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LAWYERS MUTUAL | LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

5020 Weston Parkway, Suite 200, Cary, North Carolina 27513
Post Office Box 1929, Cary, North Carolina 27512-1929
919.677.8900 800.662.8843 919.677.9641 FAX www.lawyersmutualnc.com

Debt Collection Attorneys Liable Under Fair Debt Collection Practices Act for Mistakes of Law

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (the "Act") imposes civil liability on debt collectors for certain prohibited debt collection practices. A debt collector who fails to comply with any provision of the Act will be liable for actual damages, costs, reasonable attorneys' fees and certain statutory damages set forth in the Act. However, if a debt collector shows 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" then he will not be held liable in any action brought under the Act. 15 U.S.C. § 1692k(c). The "bona fide error" defense is an absolute defense.

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 130 S. Ct. 1605 (08-1200, April 21, 2010), a law firm filed a complaint in state court on behalf of its client, a lending company, seeking foreclosure of a mortgage held by the client in real property owned by Karen Jerman ("Borrower"). The complaint included a "notice" that stated that the mortgage debt would be assumed to be valid unless Jerman disputed it *in writing.* Section 1692g(a) of the Act requires a debt collector, within five days of its initial communication with a consumer, to send a written notice to the consumer containing, among other things, a statement that unless a consumer within thirty days of receiving notice disputes the validity of the debt, the debt will be assumed valid. The Act does not state whether the dispute must be submitted to the debt collector in writing. The Borrower's attorney sent a letter disputing the debt and sought verification of the debt. The lending company subsequently acknowledged that the debt had been paid in full and the law firm withdrew the lawsuit. The Borrower then filed her lawsuit seeking damages under the Act, alleging that the law firm violated Section 1692g by stating that her debt would be assumed valid unless she disputed it *in writing*.

Both the District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals held that despite the law firm's violation of the Act, the law firm should be granted summary judgment under the Act's "bona fide error" defense. However, the United States Supreme Court disagreed and held that the "bona fide error" defense does not apply to a violation resulting from the law firm's mistaken legal interpretation of the Act. The Supreme Court first acknowledged the long standing maxim that "ignorance of the law will not excuse any person, either civilly or criminally" and reasoned that a misinterpretation of the legal requirements of the Act cannot be "not intentional". The Court also noted that when Congress has intended to provide a mistake-of-law defense to civil liability, it does so explicitly. Given the absence of explicit mistake-of-law defense language in the Act, the Court inferred that Congress intended to permit injured consumers to recover damages for violations resulting from mistaken legal interpretations of the Act. Further, the Court noted that Congress did not confine liability under the Act to "willful" violations, a term more often understood in the civil context to exclude mistakes of law.

The Court found additional support for its holding by noting that Congress copied the pertinent portions of the bona fide error defense from the Truth in Lending Act ("TILA"), 15 U.S.C. § 1640(c). Congress amended TILA – but not the Act – in 1980 to exclude errors of legal judgment.

It is important to note that the Court limited its opinion to determining whether there is a mistake-of-law defense to violations of the Act; it did not address whether requiring a consumer to dispute a debt "in writing" violates the Act. There is a circuit split with respect to this issue.

The Court's decision has an obvious impact on debt collection attorneys who may be liable for any mistaken legal interpretation of the Act. It would be wise for such attorneys to follow Justice Breyer's recommendation in his concurrence. Justice Breyer noted that a debt collector, when faced with legal uncertainty, may request an advisory opinion from the FTC. If a debt collector receives the opinion and acts upon it (while following its guidance), the Act frees him from liability (Section 1692k(e) states that debt collectors are immune from liability for any act done or omitted in conformity with any FTC advisory opinion).

Shannon Hoff practices in the area of bankruptcy law with Poyner Spruill. Shannon is a member of the NCBA and the Carolinas Network of the International Insolvency and Restructuring Confederation. She can be reached at 704.342.5250 or shoff@poynerspruill.com.