

Error of Law Defense Not Recognized Under Federal Fair Debt Collection Law

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, applies to lawyers engaged in consumer debt collection on behalf of their clients, both in prelitigation and litigation status. The act imposes civil liability for certain prohibited debt collection practices upon any "debt collector," a term broad enough to include lawyers representing clients. The act defines a debt collector as "any person who ... regularly collects ... debts owed or due or asserted to be owed or due another." Prohibited conduct includes "making false representations as to a debt's character, amount, or legal status" or communicating with consumers at an "unusual time or place" likely to be "inconvenient to the consumer ... or using obscene or profane language or violence or the threat thereof. ..." The act is enforced by two different means: administrative actions brought by the Federal Trade Commission and private lawsuits brought by consumers.

In an FTC prosecution, the commission must show that the debt collector acted with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is" prohibited conduct. Under this provision, civil penalties of up to \$16,000 per day can be assessed. A plaintiff in a private action can recover actual damages, "reasonable attorney's fee as determined by the court" and "additional damages," subject to a statutory cap of \$1,000 for individual actions, or, for class actions, "the lesser of \$500,000 or 1 per centum of the net worth of the debt collector." In determining "additional damages," the court considers "the frequency and persistence of the [debt collector's] noncompliance" and "the extent to which such noncompliance was intentional."

Violations under the act can have staggering consequences when the debt collector has committed multiple violations due to an ongoing misunderstanding of the nature of prohibited conduct. The act does, however, provide the

so-called "bona fide error" defense under §1692k(c), where "the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error." But what if a debt collector makes a reasonable misinterpretation of the legal requirements under the act that results in a violation? Does the bona fide error defense apply to thwart an otherwise valid claim under such circumstances? How about an instance where the misinterpretation occurred and there is a split of the case law in other jurisdictions, no binding case law in the jurisdiction in question and the practitioner guesses wrong on which line of cases to follow? The U.S. Supreme Court has considered this issue in a recent decision.

In *Jerman v. Carlise, McNellie, Rini, Kramer & Ulrich*, 230 S.Ct. 1605, 2010 WL 1558977 (U.S.), a lawyer filed a foreclosure action in an Ohio state court on behalf of a creditor client. The complaint, which was later served on the consumer debtor, contained a "notice" that "the mortgage debt would be assumed to be valid unless [the debtor] disputed it in writing." The problem was that the case law was split as to whether the act required that any dispute, to be effective, must be in writing. The debtor brought an action under the act in federal district court, contending that the creditor's lawyer had committed a violation because the notice erroneously states that any dispute, to be effective, must be in writing.

The district court judge, while acknowledging the split in authority, concluded that the act does not require that any dispute must be in writing to be valid. Notwithstanding, the district court granted the creditor's lawyer's summary judgment motion because it did find that the act had not been violated in this instance. The court reasoned that "§1692k(c) shielded [the lawyer and her law firm] from liability because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such errors." The debtor appealed.

The 6th U.S. Circuit Court affirmed. Although it acknowledged that the "majority view is that the defense is available for clerical and factual errors only," it held that the bona fide error defense also applies to "mistakes of law."

In the majority opinion written by Justice Sonia Sotomayor, the U.S. Supreme Court does not agree, holding that the bona fide error defense does not apply where a violation results from "a debt collector's mistaken interpretation of the legal requirements of the [act]." Five other justices, Chief Justice John Roberts, John Paul Stevens, Clarence Thomas, Ruth Bader Ginsburg and Stephen Breyer, joined in the opinion, although Justice



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By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the West Chester office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott L.L.C. He is co-vice chair of the PBA Professional Liability Committee and a member of the PBA House of Delegates.

Breyer also filed a concurring opinion. Justice Antonin Scalia filed an opinion in which he concurred in part and concurred in the judgment. Justice Anthony Kennedy filed a dissent in which Justice Samuel Alito joined.

A full-blown analysis of the court's reasoning falls outside the scope of this column. But, in short, this decision turned on a difference in view on the proper construction of statutory language. In the majority's view, a debt collector's misinterpretation of the legal requirements of the act can never constitute "not intentional" conduct under §1692k(c), "given the general rule that mistake or ignorance of law is no defense." In the minority's view, however, as characterized in the majority opinion, the statutory text contains no language that specifically excludes legal errors from qualifying as bona fide errors under §1692k(c), and they note that the act does not reference "an unintentional 'act' but rather an unintentional 'violation.'" According to the minority, this distinction "evinces that Congress intended to impose liability only in instances where the party knows that the conduct is unlawful."

The lawyer argued that inclusion of errors of law in the bona fide error defense is needed to dampen the "cottage industry" that has been fostered by professional plaintiffs who sue debt collectors for trivial violations of the act. The facts in this case underscore that point. The debtor did dispute the debt, *in writing* by her counsel, which dispute was honored by the creditor when it acknowledged that the debt had been paid in full and withdrew its foreclosure action. Therefore, the debtor sustained no actual harm because the creditor's lawyer had committed an

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error of law. Compounding matters, the debtor attempted to create a class action to engage other debtors who had received the same incorrect notice. Ironically, her own lawyer would not be liable for legal malpractice if he had the same misunderstanding as had the creditor's lawyer because, unlike claims under the act, legal malpractice claims, at least sounding in tort, require actual damages.

The absence of errors of law in the bona fide error defense raises another concern, which the dissent notes: "The threat of such liability ... creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client: An attorney uncertain about what the [act] requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle — even where there is substantial legal authority for a position favoring the client." The majority was not moved by this conflict to recognize errors of law as a defense. As a result, this places collection lawyers in an irreconcilable conflict.