Lawyers' Professional Liability UPDATE

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Statutory Liability

U.S. Supreme Court Holds That the Bona Fide Error Defense in the Fair Debt Collection Practices Act Does Not Include Mistakes of Law

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

In summary, the U.S. Supreme Court held, 7-2, that the Fair Debt Collection Practices Act (FDCPA) does not provide debt collectors and their attorneys with a good faith defense to liability for mistakes of law, even in the context of litigation. The FDCPA, 15 U.S.C. § 1692k, regulates interactions between commercial debt collectors and consumers. Attorneys engaged in debt collection litigation may be debt collectors for the purposes of the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291 (1995). Congress declared that the FDCPA's express purpose was "to eliminate abusive debt collection practices by debt collectors, [and] to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692k(g). A key provision in the FDCPA is a debt collector's potential defense to civil liability if the debt collector can show 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).

Respondents, a law firm and one of its attorneys, filed suit against petitioner to foreclose a mortgage on real property that she owned. The complaint included a demand that the debt be disputed in writing. At the time of filing suit, it was an open question whether a debt collector could demand that a debt be disputed in writing (the federal circuits still are split on this issue). Petitioner disputed the debt, in writing, and the claim was dismissed. She then sued respondents in a class action for violating the FDCPA, arguing that the Act did not require disputes to be in writing. Respondents argued that the bona fide error defense applied to this alleged violation, as it arose from a debt collector's reasonable good faith interpretation of the legal requirements of the FDCPA.

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The U.S. Supreme Court disagreed, holding instead that the bona fide error defense can only be used with respect to a debt collector's factual errors, not mistakes of law. The Court focused first on the maxim that ignorance of the law provides no excuse for violating it. Likewise, it declined to treat the FDCPA's liability as akin to requiring "willful" conduct, which often excludes mistakes of law from liability. The Court found support for its interpretation through textual and legislative historical analysis. It noted that the bona fide error defense in the FDCPA was modeled on that in the 1968 Truth in Lending Act (TILA). In 1977, when the FDCPA was passed, three courts of appeal had interpreted the TILA bona fide error defense to refer to clerical — not legal — errors. Three years later, when Congress amended the TILA to include legal errors in its defense, it could have amended the FDCPA in the same way but chose not to do so. The Court reasoned that Congress therefore did not wish to extend the bona fide error defense to mistakes of legal interpretation under the FDCPA.

The Court declined to address whether the inclusion of an "in writing" requirement in a notice sent to a consumer violates the FDCPA. The U.S. Court of Appeals for the Third Circuit has held that a consumer's dispute of a debt under the FDCPA must be in writing to be effective, while the U.S. Court of Appeals for the Ninth Circuit has held that the Act does not impose this requirement. *Compare Graziano v. Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991); *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).

This decision clearly opens the door to potential liability under the FDCPA for lawyers who may make a good faith legal error, even in the context of litigation. Attorneys can still invoke the bona fide error defense for violations of the FDCPA arising from qualifying factual errors. But the lesson here is clear that lawyers must err on the side of caution when making demands covered by the FDCPA, at least until Congress considers whether to amend the Act to expressly include a defense for good faith errors of law.

Fees / Fee Agreements

U.S. Supreme Court Strictly Limits Enhancements of Attorney Fee Awards Above Lodestar Amounts

***Perdue v. Kenny A. ex rel. Winn*, ___ U.S. ___, 130 S.Ct. 1662 (2010)**

In summary, the U.S. Supreme Court held, 5-4, that attorney fee awards may be enhanced under 42 U.S.C. § 1988 only in the rare circumstance of when the lodestar method fails to account for certain factors relevant to a fee award. The district court's enhancement was improper in the matter because it failed to use an objective and reviewable methodology to calculate its enhanced award.

