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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 35372-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ERIK MCCONNELL JOHNSON and
JACKIE MCCONNELL JOHNSON, Petitioners,

vs.

CONNELL OIL, INC., Respondent.

BRIEF OF PETITIONERS

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Superior Court erred in finding that the device used to access credit in this case was not a “credit card” under the federal Truth-In-Lending Act (TILA), 15 USC §1601, *et seq.*, and Regulation Z (hereinafter “Reg. Z), 12 CFR § 226, *et seq.*
2. The Superior Court erred in concluding that the limitations on liability for unauthorized use of lost and stolen credit cards under TILA and Reg. Z did not apply to this case.
3. The Superior Court erred in concluding that disclosure requirements related to unauthorized use of lost and stolen credit cards under TILA and Reg. Z do not apply in this case.

Issues Pertaining to Assignments of Error

1. Is the credit access device issued by Connell Oil, Inc. (hereinafter “Connell”) a “card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit,” that is, is it a “credit card” under TILA? 15 USC § 1602(l).
2. Is the express language of the statute superseded by federal staff commentaries pertaining to certain cards, keys, plates, or other devices that are “used in order to obtain petroleum products for business purposes

from a wholesale distribution facility or to gain access to that facility, and [are] required to be used without regard to payment terms”? 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B).

3. If the express language of the statute is superseded by federal staff commentaries, does the credit access device issued by Connell fall within the narrow exclusion suggested in 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B)?

4. If the credit access device issued by Connell is a “credit card” under TILA, are the cardholders in this case entitled to limitations on liability for their stolen card under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii)?

B. STATEMENT OF THE CASE

On July 27, 2014, Mr. Erik Johnson was farming near Deer Park in Spokane County, Washington, when his wallet was stolen from his farm vehicle. (CP 56). The next day, Mr. Johnson reported the theft to Spokane County law enforcement officials and began contacting issuers of his stolen credit and debit cards. (*Id.*) On July 31, 2014, Mr. Johnson telephoned Connell (a.k.a. “Co-energy”) to cancel the stolen card and request a replacement, which Connell provided, (*Id.*), but it did not immediately cancel the stolen card. (*Id.*) On or about September 8, 2014, Connell notified Mr. Johnson that it had terminated his account due to

suspicious activity. (*Id.*) Connell subsequently demanded that the Johnsons pay the company \$34,649.48 for charges incurred on the card after it was stolen. (*Id.*) On May 1, 2015, an individual was sentenced for first degree identity theft in relation to the theft of Mr. Johnsons' Connell card.¹ (*Id.*)

Previously, on or about May 10, 2010, Mr. Johnson signed a Request for New/Replacement Cardlock Cards with Connell Oil. (CP 56). The agreement stated that "If a card is lost or stolen, I understand that I am responsible for payment of all charges for 24 hours after I inform Connell Oil, Inc. in writing to invalidate the card." *Id.* The agreement did not provide any notice or disclosure of "the cardholder's maximum potential liability and means by which the card issuer may be notified of loss or theft of the card" as required by 12 CFR § 226.12(b)(2)(ii). *Id.* The agreement also provided for payment of "attorney and/or court fees incurred in the collection of unpaid accounts." *Id.*

Connell calls the credit access devices it issued to the Johnsons (and other cardholders) "Cardlock" cards, which is a reference to the plastic keys or holed "punch cards" that were once used to unlock fuel pumps, hotel rooms, airport lockers, and other limited-access portals. (CP

¹ See Spokane County Superior Court cause #14-1-03998-1.

26; CP 12-27; CP 7). Similar to the way a hotel keycard operates today, the old “Cardlock” devices could unlock a fuel pump or other portal, but the devices themselves could not substantiate credit transactions the way a typical magnetized credit card does today. *Id.*

While the largely obsolete “Cardlock” cards were essentially just plastic keys, the device Connell issued to the Johnsons was a magnetized card that was indistinguishable in form, function, and operation from a typical credit card. *Id.* Not only did the device unlock the pump, but it also allowed a user to charge potentially tens of thousands of dollars in fuel purchases to its account number, which was listed on the card and encoded on a magnetic strip, or “magstripe,” common to all other credit cards. *Id.*

To obtain fuel on credit, Connell’s cardholders are required to 1) swipe their cards, then 2) enter a personal identification number, or PIN, then 3) enter a vehicle number, then 4) obtain fuel from the pump on credit, which is 5) invoiced by Connell and paid by cardholders at a later date. (CP 226-227; 2). Unlike a traditional “Cardlock” key, which could only be used to open a portal, no matter how a person ultimately paid for the product, the device that Connell issued to the Johnsons was both a key *and* the means by which cardholders obtain Connell’s fuel on credit. (*Id.*; CP 26:12-27; 7). This is especially significant in the context of the

fundamental public policies and essential protections TILA seeks to provide to cardholders.

