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Does the "Bona Fide" Error Defense of the Fair Debt Collection Practices Act Include Mistakes of Law?

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CASE AT A GLANCE

The Fair Debt Collections Practices Act requires a debt collector to send a validation notice to a debtor that provides an opportunity for the debtor to challenge the validity of the debt. In this case the debt collector served the debtor with a validation notice and required the debtor to challenge the validity of the debt *in writing,* albeit the FDCPA is silent on the means of challenge. Upon a finding of a violation of the FDCPA, the debt collector raised the FDCPA's bona fide error defense to the mistake of law.

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA et al.
Docket No. 08-1200

Argument Date: January 13, 2010
From: The Sixth Circuit

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ISSUE

Do a debt collector's legal errors qualify for the "bona fide" error defense under the Fair Debt Collection Practices Act (FDCPA)?

FACTS

Respondents are an Ohio law firm concentrating in real estate and foreclosure law and an associate attorney at the firm. They were retained by Countrywide Home Loans, which held the mortgage on petitioner Karen L. Jerman's home. In April 2006, they filed a complaint in state court to foreclose on the house. Three days later, respondents served Jerman with both the complaint and, as required by the FDCPA, a validation notice informing her of her legal rights. Under the act, the validation notice must 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). By its terms, the provision does not require that the dispute be made in writing. Nevertheless, respondents' notice informed Jerman that her debt would be presumed valid unless disputed "in writing." After receiving the notice, she hired an attorney, who wrote a letter disputing the debt. In response, Countrywide checked its records and discovered that Jerman had fully repaid her mortgage. Respondents then dismissed their state-court complaint.

Jerman subsequently filed a suit in federal court, alleging a violation of § 1692g(a)(3) of the FDCPA. Her amended complaint sought actual and statutory damages, injunctive and declaratory relief, and class certification. Respondents moved to dismiss on the basis that their notice complied with the act. The district court denied the motion, finding that the notice violated the FDCPA because it required Jerman to dispute the alleged debt in writing even though the act imposed no such restriction.

Under the FDCPA, debt collectors may avoid liability if they can establish either of two defenses. First, a "safe harbor" defense carves out an exemption for any act done or omitted in good faith in conformity with any advisory opinion of the Federal Trade Commission. Second, a "bona fide error" defense exempts debt collectors from liability if they prove 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.

Respondents moved for summary judgment asserting the bona fide error defense. They argued that although they fully intended to notify Jerman that she was required to dispute the debt in writing, the resulting FDCPA violation was not "intentional" within the meaning of the bona fide error defense because they honestly misunderstood what the act required. Moreover, they argued, their law firm maintained procedures reasonably adapted to avoid such legal errors, including among other things designating one of the firm's principals to take the lead in FDCPA compliance, sending him to continuing education classes on the act, and subscribing to relevant legal periodicals. The district court agreed and entered summary judgment for the law firm.

On appeal, the Sixth Circuit affirmed. The court noted that Congress originally borrowed the language of the FDCPA's bona fide error defense from the Truth in Lending Act (TILA). Three years after the passage of the FDCPA, Congress amended TILA to expressly provide that "an error of legal judgment with respect to a person's obligations under TILA is not a bona fide error." As a result, the Sixth Circuit concluded that the amendment indicated that, unlike TILA, Congress did not intend to limit the FDCPA's defense to clerical errors. On June 29, 2009, the Supreme Court granted certiorari.

CASE ANALYSIS

Petitioner Jerman asserts that interpreting the FDCPA to provide a defense for mistakes of law is inconsistent with the text to the statute. In order to qualify for the bona fide error defense, the violation must not be intentional and the actor must have maintained procedures reasonably adapted to avoid any such error. Petitioner posits that to say that a "violation" of the law "was not intentional" could mean one of two things. It could mean that the defendant did not intend to commit the act that violated the statute. Alternatively, it could mean that a defendant knew exactly what she was doing but did not realize that her intentional act would violate the statute. Mistakes of law could find shelter in the bona fide error defense only under the second interpretation. In this case, for example, the respondents do not contest that they intended to include in their letter the language that violates the act. They argue only that their conduct, although intentional, did not constitute an intentional violation of the statute.

