

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

MARY ELLEN SULLIVAN,
Plaintiff

CIVIL ACTION

v.

:
:
:
:

EQUIFAX, INC., et al.,
Defendants

NO. 01-4336

ORDER AND MEMORANDUM

AND NOW, this 19th day of April, 2002, upon

consideration of defendant InoVision's Motion to Dismiss the Complaint (Docket#10), the plaintiff's Response in Opposition thereto, and InoVision's Reply in support of its motion, IT IS HEREBY ORDERED that said Motion is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Counts IV, V, and VI, and the motion is DENIED as to Counts II and VII, for the following reasons.

This dispute arises out of the allegedly false reporting of a debt stemming from an overdue utility account with PECO Energy. The plaintiff alleges that the defendants reported, or caused to be reported, on her credit report a debt relating to

a collection account with InoVision for the overdue PECO bill.' According to the plaintiff, this debt was incorrectly listed under her name, when it actually relates to a different Mary Sullivan who has a different address and date of birth than does the plaintiff. The plaintiff avers that she contacted the defendants, both orally and in writing, to contest the listing, but that the defendants failed to investigate the debt or to remove the listing from her report. The plaintiff alleges that as a result of this inaccurate listing, she has been denied loans and extensions of credit, resulting in serious financial and pecuniary harm.

The complaint alleges causes of action for violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (Counts I and II), for common law defamation (Counts III and IV), for violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. **C.S.A.** § 201.1 et seq. (Count V), for Tortious Interference with Contractual Relations (Count VI), and for violation of the Fair Debt Collection Practices Act of 1978,

¹ In considering this Motion to Dismiss under Rule 12(b)(6), the Court will "take all well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997).

15 U.S.C. § 1692 et seq. (Count VII).

Currently pending before the Court is defendant InoVision's Motion to Dismiss the complaint.² The plaintiff alleges that InoVision, which owns the collection account for the PECO debt, reported this debt to various credit reporting agencies, including defendants Equifax, Inc. and Equifax Credit Information Systems, as well as to Trans Union, LLC. The plaintiff asserts that even after she repeatedly disputed the inaccurate information concerning the PECO account with InoVision, the company failed to conduct an investigation, continued to report the inaccurate information to the credit reporting agencies, and failed to mark the debt as disputed, in violation of the FCRA and the FDCPA.

I. The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") is a consumer protection act that requires consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit." 15 U.S.C. § 1681(b). The FCRA provides

² InoVision is named in Counts II, IV, V, VI, and VII of the complaint. However, the plaintiff has agreed to withdraw her claims for defamation, tortious interference, and violation of Pennsylvania's consumer protection law (Counts IV, V & VI). For that reason, those Counts are DISMISSED, and this memorandum will not speak to them.

for a private right of action to consumers to enforce the procedures outlined in the act. See 15 U.S.C. §§ 1681n & 1681o. InoVision argues that it is not covered by the FCRA because it is not a credit reporting agency and that, accordingly, Count II of the complaint should be dismissed.

As the plaintiff correctly points out, however, the FCRA was amended in 1997 to cover "furnishers of information" as well as consumer reporting agencies. See 15 U.S.C. § 1681s-2. The FCRA now prohibits the furnishing of inaccurate information to consumer reporting agencies if the information is known to be inaccurate or if the furnisher consciously avoids knowing that the information is inaccurate. See 15 U.S.C. § 1681s-2(a)(1)(A).

In addition, if a furnisher of information receives notice from a consumer reporting agency that the information reported to that agency has been disputed, certain duties are triggered. Upon such notice, the furnisher has a duty to conduct an investigation with respect to the disputed information, to review all relevant information provided by the agency, and to report the results of the investigation to the agency. 15 U.S.C. § 1681s-2(b)(1). If the furnisher determines that the information provided was, in fact, incomplete or inaccurate, the furnisher must report those results to the other consumer reporting agencies to which the information had been sent. 15

U.S.C. § 1681s-2(b) (1)(D).

