IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

SHELLEY D. SWIFT, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**No. 98 C 8238**
	)	**Judge Kocoras**
FIRST USA BANK,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNTS II AND III OF THE AMENDED COMPLAINT

Plaintiff, SHELLEY SWIFT ("SWIFT"), individually and on behalf of all others similarly situated, through her attorneys, GOLD, ROSENFELD & COULSON, in opposition to Defendant FIRST USA BANK's ("BANK"), motion to dismiss counts II and III of her Amended Complaint, states as follows:

INTRODUCTION

This is a class action complaint alleging violations of both federal and state law arising out of Defendant BANK's mailing of unsolicited credit cards to over three million people. This activity is plainly forbidden by 15 U.S.C. §1642, which states: "No credit card shall be issued except in response to a request or application therefor." (Count I) Defendant BANK admittedly utilized consumer credit reports as part of this unlawful effort (Count II - 15 U.S.C. §1681 et seq.), and Defendant is alleged to have utilized deception to effectuate the scheme. (Count III - state law).

By Memorandum Opinion dated May 20, 1999, this court denied Defendant's Rule 12(b)(6) motion to dismiss Count I - the Truth in Lending Act ("TILA") count under 15 U.S.C. §1642. *Swift v. First USA Bank*, 1999 WL 350847 (N.D. Ill. 1999). Defendant had argued that the Visa card sent unsolicited to Plaintiff (see amended complaint ¶8), which Defendant's cover letter described as a "pre-approved credit card" was in fact not a credit card at all, but rather "...an inactive plastic card containing a Visa logo, a recipient's name and an account number..." (Defendant's reply memorandum in support of its motion to dismiss, March 23, 1999, at p. 8). Not surprisingly, this Court deemed Defendant's argument "wholly unpersuasive", and concluded that, "semantics aside, Swift alleges that Defendant issued and mailed her a credit card without her request. This would be a violation of TILA." (Memorandum Opinion pp. 8 - 9).

In light of this finding , and with leave of Court, plaintiff amended her complaint to add Count II under the Fair Credit Reporting Act ("FCRA") and Count III under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 I.L.C.A. §505/1 et seq.

Defendant BANK has now moved for a Rule 12(b)(6) dismissal of Counts II and III.

As will be demonstrated, Counts II and III allege facts sufficient to defeat the 12(b)(6) motion, particularly in light of this Court's finding that Count I states a federal Title 15 cause of action.

APPLICABLE LEGAL STANDARD

As this Court noted in its denial of Defendant's Count I motion, a Rule 12(b)(6) motion tests the sufficiency of the complaint, and is not a mechanism to decide the merits. Defendant bears a high burden, and the complaint should not be dismissed unless it appears beyond a doubt that the Plaintiff can prove no set of facts which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court

must construe the complaint in the light most favorable to the Plaintiff. The court is limited to the complaint, attached documents, and documents referred to in the complaint. *Venture Associates Corp. v. Zenith Data Systems Corporation*, 987 F 2d, 429, 431 (7th Cir. 1993).

FACTS

In January 1998, Plaintiff received an unsolicited Visa credit card from Defendant BANK. (Amended complaint ¶8).[1] The cover letter stated, "You're Pre-Approved! Just call 1(800) 335-2453 to activate your card today." (Amended complaint Ex. 1). In excess of three million persons received such an unsolicited credit card (Amended complaint ¶16).

Prior to illegally sending credit cards, Defendant BANK had obtained a credit report on Plaintiff and the others. (Amended complaint ¶s14, 26) Defendant's memorandum (p. 9) also quotes from the back of the cover letter:

"You were selected for this offer...based on your credit record maintained by credit bureaus...".

These credit reports were obtained by Defendant without permission, for "an illegitimate business need", and to unlawfully prescreen prospective customers (Amended complaint ¶26). Moreover, false pretenses and deceptions were utilized to obtain these reports from the credit reporting agencies (Amended complaint ¶26e). The recipients were deceived about the solicitation - they were not told fairly about the use of their credit reports and the illegality of the unsolicited credit card.

ARGUMENT

[1] This Court's May 20 opinion found that Count I (¶s 1 -25 of the amended complaint) stated a violation of 15 U.S.C. §1642 - the unsolicited mailing of a credit card.

