

## PROFESSIONAL LIABILITY UPDATE

### BONA FIDE ERROR DEFENSE

By Jennifer A. Becker

*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al* 130 S.Ct. 1605 (2010)

*The U. S. Supreme Court holds that attorneys, whose activities qualify them as “debt collectors” under the Fair Debt Collections Protection Act, are not entitled to the statutory defense of bona fide error when the error is one of law.*

Adrienne Foster of Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. (Carlisle) filed a complaint in Ohio state court on behalf of her client, Countrywide Home Loans, to foreclose the mortgage on real property owned by Karen L. Jerman. The complaint included a notice stating that the mortgage debt would be assumed to be valid unless Jerman disputed it in writing, which is arguably not a correct statement of the law. After Jerman disputed the debt Countrywide acknowledged that Jerman had already paid the debt in full and the law firm dismissed the foreclosure lawsuit.

Jerman then filed a lawsuit seeking class certification and damages alleging that the notice mandating a writ-ten dispute violated the Fair Debt Collections Protection Act (the Act). The District Court agreed that Carlisle violated the Act but granted summary judgment for Carlisle concluding that she was shielded 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 error. The Court of Appeals for the Sixth Circuit noted that the majority view is that the defense is only available for clerical and factual errors, but

nonetheless extended the shield to mistakes of law.

The U.S. Supreme Court reversed holding the bona fide error defense does not apply to a debt collector’s mistaken interpretation of the legal requirements of the Act.

Under the Act a debt collector is any person who regularly collects debts. A debt collector cannot make false representations as to a debt’s character, amount, or legal status, cannot communicate with a consumer at an unusual time or place likely to be inconvenient to the consumer, use obscene or profane language, or use violence or threats of violence. A debt collector who acts with actual or implied knowledge is subject to civil penalties. A consumer who prevails under the Act is entitled to actual damages, costs, and reasonable attorney’s fees.

The Court considered the exception, which states that there is no liability if “the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”

The court disagreed with Carsile that mistakes of law came within the Act's definition of the "not intentional" meaning, or that a mistake of law rendered the conduct a "bona fide error." The court followed the common maxim that ignorance of the law is no excuse. When Congress intends to provide a mistake-of-law defense to civil liability, it does so explicitly. Congress did not confine liability under the Act to "willful" violations, a term more often understood in the civil context to ex-cuse mistakes of law.

The requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error" supports the notion that bona fide errors do not include mistaken interpretations of the law. A natural reading of this language is that processes have mechanical or other such "regular orderly" steps to avoid mistakes. Examples are internal controls a debt collector adopts to ensure its employees do not communicate with consumers at the wrong time of day or make false representations as to the amount of a debt. Although procedures can also be utilized to avoid legal errors, legal reasoning is not a mechanical or strictly linear process. Thus, the procedures under the Act are those that avoid clerical or factual mistakes, not those applicable to legal reasoning.

The history of the Act reinforces this interpretation. The Act includes a bona fide error defense as well as protection for "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." Thus Congress contemplated that the FTC would resolve ambiguities in the Act. Debt collectors would rarely need to consult the FTC if the Act offered immunity for good-faith reliance on advice from private counsel. If debt collectors could rely on counsel's advice, they would have an affirmative incentive not to seek an advisory opinion to resolve ambiguity in the law. The existence of a separate provision that is tailored to the concern of excusing civil liability when the Act's prohibitions are uncertain weighs against stretching the language of the bona fide

error defense to also include a mistake of law defense.

The bona fide error exception parallels a provision in a prior, existing statute, the Truth in Lending Act (TILA). In the nine years that the TILA pre-existed the Act, three Federal Courts of Appeals interpreted the error protection as referring to clerical errors; none extended it to mistaken legal interpretations. There is no reason to suppose that Congress disagreed with those interpretations when it enacted the Act and it copied verbatim the pertinent portions of the bona fide error defense. Although some district courts had extended TILA's exception to good-faith legal errors, those lower court opinions were in doubt at the time of the passage of the Act.

The fact that a 1980 amendment to TILA added language specifically excluding legal errors as bona fide error did not establish that the Act was meant to include legal judgment errors. There was no evidence that the additional TILA language changed its scope as opposed to codifying existing judicial interpretations to remove any potential for doubt. There is no reason to make the Act's exceptions broader than the one in TILA. In other laws with identical pertinent language Congress has not expressly included mistakes of law in any of the numerous bona fide error defenses. Congress's failure to amend the Act without expressly restricting the scope of the bona fide error exception does not suggest Congress viewed the statute as having an expansive reading.

Although some legislative history sources expressly state that the TILA defense excludes legal errors they do not discuss a distinction between clerical and factual errors. The precedential cases held that mistakes of law or other nonfactual errors were not bona fide.

The court was not persuaded that its recognition of lawyers as debt collectors, in conjunction with its refusal to recognize a defense for bona fide legal errors, would lead to automatic

liability for any litigating lawyer who lost a claim against a debtor. Even if this were true, it does not warrant deviating from the statutory text. To the extent lawyers make factual errors, they are protected by the bona fide error defense.

A court may consider whether “noncompliance was intentional” in assessing statutory additional damages, which further supports the Court’s reading of the statute. Although it is not a categorical defense, a district court can adjust statutory damages for a good-faith misinterpretation of law.

The Court rejected the notion that its decision would have unworkable practical consequences for debt collecting lawyers in the form of a flood of lawsuits. The Act contains several provisions that expressly guard against abusive lawsuits, thereby mitigating the financial risk to creditors’ attorneys. Damages for trivial violations are nominal or zero. There is a cap on “additional” damages and vests courts with discretion to adjust such damages where a violation is based on a good-faith error. The provision for reasonable attorneys’ fees vests the court with discretion it can exercise if a plaintiff’s suit was brought in bad faith and for the purpose of harassment. If the lawyer’s mistake is factual, not legal, she has access to the bona fide error defense. The Court acknowledged that seeking guidance from the FTC is not always practical, and gave this factor little weight.

Nor would the Court acknowledge an irreconcilable conflict between an attorney’s personal financial interest and her ethical obligation of zealous advocacy. Constraints on a lawyer’s advocacy are not unique. Attorneys’ actions must comply with the law and professional ethics. Lawyers face sanctions for filing lawsuits for an improper purpose. Lawyers may face personal liability for conduct undertaken during representation of a client. A lawyer’s interest in avoiding liability may not always be adverse to her client, as some courts

have held clients vicariously liable for their lawyers’ violations of the Act.

There are numerous state consumer protection and debt collection statutes that contain bona fide error defenses that are either silent as to, or expressly exclude, legal errors. There are no reported decisions interpreting a parallel state bona fide error provision to immunize a defendant’s mistake of law, except in a minority of statutes that expressly provide to the contrary. Lawyers have not suffered drastic consequences under these state regimes.

The Court rejected the dissent’s view that policy concerns are evidence that Congress could not have in-tended the majority’s reading and noted that the dissent’s interpretation would have unintended consequences. The dissent focused on the reasonableness of the attorney’s conduct, the technical violation, and the lack of harm to the consumer. The majority asserted that broadening the defense as suggested by the dissent would not be limited to these factual situations. Non-lawyer debt collectors could obtain blanket immunity for mistaken interpretations of the Act simply by seeking the advice of legal counsel. Debt collectors, who are often compensated with a percentage of money recovered, will have a financial incentive to press the boundaries of the Act’s prohibitions on collection techniques, giving them a competitive advantage. This does not comport with Congress’ express purpose of eliminating abusive debt collection practices.

Broadening the interpretation of the defense invites litigation about a debt collector’s subjective intent to violate the Act and the adequacy of procedures maintained to avoid legal error.

The Court suggested that protection for attorneys for mistakes of law should come from Congress.

*Comment:* Given the financial crises there is plenty of activity for attorneys collecting debts. The passage of time will determine if attorney mistakes of law increase attorney exposure under the Act.