

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM M. PURCELL	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
UNIVERSAL BANK, N.A.; UNIVERSAL	:	
CARD SERVICES CORP.; CITIBANK	:	
(SOUTH DAKOTA), N.A.; and CITICORP	:	
	:	Civil Action No. 01-CV-2678
Defendants,	:	
	:	
v.	:	
	:	
EPHRATA NATIONAL BANK,	:	
	:	
Third-Party Defendant.	:	

MEMORANDUM AND ORDER

Van Antwerpen, J.

April 28, 2003

Plaintiff William M. Purcell filed this action against Defendants Universal Bank, N.A., Universal Card Services Corp., Citibank (South Dakota), N.A., and Citicorp (“Defendants”) alleging violations of the Fair Credit Billing Act, 15 U.S.C. § 1666 (“FCBA”) and Regulation Z of the Federal Reserve Bank, 12 C.F.R. § 226.13. Purcell also asserts state law claims for negligence, defamation/libel, and invasion of privacy. In addition, Purcell seeks punitive damages. Defendants joined Ephrata National Bank (“Ephrata”) as a third-party defendant in this case. We now consider Defendants’ Motion for Summary Judgment on all of the claims, and for the reasons given below, will grant Defendants’ motion in part and deny it in part.

## I. BACKGROUND

In November 1998, Plaintiff William M. Purcell attempted to pay the balance on his AT&T Universal Mastercard bill by issuing a check for \$8,808.93 drawn from a checking account with Ephrata. Purcell holds the account jointly with his wife.

The check was received by his credit card company, Universal Card Services Corp."Universal. AT&T Universal Card is the check's payee and Citibank FSB is the depository bank for AT&T Universal Card. Citibank FSB allegedly endorsed the check and forwarded it for payment to Ephrata. Citibank claims it followed all applicable regulations and clearly placed its routing number for payment in the proper place on the check and in the proper ink color.

Ephrata claims that the penultimate digit in the routing number was illegible. It then returned the check to Citibank FSB because it insufficiently endorsed the check. Ephrata did not inform Defendants that it deemed the check improperly endorsed because the routing number was illegible. Defendants claim the routing number was legible and that the check was properly endorsed. Moreover, Defendants allege that Ephrata negotiated similar checks submitted by Citibank FSB with the same routing number.

After payment on the check was refused by Purcell's bank, Citibank and Purcell were in contact over the unpaid credit card bill. Attempts to resolve the dispute between Citibank and Purcell failed, and Citibank reported the missed payment to the credit reporting agencies.

Purcell filed suit against Defendants claiming that Defendants violated the Fair Credit Billing Act, and Regulation Z of the Federal Reserve Bank. Purcell also claims that Defendants committed the state law torts of negligence, defamation, and invasion of privacy.

Thereafter, Defendants filed a third-party complaint against Ephrata. Defendants claimed that Ephrata violated federal banking regulations and failed to honor a properly endorsed check. By order of this court dated January 3, 2003, we denied Ephrata's motion for summary judgment. On April 1, 2003, Defendants filed the Motion for Summary Judgment now before this court.

## II. STANDARD OF REVIEW

The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. Id. at 248, 106 S.Ct. 2505. All inferences must be drawn, and all doubts resolved, in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.1985), cert. denied, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985).

On a motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving party must respond with facts of record that contradict the facts identified by the movant and may not rest on mere denials. Id. at 321 n.3, 106 S.Ct. 2548

(quoting Fed.R.Civ.P. 56(e)); see First Nat'l Bank of Pa. v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 282 (3d Cir.1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49,106 S.Ct. 2505.

### III. DISCUSSION

Defendants raise several arguments in support of their motion for summary judgment.<sup>1</sup> We address each argument in turn, and grant Defendants' Motion for Summary Judgment in part and deny it in part.

