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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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THOMAS KIMBERLY :  
v. :  
GREAT LAKES COLLECTION BUREAU, INC. :  
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:  
ELIZABETH KIMBERLY :  
v. :  
GREAT LAKES COLLECTION BUREAU, INC. :  
:  
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Nos. 3:91CV220 (HBF)  
3:92CV060 (HBF)  
SEP 21 4 00 PM '92

BENCH OPINION

The plaintiffs Kimberly, a mother and son, allege that Great Lakes Collection Bureau ("Great Lakes") violated the Fair Debt Collection Practices Act<sup>1</sup> and the Connecticut Unfair Trade Practices Act<sup>2</sup> in attempting to collect a credit card debt of \$2,392.11 owed by Thomas Kimberly. Thomas Kimberly now seeks actual, statutory, and punitive damages, costs and attorney's fees under §§ 1692b(3) and 1692c(b) of the FDCPA and CUTPA. Elizabeth Kimberly claims Great Lakes impermissibly contacted her and elicited payment from her for her son's debt in violation of §§ 1692d, 1692e, and 1692f of FDCPA and CUTPA. She also seeks actual, statutory, and punitive damages, costs and attorney's fees. The parties consented to trial before this Magistrate Judge (Doc. ## 50, 72).

<sup>1</sup>15 U.S.C. § 1692, et seq., hereafter "FDCPA."

<sup>2</sup>Conn. Gen. Stat. § 42-110a, et seq., hereafter "CUTPA."

FINDINGS OF FACT<sup>3</sup>

Great Lakes is a collection agency licensed by the Connecticut Department of Banking. Between January 15 and February 12, 1991, Great Lakes left eleven messages on Thomas Kimberly's answering machine in an attempt to collect his Discover Card debt of \$2,392.11 (Def. Ex. 502). On February 12, 1991, Great Lakes called Thomas' mother, Elizabeth Kimberly, to verify Thomas' telephone number. Great Lakes left another twelve messages on Thomas' answering machine before it again contacted Mrs. Kimberly on April 2, 1991. After that conversation, Great Lakes on April 3, 1991 charged Elizabeth Kimberly's credit card \$1000, applying the payment towards Thomas' debt. At trial, Mrs. Kimberly, who underwent a craniotomy more than forty years ago, was unable to recall any of her conversations with Great Lakes' representatives.

Thomas Kimberly testified, subject to defendant's hearsay objections, that he found his mother crying, that she kept saying, "Don't worry, I took care of it;," and that she told him, "I was told you would go to jail," and, "You can pay me the \$15 a month."

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<sup>3</sup>The court finds the following facts pursuant to Fed. R. Civ. P. 52(a).

## ISSUES RAISED AT TRIAL

### Reconsideration of Prior Summary Judgment Decisions

Prior to trial, the court (Cabranes, D.J.) granted partial summary judgment to Great Lakes on Thomas Kimberly's §1692e(11) claim and to Thomas Kimberly on his § 1692e(3) claim, awarding Thomas Kimberly statutory damages of \$1000 and reasonable attorney's fees [Doc. # 49]. In addition, the court ruled that Mrs. Kimberly did not have standing to bring a § 1692c(b) claim. [Doc. # 36]. The court has been urged to reconsider both these decisions.

Under Fed. R. Civ. P. 54(b), interlocutory orders are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Acha v. Beame, 570 F.2d 57, 63 (2d Cir. 1978); John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 88 (1922). Thus, the court's prior decisions granting summary judgment are subject to review.

#### 1. Thomas Kimberly: In-house Counsel Demand Letter

Great Lakes contends the court "woodenly applied Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993)" in granting Thomas Kimberly's motion for summary judgment. Kimberly counters that Great Lakes' demand letter is precisely the type of letter admonished in Clomon. In determining whether a collection letter violates section 1692e, courts apply "an objective test

based on the understanding of the 'least sophisticated consumer.'" Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993) (citing Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993)). Defendant's form demand letter, generated by computer, bears the name K.L. Peterson, identified as "Attorney At Law" and "Corporate Counsel" (Def. Exh. 506). It suggests, certainly under the "least sophisticated consumer" standard, that an attorney has personally assessed the file. It is the epitome of the misleading mass mailings criticized in Clomon and, as such, violates section 1692e.

