

## **When credit card bills do not have to be paid**

Peter Bowal

*Law Now*, Feb/Mar 1998. Vol. 22, Iss. 4; pg. 32

Copyright University of Alberta Feb/Mar 1998

Imagine that you contract with a moving company to move your family's possessions across the country. You arrive at the destination and the mover now claims that the cost is much higher than previously agreed. Or suppose you put a down payment on a dinnerware set, but it arrives with missing or broken pieces. Or perhaps the carpet cleaner did not do a satisfactory job of cleaning the carpet or damaged the carpet. What recourse do you have to protect yourself from overpayment?

The first step should be to try to work out a solution with the merchant, who may give you the benefit of the doubt. If that does not happen, and you feel strongly that you are being overcharged, you should know that if you have used a credit card, you might get a sympathetic response from your credit card issuer.

Credit card companies are third parties to the consumer transaction, but their power and relationship between you and the merchant should not be underestimated. They are the centrepiece of a complex tripartite relationship between merchant, consumer and credit institution, which is usually a bank representing the credit card company. Many consumers today virtually depend on credit cards for consumer purchases, for the credit and convenience that they provide. Payment by credit card is the payment mode of choice for many consumers.

Governments and merchants recognize this universal power of plastic. Virtually everything in our marketplace that used to be paid for by cash or cheque can now be paid for by credit card. Concerns about over-reliance on credit for purchases, such as at liquor stores, have disappeared. Today one may even post cash bail by credit card. The merchant is essentially guaranteed payment by the card issuer, and need not take the credit risk on each consumer who transacts. The card issuer collects for the monthly credit transactions and pays the merchant.

So strong is the practical need of business to sign up with credit card companies that they agree to pay about 4% of each transaction to the card issuer, retain detailed records, help police locate lost or stolen cards, pay initial sign-up fees and rental fees for the imprinter equipment, and maintain accounts at issuer banks. Furthermore, they sign a standard agreement with the credit card companies which contains some onerous terms any time the credit card is used in a transaction. For example, the merchant agrees not to charge more than the ticketed or posted price for the merchandise or service, not to charge any fee for the use of the credit card and not to require a minimum purchase before accepting payment by credit card.

The following standard term in the contract between the merchant and the card issuer sets out the discretion that the card issuer has to excuse payment by the consumer for improper conduct on the merchant's part.

"4. Notwithstanding any approval of a transaction which may be given by or on behalf of the issuer of a Credit Card, [the issuer bank] may refuse to credit the account of the Merchant with

or may charge back to the Merchant the total amount of any sales draft in any of the following circumstances:

- (a) The signature appearing on the sales draft is or is claimed by the Cardholder to be forged or unauthorized;
- (b) The merchandise referred to in the sales draft (i) has been returned to the Merchant or has not been received, or (ii) has been claimed by the Cardholder to have been returned to the Merchant, or not to have been received;
- (c) The Cardholder claims that the Services referred to in the sales draft have been unsatisfactory;
- (d) A sales draft exceeds the Floor Limit and has not been previously approved by or on behalf of the issuer of the Credit Card; (notwithstanding such approval, [the issuer bank] may refuse to credit the Merchant's account with or to charge back to the Merchant the total amount of any sales draft in any of the other circumstances set forth in this paragraph 4);
- (e) A sales draft is illegible; (f) A sales draft refers to a Credit Card which has expired or which CIBC has notified the Merchant not to honour; ...
- (h) The transaction evidenced by a sales draft or any other credit extended in respect thereof is for any reason illegal, null or invalid;
- (i) The Merchant can be shown to have attempted to reduce or disguise the amount of any one transaction by the use of multiple sales drafts (known as split-ticketing); ...
- (m) The Credit Card used in a transaction was listed on a Card Recovery Bulletin sent to the Merchant prior to the transaction."

Without such a contract between the merchant and the card issuer to authorize such charge backs, the credit card companies simply could not do them. One should note that the card issuer has broad discretion to disallow the payment, or charge it back to the merchant. The consumer needs only to claim that the service or product was unsatisfactory, or to return it, or to claim that the signature was unauthorized. Each card issuer maintains a Customer Service department who, it appears, will give the benefit of the doubt to the consumer. There may even be some opportunity under this clause, in force for the protection of all credit cardholders, to assert defences arising from the contract itself, and thereby avoid payment.

The card issuers do not widely advertise this discretion. Interestingly, not only is the cardholder uninformed of this right of complaint to the credit card company, the cardholder agreement, for its part, requires that the cardholder will pay to the issuer the amount of all signed charge slips, irrespective of any claims that person may have against the merchant. This conceals from the consumer the existence of the issuer's discretion to exercise this right to reverse payment. In another respect, the consumer reasonably expects that s/he can stop payment on the charge, just as if it was a cheque or installment payment. This expectation often springs from the card issuer's

dual relationship with the consumer as that consumer's home bank. To defeat the consumer's reasonable expectations with legal subtleties would be bad for business, if not a source of unwelcome issuer liability. Concealing the issuers' discretion will both reduce the frequency of consumers' requests for the exercise of the discretion and make the exercise of the discretion appear more valuable to the consumer who receives the grace extended by it.

The payment obligation may be set aside, therefore, in occasional and extraordinary instances, where the cardholder strenuously objects directly to the credit card company and resists payment for a good reason. If a consumer has a legitimate complaint, it will be investigated and the payment invoice may be cancelled or, if already paid, may be credited back to the consumer. This action would reflect unfavourably on the merchant, who has signed away this discretion to the credit card company in return for participation in the program. In summary, credit card companies are very powerful. Most people, consumers and merchants alike, want the convenience of credit cards. The card issuers, therefore, have the power to deny merchants the ability to accept their cards for payment unless the merchants waive some of their rights in transactions with third party consumers. The card issuer allows the merchant to serve as its agent; the card issuer accordingly wants to be able to discipline a merchant if the need arises, which all remains within its sole discretion. The business approach of the card issuers is that consumers are more important customers than merchants.

This is great news for consumers. If you are not satisfied, for some bona fide reason, with the service or product that you paid for by credit card, you may take up your complaint with the credit card company. The only remedy appears to be a full waiver of your obligation to pay. It is a valuable extra-judicial recourse for consumers, but overall, one which may disappear if it is not used sparingly and only in good faith.

Peter *Bowal* is an Associate Professor with the Faculty of Management, University of Calgary, Calgary, AB.