

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

JAMES P. MILLER, *et al.*

v.

CORESTAR FINANCIAL GROUP
OF PA, INC., *et al.*

O'Neill, J.

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CIVIL ACTION
NO. 05-5133

June 29, 2006

MEMORANDUM

Plaintiff James Miller filed a class action complaint in this case against defendants CoreStar Financial Group of Pa., Inc., CoreStar Financial Group, LLC, and CoreStar Financial Group, Inc., (collectively “CoreStar”) alleging violations of the Fair Credit Reporting Act. Before me now are defendants’ motion to dismiss, plaintiff’s response, defendants’ reply, plaintiffs’ surreply, and defendants’ response to plaintiffs’ surreply.

BACKGROUND

James Miller received a letter from CoreStar extending a mortgage loan offer. The letter notified him that he had been pre-approved for a loan from CoreStar. Following an asterisk, the letter provided:

You are pre-approved for a mortgage loan, subject to the following terms and conditions: The actual loan amount will vary. This offer is contingent upon receiving a valid first or second lien on your owner occupied, one- to four-family residence or condominium, excluding singlewide mobile homes and co-ops. Final loan approval is subject to verification of acceptable income and credit. Minimum and maximum property values may apply and a property appraisal may be necessary.

The second page also contains a “Prescreen and Opt Out Notice,” which provided: “This ‘prescreened’ offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria [including providing acceptable property as collateral].” The letter does not specify the amount available to be borrowed, the applicable interest rate, or the terms of the loan. CoreStar sent the letter after it obtained a consumer report on Miller without his consent or knowledge. The letter is undated and Miller does not allege when he received it.

Miller’s complaint, filed on September 28, 2005, alleges two violations of the Fair Credit Reporting Act (FCRA). First, he argues that CoreStar’s practice of obtaining and using consumer reports to solicit credit transactions without extending firm offers of credit violates 15 U.S.C. § 1681b(c). Second, he alleges that CoreStar’s offer letters failed to provide, in a clear and conspicuous manner, the disclosures required by 15 U.S.C. § 1681m(d). Miller asks for statutory damages, punitive damages, attorneys’ fees, and an injunction permanently preventing CoreStar from obtaining consumer reports on individuals unless it makes a firm offer of credit to each individual, including the disclosures required by the FCRA.

In its motion to dismiss, CoreStar argues that there is no private right of action available for violations of the “clear and conspicuous” disclosure requirements of § 1681m(d). Further, CoreStar asserts that Miller cannot maintain a claim for FCRA damages because he has not alleged that he suffered any actual damages. CoreStar also argues that an injunction is not a remedy available to private litigants. I will address each argument in turn.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6) (2004). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiff’s complaint and must determine whether “under any reasonable reading of the pleadings, plaintiffs may be entitled to relief.” Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). Nevertheless, in evaluating plaintiff’s pleadings I will not credit any “bald assertions.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). “The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff’s cause of action.” Nami, 82 F.3d at 65. A Rule 12(b)(6) motion is proper only if the plaintiff “can prove no set of facts in support of his claim which would entitle him to relief.” Conley, 355 U.S. at 45-46.

DISCUSSION

The FCRA was enacted to ensure that “consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.” 15 U.S.C. § 1681(b) (2006). “In the FCRA, Congress has recognized the crucial role that consumer reporting agencies play in collecting and transmitting consumer credit information, and the detrimental effects inaccurate information can visit upon both the individual consumer and the

nation's economy as a whole.” Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3d Cir. 1996).

A. Private Right of Action for “Clear and Conspicuous” Violations

Under the FCRA, any company who uses a consumer report to issue a credit solicitation must include specific disclosures in a clear and conspicuous statement. 15 U.S.C. § 1681m(d). The statement must include, among other information, notice that the consumer report was accessed, the consumer was selected because he satisfied certain creditworthiness criteria, and credit may not be extended if the consumer does not meet any applicable credit criteria or does not furnish adequate collateral. Id.

1. Elimination of Private Actions

The current version of the FCRA provides in § 1681m(h)(8): “No civil actions. [15 U.S.C. §§ 1681n and 1681o] shall not apply to any failure by any person to comply with this section.” Further, it notes, “This section shall be enforced exclusively under [15 U.S.C. § 1681s] by the Federal agencies and officials identified in that section.” Id. These sentence were added by the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), which became law on December 4, 2003. See Publ. L. No. 108-159, 117 Stat 1952 (2003). Prior to that amendment, private parties were permitted to bring civil actions to enforce the “clear and conspicuous” disclosure requirement. See, e.g., Kelcher v. Sycamore Manor Helath Ctr., 305 F. Supp. 2d 429, 433 (M.D. Pa. 2004).

CoreStar argues that the amendments eliminated all private actions to enforce the disclosure requirements of § 1681m. Miller disagrees, arguing that CoreStar's position cannot be reconciled with the express language of the amendment, clashes against the context and structure of FACTA, and fails to account for the legislative history of the amendment.

