an authorized written advice of its issuance is sent to the seller-beneficiary⁸¹ and vis-à-vis the beneficiary-seller when he receives the letter of credit or an authorized written advice of its issuance.⁸² The issuer must honor drafts which comply with the terms of the credit, irrespective of whether the goods or documents conform to the underlying contract for sale between the buyer-customer and the seller-beneficiary.⁸³ An issuer which has duly honored a draft is entitled to immediate reimbursement of any payment made under the letter of credit.⁸⁴ Routine commercial letter of credit transactions are handled in the foregoing manner.

The similarities between the commercial letter of credit and the bank credit card are striking. Both arrangements involve three parties.⁸⁵ Each party has two contracts—one with each of the other two parties—which are independent of each other. In both cases the issuer of the credit has agreed with the merchant to pay him upon compliance with specified conditions. In both cases the party whose credit the issuer has approved has agreed to reimburse the issuer directly without regard to any dispute between him and the merchant. In both cases the issuer pays

80. The term "document of title" is defined in § 1-201(15).

81. § 5-106(1)(a).

82. § 5-106(1)(b).

83. § 5-114(1). This subsection adopts the great weight of authority with respect to the independence of the letter of credit from the underlying sales agreement. See *S.L. Jones & Co. v. Bond*, 191 Cal. 551, 217 Pac. 725 (1923); *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 140 N.E. 803 (1923); *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925); *Laudisi v. American Exch. Nat'l Bank*, 239 N.Y., 234, 146 N.E. 347 (1924).

84. § 5-114(3). Article 5 contains no rules for determining whether or not documents submitted with drafts comply with the terms of the credit. With respect to the issuer's duty to examine documents, see *WARD & HARFIELD, BANK CREDITS AND ACCEPTANCES* 47-58 (4th ed. 1958).

85. As does the traveler's letter of credit. See notes 68-72 *supra* and accompanying text.

the merchant upon the presentment of documents. Both situations have the common denominator of a loan of credit or reputation by a bank to a customer who is a buyer of goods or services from a merchant, who accepts the bank's credit in substitution of the buyer's.⁸⁶

There are, to be sure, dissimilarities between the letter of credit and the credit card. One is that the commercial letter of credit itself is the agreement between the issuer and the merchant-beneficiary, while the credit card does not perform this function. As to the credit card, this function is performed by the issuer-merchant agreement. While this agreement is independent of the issuer-cardholder agreement, the latter authorizes the issuer to pay for the cardholder's account "all items reflecting purchases and cash advances made or obtained through the use of" the card "upon presentment of such items to the issuer."⁸⁷ The presentment of a sales slip or a cash advance slip to the issuer signed by the cardholder is, therefore, a condition precedent to the issuer's payment, which gives rise to the cardholder's obligation of reimbursement. Another difference between the two devices is the manner of distribution. While many credit cards are obtained by written application, as are all letters of credit, many credit cards are of necessity distributed on an unsolicited basis. The successful operation of a bank credit card plan requires a reasonably rapid accumulation of volume which cannot be otherwise achieved. A third difference between the letter of credit and the credit card is the prime movant in the transaction. The buyer is the prime movant in the letter of credit transaction, because his purchase of goods initiates it. The issuer is the prime movant in the credit card transaction, since it is an instrument for general use without regard to any specific purchase of goods or services.

86. The issuance of credit cards by a bank is as much a banking function as is the issuance of letters of credit. The credit card is the same substitution of the bank's credit or reputation for that of its cardholder as is the letter of credit in the case of its commercial customer. In *Block v. Pennsylvania Exch. Bank*, 253 N.Y. 227, 170 N.E. 900 (1930), Chief Judge Cardozo, speaking for the court, observed:

"The central function of a commercial bank is to substitute its own credit, which has general acceptance in the business community, for the individual's credit, which has only limited acceptability" (Willis & Edwards, *Banking and Business*, p. 74). A bank "manufactures credit by accepting the business paper of its customers as security in exchange for its own bank credit in the form of a deposit account" (Holdsworth, *Money and Banking*, p. 182). It stands ready to exchange its own credits for those of its customers [citations omitted]. Whatever is an appropriate and usual incident to this substitution or exchange of credits, instead of being foreign to the functions and activities of banking, is in truth of their very essence. It is the end for which a bank exists. 253 N.Y. at 230-31, 170 N.E. at 901.

87. See Appendix B, ¶ 1. The term "item" is a Code defined term. See note 96 *infra*. While the language quoted is illustrative only, the practicalities are such that regardless of phraseology the issuer will not pay the merchant nor the cardholder the issuer without documentation of the charges made.

If the subject matter of credit cards should be expressly incorporated into the Uniform Commercial Code, Article 5—Letters of Credit is the most logical place by reason of the basic similarity in function of the two devices.⁸⁸ Article 5 might be titled "Letters of Credit and Credit Cards." It might be divided into three parts—one dealing with definitions and general principles applicable to both devices, a part dealing with letters of credit only and a part dealing with credit cards only. Such an organization would parallel that of Article 7.⁸⁹ Moreover, the Code has an existing terminology easily adaptable to the credit card—for example, "issuer,"⁹⁰ "credit,"⁹¹ "merchant"⁹² and "honor."⁹³ Few new terms would seem required. The term "cardholder" might be the only one.⁹⁴ Since Article 5 applies to letters of credit of both bank and non-bank issuers, a like extension to credit cards might be made so that cards of all issuers operating under a tripartite arrangement would be covered. The codification of law for credit cards need not be any more complete than for letters of credit.⁹⁵

88. The few dissimilarities that exist do not detract from this conclusion. Dissimilarities also exist between the bill of lading and the warehouse receipt, both of which (together with types of documents) form the subject matter of Article 7—Documents of Title.

