IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KELLI BANKS,

OPINION AND ORDER

Plaintiff,

12-cv-731-bbc

v.

TARGET CORPORATION, d/b/a,
TARGET NATIONAL BANK,

Defendant.

- -

In this civil action under the Fair Credit Reporting Act, plaintiff Kelli Banks alleges that defendant Target Corporation, doing business as Target National Bank, violated 15 U.S.C. § 1681s–2(b) by reporting inaccurate and incomplete information to credit reporting agencies regarding her debt. Although a credit reporting agency notified defendant of plaintiff's contention that she was repaying the debt pursuant to a receivership under Wis. Stat. § 128.21, defendant refused to alter its report that plaintiff's debt was "charged-off," "written-off" and "past-due" or add a notation that the debt was being repaid through the receivership. Defendant has now filed a motion to dismiss, dkt. # 5, asserting that its reporting was accurate and complete and that defendant's alleged duty to report receiverships under Wis. Stat. § 128.21 is preempted by the Fair Credit Reporting Act.

Although I find that plaintiff has not alleged sufficient facts to imply that defendant's report was inaccurate, it is reasonable to infer from the complaint that defendant's report

was misleading and that defendant failed to perform a reasonable investigation. Accordingly, defendant's motion to dismiss will be granted in part and denied in part.

Plaintiff alleges the following facts in her complaint.

ALLEGATIONS OF FACT

Plaintiff Kelli Banks is a resident of Wisconsin. Defendant Target Corporation, doing business as Target National Bank, is a corporation organized under the laws of the State of Minnesota. Defendant lends money directly to Wisconsin consumers, including plaintiff.

Plaintiff was unable to keep up with her bills, so on March 29, 2010, she filed a petition to enter voluntary amortization of her debts under Wis. Stat. § 128.21, in order to protect her credit profile and try to stay current and pay off her creditors. In the petition, plaintiff listed the full amount of her debt to defendant and affirmed her intention to pay the balance.

On April 5, 2010, the Circuit Court for Dane County issued an order allowing plaintiff to proceed with a voluntary amortization of her debts under § 128.21. The court appointed Susan Schuelke to act as trustee in the amortization and enjoined further collection actions. On April 22, 2010, Schuelke sent a notice to defendant listing plaintiff's balance and advising defendant that the balance would be paid through the § 128.21 process. The notice instructed defendant how to object to the balance or seek a larger payment and informed defendant that it would not receive any further accruing interest, late charges or related administrative costs and fees. Defendant did not object to the listed

balance or seek a judgment for a higher amount. In August 2010, defendant began receiving regular monthly payments toward the balance from trustee Schuelke.

In September 2010, plaintiff learned that the national credit reporting agencies were reporting that her debt to defendant had been "charged off," that her balance was past due and that the unpaid balance had been "written off." The reporting agencies were not reporting that plaintiff was paying the balance in full under the § 128.21 receivership provisions.

Around September 24, 2010, plaintiff sent a dispute to one of the credit reporting agencies, Experian Information Solutions, requesting that it change its reporting to reflect that she was paying the balance in full under a receivership. Around September 27, 2010, Experian advised defendant of plaintiff's dispute and informed defendant that plaintiff asserted that she was repaying her debt in full under a receivership under Wis. Stat. § 128.21. Experian asked defendant to verify whether its reporting of the status of plaintiff's debt as "charged off," "written off" and "past due" was complete and accurate.

In its investigation of plaintiff's dispute, defendant did not review the documents relating to plaintiff's receivership that it had received from trustee Schuelke or made any effort to contact Schuelke. Defendant had no training policy for its employees about the effect of § 128.21 receiverships or how to report such receiverships to credit reporting agencies. Around October 12, 2010, defendant advised Experian that the reporting was complete and accurate and that plaintiff's alleged debt should be reported as "charged off" with a balance "written off" and a balance "past due" without any reference to the balance

being paid under the receivership.

OPINION

Plaintiff contends that defendant violated the Fair Credit Reporting Act by failing to investigate its information reasonably and providing inaccurate or incomplete information to the credit reporting agencies. Defendant argues that plaintiff's claims must be dismissed because (1) plaintiff has not alleged that it was inaccurate to report that her debt was "charged off," "written off" and "past due"; (2) it was not misleading to omit any reference to the fact that plaintiff was paying her debt through the receivership under Wis. Stat. § 128.21; and (3) plaintiff's argument that defendant was required to report the receivership is preempted by federal law.

A. Legal Background

1. The Fair Credit Reporting Act

The Fair Credit Reporting Act is intended to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." Safeco Insurance Company of America v. Burr, 551 U.S. 47, 52 (2007). The Act imposes certain duties on those who furnish information to credit reporting agencies. 15 U.S.C. § 1681s–2. After receiving notice of a dispute from a consumer reporting agency, the furnisher of information must investigate the disputed information, "review all relevant information provided by the consumer reporting agency" and "report the results of the investigation to"

that agency. 15 U.S.C. § 1681s-2(b). If the furnisher's investigation reveals that its information was "incomplete or inaccurate or cannot be verified," it must also report its results to other consumer reporting agencies and correct the information by modifying, deleting or permanently blocking the reporting of that information. Id. To state a claim against a furnisher for failure to investigate a dispute under 15 U.S.C. § 1681s-2(b), the consumer must at least allege that the reported information was in fact inaccurate or incomplete. Chiang v. Verizon New England Inc., 595 F.3d 26, 37-38 (1st Cir. 2010). See also Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir. 1991) (plaintiff must allege that information in report was inaccurate to sustain claim under 15 U.S.C. § 1681e(b) against credit reporting agency for failure to perform a reasonable investigation before preparing report).

2. Wis. Stat. § 128.21

Wis. Stat. § 128.21 creates an alternative to bankruptcy that is unique to Wisconsin. Jeffrey L. Murrell, Chapter 128: Wisconsin's Bankruptcy Alternative, Wisconsin Lawyer, May 2008, at 8. A debtor who is earning wages but cannot pay her bills on time may amortize her debt over a period of up to three years. Wis. Stat. § 128.21(1). After the petition is filed, no execution, attachment or garnishment may be levied or enforced by any of the creditors listed in the petition and subject to jurisdiction in Wisconsin. Wis. Stat. § 128.21(2). The court appoints a trustee, who then notifies the creditors, holds an optional meeting with the creditors and submits a report concerning a repayment plan to the court.

Wis. Stat. § 128.21(3). A creditor may object to approval of the plan in its entirety or to the specific balances listed by a debtor on her petition. Wis. Stat. § 128.21(3)(g) & (r).

B. Failure to Report Dispute

As an initial matter, plaintiff contends that defendant is liable for failing to report the fact that she had a "legitimate dispute." Defendant argues that a furnisher's obligation to report disputes arises only when the consumer disputes her liability for the underlying debt. Although plaintiff sent a dispute to Experian, she was not disputing her liability for the underlying debt. Plaintiff does not oppose dismissal of this claim. Plt.'s Br., dkt. #11, at 20. Accordingly, the motion to dismiss will be granted with respect to plaintiff's claim that defendant failed to report her dispute.

C. Inaccurate Information

Plaintiff has not alleged facts to support her claim that defendant's report was inaccurate. She does not allege that her balance was not past due or that defendant had not "written off" or "charged off" the debt. She alleges that she began paying defendant through the receivership in August 2010 but never describes the status of her debt before that point. The fact that plaintiff made several payments through her receivership is not inconsistent with defendant's report that plaintiff's account was properly classified as "written off" or "charged off," as those terms are ordinarily defined. According to Black's Law Dictionary 1641 (8th ed. 2004), "write off" means "to remove (an asset) from the books," and "charge

