

13 CV 8998

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

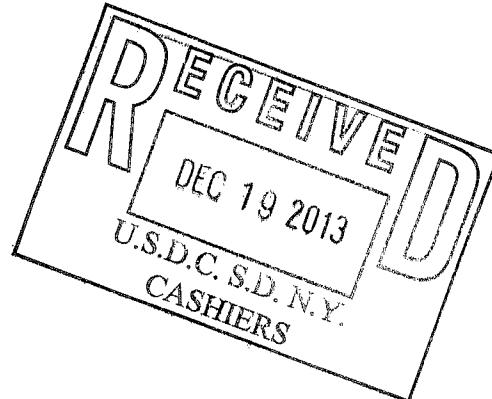
UNITED STATES OF AMERICA,

Plaintiff,

v.

TIME WARNER CABLE, INC.,

Defendant.



13 Civ. _____

**COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION, AND OTHER RELIEF**

ECF CASE

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or the “Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 56(a)(1), for its Complaint, alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), and 16(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 56(a); and Section 621(a) of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681s(a), to obtain monetary civil penalties, a permanent injunction, and other equitable relief for Defendant’s violations of Section 5 of the FTC Act; Section 615 of the FCRA, 15 U.S.C. § 1681m; and the rule regarding Duties of Users Regarding Risk-Based Pricing (“Risk-Based Pricing Rule”), 16 C.F.R. § 640.1 *et seq.*, issued pursuant to Section 615(h) of the FCRA, 15 U.S.C. § 1681m(h), and republished at 12 C.F.R. § 1022.70 *et seq.*

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and under 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), 1681s(a), and 1692l.
3. Venue is proper in this district under 28 U.S.C. §§ 1391(c)(2) and (d), and 1395(a), and 15 U.S.C. § 53(b).

DEFINITIONS

4. This action is brought by the United States of America on behalf of the Federal Trade Commission. The Commission is an independent agency of the United States government given statutory authority and responsibility by the FTC Act, 15 U.S.C. §§ 41-58. The Commission is charged, *inter alia*, with enforcing Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, and the FCRA, 15 U.S.C. § 1681a *et seq.*, which imposes duties upon consumer reporting agencies and those who furnish information to a consumer reporting agency or use information obtained from a consumer reporting agency.

5. Defendant Time Warner Cable Inc. (“TWC”), is a Delaware corporation with its principal place of business at 60 Columbus Circle, New York, NY 10023. TWC transacts or has transacted business in this district and through the United States. At all times material to this Complaint, TWC has advertised, marketed, distributed, or sold video, high-speed data, digital telephone, and other services.

COMMERCE

6. At all times material to this Complaint, Defendant has maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

THE FAIR CREDIT REPORTING ACT

7. The FCRA was enacted in 1970, became effective on April 25, 1971, and has been in force since that date. The Fair and Accurate Credit Transactions Act (“FACT Act”) amended the FCRA in December 2003, Public Law No. 108–159, 117 Stat. 1952, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended the FCRA in July 2010, Pub. L. No. 111-203, 124 Stat. 1376.

8. Section 621 of the FCRA, 15 U.S.C. § 1681s, authorizes the Commission to use all of its functions and powers under the FTC Act to enforce compliance with the FCRA by all persons subject thereto except to the extent that enforcement specifically is committed to some other governmental agency, irrespective of whether the person is engaged in commerce or meets any other jurisdictional tests set forth by the FTC Act.

THE RISK-BASED PRICING RULE

9. Section 311 of the FACT Act added Section 615(h), 15 U.S.C. 1681m(h), to the FCRA to direct the Commission and the Federal Reserve Board to prescribe a rule requiring companies to provide consumers with notice when they engage in the practice of risk-based pricing. Risk-based pricing occurs when companies provide consumers less favorable credit terms based on a review of their credit reports. The Commission’s Risk-Based Pricing Rule, 16 C.F.R. § 640.1 *et seq.*, took effect on January 1, 2011; it was updated by a notice published in the Federal Register on July 15, 2011. The Dodd-Frank Act transferred rulemaking authority for most provisions of the FCRA to the Bureau of Consumer Financial Protection (“Bureau”); the FTC remains vested with enforcement authority. See Sections 1061 and 1088 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and the FCRA, as amended, the Bureau republished the Risk-Based Pricing Rule as an interim final rule at 12 C.F.R. § 1022.70 *et seq.*, effective December 30, 2011. The republished Risk-Based Pricing Rule contains technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act, but does not alter the substantive obligations imposed on persons subject to the Risk-Based Pricing Rule.

10. The FCRA defines a “consumer report” as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes” 15 U.S.C. § 1681a(d)(1).

11. The Risk-Based Pricing Rule applies to any person who uses a consumer report in connection with an application for or grant of credit, and who grants to a consumer, based in whole or in part on the consumer report, credit on terms that are materially less favorable than those available to a substantial proportion of consumers. 16 C.F.R. § 640.3, republished at 12 C.F.R. § 1022.72.