Before I address Miller's arguments, I note that each court that has faced this challenge has decided that the FACTA amendments eliminated the private right of action to enforce the § 1681m disclosure requirements. See, e.g., Phillips v. New Century Fin. Corp., No. 05-0692, 2006 U.S. Dist. LEXIS 18498 (C.D. Cal. Mar. 1, 2006); McCane v. America's Credit Jewelers, Inc., No. 05-5089 (N.D. Ill. Dec. 1, 2005); Pietras v. Curfin Oldsmobile, No. 05-4624 (N.D. Ill. Nov. 1, 2005); Perry v. First National Bank, No. 05-1470, 2005 U.S. Dist. LEXIS 23100 (N.D. Ill. Sep.13, 2005); Murray v. Household Bank (SB), 386 F. Supp. 2d 993 (N.D. Ill. 2005); Murray v. Cross Country Bank, 399 F. Supp. 2d 843 (N.D. Ill. 2005). The Court of Appeals, however, has not decided this issue so I will review Miller's arguments.

Miller first suggests that CoreStar's reading of FACTA cannot be reconciled with the express language of the amendment. I disagree. The express language of the amendment eliminates the private right of action. "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections." Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004). House and Senate drafting manuals prepared by the legislative counsel's offices provide that each section shall be broken into subsections starting with (a), paragraphs starting with (1), subparagraphs starting with (A), and clauses starting with (i). Id. The FACTA amendment, located at § 1681m(h)(8)(B), provides, "This *section* shall be enforced exclusively under section 521 by the Federal agencies and officials identified in that section." Within § 1681m(h), § 1681n, § 1681o and § 1681s are each described as sections, indicating that sections are designated by the first letter following the number. § 1681m(h)(8); see also Cross Country Bank, 399 F. Supp. 2d at 844. Further, earlier in the statute, § 1681(a) is described as subsection (a), indicating that subsections are those parts of the statute beginning with lower case letters in

parentheses. These indications show that “this section” must refer to § 1681m. Therefore, the FACTA amendments eliminated a private right of action under § 1681m.

Miller makes a few additional arguments to support his assertion that the FACTA amendments did not eliminate a private right of action under § 1681m. First, he argues that under CoreStar’s reading of the statute, § 1681m(h)(4) would abrogate the notice requirement of § 1681m(a). Subsection § 1681m(a) provides that, in the event a person takes an adverse reaction with respect to a consumer based on information in a consumer report, the person must notify the consumer of the adverse action, and include information regarding the reporting agency and the consumer’s right to obtain a free copy of the consumer report and dispute any inaccurate information. § 1681m(a). The later paragraph provides: “A person that is required to provide a notice under subsection (a) cannot meet that requirement by providing a notice under this subsection. § 1681m(h)(4). Miller seems to argue that because subsection (h) creates additional notice requirements that apply only to subsection (h), it is entirely self-contained and therefore cannot apply to § 1681m in its entirety. This argument is nonsensical. FACTA eliminated private causes of action, not notice requirements. While the later notice requirements apply only to subsection (h), there is no language in subsection (h) that precludes that its applicability to other parts of the FCRA.

Miller also argues that FACTA’s legislative history demonstrates that the amendment did not eliminate the right of private actions under § 1681m. As the Supreme Court has noted, “the authoritative statement is the statutory text, not the legislative or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” Exxon Mobil

Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005). As I discussed above, the statute is clear; it contains no ambiguous terms. Therefore, there is no need to wade through the legislative history.¹

2. Retroactivity

Miller also asserts that even if the FACTA amendments to the FCRA eliminated all private actions, it cannot be retroactively applied to this case. He claims that dismissal is improper because the activity underlying this claim was completed before FACTA's effective date. The FACTA amendments were passed on December 4, 2003 and became effective on December 4, 2004. See Pub. L. No. 108-159, 117 Stat. 1952 (2003). Miller's complaint was filed on September 28, 2005. Although Miller's complaint does not specify the date he received the offer letter, he offers two alternative fact scenarios, and thus two different potential dates for my analysis. First, he suggests that he received the letter before the effective date. Second, he proposes that even if he did not receive the letter before FACTA's effective date, CoreStar received his credit information before that date, and I should analyze his claim from that date.²

In his surreply, Miller also argues that his complaint satisfied the short and plain statement

¹Although Miller urges me to consider the legislative history, he does not cite any legislative history that supports his position. The only legislative history he references is a statement in another district court case, which notes that the FACTA history did not indicate "such a sweeping change in enforcement." Murray v. Household Bank, 386 F. Supp.2d 993, 997 (2005). I cannot, however, base my decision on silence instead of the unambiguous language of the statute.

² Miller argues that the conduct is complete when the solicitations are designed and printed, often several months before the letter is sent. This suggestion is absurd. The disclosure requirements must be included "with each written solicitation made to the consumer." § 1681m(d)(1). Therefore, no cause of action exists until the consumer receives the written solicitation.

requirement of Fed. R. Civ. P. 8.

