

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SHELLEY DENTON, and all others similarly  
situated,

Plaintiff,

v.

DEPARTMENT STORES NATIONAL  
BANK,

Defendant.

No. 10-CV-5830 RBL

ORDER

[Dkt. #37]

This suit arises out of a “Payment Protection” service sold by Department Stores National Bank (“DSNB”) to its credit-card customers. Payment Protection, according to Plaintiff, is “a service that suspends or cancels the required minimum monthly payments due on the subscriber’s credit card account and excuses the subscriber from paying the monthly interest charge . . . for a limited period of time” in circumstances of financial difficulty. (First Am. Compl. ¶ 18.) Plaintiff alleges (on behalf of a putative class) that terms buried in fine print exclude whole classes of individuals, including the self-employed, like Plaintiff. *Id.* ¶¶ 23, 27. Despite these exclusions, the Complaint alleges, Defendants continue to sell Payment Protection to those groups. Plaintiff alleges that she purchased Payment Protection and paid years of fees, yet only after claiming benefits did she learn that she is ineligible (and always has been) because she is self-employed. *Id.* ¶¶ 37–47. On that basis, Plaintiff asserts claims for breach of contract, breach of good faith and fair dealing, unjust enrichment, and declaratory judgment. *See generally id.*

1 Defendant has moved to dismiss, arguing that the exclusions limit Plaintiff's coverage  
2 but do not entirely exclude Plaintiff from benefits, that certain claims are preempted or have  
3 expired under the statute of limitations, or that Plaintiff's claims simply lack the factual basis to  
4 proceed. (*See* Def.'s Reply at 7.) For the reasons stated below, the Court grants in part and  
5 denies in part the motion to dismiss.

## 6 I. BACKGROUND

7 On August 1, 2011, this Court dismissed Plaintiff's previous Complaint, but granted leave  
8 to amend. Plaintiff's effort to cure the original complaint's deficiencies is under review here.

### 9 A. Allegations Regarding "Payment Protection"

10 Department Stores National Bank, a subsidiary of Citibank, issues branded credit cards  
11 for various department stores, including Macy's and Bloomingdale's. (First Am. Compl. ¶ 16.)  
12 Subscribers to those cards can purchase what Plaintiff terms "Payment Protection," a service in  
13 which DSNB allows a subscriber to essentially freeze their account, requiring no payments and  
14 accruing no interest, under certain circumstances. *See id.* ¶ 18. Plaintiff alleges that the terms  
15 are "varied, complicated and always changing," but that all variations provide for "some form of  
16 payment suspension" when a subscriber is involuntarily unemployed, under an employer-  
17 approved leave of absence, disabled, hospitalized, critically injured, or certain other triggering  
18 events. *Id.* ¶ 20. Plaintiff contends that DSNB markets and sells Payment Protection to  
19 customers knowing that they are either completely or almost-completely ineligible to receive any  
20 benefit. Specifically, Plaintiff alleges that the standardized terms, presented in "small print and  
21 in complete, indecipherable, misleading and obfuscatory language," restricts "most or all of the  
22 benefits" for the self-employed, unemployed, part-time employees, seasonal employees, retirees,  
23 and the disabled. *Id.* ¶¶ 23, 27. For the service, DSNB charges 1.89% of the subscriber's card  
24 balance at month's end. *Id.* at ¶ 28.

### 25 B. Allegations Regarding Plaintiff

26 Plaintiff alleges that in 1995 she was issued a card from "The Bon" department store,  
27 which was later purchased by Macy's. *Id.* ¶ 38. She has had the same credit card since  
28 approximately 1995. *Id.* In 1998, Plaintiff purchased a variation of Payment Protection for her

1 Macy's card, now issued by DSNB. *Id.* ¶ 39. Plaintiff asserts that she "is ineligible and has  
2 always been ineligible for Payment Protection benefits" because she is self-employed. *Id.* ¶ 40.