#### A. Inclusion of Defendant Citicorp

Defendants first argue that all of Purcell's claims against Citicorp must fail because Citicorp is a separate and independent entity from its subsidiaries. The parties do not dispute that according to Pennsylvania law, a corporation is generally regarded as a "separate and independent entity" and that a parent corporation generally is not liable for the actions or obligations of a subsidiary. Botwinick v. Credit Exch., Inc., 213 A.2d 349, 353-54 (Pa. 1965); Commonwealth v. Vienna Health Prods., Inc., 726 A.2d 432, 434 (Pa. Commw.Ct. 1999); Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F.Supp.2d 688, 691 (E.D.Pa. 1998). An exception exists however, such that liability may be imposed where a parent corporation so dominates the activities of a subsidiary that is necessary to treat the dominated corporation as the

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<sup>1</sup>Third-party defendant Ephrata's Reply to Defendants' Motion for Summary Judgment presents no arguments contrary to those raised by Defendants, except on the issue of whether Purcell's check was properly endorsed. Ephrata does not dispute any of the legal conclusions asserted by Defendants. We therefore discuss Ephrata's contentions only where pertinent to the factual question regarding the endorsement of the check.

“alter ego” of the parent. Botwinick, 213 A.2d at 354.

According to Defendants, Purcell has alleged no evidence that Citicorp exercised domination over any other defendants. Purcell responds by citing Simon v. UnumProvident Corp., No. 99-6638, 2002 U.S. Dist. LEXIS 9331, (E.D.Pa. May 23, 2002) (slip op.), a case concerning a defendant disability insurer that allegedly dominated the activities of an adjustment company. Id. at \*10-11. The court denied the motion for summary judgment in favor of the insurer because, among other reasons, the plaintiff produced evidence that the insurer and adjuster were paid from the same sources and had common employees. Id. at \*14-15.

In this case, Purcell maintains that the Affidavit of Elizabeth Barnette and the Statement of Uncontested Facts show that the affairs and records of Citicorp and Citibank (South Dakota), N.A. are one in the same. In light of Simon, we agree that this evidence counsels against granting the motion for summary judgment in favor of Citibank. But simply because Purcell has raised an issue sufficient to survive summary judgment does not indicate that he will be successful in demonstrating the high degree of domination required sufficient to pierce the corporate veil and establish liability on the part of the parent corporation, Citicorp. See id. at \*9 (citing Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 150 (3d Cir. 1988)) (“To warrant piercing the veil on an alter-ego theory, a plaintiff must demonstrate that the parent company exercised ‘complete domination not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own.’”).

B. Fair Credit Billing Act and Regulation Z Claims

Defendants next assert that Purcell, as a matter of law, has no claim under the Fair Credit Billing Act, 15 U.S.C. § 1666 or Regulation Z of the Federal Reserve Bank, 12 C.F.R. § 226.13, (Counts I and II).<sup>2</sup> First, Defendants argue that Purcell did not properly invoke the protection of the FCBA or Regulation Z because he never mailed a billing error notice to Universal Bank, N.A. Purcell recognizes that the pertinent provisions require that a consumer mail a billing error notice to a creditor within sixty days of transmission of the statement containing the alleged error. 12 C.F.R. § 226.13(b). Based on evidence produced during discovery, Purcell states that he has satisfied this requirement. Specifically, according to Purcell, the billing error first appeared on his March 1999 statement. And on March 31, 1999 and April 19, 1999, he completed “Notifications of Disputed Item” forms and submitted them to Defendants. (Pl.’s Mem. of Law in Opp. to Defs.’ Mot. for Summ. J., Ex. F). A review of the forms confirms that they meet the procedural requirements of the FCBA and Regulation Z, and the forms include among other necessary information, the account at issue and the amount in dispute. Given the existence of the notification forms, Defendants’ contention that Purcell has provided no evidence of written notice is plainly wrong.

Second, Defendants argue that Universal Bank, N.A. did not commit a billing error when it failed to credit Purcell’s account for \$8,808.93. Regulation Z provides several definitions of a “billing error,” including the following:

- (4) A reflection on a periodic statement of the creditor’s failure to credit properly a payment or other credit issued to the consumer’s account.

