No. 03-3331

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ONETA S. COLE, Plaintiff-Appellant,

v.

U.S. CAPITAL, INC., AUTONATION USA CORPORATION, and JERRY GLEASON CHEVROLET, INC., Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION
THE HONORABLE JOHN DARRAH

BRIEF OF AMICUS CURIAE, FEDERAL TRADE COMMISSION IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission ("FTC" or "Commission") submits this brief pursuant to this Court's Order o

of credit in any advertising they send to the consumer. *See Trans Union Corp. v. FTC*, 81 F.3d 228, 233-34 (D.C. Cir. 1996) (holding that target marketing is not a permissible purpose for receiving a consumer report). Furthermore, by di4 0.00 0.00 rge(di4 3

of abuse. Among those was that consumer reporting agencies did not consistently protect the confidentiality of the information they collected regarding consumers. To address this problem, the FCRA permits consumer reporting agencies to disseminate consumer reports only to those who have a statutorily designated "permissible purpose" for obtaining such reports, 15 U.S.C. § 1681b, and it prohibits persons from obtaining consumer reports unless they have a permissible purpose for doing so, § 1681b(f). For the most part, a "permissible purpose" arises only in connection with transactions initiated by consumers. *See* § 1681b(a)(3)(A)-(F) (authorizing the release of consumer reports when a consumer has applied for credit, a job, insurance, a license, etc.). Each "permissible purpose" reflects a congressional determination that the benefits of that use of information are sufficient to justify the intrusion on the consumer's privacy that release of the information entails.

One of the few circumstances in which the FCRA allows the release of a consumer report in the absence of a consumer-initiated action is when the recipient of the information undertakes to make a "firm offer of credit or insurance" to the consumer. 15 U.S.C. § 1681b(c).

---

[2] There are certain other limited situations that do not involve transactions initiated by the consumer when a consumer report may be released. *See, e.g.*, § 1681b(a)(1) (consumer report may be released in response to a court order or grand jury subpoena); § 1681b(a)(4), (5) (consumer report may be released to enforce child support payments); § 1681b(a)(2) (consumer report may be released to anyone in

conditioned on certain criteria; 3) that the offer may not be extended if the consumer does not continue to meet those criteria or does not provide required collateral; and 4) that the consumer has the right to prohibit the future use of her consumer report in connection with unsolicited firm offers of credit or insurance (*i.e.*, to opt-out of future offers). The statement must also provide the consumer with a toll-free number to call if the consumer wants to preclude the use of her report for such offers.

2. Factual Background

In December 2001, plaintiff Oneta Cole, an Illinois resident, received an unsolicited advertisement in the mail. Complaint Exhibit A. The ad, which was captioned "CONGRATULATIONS ON YOUR PRE-APPROVAL STATUS!," was unclear and confusing. It appeared to contain two separate offers of credit. (The advertisement is replete with words printed in all upper-case letters.) First, the ad offered Ms. Cole "a Vecember 2001, plaintiff Oneta Cole, an Illinois resident, "ETem"eR7600

Thus, as only a keen-eyed reader would discern, the offer of "up to $19,500 in AUTOMOTIVE CREDIT," could, in fact, be as little as $300. Th

terms of acceptance, denials or any marketing of this promotion. Customer required to complete application, see application for terms and conditions. Subject To Final Lender Approval.

There is no indication in the record that Ms. Cole purchased a car, received a car loan, or obtained a credit card as a result of this ad.

3. Proceedings Below

On January 21, 2003, Ms. Cole filed her Second Amended Complaint before the United States District Court for the Northern District of Illinois. D. 37. She alleged that, in December 2001, she received the ad, and that all three defendants were responsible for sending it to her.[3] The complaint stated that Ms. Cole had not authorized any of the defendants to obtain her consumer report. It further alleged that the ad did not constitute a firm offer of credit that would provide any of the defendants with a permissible purpose under the FCRA for obtaining her consumer report. In particular, it alleged that the ad did not constitute a firm offer of credit because "[a]n offer of a $300 line of credit useable only to finance the purchase of an automobile is a sham." It further alleged that the disclosure required by § 1681m(d) was not clear and conspicuous. The complaint sought class certification, statutory

[3] The three defendants include Jerry Gleason Chevrolet, AutoNation USA, a corporation that owns or is affiliated with various auto dealerships (including Jerry Gleason Chevrolet), and U.S. Capital Corp.

damages of $1000 per person, punitive damages, and attorney's fees.

The defendants moved to dismiss th

[4] The Commission agrees with the court's holding that it must rely on federal, not state, law when interpreting the FCRA.