89. The longer title of Article 7 is "Warehouse Receipts, Bills of Lading and Other Documents of Title." Section 7-101 provides that it shall be known and may be cited simply as "Documents of Title." It is subdivided into 6 parts. Parts 2 and 3 deal respectively with provisions and problems peculiar to the warehouse receipt and the bill of lading. The remaining four parts supply general principles and definitions and deal with problems common to both: 1, general; 4, general obligations; 5, negotiation and transfer; and 6, miscellaneous provisions.

90. § 5-103(1)(c).

91. § 5-103(1)(a). The term is defined as follows:

"Credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this Article (Section 5-102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.

92. § 2-104. The term would require expansion for this purpose to include sellers of services as well as of goods. The difference in meaning of the term as used in Article 2 and as might be used in Article 5 offers no problem. The term "goods" has different meanings for the purposes of Articles 2 and 9. Cf. § 2-105(1) with § 9-105(1)(f).

93. § 1-201(20). See note 79 *supra*.

94. It would be the substitute for "customer" that "merchant" would be for "beneficiary" in adjusting from letter of credit to credit card parlance. One of the advantages of the Code is its use of the language of the business or trade to which it applies.

95. Article 2—Sales and Article 3—Commercial Paper, by way of illustration, represent almost complete codification of the law. Article 5 deliberately avoids this as to letter of credit law. Section 5-103(3) provides:

This Article deals with some but not all of the rules and concepts of letters of credit as such rules and concepts have developed prior to this act or may hereafter develop. The fact that this Article states a rule does not by itself require, imply or negate application of the same or a converse rule to a situation not provided for or to a person not specified by this Article.

Whether or not Article 5 is extended to cover credit cards, the case for their express inclusion in the Code is compelling.

KEY PROBLEMS: CODE AND CODE-RELATED

The Problem of the Nature of the Transaction

Numerous problems will arise with respect to bank credit cards. The nature of some of them cannot be foretold at this time, but will become evident as more and more plans are adopted throughout the nation. Some of them, as earlier stated, may be resolved by resort directly to Articles 1, 3 and 4. Others may be resolved by analogy to provisions in these and other Articles of the Code. The sales slips and cash advance slips used by the Midwest Bank Card System fit within the Article 4 definition of "item"⁹⁶ but since they are not negotiable, they are not subject to Article 3.⁹⁷

A key question which may arise under a bank credit card plan is the nature of the transaction between the merchant and the bank—that is, whether it involves a sale or assignment of accounts by the merchant to the bank or, like the letter of credit, a direct obligation of reimbursement.⁹⁸ To those who have read this far, the answer is clear. Insofar as the merchant is concerned, only the issuer's credit has ever been involved.⁹⁹ In accepting the cardholder's credit card and preparing a cash sales slip and forwarding it to the issuer for payment or credit, the merchant has at no time created an account as that term is defined in section

96. Section 4-104(1)(g) provides:

"Item" means any instrument for the payment of money even though it is not negotiable but does not include money. . . .

97. These slips do not contain words of negotiability (required by § 3-104(1)(d)) and are not, therefore, within the Article 3 definition of "instrument" under § 3-102(1)(e). They are also non-negotiable by reason of § 3-105(2), which provides, "A promise or order is not unconditional if the instrument states that it is subject to or governed by any other agreement. . . ." Resort must be made to the cardholder agreement to ascertain the terms of payment. Comparison may be made of these slips with the draft involved in *Franklin Nat'l Bank v. Kass*, 19 Misc. 2d 280, 184 N.Y.S.2d 783 (Sup. Ct. 1959), discussed in Hart, *Credit Cards and the Virtual Acceptance*, 1 B.C. IND. & COM. L. REV. 209 (1960).

98. This problem is raised and ably discussed in Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 465-78 (1960). Some credit card plans may involve an assignment, as the one in *Uni-Serv Corp. v. Commissioner of Banks*, 349 Mass. 283, 207 N.E.2d 906 (1965).

99. It is generally understood that only the issuer's credit is involved from the merchant's standpoint. In *Williams v. United States*, 192 F. Supp. 97 (S.D. Cal. 1961), the court observed at pages 99-100:

A credit card is nothing more than an indication to sellers of commodities that the person who has received a credit card from the issuer thereof has a satisfactory credit rating and that, if credit is extended, the issuer of the credit card will pay (or see to it that the seller of the commodity receives payment) for the merchandise delivered.