Civil liability is established under the FDCPA by even "a single violation of section 1692e." Bentley, 6 F.3d at 62. Therefore, the court affirms its previous judgment in favor of Thomas Kimberly and its award of statutory damages in the amount of \$1000 and reasonable attorney's fees, as to this violation.

## 2. Elizabeth Kimberly's Standing under § 1692c(b)

Elizabeth Kimberly urges the court to reconsider its decision that Mrs. Kimberly does not have standing to bring a claim under section 1692c(b). Great Lakes reiterates that the court correctly concluded that Mrs. Kimberly is not a "consumer" for purposes of the FDCPA. A consumer is defined under the FDCPA as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). Although Mrs. Kimberly is clearly not a "consumer" within the meaning of

the FDCPA, the question remains whether she may nevertheless recover under section 1692c(b). Section 1692c(b) prohibits a debt collector from communicating "in connection with the collection of any debt, with any person other than the consumer" except to assist in locating the consumer<sup>5</sup> (emphasis added). Whereas other sections of the FDCPA appear to protect "any person,"<sup>6</sup> section 1692c(b) protects only consumers. Wright v. Finance Serv. of Norwalk, 22 F.3d 647, 649 n.1. (6th Cir. 1994); West v. Costen, 558 F. Supp. 564, 577 (W.D. Va. 1983). The "primary purpose of section 1692c is to protect the consumer's privacy and employment." West, 558 F. Supp. at 577 (emphasis in original); S. Rep. No. 382, 95th Cong., 1st Sess. 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698. Therefore, it "would be incongruous to permit a person other than the consumer to recover for a violation of this section."

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<sup>5</sup> Section 1692b states in pertinent part:

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall- (1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer; (2) not state that such consumer owes any debt; (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information . . . .

<sup>6</sup> See 15 U.S.C. § 1692d ("A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." (emphasis added)); 15 U.S.C. § 1692e, § 1692k.

West, 558 F. Supp. at 577. Consequently, this court affirms its conclusion that Elizabeth Kimberly does not have standing under section 1692c(b).

### Elizabeth Kimberly's Trial Claims

#### 1. Section 1692d

Mrs. Kimberly also brings claims against defendant under sections 1692d, 1692e, 1692f. Section 1692d prohibits a debt collector from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. This conduct includes "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." 15 U.S.C. § 1692d(5). Civil liability is imposed under the FDCPA whenever a debt collector fails to comply with any provision of the Act with respect to "any person." 15 U.S.C. § 1692k.

At trial, Mrs. Kimberly testified that she lived alone and did not have a telephone answering machine. Great Lakes' telephone records indicate that its representatives called Mrs. Kimberly over a dozen times for periods ranging from twenty-five seconds to twelve minutes, thirty-nine seconds (Def. Exhs. 519, 601). Under section 1692b(3), a debt collector may only communicate with a third person to confirm the consumer's location and may not contact the third person "more than once"

without the consumer's permission. Thomas Kimberly testified without contradiction that he never spoke with anyone from Great Lakes. The defendant's corporate counsel, Arthur Freedman, could offer no explanation for the calls to Elizabeth Kimberly. Great Lakes' numerous calls to Mrs. Kimberly clearly constituted harassment and impermissible conduct under the FDCPA.

In addition, when a debt collector contacts a third party, he may "not state that such consumer owes any debt." 15 U.S.C. § 1692b(3). Although Elizabeth Kimberly was unable to recall her conversation with defendant,<sup>6</sup> it is evident from the \$1000. charge on Mrs. Kimberly's credit card that defendant discussed and elicited payment for Thomas Kimberly's debt (Exh. 1). This conduct also clearly violates the FDCPA.

There is ample evidence to award Elizabeth Kimberly statutory damages in the amount of \$1000, as well as reasonable attorney's fees. Because only one deceptive practice in violation of the FDCPA is necessary to sustain liability, the court need not discuss Mrs. Kimberly's other claims under the FDCPA. Clomon, 988 F. 2d at 1318; Austin v. Great Lakes Collection Bureau, 834 F. Supp. 557, 559 (D. Conn. 1993).

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<sup>6</sup>See discussion below concerning the admissibility and appropriate use of Thomas Kimberly's testimony relating statements made to him by his mother after these telephone calls.

### Hearsay Evidence

Plaintiff argues Thomas' trial testimony relaying Mrs. Kimberly's conversation with defendant is admissible under either Fed. R. Evid. 803(24) or 804(b)(5) because it "relates to a material fact; it is more probative than any other evidence which plaintiffs could procure;" the circumstances guarantee its trustworthiness; and the interests of justice will be served by its admittance (Doc. # 77 at 2-3). Defendant counters that the testimony is inadmissible hearsay because it is offered to "prove or to provide a basis for an inference" of the substance of the conversation between Mrs. Kimberly and defendant; it is self-serving and there are no circumstantial guarantees of its trustworthiness (Dkt. # 76 at 3-4). Both Rule 803(24) and Rule 804(b)(5) provide as hearsay exceptions any:

statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 803(24), 804(b)(5).

This hearsay exception is to "be used very rarely, and only in exceptional circumstances." Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991) (citations omitted). To admit evidence under the residual hearsay clause, "the evidence must



fulfill five requirements: trustworthiness, materiality, probative importance, the interests of justice and notice." Id.

In evaluating the trustworthiness of a statement, the court must assess the reliability of the statement, "the relationship of the parties," the declarant's "probable motivation . . . in making the statement, and the circumstances under which [the statement] was made." May v. Cooperman, 780 F.2d 240, 263 n.12 (3rd Cir. 1985); In Re Columbia Sec. Litig., 155 F.R.D. 466, 475 (S.D.N.Y. 1994). The reliability of the statements at issue are questionable. Mrs. Kimberly testified that she has had difficulty remembering things ever since her surgery in 1951. It is conceivable she misunderstood, misinterpreted or incorrectly remembered what defendant's representative said and in turn, conveyed misinformation to her son. Furthermore, the mother-son relationship and Thomas Kimberly's interest in this case diminishes the reliability of the statements. Lacking circumstantial guarantees of trustworthiness, these statements do not fulfill the requirements of either Rule 803(24) or Rule 804(b)(5) and therefore, will not be considered by the court.

## 2. CUTPA

Standard of Review. Mrs. Kimberly also seeks damages under CUTPA. CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen.

Stat. § 42-110b. To determine whether conduct is unfair under CUTPA, courts consider:

(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise- whether in other words, it is within the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors or other businessmen.

Aurigemma v. Arco Petroleum Products Co., 734 F. Supp. 1025, 1028 (D. Conn. 1990) (citing Web Press Serv. Corp. v. New London Motors, Inc., 203 Conn. 342, 355, 525 A.2d 57 (1987)); Shell Oil Co. v. Wentworth, 822 F. Supp. 878, 884 (D. Conn. 1993). Even though all three criteria are not met, "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." Shell Oil Co., 822 F. Supp. at 884; McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 569 n. 15, 473 A.2d 1185 (1984). Violation of another statute may constitute a breach of public policy and in turn violate CUTPA. Tillquist v. Ford Motor Credit Co., 714 F. Supp. 607, 616 (D. Conn. 1989).

While both Elizabeth and Thomas Kimberly have proved that Great Lakes defendant violated several provisions of the FDCPA and, as a result, breached public policy, Elizabeth Kimberly has proved more. The evidence shows that Great Lakes made repeated telephone calls to her, that she was an elderly and brain damaged woman, and, as a result of these calls, Mrs. Kimberly gave Great Lakes her credit card number and was

charged \$1000, applied to the debt owed by her son. The Court credits Thomas Kimberly's testimony that he found his mother in tears after the last telephone call, and that she told him not to worry, that he would not be going to jail. Considering this statement for the nonhearsay purpose of determining Elizabeth Kimberly's state of mind at the conclusion of her telephone encounters with Great Lakes, the company's actions toward Mrs. Kimberly, who was not the debtor, were indeed "immoral, unethical, oppressive and unscrupulous." See Atlantic Richfield Co. v. Canaan Oil Co., 202 Conn. 234, 520 A.2d 1008 (1987).

Damages. A CUTPA plaintiff seeking damages is "bound by the statutory requirement of proof of actual damages." Aurigemma, 734 F. Supp. at 1032 (citing Conaway v. Prestia, 191 Conn. 484, 494, 464 A.2d 847 (1983)); Conn. Gen. Stat. § 42-110g(a). Even if the plaintiff fails to show any actual damages, the court may, in its discretion, "award punitive damages and attorney's fees under the CUTPA." Tillquist, 714 F. Supp. at 617; Conn. Gen. Stat. §§ 42-110g(a), (d). The court may only award punitive damages if the evidence reveals "'a reckless indifference to the right of others or an intentional and wanton violation of those rights.'" Tillquist, 714 F. Supp. at 617 (citing Collens v. New Canaan Water Co., 155 Conn. 477, 489, 234 A.2d 825 (1967)).

Here, the inescapable conclusion from the evidence is that Elizabeth Kimberly was bullied into paying \$1000 of her son's

credit card debt by threats or implications that, if she did not, harm would come to him. The evidence at trial clearly meets the standard of reckless indifference to the rights of Mrs. Kimberly; indeed it rises to the level of an intentional and wanton violation of her rights which should not be tolerated.

Once the court determines that punitive damages are appropriate, and the award is for the purpose of deterrence rather than compensation, the financial standing of the defendant is a relevant consideration. See Lenz v. CNA Assurance Co., 42 Conn.Supp. 514, 630 A.2d 1082 (1993). According to the testimony of Arthur Freedman, its corporate counsel, the defendant here, Great Lakes, now has 650 employees; in 1991, when these violations took place, it had 350 employees. It may also have insurance coverage for these violations.

Taking into account defendant's size and the outrageous nature of its conduct toward Mrs. Kimberly, the court awards Mrs. Elizabeth Kimberly on her CUTPA claim punitive damages in the amount of \$ 20,000, her costs, and reasonable attorney's fees.

#### THOMAS KIMBERLY'S CUTPA CLAIM

To sustain a claim under CUTPA, a plaintiff must show that he was the direct victim of defendants' unfair practices. Collins v. Gulf Oil Corp., 605 F.Supp. 1519 (D.Conn. 1985).

However, Thomas Kimberly disregarded the telephone messages left for him, and was obviously not intimidated by Great Lakes' letter threatening legal action, since he never spoke to anyone from Great Lakes or paid the debt. While his rights under the FDCPA were violated, his injury was technical.<sup>7</sup> The Court does not find under CUTPA that Thomas Kimberly was the direct victim of Great Lakes' oppressive and unscrupulous acts, and therefore declines to award him either actual or punitive damages on his CUTPA claim.

#### CONCLUSION

For the reasons stated above, the court awards Elizabeth Kimberly \$1000 in statutory damages under the FDCPA, \$1,000 in actual damages and \$ 20,000 in punitive damages under CUTPA, and the reasonable attorney's fees which both statutes provide to a prevailing party.

The court reaffirms its previous award to Thomas Kimberly of \$1000 in statutory damages and reasonable attorney's fees under FDCPA. The court declines to award punitive damages to Thomas Kimberly under CUTPA.

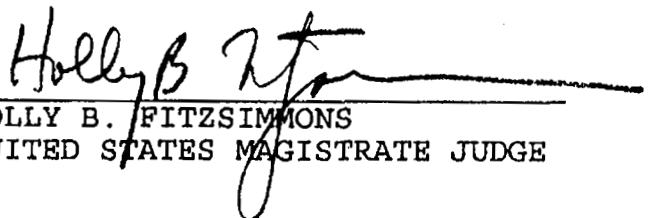
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<sup>7</sup>It is true that Thomas Kimberly was affected by the injuries to his mother, to the extent that he was upset about Great Lakes' treatment of her. However, the wrongfulness of that conduct can be punished directly, by the award of actual and punitive damages to Elizabeth Kimberly. Since Thomas Kimberly's irresponsibility in not dealing directly with the debt and Great Lakes led to the injuries to his mother, the Court is not inclined to give him a windfall.

Judgment shall enter for the plaintiffs in accordance with this Opinion.

Plaintiffs' counsel shall submit her application for attorney's fees on or before October 21, 1996. Defendant shall file any written response on or before November 4, 1996, indicating whether it seeks oral argument or a hearing on the fee applications.

SO ORDERED this 26th day of September, 1996, at Bridgeport.

  
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HOLLY B. FITZSIMMONS  
UNITED STATES MAGISTRATE JUDGE