SUMMARY OF ARGUMENT

Although the FCRA permits a business to obtain a consumer report if it provides the consumer with a firm offer of credit or insurance, the law is not satisfied if the business provides the consumer with an offer that is merely a sham. When the offer is not genuine, the consumer does not receive any benefit to offset the infringement of privacy that results from the release of the report. The district court failed to appreciate that, if the offer is a sham, then the business may simply be engaged in target marketing, which is not a permissible purpose for obtaining a consumer report. (Part I.A, *infra*.)

The district court improperly dismissed Ms. Cole's challenge to defendants' offer, which went not just to whether the offer was guaranteed, but to the substance of the offer. On remand, Ms. Cole should be permitted to present evidence showing that the offer was, in fact, illusory. (Part I.B, *infra*.)

The district court also erred by dismissing the case without addressing the

A. A sham offer is not a "firm offer of credit" under the FCRA

The FCRA defines a "firm offer of credit" as "any offer of credit * * * to a consumer that will be honored" under specified circumstances. § 1681a(*l*). But to hold, as the district court essentially did, that this definition encompasses *any* purported offer, no matter how illusory, is "to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Gregory v. Helvering*, 293 U.S. 465, 470 (1935) (denying tax deduction

statute as a whole"). A primary goal of the FCRA is to protect consumers' interest in the privacy of the information maintained by consumer reporting agencies.

underlying rationale that consumers should only be required to give up the privacy that the FCRA protects when they are getting something of value in return. Even though not all consumers will take advantage of a genuine firm offer of credit or insurance, the FCRA recognizes that such offers provide something of value to consumers, in return for which many consumers will be willing to yield a degree of privacy. *See Trans Union v. FTC*, 267 F.3d at 1143. The statute ensures the primacy of consumer choice, moreover, by requiring that a consumer who receives a firm offer must also receive a clear and conspicuous statement that explains how the offer was made and affords an opt-out opportunity for consumers who do *not* value the receipt of such offers enough to give up their privacy.

In contrast, as both the Com

Aug. 1, 2003), and arguing that defendants would have a permissible purpose even if they offered a loan of only one dollar). The fact that the creditor would honor such an

[7] In the context of their Rule 12(b)(6) motion, defendants bear the burden of showing that Ms. Cole can prove no set of facts in support of her claim that would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). Further, this Court should draw reasonable factual inferences in Ms. Cole's favor, and should construe the allegations of her complaint liberally. *See Ricketts v. Midwest Nat'l*

Cole's complaint sets forth a prima facie violation of the FCRA. *See* § 1681b(f). With respect to the elements of the violation that Ms. Cole alleges, defendants do not deny that they obtained her consu

Bank, 874 F.2d 1177, 1183 (7th Cir. 1989). However, this Court need not determine whether Ms. Cole would ultimately prevail, only whether she is entitled to go forward with the merits of her case. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995).

credit, and reserves to the defendants the right (presumably when Ms. Cole buys a car) to "determine" the terms of the loan.

[8] In its opinion, the court confined its analysis to defendants' guarantee and ignored Ms. Cole's challenge to the substance of the transaction. *See Cole v. U.S. Capital*, 2003 WL 21003696 at *5 (N.D. Ill., May 1, 2003) (holding that defendants' offer was not a sham because "[p]laintiff has not alleged that she or any other consumers attempted to accept the 690 0.00 0.00 rgB0o0000 0.252.it1.00000 0.00000 1.00000 0.

For example, what does it mean that the offer is conditioned on the "purchase of a vehicle, GRSI, Coral Springs, FL." What does the abbreviation GRSI stand for? All of this sort of information is relevant to determining whether defendants' offer really was a genuine firm offer of credit. All of these issues were raised by Ms. Cole's

a consumer report was obtained; 2) that the offer was conditioned on certain criteria; 3) that the offer may not be extended if the consumer does not continue to meet those criteria or does not provide required collateral; and 4) that the consumer has the right to prohibit the use of her consumer report in connection with unsolicited firm offers of credit or insurance. The statement must also provide the consumer with a toll-free number to call if the consumer wants to preclude the use of her report for such offers. As discussed above, the provision of such notice is an integral part of the balance the FCRA strikes between consumer privacy and the economic value that firm offers may provide to consumers. Although the ad defendants sent to Ms. Cole does contain the required information, it is buried in a lengthy, complicated, tiny-type footnote.

Plainly, subparagraph 12(e) of Ms. Cole's complaint sets forth a claim upon which relief may be granted. Indeed, this Court has "made it clear that Rule 12(b)(6) is not the appropriate vehicle for [] a dismissal" of this sort of claim. *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 805 (7th Cir. 2001), *citing Smith v. Check-N-Go of Illinois, Inc.*, 200 F.3d 511, 514 (7th Cir. 1999); *Walker v. National Recovery, Inc.*, 200 F.3d 500 (7th Cir. 1999). Moreover, as this Court explained, "allegations that disclosures are not 'clear and conspicuous' state a claim upon which relief may be granted." *Lifanda*, 237 F.3d at 805; *see also Sampson v. Western Sierra Acceptance Corp.*, 2003 WL 21785612 at *3 (N.D. Ill. 2003). Thus, where (as here) the

disclosures have been made part of the complaint, the district court should rule on the merits of the allegation by converting a Rule 12(b)(6) motion to a motion under either Rule 12(c) (motion for judgment on the pleadings) or Rule 56 (motion for summary judgment). *Lifanda*, 237 F.3d at 806.