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<sup>2</sup>Defendants, without citing any authority, maintain that there is no separate private right of action under Regulation Z. Purcell responds that where there is a statutory “private attorney general” scheme of enforcement for the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, regulations concerning the conduct of creditors would confer a similar right of action. See *Nichols v. Mid-Penn Consumer Discount Co.*, No. 88-1253, 1989 U.S. Dist. LEXIS 4796, at \*6 (E.D.Pa. April 28, 1989). We agree with Plaintiff’s position.

- (5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.

12 C.F.R. § 226.13(a)(4) and (5). Purcell argues that Defendants committed a billing error by failing to credit a properly issued payment and in improperly continuing to assess finance charges and late fees on a disputed credit card account. Further, Purcell asserts that the billing error occurred because of Defendants' failure to properly endorse his check or to later inquire as to the problem with the endorsement. Defendants contention that Ephrata's refusal to honor the check caused the discrepancy rather than any actions that Defendants committed is not a sufficient basis for granting its motion for summary judgment. If we were to read the § 226.13(a)(4) definition of "billing error" narrowly, no error would be possible without a properly processed payment that a creditor then failed to acknowledge. But in this case, Ephrata never authorized the release of funds to the check's payee because of alleged problems with the endorsement—no payment ever occurred. If Defendants did in fact provide a deficient endorsement, then they would be the cause of Ephrata's refusal to honor the check. Such conduct arguably falls within a broader reading of § 226.13(a)(4). Regardless however, if the facts as alleged by Purcell are true, then Defendants' conduct will fall under the definition of 12 C.F.R. § 226.13(a)(5). Specifically, Defendants' alleged failure to endorse the check properly would be a "similar error of an accounting nature" made by the creditor that later appeared on a periodic statement.

Defendants' third argument with respect to Counts I and II of the Amended Complaint is not sufficient to support granting the Motion for Summary Judgment. Based upon a copy of Purcell's check submitted as an exhibit, Defendants assert that they properly endorsed the check. See (Pl.'s Mem. of Law in Opp. to Defs.' Mot. for Summ. J., Ex. B). Upon reviewing

this exhibit, we agree that the penultimate digit of the routing number does appear to be a “7” and not a “9.” In fact, the digit at issue appears to be the *most legible* digit in the routing number. But because this is a motion for summary judgment and evidence must be viewed in the light most favorable to the non-moving party, we are reluctant to grant Defendants’ motion based upon a low-quality photocopy of the disputed check. The legibility of the routing number is a factual issue ill-suited for resolution upon summary judgment.

Fourth, Defendants argue that Purcell has sustained no damages as a result of their alleged conduct. Among other harms suffered, Purcell has alleged that credit was denied to his business, Purcell Construction, as a result of the ongoing dispute with Defendants. Both parties agree that “a stockholder, director, officer or employee of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the individual because of an injury to the corporation.” Marchese v. Umstead, 110 F.Supp.2d 361, 367 (E.D.Pa. 2000). But as Purcell notes, in Marchese, the court recognized an exception where the individual sustains an injury separate and distinct from that of the corporation. Id. Here, Purcell has alleged that the denial of credit from a truck dealership forced him to lease vehicles rather than buying them outright. This resulted in a cost increase on each vehicle of \$2048.89, according to Purcell. Because he was the sole shareholder of Purcell Construction during the relevant time period, his personal assets were affected by Defendants’ alleged actions. Accepting Purcell’s contentions for the purposes of summary judgment, we find that he has alleged sufficient evidence of harm such that he has standing.

We will deny Defendants’ Motion for Summary Judgment with respect to Purcell’s FCBA and Regulation Z claims based on the above discussion.

