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# Credit Union Attorney

## Law Letter

A Law Letter for Credit Unions, Financial Institutions, and Attorneys

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### **Bank That Issued Credit Card with Fixed Rate Could Be Liable Under Truth-in-Lending Act for Increasing Rate after Thirteen Months**

In *Roberts v. Fleet Bank*, No. 01-4420 (3d Cir. Aug. 27, 2003), the Third Circuit held that a jury should decide whether a bank had violated the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* (“TILA”), by increasing the interest rate on a credit card advertised and issued to a consumer as a fixed rate card.

#### Solicitation

Fleet Bank (R.I.), N.A., and Fleet Credit Card Services, L.P. (collectively “Fleet”) sent Denise Roberts a credit card solicitation encouraging her to open a Titanium MasterCard charge account with Fleet. Fleet represented that the account would have a 7.99% fixed annual percentage rate of interest (“APR”) on all purchases and balance transfers. The solicitation stated that the APR was “NOT an introductory rate” and that “it won’t go up in just a few short months.” About 13 months after Roberts opened the account, Fleet sent her a letter stating that it was increasing the APR to 10.5%.

Roberts sued on behalf of a class of similarly-situated account holders, alleging that Fleet’s rate increase violated the TILA.

#### TILA’s Credit Card Provisions

Since 1988, when Congress amended the TILA with passage of the Fair Credit and Charge Card Disclosures Act, the TILA has required credit and charge card issuers to provide more detailed and uniform disclosures of credit terms, interest rates, and other consumer costs, at the time of application or solicitation, rather than after issuance of the card. Congress delegated the responsibility of “prescribing regulations to carry out the purposes of” the TILA to the Federal Reserve Board. *See* 15 U.S.C. § 1604(a). In response to this mandate, the Board promulgated “Regulation Z,” 12 C.F.R. § 226. The Board also published a comprehensive “Official Staff Interpretation.” 12 C.F.R. Pt. 226, Supp. 1. Both the TILA and the Board-promulgated regulations require a credit card issuer to disclose the applicable APR clearly and conspicuously in a table. 15 U.S.C. § 1632; 12 C.F.R. § 226.5. That table is commonly referred to as the “Schumer Box,” in honor of Congressman, now Senator, Charles Schumer, who sponsored the bill for the 1988 amendment to the TILA.

### More About the Solicitation

Both the Schumer Box and an initial disclosure statement in Fleet's solicitation to Roberts stated two conditions under which Fleet could raise the APR: (1) failure of the card holder to meet any repayment requirement; or (2) closure of the account. Roberts asserted that a reasonable consumer in her position could believe that those two conditions were the only two under which Fleet could raise her APR and, therefore, that the Schumer Box in Fleet's solicitation did not clearly and conspicuously disclose that the 7.99% APR was subject to change at any time. In opposition, Fleet argued that the following statement in the "Terms" of the "Pre-qualified Offer" section made clear that rates were subject to change anytime: "my Agreement terms (including rates) are subject to change."

### District Court's Decision

The federal district court in which Roberts brought the claim agreed with Fleet that its Schumer Box was sufficient and that its solicitation did not violate the TILA. The court entered a summary judgment for Fleet. Roberts appealed.

### Appeals Court Reverses for Trial

On appeal, the Third Circuit reversed and held that a reasonable consumer could find Fleet's disclosures unclear and inconspicuous and therefore in violation of the TILA. The court said that, not only was the information in the Schumer Box unclear, but also the statements made in the solicitation letter that the APR was "NOT an introductory rate" and that "it won't go up in just a few short months" added to the potential for consumer confusion. Accordingly, the Third Circuit sent the case back to the district court for a trial on Roberts' TILA claim.

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## **Employer Owed Statutory Penalties and \$39,000 in Life Insurance to Employee Whose COBRA and ERISA**

## **Rights Were Violated**

In *Brown v. Aventis Pharmaceuticals, Inc.*, No. 02-4063 & 03-2084 (8th Cir. Sept. 9, 2003), the Eighth Circuit held that an employer had to pay almost \$20,000 in statutory penalties for violating notification requirements of the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161 *et seq.* ("COBRA"), and the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and also had to purchase \$39,000 in life insurance for the former employee whose rights were violated.

### Facts

Linda Brown worked for Aventis Pharmaceuticals, Inc., and its predecessors from 1986 to 2000. In 2000 she received a 180-day period of disability leave. She was unable to return to work at the end of that period and Aventis terminated her, effective October 29, 2000.

Brown received her termination letter November 15, 2000. It stated that she would receive information regarding the impact of termination on her benefits at a later date. Brown's employee benefits included health, dental, and life insurance coverage. The life insurance coverage was convertible upon leaving the company. The employee had the right to convert without providing further evidence of insurability. To qualify for conversion, an employee had to fill out some paperwork and pay a fee within 31 days of termination. The conversion procedures were contained in Aventis's Employee Yearbook. Aventis provided Brown with a copy of this Yearbook sometime before she took disability leave. She kept it in her employee locker and left it there when she went on leave. While she was on leave, her locker was cleaned out by someone at Aventis and the contents were not returned to her.

Brown never received the benefits information promised in her termination letter. Two times, she

called Aventis's Human Resources Department, requesting benefits information. Both times, Aventis's personnel said the information would be forthcoming. Two months after her termination, Brown hired an attorney to help her get the benefits information from Aventis. Brown's attorney made two more requests for benefits information. Four months after her termination, Brown received COBRA information and insurance conversion forms. Aventis did not provide a copy of the details of the insurance conversion plan that were contained in the Aventis Employee Yearbook.

Thereafter, Brown elected COBRA coverage, which was retroactive. She also attempted to convert her life insurance coverage. The insurance company denied her request for conversion because it was not filed within 31 days of her termination.

