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CONSUMER CREDIT

CREDIT CARD AGREEMENT ALLOWING CHANGE IN INTEREST RATE WAS NOT CLEAR AND CONSPICUOUS

Barrer v. Chase Bank USA, N.A., 566 F.3d 883 (9th Cir. 2009).

FACTS: Petitioners Walter and Cheryl Barrer obtained a credit card from Respondent Chase Bank and received a cardmember agreement in late 2004. The agreement allowed Chase to change the interest rate in the event of default, as defined by an enumerated list in the agreement. Another section of the agreement read, “[Chase] can change this agreement at any time, ...by adding, deleting, or modifying any provision...[including] financial terms, such as APRs and fees.” The agreement provided that Chase would periodically review petitioners’ credit reports, obtained from credit bureaus. In February 2005, petitioners received a notice which advised them of amendments to the terms of their agreement, including a significant increase in the Annual Percentage Rate., which they could decline in writing. When their interest rate increased a few months later, petitioners paid the balance due and filed a class action lawsuit under the Truth in Lending Act. The district court dismissed the complaint and this appeal followed.

HOLDING: Reversed and remanded.

REASONING: The court found that under Regulation Z the creditor must disclose all information and the disclosures “must have been true...accurate representations of the legal obligations

of the parties at the time the agreement was made.” *Rossman v. Fleet Bank (R.I.) Nat’l Ass’n*, 280 F.3d 284, 291 (3d Cir. 2002). Section 226.6 of the Truth in Lending Act identifies all of the required disclosures including each periodic rate used to calculate finance charges and APR. 12 C.F.R. § 226.6(a)(2).

A term is considered conspicuous when it is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it”.

The key mandate of Section 226.5 states “creditors must make the required disclosures clearly and conspicuously in writing.” 12 C.F.R. § 226.5(a)(1). The court borrowed from the commercial and bankruptcy codes, noting that a term is considered conspicuous when it is “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it,” and that “conspicuousness ultimately turns on the likelihood that a reasonable person would actually see the term in an agreement.”

The court found that the change-in-terms provision, found five pages after disclosure of the APR on pages 10-11, was “buried too deeply in the fine print” for a reasonable cardholder. The court determined the Barrers did state a claim under the TILA because Chase was unable to prove as a matter of law the Agreement made clear and conspicuous disclosures of APRs available. The court reversed the lower court’s grant of Chase’s motion to dismiss and remanded for further proceedings.

CREDIT AGENCY ISN’T REQUIRED TO PROCESS FRAUD ALERT FROM LIFELOCK

Experian Info. Solutions, Inc. v. LifeLock, Inc., ____ F.Supp.2d ____ (C.D. Cal. 2009).

FACTS: LifeLock, a corporation, provided consumers identity theft protection services, one of which was to submit requests for placement of “fraud alerts” on credit files maintained by consumer reporting agencies when they detected fraud, or the risk of fraud. Experian, one of the consumer reporting agencies (“CRAs”), filed a civil suit against LifeLock that claimed the business practice of requesting national reporting agencies to place fraud alerts on consumer files violated California’s Unfair Competition Law (“UCL”) because it offended a public policy under the Fair Credit Reporting Act (“FCRA”). The U.S. District Court for Central California reviewed Experian’s motion for partial summary judgment on the UCL claim.

HOLDING: Motion for partial summary judgment granted.

REASONING: The court opinion evaluated the UCL claim by determining whether LifeLock’s requests violated an established public policy. The UCL prohibits any unlawful, unfair, or fraudulent business act or practice, without a requirement that an act be specifically proscribed by a law to be unfair. Cal. Bus. & Prof. Code § 17200. The court recognized that for a public policy to be valid, it must be tied to a specific constitutional, statutory or regulatory provision. Experian argued that the business practice of requesting national reporting agencies to place fraud alerts on consumer files violated a public policy established by the FCRA. The FCRA requires CRAs to place a fraud alert upon the direct request of a consumer, or individual acting on behalf of or as personal representation of a consumer, who is acting in good faith. 15 U.S.C. § 1681c-1. The court noted that the FCRA defined “consumer” as an “individual” and that the Committee notes indicated the word “individual” was used instead of “person” to ensure the provision would not apply to entities like credit reporting clinics. LifeLock argued that the purpose of the FCRA is consumer protection and CRAs, like Experian, have the bulk of obligations under the statute.

