

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

JOHN GILLARD, <i>et al.</i> , individually and on	)	
Behalf of those similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03 CH 6659
	)	
	)	
MASTERCARD INTERNATIONAL, INC.,	)	
A Delaware corporation,	)	
	)	
Defendant.	)	

**Memorandum Order and Opinion**

This matter comes before the Court on the Motion of Defendant Mastercard International, Inc. (“Mastercard”) to Dismiss Plaintiffs’ Complaint pursuant to 735 ILCS 5/2-615.

**Background**

This case involves the fee Mastercard charges its customers when they use their credit card to purchase goods and services in currencies other than U.S. dollars. Plaintiffs allege that Mastercard does not disclose this fee and in fact conceals the fee in customer billing statements by including it within the total transaction amount reported to the issuing bank. Plaintiffs further allege that the fee is a “phony” charge in that Mastercard is not required to convert currency to settle the vast majority of its cardholders’ foreign transactions. Plaintiffs filed this class action complaint alleging a violation of the Illinois Consumer Fraud Act and unjust enrichment. Mastercard brings the present motion to dismiss.

**Discussion**

Mastercard first argues that the Illinois Supreme Court has rejected attempts by private plaintiffs to impose consumer credit disclosure requirements in addition to those mandated by

federal law under the Truth in Lending Act, 15 U.S.C. § 1640, and Illinois consumer credit disclosure laws. Lanier v. Assoc. Fin., Inc., 114 Ill. 2d 1, 17, 499 N.E.2d 440 (1986). However, the question of whether Mastercard complied with the TILA requirements is one of fact that cannot be decided on Mastercard's motion to dismiss. In addition, the court in Pawlikowski v. Toyota Motor Credit Corporation, 309 Ill. App. 3d 550, 559, 722 N.E.2d 767 (2d Dist. 1999) held that the fact that the defendant "is not liable under TILA cannot automatically translate into a finding that [the defendant] did not engage in an unfair and deceptive practice under the Consumer Fraud Act." In this case, even if this Court were to find that Mastercard complied with the disclosure requirements of TILA, that does not insulate Mastercard from liability under the Consumer Fraud Act. *See Id.*

Mastercard further argues that plaintiffs fail to sufficiently allege a claim under the Consumer Fraud Act ("CFA"). To assert a private cause of action under the CFA, a plaintiff must allege facts showing (1) a deceptive act or practice; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade; and (4) actual damage to the plaintiff (5) proximately caused by the deception. Oliveria v. Amoco Oil Co., 201 Ill. 2d 134, 149, 776 N.E.2d 151 (2002). An alleged omission is actionable only if the information is material. 815 ILCS 505/2. "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 501, 675 N.E.2d 584 (1997).

Mastercard argues that plaintiffs fail to sufficiently allege that the fee is a material fact. Mastercard relies upon the New York case of Bildstein v. Mastercard, 2004 WL 1682822 (S.D. N.Y. July 28, 2004), where the court held that the plaintiff had not alleged facts showing

materiality because the plaintiff did not allege that disclosure of the claimed fee would have caused him to select a different credit card. In this case, plaintiffs' allegation as to materiality is paragraph 54 which provides:

Mastercard's intentional concealment of the MCCR constitutes the concealment of a material fact, in that the imposition of this embedded charge, which in many instances is exorbitant in amount, is precisely the type of information upon which Plaintiffs and the Class would be expected to rely on in making the decision about whether to use their Cards in foreign currency transactions.

Plaintiffs allege that the existence of the fee is the type of information that a consumer would be expected to rely on in making a decision to purchase. Unlike in Bildstein, plaintiffs in this case allege that the fee is charged for a service that poses virtually no cost to Mastercard. ¶ 25. In fact, what plaintiffs allege could be interpreted as conduct more egregious than a material misrepresentation because the facts necessary for the consumer to make a reasoned decision were completely concealed from him that it would be impossible for him to even question whether there is a material misrepresentation. Thus, this Court finds that plaintiffs' allegation of materiality is sufficient.