3 In April 2009, Plaintiff's business "experienced financial hardship," leading Plaintiff to  
4 file a claim for Payment Protection benefits. *Id.* ¶ 42. A DSNB-representative denied coverage  
5 because Plaintiff is self-employed. *Id.* ¶ 42.

6 According to Plaintiff, DSNB then cancelled Payment Protection without notice by  
7 simply omitting the service from her credit-card statement. *Id.* ¶ 44. Plaintiff then spoke with a  
8 DSNB-representative "who assured her that she was eligible for Payment Protection and that it  
9 could be placed back on her credit card after a one month waiting period." *Id.* DSNB then re-  
10 enrolled Plaintiff in Payment Protection. *Id.* ¶ 45.

11 The primary difference, and indeed an important difference, between the original  
12 Complaint and the Amended Complaint is that Plaintiff now alleges that she applied for and was  
13 denied benefits under the Payment Protection service. *Compare* Compl. ¶¶ 50–53 (Dkt. #1) *with*  
14 *First Am. Compl.* ¶¶ 37–47 (Dkt. #32).

### 15 **C. Plaintiff's Claims**

16 Based on the facts above, Plaintiff has asserted claims for breach of contract, breach of  
17 the covenant of good faith and fair dealing, unjust enrichment, and declaratory judgment. *See id.*  
18 ¶¶ 61–93. Plaintiff requests rescission, restitution, and damages. *Id.* ¶¶ 81–95.

### 19 **D. Defendant's Motion to Dismiss**

20 Department Stores National Bank contends, first and foremost, that the Complaint fails to  
21 identify any contract term breached. (Def.'s Mot. to Dismiss at 5.) Thus, Plaintiff's claim for  
22 breach of contract and good faith and fair dealing fail as a matter of law.

23 Plaintiff's unjust enrichment claims fails, says Defendant, because the Complaint lacks  
24 an actionable promise or breach and because the statute of limitations has expired. *Id.* at 8.

25 To the extent that Plaintiff asserts rescission and restitution as causes of action,  
26 Defendant requests dismissal because they are merely remedies that must rest on proper claims.  
27 *Id.* at 10.

1 Lastly, Defendant correctly notes that the Court has already dismissed Plaintiff's claim  
2 under the Washington Consumer Protection Act, Wash. Rev. Code § 19.86 *et seq.*, as preempted  
3 by the National Banking Act, 12 U.S.C. § 1 *et seq.* See Order at 4 (Dkt. #31). Thus, the  
4 Amended Complaint's request for a declaratory judgment that DSNB violated the CPA should  
5 be dismissed. (Def.'s Mot. to Dismiss at 11.)

## 6 II. DISCUSSION

7 Defendant has filed a 12(b)(6) motion for failure to state a claim upon which relief can be  
8 granted. The complaint should be liberally construed in favor of the plaintiff and its factual  
9 allegations taken as true. See, e.g., *Oscar v. Univ. Students Co-Operative Ass'n*, 965 F.2d  
10 783,785 (9th Cir. 1992). The Supreme Court has explained that "when allegations in a  
11 complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency  
12 should be exposed at the point of minimum expenditure of time and money by the parties and the  
13 court." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal citation and quotation  
14 omitted). A complaint must include enough facts to state a claim for relief that is "plausible on  
15 its face" and to "raise a right to relief above the speculative level." *Id.* at 555. The complaint  
16 need not include detailed factual allegations, but it must provide more than "a formulaic  
17 recitation of the elements of a cause of action." *Id.* A claim is facially plausible when plaintiff  
18 has alleged enough factual content for the court to draw a reasonable inference that the defendant  
19 is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).  
20 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
21 statements, do not suffice." *Id.* at 1949.