On February 14, 2016, Connell served the Johnsons with a Complaint alleging that the married couple was liable for \$34,649.48 in stolen-card charges, plus interest, costs, and fees. (CP 56). Prior to filing an Answer, on March 7, 2016, the Johnsons, through counsel, sent Connell a check for \$50.00, reflecting their maximum potential liability under the FCBA and Reg. Z at 12 CFR § 226.12(b)(1)(ii). (*Id.*) Connell rejected and returned the Johnsons' payment. (*Id.*) The Johnsons filed an Answer with affirmative defenses, including limitations on cardholder liability for lost or stolen cards under 12 CFR § 226.12(b)(1)(ii), among others, as well as counterclaims alleging violations of TILA, Washington's Consumer Protection Act (CPA), RCW 19.86, *et seq.*, and negligence *cum contributory negligence*.

On April 10, 2017, the lower court heard the parties' cross motions for summary judgment, ruled that TILA did not apply to this case, and found substantially in favor of Connell on each of its claims and against the Johnsons on each of theirs. (CP 276). The Johnsons subsequently filed their timely appeal. (CP 289).

C. SUMMARY OF ARGUMENT

The lower court erred by supplanting TILA's clear and express statutory and regulatory definitions of a "credit card" with its conflicting interpretation of Federal Trade Bureau (FTB) staff commentary. The overwhelming weight of authority directs courts to "give effect to the unambiguously expressed intent of Congress" before deferring to FTB staff commentaries in the interpretation and application of TILA. *Chevron USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 US 837, 842-843 (1984); *Ford Motor Credit Co. v. Milhollin*, 444 US 555, 556 (1980); *Pfennig v. Household Credit Services, Inc., et al.*, 286 F.3d 340, 346 (6th Cir. 2002). Even when such deference becomes necessary, "TILA, as a remedial statute, must be given a liberal interpretation in favor of consumers to protect them in credit transactions." *Pfennig*, 286 F.3d at 346. Under the plain language of the statute, the credit access device Connell issued to the Johnsons was a "card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 USC § 1602(l). In every respect, it was a "credit card" as defined by and subject to TILA's express provisions. *Id.*

Even if the narrow exception suggested in FTB staff commentaries at 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B) did control TILA's statutory provisions, the credit access device issued by Connell does not

conform to the narrow exclusion suggested in 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B).

Because the application of TILA in this case is consistent with clear and express statutory language and the overwhelming weight of authority, the Johnsons are entitled to the rights and protections afforded to victims of credit card theft, including TILA's limitations on liability and disclosure of the same.

Pursuant to the parties' contract terms, 15 USC § 1640(a)(3), and RCW 4.84.330, the Johnsons are entitled to recovery of their costs and fees as the prevailing party in this action. Pursuant to RAP 18.1, she requests that this Court make such an award consistent with the parties' contract terms, 15 USC § 1640(a)(3) and RCW 4.84.330.

D. ARGUMENT

This Court should reverse the ruling of the lower court and find that TILA applies to this case for the following reasons:

First, the credit access device issued by Connell falls within the clear and express statutory definition of a "credit card," which includes "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 USC § 1602(1). The provisions regarding limitations on liability and disclosure of the same apply to all types of credit cards, whether for

personal, business, commercial, agricultural, or other “extensions of credit that otherwise are exempt” under TILA’s Fair Credit Billing Act (FCBA) provisions. 12 CFR § 226, Supp.1 (A) § 226.3(1). Potentially conflicting language presented in FTB staff commentaries should be considered only “absent a clear expression” of statutory language.” *Milhollin*, 444 US at 556; *see also Chevron*, 467 US at 842-43. Moreover, “[w]here a statute and an agency regulation regarding the same matters conflict, courts must defer to the statute. *Pfennig*, 286 F.3d at 346 (referencing *K Mart Corp. v. Cartier, Inc.*, 486 US 281, 291 (1988)). The lower court erred by failing to consider and rule on the express language of TILA at 15 USC § 1602(l) before deferring to FTB staff commentaries at 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B). To the extent that the lower court considered the statutory definition, it did not apply that definition to the credit-bearing features of Connell’s integrated key-plus-*credit* “Cardlock” device.