The court rejected the argument that because so many obligations were required of the CRAs, limits on those obligations should not be enforced. The court explained that a corporation like LifeLock could still be found to violate public policy when it placed requests for fraud alerts inconsistent with the limits on agencies’ obligations. The court concluded that the FCRA contained an established public policy against companies like LifeLock placing fraud alert requests on behalf of consumers, and CRAs like Experian were not required to process an invalid request. After it established a public policy violation, the court found no issue of material fact in dispute on the UCL claim and granted Experian’s partial motion for summary judgment.

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TO PROVE WILLFUL VIOLATION OF FAIR CREDIT REPORTING ACT CONSUMER MUST SHOW AGENCY ACTED KNOWINGLY OR RECKLESSLY

Levine v. World Fin. Network Nat. Bank, 554 F.3d 1314 (11th Cir. 2009).

FACTS: Levine held a credit card issued by a subsidiary of Alliance Data Systems, Inc. (“Alliance”). In 1998, Levine fully paid and closed his credit account, which was reflected in his consumer report. In 2001, Alliance began to purchase credit reports, including Levine’s report, from Experian for the purposes of determining what services Alliance might market to individual customers. Experian was informed by Alliance that all requests were for current customers of Alliance.

Levine sued Experian for willfully violating the Fair Credit Reporting Act (“FCRA”) under two theories, by selling his credit report even though his account was already closed by failing to maintain reasonable procedures to ensure that it furnished reports only for permissible purposes. During the course of litigation, the Supreme Court ruled in *Safeco Insurance* that a company does not willfully violate the FCRA by interpreting it erroneously as long as its interpretation is not objectively unreasonable. 551 U.S. 47 (2007). Based on *Safeco*, the district court granted summary judgment in favor of Experian because Experian’s actions were based on an objectively reasonable interpretation of the FCRA, and Levine failed to prove that Experian did not maintain reasonable procedures to ensure that the consumer reports it sold were for permissible purposes. Levine appealed.

HOLDINGS: Affirmed.

REASONING: The FCRA provides that a consumer reporting agency may furnish consumer reports for limited purposes, and that those agencies must maintain reasonable procedures to ensure compliance with the Act. Willful violations require the consumer to show that the agency acted knowingly or recklessly. Adopting the rationale in *Safeco*, the court held that to prove a reckless violation, a consumer must establish that the agency’s action “is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.”

The court rejected Levine’s first contention that Experian willfully violated the FCRA by adopting an objectively unreasonable reading of the Act. The court noted that the FCRA allows the sale of reports for “account review” but does not distinguish between closed and open accounts, nor does it define accounts to mean an open account. Applying the *Safeco* standard, the court held that the sale of consumer report on a closed account is an objectively reasonable interpretation of the Act; therefore, Experian cannot be held to have willfully violated the Act when acting on that interpretation.

The court also rejected Levine’s argument that Experian failed to maintain reasonable procedures to ensure that the reports it sold were for permissible purposes. Because it was not objectively unreasonable to read the Act as allowing the sale of a report for a closed account, no investigation or procedure would have alerted Experian to the possibility of an impermissible use.

THE TILA APPLIES TO INTEREST RATE INCREASES

McCoy v. Chase Manhattan Bank, USA, 559 F.3d 963 (9th Cir. 2009).