9-106 of the Code.¹⁰⁰ The sales slip does, however, qualify as an instrument as that term is defined in section 9-105(1)(g) of the Code:

"Instrument" means a negotiable instrument (defined in Section 3-104), or a security (defined in Section 8-102) or *any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.* . . .¹⁰¹

Perhaps more significantly the writing evidences a right to the payment of money in favor of the issuer from the moment of its creation. Possession of the instrument is transferred to the participating bank and acquired by it in the ordinary course of the bank's business under the credit card plan. If the merchant were subsequently to become insolvent, his assets, to the extent of credit card sales, would not include any accounts. Nor would it include any sales slips already delivered to a bank for which he had been paid.¹⁰² While the issuer-merchant agreement provides for the purchase of sales slips by the issuer or the participating bank from the merchant, it does not constitute a security agreement under Article 9,¹⁰³ since no sale of accounts, contract rights¹⁰⁴ or chattel paper¹⁰⁵ is involved at any point in the transaction.¹⁰⁶ Surely, avoidance of this result is one of the purposes of a credit card plan,¹⁰⁷ but it is one in harmony with the extension of a bank's function to include the issuance of credit cards.

At least two other problems which have been raised concerning credit cards generally also exist with regard to bank credit cards. Any legislative or judicial resolution of them may well be made through the adoption of

100. "Account" is defined in the cited section as follows: "'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper."

101. Emphasis supplied.

102. His assets in the bankruptcy estate would include, however, any accumulated sales slips which he had not deposited with the bank.

103. The Code defines security agreement as "an agreement which creates or provides for a security interest." § 9-104(1)(h). The term "security interest" is defined in § 1-201(37). Article 9 also includes within its scope any sale of accounts, contract rights or chattel paper. § 9-102(1)(b).

104. A "contract right" is defined by § 9-106 as "any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper."

105. "Chattel paper" is defined by § 9-105(1)(b) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods."

106. *I.e.*, no obligation to the merchant is ever created by the cardholder and none is therefore transferred either by assignment or sale.

107. Business considerations—*e.g.*, the number, frequency and cost of filings—make it impractical to comply with the filing requirements of Article 9. Moreover, any effort to comply would likely encounter merchant resistance.

rules similar to those found in the Code. These problems are: (1) the availability in an action by an issuer against a cardholder of a defense which the cardholder may have against a merchant,¹⁰⁸ and (2) the alerting of the cardholder to the allocation of risk of unauthorized use of the card after its loss or theft.¹⁰⁹

Even if the credit card is regarded as a form of and treated with the letter of credit, reason exists for modification of some of the rules of law applied to letters of credit if and when they are extended to bank credit cards. The commercial letter of credit is used by a sophisticated merchant, versed in and conversant with commercial facts of life. Users of traveler's letters of credit and holders of credit cards of independent issuers for purposes of travel and entertainment are also, for the major part at least, sophisticated and conversant with commercial facts of life, because the credit requirements of their issuers make these devices available only to persons of higher incomes. On the other hand, the majority of holders of bank credit cards are consumers, whose line of credit may not exceed 300 dollars. These consumer cardholders are not, and cannot be expected to be, as knowledgeable concerning the commercial facts of life as persons in the mentioned groups. Modified rules should, therefore, be formulated, at least in some instances.

*The Problem of the Availability of a Defense of a
Cardholder Against a Merchant in an Action by the Issuer*

Under letter of credit law the buyer's obligation of reimbursement of the issuer exists without respect to any defense he may have against the seller of the goods which he has purchased. When goods which a cardholder consumer purchases on an installment credit basis do not conform to his expectations, his normal response is to refuse further payment until an adjustment is made, either by the substitution of replacement goods, the return of his money, or a credit. The fact that his obligation now runs directly to a bank (rather than to a merchant who has assigned it to a bank) may not make much difference to him. Yet the issuer-cardholder agreement provides that he will pay the issuer without regard to any dispute with the merchant. These considerations bring to

108. See Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 471-78 (1960); Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE DAME LAW. 225, 228-29 (1960); and Note, *Regulation of Installment Credit Cards*, 35 U. CINC. L. REV. 424, 428-33 (1966).

109. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966), and Note, *Applicability of Exculpatory Cause Principles to Credit Card Risk-Shifting Causes*, 22 LA. L. REV. 640 (1962).

the forefront the effect to be given to this provision of the issuer-cardholder agreement. A recognition of commercial realities requires an accommodation of viewpoints from both ends—by both the cardholder and the issuer. The cardholder must realize that he cannot in good faith¹¹⁰ and with good reason assert every minuscule dispute he may have with a merchant as an excuse not to pay an issuer who has already paid the merchant. A bank issuer of credit cards must, and most do, also recognize that its cardholders regard it as an institution of esteem and good reputation and, therefore, reasonably believe and expect that it will not knowingly enlist as merchant members of a credit card plan organizations not of reputable character. An unreasonably high percentage of cardholder complaints against a merchant member would be a fact of commercial life which an issuer in its own self-interest could not, and would not, disregard.¹¹¹ A fair and reasonable rule might therefore be that if an issuer requires its merchant members to adopt a fair and reasonable policy of returns and adjustments with the issuer's cardholder members¹¹² and enforces that requirement, the issuer may enforce the provision of its cardholder agreement that payment must be made without regard to disputes with merchant members.¹¹³

*The Problem of Alerting Cardholders to Their Risk
from Unauthorized Use of the Card after Loss or Theft*

The contractual provision allocating to the cardholder the risk of loss from unauthorized credit extended on the basis of presentation of the card after its loss by or theft from him and prior to his notification of the issuer is a reasonable one in view of the provision of the issuer-merchant agreement requiring the merchant to compare signatures.¹¹⁴ An issuer's risk on losses from fraud is considerably diminished if it is

110. The obligation of good faith is a fundamental one under the Code. See § 1-203.

111. A frequent repetition of similar or like complaints is, of course, a different thing from an isolated complaint. See note 58 *supra* and accompanying text.