Second, to the extent that FTB staff commentaries control TILA’s statutory provisions, the credit access device issued by Connell does not conform to the narrow exception suggested by 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B), because Connell’s device integrates exclusive access and credit-bearing features, with prescribed payment terms, for every credit transaction. (CP 26:12-27; 7)

Third, the Johnsons are entitled to limitations on liability for their stolen card under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii), because they properly exercised their cardholder rights and invoked their statutory protections under TILA.

The Johnsons address each of these issues, with legal authority and argument, in the sections below.

1. TILA's Clear and Express Definition of a "Credit Card" Controls the Application of the Statute.

TILA clearly defines the term "credit card" as "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit."² 15 USC § 1602(l). This express statutory language is the threshold for determining whether or not the Plaintiff's card is a "credit card" as defined by TILA and the FCBA's Regulation Z (Reg. Z). *Id.* Only "in the absence of a clear expression" does it become necessary to consider the examples and interpretations of the Federal Reserve Board's (FRB) staff commentaries. *Milhollin*, 444 US at 560. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467

² Reg. Z similarly defines "credit card" as "any card, plate, or other single credit device that may be used from time to time to obtain credit." 12 CFR § 226.2(15)(i).

US at 842-843. “Where a statute and an agency regulation regarding the same matters conflict, courts must defer to the statute.” *Pfennig*, 286 F.3d at 346 (referencing *K Mart Corp. v. Cartier, Inc.*, 486 US 281, 291 (1988)).

Once a court determines that a statute is “silent or ambiguous with respect to the specific issue,” the court proceeds to determine if the agency’s interpretation is based on a permissible construction of the statute. *Id.* Congress has given the FTB broad authority to carry out the purposes of TILA under step two of *Chevron*, but this authority is not without limits. *First Premier Bank, et al., vs. United States Consumer Financial Protection Bureau, et al.*, 819 F.Supp.2d 906, 916 (D.S.D. 2011); *Pfennig*, 286 F.3d at 345; *see also Anderson Bros. Ford v. Valencia*, 452 US 205, 219 (1981) (holding that courts need only defer to regulations that are not “repugnant” to TILA). In synthesizing the standards of deference offered by pre-*Chevron* decisions, including *Milhollin*, *Anderson Bros.*, and others, courts have read such cases “to describe a heightened level of deference that is due the agency’s interpretation of an ambiguous statute under step two, rather than a warrant to override a clear statute under *Chevron* step one.” *Colorado River Indian Tribes v. National Indian Gaming Commission*, 383 F.Supp.2d 123 (2005) (citing cases).

In the present matter, the lower court was presented with multiple definitions of a “credit card” under TILA, Reg. Z, and FTB staff commentaries. Based on the authorities presented above, the Johnsons submitted that the credit access device issued by Connell was a “credit card” as defined by 15 USC § 1602(1), and that TILA therefore limited their liability for the unauthorized use of the stolen card to \$50 as provided by 15 USC § 1643(a)(1) and Reg. Z at 12 CFR § 226.2(15)(i). Based on the applicability of that definition to what was indisputably a card used to purchase fuel on credit, the Johnsons argued that they were entitled to limitations on liability for their stolen card and proper disclosures regarding their rights and liabilities for unauthorized use. *See generally*, CP 14 (Defs.’ Mot. Partial. Summ. J.)