Plaintiffs (children in the Georgia foster-care system) successfully mediated a civil rights class action against various Georgia state officials. But the consent decree did not resolve the amount of prevailing party attorneys' fees. The relevant fee shifting statute, 42 U.S.C. § 1988, requires that such fee awards be reasonable. The U.S. District Court for the Northern District of Georgia awarded $6 million in attorneys' fees based on the lodestar method (attorney hours multiplied by prevailing market hourly rates), and a $4.5 million fee enhancement based upon class counsel's skill, commitment, dedication, professionalism and extraordinary results achieved. The enhancement was further based on the facts that class counsel had to advance case expenses, that class counsel were not paid on an on-going basis, and that class counsel's ability to recover a fee was contingent upon the outcome of the case. The U.S. Court of Appeals for the Eleventh Circuit affirmed, but each judge wrote a separate opinion.

The U.S. Supreme Court confirmed that fee enhancements may, on rare occasions, be reasonable, but held that the award in this case was not reasonable. To be reasonable, a fee must be high enough to attract competent counsel, but not so high as to produce a windfall for attorneys. The Court held that there is a strong presumption that the lodestar method yields a reasonable fee, and that any fee enhancement cannot be based on factors already subsumed in the lodestar calculation. The Court then analyzed which factors are subsumed in the lodestar calculation, and which are properly considered as part of a fee enhancement. The Court foreshadowed the difficulty of this analysis by noting that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee . . ."

The Supreme Court held that the results achieved by an attorney do not justify an enhancement because superior results can be the result of, *inter alia*, inferior performance by defense counsel or simple luck. On the other hand, the Court noted that there may be rare circumstances in which the lodestar calculation does not adequately account for superior lawyer performance, such as when an hourly rate is based on only one, or a few, simple factors (*e.g.*, years of experience). Further, an enhancement may be proper when litigation involves an unanticipated and extraordinary outlay of expenses and is exceptionally protracted, or when an attorney experiences an unanticipated and exceptional delay in payment of fees. Enhancements must, the Court held, be based on objective and reviewable methods. Notably, the Court acknowledged that if hourly billing becomes less common, an alternative to the lodestar method may have to be found.

Turning to the facts at hand, the Supreme Court held that the district court did not properly justify its enhancement and that the award was largely unreviewable. The district court's error was in awarding the enhancement based on a number of factors without detailing how each contributed to the court's calculation. And to the extent that the award was based on counsel's performance, the trial court failed to employ an objective and reviewable methodology. In line with the Supreme Court's directive to use reviewable methods and calculations, the Court also held that the fee applicant has the burden of proving that an enhancement is necessary by producing specific evidence. Justices Anthony Kennedy and Clarence Thomas each concurred, writing separately and emphasizing that enhancements will only be proper under the rarest of circumstances.

The Court's decision materially limits the circumstances under which attorney fee enhancements above a lodestar amount may be awarded. The Court has squarely placed the burden on plaintiffs to provide specific evidence, and the district court to utilize an objective and reviewable method, for any enhancement. As a practical matter, this limitation on the circumstances under which attorney fee enhancements may be awarded may prove to facilitate settlements in certain class action litigation by eliminating some of the current uncertainty about how attorney fees may be determined.

Miscellaneous

Illinois Supreme Court Holds That Ethical Rule Prohibiting Communication With a Represented Party Is Limited to the Same Matter, Regardless of Whether the Matters Are Factually Related

***People v. Santiago*, 236 Ill. 2d 417, 925 N.E.2d 1122 (2010)**

In summary, the Illinois Supreme Court held that Rule of Professional Conduct (RPC) 4.2 (prohibiting communication with a represented party) is matter-specific. Where defendant was a party to substantially related civil and criminal proceedings, but was only represented in the civil proceeding, the Court held that criminal prosecutors could communicate directly with defendant without the consent of her civil attorney.

The Cook County (Illinois) child protection division sought temporary custody of defendant's child based on suspected child abuse. Defendant was appointed counsel in this civil proceeding. The state ultimately brought criminal charges against defendant based on the same underlying incident. During the criminal investigation, and before indictment, state prosecutors interviewed defendant with a *Miranda* waiver, but without the consent of her counsel from the child protection proceeding, and without intent to use any evidence in the child protection proceeding. In the criminal case, defendant sought to suppress the evidence from these interviews because the prosecutors allegedly violated Illinois RPC 4.2, which states:

> During the course of representing a client a lawyer shall not communicate . . . on the subject of representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party . . . 134 Ill. 2d R. 4.2.

The Illinois Supreme Court held that the prosecutors did not violate RPC 4.2 because defendant was not represented in the criminal matter. The Court emphasized that the rule only prohibits communication with "a party the lawyer knows to be represented by another lawyer in that matter . . . " Defendant conceded that although she was represented in the child protection matter, she was not represented in the related criminal matter.

The Court noted that the result was consistent with rulings in other jurisdictions, and that the drafters of the RPCs clearly knew how to make RPC 4.2 broader, had they so intended. For example, had RPC 4.2 been intended to apply to all matters arising out of a specific set of facts, as defendant argued, the drafters could have used the phrase "same or substantially related matter" which is contained in the conflict of interest rules. Finally, because the Court found no violation of RPC 4.2, it did not reach the issue of whether suppression of evidence would be an appropriate remedy for violations of the rule.

Under this opinion, a party alleging an RPC 4.2 violation must establish that the scope of his or her legal representation encompassed the specific matter in which the violation allegedly occurred. Thus, RPC 4.2 considerations may play a role in defining the scope of representation in the context of related or parallel proceedings, including, for example, class action or other litigation when there are related government enforcement or criminal proceedings.

Settlements

New Jersey Supreme Court Holds Legal Malpractice Action Is Not Precluded by Acknowledgement That a Settlement Is "Acceptable"

***Guido v. Duane Morris LLP*, 202 N.J. 79, 995 A.2d 844 (2010)**

Plaintiff sued the company of which he was chairman of the board and majority shareholder, claiming corporate governance improprieties. He and his wife filed a second action, which they settled while represented by the law firm, agreeing to and accepting the settlement in response to questions by the court. Although the trial court acknowledged a question whether plaintiffs were adequately advised regarding the impact of stock restrictions, it granted summary judgment for the law firm, citing *Puder v. Buechel*, 183 N.J. 428, 874 A.2d 534 (2005) and the clients' acknowledgement in response to the court's questions. The court explained that *Puder* was an equitable exception where the plaintiff had twice accepted the substantially same settlement, and knowing of the alleged malpractice, responded that the settlement was acceptable and fair. Here, plaintiffs were not subject to equitable estoppel because they did not state that the settlement was satisfactory or fair, only that it was acceptable. The court held that the failure to seek to vacate the settlement could be relevant to the failure to mitigate damages, but not as to whether there was a cause of action.

Statute of Limitations

The Need for a Closing Letter

***Laclette v. Galindo*, ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2010 WL 1949787 (2010)**

A lawyer defended plaintiff, a real estate broker who was sued for advising a residential property buyer that she did not need an inspection. Ultimately, plaintiff and her brokerage were held liable on a jury verdict for $275,000. On January 25, 2005, the parties worked out a settlement plan, requiring plaintiff to pay $3,750 per month. On February 9, 2007, the plaintiff sued the attorney for legal malpractice, alleging a conflict in jointly representing both her and the real estate brokerage company.

Plaintiff contended that the lawyer's representation continued past the settlement. The court agreed, citing the proposition that the representation ends when the client discharges the attorney or consents to withdrawal, or upon completion of the tasks for which the attorney was retained. Here, the attorney did not show that the representation had been fulfilled and that all agreed upon tasks were completed. The only showing was that there had been no contact. Because the court retained jurisdiction over the settlement, which required monthly payments, there was an issue of fact as to whether the representation had ended.

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