112. An illustration of such a requirement may be found in Appendix C, ¶ 12.

113. This is not the same rule established by § 9-206(1), since no assignment is involved. Section 9-206(1) provides in part as follows:

Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3).

114. An illustration may be found in Appendix C, ¶ 4. The requirement is a reasonable one of due care, whose observance will diminish the risk both to the cardholder and the issuer.

notified of loss or theft of the card.¹¹⁵ It can act within a short space of time to retrieve the card and to try to prevent its further use. The provision thus insures cardholder responsibility. The primary criticism made by law review comments to date does not concern the allocation of the risk, but rather that the issuer has frequently not made the cardholder sufficiently aware of this risk.¹¹⁶ While newspaper publicity on bank credit card plans has undoubtedly made the public much more aware of this provision of a credit card agreement than formerly, it seems desirable that the issuer-cardholder agreement call the cardholder's attention to this provision. A satisfactory rule might condition effectiveness of the provision upon its appearance in conspicuous type in the issuer-cardholder agreement or on the credit card.¹¹⁷ The requirement of conspicuousness for effectiveness has been imposed in several places in the Code.¹¹⁸ The observation may be made, however, that many issuers have considerably mitigated the impact of the provision in that they absorb all loss for unauthorized use of the card over a specified limit—fifty dollars to 100 dollars.¹¹⁹ For reasons already stated, no prudent issuer will re-

115. Comparison may be made with the rule of § 8-405(1), which provides where a security has been lost, apparently destroyed or wrongfully taken and the owner fails to notify an issuer of the fact within a reasonable time after he has notice of it and the issuer registers a transfer of security before receiving such a notification, the owner is precluded from asserting any claim against the issuer for registering a transfer of the security or for a new security.

116. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966), and Note, *Applicability of Exculpatory Clause Principles to Credit Card Risk-Shifting Clauses*, 22 LA. L. REV. 640 (1962). Many of the law review articles cited in notes 16 through 18 *supra* note that this provision often appears in fine print on the credit card. See Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950).

117. As the New York statute has done. See note 21 *supra*. The requirement might also be imposed on a common law basis. The Supreme Court of Oregon so suggested in *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960):

In this connection it is pointed out that when the plaintiff invited defendant to make application for a credit card the application form contained no reference to the cardholder's liability for the unauthorized use of the card by another person. Further, it is shown that the conditions limiting the use of the card (which have been set out above) are printed in very small print on the back of a card which is approximately 1-3/4 by 3-1/4 inches in size. Had the issue been properly raised, the foregoing circumstances, together with proof that defendant was not aware of the conditions, would have presented a jury question as to whether the printed conditions constituted a part of the contract.

220 Ore. at 419, 349 P.2d at 246-47.

118. See, e.g., § 2-316 (disclaimer of implied warranties of merchantability and fitness for purpose); § 5-102 (letters of credit other than commercial); § 7-210 (notice of sale by warehousemen of consumer goods); § 8-103 (notice of issuer's lien); § 8-204 (restriction on transferability of security). The term "conspicuous" is defined in § 1-201(10).

119. For example, the American Express Company and the Diners' Club have advised their cardholders that they will absorb all loss from fraudulent use after loss or theft and before notice is given which exceeds \$100. See Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts and*

lieve a cardholder of all liability.

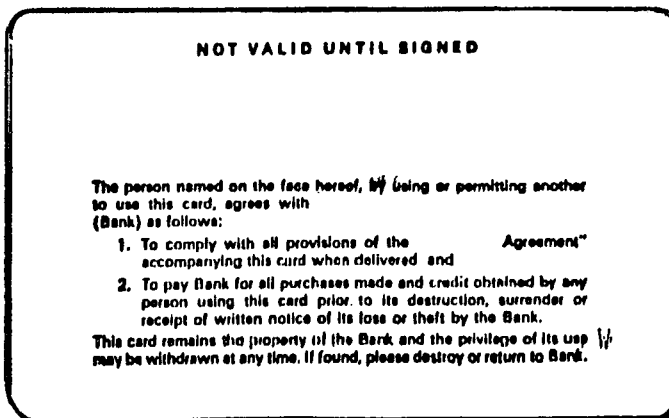
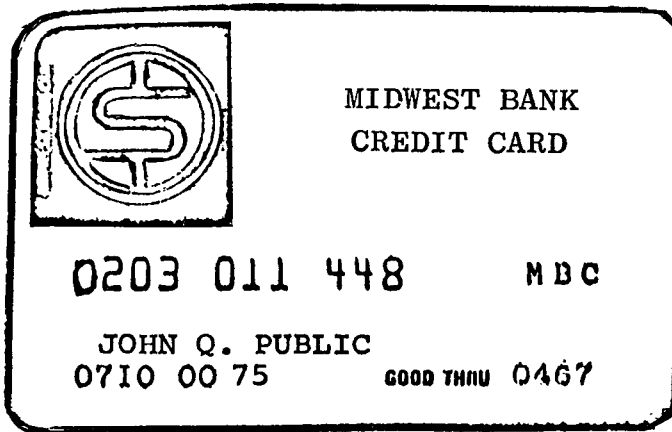
CONCLUSION