Connell did not argue that either the statutory or regulatory definitions were ambiguous, or that the credit access device it issued to the Johnsons did not “[exist] for the purpose of obtaining money, property, labor, or services on credit.” 15 USC § 1643(a)(1). Instead, Connell argued that the controlling law was found at 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B), which suggested that devices used “in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that [are] required to be used without regard to payment terms” are not “credit cards” under

Reg. Z. (RP at 30:17-25). In support of its argument, Connell relied on a partially excerpted rule from *Milhollin* to argue that “unless its demonstrably irrational . . . staff opinions construing the act of regulations [sic] should be dispositive.” (RP at 29:14-18). In fact, the rule of *Milhollin* is that “staff opinions construing the Act or Regulation should be dispositive,” *Milhollin*, 444 US at 565, but the *Milhollin* court explicitly states that staff commentaries are only considered “[i]n the absence of an express statutory mandate.” *Id.* at 556. The *Milhollin* court emphasized that “interpretation of TILA and Regulation Z demands an examination of their express language; *absent a clear expression*, it becomes necessary to consider the implicit character of the statutory scheme.” *Id.* Only after deciding that TILA was silent on the particular issue presented, the *Milhollin* court determined that “it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth in lending enactments.” *Id.*

Post-*Milhollin* courts have refined that court’s statements and consistently reinforced the principle that an examination of express statutory language is the first step of any analysis, and that unambiguous statutory language controls potentially conflicting regulations and associated agency staff commentaries. *Chevron*, 467 US at 842-843; *Pfennig*, 286 F.3d at 346; *Cartier, Inc.*, 486 US at 291; see also *Schramm*

v. *J.P. Morgan Chase Bank, et al.*, Memo. No. 14-56284 (9th Cir. 2016) (“The Federal Reserve Board’s Staff Interpretation controls only when TILA or Regulation Z are ambiguous.”) (attached hereto as Ex. A.).

In reaching its decision, the lower failed to first fully consider and rule upon whether or not TILA was ambiguous in its definition of a “credit card” at 15 USC § 1602(l). (RP 36:14-37:8 and CP 276 (Order. Defs.’ Mot. Partial. Summ. J). To the extent that the lower court considered the statutory definition, it did not apply that definition to the credit-bearing features of Connell’s integrated key-plus-*credit* “Cardlock” device. (RP at 36:19-24)(CP 276)(Order. Defs.’ Mot. Partial. Summ. J.) Instead, the court agreed with a previous Franklin County Superior Court Order from another judge, over the Johnsons’ objection, which relied on the same obscure and conflicting FTB commentary proffered in this case. (*Id.*: CP at 211-213).

In these respects, the court erred in its ruling that TILA did not apply in this case, and that the Johnsons were not entitled to the limitations on liability and related disclosures afforded to cardholders under the Act.

2. Connell’s Credit Access Device Does Not Conform to the Narrow Exception of 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B).

To the extent that FTB staff commentaries control TILA’s statutory definition of a “credit card,” the credit access device issued by

Connell does not conform to the narrow exception suggested by 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B). because Connell's credit access device integrates exclusive access and credit features, with prescribed payment terms, for every credit transaction. (CP 26-27; 226-227).

As a remedial statute, courts construe the application of TILA and Reg. Z liberally in favor of the cardholders the statute aims to protect, and in doing so, the substance of the transaction, not the form, dictates. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993) ("Because the Truth In Lending Act is liberally construed to protect consumers," courts look past the form of transactions to their substance to determine if TILA applies); *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1977) ("The Act is remedial in nature, and the substance rather than the form of credit transactions should be examined in cases arising under it.").

The FTB staff commentary suggests that devices used "in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that [are] required to be used without regard to payment terms" are not "credit cards" under Reg. Z. 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B). Significantly, this commentary does not suggest that such cards that also incorporate credit-bearing features are not "credit cards," *id.*, which would flatly contradict both TILA's statutory definition of "credit card" as any device

that exists “for the purpose of obtaining money, property, labor, or services on credit,” 15 USC § 1602(l), as well as Reg. Z’s applicability to any devices that “may be used from time to time to obtain credit,” 12 CFR § 226.2(15)(i).

To the extent that this staff commentary might control the statutory and regulatory definitions of a “credit card,” Connell’s “Cardlock” device is not simply a lock-and-key device that allows access to fuel pumps, “without regard for payment terms.” 12 CFR § 226, Supp.1 (A) § 226.2(a)(15)(2)(ii)(B). Rather, Connell’s device requires that it be used not only to unlock fuel pumps, but also to obtain the fuel on “credit,” as that term is defined by TILA and Reg. Z.³ With Connell’s device, the access device wholly integrates and fully regards specific its “payment terms,” including a credit-bearing feature linked to a credit account and cardholder agreement, for obtaining its petroleum products. (RP 23:9-16, 31:16-18).

