



September 10, 2012

NINTH CIRCUIT AFFIRMS DISMISSAL OF CLAIMS ALLEGING ADVERTISING DEFICIENCIES

On August 31, 2012, the States Court of Appeals for the Ninth Circuit affirmed a district court's decision dismissing a consumer's claim that an advertisement for a credit card did not adequately disclose an annual fee. The credit card was issued by a federally-chartered bank, and branded in the name of a retailer's rewards program.

The consumer's claim arose from a newspaper advertisement stating that credit card applicants would receive \$25 worth of reward certificates for using the credit card. The consumer applied online to become a cardholder and reviewed the "Program Rules" and "FAQs" page before applying – neither of which mentioned the annual fee. To complete the application, the consumer was directed to a page with a well-captioned scroll box containing important account terms, including a description of the annual fee. The consumer checked a box adjacent to an affirmation stating that the applicant agreed to these account terms.

Upon approval, the consumer received his account documents and saw that there was an annual fee for the account. The consumer re-reviewed the webpage containing the account terms and saw the annual fee disclosed there. Rather than cancel the card, the consumer refused to activate it, continued to pay the annual fee for five years and then filed a class action complaint that was ultimately dismissed.

The consumer filed an amended complaint alleging four causes of action against the bank and the retailer, including (i) false advertising in violation of California's False Advertising Law, (ii) fraudulent concealment, (iii) "unlawful" business practices in violation of California's Unfair Competition Law ("UCL") and (iv) "unfair" and "fraudulent" business practices in violation of the UCL. The district court dismissed the claims, taking judicial notice of the account terms documents referenced in, but not attached to, the complaint. The consumer appealed.

The Ninth Circuit Court first agreed that the district court was entitled to review the account terms documents, even though the documents were not attached to the amended complaint, as the

contents of such documents were alleged in the complaint and not in dispute. The Ninth Circuit Court also determined that the consumer did not challenge the documents' authenticity in the district court, regardless of the consumer's assertions that he did not review the documents and that they were not made available to him.

In addressing the consumer's claim that the advertisement violated the California False Advertising Law, the Ninth Circuit Court noted the important advertisement disclaimer that "other restrictions may apply." The consumer would have had to show that members of the public were likely to be deceived by the advertisement, and the court concluded that "no reasonable consumer could have believed that if an annual fee was not mentioned, it must not exist." The court also rejected the argument that the annual fee was misleading because it offset any available rewards, stating that "[i]t defies common sense to claim that the tradeoff would lead a rational consumer to conclude that any credit card that offers rewards for spending must therefore not have associated costs of ownership."

With regard to the claim that the annual fee was fraudulently concealed, the Ninth Circuit Court focused only on the fact that the consumer could not demonstrate justifiable reliance on the failure to disclose the annual fee. The court determined that the consumer's failure to read the account terms before checking the box to accept the terms and conditions was fatal to his claim. Especially important was the consumer's admission that he was able to discover the annual fee when he revisited the website containing the account terms.

As to the claims alleging that the bank and retailer made inadequate disclosure of the annual fee in violation of the UCL, the court's determinations hinged on whether there was specific legislation that would provide a safe harbor by permitting or mandating the disclosure. With regard to the online application, the court held that the Truth in Lending Act ("TILA") and its implementing Regulation Z provide a safe harbor by mandating the format of the application disclosures. Because the annual fee was disclosed in compliance with the TILA and Regulation Z, the application disclosure could not serve as a basis for liability under the UCL.

However, the advertising material did not enjoy the benefit of the safe harbor under the UCL, as the omission of the annual fee disclosure was not expressly permitted by law. In determining

Darrell L. Dreher
ddreher@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Charles V. Gall
cgall@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

DREHER TOMKIES SCHEIDERER LLP

2750 Huntington Center

41 S. High Street

Columbus, Ohio 43215

Telephone: (614) 628-8000 Facsimile: (614) 628-1600

WWW.DLTLAW.COM

To see all previously sent ALERTS, visit our website at www.dltlaw.com

To decline future ALERTS, please contact us at ALERTS@DLTLAW.COM. This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies
mtomkies@dltlaw.com

Margaret M. Stolar
mstolar@dltlaw.com

Robin R. De Leo
robin@dreher-la.com

Vanessa A. Nelson
vnelson@dltlaw.com

Kathleen L. Caress
kcaress@dltlaw.com



whether the omission was “unlawful,” the court explained that the advertisements must have violated some other “borrowed” law (here, the consumer alleged a violation of Section 5 of the Fair Trade Commission Act, prohibiting unfair or deceptive practices). The Ninth Circuit court determined that no reasonable consumer would have been deceived into thinking that no annual fee would be imposed. The court also determined that the practice was not unfair, as the harm was reasonably avoidable by reviewing the provided disclosures. Furthermore, the consumer was entitled to close his account and receive a refund of the annual fee within 90 days of account opening, which he chose not to do.

In evaluating whether the advertising material was “fraudulent” in violation of the UCL, the court rejected this claim for the same reasons that it rejected the consumers False Advertising Law claim – the consumer was put on notice that there were “other restrictions” that might apply.

Lastly, the Ninth District Court rejected the contention that the advertisements were “unfair.” Although the court was confronted with two different standards of what type of conduct is “unfair” under the UCL, it declined to resolve the question of which standard applied because the consumer failed to state a claim under either definition. The court emphasized that (i) the advertisements clearly warned that “other restrictions might apply,” (ii) the annual fee was disclosed in the application materials and (iii) the consumer had the opportunity to cancel the account for a full refund.

Although the creditor prevailed, this case illustrates the kinds of arguments likely to arise as advertisements come under increasingly sophisticated scrutiny under the broad concept of “unfairness” and the like. □

✧ *Mike Tomkies and Kathleen Caress*