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No. 35372-9-III

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERIK McCONNELL JOHNSON and
JACKIE McCONNELL JOHNSON, Petitioners,

vs.

CONNELL OIL, Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Erik McConnell Johnson and Jackie McConnell Johnson, Petitioners, ask this Court to accept review of the Court of Appeals decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION

On October 25, 2018, the Division III Court of Appeals affirmed the May 25, 2017, decision of the Franklin County Superior Court in favor of Respondent Connell Oil, Inc., finding that the federal Truth in Lending Act's (TILA) limitations on cardholder liability for unauthorized use of credit cards, did not apply to the card Petitioners Erick and Jackie McConnell Johnson used to access credit in this case.

The appellate court's decision, which stands in stark contrast to established public policies regarding protections for unauthorized credit card use, appears to be the first and only published Opinion on this issue from any state or federal court in the United States. With countless cardholders using essentially the same type of card to access credit at nearly 60,000 sites throughout Washington and across the nation¹, the appellate court's erroneous ruling may become a false beacon for courts

¹ See <https://www.connelloil.com/card-lock/>. (November 26, 2018).

applying TILA not only in this state, but also far beyond. This matter therefore represents an issue of substantial public interest that should be reviewed by Washington's highest court.

A copy of the appellate court's Opinion is in the Appendix herein at pages A-1 through A-13. Petitioners did not file a Motion for Reconsideration.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in ruling that the card the Johnsons used to obtain credit in this case was not a "credit card" under the federal Truth-In-Lending Act (TILA), 15 USC §1601, *et seq.*, and Regulation Z (hereinafter "Reg. Z), 12 CFR § 226, *et seq.*, being a "card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 USC § 1602(l).

2. Whether the express language of TILA is superseded by a narrow exclusion in 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B), notwithstanding the fact that the "cardlock" cards at issue now integrate the same credit-bearing features as any other credit cards, along with those cardlock cards' traditional lock-and-key function?

3. If the express language of the statute is superseded by federal staff commentaries, does the credit access device issued by

Connell Oil fall within the narrow exclusion suggested in 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B)?

4. If the credit access device issued by Connell Oil is a “credit card” under TILA, are the cardholders in this case entitled to limitations on liability for their stolen card under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii)?

D. STATEMENT OF THE CASE

On July 27, 2014, Mr. Erik Johnson was farming near Deer Park in Spokane County, Washington, when his wallet was stolen from his farm vehicle. *Connell Oil Inc. v. Johnson*, 2018 Wn. App. LEXIS 2454, *3, 2018 WL 5289383; Appendix A. The next day, Mr. Johnson reported the theft to Spokane County law enforcement officials and began contacting issuers of his stolen credit and debit cards. (*Id.*) On July 31, 2014, Mr. Johnson telephoned Connell Oil (a.k.a. “Co-energy”) to cancel the stolen card, but Connell Oil failed to do so. (*Id.*) On or about September 8, 2014, Connell Oil notified Mr. Johnson that it had terminated his account due to suspicious activity. (*Id.*) Connell Oil subsequently demanded that the Johnsons pay the company \$34,649.48 for charges incurred on the card after it was stolen. (*Id.* at *4). On May 1, 2015, an individual was

sentenced for first degree identity theft in relation to the theft of Mr.

Johnsons' Connell Oil card.²

Connell Oil calls the credit access devices it issued to the Johnsons (and other cardholders) "Cardlock" cards, which is a reference to the plastic keys or holed "punch cards" that were once used to unlock fuel pumps, hotel rooms, airport lockers, and other limited-access portals. (*Id.* at *3). Similar to the way a hotel keycard operates today, the old "Cardlock" devices could unlock a fuel pump or other portal, but the devices themselves could not substantiate credit transactions the way a typical magnetized credit card does today. *Id.*

While these "Cardlock" devices began as literally metal keys, the device Connell Oil issued to the Johnsons was a magnetized card that was indistinguishable in form, function, and operation from a typical credit card. *Id.* Not only did the device unlock the pump, but it also allowed a user to charge potentially tens of thousands of dollars in fuel purchases to its account number, which was listed on the card and encoded on a magnetic strip, or "magstripe," common to all other credit cards. *Id.*

To obtain fuel on credit, Connell Oil's cardholders are required to 1) swipe their cards, then 2) enter a personal identification number, or

² See Spokane County Superior Court cause #14-1-03998-1.

PIN, then 3) enter a vehicle number, then 4) obtain fuel from the pump on credit, which is 5) invoiced by Connell Oil and paid by cardholders at a later date. (*Id.* at *2-4). Unlike a traditional “Cardlock” key, which could only be used to open a portal, no matter how a person ultimately paid for the product, the device that Connell Oil issued to the Johnsons was both a key *and* the means by which cardholders obtain Connell Oil’s products on credit. (*Id.*) This is especially significant in the context of the fundamental public policies and essential protections TILA seeks to provide to cardholders. *See, e.g., Telco Communications Group, Inc. v. Race Rock*, 57 F. Supp. 2d 340, 345 (E.D. Va. 1999) (ultimate purpose of TILA’s limitations on liability is to protect cardholders from unauthorized use, regardless of the terms of credit being accessed).

On February 14, 2016, Connell Oil served the Johnsons with a Complaint alleging that the married couple was liable for \$34,649.48 in stolen-card charges, plus interest, costs, and fees. (*Id.* at *4). The Johnsons filed an Answer with affirmative defenses, including limitations on cardholder liability for lost or stolen cards under 12 CFR § 226.12(b)(1)(ii), among others, as well as counterclaims alleging violations of TILA, Washington’s Consumer Protection Act (CPA), RCW 19.86, *et seq.*, and negligence. (*Id.* at *4).

On April 10, 2017, the lower court heard the parties' cross motions for summary judgment, ruled that TILA did not apply to this case, and found substantially in favor of Connell Oil on each of its claims and against the Johnsons on each of theirs. Following the Johnsons' timely appeal, the Division III Court of Appeals published its Opinion affirming the lower court in *Connell Oil Inc. v. Johnson*, 2018 Wn. App. LEXIS 2454, 2018 WL 5289383; Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should accept review for two reasons. First, the liability of credit cardholders for unauthorized use involved an issue of substantial public interest, pursuant to RAP 13.4(b)(4). Second, the lower courts' rulings conflict with established state laws and federal policies, which implicate further conflicts subject to RAP 13.4(b)(1) and RAP 13.4(b)(2).

A. The Liability of Cardholders for Unauthorized Use of Credit Cards Involves an Issue of Substantial Public Interest.

According to the American Bankers Association, there are more than 362 million credit card accounts in the United States, which amounts

to more than one card for every person of every age in the county.³

Appendix B. In a state of approximately 7.5 million, such as Washington, these same proportions would equate to more than eight million credit cards being used by residents of this state. While statistics regarding the number of “Cardlock” cards are more elusive, Connell Oil advertises that its cards are accepted at more than 60,000 sites throughout Washington and across the nation.⁴ Appendix C.

The sheer volume of credit cards and the prevalence of their use have led to an extensive body of state and federal laws designed to regulate card issuers, deter would-be identity thieves and protect cardholders from unauthorized use. The Fair Credit Billing Act (FCBA), which is integrated within the broader provisions of TILA at 15 USC § 1643, and implemented by Regulation Z (“Reg. Z”) at 12 CFR § 226, *et seq.*, provides sweeping protections for all credit cardholders, beyond just consumer credit applications, to include “any person to whom a credit card is issued for any purpose, including business, commercial or agricultural use.” 12 CFR § 226.2(a)(8).

