

**CASE NOTE:
AUSTRIA**

CASE CITATION:
**OGH Urteil vom 29.6.2000, 2
Ob 133/99v**

NAME AND LEVEL OF COURT:
**Oberster Gerichtshof
(Austrian Supreme Court)**

DATE OF DECISION:
29 June 2000

MEMBERS OF THE COURT:
**Dr. Niederreiter as a chairman
and Dr. Schinko, Dr. Tittel, Dr.
Baumann and Professor Dr.
Danzl**

LAWYER FOR THE PLAINTIFF:
**Dr. Heinz Kosesnik Wehrle,
attorney in Vienna**

LAWYERS FOR THE DEFENDANT:
**Wolf, Theiss & partner,
attorneys in Vienna**

Facts

The plaintiff had a giro banking account with the defendant and was issued an ATM-card. The defendant charged the plaintiff's account in the amount of ATS 10,000 because of ATM withdrawals. The plaintiff denied having made the withdrawals. It could not be determined whether the withdrawals were made by the plaintiff using his original ATM-card, or by a third person using a copy of the plaintiff's ATM-card.

The defendant's general terms and conditions contain a disclaimer of liability stating that all consequences and disadvantages resulting from loss, fraudulent use, counterfeit or falsification of the ATM-card are to be borne by the holder of the giro bank account.

The plaintiff sued for the payment of ATS 10,000. The district court ruled in favour of the plaintiff. The higher regional court dismissed the defendant's appeal. The Austrian Supreme Court dismissed the defendant's appeal on questions of law, giving the following reasons for the judgement.

It is necessary to distinguish between the bank's liability for the technical misuse of ATM-cards and its liability for misuse of ATM-cards lost by the customer. In the case of ATM-cards (and PINs) lost by the customer, the Supreme Court sees no problem in ascribing the liability to the customer. However, the Supreme Court takes a different view in cases of technical misuse of ATM-cards, citing as an example a case where the ATM-card is copied by criminals and the PIN is ascertained by watching the customer making a withdrawal. In such circumstances, the liability of bank customers is rejected, because the risk of such misuse of ATM-cards is the bank's responsibility. Because the bank introduced such technical devices and uses them in its business with its customers and to expand its business, it has to bear all the risks arising out of the use of these complicated devices and techniques.

Generally the rules on the burden of proof are the same in case of the use of a PIN as in any other case. If

the bank seeks reimbursement from the customer, it has to prove that the customer himself used the ATM-card to make a withdrawal. Therefore it has to prove that the customer used the original ATM-card and not a counterfeit or falsified ATM-card. Use of the PIN is seen as a strong indication that the customer himself made the withdrawal or culpably made it possible for a third person to withdraw money from his giro bank account. Insofar as the correct PIN was used, the Supreme Court sees this as prima facie evidence that the ATM-card was used by the customer entitled to do so, or that the customer breached his obligation to maintain secrecy of the PIN. The customer can prove this wrong by showing that there is a reasonable possibility of an atypical chain of events. The other party then has to (strictly) prove the facts in question.

The bank could not prove that the withdrawal was made using the original ATM-card and consequently the Supreme Court dismissed the appeal.

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For further details see: RdW 2000, 599; Wilhelm, Gefälschte Bankomatkarten – Beweis- und Zurechnungsfragen, eolex 2000, 617; Graf, Wer haftet beim Bankomatkartenmißbrauch?, RdW 2007, 531.