FACTS: James McCoy, a credit card holder, filed a class action suit against Chase Manhattan Bank, USA, N.A. (“Chase”), and alleged that Chase increased his interest rates retroactively to the beginning of his payment cycle after his account was closed as a result of a late payment to the bank or another creditor. McCoy claimed that the retroactive interest rate increase violated federal law, namely the Truth in Lending Act (“TILA”), because Chase gave no notice of the increase until the following periodic statement, *after* the rate increase had already taken effect. The district court dismissed McCoy’s complaint with prejudice, holding that because Chase had already disclosed the highest rates in the event of default in its cardmember agreement, no further notice was required. McCoy appealed.

HOLDINGS: Reversed and remanded (as to the TILA claim).

REASONING: The underlying policy behind the TILA was to “assure a meaningful disclosure of credit terms” so that consumers can compare various credit offers and also to protect consumers from “inaccurate and unfair credit billing” practices. 15 U.S.C. § 1601(a). Under Regulation Z, adopted by the Federal Reserve Board to implement the TILA, a written notice must be given at least 15 days prior to the effective date of change for “any term required to be disclosed under § 226.6.” 12 C.F.R. § 226.9(c)(1). Section 226.6 requires that a creditor disclose each periodic rate that may be used to compute the finance charge. McCoy argued that the phrase “any term required to be disclosed under § 226.6” applies to the list of specific items under § 226.6(a)(2), including the interest rates to be used, while Chase argued that the phrase only applies to the contractual terms of the cardmember agreement.

Citing the longstanding rule of deferring to an agency interpretation of an ambiguous regulation, the court examined the official staff comments to § 226.9(c)(1) to determine whether changes to interest rates require notice. Under Official Staff Commentary 3, notice must be given if there is an “increased periodic rate...attributable to the consumer’s delinquency or default”; although, the notice may be delivered as late as the date of the effective change. Under the plain language of comment 3, the court found that McCoy had stated a claim because Chase’s notice occurred after the rate increase became effective.

Further, the court examined Official Staff Commentary 1, and noted that while Comment 1 allows no notice of change in terms if the specific change is set forth initially, it specifically requires notice to be given “if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase.” The court pointed out that three examples given in Comment 1 for interest rate changes that require no notice involved an element of control by the consumer, such as when the interest rate is tied to the prime rate, when the interest rate is tied to employment, and when the interest rate is tied to the consumer maintaining a certain balance in a savings account. In contrast, McCoy’s rate increase occurred at Chase’s discretion because the Chase cardmember agreement stated that Chase “may” change the interest rate and imposes a non-preferred rate “up to” the maximum rate. Further, the agreement provides that McCoy’s rate “may” lose its preferred rate if he defaults. The court held

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that because Chase's retroactive rate increases are within Chase's discretion, it is required to give notice under Comment 1.

Finally, the court briefly examined and rejected Chase's argument interpreting Regulation Z based on language contained in the now-superseded Advance Notice of Proposed Rulemaking ("ANPR") in 2007. While the court found that some language in the 2007 ANPR supported Chase's interpretation, the court held that the ANPR did not clearly weigh in favor of either McCoy's or Chase's interpretation because the primary purpose of the ANPR is to solicit comments to proposed changes and not to offer additional staff commentary on current regulations.

The court held that McCoy has stated a TILA claim, under Regulation Z, if Chase failed to give him notice of an interest rate increase "because of the consumer's delinquency or default" required under Comment 3 or if his contract with Chase "allows the creditor to increase the rate at its discretion but does not include the specific terms for an increase" under Comment 1. 12 C.F.R. § 226.9(c)(1). Having concluded that McCoy has stated a claim under either standard, the court of appeals reversed and remanded McCoy's TILA claim back to the district court.

RATE HIKE DOES NOT VIOLATE THE TILA

Swanson v. Bank of America, N.A., 559 F.3d 653 (7th Cir. 2009).

