CONSUMER CREDIT

OFFER QUALIFIES AS A "FIRM OFFER OF CREDIT"

Murray v. New Cingular Wireless Servs., 523 F.3d 719 (7th Cir. 2008).

FACTS: Consumers filed a class action suit, which resulted from three individual cases, each alleging Fair Credit Reporting Act ("FCRA") violations. In Illinois, a consumer filed suit against New Cingular Wireless Services ("NCWS") regarding NCWS's wireless promotion service, and resulted in the district court granting NCWS's motion for summary judgment. In Indiana, a consumer filed suit against Keybank ("KNA") for accessing credit information prior to sending a home equity loan offer, and resulted in the district court granting in part and denying in part, parties' cross-motions for summary judgment. In Wisconsin, consumers filed suit against Capital One Bank ("COB") for accessing credit reports prior to sending credit card offers, and resulted in the district court granting COB's motion for judgment on the pleadings. The three cases were joined for the Seventh Circuit's review.
HOLDING: Affirmed.
REASONING: The court organized the opinion based on six issues to cover the distinguishing facts of each case; three of the questions addressed were relevant when determining what constituted a "firm offer of credit." First, does a promise of "free" merchandise mean that an offer is not one of credit? The statute allows companies to access consumer credit information prior to offering when the information is used to make a firm offer of credit or insurance. 15 U.S.C. §1681b(c)(1)(B)(i). The term credit means the right granted by a creditor to a debtor to incur debts and defer its payment. 15 U.S.C. § 1691a(d). In the case involving NCWS, the offer was a credit offering, because NCWS provided the phone service before payment was due. In addition, the free phone was not perceived to be truly free, because it was tied to the payment for service. Therefore, the cost of the phone was assumed amortized over the term of the contract through monthly payments. The court determined the phone and the service together were offers of credit.

The second issue was whether the company's initial flyer must contain all material terms? "Firm offer of credit" means any offer of credit to a consumer that will be honored based on the information on the credit report, except when the offer may be further conditioned on one or more of the following: expectation that consumer satisfies specific criteria bearing on credit worthiness; verification of information on consumer credit application, and the consumer continues to meet the specific criteria and/or the consumer furnishes collateral that was established before selection of the consumer and disclosed to the consumer in the offer. "Firm offer" is a defined phrase and, therefore, it is wrong to believe that there can be no offer of any kind without all material terms.

Finally, the court considered whether the power to vary the deal's terms makes the offer not "firm"? KNA reserved the right to set terms later. If plaintiff had requested discovery to determine how the language stating the company's power to vary terms was actually used, then there would be a basis for further investigation. The letter from COB omitted a minimum line of credit and a maximum rate. COB only utilized very simple screening procedures before the offer was issued, and it was unreasonable to expect COB to provide definitive credit limits or rates without a closer look at the consumer's full credit history and other particulars. The flexibility in terms appeared to merely reserve each respective company's right to walk away or adjust the terms based on verification of the consumer's qualifications. The court determined matters for future determination were normal in most offers. The court found each of the three cases established firm offers of credit and affirmed the lower courts' decisions.

CONSUMER MUST SHOW ERROR TO SUE CREDIT AGENCY FOR FAILURE TO REINVESTIGATE

DeAndrade v. Trans Union L.L.C., 523 F.3d 61 (1st Cir. 2008).

FACTS: The DeAndrades purchased new windows from NESCOR, financed by a mortgage on their home. NESCOR secured financing from Conseco Finance, but after several months, the DeAndrades began receiving invoices from KeyBank. Eventually, the DeAndrades discovered that KeyBank had been granted the mortgage on their home and that the mortgage transfer documents contained an allegedly forged signature. After discovering the forgery, Mr. DeAndrade filed suit in state court, alleging they had never granted NESCOR authorization to transfer their home mortgage and requested declaratory relief as to the validity of the KeyBank mortgage. After filing suit, DeAndrades made payments on the loan to an escrow account rather than to KeyBank, pending resolution of their action. KeyBank notified the major credit bureaus, including Trans Union, of the alleged delinquent payments, and they updated their records accordingly.

DeAndrades notified the credit bureaus of the fraudulent mortgage and pending suit, followed by a request that the bureaus investigate the disputed charges made by KeyBank. Trans Union verified receipt of DeAndrades' notice, but instead of forwarding DeAndrades' documents to KeyBank, it sent an automated dispute verification form. KeyBank confirmed the disputed item to Trans Union, which continued to publish the disputed charges. DeAndrades filed suit against Trans Union, alleging it violated the Fair Credit Reporting Act ("FCRA") by failing to conduct a lawful reinvestigation of the disputed debt and failing to delete the disputed item from DeAndrades' credit report. Trans Union moved for and was granted summary judgment on grounds that DeAndrade ratified the underlying loan. Therefore the credit report was accurate. DeAndrades appealed.

