

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LISA PENNER, PAUL HAUGH and DARCI  
HAUGH, on behalf of themselves and all others  
similarly situated,,

Plaintiffs,

v.

CHASE BANK USA, N.A., and BANK ONE,  
DELAWARE, N.A.,,

Defendants.

Case No. C06-5092 FDB

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFFS'  
FIRST AMENDED COMPLAINT

This matter comes before the Court on a Fed. R. Civ. P. 12(b)(6) motion of Defendants Chase Bank USA, N.A. and Bank One Delaware, N.A. (hereafter, Chase) to dismiss Plaintiffs' First Amended Complaint for failure to plead any facts that state a cause of action. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants the motion and dismisses the First Amended Complaint for the reasons stated below.

**INTRODUCTION AND BACKGROUND**

Plaintiffs Lisa Penner, Paul Haugh, and Darci Haugh, on behalf of themselves and all others similarly situated, allege that Chase engages in a practice of increasing interest rates retroactively, without giving advance notice, violating the Truth in Lending Act (TILA), the Cardmember

1 Agreement, and state contract and consumer protection laws.<sup>1</sup>

2 Chase is a national banking association organized under the National Bank Act with its home  
3 office in the State of Delaware. Plaintiffs purport to represent all Chase credit card members in  
4 Washington “whose interest rates charges on outstanding balances were retroactively increased by  
5 Chase without warning or advance notice.” Plaintiffs contend that Chase violated Regulation Z of  
6 the TILA, 12 C.F.R. § 226.9(c), by failing to notify its customers of increases in the interest rates  
7 before the effective date of the change. Plaintiffs assert that Chase is not in compliance with  
8 Regulation Z because rate increases are discretionary, are based on unknown factors, and are applied  
9 retroactively. Plaintiffs asset that such unannounced and retroactive interest rate increases are unfair,  
10 unconscionable and constitute illegal penalties.

11 The First Amended Complaint alleges six causes of action arising out of Chase Cardmember  
12 interest rate practices:(1) Chase’s practices violate the TILA, (2) Plaintiffs are entitled to declaratory  
13 relief, (3) the Court should sever the unconscionable contract terms, (4) the Court should declare  
14 that Chase’s practice is the imposition of an illegal penalty, (5) Chase is committing consumer fraud  
15 under Washington’s Consumer Protection Act, RCW 19.86, and (6) Chase breached its contract  
16 with cardholders.

17 Chase contends that its practices are in compliance with the TILA, Regulation Z, as the  
18 retroactive increases complained of are the implementation of lawful terms explicitly disclosed in the  
19 Cardmember Agreement. Thus, Chase claims there is no violation of the TILA or breach of  
20 contract. Chase further asserts that Plaintiffs’ common law claims fail because the challenged  
21 practices are explicitly authorized by federal and State of Delaware law and that the State of

22

---

23 <sup>1</sup>This Court takes particular notice of the decision of Judge Conti in Evans v. Chase  
24 Manhattan Bank USA, N.A., 2006 WL 213740 (N.D. Cal.,2006)(Slip Copy, January 27, 2006),  
25 wherein the Court dismissed a complaint against Chase asserting nearly identical claims. This Court  
26 finds Judge Conti’s well-reasoned decision highly persuasive and regrets the necessity of revisiting  
the issues.

1 Washington consumer protection law claim is preempted.

2 The Cardmember Agreement<sup>2</sup> between Chase and Plaintiffs specifically provides that the  
3 annual percentage rate “may vary” if the cardmember is in default under the Agreement for the  
4 following specified reasons: failure to make minimum payments, exceeding credit limits, failure to  
5 make payment to other creditors, payments with dishonored checks, and upon demand after closing  
6 the account. The Cardmember Agreement states that if any of these default events occurs, Chase  
7 “may increase the APRs (including any introductory or promotional APR) on all balances (including  
8 existing balances, but not Overdraft Advances) “up to a maximum default rate of the prime rate plus  
9 23.99%.” The Agreement further lists factors considered to determining the default rate, such as  
10 length of time account is open; existence, serious and timing of defaults on the account; other  
11 indications of account usage and performance; and information related to credit history. The  
12 Agreement provides that Chase reserves the discretion to charge reduced default rates below the  
13 maximum default rate stated in the rates and fees table. Finally, the Agreement provides that the  
14 “default rate will take effect as of the first day of the billing cycle in which the default occurs, and  
15 will apply to purchase balances from the previous billing cycle for which periodic finance charges  
16 have not been already billed.”