off" means "to treat (an accounts receivable) as a loss or expense because payment is unlikely." Id. at 249. One might argue that once plaintiff paid a substantial portion of the balance through her receivership, it would be inaccurate for defendant to continue classifying her debt as charged off. However, plaintiff has alleged nothing about the size of her debt or the amount of her payments to suggest that this was her situation. Instead, she argues that the court should infer that defendant's reporting was inaccurate from the absence of allegations suggesting that it was accurate. For instance, she argues that the court cannot infer that defendant classified her account correctly under its internal policies because defendant's policies about when to classify accounts as "charged off" or "written off" are not in the record. Plt.'s Br., dkt. #11, at 18. Similarly, she argues that the Uniform Retail Credit Classification and Account Management Policy, 65 FR 36903, 36904 (June 12, 2002), encourages creditors to classify a debt as "charged off" only if it is past due for 180 days and, because the precise dates of her last payment and her first renewed payment in August 2010 are not in the record, the court cannot infer that her account was classified correctly under the uniform policy. Id. at 17-18.

Defendant's arguments reverse the pleading standard. Plaintiff must plead sufficient facts to "permit the court to infer more than the mere possibility of misconduct." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). It is possible that plaintiff's debt was not classified properly under defendant's definition or the uniform definition of "charged off," but none of plaintiff's allegations suggest that this is what actually happened.

Plaintiff also argues that defendant's classification of her debts as "past due" was

inaccurate because she "only missed payments from April to July 2010 because she was waiting for her Chapter 128 plan to be confirmed . . . and for her trustee to start disbursing payments." Plt.'s Br., dkt. #11, at 16. As I understand this argument, she proposes to assert on summary judgment that it is inaccurate to classify an account as "past due" simply because a debtor misses payments between the time she files a Wis. Stat. § 128.21 petition and her trustee makes the first payments under the plan. This theory is not well-grounded in the allegations of complaint or in the law. The court cannot incorporate facts from briefs into a complaint, Bissessur v. Indiana University Board of Trustees, 581 F.3d 599, 603 (7th Cir. 2009), and plaintiff does not allege in her complaint that the only payments she missed were payments between April and July 2010. Moreover, she does not allege that defendant relied on these specific missed payments when it classified her account as "past due." In any case, plaintiff has not developed her legal argument that Wis. Stat. § 128.21 authorizes consumers to stop paying debts while they wait for a court to approve their petition or that it is inaccurate for a creditor to classify a balance as past due when the consumer fails to make payments during this time period. Plaintiff has not met her pleading burden with respect to her first claim that defendant's credit reporting was inaccurate. Therefore, this claim will be dismissed.

D. Incomplete Information

Plaintiff contends that defendant's information was incomplete because defendant refused to retract or supplement its information to explain that plaintiff was paying her debt

through the receivership. Information is "incomplete" for purposes of the Fair Credit Reporting Act if it is technically accurate but contains omissions that are "'misleading in such a way and to such an extent that [it] can be expected to have an adverse effect.'" Scheel-Baggs v. Bank of America, 575 F. Supp. 2d 1031, 1039 (W.D. Wis. 2008) (quoting Saunders v. Branch Banking and Trust Co. of Virginia, 526 F.3d 142, 148 (4th Cir. 2008)); Chiang, 595 F.3d at 37-38 ("Mere incompleteness, however, is not enough; the incompleteness must be such as to make the furnished information misleading in a material sense.").

According to plaintiff, defendant's omission of the receivership painted a misleading picture of her creditworthiness. The receivership under Wis. Stat. § 128.21 showed her "commitment" to paying her debt on a regular schedule, but reporting the debt as written off and charged off without mentioning the receivership implies "an absolute dereliction of financial irresponsibility." Plt.'s Br., dkt. #11, at 15. Moreover, plaintiff's creditors, including defendant, approved the plan, if only tacitly by not filing any objections. Plaintiff argues further that she will present evidence at summary judgment that creditors view Wis. Stat. § 128.21 receiverships more favorably than charged off or written off debts.

