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Everyone Makes Mistakes? Debt Collection after *Jerman v. Carlisle*

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On April 21, 2010, the United States Supreme Court handed down an opinion that dramatically increases debt collectors' liability for violations of the Fair Debt Collections Practices Act (FDCPA or the Act), 15 U.S.C. § 1692 et seq. The opinion involves the FDCPA's "bona fide error" defense, which allows a debt collector to avoid liability for a violation of the Act if (1) the violation was not intentional, (2) it resulted from a bona fide error and (3) the error was made notwithstanding procedures reasonably adapted to avoid such errors. Before April 21, the courts of appeal were split on whether the bona fide error defense applied to mistake of law as well as of *fact*.

Enter our High Court. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA* holds that ignorance of the law is no defense for debt collectors making mistaken legal interpretations the FDCPA's provisions: the bona fide error defense now applies only to clerical and factual errors. 130 S. Ct. 1605 (2010).

How Does *Jerman* Affect You?

Jerman suggests that "learning from our mistakes" is no longer an option. Incorrect interpretations of the provisions of the FDCPA, even if made in good faith, could expose you to liability for a violation of the Act. While *Jerman* might seem like a big blow to the debt collection industry, the scope of the decision is narrow; debt collectors may no longer avoid liability for a mistake of law that was (1) unintentional, (2) resulted from a bona fide error and (3) was made notwithstanding procedures reasonably adapted to avoid such errors. The majority opinion rightly observed that most of the violations that fit the criteria of the bona fide error defense will be clerical or factual. For those circumstances in which a legal interpretation is necessary, the Court calls debt collectors to increase their diligence.

The bottom line? In the post-*Jerman* debt-collection climate, the biggest threat to your business is an established procedure uniformly applied to a large group of your customers that is based on a legal invalidity. For example, if your business sends a letter to all of your customers facing foreclosure that incorrectly requires *written* dispute of a debt (as the attorney did in *Jerman*), the business is exposed to liability for a large class action lawsuit. So when adopting company-wide procedures and training your collectors, ensure that you abide by the legal requirements of the FDCPA that are *clear and unambiguous*.

Jerman proves that not every requirement of the FDCPA is clear and unambiguous. When faced with a vague or indefinite provision, contact your attorney first. The legal quandary may be simple to solve, leading to implementation of procedures that ensure a violation does not occur. However, there may be times when your attorney believes intelligent minds could differ as to interpretation of the Act; unfortunately, debt collectors are now left in the precarious position of both needing a speedy answer in order to conduct business and needing to protect themselves from liability. Accept that you are in for a more lengthy process. Consult the Federal Trade Commission (FTC) Staff Opinion Letters for an answer. If a germane opinion has not been issued, submit the question to the FTC. The added expense that comes with this course of action is preferable to being faced with a class action suit due to, as in *Jerman*, the mistaken belief that written notification of a dispute is required.

Jerman v. Carlisle

Factual Background

In April of 2006, the Carlisle law firm filed a complaint on behalf of its client, Countrywide Home Loans, Inc., seeking to foreclose on a mortgage. The complaint included a notice that was served on Jerman, the debtor, stating, "the mortgage debt would be assumed to be valid unless Jerman disputed it in writing." *Id*. at 1609. Jerman's lawyer disputed the debt in writing, Countrywide acknowledged Jerman's payment in full and Carlisle withdrew the suit. *Id*. Jerman then filed suit against Carlisle, alleging violation of section 1692g of the FDCPA and seeking class certification and damages. That section provides that a debt collector must send the consumer a written notice[1] containing a statement that, unless the debtor disputes the validity of the debt, it will be assumed valid. 15 U.S.C. § 1692g. Jerman argued that Carlisle violated the Act by requiring that the debt dispute be *in writing*. *Jerman*, 130 S. Ct. at 1606.

Both the trial court and the Court of Appeals for the Sixth Circuit agreed 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." *Id*. at 1610. The Sixth Circuit affirmed the trial court's decision despite the majority view that noted the bona fide error defense applies only to clerical and factual errors. The Supreme Court granted certiorari to resolve the circuit split regarding whether the bond fide error defense is available for mistakes of law as well as clerical and factual errors. *Id*.