Defendant BANK first argues that Count II of the amended complaint fails to state a violation of FCRA (15 U.S.C. §1681 et seq.), because, as Defendant says, "FCRA permits prescreening in connection with a firm offer of credit." (Defendant's memorandum p. 5).

There are three short answers to this argument. First, it is irrelevant, because the use of credit reports to make an illegal offer of an unsolicited credit card cannot constitute a "firm offer of credit" under Title 15. Second, Defendant concedes that a "firm offer of credit" also requires a *clear and conspicuous* notice of rights to the offeree, and a reasonable jury could find that Defendant's notice was not *clear and conspicuous*. Third, the manner and propriety of any "prescreening" by Defendant is a fact intense inquiry, in the nature of an affirmative defense on which Defendant would bear the burden - it is not a proper basis for a Rule 12(b)(6) determination.

Defendant next argues, as to Plaintiff's state law claim in Count III, that no deception is alleged, and that FCRA pre-empts the state claim. The former argument is belied by the amended complaint and accompanying exhibits, the latter argument by a plain reading of FCRA.

Plaintiff shall address each argument below.

A. An illegal offer of credit under Title 15 (the sending of unsolicited credit cards) cannot constitute a "firm offer of credit" under Title 15.

Both TILA and FCRA are important aspects of Title 15's regulatory scheme covering credit offers, credit disclosures, credit cards, and credit reports. Title 15 protects consumers from acts which mislead, overreach, or invade their privacy. TILA is codified as Title I, FCRA as Title VI, both of the Consumer Credit Protection Act, which must be read as a whole. As the D.C. Circuit Court of appeals states in *Trans Union Corp. v. Federal Trade Commission*, 81 F3d. 228 (D.C. Cir. 1996):

> "Along with accuracy of collected information, a major purpose of the Act is the privacy of a consumer's credit-related data. 'There is a need to insure that consumer reporting agencies

> exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.' 15 U.S. C. §1681(a)(4). It seems consistent with this view that information about a consumer, once it has been found to have the sensitive character required to qualify as a consumer report covered by the Act, be kept private except under circumstances in which the consumer could be expected to wish otherwise or, by entering into some relationship with a business, could be said to implicitly waive the Act's privacy to help further that relationship."

As Defendant notes, a credit report may be obtained without the knowledge or consent of the consumer, but only under very limited circumstances. (See Defendant's memorandum pp. 6, 8 and 9.) Defendant argues that it can "prescreen", using credit reports, if it intends to extend to the consumer a "firm offer of credit", and if it notifies the consumer of her rights in a "clear and conspicuous" notice (15 U.S.C. § 1681 m (d)(1).) Defendant asserts, as a fact, in its memorandum, that it complied with these requirements. Such factual questions raise issues beyond 12 (b)(6).

But at the threshold, Defendant's claim that its illegal sending of a credit card could ever constitute a "firm offer of credit" is oxymoronic. Sending an unsolicited credit card is illegal under 15 U.S.C. § 1642. It remains illegal as illustrated a few paragraphs later in the Consumer Credit Protection Act, at § 1681 where the act defines a "firm offer of credit" as:

> any offer of credit...to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer." 15 U.S.C. § 1681a(e).

Here the "offer of credit" was the unsolicited credit card - unlawful under § 1642. Such an illegal act could never "be honored"; to the contrary, it is an actionable wrong. Nowhere in its motion does Defendant BANK explain how such an illegal act could possibly form the predicate of any proper prescreening use of credit reports.

Taking two pages from Defendant BANK's own memorandum in support of its motion to dismiss, the following language is found at the bottom of page 10 and the top of page 11:

"As the court in *Pappas v. City of Calument City*, 9 F. Supp. 2d 943 (N.D. Ill. 1998), reasoned:

> Like other courts, this court interprets the concepts of 'false pretenses' and 'permissible purposes' interchangeably. That is, if a user obtains a consumer report under 'false pretenses,' that means the user did not have a permissible purposes for procuring the report. Similarly, if a user obtains a consumer report for the 'permissible purposes,' that user could not have obtained the report under 'false pretenses.' *Id*. at 949 n.3 (citation omitted).

