Could You Be Exposing Your Firm to Civil Liability?

The Continued Erosion of the Protection Afforded to Attorneys under the Bona Fide Error Defense to Civil Liability Pursuant to the FDCPA

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In 1995, the United States Supreme Court, in a unanimous opinion, interpreted the definition of a "debt collector" under the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1962, *et seq*., to include attorneys regularly engaged in the practice of collecting debts. *Heintz v. Jenkins*, 514 U.S. 291 (1995). The Supreme Court's opinion in *Heintz* put an end to a decade-long division in authority regarding the application of the FDCPA to attorneys. Until its 1986 revision, the FDCPA included language specifically excluding practitioners of law, attempting to collect debts owed to their clients, from the definition of a "debt collector." In fact, it was this revision to the FDCPA (the omission of this exclusionary language), which the Supreme Court heavily relied upon in reaching its decision in *Heintz*. Naturally, the Supreme Court's decision in *Heintz* served to significantly diminish the protections afforded to debt collection attorneys under the FDCPA. Justice Breyer, however, writing for the unanimous Court, dismissed the concerns raised by Heintz – that this interpretation of the definition of a "debt collector" under the FDCPA would ultimately lead to exposure to liability for any attorney bringing an unsuccessful action to collect an outstanding debt. The Court held this argument to be unpersuasive due to the protections afforded to "debt collectors" under the FDCPA's bona fide error defense, which provides, in part, that a "debt collector" will not be held liable under the FDCPA if he: "shows by a preponderance of evidence 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). Although the concerns raised by Heintz, including his ominous predictions regarding the fallout from the Supreme Court's decision of his appeal, have not yet come to fruition, the Supreme Court's most recent decision regarding the interpretation of the FDCPA may provide debtors with the ammunition needed for an all-out onslaught on debt collection lawyers for alleged violations under the Act.

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The Court's Most Recent Interpretation of the FDCPA

On April 21, 2010, the United States Supreme Court issued another decision, which further diminishes the protections afforded to debt collection attorneys under the FDCPA. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605, 2010 WL 1558977 (Apr. 21, 2010), the Court interpreted the bona fide error defense set forth in § 1692k(c) of the FDCPA as being inapplicable to violations of the FDCPA resulting from a debt collector's misinterpretation of the legal requirements of the Act. The Court reasoned that § 1692k(c)'s requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error" more naturally evoked procedures to avoid mistakes like clerical or factual errors rather than legal errors. Thus, Justice Sotomayor, writing for the seven-justice majority, declared that an attorney and her law firm (collectively "Carlisle") were not protected by the bona fide error defense for a mistaken interpretation of the requirements of the FDCPA.

Underlying Facts and Procedural Posture

The facts in *Jerman* are alarmingly pedestrian in nature. The case stems from the efforts of Carlisle to foreclose on a mortgage of real property in an Ohio State Court. Pursuant to the notice requirement of § 1692g(a) of the FDCPA, Carlisle issued notice to the debtor (Jerman) informing her that unless she disputed the debt, in writing, within thirty days, it would be assumed that the debt was valid. In accordance with Carlisle's notice, Jerman's attorney sent Carlisle a letter disputing the debt. Ultimately, the creditor confirmed that the debt had, in fact, been paid and Carlisle withdrew the lawsuit.

Subsequently, Jerman filed a lawsuit against Carlisle in the United States District Court for the Northern District of Ohio alleging violations of the FDCPA. Specifically, Jerman claimed that Carlisle's inclusion of the words "in writing" in its notice pursuant to § 1692g(a) of the FDCPA constituted a violation of the Act. In other words, Jerman alleged that Carlisle violated the FDCPA by misstating the requirements of the FDCPA, which states that the required notice to a debtor shall include: "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a)(3) (emphasis added). This portion of the FDCPA does not require that the debt be disputed in writing as was represented to Jerman in the notice prepared by Carlisle.

