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District Court Opinion Provides Road Map for Successful Bona Fide Error Defense

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The FDCPA, through section 1692d(6), prohibits a debt collector from placing telephone calls to a debtor “without meaningful disclosure of the caller’s identity.” 15 U.S.C. § 1692d(6). The FDCPA also includes a “bona fide error” defense to violations of its mandates, including violations of Section 1692d(6). 15 U.S.C. § 1692k(c) provides that “[a] debt collector may not be held liable in any action brought under this subchapter [, the FDCPA,] if the debt collector shows by a preponderance of evidence 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.” Once a violation of the FDCPA has been shown, the debt collector must establish that the violation was (1) unintentional, (2) a bona fide error, and (3) made despite the maintenance of procedures reasonably adapted to avoid the error. *See Johnson v. Riddle*, 443 F.3d 723, 727-28 (10th Cir. 2006).

A recent case from the US District Court for the District of Utah provides a useful roadmap for a debt collector attempting to use the bona fide error defense against an alleged violation of 15 U.S.C. § 1692d(6). In *Berry v. Van Ru Credit*, 2017 U.S. Dist. LEXIS 164266 (D. Utah Sep. 11 2017), the debtor, Berry, defaulted on student loans he had taken out with the US Department of Education. The loans were placed with Van Ru for collection, and a representative of Van Ru contacted Berry and informed him that the Department of Education had the right to pursue an involuntary wage garnishment or a federal tax offset against him should his loans remain in default. *Id.* at *2. However, the representative failed to state that he was calling from Van Ru during the initial call. *Id.* at *18. That failure, Berry alleged, was a violation of 15 U.S.C. § 1692d(6).

While the court held that the representative’s failure to inform Berry that he worked for Van Ru “violated . . . the FDCPA,” *id.* at *19, Van Ru argued that it was entitled to the bona fide error defense because it did not intend to violate the FDCPA. The court agreed, finding that Van Ru had met each of the three prongs for a successful bona fide error defense.

As to the first prong, the court found that there was no evidence to support a finding that Van Ru intentionally violated the FDCPA and, in fact, there was evidence that the

representative provided meaningful disclosure that he was calling from Van Ru in subsequent calls. As to the second prong, the court noted that while the Van Ru representative did not identify himself as such, he did identify the Department of Education as the client, which demonstrated that any error was “in good faith, genuine, and bona fide.” *Id.* at *20.

Key to the court’s decision was a review of the policies and procedures implemented and followed by Van Ru representatives during live telephone calls with consumers. Those procedures included a requirement that each representative discloses: (1) their identity; (2) that the representative is calling from Van Ru; and (3) that the call is being made on behalf of a Van Ru client. Under Van Ru’s procedures, when a representative contacts a consumer over the phone, the representative is prohibited from making any false or misleading statement to the consumer. The court noted that these procedures were available online to all Van Ru representatives to serve as a reference throughout their employment with the company, and that all representatives are specifically trained on the policy.

The court also detailed Van Ru’s training procedures that all representatives must undergo before contacting consumers. Van Ru provided an initial three-week training program for all new hires which detailed both company policy and the laws and regulations governing collection activities; required new hires to pass an exam on the requirements of the FDCPA before making collection calls; and required all representatives to participate in seven additional weeks of ongoing training once released to the floor, including “side-by-side coaching, system navigation, and work effort reviews.” *See id.* at *6-7. After the first 10 weeks of training, Van Ru conducted refresher training on a monthly and as needed basis, provided workshops and remedial training sessions, and mandated retraining for all representatives twice per year. Any representative who failed the mandatory retraining exam three times was automatically terminated, and any representative who violated Van Ru’s policies were subject to disciplinary action, up to and including termination. *Id.*

The court found these procedures to be “specific and extensive” and, because Van Ru was able to meet all three prongs of the test, the court concluded Van Ru was entitled to the bona fide error defense. *Id.* at *20-21. This case provides an example of the types of detailed policies and procedures a debt collector should have in place, and vigorously enforce, in order to be entitled to 15 U.S.C. § 1692k(c)’s bona fide error defense.

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