Jerman argues that the language of the bona fide error defense must be understood in light of the familiar legal maxim that ignorance of the law will not excuse any person, either civilly or criminally. The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Of course, Congress occasionally departs from this standard rule, but exceptions are rare. The most common examples are found in criminal statutes that limit punishment to those who violate the law knowing its requirements. But the bona fide error defense applies to civil not criminal claims, and it does not simply limit penalties and remedies. It provides a defense to any liability. It is exceedingly rare—indeed, as far as petitioner can tell, completely unprecedented—for Congress to make ignorance of the law a complete defense to all liability in the civil context. Statutory references to intentional conduct, or even intentional violations, are best understood to refer to defendants' intentions with respect to their actions, not to their intention to disobey a known legal duty. At the very least, they establish that the phrase does not unambiguously demonstrate Congress's intent to make an exception to the venerable principle that ignorance of the law is no defense.

She contends that had Congress intended to provide a defense for mistakes of law, it would have used different language in § 1692k(c). When Congress intends to refer to defendants who know their conduct is unlawful, it generally uses the word "willful" rather than "intentional." It is unlikely that in enacting the FDCPA, Congress used the work "intentional" intending for courts to give it the meaning traditionally reserved for the word "willful." In fact, the origins of the bona fide error defense belie any such suggestions. The language of the defense originated in the Truth in Lending Act, which unlike the FDCPA, contains both a civil private right of action and criminal penalties. Under TILA, the bona fide error defense applies to those who do not violate the act intentionally, and the criminal provision applies only to those who "willfully and knowingly" fail to comply with the act.

This distinction between "intentional" violations on the one hand and "willful and knowing" violations on the other is consistent with the ordinary legal use of those terms. Willful violations, being the most culpable because undertaken with knowledge of the act's requirements, are subject to the severe sanction of criminal penalties. On the other end of the spectrum, truly unintentional violations where the lender did not intend to commit the act that violates the statute qualify for a complete defense. It should come as no surprise, therefore, that by the time Congress enacted the FDCPA, every court of appeals to have considered the question had rejected the view that TILA's bona fide error defense excused mistakes of law. The inescapable conclusion is that under TILA a mistake of law was a defense to criminal charges but did not fall within the bona fide error defense to civil liability. Because Congress adopted the FDCPA's bona fide error defense verbatim from TILA, it is presumed to have intended the same limitation on the scope of the FDCPA's bona fide error defense as well.

Jerman also maintains that in addition to requiring that the defendant's violation be unintentional, the act provides a defense only if the defendant has maintained, "procedures reasonably adapted to avoid any such error." The Sixth Circuit acknowledged that "it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adapted to avoid mistakes of law." Indeed, the difficulty of applying the act's reasonable procedures requirement to legal errors provides a significant reason to conclude Congress did not intend courts to attempt it. There are any numbers of ways in which clerical and other nonlegal errors may lead to unintended violations of the statute. On the other hand, courts that have extended the defense to legal errors have struggled to define just what constitutes a procedure reasonably adapted to avoid misinterpreting the law. Moreover, applying the reasonable procedures requirement to legal errors is not only difficult, but it puts federal courts (or even lay juries) in the awkward position of having to establish standards for the professional conduct of attorneys, an area traditionally left to the states. Jerman reasons that the Supreme Court should not adopt a construction of the act that would "alter the existing balance of federal and state powers" "absent a clear indication of Congress' intent" to do so.

Petitioner further argues that allowing a mistake of law defense renders the advisory opinion process ineffective, and the safe harbor defense superfluous. Congress provided a "safe harbor" defense, under which debt collectors are immune from liability for "any act done or omitted in good faith" in conformity with any advisory opinion of the Commission. Recognizing a defense for mistakes of law conflicts with this provision in two ways. First, it is unlikely that Congress would have intended courts to force an awkward fit between legal errors and the bona fide error defense when it had already provided a more direct solution to the same problem. Second, the court of appeals' decision renders the safe harbor defense superfluous. Under that decision, every application of the safe harbor defense is already covered by the bona fide error provision. The Supreme Court has long expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. Here, the bona fide error and safe harbor defenses may easily be harmonized, the former addressing nonlegal errors and the latter addressing errors of legal judgment.