The court noted that FCRA was intended to protect consumers against the compilation and dissemination of inaccurate credit information.

HOLDING: Affirmed.
REASONING: Under FCRA § 1681i(a), if a consumer disputes any item contained in his or her consumer report, a consumer reporting agency is required to conduct a reasonable reinvestiga-

tion to determine whether the disputed information is inaccurate. Although § 1681i(a) contains no language requiring the consumer to show actual inaccuracy, the First Circuit adopted the view that a plaintiff must first allege that his credit report sports an actual inaccuracy. The court noted that FCRA was intended to protect consumers against the compilation and dissemination of inaccurate credit information. The court found no genuine issue as to whether the KeyBank debt reported by Trans Union was inaccurate, because DeAndrades did not state any factual deficiency, which could have been resolved by a reasonable reinvestigation. The court held that determining whether DeAndrades was entitled to stop making payments was a question for a court to resolve in a suit against KeyBank, but not a job imposed upon consumer reporting agencies. The court further held that if a court had ruled the mortgage invalid, and Trans Union continued to report the debt, DeAndrades would have grounds for a potential FCRA claim.

TRUTH IN LENDING ACT DOESN'T APPLY TO ATM CARD

In re Wash. Mut. Overdraft Prot. Litig., 539 F. Supp. 2d 1136 (C.D. Cal. 2008).

FACTS: Consumers filed a consolidated class action complaint, after they opened checking accounts and signed a master agreement acknowledging receipt of account disclosures and regulations that included an overdraft limit provision. The consumers claimed the lender, Washington Mutual Bank ("WAMU"), violated the Truth in Lending Act ("TILA") in their overdraft limit feature on ATM and debit cards. The district court dismissed the action and the consumers appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded. During the appeal, the Ninth Circuit asked the Board of Governors of the Federal Reserve System ("Board") to file an amicus brief addressing whether overdraft protection programs were subject to TILA, and the degree of deference to which the Board's interpretations of TILA are entitled. On remand, WAMU moved for summary judgment on the alleged TILA violation.
HOLDING: Motion granted.
REASONING: The Board was entitled to a high degree of deference; therefore, the court adopted the Board's interpretation of TILA. In its amicus brief, the Board stated that overdraft programs were not subject to TILA disclosures unless those programs were pursuant to a written agreement to pay overdrafts. Under Regulation Z, credit disclosures must be made by a creditor, defined as a person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments. 12 C.F.R. § 226.2(a)(17)(i). The Board's regulations state charges imposed by a financial institution for paying items that overdraw an account are not finance charges, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.

The Board found the fees imposed by WAMU in connection with the overdraft limit were not finance charges within the meaning of TILA. Because of this, the court said consumers could satisfy the test for determining whether WAMU was a creditor only if consumers could show extension of credit was payable by written agreement in more than four installments. The court found that the plain language of the account disclosures made it clear that WAMU retained discretion whether to pay overdrafts and they were not legally bound to pay. The court found no written agreement by which WAMU was obliged to pay the overdrafts. In addition, the court declined to incorporate the terms of a promotional brochure, because it was not an agreement, and because conversations and writings that occur prior to the execution of a written agreement are inadmissible to change or modify the terms of the agreement. The court held that the master agreement and brochure did not constitute a written credit agreement rendering ATM and debit cards as credit cards. Therefore, the lender was not defined as a creditor within TILA.

CONSUMER MADE PRIMA FACIE SHOWING OF INACCURATE REPORTING AS REQUIRED UNDER FAIR CREDIT REPORTING ACT

Dennis v. BEH-1, L.L.C., 520 F.3d 1066 (9th Cir. 2008).

FACTS: Jason Dennis was served with an unlawful detainer complaint by his landlord, BEH-1. Both parties agreed to a settlement under stipulation that no judgment be entered. However, the trial court mistakenly recorded a judgment against Dennis. The trial court amended its record two months later to show a dismissal without prejudice, after Dennis had paid the full settlement amount. Dennis later received a credit report from Experian Information Solutions, Inc. ("Experian"), stating a civil claim judgment was entered against him. Disputing that entry of judgment, Dennis informed Experian that the matter was settled out of court. Experian subsequently contacted a third-party vendor to verify. The vendor reported that the information Experian had was accurate, and Experian therefore determined it would not change Dennis's credit report.

Dennis brought suit against Experian, alleging violations of the California Consumer Credit Reporting Agencies Act and the Fair Credit Reporting Act ("FCRA"). Summary judgment was entered for defendant on all claims. On appeal, Dennis challenged only the federal claims arising from Experian's duty to maintain reasonable procedures to ensure the accuracy of credit reports under FCRA § 1681e(b), and its duty to reinvestigate disputed information under FCRA § 1681(i).
HOLDING: Reversed and remanded.
REASONING: The court held that the district court erred since Dennis had made a prima facie showing of inaccurate reporting, as required by FCRA. The public record clearly showed a dismissal without prejudice, which is a civil judgment for a defendant. The court noted Experian's report would have been accurate if it had reported that Dennis settled a lawsuit against him and the terms of that settlement, but the report was not accurate in identifying the settlement as a civil claim judgment.