#### 17 **STANDARDS FOR RULE 12(b)(6) DISMISSAL**

18 On a motion to dismiss for failure to state a claim, the Court must construe the complaint in  
19 the light most favorable to the plaintiff, taking all his allegations as true and drawing all reasonable  
20 inferences from the complaint in his favor. A complaint should not be dismissed for failure to state a  
21 claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
22 which would entitle him to relief. Doe v. U.S., 419 F.3d 1058, 1062 (9<sup>th</sup> Cir. 2005). The complaint

---

24 <sup>2</sup>Plaintiffs did not attach to their Complaint a copy of the Cardmember Agreement to which  
25 the Complaint makes reference. The Cardmember Agreement of Plaintiff Paul Haugh has been cited  
26 by Defendants and is referenced in this Order.

1 need not set out the facts in detail; what is required is a “short and plain statement of the claim  
2 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); La Salvia v. United Dairymen, 804  
3 F.2d 1113, 1116 (9<sup>th</sup> Cir. 1986). Thus, the Court's task “is merely to assess the legal feasibility of the  
4 complaint, not to assay the weight of the evidence which might be offered in support thereof.”  
5 Cooper v. Parsky, 140 F.3d 433, 440 (2<sup>nd</sup> Cir. 1998).

#### 6 **REGULATION Z AND THE TRUTH IN LENDING ACT**

7 The Federal Reserve Board has adopted regulations (Regulation Z, 12 C.F.R., part 226)  
8 implementing provisions of the TILA. Section 226.6(a)(2) requires “a disclosure of each periodic  
9 rate that may be used to compute the finance charge ... and the corresponding annual percentage  
10 rate.” Section 226.9(c)(1), requires creditors to notify consumers whenever “any term required under  
11 § 226.6 is changed.” The Official Staff Commentary<sup>3</sup> to Regulation Z (“Commentary”), requires  
12 Chase to provide written notice “if there is an increased periodic rate or any other finance charge  
13 attributable to the consumer's delinquency or default.” 12 C.F.R. pt. 226, Supp. I, § 226.9(c)(1), cmt.  
14 3. The Commentary goes on to state, however, that “[n]o notice of a change in terms need be given  
15 if the specific change is set forth initially, such as: [r]ate increases under a properly disclosed  
16 variable-rate plan.” 12 C.F.R. pt. 226, Supp. I, § 226.9(c), cmt. 1.

17 In Evans v. Chase Manhattan Bank USA, N.A., 2006 WL 213740 (N.D. Cal.,2006)(Slip  
18 Copy, January 27, 2006), Judge Conti reviewed the exact circumstances alleged here and found that  
19 Chase’s Cardmember Agreement gives cardmembers the appropriate notice required under  
20 Regulation Z. Addressing plaintiffs’ allegations that the rate increases are discretionary and based on  
21 unknown factors, Judge Conti noted that Regulation Z states that “notice must be given if the  
22 contract allows the creditor to increase the rate at its discretion but does not include specific terms for  
23 an increase.” 12 C.F.R. pt. 226, Supp. I, § 226.9(c), cmt. 1. According to the Commentary, because

---

24  
25 <sup>3</sup>The Commentary, which is put forth by the Board of Governors of the Federal Reserve  
26 System is entitled to a great deal of deference. Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219,  
(1981)

1 Chase's Cardmember Agreement discloses the specific terms for its increases, it is not bound by  
2 Regulation Z's notice requirements. Evans, 2006 WL 213740 at 2. Chase discloses the maximum  
3 rate it will set an APR in the event of a cardmembers default. Thus, the increase in rates based upon a  
4 cardmembers default is not a “change in terms” under the TILA because the rate increase has been  
5 previously disclosed. Similarly, because Chase gives the reasons for its rate changes, Plaintiffs'  
6 contention that they are based on unknown factors is simply not accurate. That Chase may elect not  
7 to increase the rate to the maximum allowable by the Cardmember Agreement does not require any  
8 additional notice. Section 226.9(c)(2) provides that “[n]o notice ... is required when the change  
9 involves ... reduction of any component of a finance or other charge.” A decision not to increase the  
10 interest rate to the maximum allowed has the same effect as a reduction in the maximum default to a  
11 lower rate. See, Evans 2006 WL 213740 at 2-3.