The complaint alleges that the plaintiff disputed the information regarding the PECO bill with both the credit reporting agency defendants and with InoVision. The complaint also alleges that InoVision, after notice of the dispute, failed to conduct the required investigation and has continued to report the disputed information to various consumer reporting agencies. These allegations are sufficient to invoke § 1681s-2(b) of the FCRA.³

In its reply brief, InoVision does not contest this reasoning, but merely states that dismissal is appropriate because the allegations in the complaint are insufficiently pled

³ The plaintiff has not explicitly alleged that InoVision received notification of the disputed information from a consumer reporting agency. Although § 1681s-2(b) seemingly "requires a pleading that a consumer reporting agency notified a furnisher of a dispute," this information would, at the pleading stage, be unknowable by the plaintiff. See Jaramillo v. Experian Info. Solutions, Inc., 115 F. Supp.2d 356, 363-64 (E.D. Pa. 2001). Recognizing this problem, the Jaramillo court allowed a similar claim to go forward, subject to the defendant's right to renew its motion to dismiss if during discovery it could not be established that the defendant had received notice of the disputed information from a consumer reporting agency. Id. at 363. Such an approach is particularly appropriate in this case, where the plaintiff has alleged that she disputed the information with the credit reporting agencies as well as with InoVision. Therefore, the Court finds that, at this stage, the allegations are sufficient to state a violation of § 1681s-2(b). Should discovery reveal that InoVision never received notice of the dispute from a credit reporting agency, InoVision will be permitted to renew its motion to dismiss the FCRA claim.

pursuant to Federal Rule of Civil Procedure 9(b).⁴ However, InoVision has cited no authority for the invocation of Rule 9(b), which requires heightened pleading for allegations of fraud or mistake. Fed. R. Civ. P. 9(b). Section 1681s-2(b) is not a fraud provision, nor does it require allegations of mistake. For that reason, claims brought for a violation § 1681s-2(b) do not appear to be subject to the strictures of Rule 9(b).

The Court finds that the plaintiff has stated a valid cause of action under Rule 8, which requires only a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). InoVision has alleged what information was reported, the time-period in which the information was reported, and that InoVision's failure to report investigation results to the defendant consumer reporting agencies violated § 1681s-2(b) of the FCRA. See Complaint, ¶¶ 16, 35(g), 35(h), 35(l) & 35(m). In addition, the complaint notes that InoVision's liability is

⁴ InoVision also argues that the plaintiff's FCRA claim is "clearly discredited" by the Consumer Dispute Verification Form attached to its motion to dismiss. It is inappropriate, however, for the Court to consider this document at this stage of the proceedings. See Chester County Intermediate Unit v. Pa. Blue Shield, 896 F.2d 808, 812 n.6 (3d Cir. 1990); 5A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d, § 1357 (1995). **In any event, the CDV does not demonstrate** that InoVision conducted an appropriate investigation or reported the resulting information to all consumer reporting agencies as required by the FCRA.

limited to its conduct within the previous two years. Id. at ¶ 36. These allegations are sufficient, at this stage, to state a claim under the FCRA.⁵

11. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act of 1978 ("FDCPA") was passed to promote ethical business practices by debt collectors. See Robert J. Hobbs, Fair Debt Collection, § 3.1, p. 69 (3d Ed. 1996). The FDCPA provides a remedy for consumers who are subjected to abusive, deceptive, or unfair trade collections practices by debt collectors. See Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 400 (3d Cir. 2000). The FDCPA generally applies to "debt collectors," rather than to creditors. Id. at 403.

In Count VII, The plaintiff alleges that InoVision **violated the** FDCPA by continuing to report inaccurate information

⁵ The Court also notes that there is some dispute as to whether a private right of action can be brought for violations of § 1681s-2(b). Compare DiMezza v. First USA Bank Inc., 103 F. Supp.2d 1296 (D.N.M. 2000) (private right of action **exists**); McMillan v. Experian Info. Servs., Inc., 119 F. Supp.2d 84 (D. Conn. 2000) (same); Dornhecker v. Ameritech Corp., 99 F. Supp.2d 918 (N.D. Ill. 2000) (same), with, Carney v. Experian Info. Solutions, Inc., 57 F. Supp.2d 496 (W.D. Tenn. 1999) (no private right of action). Because this issue was not raised by the parties, however, the Court will not address it in this memorandum.

to credit reporting agencies and failing to mark the debt as disputed after receiving notice from the plaintiff. InoVision makes several arguments as to why the FDCPA claim should be dismissed.