While acknowledging a division in authority as to whether the inclusion of "in writing" in the language set forth in § 1692g(a)(3) was a violation of the FDCPA, the District Court ultimately determined that Carlisle did, indeed, commit a violation of the Act. The District Court, however, ultimately dismissed Jerman's claims on summary judgment, citing the bona fide error exception set forth in § 1692k(c). The District Court held that Carlisle's violation was "not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error." *Jerman*, 2010 WL 1558977 at *4. Jerman appealed and the United States Court of Appeals for the Sixth Circuit affirmed. The Supreme Court summarized the Sixth Circuit's reasoning as follows:

> Acknowledging that the Courts of Appeals are divided regarding the scope of the bona fide error defense, and that the "majority view is that the defense is available for clerical and factual errors only," the Sixth Circuit nonetheless held that § 1692k(c) extends to "mistakes of law." The Court of Appeals found "nothing unusual" about attorney debt collectors maintaining "procedures" within the meaning of § 1692k(c) to avoid mistakes of law.

Id. (citations omitted).

While granting Jerman's Petition for Writ of Certiorari, the Supreme Court refrained from expressing an opinion as to whether the inclusion of an "in writing" requirement in a notice to a consumer was a violation of the FDCPA because the issue was not raised on appeal. Jerman, 2010 WL 1558977 at *4 n.3. Specifically, the Court stated that "[It] granted certiorari to resolve the conflict of authority as to the scope of the FDCPA's bona fide error defense, and now reverse[s] the judgment of the Sixth Circuit." *Jerman*, 2010 WL 1558977 at *4 (footnote omitted).

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Policy Considerations Raised By Respondent, Carlisle

In addition to the arguments raised by Carlisle (in opposition to an interpretation of the FDCPA that excludes misinterpretations of the requirements of the Act from its bona fide error defense), which focused primarily on congressional intent and the specific language of the Act, "Carlisle, its *amici*, and the dissent raise[d] the additional concern that [the majority's] reading [of § 1692k(c)] will have unworkable practical consequences for debt collecting lawyers." *Jerman*, 2010 WL 1558977 at *11.

Specifically, Carlisle argued that, "the FDCPA's private enforcement provisions have fostered a 'cottage industry' of professional plaintiffs who sue debt collectors for trivial violations of the Act." *Id.* According to Carlisle, if the Act is interpreted to allow debt collecting attorneys to be held personally liable for good faith, or "reasonable" mistakes in their interpretation of the requirements of the Act, there will likely be a "flood of lawsuits against creditors' lawyers by plaintiffs (and their attorneys) seeking damages and attorney's fees." Id. This, in turn, will create a situation wherein the creditors' attorneys will be faced with an irreconcilable conflict of interest between the attorney's personal financial interest and his ethical obligations as a lawyer to zealously represent his client's interests. Simply put:

> An attorney uncertain about what the FDCPA 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.

Id. (citations to Respondent's brief omitted).

Clearly, the majority found these "policy" arguments unpersuasive.

Ways to Minimize Your Exposure

As pointed out by both Carlisle and the dissent, the FDCPA imposes a plethora of procedural requirements on debt collectors. These requirements vary from the proper procedure for locating and identifying collateral to the proper procedure for communicating with consumers and bringing legal actions for the collection of debt. In other words, there is plenty of room for error when it comes to an attorney's interpretation of the FDCPA's various requirements.

Although this article is intended to be an update on significant developments in the law, rather than a practitioner's guide to debt collection, the nature of the *Jerman* opinion and its potential implications merit the following list of suggestions for minimizing your risk of exposure to liability in connection with collecting consumer debts pursuant to the FDCPA:

1. Have the text of the Act readily available for review;
2. Prepare a quick-reference guide or a checklist to be used in every case;
3. Always track the language of the Act explicitly, rather than paraphrasing;
4. If you currently have forms that you use, re-examine them for accuracy;
5. Once you have an accurate form in place, use it (cut-and-paste, rather than re-typing the text);
6. If you have questions regarding the interpretation of certain requirements, rather than moving forward with your own interpretation, you may want to consider sending a formal request for an interpretation to the FTC.[1]

Although it remains to be seen exactly what impact Jerman will have in this area of the law, following these tips will help to minimize any additional liability which may be imposed on attorneys as a result thereof.

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[1] This recommendation was made by Justice Bryer while concurring in Justice Sotomayor's opinion in *Jerman*. 2010 WL 1558977 at *14. It should be noted, however, that the FTC has only issued four opinions on the FDCPA over the past decade. *Id.*