Jerman also asserts that excusing legal errors would undermine the FDCPA's deterrent effect. Congress was well aware that the debt collection market—which generally compensates collectors by giving them a percentage of the money collected—establishes an economic incentive for aggressive, misleading, and even abusive practices. Excusing mistakes of law conflicts with Congress's intent to ensure that those debt collectors who refrain from abusive debt collection

practices are not competitively disadvantaged. As between similarly situated debt collectors, all having procedures reasonably designed to avoid legal errors, the Sixth Circuit's decision provides a competitive advantage to the collectors who take the more aggressive, but incorrect, view of the law. That result is not only unfair to the law-abiding collectors, but creates a race to the bottom that will leave the field to collectors with the fewest scruples. This is exactly what Congress intended the FDCPA to prevent.

Petitioner also maintains that debt collectors can be protected from unfair liability without excusing their mistakes of law. Congress has provided debt collectors with special protections in the form of a defense for violations based on nonlegal errors, and an easy and cost-effective way to obtain expert advice on the meaning of the act that will shield them from liability so long as they follow it. Moreover, like all others expected to comply with the sometimes uncertain requirements of the law, debt collectors can mitigate the risk of liability through careful study of the law, reliance on forms and procedures developed by expert bodies, and by forgoing practices of questionable lawfulness. It does not seem unfair to require that one who deliberately goes perilously close to an area of proscribed conduct must assume the risk that he or she may cross the line. The statute already provides debt collectors with considerably more protection than other businesses subject to federal regulation enjoy. If more is required, it must be sought from Congress rather than this Court.

Finally, petitioner argues that the Sixth Circuit misconstrued the intent and effect of the 1980 amendment to TILA. The Sixth Circuit placed significant weight on the fact that in 1980 Congress amended that law to declare expressly that legal mistakes do not qualify as bona fide errors under that statute's defense, but it made no such amendment to the FDCPA. The court concluded that the fact that the TILA's bona fide error provision expressly excludes legal errors while the analogous provision in the FDCPA does not have such limitation suggests that, unlike TILA, Congress did not intend to preclude legal mistakes from protection under the FDCPA. In Jerman's view, the court drew the wrong inference from the amendment. It assumed that the 1980 amendment was meant to change, rather than codify, existing law as it pertained to legal mistakes. But there is no basis for that assumption. Congress included its reference to legal errors not to change the law, but rather to make clear that although other portions of the 1980 amendment may have expanded the scope of the defense, Congress did not intend to go so far as to make ignorance of the law an excuse. In 1980, there was no need to change the meaning of the TILA to exclude legal mistakes—at that time, every court of appeals to have construed the defense had already held that mistakes of law were not covered. Moreover, Congress would have had every reason to believe that those decisions were correct, and that as enacted, the statute already excluded mistakes of law. Accordingly, the more plausible inference is that Congress intended its reference to legal mistakes to codify the existing consensus.

For their part, the respondents assert that the plain text of the FDCPA requires that legal errors be included in the bona fide error defense. A growing majority of federal courts have concluded that nothing in the FDCPA limits the reach of the defense to clerical errors only. In fact, respondents say they are unaware of a single decision that excludes legal errors from the bona fide error defense based on an analysis of the plain text of the statute. The Supreme Court has long recognized that the preeminent canon of statutory interpretation requires courts to presume that the legislature says in a statute what it means and means in a statute what it says. Thus, when interpreting language used by Congress in the absence of statutory definitions, courts construe words in accordance with their ordinary and natural meanings, in context, and with a view of their place in the overall statutory scheme. Consequently, it is well established that when the statute's language is plain, the sole function of the courts—at least when the disposition required by the text is not absurd—is to enforce it according to its terms.