³ See [https://www.aba.com/Press/Documents/ABA.CreditCardMonitor.2018Q1.V4%20\(01.24.18\).pdf](https://www.aba.com/Press/Documents/ABA.CreditCardMonitor.2018Q1.V4%20(01.24.18).pdf). (November 26, 2018).

⁴ See <https://www.conelloil.com/card-lock/>. (November 26, 2018).

Notwithstanding the ubiquitous use of credit cards and seemingly universal protections afforded to cardholders by state and federal law, the matter between Connell Oil and the Johnsons appears to be the first and only case to have generated a published opinion on the question of whether TILA's cardholder protections apply to credit cards that also unlock a fuel pump. Although the Court of Appeals acknowledges that the Johnsons' card may be used "for the purpose of obtaining money, property, labor, or services on credit," 15 USC § 1602(l), just as any other credit card, it found that its other function of "unlock[ing] an unmanned fuel pump to facilitate a wholesale purchase of gasoline," removed it from the otherwise expansive protections of TILA based on an obscure exemption in the FTB staff commentaries at 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B). *Connell Oil Inc. v. Johnson*, 2018 Wash. App. LEXIS 2454, *10, 2018 WL 5289383; Appendix A.

Given the extensive use of credit cards in Washington and the United States, whether or not they include so-called "cardlock" features, as well as the attendant costs and risks of theft and loss leading to massive potential losses for unprotected cardholders, only Washington's highest court should set the beacon by which credit cardholders, credit card issuers, and other courts in this state and beyond will resolve disputes

involving credit cards that have integrated features that might otherwise be exempted from TILA's protections.

B. The Lower Courts' Rulings Conflict with Established Laws and Public Policies Regarding Protections for Unauthorized Use.

In acknowledging that Connell Oil's "Cardlock" card included both a credit feature, which is covered by TILA, but ruling that a lock-and-key feature removed it from TILA's protections, the Court of Appeals published a decision that stands in stark contrast to established laws and public policies regarding unauthorized use of credit cards.

Telco Communications Group, Inc. v. Race Rock, 57 F. Supp. 2d 340 (E.D. Va. 1999) presents federal authority that is highly analogous to the present matter. In *Telco*, a telephone card issuer sued a business cardholder for more than \$92,000 in unauthorized charges to a telephone calling card. *Id.* at 341. Recognizing that "public utility credit" is normally exempt from Reg. Z, the court ruled that any card that permitted a cardholder "to defer payment on the purchase ... until the invoice was due and payable" is subject to Reg. Z's limitations on cardholders' liability for lost or stolen cards. *Id.* at 343; see 12 CFR § 226.12(b)(1)(ii) (limiting cardholder liability for unauthorized charges to a maximum of

\$50.00). In so ruling, the court was not persuaded by the issuer's arguments that its card "merely provides a method for accessing its public utility function from alternate sites and [has] no independent or potential credit function," *id.*, or that "[t]he card can only be used to purchase telephone time, not other items normally bought with consumer credit," *id.*, or that "the entire bill is due and payable in full upon receipt of each monthly invoice." *Id.* In granting the cardholder's Motion to Dismiss, the *Telco* court aptly noted:

Because the purpose of § 226.12(b) is to protect consumers, it makes little difference if the entire telephone bill is due and payable at the end of the month, or if the consumer chooses to pay a finance fee. The distinctions between credit cards and charge cards—and credit cards and telephone calling cards for that matter—are irrelevant to the ultimate goal of protecting the consumer from being liable for unauthorized use."

Id. at 345.

As with the business telephone card at issue in *Telco*, Connell Oil's "Cardlock" card permits its cardholders to "defer payment on purchases" until its invoices are due and payable, subject to the clear and expressly stated applicability of TILA and Reg. Z to any device that exists "for the purpose of obtaining money, property, labor, or services on credit," 15

USC § 1602(1), and devices that “may be used from time to time to obtain credit,” 12 CFR § 226.2(15)(i). The lower court’s ruling not only contradicts the clear and express language of the statute, but it also undermines TILA’s fundamental purpose.

This federal perspective is also reflected in official consumer outreach publications produced by the Federal Trade Commission, which advise cardholders to do exactly what the Johnsons did in response to lost or stolen credit or debit cards.⁵ Appendix D. Nowhere does the FTC advise cardholders to do something different if their credit cards also have a lock-and-key feature, presumably because it is the credit-bearing feature that demands TILA’s protections. *Id.*

Consistent with this federal authority, Washington law also focuses on the credit-bearing features of credit cards, regardless of whatever other features might be integrated with them. Washington’s criminal statutes echo TILA’s definition of a “credit card” as “a card, plate, booklet, credit card number, credit card account number, or other identifying symbol, instrument or device that can be used to pay for, or to obtain on credit, goods or services.” RCW 9A.56.280(3). There is no exemption for a device that satisfies this definition in every respect and also happens to

⁵ See <https://www.consumer.ftc.gov/articles/pdf-0075-lost-or-stolen-credit-atm-and-debit-cards.pdf>. (November 26, 2018).

unlock a fuel pump. *Id.* If there were such an exemption, then the thief who stole the Johnsons' card would not be liable under the state's criminal statute pertaining to unauthorized credit card use. RCW 9A.56.290. It makes little sense for Washington courts to consider the Johnsons' card to be a "credit card" for purposes of prosecuting the thief, then disregard the same credit-bearing features of the card when it comes to applying statutory protections designed for exactly those circumstances.


Because the Court of Appeals' Opinion appears to be the first and only published decision on this issue, while at the same time conflicting with analogous federal and state authorities, this issue should be resolved by the full and final authority of Washington's Supreme Court.

F. CONCLUSION

This court should accept review for the reasons indicated in part E and find that: 1) TILA's application to "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit," 15 USC § 1602(1), applies to the credit-plus-key card at issue in this case, and 2) the cardholders implicated in this case entitled to limitations on liability for unauthorized use under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii). In so doing, the Court of Appeals should be reversed.

DATED this 26th day of November, 2018.

Respectfully submitted,


~~Brian G. Cameron, WSBA #44905~~
Attorney for Petitioner

APPENDICES

APPENDIX A

Connell Oil Inc. v. Johnson, 2018 Wn. App.
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APPENDIX B

American Banking Association
Credit Card Market Monitor, January 2018B-1

APPENDIX C

Connell Oil / Co-Energy “Cardlock” AdvertisementC-1

APPENDIX D

FTC Brochure: Lost or Stolen Credit, ATM, and Debit Cards..... D-1

APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CONNELL OIL INC., A Washington Corporation,
Respondent,
v.
ERIK MCCONNELL JOHNSON and JACKIE MCCONNELL JOHNSON, a marital community,
Appellants.

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PUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Are cards used to access unmanned fuel pumps “credit cards” so that cardholder liability is limited for unauthorized fuel purchases?

15 U.S.C § 1643 of the Truth in Lending Act (TILA)¹ limits a cardholder’s liability for the unauthorized use of a credit card. Staff working for a division of the Federal Reserve Board (FRB) issues official commentaries to TILA. One official commentary states that a credit card does not include a card required to be used to obtain

¹ Truth in Lending Act, 15 U.S.C. §§ 1601-1667f.