Here, FUSA could not have obtained consumer reports under false pretenses as a matter of law because it obtained the reports for a permissible purpose under the FCRA- to prescreen individuals for the firm offer of credit included in the Connect Card solicitation."

But, for purposes of a 12(b)(6) motion, Plaintiff claims Defendant BANK obtained credit reports under "false pretenses" for issuing an illegal credit card. If Plaintiff is correct, Defendant BANK did not have a "permissible purpose". Moreover, Defendant BANK recognizes the language of §604 of the Act, 15 U.S.C. §1681(b), which only permits the use of a credit report by a third party having a "legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C. §1681(b)(3)(e). This court has already ruled that, for 12(b)(6) motion purposes, Defendant BANK sent an unsolicited credit card to Plaintiff in violation of the Truth and Lending Act, which is clearly not a permissible or legitimate purpose. The complaint alleges that in violation of the rights of privacy of in excess of three million (3,000,000) people, Defendant BANK illegally obtained their credit reports! Such conduct is clearly impermissible under 15 U.S.C. §1681 (see *Trans Union Corp. v. FTC, supra*, at page 4.

So illegally sending a credit card is not a "firm offer of credit".

B. Defendant's concededly required FCRA notice was inadequate.

The cover letter sent by Defendant BANK (Exhibit 1 to the amended complaint) makes three written representations that the credit card is "Pre-Approved". The letter concludes. "Activating your card is simple, since your already Pre-Approved. Just call 1(800) 335-2453 by January 30, 1998..." The accompanying brochure adds, in headline print; "It's a Pre-Approved CREDIT CARD". (Exhibit 2 to amended complaint.)

Ironically, in Defendant's effort to obtain a dismissal by motion, Defendant BANK argues that its mailing later informs the recipient that the card is in fact *not* Pre-Approved. (Defendant's memorandum, p. 9) Defendant BANK quotes language from the backside of its letter (in print so tiny that anyone over 40 needs powerful reading glasses to discern it): "If, after First Credit reviews your credit history, income and the information you provide, First Credit finds that you do not meet these criteria, we will be unable to offer you an account." So in large print, several times, Defendant represents that the card is "Pre-Approved", then in tiny print on the back, Defendant says that it is not pre-approved. The inserted copy (front and back) on the next page illustrates the large "pre-approved" on front and the tiny disclosure on back:

Of course, in its initial motion to dismiss Count I of Plaintiff's complaint, Defendant BANK claimed that the following was not a credit card:

Far from providing basis for a Rule 12 dismissal, the minuscule disclaimer serves to illustrate the deception inherent in Defendant's "offer"; deception which surely neither federal nor state law tolerates.

Moreover, Defendant BANK concedes that, in connection with obtaining such a credit report, FCRA requires that the consumer be provided a *clear and conspicuous* notice reciting the Defendant's use of the consumer credit report and the consumer's right to prohibit such use (Defendant's memorandum pp. 8-9 n. 4). Indeed, 15 U.S.C.§ 1681m (d)(1) requires just that - and that the notice be *clear and conspicuous*. The notice sent by Defendant, with the illegally sent credit card, is not *clear and conspicuous*. As noted, it is infinitesimal in print, hidden on the back of Defendant's cover letter. At minimum, a reasonable jury could find that this notice is not *clear and conspicuous*.

At the Rule 12(b)(6) motion stage, clearly, Defendant BANK cannot establish, as a matter of fact and law, that it complied with the FCRA in its mailing of an unsolicited credit card; - on the basis of the required notice provision alone. Without a proper clear and conspicuous notice, Defendant BANK concedes that is has not complied even with Defendant's limited view of the FCRA's reach.

The Rule 12(b)(6) motion must be denied on this ground as well.

C. Whether any particular "prescreening" was proper is a fact-intense inquiry.

The use of consumer credit reports to "prescreen" offerees without their knowledge is limited by statute. Even under Defendant's formulation of proper "pre-screening", it requires some "specific criteria" used to select the consumer for the offer (See, 15 U.S.C. §1681 a(e), Defendant's memorandum p. 7.) The FTC's commentary at 16 CFR §600 App. (Cited by Defendant at p.5-6 of its memorandum), also includes this observation:

> "Prescreening is permissible under the FCRA if the client [here Defendant BANK] agrees in advance that each consumer whose name is on the list after prescreening will receive an offer of credit."