The court below erred by granting a Rule 12(b)(6) motion as to the entire complaint, without any analysis of this distinct statutory claim. The court's only explanation was that this allegation (and all the other portions of paragraph 12 except for subparagraph 12(a)) "are legal conclusions rather than factual allegations and, therefore, are improper and need not be accepted as true." 2003 WL 21003696 at *5 n.2, *citing Papasan v. Allain*, 478 U.S. 256, 286 (1986). But *Papasan* merely states that, in the context of a motion to dismiss, a court need not accept a legal allegation as true, not that such an allegation is in any way improper. 478 U.S. at 286. Accordingly, on remand, the district court should address the merits of Ms. Cole's allegation that the mandatory disclosures are not clear and conspicuous.[9]

On remand, the district court should consider whether, because they are set

[9] Of course, the district court may not need to address the allegation of paragraph 12(e), depending on its resolution of the allegations of other parts of that paragraph. In particular, subparagraphs 12(a)-(d) allege that defendants did not make a valid firm offer of credit. The disclosures of § 1681m(d) are triggered only if defendants made a valid firm offer. Thus, if Ms. Cole prevails in establishing that defendants violated the FCRA because they failed to make a firm offer of credit, the allegation of subparagraph 12(e) becomes moot.

forth in tiny type (approximately 6-point), the disclosures are clear and conspicuous. As this Court explained in *Lifanda,* although a statute does not mandate a specific type size, "it simply does not follow that type size is irrelevant to a determination of whether a disclosure is 'conspicuous.' If the term 'conspicuous' is to retain any meaning at all, it cannot be met as a matter of law by type disproportionately small to that in the rest of the document * * *." 237 F.3d at 808; *see Sampson v. Western Sierra,* 2003 WL at 21785612 at *4 (holding that disclosures in 6-point type are not clear and conspicuous where the rest of the document is printed in type ranging in size from 10.5 to 28 point); *see also Encyclopedia Britannica, Inc. v. FTC,* 605 F.2d 964, 971-72 (7th Cir. 1979) (affirming FTC order requiring disclosures to be printed in 10-point type); *In re Herb Gordon Auto World, Inc.*, 123 F.T.C. 1172, 1181 (1997) (consent order) (defining clear and conspicuous disclosures to "appear [] in a size, shade, contrast, prominence and location, [] as to be readily noticeable, readable and comprehensible to an ordinary consumer); U.C.C. § 1-201(10) (term is conspicuous if it is in larger or other contrasting type or color).[10]

Although defendants suggest that they can comply with the clear and

[10] Nor are disclosures automatically conspicuous merely because they are on the same page as the ad. *See* App. Br. at 18. Indeed, in *Lifanda,* this Court held that disclosures on the front of the page were, nonetheless, inconspicuous. 237 F.3d at 808.

[11] Although defendants contend that "minuscule print can be part of a conspicuous disclosure," App. Br. at 20, the case they cite, *Transurface Carriers, Inc. v. Ford Motor Co.*, 738 F. 2d 42 (1st Cir. 1984), provides no support whatsoever for

report from being used for such offers in the future. These disclosures are important because they allow consumers to protect their privacy, an interest that is of the highest order. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (protecting consumers from unwanted solicitation); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (same); *Trans Union v. FTC*, 245 F.3d at 818 ("we have no doubt that this interest -- protecting the privacy of consumer credit information -- is substantial").

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's dismissal and remand the matter for resolution of the merits of Ms. Cole's complaint.

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for
Litigation

LAWRENCE DeMILLE-WAGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2448

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 6967 words. I relied on my word processor and its WordPerfect 10 software to obtain this count.

CERTIFICATE OF SERVICE

I hereby certify that, on April 15, 2004, I served the Brief of Amicus Curiae, Federal Trade Commission on appellant and appellees by sending two copies, by express overnight delivery, to:

Daniel Edelman
Edelman, Combs & Latturner, LLC
120 South LaSalle St., 18th Floor
Chicago, IL 60603

Kevin B. Duff
Rachlis Durham Duff & Adler
542 South Dearborn St., Suite 1310
Chicago, IL 60605

Daniel S. Kaplan
181 Waukegan Rd., Suite 301
Northfield, IL 60093

Gary C. Wykidal
Law Offices of Gary C. Wykidal & Assoc.
245 Fischer Ave., Suite A-1
Costa Mesa, CA 92626-4553

_____

Lawrence DeMille-Wagman