#### Suit

Brown sued Aventis, alleging that its conduct had violated her rights under COBRA and ERISA. On her COBRA claim, Brown sought the maximum statutory penalties. On her ERISA claim, Brown sought penalties and the insurance coverage that she had lost.

Aventis objected to imposition of statutory penalties under COBRA, arguing that its actions were not in bad faith and that Brown had suffered no actual loss of health insurance coverage because benefits were retroactive. Aventis further argued that its failure to provide Brown with insurance conversion information at the time of termination did not violate ERISA because it had already given Brown that information in the Employee Yearbook.

Following a trial, the district court ruled in favor of Brown. It imposed the maximum in statutory penalties (\$8030) against Aventis for violating COBRA's timely notification procedures related to health insurance coverage. The district court also imposed a statutory penalty of \$11,550 against Aventis, under ERISA, for failing to supply Brown

with a copy of the details of the insurance conversion plan at the time of her termination. The court also required Aventis to provide Brown with life insurance in the amount of \$39,000, the amount of insurance Brown was unable to convert, minus any costs Brown would have incurred in the conversion process.

#### Appeal

Aventis appealed, arguing: (1) that the district court abused its discretion in the amount of COBRA penalties awarded; (2) that Aventis's failure to provide information on life insurance conversion benefits at the time termination did not violate ERISA; and (3), even if its conduct violated ERISA, the district court lacked authority to award insurance benefits to Brown, because ERISA authorizes only restitution, not compensatory damages. The Eighth Circuit Court of Appeals rejected each of Aventis's arguments, ruling: (1) that Aventis's failure to act for four months in spite of Brown's repeated requests was evidence of bad faith and, while she suffered no loss of health insurance benefits, she had been forced to hire an attorney to obtain the COBRA benefits to which she was entitled; (2) that where, as here, the evidence showed that the employer had retained the employee's copy of the Yearbook explaining life insurance benefits and the employee had made a request for benefits information post termination, it violated ERISA not to provide her with another copy of the life insurance benefits information; and (3) the requirement of purchasing life insurance for Brown could be viewed as restitution. Accordingly, the judgment against Aventis was affirmed.

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### **Bank that Received Stolen Funds Could Keep Them Because No Evidence That It Knew or Should Have Known Funds Were Stolen**

In *Regions Bank v. The Provident Bank*, No. 02-15981 (11th Cir. Sept. 19, 2003), the Eleventh

Circuit refused to allow a bank seeking to recover stolen funds from another bank to do so, because there was no evidence that the receiving bank knew or should have known that the funds were stolen.

#### **Facts**

Regions Bank and Provident Bank were both engaged in advancing money to Morningstar Mortgage Bankers, Inc., an independent mortgage lender, to fund residential real estate loans. At the beginning of April 2000, Morningstar owed Provident money in connection with several loans Provident had funded. On April 4, 2000, an attorney who performed closings for Morningstar notified Provident that his signature had been forged on closing documents and that the FBI was investigating the transaction. The next day, Provident demanded that Morningstar repay all outstanding loans within 10 days. One day later, Provident learned that Morningstar had used the same collateral to obtain funding from both Provident and First Union Bank.

Morningstar subsequently used money advanced by Regions for residential mortgages to repay Provident. The money in question was sent by Regions on April 10 & 11, 2000, in three separate wire transfers directly to escrow accounts at Fleet Bank maintained by attorneys who were performing closings for Morningstar. Each wire transfer bore the name of the intended borrower. In each case, a Morningstar official contacted the closing attorney and stated that the funds had been transferred to him in error and should have been transferred to a Morningstar account at Provident. The closing attorney then had Fleet Bank wire transfer the funds to the Morningstar account at Provident. Provident received these wire transfers on April 11 & 13, 2000. Each wire transfer to Provident bore the name of the intended borrower identified by Regions. The same Morningstar official then contacted Provident and authorized that bank to set

off the funds in Morningstar's account against Morningstar's outstanding loan balances. On the afternoon of April 13, 2000, a Fleet Bank employee contacted a Provident employee and informed her that the wire transfers were wrongfully sent to Provident. Fleet Bank did not attempt to recall the wire transfers that day though. On April 14, Provident used the funds in the Morningstar account to repay the loan balances owed it by Morningstar.

#### **Suit to Recover Funds**

On April 17, 2000, Regions requested that Provident return its funds. Provident refused. Regions sued, arguing that Provident was liable for conversion, unjust enrichment, receipt of stolen property, and wrongful set off. Because Provident obtained the funds in question via the Federal Reserve Wire Transfer Network, Provident's conduct was governed, at least in part, by Regulation J of the Federal Reserve Regulations, 12 C.F.R. §§ 210.25-210.32. Regulation J incorporates the provisions of Article 4A of the Uniform Commercial Code ("UCC").

Regions could not dispute that Provident complied with the letter of Regulation J in accepting the wire transfers and setting off the funds to credit the debt owed it by Morningstar. Regions instead argued that Provident violated the spirit of Regulation J because it knew or should have known that the funds were fraudulently obtained. The district court rejected Regions' argument, on the ground that there was no evidence that Provident knew or should have known the funds were fraudulently obtained. The district court entered a judgment for Provident. Regions appealed.

#### **Appeal**

On appeal, the Eleventh Circuit affirmed. The court agreed with Regions that Regulation J should not be interpreted so as to shield a receiving bank

from fraudulent activity if it knew or should have known that the funds were fraudulently obtained. It agreed with the district court though, that Regions could not establish that Provident knew or should have known that the funds it received were

fraudulently obtained. The court characterized the evidence as showing no more than that Morningstar "engaged in poor business or accounting practices, ... [and] was an inept business entity with questionable ethical standards."