Indeed, while Connell emphasized the lock-and-key features of its “Cardlock” device to the lower court, it carefully obfuscated the fundamental and fully integrated credit-bearing features of the key-plus-

³ See 15 USC 1602(f) (defining “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.”); and see 12 CFR § 226.2(14) (defining “credit” as “the right to defer payment of debt or to incur debt and defer its payment.”)

credit card. (RP at 31:5-18). In its fundamental design, function, and operation, Connell's card clearly exists "for the purpose of obtaining money, property, labor, or services on credit" and "may be used from time to time to obtain credit" as contemplated by TILA and Reg. Z. 15 USC § 1602(1); 12 CFR § 226.2(15)(i). The Plaintiff's card may or may not have evolved from a simple lock-and-key system, but it is now, in virtually all substantive respects, an "open-end credit" card under the Act. *See, e.g.*, 12 CFR § 226(20) ((i) creditor contemplates repeated transactions; (ii) creditor may impose a "finance charge" from time to time on an unpaid balance; (iii) the amount of credit that may be extended is made available to the extent that any outstanding balance is repaid).

Consistent with the plain language of Reg. Z, federal courts have ruled decisively that TILA and Reg. Z's unauthorized use provisions apply to all credit cards, even if they are used in connection with otherwise exempt extensions of credit. 12 CFR § 226, Supp.1 (A) § 226.3(1). This includes card-based payment systems in which the user is merely allowed to defer payment until a periodic bill is received, rather than rolling over the balance from one month to the next and paying finance charges. *See, e.g., Telco Communications Group, Inc. v. Race Rock, 57 F. Supp. 2d 340 (E.D. Va. 1999).*

Telco presents federal authority that is highly analogous to the present matter. In *Telco*, a telephone card issuer sued a business cardholder for more than \$92,000 in unauthorized charges to a telephone calling card. *Id.* at 341. Recognizing that “public utility credit” is normally exempt from Reg. Z, the court ruled that any card that permitted a cardholder “to defer payment on the purchase ... until the invoice was due and payable” is subject to Reg. Z’s limitations on cardholders’ liability for lost or stolen cards. *Id.* at 343; *see* 12 CFR § 226.12(b)(1)(ii) (limiting cardholder liability for unauthorized charges to a maximum of \$50.00). In so ruling, the court was not persuaded by the issuer’s arguments that its card “merely provides a method for accessing its public utility function from alternate sites and [has] no independent or potential credit function,” *id.*, or that “[t]he card can only be used to purchase telephone time, not other items normally bought with consumer credit,” *id.*, or that “the entire bill is due and payable in full upon receipt of each monthly invoice.” *Id.* The *Telco* court properly relied on the plain language of 12 CFR § 226.2(15)(i), substance over form regarding the credit-payment system itself, and the remedial intent of TILA and Reg. Z. In granting the cardholder’s Motion to Dismiss, the *Telco* court aptly noted:

Because the purpose of § 226.12(b) is to protect consumers, it makes little difference if the entire telephone bill is due and payable at the end of the month, or if the consumer chooses to pay a finance fee. The distinctions between credit cards and charge cards—and credit cards and telephone calling cards for that matter—are irrelevant to the ultimate goal of protecting the consumer from being liable for unauthorized use.”

Id. at 345.

As with the business telephone card at issue in *Telco*, Connell’s fuel card permits its cardholders, including the Johnsons, to “defer payment on purchases” until its invoices are due and payable, subject to the clear and expressly stated applicability of TILA and Reg. Z to any device that exists “for the purpose of obtaining money, property, labor, or services on credit,” 15 USC § 1602(1), and devices that “may be used from time to time to obtain credit,” 12 CFR § 226.2(15)(i). The lower court’s ruling not only contradicts the clear and express language of the statute, but it also undermines TILA’s fundamental purpose.

3. The Johnsons Are Entitled to The Rights and Protections Afforded by TILA to Victims of Credit Card Theft.

The Johnsons are entitled to the rights and protections afforded to victims of credit card theft, including TILA’s limitations on liability at 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii). Because the purpose of TILA is to protect consumers

in credit transactions, the statute must be construed liberally in favor of cardholders. *Hickman*, 566 F.2d at 46; *Pfennig*, 286 F.3d at 344.