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petroleum products for business purposes from a wholesale distribution facility, regardless of payment terms. In general, an official commentary is binding on a court unless it is arbitrary, capricious, or manifestly contrary to the statute.

We hold that the commentary at issue here is binding because it is not arbitrary, capricious, or manifestly contrary to the statute. We conclude that Erik Johnson's stolen petroleum card is a type of card described by the commentary, and his liability for its unauthorized use is not limited by TILA. In so holding, we affirm the trial court.

FACTS

Connell Oil is in the business of selling and distributing wholesale fuel for commercial purposes. It provides its customers access to unmanned fueling stations commonly used by police, fire, transit, and school districts.

The unmanned fuel pumps are inoperable unless the customer uses an appropriate access device. Early on, the access device was a key, referred to as a keylock system. As technology developed, the keylock system was replaced with an optical-lock, which is a card with holes in it. Later, as computers were used to read magnetic strips, the optical-lock system was replaced by the current cardlock system.

The cardlock system is a plastic card that looks exactly like a credit card. The card has a magnetic strip, which when swiped, communicates the customer's account number

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to Connell Oil's computer system. For security, the customer must enter a personal identification number (PIN) before the pump is activated. Connell Oil recommends to its customers that they keep their PIN separate from their card.

Once the customer completes fueling, an invoice is generated for the specific amount of fuel purchased. Invoices are sent to customers at regular intervals, twice each month. Customers are required to pay the invoices within 15 days. Unpaid balances accrue interest at 1.5 percent per month.

Since 2009, Erik Johnson has been a customer of Connell Oil. On July 27, 2014, Mr. Johnson's wallet was stolen from his farm vehicle. The next day, Mr. Johnson began contacting issuers of his stolen credit and debit cards. On July 31, 2014, Mr. Johnson telephoned Connell Oil. There is a factual dispute whether Mr. Johnson asked Connell Oil to cancel his stolen petroleum card or simply ordered one or more cards. But there is no factual dispute that the cardlock agreement required cancellation to be in writing, and Mr. Johnson never requested in writing that his stolen petroleum card be canceled.

Around September 8, 2014, Connell Oil called Mr. Johnson and notified him that it was terminating his account because of suspicious activity. Because Mr. Johnson had kept his PIN and petroleum card together in his wallet, the thief was able to steal \$34,649.68 worth of fuel during the six weeks before the card's cancelation. Although

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Connell Oil had invoiced Mr. Johnson three times since his wallet was stolen, Mr. Johnson did not detect the fuel theft. Mr. Johnson explained to Connell Oil that he was too busy during harvest to open its invoices. The parties were unable to resolve the dispute.

Connell Oil served Mr. Johnson and his wife, Jackie McConnell Johnson, with a complaint alleging that the Johnsons were liable for \$34,649.68 in stolen card charges, plus interest, costs, and attorney fees. The Johnsons then filed an answer with affirmative defenses, including limitations on cardholder liability for lost or stolen cards as well as counterclaims under TILA, Washington's Consumer Protection Act, chapter 19.86 RCW, and negligence.

Procedure

After discovery, the Johnsons filed a motion for partial summary judgment and Connell Oil filed a cross-motion. The court ruled that the petroleum card issued by Connell Oil was not a credit card as contemplated by TILA. The court held that the Johnsons' defenses under TILA were inapplicable, granted Connell Oil's motion for summary judgment, and dismissed the Johnsons' affirmative defenses and counterclaims. The court entered judgment in favor of Connell Oil for the unpaid petroleum charges,

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plus interest, costs, and reasonable attorney fees in accordance with the cardlock agreement.

The Johnsons timely appealed.

ANALYSIS

A. STANDARD OF REVIEW

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014). “Summary judgment is appropriate only if ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *RockRock Grp., LLC v. Value Logic, LLC*, 194 Wn. App. 904, 913, 380 P.3d 545 (2016) (quoting CR 56(c)), *review denied*, 187 Wn.2d 1002, 386 P.3d 1078 (2017). A fact is material when the outcome of the litigation depends on it, in whole or in part. *Atherton Condo. Apt.-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). This court views all facts and reasonable inferences in the light most favorable to the nonmoving party. *SentinelC3*, 181 Wn.2d at 140. Summary judgment is appropriate if reasonable persons could reach but one conclusion from all the evidence. *Id.*

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B. PURPOSE OF TILA

The purpose of TILA is to

assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a). Because TILA is remedial in nature, the substance rather than the form of the credit transactions should be examined in cases arising under it. *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1977). TILA is liberally construed to protect consumers. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993).

C. DEFERENCE TO FEDERAL RESERVE BOARD REGULATIONS AND OFFICIAL COMMENTARY

Congress expressly delegated authority to the FRB to promulgate regulations with such classification, differentiations, or other provisions that are in the FRB's opinion necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004). "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980).

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In accordance with this delegated authority, the FRB has promulgated a detailed and comprehensive set of rules known as “Regulation Z,” which is codified at 12 C.F.R. § 226.1(a). The staff of the Division of Consumer and Community Affairs to the FRB issues official interpretations of Regulation Z, referred to as commentary. See 12 C.F.R. pt. 226, supp. I, (1). Courts have recognized that the FRB “‘play[s] a pivotal role in ‘setting [TILA] in motion . . .’” and have consistently afforded the FRB’s regulations and staff interpretations great deference. *Household Credit Servs.*, 541 U.S. at 238 (alterations in original) (internal quotation marks omitted) (quoting *Ford Motor Credit Co.*, 444 U.S. at 566).

D. LIMITATION OF LIABILITY FOR UNAUTHORIZED CREDIT CARD USE

1. Overview

15 U.S.C. § 1643(d) states: “Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.” 15 U.S.C. § 1643(a)(1) limits a cardholder’s liability to \$50, if various conditions were met, including that the card issuer gave adequate notice of the cardholder’s limitation of liability.

The term “cardholder” includes “any person to whom a credit card is issued.” 15 U.S.C. § 1602(n). The term “person” means “a natural person or an organization.” 15 U.S.C. § 1602(e). The term “organization” means “a corporation, government or

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governmental subdivision or agency, trust, estate, partnership, cooperative, or association.” 15 U.S.C. § 1602(d). Therefore, 15 U.S.C. § 1643 significantly limits a person’s and a business’s liability for the unauthorized use of their credit card.

The term “credit card” “means any card, plate, coupon book or other device existing for the purpose of obtaining money, property, labor, or services on credit.” 15 U.S.C. § 1602(l). The term “credit” “means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” 15 U.S.C. § 1602(f). “Deferral of debt” includes even short-term deferrals where payment in full is due promptly. *Telco Commc’ns Grp., Inc. v. Race Rock*, 57 F. Supp. 2d 340, 343 (E.D. Va. 1999). Therefore, any card that allows a debtor to defer payment of a debt, even for a short time, is a credit card.

In furtherance of this section, the FRB promulgated 12 C.F.R. § 226.12(b)(1)(ii), which provides in relevant part:

The liability of a *cardholder* for unauthorized use of a credit card shall not exceed the lesser of \$50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

(Emphasis added) (footnote omitted).