12 Plaintiffs assert that the retroactive nature of Chase's rate increase is a “change in terms”  
13 requiring prior notice. Judge Conti rejected this allegation as well:

14 **[T]he Court is unimpressed by Plaintiffs' complaints that the rate increases are**  
15 **discretionary, that they are based on unknown factors, and that the rate increases are**  
16 **retroactive.** These complaints have nothing to do with Regulation Z's notice  
17 requirements. **The Official Staff Commentary to Regulation Z states that “notice**  
18 **must be given if the contract allows the creditor to increase the rate at its**  
19 **discretion but does not include specific terms for an increase.”** 12 C.F.R. pt. 226,  
20 Supp. I, § 226.9(c), cmt. 1. According to the Commentary, because Chase's  
21 Cardmember Agreement discloses the specific terms for its increases, it is not bound  
22 by Regulation Z's notice requirements.FN5 Similarly, because Chase gives the reasons  
23 for its rate changes, Plaintiffs' contention that they are based on unknown factors is  
24 simply not accurate. Finally, **that Chase applies rate increases retroactively is**  
25 **disclosed by the Cardmember Agreement.**

26 Evans, 2006 WL 213740 at 2-3. (emphasis added, citations omitted).

27 The Cardmember Agreement sets forth the circumstances constituting default and the  
28 maximum default interest rate. It further identifies the specific terms that might result in higher  
29 interest rate up to the maximum default rate and the factors considered in determining whether to  
30 charge the maximum default rate or a lower rate. The Cardmember Agreement also explicitly states  
31 that the increase in rates will take effect as of the first day of the billing cycle in which the default

1 occurs, and will apply to purchase balances from the previous billing cycle for which periodic finance  
2 charges have not been already billed. As Judge Conti held in Evans, an increase in interest rate based  
3 explicitly on the terms set forth in the Cardmember Agreement is simply not a “change in terms” that  
4 requires notice. The Complaint does not state a claim for relief under the TILA and thus, the First  
5 Cause of Action for violation of the TILA is subject to dismissal.

#### 6 **DECLARATORY RELIEF AND COMMON LAW CLAIMS**

7 Plaintiffs’ second, third and fourth causes of action allege that these same provisions are unfair  
8 and unconscionable and constitute an illegal penalty. Specifically, Plaintiffs’ second claim asks the  
9 Court for a determination and a declaration that these provisions are unfair, unconscionable and  
10 constitute an illegal penalty, and as such are unenforceable. Plaintiffs request an award of damages to  
11 the extent Chase has enforced the unconscionable and illegal penalty. Plaintiffs’ third cause of action  
12 asks the Court to sever the unconscionable contract terms and for appropriate damages. Plaintiffs’  
13 fourth cause of action asks the Court for an order enjoining Chase from further enforcement and  
14 collection of increased finance charges based on interest rates imposed retroactively and without  
15 advance notice. Plaintiffs also ask the Court to order Chase to make restitution and disgorge its  
16 profits.

17 Chase contends that the provisions are authorized by the law of Chase’s home state, Delaware  
18 and cannot be deemed unconscionable.

19 Judge Conti dismissed virtually identical causes of action brought against Chase in Evans v.  
20 Chase Manhattan Bank USA, N.A., 2006 WL 213740 (N.D. Cal.,2006)(Slip Copy, January 27,  
21 2006). Again, this Court finds Judge Conti’s analysis persuasive. The Cardmember Agreement states  
22 that the terms of the Agreement shall be governed and interpreted in accordance with the laws of  
23 Delaware. Section 944 of the Delaware Banking Act, 5 Del. C. § 944, states that “[i]f the agreement  
24 governing the revolving credit plan so provides, the periodic percentage rate or rates of interest under  
25 such plan may vary in accordance with a schedule or formula.” A permissible schedule or formula

1 may include provision in the agreement governing the plan for a change in rates of interest applicable  
2 to all or any part of outstanding unpaid indebtedness contingent upon the happening of any event or  
3 circumstance specified in the plan, which event or circumstance may include the failure of the  
4 borrower to perform in accordance with the terms of the plan. 5 Del. C. § 944. The Cardmember  
5 Agreement complies with these requirements. See, Evans, 2006 WL 213740 at 3. Based on this  
6 statutory authority, Judge Conti held that “[w]here, as here, Delaware law not only speaks directly to  
7 the issue, but specifically authorizes the custom, the Court will not declare the terms unconscionable.”  
8 Evans, 2006 WL 213740 at 3.