While bank credit cards are not a complete substitute for cash,¹²⁰ they do represent a great commercial advance. Some believe that the bank credit card is one of the stations on our way to a checkless society. The economic impact of bank credit card plans seems clear. Banks will hold directly a considerably greater proportion of consumer debt than formerly, some of which they held indirectly in the form of loans to merchants secured by their accounts receivable.

The use of credit cards on such a widespread basis is a comparatively recent development. It has occurred so rapidly that neither statutory nor decisional law has kept pace with it. As more and more banks over the nation adopt credit card plans, the demand for a uniform law expressly applicable to credit cards will increase. It is not a question of whether a uniform law will be adopted. Neither is it a question of where that law should be placed. The question is only when.

Credit Cards, 19 VAND. L. REV. 1051, 1093 (1966). Some banks have adopted a similar policy, but have reduced the amount to \$50. Insurance protection may also be obtained against credit card loss of this kind by cardholders.

120. See *Chicago Daily News*, April 8, 1967, p. 2, col. 6-8. It seems that bank credit cards cannot be used for the purchase of groceries under a minimum amount or transportation on commuter trains, buses and tollways. Some cash in the pocket is still necessary.



FICTITIOUS CREDIT CARD

Appendix A

BANK CREDIT CARDS

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Card is Issued by Bank of Chicago ("Issuer"), subject to the terms hereof. The Customer whose name appears on the face of each Card, by his retaining, using or permitting another to use Card, accepts the terms hereof and agrees to be bound hereby:

1. Customer authorizes Issuer to pay for his account for all items reflecting purchases and cash advances made or obtained through the use of his Card(s) upon presentation of such items to the Issuer.
2. Customer promises to pay Issuer for all credit extended thereby together with interest, service charges, and credit investigation charges if applicable thereto.
3. Customer will be furnished monthly statements for all purchases and borrowings made with Customer's Card(s). Customer will pay such statements by remitting the Issuer of the Bank of Chicago with 25 days after the date of billing or at Customer's option (b) an amount equal to 5% of the total amount billed or minimum payment of \$10.00, whichever is the greater.
4. If Customer obtains cash advances or elects to pay for credit purchases in monthly installments as provided in 3 (b) above, each monthly statement will include and Customer agrees to pay: interest, service charges and credit investigation fees indicated on such statement. In respect to credit purchases, the aggregate of all interest, service charges and credit investigation fees shall not exceed 1½% per month of the outstanding principal balance. Interest on credit pur-

CARD AGREEMENT

chases shall commence 25 days from statement date. On all cash advances, interest shall commence on the date when the cash advance slip is honored by the Issuer. The aggregate amount of all interest, service charges and credit investigation fees in respect to cash advances shall in no case exceed 1½% per month of the outstanding cash advance balance. All payments received will be applied first to accrued interest and charges, next to any cash advance balance, and the remainder to the outstanding principal balance of credit purchases.

5. Customer has been informed of the amount of the approved credit line established for him by Issuer, and Customer agrees that he will make no credit purchases or cash advances which will bring the aggregate outstanding balance to a figure in excess of such limit.

6. All credit for purchases and cash advances is extended at the option of the merchant or cashing bank and neither the Issuer of Card nor the bank named on the face thereof shall be responsible for refusal by any merchant or bank to honor Customer's Card. At any time, without liability to Customer and without affecting Customer's liability to Issuer for credit previously extended, Issuer may cause Customer's approved credit limit to decline to make any further advances for Customer's account and revoke Customer's Card. Card remains the Issuer's property and Customer shall surrender it to Issuer upon demand.

7. Issuer has no responsibility for merchandise or services purchased by Customer with Card

and Customer agrees to pay Issuer for all credit purchases even though a dispute may exist.

8. Customer agrees that he is liable to Issuer for all payments made by Issuer on account of purchases made and credit obtained by any person using Card prior to its destruction, surrender or receipt of written notice of loss or theft by said Issuer or the bank named on the face of Card. In the event that (a) Customer's Card is canceled or its surrender demanded by the Issuer or (b) Customer defaults in any payment due or (c) that death, bankruptcy or insolvency of Customer or any attachment or garnishment proceedings are initiated against Customer or his property, the Issuer may at his election declare all amounts then owed to Issuer to be immediately due and payable without notice or demand of any kind. In any such event, any and all indebtedness due from the Issuer to Customer may be offset and applied in satisfaction of Customer's indebtedness.

9. Customer agrees to pay all reasonable costs of collection including attorneys' fees and court costs incurred in connection with collecting Customer's indebtedness to Issuer hereunder.