By regulation, “cardholder” is defined as “a natural person to whom a credit card is issued for consumer credit purposes.” 12 C.F.R. § 226.2(a)(8). But for purposes of

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§ 226.12(a) and (b), “cardholder” also “includes any person to whom a credit card is issued for any purpose, including business, commercial or agricultural use”

12 C.F.R. § 226.2(a)(8). So under both the statute and the regulation, natural persons as well as businesses enjoy extensive protection from the unauthorized use of their credit cards.

However, an official commentary provides:

[A] credit card does not include, for example

. . . .
. . . [a]ny card . . . that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility . . . and that is required to be used without regard to payment terms.

12 C.F.R. pt. 226, supp. I, subpt. A, § 226.2(a)(15)(2)(ii)(B) (hereafter “Commentary (B)”).

2. *Whether Commentary (B) is binding*

To determine if an FRB regulation or a staff commentary is binding, a court is “faced with only two questions.” *Household Credit Servs.*, 541 U.S. at 239. First, the court must ask if “Congress has directly spoken to the precise question at issue.” *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Second, if “Congress has ‘explicitly left a gap for the agency to fill,’ the agency’s regulation is ‘given controlling weight unless [it is] arbitrary,

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capricious, or manifestly contrary to the statute.’’ *Id.* (alteration in original) (quoting *Chevron U.S.A.*, 467 U.S. at 843-44).

Connell Oil argues that Congress has not directly spoken to the precise question of whether cardlocks used to access fuel pumps at unmanned stations are credit cards under TILA. We agree.

A cardlock serves two functions. First, it unlocks an unmanned fuel pump to facilitate a wholesale purchase of gasoline. Second, it facilitates a short-term credit purchase. Although the latter function is within the definition of a credit card, the former is not.

Nor is Commentary (B) arbitrary, capricious, or manifestly contrary to the statute. The device used to access fuel at Connell Oil’s unmanned fuel stations evolved from a keylock, to an optical-lock, to a card with a magnetic strip. All versions of this evolution allowed a customer to access a fuel pump at an unmanned station so as to purchase fuel at wholesale prices. Because TILA is remedial in nature, the substance rather than the form of the transaction should be examined. *Hickman*, 566 F.2d at 46. The substance of the transaction has not changed through this evolution. Commentary (B) reasonably concluded that Congress had no more desire to regulate a cardlock than it had to regulate a keylock or an optical-lock device.

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3. *Whether the cardlock is a device that conforms to Commentary (B)*

The Johnsons argue that Connell Oil’s cardlock device does not conform to Commentary (B). Specifically, the Johnsons argue that the cardlock device not only provides access to a fuel pump, but also allows customers to accumulate large credit balances on their accounts. Even if true, we disagree that this causes the device to not conform to Commentary (B).

Commentary (B) states, “[a] credit card does not include . . . [a]ny card . . . that is used to obtain petroleum products for business purposes from a wholesale distribution facility . . . *without regard to payment terms.*” Commentary (B) itself states it makes no difference if the card permits a business customer to accumulate a balance and pay interest on that balance.

4. *Whether Mr. Johnson used his petroleum card for business purposes*

The Johnsons do not argue on appeal that they primarily used their stolen petroleum card for personal, as opposed to business, purposes. Shalon Braswell, Connell Oil’s Chief Operating Officer, stated by declaration: “[The Johnsons] requested the use of all fuel type products to include, Diesel, Gas, and ‘Off Road’ which is a dyed farm diesel commonly used for agricultural purposes.” Clerk’s Papers (CP) at 411-12. Connell Oil’s officer further stated: “Johnson has paid [our] invoices through the business entity of

No. 35372-9-III
Connell Oil v. Johnson

Johnson Enterprise.” CP at 412. In response, Mr. Johnson stated by declaration: “My Connell Oil credit card allowed me to buy fuel for personal and family use, which I have done on occasion.” CP at 227. Because the Johnsons did not raise the issue on appeal, we infer that Mr. Johnson used his petroleum card primarily for business purposes. Nevertheless, the Johnsons failed to preserve the issue. RAP 2.5(a).

In summary, we conclude the trial court did not err when it ruled that the stolen cardlock was not a credit card for purposes of TILA and entered judgment in favor of Connell Oil.

E. ATTORNEY FEES AND COSTS

Connell Oil, citing RAP 18.1, RCW 4.84.330, and its contract with Mr. Johnson, requests an award of attorney fees and costs.

RAP 18.1 requires a party to request attorney fees and expenses if recovery of such is permitted by applicable law. If recovery of attorney fees and costs is authorized by contract, RCW 4.84.330 requires a court to award the prevailing party its reasonable attorney fees and costs.

The parties’ contract provides in relevant part: “I agree to pay . . . any attorney and/or court fees incurred in the collection of unpaid accounts. . . . /s/ Erik Johnson.”

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CP at 416. Subject to its compliance with RAP 18.1(d), we award Connell Oil its reasonable attorney fees and costs on appeal.

Affirmed.

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

WE CONCUR:

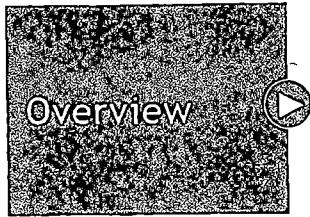
Korsmo, J.
Korsmo, J.

Siddoway, J.
Siddoway, J.

APPENDIX B



Credit Conditions Through the Eyes of Consumers

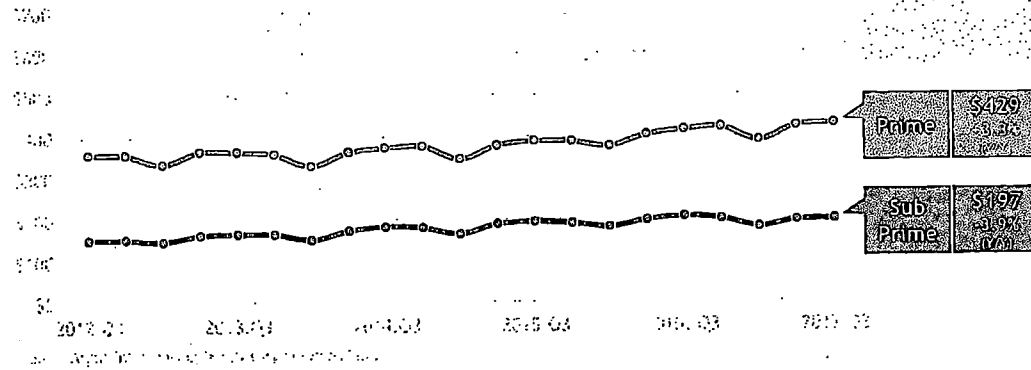


The credit card market expanded in Q3, spurred by steady consumer spending and solid job gains despite destruction from hurricanes in September.

- 1) Third quarter purchase volumes edged up across risk tiers in Q3. On a year-over-year basis, purchase volumes for prime and super-prime accounts rose moderately, while subprime accounts fell 3.9 percent – the third consecutive quarter of year-over-year decline.
- 2) The effective finance charge yield (a measure of interest payments relative to overall card usage) increased 26 basis points to 12.14 percent, echoing upticks in the federal funds rate with a slight lag. This metric remains below early post-recession levels.
- 3) Credit card credit outstanding as a share of disposable income rose 14 basis points in Q3, but remains low by historical standards.