### 22 A. Breach of Contract

23 Plaintiff claims that the contract "imposes on Defendant an obligation to provide benefits,  
24 including suspending or cancelling the required minimum monthly payment" in certain  
25 circumstances, and Defendant breached that obligation by denying benefits due to Plaintiff's  
26 self-employed status. (Pl.'s Resp. at 3.) Defendant asserts that the "only alleged denial of  
27 benefits was perfectly consistent with the contract," i.e., the denial was proper given the self-  
28 employment exclusion. (Def.'s Mot. to Dismiss at 1.)

1 To sustain a claim for breach of contract, a party must allege a duty imposed by contract,  
2 a breach, and damages proximately caused. *Nw. Indep. Forest Mfrs. V. Dep't of Labor & Indus.*,  
3 78 Wash. App. 707, 712 (1995).

4 Plaintiff does not allege that Defendant breached a specific contract term; rather, Plaintiff  
5 argues that the self-employment exclusion undermines the very purpose of the contract.

6 Essentially, Plaintiff claims that Defendant uses a categorical exclusion to cheat its subscribers of  
7 all, or nearly all, of the benefits provided by Payment Protection, a service for which Plaintiff  
8 pays an astronomical—indeed, barely comprehensible—22.68% yearly fee (compounding at  
9 1.89% *monthly*).

10 Plaintiff's claim amounts to an attack on the viability of the exclusions. To succeed on  
11 her breach of contract claim, Plaintiff must show that the exclusions she complains of are  
12 unenforceable, and thus, Defendant's denial of benefits under the contract amounts to breach.

13 Given Washington's "fundamental public policy" of "[p]rotecting parties in a position of  
14 weaker bargaining power from exploitation" in contracts of adhesion, *McKee v. AT&T Corp.*,  
15 164 Wash. 2d 372, 385 (2008), there is a question of whether the self-employment exclusion is  
16 unconscionable. *See* First Am. Compl. ¶ 67 (alleging provisions are unconscionable).

17 Unconscionability "is a question of law for the courts." *McKee*, 164 Wash. 2d. at 397.

18 Substantive unconscionability "involves those cases where a clause or term in the contract is  
19 one-sided or overly harsh." *Id.* At this juncture, with Plaintiff alleging that the exclusions at  
20 issue deprive subscribers, including Plaintiff herself, of all value under the contract, it is not clear  
21 that the term is enforceable. While the claim is tenuous, it should be addressed more thoroughly  
22 at summary judgment. The Court therefore denies the motion to dismiss Plaintiff's claim for  
23 breach of contract.

#### 24 **B. Breach of the Covenant of Good Faith and Fair Dealing**

25 Inherent in every contract is an implied duty of good faith and fair dealing. *Badgett v.*  
26 *Sec. State Bank*, 116 Wash. 2d 563, 569 (1991). The duty "obligates the parties to cooperate  
27 with each other so that each may obtain the full benefit of performance," but requires them to  
28 perform only those duties arising "in connection with the terms agreed to by the parties." *Id.*

1 (citation omitted). In other words, “there cannot be a breach of the duty of good faith when a  
2 party simply stands on its rights to require performance of a contract according to its terms.” *Id.*  
3 at 570 (citations omitted).

4 Plaintiff correctly argues that the duty of good faith and fair dealing can give rise to a  
5 duty to disclose during contract formation. Pl.’s Resp. at 6; *see also Liebergsell v. Evans*, 93  
6 Wash. 2d 881, 892 (1980) (“the duty to disclose relevant information to a contractual party can  
7 arise as a result of the transaction itself within the parties’ general obligation to deal in good  
8 faith”). Disclosure, however, is governed by the National Bank Act, 12 U.S.C. § 1 *et seq.* (debt  
9 cancellation and suspension contracts are governed by “applicable Federal law and regulation,  
10 and not . . . by state law,” *see* 12 C.F.R. §37.1(c)). The Act preempts Plaintiff’s claim for breach  
11 of the covenant of good faith and fair dealing.