10. The validity, construction and enforcement of this Agreement and all matters arising out of the issuance and use of Card shall be governed by the law of Illinois. From time to time, the Issuer may amend this Agreement upon ten days' notice to the Customer by mailing a copy of such amendment to the Customer at his last known address as shown on the records of Issuer and all such amendments shall become effective from and after that time.

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

MEMBER AGREEMENT—DEPOSITORY BANK

THIS AGREEMENT, made this _____ day of _____,
 19____, between _____
 (hereinafter called "Member"), whose address is _____

 division of _____ CHARGE, a
 (hereinafter called "____"), and _____
 _____ (hereinafter called "Depository Bank").

WITNESSETH:

WHEREAS, Member desires to participate in the Midwest Bank Card System and to honor Midwest Bank Cards in connection with sales of merchandise or services and will from time to time present to _____ through Depository Bank sales slips taken as payment for such merchandise or services; and

WHEREAS, _____ desires that Member honor Midwest Bank Cards and receive credit for sales slips so taken as payment and presented by Member through Depository Bank in accordance with and subject to the terms and conditions of this Agreement;

IT IS AGREED:

1. The following terms shall have the following meanings for the purpose of this Agreement:
 - (a) "Midwest Bank Card" shall mean a charge card bearing the name "Midwest Bank Card" and the Midwest Bank Card symbol.
 - (b) "Cardholder" shall mean with respect to any Midwest Bank Card the person whose name is embossed upon the face of such Card.

If Member does not obtain authorization in any circumstance described in this paragraph, _____ acceptance of the sales slip arising out of such sale shall be subject to the provisions of Paragraph 14.

5. Unless otherwise specifically authorized by Issuer in accordance with the procedure set forth in Paragraph 6, Member shall not make any Midwest Bank Card sale on the basis of a telephone or mail order where the total amount of such sale is in excess of the Floor Limit established for such sales in accordance with Paragraph 20. All such sales made in one department or by any one sales person in any one day, through the use of a Midwest Bank Card of the same Cardholder, shall constitute a single sale to which the Floor Limit applies. If Member does not obtain authorization under the circumstances described in this paragraph, _____ acceptance of the sales slip arising out of such sale shall be subject to the provisions of Paragraph 14.

6. In the event Member desires to make a Midwest Bank Card sale to any person in any circumstance described in Paragraphs 4 and 5, Member shall telephone the Authorization Center of the Issuer of the Midwest Bank Card to be used by such person and shall advise such Center of the specific respects in which waiver of the provisions of Paragraphs 4 and 5 are requested. If such Center authorizes such waiver, Member may consummate the sale, noting Issuer's authorization code number at the appropriate place on the sales slip. Such authorization shall be binding upon Issuer only as to the specific respects for which waiver was requested and given by Issuer's Authorization Center, and shall not constitute any waiver of any of the other provisions of Paragraphs 4 and 5.

7. A sales slip on a form provided by _____ shall be used by Member in each Midwest Bank Card sale. Each such sales slip shall be imprinted by Member with Member's name and number and with the Midwest Bank Card presented by the purchaser, shall state the date of the sale and the total cash price of the sale (including any applicable State or Federal taxes), shall contain a short description of the merchandise or service sold, and shall be signed by

the Cardholder or other Authorized User presenting the Midwest Bank Card (except where the sale is made pursuant to a telephone or mail order). If a purchaser is unable to present a Midwest Bank Card at the time of sale, Member shall print on the sales slip the Cardholder's name and account number. Member shall deliver the "customer copy" of the sales slip to the purchaser. Member agrees it will not, in connection with any Midwest Bank Card sale, accept any cash or other form of payment, make any special charge, or extract any special agreement or security from the purchaser.

8. Member hereby appoints Depository Bank as an agent of Member for the purposes of forwarding to sales slips arising from Midwest Bank sales by Member and credit slips in connection therewith. Member shall establish and maintain with Depository Bank a commercial banking account to be known as Member's " (herein called "Member's Account") and may for this purpose designate an existing account maintained by Member with Depository Bank. Member authorizes to make payment of any amounts payable under the terms of this Agreement by Member by payment to Depository Bank (and Depository Bank agrees with Member that any such payment received by Depository Bank which shall not have been theretofore credited by it to Member's Account will be so credited when received) and authorizes Depository Bank to charge from time to time against Member's Account any amounts payable under the terms of this Agreement by Member to Depository Bank or any amounts so payable from time to time to any amounts so payable to it. Member agrees to deposit and maintain in Member's Account sufficient funds to cover all such charges, including those estimated by Depository Bank or as likely to arise. Member may make payment of any amount payable under the terms of this Agreement by it to Depository Bank for remittance to by transmittal to Depository Bank for remittance to

9. The "cardholder bank copy" of each sales slip arising from a Midwest Bank Card sale of Member shall be deposited, not later than the third banking business day following the date of such sale, by Member with Depository Bank for forwarding on behalf of Member to and shall be so forwarded by Depository Bank promptly after such deposit. Subject to Paragraph 14, agrees with Member to accept all sales slips complying with the terms

(c) "Authorized User" shall mean with respect to any Midwest Bank Card the person whose signature appears in the signature panel on the reverse side of such Card, provided that such person has the same surname as the Cardholder of such Card.