First, InoVision argues that the complaint fails to plead with particularity, in accordance with Rule 9(b), the specific acts, communications, unfair practices, and deceptive means allegedly employed by InoVision. Next, InoVision argues that the FDCPA claim is barred by the one year statute of limitations governing the FDCPA. Finally, InoVision asserts that it has not engaged in "debt collection activities" with respect to the plaintiff, and that dismissal is therefore appropriate.

A. Failure to Plead with Particularity

Although InoVision argues that the complaint should be dismissed because the plaintiff has failed to comply with Rule 9(b) by pleading with particularity the facts giving rise to a FDCPA violation, InoVision cites no authority for the application of Rule 9(b) to a FDCPA claim. The FDCPA provisions invoked by the plaintiff make illegal "false, deceptive, or misleading representation(s) or means in connection with the collection of any **debt**." **See** 15 U.S.C. § 1692e. Liability under these provisions does not seem to require that the elements of fraud be

alleged or proven by the plaintiff.

For example, § 1692e(8) makes it a violation for a debt collector to communicate or threaten to communicate to any person credit information **which is** known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. 15 U.S.C. § 1692e(8). This provision contains no requirement that the elements of fraud or mistake be alleged in order to state a cause of **action**.

Moreover, courts considering the issue have invariably determined the sufficiency of FDCPA pleadings by applying Rule 8 rather than Rule 9(b). See, e.g., Hartman v. Merician Fin. Servs., Inc., No. 01-C-0060-C, 2002 WL 442088, *7 (W.D. Wis. 2002); Greer v. Shaoiro & Kreisman, 152 F. Supp.2d 679, 685-86 (E.D. Pa. 2001); Havens-Tobias v. Eagle, 127 F. Supp.2d 889, 894 (S.D. Ohio 2001); Nix v. Welch & White, No. Civ. A. 00-669-JJF, 2001 WL 826558, *3 (D. Del. July 18, 2001); Johnson v. Capital One Bank, No. Civ. A. SA00CA315EP, 2000 WL 1279661, *1 (W.D. Tex. 2000); Burger v. Risk Mgmt. Alternatives, Inc., 94 F. Supp.2d 291, 292-93 (N.D.N.Y. 2000); Knowles v. Credit Bureau of Rochester, Div. of Rochester Credit Ctr., Inc., No. 91-CV-148, 1992 WL 131107, *3 (W.D.N.Y. 1992) (all applying Rule 8(a)); but see Knowles v. I.C. Svs., Inc., No. Civ-90-822E, 1991 WL 5182, *2 (W.D.N.Y. Jan. 14, 1991) (applying Rule 9(b)).

The complaint is sufficient to state a claim under Rule 8. It identifies the relevant law, the relevant conduct (reporting the information to the credit reporting agencies), and gives InoVision "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Greer, 152 F. Supp.2d 679, 683.⁶ For this reason, the Court will not dismiss the FDCPA claim for failure to comply with Rule 9(b).

B. Statute of Limitations

The FDCPA requires private actions seeking damages to be filed "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). InoVision argues that its last communication with a credit reporting agency involving the disputed information was in February of 2000 when it reported the debt to Trans Union. For that reason, InoVision argues, the complaint should be dismissed as untimely.

However, as an affirmative defense, the statute of limitations can be raised in a motion to dismiss only if it is apparent on face of complaint. See Oshiver v. Levin, Fishbein,

⁶ Indeed, based on the allegations in the **complaint**, InoVision was apparently able to determine when it reported the information to the appropriate credit reporting agencies. As discussed below, InoVision alleges that its latest communication was with Trans Union in February of 2000. Mem. of Law in Support of Def. InoVision's Mot. to Dismiss Plf.'s Compl., 23.

Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (citing Wright & Miller, § 1357). It is clear here that the February 2000 date (even if accurate) does not appear on the face of the complaint.

The complaint alleges only that InoVision has "willfully continued" to report the inaccurate information to the credit reporting agencies. Complaint, ¶ 16. This allegation, read in the light most favorable to the plaintiff, is enough to establish that the alleged violations occurred within the limitations period. For these **reasons**, the limitations defense does not appear on the face of the complaint, and it is inappropriate at this juncture to dismiss the complaint for failure to comply with the statute of limitations. Of course, should discovery reveal that InoVision's activities all occurred outside of the limitations period, then summary judgment may be appropriate on that ground.

C. Debt Collection Activities

The FDCPA prohibits the use of abusive, deceptive, or unfair trade collections practices in connection with the collection of a debt. The plaintiff argues that InoVision's acts of reporting the disputed debt to a consumer reporting agency represent a collection tactic that constitutes a debt collection

activity. InoVision argues that it has not engaged in any debt collection communication or activity with respect to the plaintiff, and that it is therefore not covered by the FDCPA.

The FDCPA prohibits debt collectors' from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. 15 U.S.C. § 1692e. Among the conduct that violates this provision is the "communication or threat[] to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." 15 U.S.C. § 1692e(8).

The term "communication" is given a very broad definition in the act. It means "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). One commentator has remarked

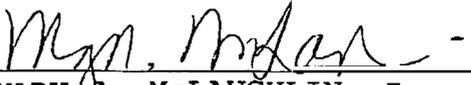
⁷ The **FDCPA** covers the activities of "debt collectors." Section 1692a(6) defines a debt collector as any person who uses interstate commerce in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed to another. See 15 U.S.C. § 1692a. The complaint alleges that the "principal purpose of InoVision is the collection of debts already in default using the mails and telephone, and InoVision regularly attempts to collect said debts." Complaint, ¶ 7. This allegation is enough, in conjunction with the allegations regarding the reporting of debts to credit reporting agencies, to survive any argument that InoVision is not a debt collector. See generally, Hobbs, § 4.3.1, p. 97 ("A purchaser of debts may also be a debt collector because that is its principal business.").

that "[t]his provision recognizes that reporting a debt to a credit reporting **agency** is "a powerful tool designed, in part, to wrench compliance with payment terms" **Hobbs**, § 5.5.10, p. 170-71 (citing Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993) & Matter of Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991)). See Ditty v. CheckRite, Ltd., Inc., 973 F. Supp. 1320, 1331 (D.Utah 1997). Because reporting a debt to a credit reporting agency can be seen as a communication in connection with the collection of a debt, the reporting of **such** a debt in violation of the provisions of § 1692e(8) can **subject a debt collector** to liability under the FDCPA.

The complaint alleges that InoVision has "continued to report such inaccurate information to **various** credit reporting **agencies** . . . **has failed to mark the debt as** disputed and has continued to attempt to collect monies from the plaintiff regarding the inaccurate information **by** the aforementioned conduct." Complaint, ¶ 16. These allegations are sufficient, at this stage of the proceedings, to state a claim under the broad language of § 1692e of the FDCPA. See, e.g., Finnegan v. Univ. of Rochester Med. Ctr., 21 F. Supp.2d 223, 229 (W.D.N.Y. 1998) ("allegation that defendants . . . caused derogatory information **to be placed [on plaintiff's] credit report states a claim** sufficient to survive a motion to dismiss under 15 U.S.C. §

1692e(8)"); Mitchell v. Surety Acceptance Corp., 838 F. Supp. 497, 501 (D. Colo. 1993) (denying summary judgment because listing of incorrect information and failing to correct information with credit reporting agency raised issues of fact about violation of § 1692e(8)).

BY THE COURT:



MARY A. McLAUGHLIN, J.

2 4/19/02:

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