Within TILA, FCBA and Reg. Z provide that “[t]he liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of \$50.00 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.” 12 CFR § 226.12(b)(1)(ii). Although FCBA provides a billing dispute and notification procedure in 15 USC § 1666, *et seq.*, such procedures do not constrain cardholders’ notifications of lost or stolen credit cards, which are covered by Reg. Z at 12 CFR § 226.12(b)(3). In those circumstances, notice “may be given, *at the option of the person giving it*, in person, by telephone, or in writing. *Id.* (emphasis added). The notice need not be given at the address or telephone number provided by the card issuer for that purpose. 12 CFR § 226 Supp. 1 (B) 226.12(b)(3)(1). It does not have to comply with billing error resolution procedures as to timing or form (*i.e.*, the billing dispute procedures per 12 CFR § 226.13). 12 CFR § 226 Supp. 1 (B) 226.12(b)(3)(1). In fact, Reg. Z provides that “[t]he liability protections afforded to cardholders in § 226.12 [*i.e.*, unauthorized charges on lost or stolen cards] do not depend on the cardholder’s following the error resolution procedures in § 226.13 [*i.e.*, standard billing dispute procedures]. For example, *the written notification and time limit*

requirements of § 226.13 do not affect the § 226.12 protections.” Id. at 12(b)(3)(3) (emphasis added).

While Reg. Z typically excludes transactions that are for “business, commercial, or agricultural” purposes, 15 USC § 1603; 12 CFR § 226.3(a), these exclusions do not apply to unauthorized charges on lost or stolen cards are not excluded:

The provisions of § 226.12(a) and (b) governing the issuance of credit cards and the limitations on liability for their unauthorized use ***apply to all credit cards***, even if the credit cards are issued for use in connection with extensions of credit that otherwise are exempt under this section.

12 CFR § 226, Supp. 1 (A) § 226.3(1) (emphasis added).

Reg. Z also requires card issuers to “provide adequate notice of the cardholder’s maximum potential liability and means by which the card issuer may be notified of loss or theft of the card,” and prohibits card issuers from imposing ***any*** liability on cardholders for unauthorized charges unless they do so. 12 CFR § 226.12(b)(2)(ii). This provision further requires the notice to state “that the cardholder’s liability shall not exceed \$50 (or any lesser amount) and that the cardholder may give oral or written notification . . .” *Id.*

The Johnsons properly contacted Connell to inform them that the credit card issued by Connell had been stolen, and to request replacement cards, within 72 hours of the theft. (CP at 56). Although Connell acknowledged the Johnson's request and issued them new cards, Connell did not cancel the stolen account numbers, leaving the thief free to charge tens of thousands of dollars to the credit account over the next two months. *Id.* Had Connell duly cancelled the stolen accounts at or near the time it issued the Johnsons' "replacement" cards, the thief would not have been able to make such exorbitant and unauthorized charges. *Id.* Instead, Connell allowed a reported thief to charge tens of thousands of dollars to a stolen account, then demanded that the Johnson's pay for it in violation of 12 CFR § 226.12(b)(2)(ii). *Id.*

With regard to TILA's disclosure requirements, the only disclosure Connell provided to the Johnsons, and countless other cardholders, was false and misleading. Its standard agreement requires cardholders to accept that that "[i]f a card is lost or stolen, I understand that I am responsible for payment of all charges for 24 hours after I inform Connell Oil, Inc. **in writing** to invalidate the card." (CP at 32-36). While Reg. Z provides that "if state law or an agreement between a cardholder and the card issuer imposes *lesser liability* than that provided in [§ 226.12(b)], the lesser liability shall govern," 12 CFR § 226.12(b)(4) (emphasis added), it does not permit a card issuer to impose greater liability, or change the

terms of cardholder protections, beyond those established in 12 CFR § 226.12(b)(ii). In addition to actual damages, card issuers who violate Reg. Z may be liable for “twice the amount of any finance charge in connection with the transaction, with a minimum of \$500 and a maximum of \$5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures.” 15 USC § 1640(a)(2)(A)(iii). Prevailing cardholders are also entitled to actual damages and an award of costs and fees. 15 USC § 1640(a)(3).