(d) "Issuer" shall mean with respect to any Midwest Bank Card the bank which has issued that Card.

(e) "Midwest Bank Card sale" shall mean each sale by Member of merchandise or services through the use of a Midwest Bank Card.

(f) "Sales slip" shall mean a sales slip in a form provided by to be used by Member in making a Midwest Bank Card sale.

2. Subject to the provisions of Paragraphs 3, 4, 5 and 6 of this Agreement, Member agrees to make Midwest Bank Card sales to any Cardholder or other Authorized User of a Midwest Bank Card, and agrees to honor any valid Midwest Bank Card properly tendered for use, regardless of the identity of Issuer.

3. Member shall not make any Midwest Bank Card sale where the Midwest Bank Card presented has been voided or revoked by the Issuer of such Card, according to the current list of such Cards furnished to Member by Town & Country.

4. Unless otherwise specifically authorized by Issuer in accordance with the procedure set forth in Paragraph 6, Member shall not make any Midwest Bank Card sale to a customer present in Member's place of business in any one or more of the following circumstances:

(a) where a Midwest Bank Card is not presented at the time of sale; (b) where the Midwest Bank Card presented has expired, according to the expiration date shown on the face of the Card;

(c) where the signature on the sales slip does not correspond to the signature appearing in the signature panel on the reverse side of the Midwest Bank Card; or

(d) where the total amount of any such Midwest Bank Card sale is in excess of the Floor Limit established for such sales, as determined in accordance with Paragraph 20. All sales made in one department or by any one sales person in any one day, through the use of a Midwest Bank Card of the same Cardholder, shall constitute a single sale to which the Floor Limit applies.

(b) The Cardholder of the Midwest Bank Card used in such sale disputes his liability to the Issuer on any one or more of the following grounds:

(i) that the merchandise or services covered by such sales slip were returned, rejected or defective in some respect, or Member has failed to perform any obligation on its part in connection with such merchandise or services, and Member has refused to issue a credit slip in the proper amount; or

(ii) that the signature on the sales slip was not that of the Cardholder or any Authorized User, and in good faith believes that Member should have discovered this fact by examination of the signature appearing in the signature panel on the reverse of the Cardholder's Midwest Bank Card (unless Issuer's Authorization Center waived this defect in accordance with Paragraph 6).

If a sales slip on its face clearly indicates the existence of any of the foregoing circumstances, but nevertheless is accepted by then shall be entitled to revoke its acceptance of such sales slip for such reason only within 30 days after such acceptance.

15. Member agrees to pay the initial membership fee for becoming a member of Midwest Bank Card System which shall be in effect at the time of this Agreement.

16. Member agrees to lease to Member any number of imprints Member may desire at an annual rental fee to be determined by from time to time, in accordance with Paragraph 20. All imprints shall remain the property of and shall be returned to it upon termination of this Agreement.

17. Member will furnish to Member without charge promotional material and advertising displays indicating Member's participation in Midwest Bank Card System, and Member agrees to display such materials and displays prominently in his place(s) of business. will also furnish Member without charge with sales slips, credit slips, and any other forms that may be required by

All promotional materials, advertising displays, sales slips, credit slips and other forms supplied to Member hereunder and not consumed in use shall remain the property of and shall be returned to it upon termination of this Agreement.

18. This Agreement shall be and continue in full force and effect from the date hereof until terminated by any party by written notice to the others, such termination to become effective on the later of the date of such notice or the termination date specified in such notice. All obligations of Member with respect

and conditions of this Agreement arising from Midwest Bank Card sales of Member and forwarded hereunder by Depository Bank to and to pay Member therefor (by payment to Depository Bank) the total face amount of each sales slip accepted by hereunder, less the percentage thereof determined by from time to time in accordance with Paragraph 20. Upon each deposit by Member with Depository Bank of sales slips arising from Midwest Bank Card sales of Member, Depository Bank shall credit Member's Account with the amount which would be payable by pursuant to the preceding sentence if such sales slips were accepted by hereunder. also agrees with Member to pay Member rebates determined from time to time in accordance with Paragraph 20. All payments, credits and charges hereinabove referred to are subject to audit and final checking by and prompt adjustment shall be made for any inaccuracies discovered.

10. Member agrees that the sales slip arising from each Midwest Bank Card sale shall constitute payment to Member for merchandise or services sold in such sale and further agrees that it will not have and claim against, or receive payment from, the Cardholder or any other purchaser in such sale unless refuses to accept such slip or revokes its prior acceptance thereof in accordance with Paragraph 14.

11. All disputes between Member and any purchaser relating to any Midwest Bank Card sale shall be settled between Member and such purchaser. Member agrees to indemnify and hold Depository Bank and harmless from any claim or liability relating to any such sale.

