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Contemporaneous Notice of Credit Card Default Interest Rate Increase Not Required, Says Ninth Circuit

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On February 22, 2008, the Ninth Circuit rejected a challenge to Chase Bank USA, N.A.'s default interest rate practices. *Evans v. Chase Bank USA, N.A.*, No. 06-1522. Specifically, the court held that because Chase's Cardmember Agreement set forth the circumstances constituting default and the maximum default interest rate, the Truth in Lending Act ("TILA") did not require additional notice after a cardmember's default and before the default interest rate increase. The court further held that Chase's contractually authorized practice of applying the default interest rate on the first day of the billing cycle in which the default occurred did not violate TILA.

Plaintiffs filed the putative class action in the United States District Court for the Northern District of California, asserting that Chase's default notice practices and the timing of the default interest rate increase violated Section 226.9(c) of Regulation Z (12 C.F.R. § 226.9(c)), constituted an illegal penalty, were unconscionable, constituted a breach of contract and of the implied covenant of good faith and fair dealing, and violated California and Delaware consumer protection statutes. Section 226.9(c) requires banks to provide notice of changes to terms that must be disclosed in the initial customer agreement either 15 days in advance or before the effective date of the change, depending on the nature of the change.

The district court granted Chase's motion to dismiss with prejudice. On the TILA claim, the district court noted that the Official Staff Commentary to Section 226.9(c) created an exception to the notice requirement for changes that were "set forth initially" and held that Chase's default interest rate practices fell within this exception because the specific changes — the circumstances constituting default and the maximum default interest rate — were set forth in the plaintiffs' Cardmember Agreements. The district court further held that none of the other causes of action stated a claim because the challenged practices were authorized by plaintiffs' Cardmember Agreements and Delaware banking law.

The Ninth Circuit affirmed the district court's decision. The decision cites the Federal Reserve Board's interpretation of the current version of Section 226.9(c) in the Board's pending Proposed Rules, which would add a new provision requiring the notice plaintiffs sought in this suit. The court also held that any claim that state laws required additional notice is preempted by the National Bank Act and OCC regulations.

Plaintiffs' counsel in *Evans* filed additional suits against Chase and several other national banks and thrifts, asserting similar claims. Each of these cases was dismissed with prejudice, with several currently on appeal. Although the Ninth Circuit's Memorandum is not binding precedent, it may be cited to courts in the Ninth Circuit under Circuit Rule 36-3(b).