Section 1692k(c) is an affirmative defense requiring debt collectors to prove that their "violation" of the FDCPA was (1) not intentional and (2) resulted from a bona fide error (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. The debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. As commonly used, *violation* means "[t]he act or an instance of violating or the condition of being violated." Synonyms include *breach, infraction, transgression, trespass,* and *infringement*. Thus, the common meaning of *violation* encompasses not only the "act" constituting an infraction, but also the actual "condition being violated," i.e., the infraction or violation itself.

The respondents argue that when viewed in the context of the plain language of the FDCPA, the bona fide error defense does not restrict the phrase "violation was not intentional" to an "act" constituting the violation of the statute. A review of the FDCPA's safe harbor provision at § 1692k(e) reveals that when Congress intended to limit application of a defense to an "act," it specifically did so. Had Congress intended to limit the bona fide error defense to an unintentional "act or omission," it could have used language consistent with § 1692k(e). Congress did not use the term *act* in § 1692k(c), but rather *violation*.

Respondents posit that the plain language of the bona fide error defense does not exculpate debt collectors who are ignorant of the law. Jerman, on the other hand, argues that the statutory phrase "violation was not intentional" must be restricted to "acts" constituting an infraction of the law, based on the criminal law maxim that "ignorance of the law is no defense." Petitioner, they say, relies on this argument in order to inject a meaning into the bona fide error defense that is otherwise not apparent from the actual text. Her reliance on this criminal law maxim is unpersuasive, the respondents contend, because it is predicted on a false premise—that the respondents' error in legal judgment was the result of "ignorance of the law." They contend that this characterization of their legal violation is absurd. The conduct found to be in violation of the FDCPA (the issuance of a letter requiring a response "in writing) was predicated upon a reasonable analysis of existing case law in an effort to comply with the statute.

Importantly, the bona fide error defense is not an exception to the criminal law maxim that "ignorance of the law is no defense." Although this affirmative defense includes legal errors, it excludes ignorance as a basis for establishing the defense. In ordinary English, *ignorance* means "[t]he condition of being uneducated, unaware, or uninformed." While ignorance may be asserted to establish that a legal error was unintentional under the bona fide error defense, by its very definition, ignorance would prove that a debt collector did not

act in good faith or maintain procedures reasonably adapted to avoid any such error. Thus the district court did not find that respondents were ignorant of the law. Rather, it found just the opposite—that respondents had knowledge and awareness of existing case law. Stated differently, respondents' contend that their violation of the statute was subjectively found to be unintentional because they relied on existing case law. In addition, their reliance was objectively found to be made in good faith while maintaining procedures reasonably adapted to avoid any such error. There is, they say, no factual basis to assert "ignorance of the law" is involved in this case.

Respondents believe that a plain reading of the bona fide error defense does not render the FDCPA's safe harbor provision ineffective or superfluous. Petitioner Jerman broadly characterizes the safe harbor provision as a means for a debt collector to obtain clarification about the FDCPA's meaning and application, where legal uncertainty puts debt collectors at risk for liability. In the respondents' view, however, her suggestion that an advisory opinion is available for all situations involving "legal uncertainty" is overstated. The "practicability" of obtaining an advisory opinion from the FTC is highly questionable, especially in situations in which a lawyer is engaged to initiate litigation and a delay in obtaining an opinion could impact a statute of limitations or otherwise adversely compromise a client's rights. Obtaining an advisory opinion would also be especially troublesome in situations such as foreclosures where time is of the essence and any delay in litigation could result in the value of collateral being substantial impaired.

This "practicability" is also impacted by the FTC's internal rule that it issue advisory opinions only when there is "no clear Commission or court precedent." Given this requirement, it is understandable that the FTC would be reluctant to issue an advisory opinion when there is existing case law. Finally, Jerman's characterization of the alleged broad remedy available under the safe harbor provision ignores the undeniable complexity of the meaning and application of the FDCPA. This legislation contains few definitions and is applied without the benefit of governing administrative rules and regulations. As a result, there has been litigation on virtually every aspect of the act. Common sense dictates that the bona fide error and safe harbor defenses are not incompatible and superfluous but rather can and should be construed to work hand-in-hand.

