http://www.financialinstitutionlawblog.com/

SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP

Financial Institution Law BLOG
Up-to-date Information on Financial Institutions

August 4, 2010 | Posted By

"SCHUMER BOX" DISCLOSURE NOT "CLEAR AND CONSPICUOUS" AS A MATTER OF LAW

Question: Is a Schumer box disclosure describing an APR as "fixed," linked with an asterisk to a paragraph printed just below the Schumer box stating the APR could be increased under three conditions, and also coupled with language, further down the same page, providing the customer would be bound by the terms of the bank's customer agreement (which permitted the bank to change rates at any time) "clear and conspicuous" under the Truth in Lending Act?

Answer: No, as a matter of law, according to a divided Ninth Circuit Court of Appeals in *Rubio v. Capital One Bank* (No. 08-56544), decided July 21, 2010.

In this case, Capital One sent plaintiff Raquel Rubio a credit card solicitation with a "Schumer Box" a table required by federal law, describing the credit card's APR as a "fixed rate of 6.99%." Next to the box was an asterisk linked to a paragraph just below the Schumer box stating the APR could increase in three specific circumstances. Further down the same page, there was a heading that read "Terms of Offer." Under that heading, printed in 8 point type, was language reciting that the customer agreed to be bound by the terms and conditions of Capital One's Customer Agreement. And, in the Agreement, Capital One reserved the right to "amend or change any part of your Agreement, including periodic rates and other charges . . . at any time."

The trial court granted Capital One's motion to dismiss Rubio's TILA (and also her claim under California's Unfair Competition Law). The Ninth Circuit reversed. Writing for the majority of a three-judge panel, Judge Betty Fletcher held that as a matter of law, these disclosures did not constitute a "clear and conspicuous disclosure" of Capital One's APR as required by TILA (see 15 U.S.C. § 1632(a).) Taking the unusual step of considering evidence outside the pleadings on a motion to dismiss, the majority relied heavily on a study commissioned by the Federal Reserve finding that "participants frequently assume that a rate that is labeled 'fixed' cannot be changed for any reason."

The majority also noted that in late January 2009, the board promulgated revisions to regulation Z that the term "fixed" may not be used "unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period . . . ." As a result, the majority was persuaded that because "fixed" can reasonably be interpreted to mean "unchangeable" Capital One's disclosure was not "clear and conspicuous" as a matter of law. It therefore reversed the district court's dismissal of Rubio's TILA claim.

In a partial dissent, Judge Susan Graber agreed the district court should not have dismissed Rubio's TILA claim. Instead of deciding the "clear and conspicuous" disclosure issue as a matter of law, however, Judge Graber would have remanded this issue to the district court for resolution as a matter of fact, not law, after full presentation of evidence. Judge Graber noted that there "seems to be a circuit split regarding the question whether the clarity of a disclosure is a question of law or fact." The Seventh Circuit "holds that this is a question of law." The Third Circuit "appears to treat the clarity of a disclosure as a question of fact." According to Judge Graber, the majority's "reliance on evidence outside the pleadings underscores the appropriateness of fact-finding in a case such as this."

Authored by:

Robert J. Stumpf, Jr.
(415) 774-3288
rstumpf@sheppardmullin.com