The Majority Opinion[2]

The Court's substantive discussion began by quoting the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman*, 130 S. Ct. at 1611 (quoting *Barlow v. United States*, 7 Pet. 404, 411 (1833)). Our jurisprudence often allows the imposition of civil liability when an individual lacks actual knowledge of the illegality of her conduct; as such, the Court reasoned, if Congress intends to provide a mistake-of-law excuse, it does so more explicitly than the terms of the FDCPA's bona fide error defense. *Id*. at 1612; see 15 U.S.C. § 1692k(c). For example, the FDCPA does not require that a violation be "willful" in order to impose liability; such a term is "more often understood in the civil context to excuse mistakes of law." *Jerman*, 130 S. Ct. at 1613. The Court also found support for its position in the language of the defense itself, which requires that a debt collector maintain "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Such "procedures," the Court stated, are better tailored to preventing clerical and factual errors as opposed to legal mistakes. While "some entities may maintain procedures to avoid legal errors [,] . . . legal reasoning is not a mechanical or strictly linear process." *Jerman*, 130 S. Ct. at 1614. The Court viewed the statutory procedures required by the Act as properly in place to help avoid clerical and factual mistakes. *Id*.

The Court then turned to the context of the defense and the legislative history of the Act. In addition to the bona fide error defense, Congress also included "a separate protection from liability for 'any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade Commission].'" *Id*. at 1615 (quoting 15 U.S.C. § 1692k(e)). Under Carlisle's interpretation, that provision would be rendered essentially moot, as debt collectors would "rarely need to consult the FTC" if section 1692k(c) provided a defense in the case of good-faith reliance on the legal advice. Id. Moreover, the provision allowing immunity in the case of reliance on an FTC opinion is more fittingly tailored to legal errors than is the bona fide error defense. Id. Next, the Court considered identical language in the Truth in Lending Act (TILA). In the nine years between the passage of the TILA and the FDCPA, the three courts of appeals that considered the bona fide error defense in the TILA ruled that it did not extend to errors of law. *Id*. at 1616. As Congress used the same language in both statutes, the "close textual correspondence supports an inference that Congress understood the statutory formula it chose for the FDCPA consistent with Federal Court of Appeals interpretations of TILA." Id.

The Court then addressed concerns raised by Carlisle and the dissent that the decision would have "unworkable practical consequences for debt collecting lawyers," including a flood of lawsuits. The Court quelled those arguments, citing the provisions of the Act expressly guarding against such abusive lawsuits and the imposition of unreasonable damages and fees. *Id*. at 1620-21. The Court was similarly unimpressed with the argument that its decision would have a chilling effect on zealous advocacy due to lawyers' increased liability; the Court found the effect of its opinion unexceptional, pointing to the many laws and rules of professional conduct that constrain attorneys' conduct. *Id*. at 1622.

Absent a showing that the result of imposing liability for mistakes of law would be so absurd as to warrant abandoning the clear reading of the statute's text, the Court held that the bona fide error defense in section 1692k(c) of the FDCPA does not apply to a violation resulting from an incorrect interpretation of the statute's requirements. Id. at 1624.

Conclusion

We wish we could provide you with a simple solution to navigating the Fair Debt Collection Practices Act after *Jerman v. Carlisle*. Unfortunately, the Supreme Court's decision tips the liability scale squarely in the corner of even the most well meaning debt collector. Take your precautions on the front end. Get legal advice and train your collectors accordingly. Implement procedures consistent with your attorney's recommendations. Your shared exposure to liability will further ensure that all parties are covering their bases. After all, we all learn from our mistakes.

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1. Notice must be sent within five days of the initial communication regarding the debt collection.
2. Justice Sotomayor wrote the opinion for the Court, joined by Chief Justice Roberts, Justice Stevens, Justice Thomas, Justice Ginsberg and Justice Breyer (also writing a separate concurrence). Justice Scalia concurred in part and concurred in judgment. Justices Kennedy and Alito dissented.