Respondents believe that the bona fide error defense is consistent with the purpose of the FDCPA to balance the rights of ethical debt collectors and consumers. Notwithstanding the remedial purpose of the FDCPA, Congress was also sensitive to the rights of ethical debt collectors. Congress expressly acknowledged that an important purpose of the FDCPA was to eliminate abusive debt collection practices while not competitively disadvantaging ethical debt collectors. If Congress meant what it said—that ethical debt collectors warrant protection—it is the petitioner who is asking the Court to disrupt the balance struck in the FDCPA. Respondents' conduct was responsible, conservatively based on case law, and unquestionably ethical. The bona fide error defense does not, as Jerman argues, undermine the statute's deterrent effect, nor will it create a race to the bottom that will leave the field to collectors with the fewest scruples. Petitioner's assertion that the Sixth Circuit's decision will embolden debt collectors to act unethically in a "race to the bottom" ignores the serious financial penalties contained in the FDCPA under the civil and administrative provisions. Indeed, her fear that the floodgates will be opened to unscrupulous debt collectors has not materialized. Since the Sixth Circuit's decision in this case, respondents have found twenty-one cases in which federal courts have considered the bona fide error defense as applied to legal errors. Seven courts denied the defense as a matter of law, eleven found issues of fact, and three granted summary judgment for the debt collector.

Respondents argue that if legal errors are removed from the bona fide error defense, lawyers will face potential liability to nonclients for the exercise of their professional judgment. A lawyer's potential liability under the FDCPA will generally be a consequence of claimed legal error. Thus, Jerman's proposal to restrict the bona fide error defense to exclude legal errors essentially removes the conduct of lawyers from the ambit of the bona fide error defense—leaving them with no protection from liability for even the most unintentional and good faith errors in professional judgment. This is tantamount to congressional control of attorney advocacy under the FDCPA, subjecting even the most ethical attorneys to lawsuits by nonclients for exercising professional judgment. Most states recognize a litigation privilege that generally shields an attorney from a third-party claim arising from litigation activities. Petitioner's attempt to remove the vast majority of attorney errors from the bona fide error defense would necessarily drive a wedge between debt collection lawyers and their clients.

Respondents also argue that TILA does not warrant setting aside the plain meaning of the FDCPA. In this regard, they say, petitioner's analogy to the bona fide error defense in TILA is flawed. Jerman argues that § 1692k(c) excludes legal errors because (1) Congress "borrowed" the language from TILA's then current bona fide error defense when it enacted the FDCPA and (2) Congress understood the allegedly "settled" interpretation of the pre-1980 TILA defense to exclude legal errors.

The respondents contend there are a number of problems with this argument. First, it wrongly assumes that when Congress utilizes language from an existing statute in a new statute, there is a presumption that Congress intended to adopt the existing judicial interpretations of that language. On the contrary, the respondents say, the Supreme Court has recognized several factors that must be considered in determining whether Congress intended to adopt existing judicial interpretations. These include (1) whether the judicial interpretations are settled and (2) whether congressional intent has been expressed in the legislative history or stated purpose of the statute. Regarding the first factor, respondents argue, the judicial interpretation of TILA's bona fide error defense was unsettled: the Supreme Court had never reviewed the language petitioner claims was lifted from the pre-1980 version of TILA and inserted into the FDCPA, nor was there a consensus among the lower courts. As to the second factor, Congress did not express an intent in the FDCPA's legislative history to adopt any particular judicial interpretation of TILA's bona fide error defense.