Defendant's blithe assertion that it properly "prescreened" has no factual support, and indeed is flatly contradicted by the amended complaint. As discussed above, the unsolicited credit card was an *unlawful offer*, and cannot be a "firm offer of credit that will be honored" under FCRA. As discussed above, the documents sent to Plaintiff by Defendant demonstrate that Defendant also did not comply with the FCRA requirement of a "*clear and conspicuous*" notice to the offeree. So the state of the record is that Defendant did not properly "prescreen"or otherwise comply with the Act. Any affirmative assertion by Defendant that it properly "prescreened" could theoretically be raised by way of an affirmative defense. But there is no basis for a Rule 12(b)(6)finding that its conduct was proper.

Defendant also attacks the FCRA "false pretense" allegation of ¶26e of the amended complaint. As Defendant points out, (page 6 *supra*,) however, "false pretense" under FCRA is interchangeable with "impermissible purpose." *Pappas v. City of Calumet City*, 9 F. Supp 2d 943 (N.D. Ill 1998). The amended complaint, as outlined above, recites the "impermissible purpose" for which the credit reports were obtained - mainly, to illegally send out unsolicited credit cards. ¶26e merely makes the common

sense allegation that Defendant falsely represented its true purpose to the credit agencies from whom it obtained the credit reports.[2]

Defendant argues that its intent is relevant to the FCRA analysis. Defendant's memorandum p. 10 - 11. Surely intent is a fact question, not resolvable on a 12(b)(6) motion.

Defendant knows what it is accused of. The pleadings are sufficient under Rule 12(b)(6).

D. FCRA does not pre-empt the state law count.

Lastly, Defendant asserts that state law is pre-empted by FCRA in two respects.

First, the Illinois statute is clear that its prohibitions do not apply to "actions or transactions specifically authorized by laws..." 815 ILCS §505/106. Defendant asserts that since it "has fully complied with the requirements of the FCRA", there can be no liability under the Illinois statute. This begs the question. As discussed above, the amended complaint and the attachments allege that the FCRA was indeed violated by the improper utilization of credit reports. At this stage of the case, that is the operative record.

Second, Defendant cites 15 U.S.C. §1681 t(6)(1)(a) of FCRA which states that"no requirement or prohibition may be imposed under the laws of any state with respect to any subject matter ...relating to the prescreening of consumer reports." But count III and the Illinois Deceptive Practices Act does not seek to impose new "requirements or prohibitions" on Defendant's prescreening. The prescreening, to the extent it improperly utilized credit reports, is illegal under FCRA. FCRA explicitly does not pre-empt state law which is consistent with FCRA, as is the count III claim. FCRA, at 15 U.S.C. §1681t(a) states that it "...does not annul, alter, affect or exempt any person ...from complying with state laws", except to the extent of an inconsistency. The FTC's commentary is instructive:

[2] If, to the contrary, the credit agencies knew of the illegal unsolicited credit card offer, then those agencies would also be liable under FCRA.

> "State law is pre-empted by the FCRA only when compliance with inconsistent state law would result in violation of the FCRA."

16 C.F.R. pt. 600 App. at §622.

Here, the alleged course of conduct violates all three statutes - federal TILA, federal FCRA, and the Illinois Consumer Fraud and Deceptive Business Practices Act. The unsolicited credit card violates TILA, the illegal utilization of credit reports violates FCRA, and the misrepresentations violate Illinois law. Here, as alleged, state law is *consistent* with and *supportive* of the federal law.

There is no pre-emption, and certainly none at this Rule 12(b)(6) stage.

E. "Fraud" is adequately pleaded.

From the amended complaint and the referenced documents, the count III allegations of fraud and false pretenses are sufficiently specific to withstand a Rule 12(b)(6) motion. That has been demonstrated by the discussion above. Defendant BANK knows what it is charged with. The facts pleaded state damages for the invasion of Plaintiff's privacy, which has long been a basis for damages in Illinois.

CONCLUSION

The violations of Title 15 by Defendant BANK are palpable. The BANK sent an unlawful unsolicited credit card, and utilized consumer credit reports to do so.

Defendant's Rule 12(b)(6) motion to dismiss must be denied.

Respectfully submitted,

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