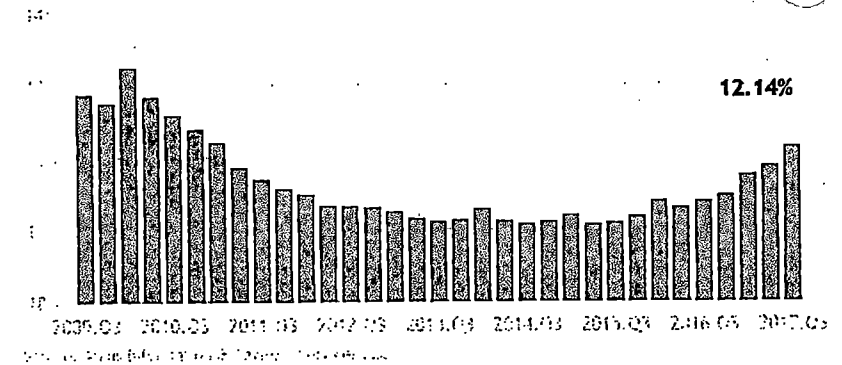
Monthly Purchase Volume by Risk Type

Monthly purchase volumes rose marginally in Q3 after strong growth in the previous quarter. On an annual basis, purchase volumes rose for prime and super-prime accounts, but fell for subprime accounts.



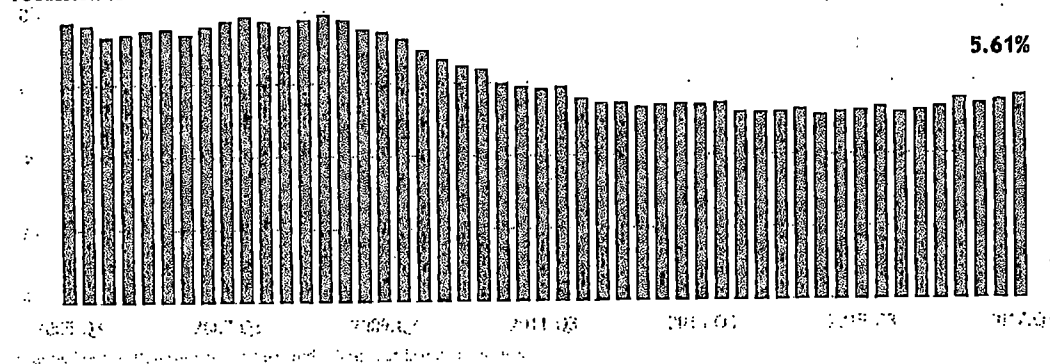
Effective Finance Charge Yield

The effective finance charge yield rose 26 basis points in Q3 2017, echoing increases in federal interest rates, but at a slight lag. Additional interest rate hikes in 2018 may push the effective finance charge yield higher.



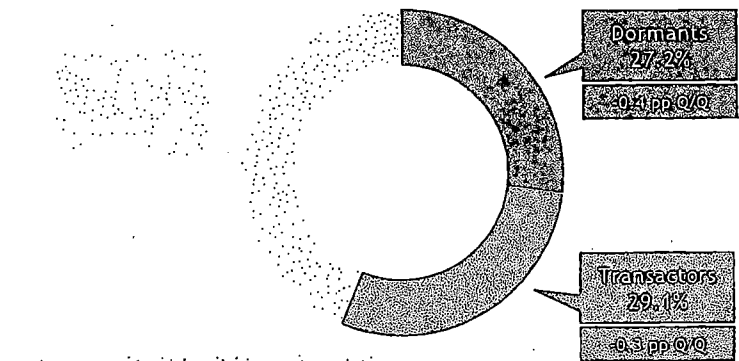
Credit Card Credit Outstanding as a Share of Disposable Income

As a share of disposable income, credit card credit outstanding increased 14 basis points to 5.61 percent in Q3 2017. This metric has risen slowly since bottoming out in early 2015, but remains well below pre-recession levels.



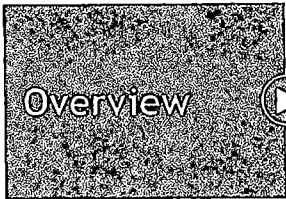
Distribution of Accounts by Behavior Type

Revolvers rose 0.7 percentage point to 43.7 percent in Q3, while Dormant accounts and Transactors fell 0.4 and 0.3 percentage point, respectively.





Broader Credit Market Conditions

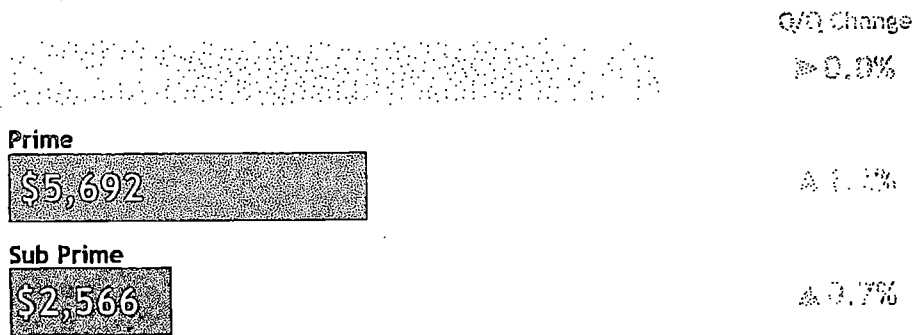


Credit lines experienced moderate growth in Q3, while the volume of credit card accounts continued to increase across risk tiers. Both of these trends are consistent with healthy consumer spending data and an expanding economy.

- 1) The number of new accounts (i.e., accounts opened in the previous 24 months) rose to 91.6 million in Q3, up nearly 5 percent from a year ago. However, among prime and subprime cardholders, new account openings slowed to their weakest annual rates in nearly four years.
- 2) Average credit lines among all accounts increased across risk tiers after declining for two consecutive quarters, consistent with improvements in the overall economy. Among new accounts, credit lines rose for prime and subprime accountholders, but were flat for super-prime accounts.

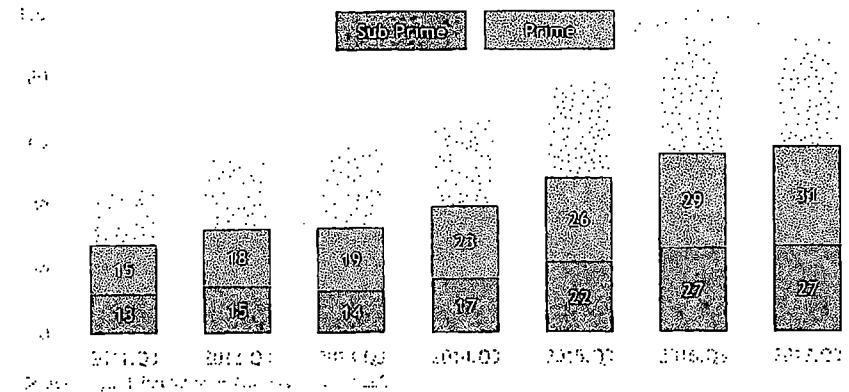
Average Credit Line (New Accounts*)

In Q3 2017, average credit lines for accounts opened in the previous 24 months increased for prime and subprime accountholders. However, super-prime credit lines were flat, marking the first quarter since early 2013 that this measure failed to rise on a quarterly basis.



