

April 27, 2010

## Supreme Court: Legal Error Not A Defense To FDCPA Action

On April 21, 2010, in a 7-2 decision authored by Justice Sonia Sotomayor, the U.S. Supreme Court held that 15 U.S.C. 1692k(c), the provision of the Fair Debt Collection Practices Act (the "FDCPA" or the "Act") that excuses a debt collector from liability for violations arising from "a bona fide error," does not protect debt collectors from errors in interpreting the legal requirements of the FDCPA. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200, an Ohio law firm commenced a foreclosure action on behalf of Countrywide Home Loans, Inc. ("Countrywide"). The complaint included a "Notice" to the homeowner, Karen Jerman, that her mortgage debt would be assumed to be valid unless she disputed the debt in writing. Countrywide subsequently concluded that the debt had in fact been paid, and Carlisle McNellie withdrew the foreclosure action. Jerman then brought suit against Carlisle McNellie seeking class certification and damages under the FDCPA, alleging that the law firm had violated the Act by requiring her to dispute her alleged debt in writing. The District Court, noting that there was a split of authority as to whether a debt protest had to be made in writing, found that the law firm did violate the Act when it required the protest to be in writing. However, the court held that the law firm was shielded from liability because 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 U.S. Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed, holding that the "bona fide error" defense under the FDCPA does not apply to errors of legal interpretation. The Court, noting that ignorance of the law is not an excuse for failing to comply, stated that Congress had not explicitly made a mistake-of-law defense to civil liability applicable to violations under the FDCPA, in contrast to other laws in which a mistake-of-law defense was specifically set forth in the governing statutes by Congress. In a separately written concurrence, Justice Stephen Breyer stressed that the Federal Trade Commission should set forth clear guidelines as to the FDCPA requirements. Justice Anthony Kennedy, in a dissent joined by Justice Samuel Alito, Jr., said that the majority's opinion would likely turn good-faith, technical FDCPA violations into lucrative litigation for plaintiffs. While lawyers and debt collectors will no longer be able to find legal shelter in a mistake-of-law defense, the "bona fide error defense" will still be applicable to factual or clerical errors, as long as there are procedures in place to reasonably avoid those errors. The decision will likely make it easier for debtors to sue debt collection agencies and law firms. Indeed, the majority opinion acknowledged that debt-collecting lawyers will be impacted by the decision, but did not believe the new burdens would be "unmanageable." The Court noted that several state consumer protection and debt collection laws explicitly exclude a defense for legal errors. Should you have any questions or concerns about how the Supreme Court's decision may affect your company, or to request assistance with respect to compliance with the provisions of the FDCPA, please do not hesitate to contact the authors of this alert.