C. Negligence Claim

Defendants assert that Purcell's negligence claim (Count III) is preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* In support of their position, they cite Aklagi v. NationsCredit Financial Services Corp. 196 F.Supp.2d 1186, 1195-96 (D.Kan. 2002) (finding that qualified immunity provision of Fair Credit Reporting Act preempted a defamation claim). Purcell responds that he is seeking relief under the Fair Credit Billing Act, 15 U.S.C. § 1666, and that no preemption applies to that legislative scheme. He adds, correctly, that Defendants provide no authority stating that the FCBA preempts state law claims. Defendants' citation to the language of 15 U.S.C. § 1681 is inapposite; instead, § 1666j addresses the interaction of the FCBA and state law, providing that, "[t]his part does not annul, alter, or affect, or exempt any person subject to the provisions of this part from complying with, the law of any State with respect to credit billing practices, except to the extent that those laws are inconsistent with any provision of this part, and then only to the extent of the inconsistency." 15 U.S.C. § 1666j(a). Seeing no inconsistency between the federal statute and state law negligence claim, we find that there is no preemption.

As an additional challenge to the negligence claim, Defendants argue that the claim fails because Defendants did not breach any duty owed to Purcell. Not surprisingly, Purcell disagrees and alleges that Defendants owed him a duty to credit his account for properly tendered payments, to resolve billing disputes in a timely manner, to take care in publishing his personal financial information to third parties, and to refrain from reporting disputed debts to credit bureaus. Regulation Z states that a "creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse report to any person about the consumer's credit standing,

or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges.” 12 C.F.R. § 226.13(d)(2). According to the facts as alleged by Purcell, Defendants may have failed to comply with a duty imposed by Regulation Z.

We have already determined that Purcell has alleged facts sufficient to assert that he sustained damages as a result of Defendants’ actions. See Part III.B. supra. We will then deny the motion for summary judgment with regard to Purcell’s negligence claim.

D. Defamation/Libel and Invasion of Privacy

For the same reasons that the negligence claim is not preempted by the FCBA, Purcell’s claims for defamation (Count IV) and invasion of privacy (Count V) shall stand with one important limitation. See 15 U.S.C. § 1666j(a). To the extent that Purcell’s claims are based upon a reporting of delinquency to consumer credit agencies, they are preempted by 15 U.S.C. §§ 1681s-2 and 1681t. Section 1681t provides that no requirement or prohibition may be imposed under the laws of any state with respect to subject matter regulated by § 1681s-2, which concerns the responsibilities of persons furnishing information to consumer credit agencies. 15 U.S.C. § 1681t(b)(1)(F). This court has already discussed the issue of preemption under § 1681t. See Jaramillo v. Experian Info. Solutions, Inc., 155 F.Supp.2d 356, 361-62 (E.D.Pa. 2001), reconsideration granted in part, 2001 WL 1762626 (E.D.Pa. Jun. 20, 2001). Although in Jaramillo, the court reinstated a defamation claim with a one sentence order and no other explanation, other courts have found the original opinion persuasive and have held that similar state law claims are in fact preempted by 15 U.S.C. § 1681t(b)(1)(F). Riley v. General Motors

Acceptance Corp., 226 F.Supp.2d 1316, 1323 (S.D.Ala. 2002); Vasquez-Garcia v. Trans Union De Puerto Rico, 222 F.Supp.2d 150 (D.P.R. 2002). We likewise find that any state law claims based upon reports to credit agencies are preempted in light of precedent as well as the plain language of § 1681t(b)(1)(F).

Defendants argue that we should grant the motion for summary judgment on the remainder of the defamation claim because Purcell did not pay his credit card bill. Truth is a complete and absolute defense to a claim for defamation. Pelagatti v. Cohen, 536 A.2d 1337, 1345-46 (Pa.Super.Ct. 1987). None of the parties dispute that Purcell wrote a check for \$8,808.93 or that Defendants did not receive the \$8,808.93 from either Purcell or Ephrata. But, as Purcell argues, Defendants are responsible for the mishandling of the check and its subsequent rejection by Ephrata for lack of a proper endorsement. He also alleges that Defendants have improperly reported the disputed charge to consumer credit agencies. Defendants halfheartedly suggest in an incomplete footnote that they have recognized that the \$8,808.93 is disputed since an unspecified date. Arguably, by the time Defendants were reporting the dispute, the damage to Purcell's credit record had already been done and he had been denied credit that otherwise might have been extended to him. More importantly, Purcell also alleges that the collection attempts initiated by Defendants caused gossip and speculation among his employees and in the small town of approximately 4,300 persons where his business is located. We will not grant Defendants' motion for summary judgment where their actions may have been the reason that the credit card bill remained unpaid.