When enacting the FDCPA, Congress did not indicate that the bona fide error defense should be construed consistent with any interpretations of TILA. In fact, the legislative histories of TILA and the FDCPA are significantly different. The legislative history of TILA reflects

Congress's inclusion of the bona fide error defense in response to complaints from creditors that clerical errors would be inevitable due to the complexity of mathematical computations. Conversely, the legislative history of the FDCPA shows that Congress granted more expansive protection, stating that a debt collector has no liability if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations. The fact that Congress chose not to amend the FDCPA to exclude legal errors—despite having amended the statute several times—defeats any attempt to draw parallels between the defenses now. The legislative history of the FDCPA does not evidence a restricted congressional intent to adopt TILA's bona fide error defense.

Respondents further maintain that the express purpose of the FDCPA demonstrates that Congress did not intend to adopt TILA's more limited bona fide error defense. Finding that there has been a congressional adoption of judicial interpretation is only appropriate when analyzing statutes with the same or similar objectives. In this case, however, the purposes of TILA and the FDCPA are fundamentally different. The purpose of TILA is exclusively to protect consumers through "a meaningful disclosure of credit terms." The FDCPA, on the other hand, was drafted to balance the purposes of (1) eliminating abusive debt collecting practices while (2) not competitively disadvantaging nonabusive debt collectors. These differing legislative purposes support the inclusion of legal errors within the FDCPA's bona fide error defense. While TILA provides creditors with several avenues to avoid liability for legal errors, the FDCPA does not. If legal mistakes are removed from the plain language of the FDCPA's bona fide error defense, ethical debt collectors will be left with only the safe harbor defense which, as already demonstrated, is often impracticable or unavailable. Therefore, to give effect to the FDCPA's express purposes of balancing the interests of both consumers and ethical debt collectors, legal errors cannot be removed from the plain language of the bona fide error defense.

Finally, the respondents add that the 1980 TILA amendments do not support a restrictive interpretation of the FDCPA's bona fide error defense either. Congress amended TILA to remove legal errors concerning the act's coverage from protection. The FDCPA was not so amended despite Congress having had the opportunity to do so on numerous occasions. Petitioner's assertion that the 1980 amendments demonstrate a congressional intent to exclude legal errors from the FDCPA's bona fide error defense presumes that in all likelihood, the issue never occurred to Congress. Congress's failure to amend § 1692k(c) since 1980, however, leads to the opposite conclusion. In 1986, Congress did amend the FDCPA to repeal the exemption for attorneys. In 1995, the Supreme Court highlighted the "clerical versus legal error' debate in *Heintz v. Jenkins,* 514 U.S. 291, when it held that lawyers are liable under the FDCPA as debt collectors. Since *Heintz,* the vast majority of circuit and district courts have determined that § 1692k(c) is not limited to clerical errors.

Nevertheless, Congress has remained silent on this issue. It is recognized that when Congress had abundant opportunity to give further expression of its will, the failure to do so amounts to legislative approval and ratification of the construction given the statutes by the courts. These principles of statutory construction are especially applicable when, as in this case, the statute has undergone amendments. Thus, the respondents contend, petitioner's assertion that Congress forgot to amend the FDCPA is unpersuasive. In their view, the fact that Congress did not amend the bona fide error defense in the FDCPA to exclude legal mistake on eight occasions since the 1980 TILA amendments signifies its ratification and approval of the construction placed upon § 1692k(c) by a growing majority of courts.

SIGNIFICANCE

While both parties agree that the outcome of this case will have a major impact on debt collection law and practice, they disagree sharply as to what the effect will be.

From petitioner Karen L. Jerman's perspective, extending the bona fide error defense to legal errors would undermine Congress's efforts to deter abusive collection practices. Allowing this defense to suit would encourage debt collectors to take an aggressive view of the law when its requirements are not clear, knowing that there will be no liability if they cross the line into illegal conduct.

From the respondent law firm's point of view as debt collectors, however, requiring collectors to prove the three elements of the bona fide error defense by a preponderance of the evidence will protect consumers from unethical collectors, but failing to extend the defense to legal errors at all would undermined the congressional intent to equitably balance the valid interests of both consumers and ethical debt collectors.

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PREVIEW of United States Supreme Court Cases, pages 184–189.

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