9 This Court (and Judge Conti, in Evans) has determined that the Complaint does not allege  
10 facts that support the allegation that the practices of Chase violate either federal or State of Delaware  
11 law. It is also evident that the retroactive increase in interest charges do not constitute an unlawful  
12 penalty. See, United States v. Childs, 266 U.S. 304, 307 (1924)(“A penalty is a means of  
13 punishment; interest a means of compensation”); Citibank, N.A. v. Nyland, Ltd., 878 F.2d 620, 624-  
14 25 (2<sup>nd</sup> Cir. 1989)(Increased in interest rate on principal in the event of a default to a “default rate” of  
15 17.5% is not an unlawful penalty, but simply reflects the heightened risk of repayment that the  
16 creditor bears upon entry of default).

17 The terms of the Cardmember Agreement are not unconscionable and do not constitute an  
18 unlawful penalty. Plaintiffs’ second, third and fourth causes of action are subject to dismissal.

### 19 WASHINGTON’S CONSUMER PROTECTION ACT

20 Plaintiffs’ fifth cause of action alleges a violation of Washington’s Consumer Protection Act,  
21 (CPA), RCW 19.86. This action fails because the CPA expressly exempts actions or transactions  
22 which are “otherwise permitted, prohibited or regulated under laws administered by ... any other  
23 regulatory body or officer acting under statutory authority of ... the United States.” RCW 19.86.170.

24 In Miller v. U.S. Bank of Washington, N.A., 72 Wn.App. 416, 865 P.2d 536 (1994), the court  
25 held customers’s claim against bank alleging that loan collection practices were unfair or deceptive in

1 violation of Washington's Consumer Protection Act was preempted by the National Bank Act. The  
2 relationship between bank and customer concerning a bank's loan collection practices was specifically  
3 regulated by U.S. Comptroller of the Currency. Comptroller was uniquely qualified to regulate and  
4 resolve disputes arising in bank-customer relationship, and danger existed that state court decisions  
5 could conflict with Comptroller's decisions and regulations. Given the pervasive federal regulation of  
6 banking system and its intent to regulate unfair and deceptive practices, the customer could not  
7 maintain a CPA claim. Id., at 421-22.

8 Plaintiffs' CPA claim is subject to dismissal for the reasons set forth in Miller. Additionally,  
9 this Court has already determined that Chase's rate increase practices are not unconscionable. The  
10 Cardmember Agreement provides cardmembers notification of the maximum default interest rate, that  
11 Chase may change a cardmember's APR upon a default, that it would apply rate increases  
12 retroactively, and that it "may consider" various factors in determining a new APR. These practices  
13 do not constitute a violation of the CPA. See, Evans, 2006 WL 213740 at 5-6 (Chase's interest rate  
14 practices do not violate Delaware or California consumer protection laws).

15 Plaintiffs' fifth cause of action is subject to dismissal.

#### 16 **BREACH OF CONTRACT**

17 Plaintiffs' sixth cause of action alleges a breach of contract on the basis that the  
18 Cardmember Agreement incorporates federal law and this incorporated federal law, specifically  
19 Regulation Z, was violated. As noted by Judge Conti, this is simply a reiteration of Plaintiffs' first  
20 cause of action: violation of the TILA, and is subject to dismissal for the same reasons. See, Evans,  
21 2006 WL 213740 at 5. This Court is in agreement. Chase's practices do not violate Regulation Z  
22 and thus there is no breach of contract premised upon incorporation of Regulation Z into the  
23 contract. Plaintiffs have failed to allege a cause of action for breach of the Cardmember Agreement.  
24 The sixth cause of action is subject to dismissal.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26


**CONCLUSION**

For the reasons set forth above, the Court finds that Plaintiffs have not alleged facts sufficient to sustain a cause of action for violations of the TILA, state law, common law and the contractual agreements.

ACCORDINGLY,  
IT IS ORDERED:

Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint [Dkt. #20] is **GRANTED**, and this case dismissed in its entirety, with prejudice

DATED this 1<sup>st</sup> day of August, 2006.

  
FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE