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U.S. Supreme Court Holds That the Bona Fide Error Defense in the Fair Debt Collection Practices Act Does Not Include Mistakes of Law

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Lawyers for the Profession® Alert

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, ___ U.S. ___ (08-1200, April 21, 2010)

Brief Summary
The U.S. Supreme Court held, 7-2, that the Fair Debt Collection Practices Act does not provide debt collectors and their attorneys with a good faith defense to liability for mistakes of law, even in the context of litigation.

Complete Summary
The Fair Debt Collection Practices Act (the Act), 15 U.S.C. § 1692k, regulates interactions between commercial debt collectors and consumers. Attorneys engaged in debt collection litigation may be debt collectors for the purposes of the Act. *Heintz v. Jenkins,* 514 U.S. 291 (1995). Congress declared that the Act's express purpose was "to eliminate abusive debt collection practices by debt collectors, [and] to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S. C. § 1692k(g). One of the key provisions within the Act is a debt collector's potential defense to civil liability if the debt collector can show that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

Respondents, a law firm and one of its attorneys, filed suit against petitioner to foreclose a mortgage on real property she owned. The complaint included a demand that the debt be disputed in writing. At the time of filing suit, it was an open question whether a debt collector could demand that a debt be disputed in writing (the federal circuits still are split on this issue). Petitioner disputed the debt, in writing, and the claim was dismissed. Petitioner then sued respondents in a class action for violation of the Act, arguing that the Act does not require disputes to be in writing. Respondents argued that the bona fide error defense applied to this alleged violation, as it arose from a debt collector's reasonable good faith interpretation of the legal requirements of the Act.

The Supreme Court disagreed, holding instead that the bona fide error defense can only be used with respect to a debt collector's factual errors, not mistakes of law. The Court focused first on the maxim that ignorance of the law provides no excuse for violating it. Likewise, it shied away from treating the Act's liability

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as akin to requiring “willful” conduct, which often excludes mistakes of law from liability.

The Court found support for its interpretation through textual and legislative historical analysis. It noted that the bona fide error defense in the Act was modeled on the 1968 Truth in Lending Act (TILA). In 1977, when the Act was passed, three courts of appeal had interpreted the TILA bona fide error defense to refer to clerical — not legal — errors. Three years later, when Congress amended the TILA to include legal errors in its defense, it could have amended the Act in the same way but chose not to do so. By not doing so, the Court reasoned that Congress did not wish to extend the bona fide error defense to mistakes of legal interpretation under the Act.

Justice Stephen Breyer, joining in the majority, urged attorneys to turn to the Federal Trade Commission for an advisory opinion. (Both Justice Sonia Sotomayor’s majority opinion and Justice Anthony Kennedy’s dissent noted, however, that this process can be time consuming, and only four such advisory opinions have been rendered this decade.) Justice Antonin Scalia, concurring in part and concurring in the judgment, urged the Court to apply only a textual analysis to the Act, not a legislative history approach. Dissenting, Justice Kennedy, joined by Justice Samuel Alito, favored a more expansive interpretation of “bona fide error” to extend its definition to include factual and legal errors, positing that the focus should be on whether the debt collector evidenced a subjective intent to violate the Act.

The Court declined to address whether the inclusion of an “in writing” requirement in a notice sent to a consumer violates the Act. At present, the U.S. Court of Appeals for the Third Circuit has held that a consumer’s dispute of a debt under the Act must be in writing to be effective, while the U.S. Court of Appeals for the Ninth Circuit has held that the Act does not impose this requirement. *Compare Graziano v. Harrison,*950 F.2d 107, 112 (3rd Cir. 1991); *Camacho v. Bridgeport Financial, Inc.,* 430 F.3d 1078, 1082 (9th Cir. 2005).

Significance of Opinion
This decision clearly opens the door to potential liability under the Act for lawyers who may make a good faith legal error, even in the context of litigation. Attorneys can still invoke the bona fide error defense for violations of the Act arising from qualifying factual errors. But the lesson here is clear that lawyers must err on the side of caution when making demands covered by the Act, at least until Congress considers whether to amend the Act to expressly include a defense for good faith errors of law.

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