### 12 **C. Unjust Enrichment**

13 As the Court stated in its previous order, “[a] party to a valid express contract is bound by  
14 the provisions of that contract, and may not disregard the same and bring an action on an implied  
15 contract relating to the same matter, in contravention of the express contract.” *Chandler v.*  
16 *Wash. Toll Bridge Auth.*, 17 Wash. 2d 591, 604 (1943). The Court declined to dismiss on the  
17 grounds that an express contract controlled because Plaintiff alleged that the contract was  
18 illusory or failed of consideration, in that it provided her no benefit. (Order at 10 (Dkt. #31).)  
19 The claim was dismissed, however, because Plaintiff “[did] not contend that she ever filed a  
20 claim or needed the benefits of the service.” *Id.* Plaintiff has corrected that deficiency. (First  
21 Am. Compl. ¶ 42.) If the contract was indeed illusory or failed of consideration, then the unjust  
22 enrichment claim may stand.

### 23 **D. Statute of Limitations**

24 Defendant argues that all Plaintiff’s causes of action are barred because Plaintiff asserts  
25 that breach occurred at the time she was “induced” into the Payment Protection contract. (Def.’s  
26 Mot. at 9–10.) The Complaint, while seeking damages for all fees paid over a more than 10-year  
27 period, is not clear as to when the alleged breach occurred. The Court must assume that the  
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1 alleged breach occurred at the time Plaintiff was denied benefits. Thus, the statute of limitations  
2 does not bar Plaintiff's breach of contract and unjust enrichment claims.

### 3 **E. Restitution and Rescission**

4 As the Court stated in its earlier order, Plaintiff's restitution and rescission "claims" are  
5 remedies. *See, e.g., Veritas Operating Corp. v. Microsoft Corp.*, No. 06-cv-703, 2008 WL  
6 7404617, at \*4 (W.D. Wash. Feb. 26, 2008) ("Restitution is an alternative remedy to damages  
7 for breach of contract. The purpose of restitution is to prevent unjust enrichment of the defendant  
8 by restoring to the plaintiff any benefit conferred on the defendant.") (citing 25 David K.  
9 DeWolf & Keller W. Allen *et al.*, *Wash. Prac., Contract Law and Practice* § 14:6 (2011)).

10 Moreover, the cases cited by Plaintiff do not stand for the proposition that restitution and  
11 rescission are independent causes of action. In *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wash.  
12 App. 892 (1971), the appellate court explicitly noted that the cause of action was breach of  
13 contract and subsequently reviewed the trial court's grant of rescission as a remedy. *Id.* at 242  
14 ("The court found the above defects constituted a substantial breach of the contract and granted  
15 rescission."). In *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179 (W.D. Wash. 2010), the  
16 only mention of "restitution" arises when the court states that there is no basis to find "that the  
17 doctrine of unconscionability is a basis for restitutionary relief." *Id.* at 1185.

### 18 **F. Declaratory Judgment**

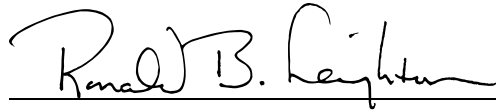
19 Plaintiff's claim for declaratory judgment rises and falls with her other claims. Because  
20 the Court finds that the breach of contract and unjust enrichment claims survive, Plaintiff has  
21 asserted a proper claim for declaratory judgment. To the extent that Plaintiff seeks a declaratory  
22 judgment with respect to the Washington Consumer Protection Act, *see* First. Am. Compl. ¶ 93,  
23 the Court notes that Plaintiff's CPA claim has been dismissed as preempted and remains  
24 dismissed for the reasons stated in the previous order.

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**III. CONCLUSION**

For the reasons stated above, the Court **GRANTS** the motion and dismisses Plaintiff's claim for breach of the covenant of good faith and fair dealing and **DENIES** the motion as to Plaintiff's breach of contract, unjust enrichment, and declaratory judgment claims.

Dated this 11<sup>th</sup> day of April 2012.



RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE