



Blowing the Cap Off Statutory Damages Under the FCCPA?: An Analysis of *Kahmeyer v. Federal Credit Corporation*

By John R. Chiles and S. Kristen Peters

April 2013

In *Kahmeyer v. Federal Credit Corporation*, the 13th Judicial Circuit in Hillsborough County, Florida released an opinion that has given new life to the argument that each violation of the Florida Consumer Collection Practices Act ("FCCPA") results in a separate award of statutory damages.¹ While no Florida appellate court has addressed the issue, the expectation is that consumer attorneys will increasingly rely on the *Kahmeyer* decision to claim damages in excess of the \$1,000 per case statutory limit provided under the FCCPA.

Damages Under the FCCPA

Similar to the federal Fair Debt Collection Practices Act ("FDCPA"), the FCCPA was enacted in 1993 to protect consumers from abusive, harassing, and unfair debt collection practices. Section 559.72 of the FCCPA contains a list of nineteen prohibited practices, which include, for example, disclosing information about the debtor to third parties in a way that affects the consumer's reputation, using abusive language when communicating with the debtor, and attempting to enforce an illegitimate debt.²

The FCCPA allows the consumer to recover up to \$1,000 for violations of § 559.72, and provides in pertinent part:

*(2) Any person who fails to comply with any provision of s. 559.72 is liable for actual damages and for additional statutory damages as the court may allow, but not exceeding \$1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff. In determining the defendant's liability for any additional statutory damages, the court shall consider the nature of the defendant's noncompliance with s. 559.72, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional. . . .*³

¹ 19 Fla. Weekly Supp. 1023c (Fla. 13th Cir. May 16, 2012).

² Fla. Stat. Ann. § 559.72.

³ *Id.* at § 559.77(2) (emphasis added).

The FCCPA provides guidance in how courts should interpret the statute stating that "[i]n applying and construing [the FCCPA], due consideration and great weight shall be given to interpretations of the Federal Trade Commission and the federal courts relating to the Fair Debt Collection Practices Act."⁴ However, the FCCPA was drafted to provide stronger consumer protection than the FDCPA, explicitly providing that "[i]n the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail."⁵ Relying on this "more protective" language in §559.552, two Florida courts have interpreted terms in the FCCPA to afford the consumer greater protection than that in the FDCPA and, thus, have awarded statutory damages in excess of \$1,000 per case.

Florida Cases Awarding Statutory Damages in Excess of \$1,000

A. Federal Court: *Beeders v. Gulf Coast Collection Bureau*

The U.S. District Court for the Middle District of Florida first permitted an award of \$1,000 for each separate violation of the FCCPA in *Beeders v. Gulf Coast Collection Bureau*.⁶ In *Beeders*, the consumer sought relief under Fla. Stat. § 559.77(2) for a violation of § 559.72(7), which prohibits "willful communication with a debtor or debtor's family member at a frequency that can reasonably be expected to harass."⁷ The *Beeders* court acknowledged that the FCCPA "is limited to \$1,000 per defendant per adverse adjudication."⁸ Significantly, the court interpreted "adjudication" to mean a final determination or judgment, and concluded that "each count of the cause of action constitutes an adjudication."⁹ Thus, the court found that each count based on each telephone call made to the consumer could result in award of up to \$1,000.¹⁰ The court determined that its interpretation was consistent with the language and purpose of the FCCPA based on the language of § 559.77(5) and § 559.552 because the FCCPA affords greater protection to the consumer than the FDCPA, which limits consumer recovery to \$1,000 per case.¹¹

It is worth noting, however, that the issue in *Beeders* was whether the consumer could maintain ten separate cases against the defendant, one for each telephone call made to the consumer.¹² Because each telephone call was based on the same nucleus of operative facts, subjecting each count to claim preclusion if they proceeded separately, the court held that the ten separate cases should be consolidated.¹³ In response, the defendant filed a motion to reconsider the court's order

⁴ *Id.* at § 559.77(5).

⁵ *Id.* at § 559.552.

⁶ 632 F. Supp. 2d 1125 (M.D. Fla. 2009).

⁷ *Id.* at 1129.

⁸ *Id.* (citing Fla. Stat. § 559.77(2)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 632 F. Supp. 2d 1126 (M.D. Fla. 2009).

¹³ *Id.* at 1129.

to the extent that it provided for a recovery of up to \$1,000 per violation.¹⁴ The defendant relied, for the first time, on *Peters v. Collision Clinics International, Inc.*,¹⁵ which held that the FCCPA allows recovery of one statutory penalty, regardless of the number of alleged violations.¹⁶

Addressing the defendant's motion, the court found that it could reconsider its order on only three grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice."¹⁷ The court stated that *Peters* was applicable, but concluded that it did not constitute "an intervening change in controlling law" as it was decided almost thirty years prior.¹⁸ Moreover, the court took issue with the fact that the defendant failed to raise the argument under *Peters* in response to the consumer's motion for partial summary judgment.¹⁹ The court concluded that the defendant failed to show "clear error that must be corrected or manifest injustice that must be prevented" because the court did not automatically award the debtor \$1,000 per telephone call. Accordingly, the court denied the defendant's motion for reconsideration.

B. State Court: *Kahmeyer v. Federal Credit Corporation*

Most recently, the *Kahmeyer v. Federal Credit Corporation* court held that a consumer can recover \$1,000 per violation under the FCCPA. In *Kahmeyer*, the debtor filed a lawsuit alleging violations of the FDCPA and FCCPA when the creditor sent dunning letters and left telephone messages after receiving a request to cease contact with the debtor.²⁰ The court looked to Fla. Stat. § 559.552 and noted that the provision of the FCCPA or FDCPA that is more protective of the consumer or debtor shall prevail.²¹ The court determined that the definition of "harassment" was broader under the FCCPA than the FDCPA because it uses a "reasonableness" standard.²² This, combined with its reliance on *Beeders*, led the court to conclude that consumers can recover statutory damages for each violation of the FCCPA when each claim is separately stated.²³ Thus, the court entered a judgment for the consumer in the amount of \$11,000 for eleven separate violations of the FCCPA.

¹⁴ See *Beeders v. Gulf Coast Collection Bureau*, No. 8:09-cv-00458-T-17-EAJ, 2009 WL 3013502, at *1 (M.D. Fla. Sept. 16, 2009).

¹⁵ 404 So. 2d 116 (Fla. 4th DCA 1981).

¹⁶ *Beeders*, 2009 WL 3013502, at *2. The *Peters* decision interpreted the 1981 version of the FCCPA, which provided for actual damages or \$500 for each violation of the statute. See *Peters*, 404 So. 2d at 117 (citing Fla. Stat. § 559.77). The FCCPA was amended in 2001 to increase damages from \$500 to \$1,000. See S. 94, Reg. Sess. (Fla. 2001).

¹⁷ *Beeders*, 2009 WL 3013502, at *2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 19 Fla. Weekly Supp. 1023c (Fla. 13th Cir. May 16, 2012).

²¹ *Id.* (citing Fla. Stat. Ann. § 559.552).

²² *Id.*

²³ *Id.* (citing *Beeders*, 2009 WL 3013502).

Similar to *Beeders*, the *Kahmeyer* court did not consider the *Peters* decision in reaching its conclusion. Significantly, the *Kahmeyer* court entered judgment for the plaintiff following a final hearing at which the defendant failed to appear. The circumstances under which *Kahmeyer* was decided may therefore remove some of the power behind the argument that a consumer may recover damages for each separate violation of the FCCPA.

Conclusion

The *Kahmeyer* decision bolsters an argument that had previously lost much of its momentum and provides consumers with a basis to recover damages in excess of the statutory cap. The context in which *Kahmeyer* was decided and the *Peters* decision, however, suggest that such a claim may fail if met by a defendant that adequately addresses the argument. Regardless, claims that a consumer is entitled to recover for each violation of the FCCPA, rather than a statutory maximum of \$1,000, will likely increase in light of *Kahmeyer*. It still remains to be seen which statutory interpretation will prevail in the Florida appellate courts.

For more information, contact:

[John R. Chiles](mailto:jchiles@burr.com) in Ft. Lauderdale at (954) 414-6203 / jchiles@burr.com or

[S. Kristen Peters](mailto:kpeters@burr.com) in Birmingham at (205) 458-5169 / kpeters@burr.com,

or your Burr & Forman attorney with whom you regularly work.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.