12. The Risk-Based Pricing Rule, defines “material terms” to include:

In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report that has the most significant financial impact on consumers, such as a deposit required in connection with credit extended by a telephone company or utility

16 C.F.R. § 640.2, republished at 12 C.F.R. § 1022.71(n)(3).

13. A person who is subject to the Risk-Based Pricing Rule must provide a risk-based pricing notice, containing the following specified information, to consumers receiving the materially less favorable terms:

1. A statement that a consumer report includes information about the consumer’s credit history and the type of information included in that history;
2. A statement that the terms offered have been set based on information from a consumer report;
3. A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

4. A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;
5. The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;
6. A statement that Federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;
7. A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies;
8. A statement directing consumers to the Web site of the Consumer Financial Protection Bureau to obtain more information about consumer reports; and
9. If the creditor used a credit score,
 - a) A statement that a credit score is a number that takes into account information in a consumer report, that the consumer's credit score was used to set the terms of credit offered, and that a credit score can change over time to reflect changes in the consumer's credit history;
 - b) The credit score used in making its credit decision;
 - c) The range of possible credit scores under the model used to generate the credit score;
 - d) All of the key factors that adversely affected the credit score, limited to four key factors unless one of the key factors was the number of enquiries to the consumer's report and in such instance listing five key factors;

- e) The date on which the credit score was created; and
- f) The name of the consumer reporting agency or other person that provided the credit score.

See 16 C.F.R. § 640.4, republished at 12 C.F.R. § 1022.73.

DEFENDANT'S BUSINESS PRACTICES

14. TWC provides, among other things, cable television, high-speed internet, Voice Over IP telephone, and other services to consumers and businesses. In providing such services, TWC extends “credit” to consumers, as that term is defined under the FCRA. “Credit” is a “right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor,” and a “creditor” is “a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit.” 12 C.F.R. § 1002.2(j) and (l), incorporated by reference in 15 U.S.C. § 1681a(r)(5). TWC permits consumers to defer payment for some of its services. As a creditor that extends credit, if TWC offers such credit to some consumers on materially less favorable terms than are available to a substantial proportion of its other customers based on a credit report, it must provide a risk-based pricing notice.

15. In the course of reviewing a consumer’s request for service, TWC retrieves the consumer’s credit report. Based on the information included in the report, TWC requires some prospective customers to pay a deposit or to pay the first month’s bill in advance in order to receive service. A substantial proportion of TWC’s prospective customers, those with more favorable credit histories, are not required to pay a deposit or the first month’s bill.

16. Beginning January 1, 2011 through at least March 5, 2013, TWC failed to provide consumers who paid a deposit or other pre-payment with a notice, as set forth in the Risk-Based Pricing Rule, that the deposit requirement was imposed based on information contained in the consumer's credit report.

Count I

Violation of the Risk-Based Pricing Rule

17. TWC has extended credit to consumers on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of its customers, based in whole or in part on its use of consumer reports.

18. In numerous instances, TWC failed to provide notice to consumers that they were extended credit on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of TWC's customers. Failure to provide such notice to a consumer constitutes a violation of the Risk-Based Pricing Rule.

19. Pursuant to Section 621(a)(1) of the FCRA, 15 U.S.C. § 1681s(a)(1), TWC's violations of the Risk-Based Pricing Rule constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

20. Section 621 of the FCRA, 15 U.S.C. § 1681s, authorizes the Commission to use all of its functions and powers under the FTC Act to enforce compliance with the requirements imposed by the FCRA on all persons subject thereto except to the extent that enforcement specifically is committed to some other governmental agency, irrespective of whether the person is engaged in commerce or meets any other jurisdictional tests set forth by the FTC Act.

THIS COURT'S POWER TO GRANT RELIEF

21. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC.

**CIVIL PENALTIES FOR VIOLATIONS
OF THE RISK-BASED PRICING RULE**

22. Section 621(a)(2)(A) of the FCRA, 15 U.S.C. § 1681s(a)(2)(A), as adjusted by 16 C.F.R. § 1.98(m), authorizes the Court to award monetary civil penalties of not more than \$3,500 for each knowing violation of the FCRA that constitutes a pattern or practice of violations of the statute.

23. Each instance in which TWC has failed to comply with Section 615(h)(1) of the FCRA, 15 U.S.C. § 1681m(h)(1), and the Risk-Based Pricing Rule, 16 C.F.R. § 640.1 *et seq.* and 12 C.F.R. § 1022.70 *et seq.*, constitutes a separate violation of the FCRA for the purpose of assessing monetary civil penalties under Section 621(a)(2)(A) of the FCRA, 15 U.S.C. § 1681s(a)(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53(b), 1692l, 1681s(a), and the Court's own equitable powers, respectfully requests that the Court:

1. Enter judgment against TWC and in favor of Plaintiff for each violation alleged in this Complaint;
2. Enter a permanent injunction to prevent future violations of the FCRA and the Risk-Based Pricing Rule by TWC;
3. Award such relief as the Court finds necessary to redress injury to consumers resulting from TWC's violations of the FCRA, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten gains;
4. Award Plaintiff monetary civil penalties from TWC for each violation of the FCRA and the Risk-Based Pricing Rule alleged in this Complaint; and

5. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: New York, New York
December 19, 2013

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA:

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