FACTS: Bank of America, N.A. ("BOA") issued a credit account to Laura Swanson with a term allowing BOA to raise the interest rate if Swanson exceeded her credit balance at the end of two months in any rolling 12-month period. BOA noticed Swanson that the higher penalty interest rate would take effect at the beginning of the billing cycle to which it applied. Swanson exceeded her credit limit at the close of the billing cycles in August, November, and December of 2007. BOA applied the penalty rate at the start of the November-December billing cycle. Swanson sued BOA and argued that the Truth in Lending Act ("TILA") forbids rate changes that apply to the entire billing cycle in which the change occurs. The district court granted BOA's motion to dismiss the suit. Swanson appealed.

HOLDINGS: Affirmed.

REASONING: The court held that the credit contract between BOA and Swanson should not be overridden because the court held that the TILA subsection 226.9(c), as well as commentary to that section, was ambiguous as to whether a bank may apply retroactive penalty interest. Subsection 226.9(c)(1) provides that when any "term required to be disclosed under § 226.6" is changed, the creditor must give 15 days notice prior to the effective date of the change. However, § 226.9(c)(1) waives the 15 day requirement if the change had been agreed to by the customer. Under Swanson's interpretation that "term" includes changes in interest rates, BOA could not raise her rate because the "effective date" preceded the notice, regardless of whether she agreed. BOA argued that the word "term" should be interpreted to mean "contractual term". Under BOA's interpretation, no contractual term had been changed and thus the 15 day notice requirement does not apply.

The court then examined official commentary to § 226.6(c), and held that the comment was also ambiguous. The official comment clarifies that no notice of a change in terms is

required if the specific change had been set forth initially, but that notice must be given if the contract allows a rate increase at the creditor's discretion. The court held that the comment was ambiguous as to whether notice must be given if the bank "has discretion *not* to raise the rate", which Swanson contended.

The court held that BOA's actions did not violate the TILA by implication of the newly enacted subsection 226.9(g), which would be effective July 1, 2010. Subsection (g) prevents retroactive rate changes and requires 45-day notice that over-rides any existing contractual provision authorizing swifter changes. The commentary on § 226.9(g) indicates that the section requires any change in a start-of-cycle approach to be deferred for a billing cycle and a half. The court held that it would be inappropriate to give the TILA added protections as if § 226.9(g) was currently in effect. The court affirmed the district court's dismissal on the grounds that the law currently in force does not grant the interpretation or protections that Swanson wanted.

E-MAILED CONFIRMATION CONTAINING CREDIT CARD EXPIRATION DATE IS NOT A FACTA VIOLATION

Turner v. Ticket Animal, LLC., ____ F. Supp. ____ (S.D. Fla. 2009).

FACTS: Plaintiff, Daniel Turner, filed suit against Defendant, Ticket Animal LLC, alleging violations of the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g) ("FACTA"). Plaintiff alleged that Defendant violated FACTA when it sent, and Plaintiff received, an e-mail order confirmation that included the expiration date of the credit card he used to make the purchase. Plaintiff sought statutory and punitive damages. Defendant moved to dismiss the complaint under FRCP 12(b)(6) and 12(b)(1), for failure to state a claim upon which relief can be granted and lack of subject-matter jurisdiction, respectively.

HOLDING: Dismissed.

REASONING: The court noted that FACTA § 1681c(g)(1) provides: "...no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." The court noted that the term "print" is not defined in the statute. The court stated that several other courts in the Southern District of Florida have addressed the question of whether e-mail or automatically displayed internet receipts fall under the purview of § 1681c(g), and most have concluded that the word "print" does not encompass an e-mail or internet confirmation or receipt, but only applies to tangible, paper receipts. The court concluded that the plain and unambiguous meaning of "print" meant to imprint onto paper or some other tangible surface, so the e-mail receipt received by Plaintiff did not bring rise to a claim under FACTA.

No notice of a change in terms is required if the specific change had been set forth initially.