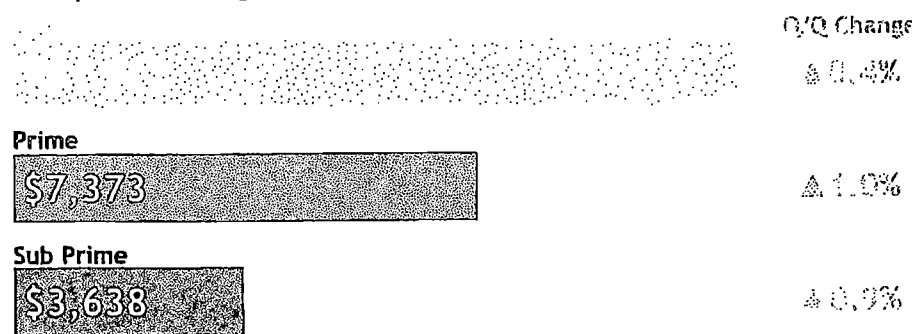
Number of New Accounts* (Millions)

The volume of new accounts rose 4.9 percent year-over-year in Q3 2017, the slowest growth rate since Q2 2011. The growth slowdown occurred across risk tiers.



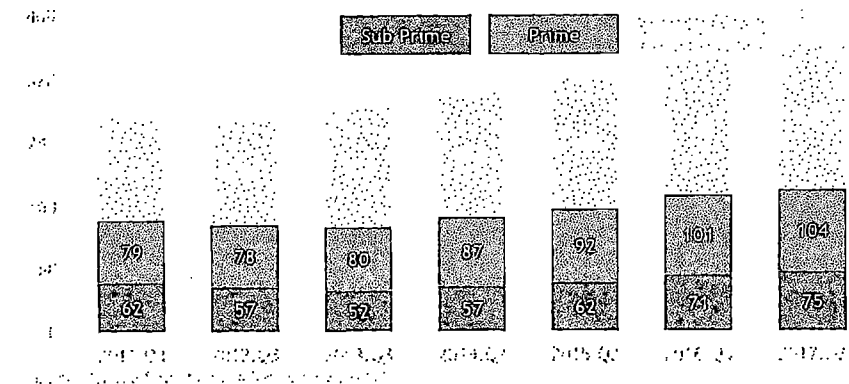
Average Credit Line (All Accounts)

On a quarterly basis, average credit lines for all accounts rose across risk tiers in Q3, led by prime (+1.0 percent) and subprime (+0.9 percent) accounts. Credit lines remain 10-30 percent below post-recession highs, however.



Number of All Accounts (Millions)

The number of open accounts increased 4.7 percent annually to 362 million accounts. Though growth occurred across risk tiers, growth in credit card account volume is significantly slower in 2017 than it was in 2016.



New Accounts include accounts vintage less than 24 months.



American
Bankers
Association

Frequently Asked Questions: ABA Credit Card Industry Monitor

Q: What is the Credit Card Market Monitor?

The American Bankers Association (“ABA”) Credit Card Market Monitor (“Monitor”) provides key statistics on industry trends and relevant economic factors affecting the industry. The purpose of the report is for ABA to provide a clear, concise, and fact-driven assessment of credit card market conditions and to place current trends in both a historical and macroeconomic context. Additionally, the Monitor will occasionally be accompanied by a supplemental “Special Report” on a specific key issue in the credit card industry.

Q: How often and when is it released?

The Monitor is published quarterly, with the first report released in September 2013.

Q: Who publishes the report?

The report is published by the American Bankers Association. Data is provided by Argus Information and Advisory Services, which serves as the leading provider of information services for U.S. financial institutions. Analytical support is provided by Keybridge LLC, a boutique economic and public policy consulting firm with a diverse clientele of companies, associations, and other institutions that operate at the intersection of economics and public policy.

Q: Where do the data come from?

The data used in the report originate from proprietary industry databases and publicly available government sources. Specifically, the credit card data are taken from a nationally representative sample provided by Argus. Credit card data are presented as national averages for all accounts based on actual credit card account information. No individual account holder’s information or specific financial institution’s data can be identified from the data set. Other data used in the report are taken from various public and private sources, including the Department of Commerce’s Bureau of Economic Analysis and the Federal Reserve.

Q: How current are the data?

In all cases, the Monitor uses the latest available quarterly data, which are typically published several weeks after the end of each quarter. As a result, there is a time lag between the period of the latest available data and the Monitor’s publication date. Among the figures used in the Monitor, data typically lag by 1-2 quarters.

Q: What are the data elements included in the Monitor, and how are they defined?

Page 1 of the Monitor shows credit conditions through the eyes of consumers, while Page 2 depicts broader credit market conditions. Each page consists of four charts and includes an overview section followed by brief textual descriptions that accompany each chart. In some cases, charts are broken down by risk category (sub-prime, prime, and super-prime). These risk categories are

defined by Argus according to the following risk scores: (1) sub-prime <680, (2) prime 680-759, and (3) super-prime >759.

Page 1 Charts

- **Monthly Purchase Volume, by Risk Type:** The average amount of purchases paid for with credit cards per cardholder per month, for each risk category.
- **Credit Card Debt Outstanding as a Share of Disposable Income:** Credit Card Debt-to-Income is a commonly used ratio to indicate cardholders' ability to repay their credit card balances. Outstanding Credit Card Debt measures the aggregate amount of outstanding credit card loans held by U.S. households as reported by the Federal Reserve. Disposable Income is the aggregate amount of money available to individuals after saving and income taxes as reported by the Federal Reserve.
- **Effective Finance Charge Yield:** This credit card rate, sourced from Argus, represents the average effective finance charge yield on all accounts. The effective finance charge yield is the annualized interest income generated by a portfolio expressed as a percentage of a portfolio's assets.
- **Distribution of Accounts by Behavior Type:** The share of credit card accounts by three behavior categories: (1) "Transactors," or accounts that have purchases, fees, and/or a balance during the quarter but have no finance charges (net of reversals) in any month of a quarter; (2) "Revolvers," or accounts for which some percentage of the monthly balance is rolled over to the next month at least once during a quarter; and (3) "Dormants," or accounts that show no activity over the course of the quarter.

Page 2 Charts

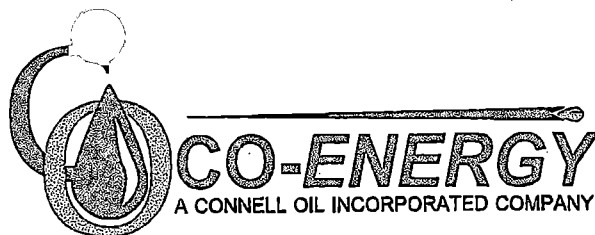
- **Average Credit Line (New Accounts):** The average line of credit on accounts opened in the last 24 months, by risk category.
- **Average Credit Line (All Accounts):** The average line of credit on open accounts, by risk category.
- **Number of New Accounts:** The number of accounts opened within the past 24 months of a given quarter, by risk category.
- **Number of All Accounts:** The total number of open accounts in a given quarter, by risk category.




Q: Where can I find past editions of the report, and who is the point of contact?


Past editions of the Monitor are available at ABA's website (www.aba.com). For inquiries related to the Monitor, please contact Jeff Sigmund, ABA VP for Public Relations, at 202-663-5439.