Mastercard also argues that plaintiffs fail to allege actual injury since plaintiffs received the service they expected and plaintiffs do not allege the existence of a cheaper alternative available at the time of the service. Mastercard again relies upon the holding in Bildstein, where the plaintiff alleged that his injury was the fact that he paid the deceptive fee charged by Mastercard. The court in that case found that allegation to be insufficient to establish an actual injury. The court held that the plaintiff did not allege that Mastercard failed to deliver the service paid for or that Mastercard charged an inflated fee, allegations that the court stated it would have found sufficient. In this case, however, plaintiffs did allege that the fee at issue was inflated since the conversion process posed virtually no cost to Mastercard. ¶ 25. Thus, Mastercard's

reliance on Bildstein is inapposite. This Court finds that plaintiffs' allegation of injury is sufficient.

Mastercard further argues that plaintiffs have failed to allege with particularity the deceptive conduct. Mastercard asserts that the alleged non-disclosure of the fee could not have caused plaintiffs to choose to pay for purchases abroad using Mastercard credit cards under a false belief that Mastercard's conversion procedure is costless since they did not receive their billing statements until after they made their purchases. However, plaintiffs rely upon Mastercard's omission, not on particular statements made by Mastercard regarding the alleged fee. Plaintiffs cite to the California decision against Mastercard where the court held that the practice of embedding the fee into the billing statement such that the billing statement contained no indication to consumers that they were being charged a fee or the amount of that fee is likely to deceive reasonable consumers. Schwartz v. Visa International Corp., 2003 WL 1870370 \*51. As discussed above, plaintiffs have alleged that the fee was too hidden to see such that receipt of the statements is irrelevant. And again, the real deception or more egregious conduct is causing the cost to be incurred without informing the consumer at all. Thus, this Court finds that allegations of this hidden fee deceiving reasonable consumers is sufficient at this stage of the proceedings.

Finally, Mastercard argues that plaintiffs have not sufficiently alleged an unjust enrichment claim. To state a claim for unjust enrichment, a plaintiff need only allege that "the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." HPI Health Care Services, Inc. v. Mount Vernon Hospital, Inc., 131 Ill. 2d 145, 160, 545 N.E.2d 672 (1989). Mastercard argues again that plaintiffs cannot sustain their claim

because they concede they received exactly the service they desired and do not claim they were overcharged for that service compared to available alternatives. However, as noted above, plaintiffs do allege that they were overcharged for the service provided by Mastercard in that the service did not cost Mastercard anything to provide. Further, plaintiffs allege that Mastercard did not in fact convert the currency such that plaintiffs did not receive the service they paid Mastercard to perform.

In addition, Mastercard argues that in order for a claim of unjust enrichment to exist, there must be some independent basis which establishes a duty on the part of the defendant to act in the manner assertedly required and the defendant must have failed to abide by that duty. Lewis v. Lead Indus. Ass'n, 342 Ill. App. 3d 95, 105, 793 N.E.2d 869 (1<sup>st</sup> Dist. 2003). In this case, although not clearly articulated by plaintiffs, it seems as though Mastercard would have the duty to accurately represent transaction amounts on customer billing statements. It is not clear in this case if that duty arises as a result of the cardholder agreements the customers have with the issuing banks. Nevertheless, Mastercard is not a party to those agreements. Further, according to plaintiffs' allegations, Mastercard adds the fee to the transaction amount and reports the two as one charge to the issuing banks for the purpose of generating a billing statement. As such, the fee is wrongfully obtained and retained by Mastercard.

Mastercard also argues that plaintiffs' unjust enrichment claim fails because plaintiffs have an adequate remedy of law against the card-issuing banks. However, since plaintiffs' claim is in the nature of restitution or quasi-contract, it is an action at law. Partipilo v. Hallman, 156 Ill. App. 3d 806, 809-10, 510 N.E.2d 8 (1<sup>st</sup> Dist. 1987). Thus, this Court finds that plaintiffs may maintain their unjust enrichment claim.

Accordingly, Mastercard's motion to dismiss is denied. Defendants are given until January 14, 2005 to answer the Complaint. The parties shall schedule a date with chambers within two weeks of the Answer being filed in order to discuss case management.

**ENTERED**

**Entered:**

DEC 17 2004

JUDGE

JULIA M. NOWICKI - 293

**Julia M. Nowicki**

**Circuit Judge**

**Dated: December 17, 2004**