With respect to the claim for invasion of privacy, Defendants urge that no publication of a matter concerning Purcell's private life occurred, and further, that if any

publication did occur, it would not be highly offensive to a reasonable person. See Wells v. Thomas, 569 F.Supp.426, 436 (E.D.Pa. 1983). First, regarding the issue of publication, Purcell has provided evidence that employees at his business received numerous calls from Defendants regarding collection of the dispute amount. In some cases that may be insufficient to constitute publication. See Vogel v. W.T. Grant Co., 327 A.2d 133, 138 (Pa. 1974) (noting that under the specific facts of the case at hand, notification to two or four parties at employee's workplace did not amount to publication). In this case however, Purcell argues that his community of approximately 4,300 persons is small enough that any damaging rumors would spread quickly. Second, whether an alleged publication would be offensive to a reasonable person depends on underlying issues of fact and cannot be resolved at this time. We accordingly will deny the motion for summary judgment for the remainder of the invasion of privacy claim.

#### E. Punitive Damages

The Amended Complaint seeks punitive damages (Count VI) based upon the averments of ¶¶ 1-66, which encompass all of Purcell's federal and state law claims. Defendants suggest that we enter summary judgment in their favor because Pennsylvania law recognizes no independent cause of action for punitive damages. But Defendants misunderstand the applicable legal precedent. If all of a plaintiff's independent claims are dismissed and only a dependent claim for punitive damages remains, then by definition, the dependent claim cannot stand. See In re Collins, 233 F.3d 809, 811-812 (3d Cir. 2000); Hilbert v. Roth 149 A.2d 648, 652 (Pa. 1959). When a plaintiff outlines the relief he seeks however, the term "claim" has broader applicability than the more limited concept of a cause of action. Collins, 233 F.3d at 811. In this case,

Purcell's dependent claim for punitive damages shall stand because the independent claims upon which it rests still remain.

#### IV. CONCLUSION

Defendants' motion will be granted in part because Plaintiff's defamation and invasion of privacy claims are preempted in part by 15 U.S.C. § 1681t(b)(1)(F). Those state law claims are preempted to the limited extent that Purcell's claims are based upon reports made to consumer credit agencies. The remainder of Defendants' motion will be denied because of the need to resolve disputed issues of material fact. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM M. PURCELL	:	
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Plaintiff,	:	
	:	
v.	:	
	:	
UNIVERSAL BANK, N.A.; UNIVERSAL	:	
CARD SERVICES CORP.; CITIBANK	:	Civil Action No. 01-CV-2678
(SOUTH DAKOTA), N.A.; and CITICORP	:	
	:	
Defendants,	:	
	:	
v.	:	
	:	
EPHRATA NATIONAL BANK,	:	
	:	
Third-Party Defendant.	:	

ORDER

AND NOW, this 28th day of April, 2003, upon consideration of Defendants Universal Bank, N.A., Universal Card Services Corp., Citibank (South Dakota), N.A., and Citicorp's ("Defendants'") Memorandum in Support of Their Motion for Summary Judgment, filed April 1, 2003; Brief of Plaintiff, William M. Purcell, in Opposition to Defendants' Motion for Summary Judgment, filed April 15, 2003; and Third-Party Defendant Ephrata National Bank's Reply to Defendants' Motion for Summary Judgment, filed April 18, 2003, consistent with the foregoing memorandum of law, it is hereby **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED** in part to the limited extent that Purcell's claims are based upon reports made to consumer credit agencies, and

2. The remainder of Defendants' Motion for Summary Judgment is **DENIED**.

BY THE COURT:

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Franklin S. Van Antwerpen, U.S.D.J.