12. Member shall establish and maintain a fair policy for the exchange or return of, or adjustments on, merchandise or services sold in Midwest Bank Card sales. Member shall make no cash refunds or payments to any person for returns or adjustments on Midwest Bank Card sales; instead, when a refund or payment is due for any return or adjustment, Member shall issue a credit slip on a form provided by

Each such credit slip shall be imprinted by Member with Member's name and number and with the Midwest Bank Card presented by the person to whom the refund or adjustment is to be made, shall state the date it is issued and the total amount of the refund or adjustment, shall contain a description of the merchandise or services in connection with which the refund or adjustment is to be made, and shall be signed by Member's authorized representative and also by the person requesting the refund or

adjustment. Member shall deliver the "customer copy" of the credit slip to such person. The "cardholder bank copy" of each credit slip shall be delivered, not later than the close of business on the third banking business day following the date of its issuance, by Member to Depository Bank, for forwarding on behalf of Member to and shall be so forwarded by Depository Bank promptly after such delivery. Member agrees to pay the total face amount of each credit slip issued by Member which shall be received by Member, less the percentage thereof determined by Paragraph 20. Member agrees to arrange for a credit to the Midwest Bank Card account for the Cardholder named on the credit slip of the total face amount of such slip. Member warrants that each credit slip issued by Member which shall be received by Member will represent a bona fide refund or adjustment on a Midwest Bank Card sale by Member with respect to which a sales slip shall have been accepted by

13. Member agrees that:

- (a) Member will not discriminate as to price, service or otherwise against any person using or desiring to use a Midwest Bank Card.
- (b) Representatives of or any issuer may, during normal business hours, inspect, audit and make copies of Member's books, accounts, records and files pertaining to Midwest Bank Card sales and refunds or adjustments thereon, and Member agrees to preserve its records of any Midwest Bank Card sale and any refund or credit adjustment thereon for at least one year from date of such sale, refund or adjustment.
- (c) Member will fulfill completely all of its obligations to purchasers under the terms of any Midwest Bank Card sale.

14. Member may refuse to accept any sales slip, or revoke its prior acceptance thereof, and in the event of such revocation, Member agrees to repay the amount theretofore paid by Member (by payment to Depository Bank or otherwise) for such sales slip in any one or more of the following circumstances:

- (a) The Midwest Bank Card sale giving rise to such sales slip was not made in compliance with all the terms and conditions of this Agreement (including the provisions of Paragraphs 4 and 5, unless such provisions were waived by Issuer's Authorization Center in accordance with Paragraph 6) as well as all applicable laws and regulations of any governmental authority.

to sales slips accepted by Member prior to the effective date of termination shall survive such termination.

19. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective personal representatives, successors and assigns, and shall be governed by and construed in accordance with the laws of the State of Illinois.

20. Attached hereto is Schedule A showing discount rates, rebates, Floor Limits, membership fees and imprinter rentals in effect on the date of this Agreement. Member reserves the right to change Schedule A, upon written notice to Member, but no change shall be effective for any period prior to the time of giving such notice. Member shall give prompt notice to Depository Bank of any such change.

DATED this _____ day of _____, 19____

Member _____

By _____
 (TITLE)

By _____
 (TITLE)

By _____
 (TITLE)

Depository Bank _____

By _____
 (TITLE)

MIDWEST BANK CARD						SALES SLIP	
QUAN	DESCRIPTION			PRICE	AMOUNT		
TAKE			DEPT.	SUB TOTAL			
SEND							
4385201				SALES CLERK	SALES TAX		
DATE				AUTH CODE	TOTAL		

CUSTOMER COPY

CHARGE TO THE ACCOUNT OF



I hereby authorize the Issuer of the Midwest Bank Card imprinted above to pay the amount shown as Total hereon upon presentation hereof to Issuer by a bank which is a member of the Midwest Bank Card system I hereby promise to pay said Issuer the amount shown Total hereon (together with other charges due thereon, if any) subject to and in accordance with the terms of the cardholder agreement governing the use of Issuer's Midwest Bank Cards.

CUSTOMER'S SIGNATURE

CHCl₃ · 2

BANK CARD SALES SLIP

Appendix D

CHARGE TO THE ACCOUNT OF



MIDWEST BANK CARD	CASH ADVANCE SLIP
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151401

I hereby authorize the Issuer of the Midwest Bank Card imprinted above to pay the amount shown as Total hereon upon presentation hereof to Issuer by a bank which is a member of the Midwest Bank Card system. I hereby promise to pay said Issuer the amount shown as Total hereon (together with other charges due thereon, if any) subject to and in accordance with the terms of the cardholder agreement governing the use of Issuer's Midwest Bank Cards.

BANK APPROVAL BY		
DATE	AUTH. CODE	TOTAL ▶ \$

X _____
 BORROWER'S SIGNATURE

CHCD - 1

BORROWER COPY

BANK CARD CASH ADVANCE SLIP

Appendix E

COPY

MIDWEST BANK CARD			CREDIT SLIP
QUAN.	DESCRIPTION	PRICE	AMOUNT
REASON FOR RETURN		SUB TOTAL	
DATE		SALES TAX	
520951			
TOTAL			

X

CUSTOMER'S SIGNATURE

CREDIT TO THE ACCOUNT OF



I hereby request that the Midwest Bank Card cardholder account imprinted above be credited with the amount shown herein as Total because of the return of, or adjustment on, the goods and/or services described, and I authorize the bank to which this credit slip is delivered to charge my account in accordance with my membership agreement in the Midwest Bank Card system.

MEMBER
AUTHORIZED
SIGNATURE

CHCD - 4

BANK CARD CREDIT SLIP

Appendix F