The lower court erred in ruling that TILA did not apply to this case, and that the Johnsons were not entitled to the limitations on liability, and disclosure of the same, that TILA affords to victims of credit card theft.

4. The Johnsons Are Entitled to an Award of Costs and Fees.

Pursuant to TILA, 15 USC § 1640(a)(3), and RCW 4.84.330, the Johnsons are entitled to recovery of their costs and fees as the prevailing party in this action. Pursuant to RAP 18.1, she requests that this Court make such an award consistent with 15 USC § 1640(a)(3) and RCW 4.84.330.

E. CONCLUSION

Because TILA’s clear and express definition of a “credit card” controls the applicability of the statute, and because the key-plus-*credit*

card issued by Connell 1) exists “for the purpose of obtaining money, property, labor, or services on credit,” 15 USC § 1602(1), and “may be used from time to time to obtain credit,” 12 CFR § 226.2(15)(i), the lower court erred in ruling that TILA did not apply to this case. The Johnson’s properly exercised their statutory rights as victims of credit card theft under TILA and were wrongfully denied the statutory protections and disclosures to which they are entitled. Should this Court rule in favor of the Johnsons, they request an award of costs and attorney’s fees pursuant to RAP 18.1, the parties’ contract terms, 15 USC § 1640(a)(3) and RCW 4.84.330.

Based upon the legal authorities and arguments herein presented, the Johnsons respectfully request that this Court reverse the decision of the Superior Court below and rule in favor of her claims or remand with instructions.

DATED this 9th day of November, 2017.

Respectfully submitted,


Brian G. Cameron, WSBA #44905
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **9th day of November, 2017**, at Spokane, Washington, I caused to be served the foregoing document(s), and accompanying exhibits, on the following person(s) and/or entity(ies) in the manner indicated:

Brian Davis Leavy Schultz Davis, PS 2415 W. Falls. Ave. Kennewick, WA 99336	<input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input checked="" type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA EXPRESS DELIVERY
--	---

DATED this 9th day of November, 2017.



DAN KEEPE
Paralegal

EXHIBITS

Exhibit A

Schramm v. J.P. Morgan Chase Bank, et al.,

Memo. No. 14-56284 (9th Cir. 2016)..... A-1

BARBARA L. SCHRAMM, an individual; STEVEN L. WEINSTEIN, an individual, individually and on behalf of all others similarly situated, Plaintiffs - Appellants,

v.

J.P. MORGAN CHASE BANK, N.A., a banking corporation; CHASE HOME FINANCE, LLC, a limited liability company, Defendants-Appellees.

No. 14-56284

United States Court of Appeals, Ninth Circuit

July 12, 2016

NOT FOR PUBLICATION

Submitted July 7, 2016 [**] Pasadena, California

Appeal from the United States District Court No. 2:09-cv-09442-JAK-FFM, for the Central District of California John A. Kronstadt, District Judge, Presiding

Before: VANASKIE, [***] MURGUIA, and WATFORD, Circuit Judges.

MEMORANDUM [*]

Barbara Schramm and Steven Weinstein (collectively, "Schramm") appeal from the district court's entry of judgment in favor of JPMorgan Chase Bank, N.A. ("Chase") following a bench trial on Schramm's class action claim under the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgment of the district court.

On appeal, Schramm argues that Chase's mortgage disclosures were "unlawful" for purposes of the UCL because they failed to comport with the Federal Reserve Board's Staff Interpretation of Regulation Z, which the Federal Reserve Board promulgated to implement the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f. This argument was waived, as Schramm never clearly made it before the district court. See *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). While "[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court," *Puerta v. United States*, 121 F.3d 1338, 1341-42 (9th Cir. 1997), Schramm's reliance on the staff interpretation is more than just an additional citation.

Rather, it is an entirely new theory of liability of which the district court was never put on notice. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

Even if the argument were not waived, the Federal Reserve Board's Staff Interpretation controls only when TILA or Regulation Z are ambiguous, which Schramm does not argue is the case here. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 203 (2011).

AFFIRMED.

Notes:

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**]The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[***]The Honorable Thomas I. Vanaskie, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

Citing References :

No negative treatment in subsequent cases