UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRENDA M. JEWELL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:03CV1157 (RNC)
	:	
	:	
THE MEDICAL PROTECTIVE CO.,	:	
	:	
Defendant.	:	

RULING AND ORDER

Plaintiff Brenda Jewell brings this action against defendant The Medical Protective Company, alleging nine counts under the statutory and common law of six states. Defendant, after removing the case to this court under its diversity jurisdiction, has filed a motion to dismiss all nine counts under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted [Doc. #9]. For the reasons that follow, the motion is granted in part and denied in part.

I. Facts

In ruling on this motion, the court must accept as true all material facts alleged in the complaint and draw all reasonable inferences in plaintiff's favor. Charles W. v. Maul, 214 F.3d 350, 356 (2d Cir. 2000). Plaintiff alleges that she was employed as defendant's general agent for New England from October 1996 to June

2001, selling defendant's liability insurance to physicians and dentists. In June 2001, plaintiff left defendant's employ to take a position with the insurance broker McDonough Keegan. Plaintiff alleges that after she left defendant's employ, defendant continued to use her name and signature on its policies and to hold her out as its representative. She alleges that defendant did this in part because its new general agent was not licensed until May 2002. She alleges further that upon learning about defendant's continued use of her name and licenses, she demanded that defendant cease using them on any policies not issued through her new employer. She alleges that defendant ignored her protests and continued using her name at least until fall 2002.

II. Discussion

A. Second, Third, Fourth, Sixth, Seventh, Eighth and Ninth Counts (Withdrawn)

In her memorandum in opposition to defendant's motion to dismiss [Doc. #13], plaintiff states that she will proceed only on the first, third and fifth counts of her complaint. Accordingly, the following counts are dismissed by agreement of the parties: the second count (conversion), the fourth count (Conn. Gen. Stat. § 38a-816), the sixth count (N.H. Rev. Stat. Ann. §§ 417:1, et seq.), the seventh count (Me. Rev. Stat. Ann. tit. 24-A, § 2151, et seq.), the

eighth count (Vt. Stat. Ann. tit. 8, § 4721, et seq.), and the ninth count (R.I. Gen. Laws § 27-29-1, et seq.).

B. First Count (Connecticut Unfair Trade Practices Act)

Plaintiff alleges that defendant's use of her name and licenses constitutes unfair and deceptive trade practices under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, et seq. Defendant argues that plaintiff has failed to state a claim under CUTPA for three reasons: (1) plaintiff does not allege that she has suffered any economic loss; (2) the conduct alleged does not fall within the scope of CUTPA because it does not involve "trade or commerce"; and (3) the conduct alleged does not offend public policy.

The private right of action under CUTPA is limited by its terms to a "person who suffers any ascertainable loss of money or property, real or personal" as a result of a violation of CUTPA. Conn. Gen. Stat. § 41-110g(a). To bring a CUTPA claim, a plaintiff must at least allege some economic loss. Madonna v. Academy Collection Serv., 1997 WL 530101, at *10 (D. Conn. Aug. 12, 1997). Plaintiff's complaint does not allege any such loss, directly or by implication. Thus, defendant's first argument justifies dismissal of the CUTPA count.

Defendant's second argument fails because the conduct alleged does fall within the scope of CUTPA. Defendant argues that this conduct cannot be "commerce" for CUTPA purposes because it arose out of an employment relationship. However, the Connecticut Supreme Court has held, in a very similar case, that acts involving a former employment relationship occurring after the end of that relationship can be "commerce" for CUTPA purposes. Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 492-94 (1995). The conduct alleged here occurred outside of what Larsen Chelsey called the "narrow confines" of the employment relationship, and can be considered "commerce."

Defendant's third argument fails because the requirement that the conduct alleged be contrary to public policy has been removed from CUTPA. "Proof of public interest or public injury shall not be required in any action brought under this section." Conn. Gen. Stat. § 42-110g(a). Assuming the truth of plaintiff's allegation that defendant used her name without her permission, defendant's conduct certainly rises to the level of unfairness necessary for a CUTPA claim.

Nevertheless, defendant's motion to dismiss the CUTPA count must be granted because plaintiff has failed to allege economic loss, an essential element of a CUTPA claim.

C. Third Count (Unjust Enrichment)

Plaintiff alleges that defendant's use of her name and licenses

constitutes unjust enrichment under Connecticut common law. Defendant argues that plaintiff has not stated a claim for unjust enrichment because plaintiff has not alleged that she supplied any property or services to defendant.

The Connecticut courts have expressed in clear terms the three elements necessary to allege an unjust enrichment claim under Connecticut law: "Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 231 Conn. 276, 283 (1994). There is no requirement that plaintiff have supplied the benefits to defendant.

Plaintiff's complaint can be read liberally to allege all three elements. She alleges that defendant benefited from holding her out as its agent because its replacement agent was not licensed. She also alleges, by plain implication, that defendant did not pay her for the use of her name and that this failure to pay was to her detriment. Because plaintiff has alleged the essential elements of a claim for unjust enrichment under Connecticut law, the motion to dismiss this count must be denied.

D. Fifth Count (Massachusetts Consumer Protection Act)

Plaintiff alleges that defendant's use of her name and

licenses, which occurred in Massachusetts as well as Connecticut, violated the Massachusetts Consumer Protection Act, Mass. Gen. Laws. ch. 93A ("Chapter 93A"). Two sections of that Act create private rights of action: §§ 9 and 11. Because § 9 creates a right of action for persons who cannot satisfy the requirements of § 11, it is convenient to consider § 11 first.

1. Section 11 of Chapter 93A

Defendant argues that plaintiff does not state a claim under § 11 of Chapter 93A for three reasons: (1) she does not allege a loss of money or property; (2) the conduct alleged is not within the scope of § 11 because it involves an employment relation rather than commerce; and (3) the conduct alleged does not rise to the "level of rascality" required for a § 11 claim. Because the first argument suffices to show that plaintiff has not alleged a cause of action under § 11, the court will not reach the second and third arguments.

By its terms, § 11 grants a cause of action only to persons who have suffered an economic loss: "Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of [a violation of the Act] may ... bring an action in the superior court...." Mass. Gen. Laws ch. 93A, § 11. Massachusetts courts have held that to make a claim under § 11 a plaintiff must show some economic loss. See, e.g., Kaitz v. Shane, 1995 WL 808735, at *6 (Mass. Super. July 18, 1995).

As noted above, plaintiff's complaint makes no allegation of economic loss.

2. Section 9 of Chapter 93A

Defendant argues that plaintiff does not state a claim under § 9 of Chapter 93A, which is available to plaintiffs who cannot state claims under § 11, for two reasons: (1) she does not allege that she was related to defendant as a consumer; and (2) she does not allege that she presented defendant with a demand letter. Chapter 93A explicitly makes a § 9 claim available to plaintiffs who do not have a cause of action under § 11, but who claim they have suffered injury from a trade practice banned by Chapter 93A. The requirement that the plaintiff be related to the defendant as a consumer was removed from the statute in 1979, substantially broadening the set of persons who may sue. Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 674-75 (1983). Under the current statute, "[a]ny person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by [a violation of the Act] may bring an action in the superior court...." Mass. Gen. Laws ch. 93A, § 9. Thus, plaintiff need not allege that she is related to defendant as a consumer to state a claim under § 9.[1] Nor does § 9

[1] Defendant inaccurately cites Levin v. Barley, 728 F.2d 551 (1st Cir. 1984) for the proposition that § 9 applies only to consumers. The First Circuit applied that rule in Levin because the cause of action arose before the passage of the 1979 amendments to § 9. Id. at 555.

require a plaintiff to allege economic loss. Leardi v. Brown, 394 Mass. 151, 158-60 (1985).

As defendant observes, § 9(3) requires that a plaintiff send a demand letter to a defendant at least thirty days before the commencement of an action. However, the eighth paragraph of plaintiff's complaint can be read liberally as alleging that plaintiff sent such a letter. ("Upon learning of these deceptive practices, Jewell demanded that the defendant immediately cease using her name and license in all situations that did not involve policies issued through her new employer, McDonough Keegan.") Plaintiff alleges that defendant did not respond to her demands or change its conduct.

Thus, while plaintiff has not stated a cause of action under § 11 of Chapter 93A, she has stated a claim under § 9.

III. Conclusion

Accordingly, the motion to dismiss is granted with prejudice as to the second, fourth, sixth, seventh, eighth, and ninth counts of the complaint. The motion is granted as to the first count (CUTPA) without prejudice. The motion is denied as to the third and fifth counts.

So ordered.

Dated at Hartford, Connecticut this ___th day of October 2003.

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Robert N. Chatigny
United States District Judge