As presented, this Count of Miller's complaint is not viable. As I discussed above, no private cause of action existed at the time of Miller's complaint to challenge the "clear and conspicuous" disclosure requirements. Therefore, I will dismiss this count of Miller's complaint with leave to amend if he received the offer letter before FACTA's effective date.³ I am not dismissing this claim because it lacks detailed facts. Instead, I am dismissing it because, as it is presented, no claim exists.

B. Actual and Statutory Damages

CoreStar asserts that Miller's remaining claim should be dismissed because he has not alleged any actual damages. The FCRA contains two damages provisions, one providing liability for negligent violations, § 1681o, and one discussing liability for willful noncompliance, § 1681n. The willful compliance liability section provides for "any actual damages sustained by the consumer as a result of the failure *or* damages of not less than \$100 and not more than \$1,000." § 1681n(a)(1) (emphasis added). It also allows punitive damages, costs and attorneys fees. Id. The negligent noncompliance section provides for only "actual damages sustained by the consumer," costs, and attorneys fees. § 1681o(a). Miller's complaint alleges willful noncompliance, not negligent violations.

CoreStar bases its argument primarily on the Seventh Circuit's decision in Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F3d 603 (7th Cir. 2005). In that decision, the

³Miller urges me to undertake a retroactivity analysis. This analysis, however, is unnecessary at this time because Miller's complaint is silent as to the date he received the offer letter. If in good faith he amends his complaint to allege that he received the letter before FACTA's effective date, I will address this issue.

court found that a consumer must prove that he is entitled to actual damages before he can recover statutory damages. Id. at 610-611. I respectfully disagree. “Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.” Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). The provision in the willful compliance liability allows for actual damages or statutory damages. Although they are located in the same paragraph of the section, the statutory damages provision is not dependent on the plaintiff first proving actual damages. Instead, the paragraph allows a plaintiff to recover for either actual or statutory damages, but not both.

As one district court has noted, the plain language of § 1681n “buttresses the view that actual damage is not required in an action to enforce any liability under the Act.” Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 661 (D. Wyo. 1974). The Ackerley court further opined, “This section does not speak in terms of requiring actual damages; rather, it refers to actual damages as one portion of any award or relief that might be granted.” Id. Therefore, as the statute clearly provides, Miller need not allege actual damages in order to recover statutory damages.

C. Injunctive Relief

CoreStar also argues that, under the FCRA, injunctive relief is not available under the FCRA. The two sections of the FCRA discussing private remedies are § 1681n, which discusses liability for willful violations, and § 1681o, which discusses liability for negligent violations. Neither of those sections mention the availability of injunctive relief. In another section, the FCRA specifically granted the power to obtain injunctive relief to states and the FTC. See § 1681s(c)(1) (the state “may bring an action to enjoin such violation”); § 1681s(a) (referencing the

FTC's enforcement powers under the Federal Trade Commission Act, 15 U.S.C. § 45); and 15 U.S.C. § 45(b) (discussing FTC's ability to require persons to "cease and desist").

Courts have split on the issue. See, e.g., Washington v. CSC Credit Services, Inc., 199 F.3d 263, 268 (5th Cir. 2000) (denying availability of injunctive relief); Andrews v. Trans Union Corp., 7 F. Supp. 2d 1056, 1084 (C.D. Cal. 1998) (allowing injunctive relief). I agree with the Fifth Circuit. As that court has reasoned, "the affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC." Washington, 199 F.3d at 268.

The Court of Appeals has come to a similar conclusion with a statute similar to the FCRA, the Fair Debt Collections Practices Act ("FDCPA"). See Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004). In that case, the plaintiff sought statutory damages, declaratory, and injunctive relief under the FDCPA. Id. at 339. In their analysis, the Court noted that the FDCPA did not explicitly provide for injunctive or declaratory relief in private actions. Id. at 341 citing 15 U.S.C. § 1692k (2004). Like the FCRA, the FDCPA specifically permitted the Federal Trade Commission to pursue injunctive relief. The Court held, "Because the statute explicitly provides declaratory and equitable relief only through actions by the Federal Trade Commission, . . . the different penalty structure demonstrates Congress's intent to preclude equitable relief in private actions." Id. at 341-42. Although a different statute is at issue here, the conclusion must be the same. Congress's explicit grant of power to the FTC and states, when viewed together with Congress's silence as to the right of private parties' to pursue injunctions, mandates the

conclusion that injunctive relief is not available to private parties.

An appropriate order follows.

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ORDER

AND NOW, this 29th day of June 2006, upon consideration of defendants' motion to dismiss, plaintiff's response, defendants' reply, plaintiffs' surreply, and defendants' response to plaintiffs' surreply, and for the reasons set forth in the accompanying memorandum, defendants' motion to dismiss is GRANTED as to Miller's "clear and conspicuous" disclosures claim and Miller's request for injunctive relief. The defendants' motion to dismiss is DENIED as to all other claims.

Plaintiff is granted leave to amend his Complaint within thirty days regarding his claim under the "clear and conspicuous" disclosures requirement. The request for injunctive relief is DISMISSED WITH PREJUDICE.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.