LAST UPDATED January 30, 2018

APPENDIX C



 Call
 (tel:509-547-3326)
  Email
 (mailto:info@connelloil.com)
  Order
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 **MENU**

CARDLOCK

PRIDEADVANTAGE



Welcome to Pacific Pride, the nation's largest cardlock fueling network. The PrideAdvantage fueling program brings you the most advanced fueling controls - 24 hours a day, 365 days a year - via a network of more than 1,300 Pacific Pride locations, 57,000 Fuelman sites, and 2,500 independent truck stops. Everywhere you see a Pacific Pride or Fuelman sign, your PrideAdvantage card is welcome and accepted. With PrideAdvantage, convenient fueling locations allow you the ease of carrying one fueling card that provides you with a single detailed invoice to better manage your fuel purchases. And most importantly, PrideAdvantage will give you a fueling program tailored to your requirements including, an unrivaled diesel network, industry leading security controls and online account access.

Customize Your Fueling Requirements

PrideAdvantage allows you to establish profiles for individual drivers, or your entire fleet. Setting up fueling times, gallon limits, and product controls helps you manage fuel consumption. Available controls include:

- Per day transaction limits
- Per transaction gallon limits
- Time of day and day of week fueling controls
- Strict product controls at cardlock locations
- Unique Driver Identification Number (DIN) which provides security against unauthorized use and driver accountability
- Floating Driver Identification Number/Driver Pool which creates a virtual driver card. Each driver has a DIN that will work with any vehicle card in your fleet

Fuel Management and Reporting

Through our Online Account Access web portal you can view or download transaction details, fuel summary reports, and much more. We also offer email alerts when excessive use of a card has been detected.

Personalized Customer Service

Customer Service Representatives are available to meet your needs. Whether setting up your account profile, issuing cards, or making changes to cards, we're here for you. Please contact Pacific Pride Customer Service at 509-547-3326.

For a complete list of locations go to www.pacificpride.com (<http://www.pacificpride.com/>) or you can download the Pacific Pride App for iPhone (App Store) and Android (Android Market)



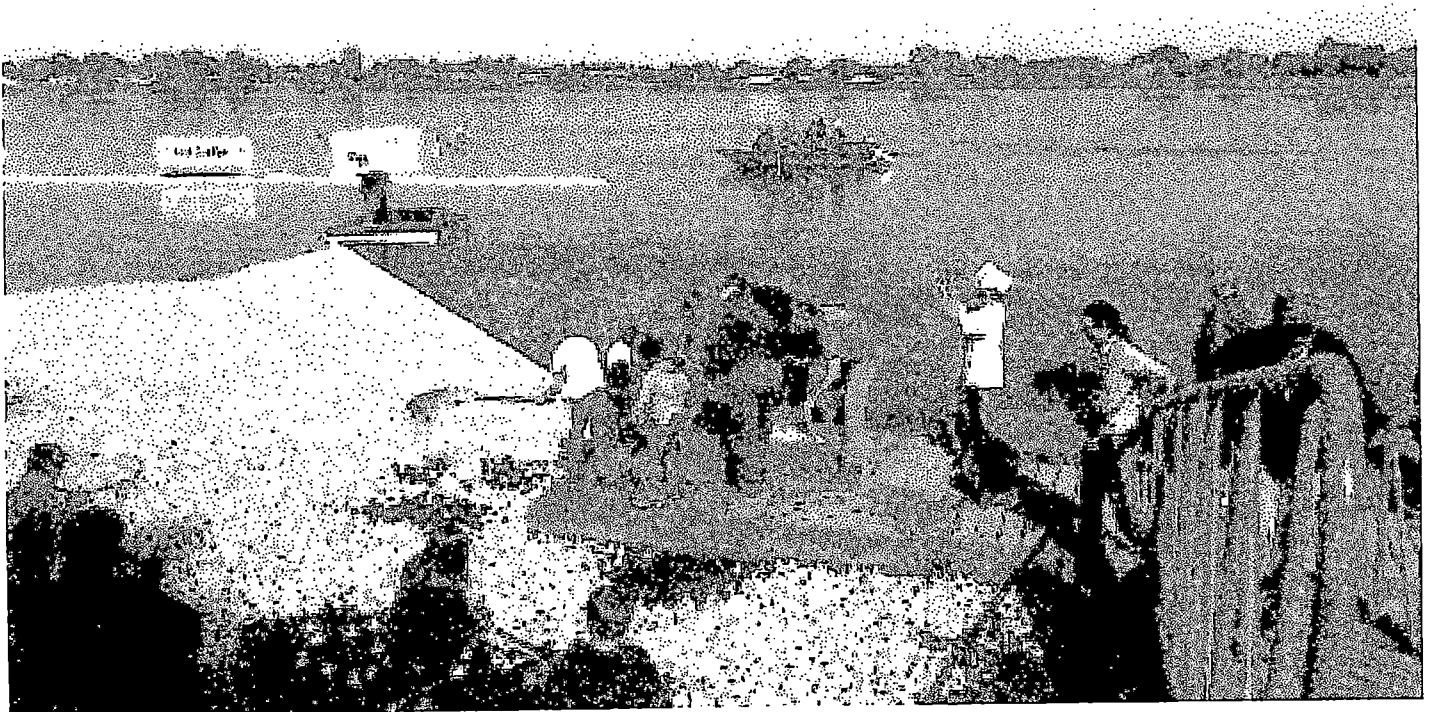
iPhone (<https://itunes.apple.com/us/app/pacific-pride/id437687617>)



Android

(<https://play.google.com/store/apps/details?id=com.pacificpride>)

CO-Energy owns and operates 19 unattended, automated commercial fueling stations in Washington that give you convenient 24/7/365 access to fuels.



OFFICE LOCATIONS

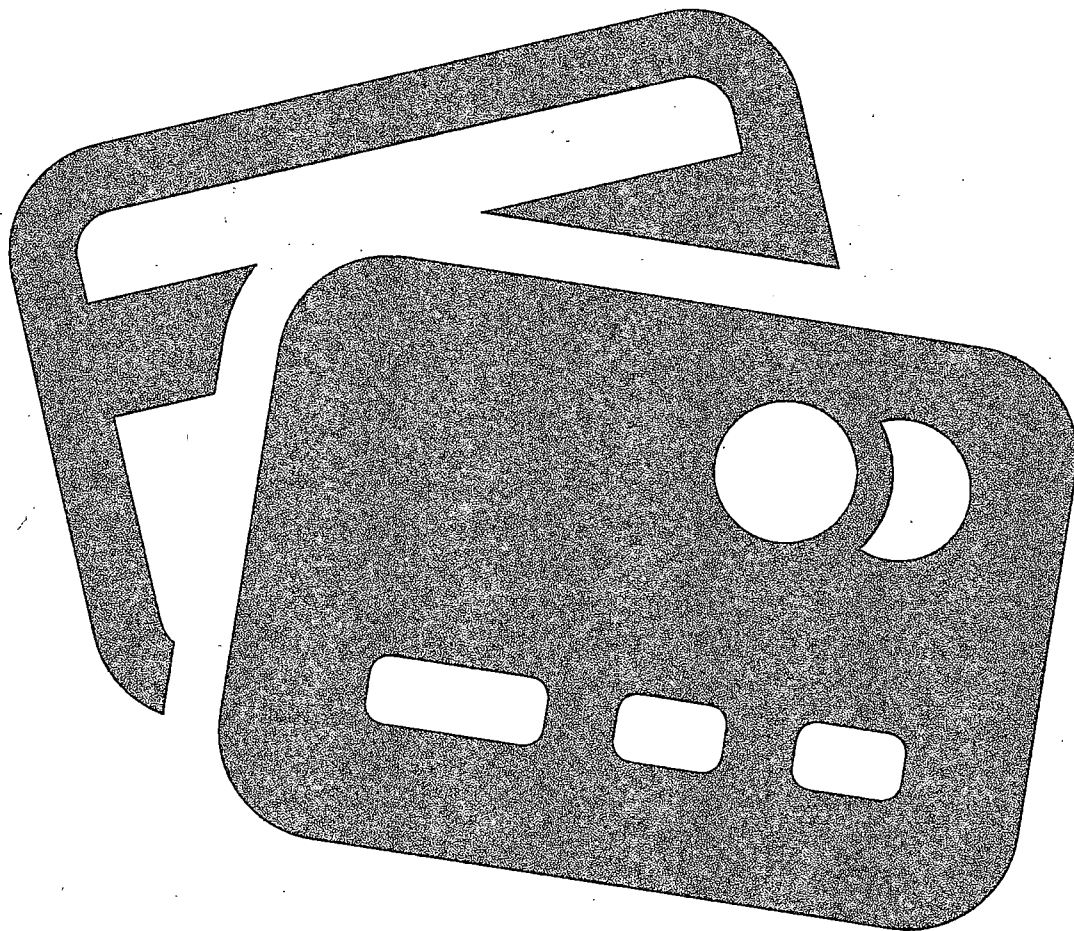
Pasco Corporate Office	+
Connell Office	+
Oroville Office	+
Ritzville Office	+
Moses Lake Area	+
Spokane Office	+
Sunnyside Office	+
Yakima Office	+

Customer Login (<https://coenergy.axxispetro.com/Login.aspx>)

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APPENDIX D

Lost or Stolen Credit, ATM, and Debit Cards



If your credit, ATM, or debit card is lost or stolen, federal law limits your liability for unauthorized charges. Your protection against unauthorized charges depends on the type of card – and when you report the loss.

Report Loss or Theft Immediately

.....

Acting fast limits your liability for charges you didn't authorize. Report the loss or theft of your card to the card issuer as quickly as possible. Many companies have toll-free numbers and 24-hour service for such emergencies. Once you report the loss of your ATM or debit card, federal law says you cannot be held liable for unauthorized transfers that occur after that time.

- **Follow up with a letter or email.** Include your account number, the date and time when you noticed your card was missing, and when you first reported the loss.
- **Check your card statement carefully for transactions you didn't make.** Report these transactions to the card issuer as quickly as possible. Be sure to send the letter to the address provided for billing errors.
- **Check if your homeowner's or renter's insurance policy covers your liability for card thefts.** If not, some insurance companies will allow you to change your policy to include this protection.

How to Report Fraudulent Transactions

Contact your ATM or debit card issuer.

Report the fraudulent transaction.

Act as soon as you discover a withdrawal or purchase you didn't make.

Write a follow up letter to confirm that you reported the problem.

Keep a copy of your letter.

Send it by certified mail and ask for a return receipt.

Update your files.

Record the dates you made calls or sent letters.

Keep copies of letters in your files.

How to Limit Your Losses

The Fair Credit Billing Act (FCBA) and the Electronic Fund Transfer Act (EFTA) offer protection if your credit, ATM, or debit cards are lost or stolen.

Credit Card Loss or Fraudulent Charges

Under the FCBA, your liability for unauthorized use of your credit card tops out at \$50. However, if you report the loss before your credit card is used, the FCBA says you

are not responsible for any charges you didn't authorize. If your credit card number is stolen, but not the card, you are not liable for unauthorized use.

ATM or Debit Card Loss or Fraudulent Transfers

If you report an ATM or debit card missing before someone uses it, the EFTA says you are not responsible for any unauthorized transactions. If someone uses your ATM or debit card before you report it lost or stolen, your liability depends on how quickly you report it:

If you report:	Your maximum loss:
Before any unauthorized charges are made.	\$0
Within 2 business days after you learn about the loss or theft.	\$50
More than 2 business days after you learn about the loss or theft, but less than 60 calendar days after your statement is sent to you.	\$500
More than 60 calendar days after your statement is sent to you.	All the money taken from your ATM/debit card account, and possibly more; for example, money in accounts linked to your debit account.

If someone makes unauthorized transactions with your debit card number, but your card is not lost, you are not liable for those transactions if you report them within 60 days of your statement being sent to you.

How to Protect Your Cards and Account Information

.....

For Credit and ATM or Debit Cards

- **Don't disclose your account number** over the phone unless you initiate the call.
- **Guard your account information.** Never leave it out in the open or write it on an envelope.
- **Keep a record of your account numbers, expiration dates, and the telephone numbers of each card issuer** so you can report a loss quickly.
- **Draw a line through blank spaces** on charge or debit slips above the total so the amount can't be changed.
- **Don't sign a blank charge or debit slip.**
- **Tear up copies** and save your receipts to check against your monthly statements.
- **Cut up old cards** — cutting through the account number — before you throw them away.
- **Open your monthly statements promptly** and compare them to your receipts. Report mistakes or discrepancies as soon as possible.
- **Carry only the cards you'll need.**

For ATM or Debit Cards

- **Don't carry your PIN in your wallet, purse, or pocket** — or write it on your ATM or debit card. Commit it to memory.

- **Never write your PIN** on the outside of a deposit slip, an envelope, or other papers that could be lost or looked at.
- **Carefully check your ATM or debit card transactions**; the funds for this item will be quickly transferred out of your checking or other deposit account.
- **Periodically check your account activity**, especially if you bank online. Compare the current balance and transactions on your statement to those you've recorded. Report any discrepancies to your card issuer immediately.

For More Information

.....

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261.

Watch a video, *How to File a Complaint*, at consumer.ftc.gov/media to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.



Federal Trade Commission
consumer.ftc.gov
August 2012

No. 35372-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ERIK MCCONNELL JOHNSON and
JACKIE MCCONNELL JOHNSON, Petitioners,

vs.

CONNELL OIL, INC., Respondent.

CERTIFICATE OF SERVICE

Attorneys for Petitioners

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **26th day of November, 2018**, at Spokane, Washington, I caused to be served the following document(s), and accompanying exhibits, on the following person(s) and/or entity(ies) in the manner indicated:

CONNELL OIL V. JOHNSON, PETITION FOR REVIEW

<p>Brian Davis Leavy Schultz Davis, PS 2415 W. Falls. Ave. Kennewick, WA 99336</p>	<p><input checked="" type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input checked="" type="checkbox"/> VIA ELECTRONIC MAIL <input type="checkbox"/> VIA EXPRESS DELIVERY</p>
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DATED this 26th day of November, 2018.



CASSANDRA BORN
Legal Assistant

Cameron Sutherland, PLLC

Attorneys at Law

PRIVATE AND CONFIDENTIAL

DATE: November 26, 2018

TO: Court of Appeals, Div. III

FAX #: 509-456-4288

FROM: Brian Cameron

PAGES: 49 approx.

RE: COA # 353729, FCSC NO: 16-2-50105-5
Connell Oil v. Johnson, et al

NOTES

Petition for Review - for filing.
Filing fee to come in the mail.

- Cassandra Burn, Plyn
e: cborn@cameronsutherland.com
ph: 509-315-4507
fx: 509-315-4585

*Hardy color copy to follow

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