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DIVISION III
STATE OF WASHINGTON
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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.

PETITIONERS' REPLY BRIEF

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A. INTRODUCTION

In this appeal, Petitioners Erik McConnell Johnson and Jackie McConnell Johnson question whether or not a credit access device they used to obtain fuel under a deferred payment system is 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.*, and therefore subject to the limitations on liability for unauthorized charges and related disclosures under the Act. 12 CFR § 226.12(b)(1)(ii); 12 CFR § 226.12(b)(2)(ii). The Johnsons’ card was stolen while farming and, although they notified Respondent Connell Oil, the card issuer, that their card had been stolen, Connell failed to cancel the card while the thief ran up more than \$34,649 in unauthorized charges over the following two months. Connell then sued the Johnsons for the full amount of those unauthorized charges.

Respondent Connell Oil filed its responsive brief in this appeal on or about January 29, 2018, arguing that its “cardlock” cards are not “credit cards,” because they do not involve an extension of “credit,” as that term is defined by TILA and Reg. Z. 15 USC § 1602(1); 12 CFR § 226.2(15)(i), and that the plain language of TILA and because Reg. Z does not consider their particular card in its definition. The Johnsons reply to these arguments herein.

B. REPLY ARGUMENT

1. Connell's Card Is a "Credit Card" Under the Plain Language of TILA and Reg. Z.

In its responsive brief, Connell declines to challenge the Petitioners' assertion that the definitions of a "credit card" under TILA and Reg. Z are wholly unambiguous and should apply to the credit access device at issue in this case. Instead, Connell generally denies that its "cardlock" card is a "credit card" under TILA and Reg. Z because, Connell claims, it does not allow cardholders to "obtain money, property, labor, or services on credit," 15 USC § 1602(1), or "be used from time to time to obtain credit, 12 CFR § 226.2(15)(i). (Brief of Resp., 10). That is, Connell claims that its card does not allow cardholders "to defer payment of debt or to incur debt and defer its payment." 12 CFR § 226.2(14).

Connell describes a system in which its cardholders may use the card to obtain fuel and then pay for it later, after a future invoice is sent. *Id.* However, Connell fails to explain how obtaining fuel one day and deferring payment for it until some future date is not "credit" under TILA and Reg. Z. To argue that obtaining goods one day and paying for them at some future date does not involve an extension of "credit" under TILA and Reg. Z is implausible.

2. Connell's Position Is Contrary to Public Policy.

Connell also suggests that its cards “cannot be used for a spending spree that the user pays off over time and at a later date,” averring that its cards “are simply incapable of such function,” (Brief of Resp., 11), but that is exactly what occurred in this case. Erik Johnson’s card was stolen while he was farming near Deer Park, Washington. (CP 56). Even though Mr. Johnson reported the theft to Connell within days of the incident, Connell allowed the thief to go on a “spending spree” over the course of the next two months, during which time more than \$34,649 of fuel was charged to the card, and then subsequently invoiced to the Johnsons by Connell. (*Id.*). One of the central purposes of Reg. Z’s limitations on liability is to ensure that cards such as Connell’s are actually “incapable” of such function, or at least that card issuers implement practical safeguards against these risks and harms. *See, e.g., Telco Communications Group, Inc., v. Race Rock*, 57 F. Supp. 2d 340, 345 (E.D. Va. 1999) (describing Reg. Z’s “ultimate goal of protecting the consumer from being liable for unauthorized use”). The fact that Connell’s card fails to incorporate *any* safeguards for cardholders, who are completely reliant on card issuers to cut off the bleeding, is precisely why TILA’s and Reg. Z’s limitations on liability were enacted.

3. All “Accounts Receivable” Necessarily Involve an Extension of “Credit.”

Connell also suggests that its cards are “analogous to an account receivable,” *id.*, without noting that an “account receivable” pertains to any “account reflecting a balance owed by a debtor,” *Black’s Law Dictionary* 18 (8th ed. 2004), regardless of whether or not the debt happens to be through a credit card, promissory note, consumer loan, judgment, or other instrument. All accounts receivable involve “a balance owed by a debtor,” *id.*, necessarily meaning that all accounts receivable involve a *creditor*, being “one who gives *credit* for money or goods.” *Id.* at 396 (emphasis added). The specific character of a “credit card,” and the special risks and limitations associated with it, are what drive TILA and Reg. Z’s cardholder protections, especially the limitations on cardholder liability for lost and stolen cards. *Telco*, 57 F. Supp. 2d 345.

4. The Sky Will Not Collapse Around the Business World.

Connell proclaims that the sky will collapse around “the business world” if the court agrees that its cards are “credit cards” under TILA and Reg. Z, because it claims “such a finding would render *all* accounts receivable and “net payable’ contracts ‘credit cards’ under TILA and Regulation Z.” (Brief of Resp., 11) (emphasis original). This proposition is absurd. First of all, far from encompassing “all accounts receivable,”

the limitations on cardholder liability under TILA and Reg. Z only apply 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). Second, TILA and Reg. Z generally apply only to *consumer* credit, with an exception for unauthorized charges on business and agricultural credit cards, which are covered by the same limitations on liability as applies to consumers. 12 CFR § 226, Supp.1 (A) § 226.3(1). Finally, the vast, thriving, and ubiquitous open-end credit card industry already has and continues to offer effective safeguards in response to the statutory limitations on liability for unauthorized charges, one of the simplest and most recognizable being the cancellation of cards once a cardholder has reported them stolen.

5. Connell’s Remaining Arguments in This Appeal Are Inapt.

Connell’s remaining arguments suggest that “the lower court did not rely on the Commentary in reaching its decision,” (Brief of Resp., i.), but that its credit access device is nonetheless “exempted from TILA and Regulation Z because it meets the Commentary’s Exclusion.” (Brief of Resp., 19). The Johnson’s reiterate that the plain and unambiguous language of TILA and Reg. Z apply 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) (emphasis added), and that

Connell's card allows cardholders "to defer payment of debt or to incur debt and defer its payment." 12 CFR § 226.2(14). Whether or not the lower court relied on the Commentary, it erred in ruling that the credit access device at issue in this case was not a "credit card" under TILA and Reg. Z

Finally, whether or not Connell may escape liability under TILA and Reg. Z's "safe harbor" provision is an issue that is not before this court.

C. CONCLUSION

Connell's argument that its "cardlock" card does not involve an extension of credit is implausible. Connell describes a system in which its cardholders may use the card not just to unlock a fuel pump, but also to obtain fuel and pay for it at some later date. Under TILA and Reg. Z, this constitutes a card used to obtain an extension of "credit," that is, a "credit card," and therefore the Johnsons' were protection by the limitations on liability afforded to cardholders under the Act.

Based upon the legal authorities and arguments herein presented, the Johnsons respectfully request that this Court reverse the decision of the Superior Court below and rule in favor of her claims or remand with instructions.

DATED this 28th day of February, 2018.

Respectfully submitted,


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

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **28th day of February, 2017**, at Spokane, Washington, I caused to be served the foregoing document(s), and accompanying exhibits, on the following person(s) and/or entity(ies) in the manner indicated:

Brian Davis Leavy Schultz Davis, PS 2415 W. Falls. Ave. Kennewick, WA 99336	<input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL X HAND DELIVERED <input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA EXPRESS DELIVERY
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DATED this 28th day of February, 2018.



DAN KEEFE
Paralegal