PROVISION IN IDENTITY THEFT LAW IS UNCONSTITUTIONAL

Grimes v. Rave Motion Pictures Birmingham, L.L.C., 552 F. Supp. 2d 1302 (N.D. Ala. 2008).

FACTS: Julie Grimes and three other plaintiffs each brought separate class action lawsuits against Rave Motion Pictures and

three other defendants under the Fair and Accurate Credit Transactions Act ("FACTA"). Each plaintiff alleged defendants violated FACTA by providing electronic credit card transaction receipts containing more than five digits of the plaintiff's credit card number or the expiration date. 15 U.S.C. § 168c(g). The purpose of FACTA is to protect credit card users from identity theft and provides for strict liability for violations, resulting in an award of damages "not less than $100 and not more than $1,000 or actual damages sustained by the consumer or $1,000, whichever is greater, and punitive damages to each consumer for each incidence of willful noncompliance. Defendants filed motions for summary judgment based on violations of its Fifth Amendment right to due process and Seventh Amendment right to trial by jury. The district court consolidated all four class action lawsuits and addressed the motions together.

HOLDING: Motions granted.

REASONING: The court agreed with defendants' contention that FACTA damages provision, "not less than $100 and not more than $1,000," was unconstitutional because the provision violated the Seventh Amendment right to trial by jury and the Fifth Amendment right to due process. The court reasoned because the statute provides a vague description of damages, a proper jury instruction could not be written. The jury would be left to decide an unguided award where no actual damages exist. Because this provision renders the jury unable to fairly perform its adjudicative function, the court found it unconstitutional under the Seventh Amendment. The court emphasized, had the damages amount been fixed, the jury charge would be simple and constitutional.

The court also held that FACTA's damages provision allowed for double punishment, which violated the due process clause of the Fifth Amendment. The court explained that the defendants would be punished twice for the same conduct, once under the damages provision and second under the punitive provision. The court found any adjustment upward from FACTA's minimum of $100 would necessarily be punitive. Therefore, would trespass upon the punitive damages provision that immediately follows. The imposition of punitive damages without actual damages, or suffering any harm, was problematic because it was inherently disproportionate to the amount of harm caused. Thus, the court found the damages provision unconstitutional under the due process clause and granted the defendants' motion for summary judgment.

TRUTH IN LENDING DOES NOT PREEMPT ACTION FOR FRAUD, DECEPTION AND FALSE ADVERTISING

People v. Applied Card Sys., ____ N.E.2d ____ (N.Y. 2008).

FACTS: Respondent, Cross County Bank ("CCB"), was a Delaware bank that actively solicited consumers in the "sub-prime" credit market to apply for its credit cards. Respondent, Applied Card Systems, provided debt collection services for CCB's credit card accounts. The Attorney General, petitioner, filed the petition, asserting respondents' credit card solicitations and collections practices violated New York's Executive Law and Consumer Protection Act due to misrepresentations to consumers. The petition contained allegations of fraud and deception pertaining to many of respondent's marketing practices and programs. In addition, there were allegations pertaining to respondent's late fees, finance charges, balance calculation methods, and the lack of any "grace period" for consumer payments, all of which are terms that must be disclosed under the federal Truth in Lending Act ("TILA"). Respondents argued that petitioner's claims were preempted by credit card application and solicitation disclosure requirements set forth in TILA. The trial court held the claims were not preempted and the appellate court affirmed.

HOLDING: Affirmed.

REASONING: The court found TILA did not preempt petitioner's claims of fraudulent and deceptive credit card solicitation schemes because the claims related not to the disclosure of credit info, but rather to affirmative deception. The court looked to the statutory text, legislative history, and administrative interpretation of TILA's credit card application and solicitation preemption provision. Preemption under the provision was limited to laws purported to alter the format, content, and manner of the TILA-required disclosures and those which required credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z. The court found neither of these situations in the present case. The court noted that the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not transform a state law action into one that is preempted under federal law. No preemption occurs if the effect of the relief sought upon the federal scheme is too tenuous, remote, or peripheral. In the present case, petitioner sought relief that would prevent the respondents from making affirmative misrepresentations and using deceptive trade practices (e.g. signing customers up for programs without their knowledge). Respondents were not asked to alter their TILA disclosures. Therefore, just as the claims had no effect on respondents' disclosures, neither did the relief sought.

The court noted that the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not transform a state law action into one that is preempted under federal law.

The legislative record showed Congress only intended TILA's preemption provision to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts. Additionally, the Senate Banking Committee Report states that TILA does not preempt "the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices." Thus, the court held petitioner's claims were not preempted, because the claims and relief dealt with preventing affirmative misrepresentations and deceptive trade practices.