In response, defendant maintains that its omission was not misleading and that plaintiff's theory is preempted by federal law. It marshals three arguments in support. First, even if the receivership proceeding shows a commitment to payment, a credit report is about a consumer's creditworthiness and not about her commitments or promises to pay in the future. A consumer could also show "commitment" to making payments by signing up for

a credit repair or counseling service, but her creditors need not report this favorable information to credit reporting agencies. A debtor who enters a receivership under Wis. Stat. § 128.21 may still default on the payments, leading the state court to dismiss the proceedings. Wis. Stat. § 128.21(5).

Although these hypotheticals have some force, defendant has cited no cases in which a court found that a creditor's failure to report legal proceedings similar to the § 128.21 receivership was not misleading as a matter of law. Whether the omission in this case was misleading appears to depends on factual disputes that require further development. Defendant reported to Experian that plaintiff's balance was classified properly as written off and charged off, even though defendant had received payments from the trustee for two months under a plan that would pay of the debt in three years. At this stage of the litigation, it is reasonable to infer that a creditor would view plaintiff's creditworthiness more favorably if it knew she was making payments on her debt under a receivership plan than if it believed her balance was simply charged off. Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 44 (D.C. Cir. 1984) (whether it was misleading to report plaintiff's debt simply as in "default" when he repaid loan after it was referred for collection required evidence about whether it would affect creditor's willingness to grant credit). Accordingly, I conclude that plaintiff has alleged sufficient facts to allow the inference that defendant's omission was materially misleading.

Second, defendant argues that plaintiff's legal theory is preempted by the Fair Credit Reporting Act, which provides in relevant part:

> No requirement or prohibition may be imposed under the laws of any State–
>
> (1) with respect to any subject matter regulated under–
>
> * * * *
>
> (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . .

15 U.S.C. § 1681t(b). According to defendant, plaintiff is attempting to use a state law to impose a unique reporting responsibility on creditors who extend credit to Wisconsin consumers and, therefore, her claim is preempted by federal law.

Defendant's argument is not persuasive. The cases interpreting § 1681t(b)(1)(F) involve preemption of state laws that regulate credit reporting or state law claims for defamation, invasion of privacy or negligence arising from credit reporting. E.g. Purcell v. Bank of America, 659 F.3d 622, 623 (7th Cir. 2011). What these laws have in common is that they purport to alter the furnisher's liability for reporting information. Plaintiff is not alleging a similar state law claim. Instead, she is alleging that defendant reported the status of her debt under state law misleadingly. Many state laws regulate the relationship between creditors and consumers, which in turn affects the information that creditors report to credit reporting agencies. For example, if Wisconsin passed a law stating that creditors may not charge off a debt until it is 180 days past due, then creditors would be required to change the way they report the debts of Wisconsin consumers. However, that law would not "impose a requirement" on creditors "relating to the responsibilities of persons who report information to consumer agencies."

Defendant is required to report accurate and complete information about consumer

debts to the credit reporting agencies. In doing so, it must follow the state laws that regulate credit. This principle applies equally to Wis. Stat. § 128.21, even if it is a legal process unique to Wisconsin.

Third, plaintiff contends that defendant failed to investigate her dispute in a reasonable manner, because it failed to review documents about her receivership sent by trustee Schuelke, never contacted Schuelke and maintained no training policy for its employees about how to report Wis. Stat. § 128.21 receiverships. Defendant argues that plaintiff cannot sustain its claim for inadequate investigation because the duty of reinvestigation is triggered only if the consumer makes some showing that the reported information was inaccurate or incomplete. 15 U.S.C. §1681s-2(b)(1)(A) ("*After* receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information. . . the person shall . . . conduct an investigation . . . ."). In light of my previous conclusion that plaintiff has alleged that defendant's information was incomplete, defendant's argument fails.

ORDER

IT IS ORDERED that the motion to dismiss, dkt. # 5, filed by defendant Target Corporation doing business as Target National Bank is GRANTED IN PART. Plaintiff Kelli Banks's complaint is DISMISSED without prejudice as to her claim that defendant reported inaccurate information because it failed to add a notation that her account was disputed or delete its report that plaintiff's balance was past due, charged off or written off. The motion

is DENIED in all other respects.

Entered this 6th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge