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Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer financial services and has

Sixth Circuit Side Steps the Bona Fide Error Defense

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A recent opinion issued by the Sixth Circuit should prove helpful to attorneys facing unsettled issues of state law. As drolly described by the Court, "[a] lawyer sued two lawyers, and each side hired more lawyers. Five years later, after 'Stalingrad litigation' tactics, discovery sanctions, and dueling allegations of professional misconduct, we are left with $3,662 in damages and roughly $180,000 in attorney's fees." *Van Hoven v. Buckles & Buckles,* 2020 U.S. App. LEXIS 1483, *2 (6th Cir. Jan. 16, 2020). So what caused this apocalyptic litigation war? A series of post-judgment garnishments.

In *Van Hoven*, a law firm enforced a judgment by filing a series of garnishments. With each garnishment, the law firm included within the post-judgment costs accrued to date their garnishment filing fees. The consumer contended that the law firm violated §1692e of the FDCPA by seeking the costs of each garnishment, contending that doing so violated Michigan law because (a) the law firm was not allowed to include the costs of the present garnishment within the amount due, and (b) the law firm was not allowed to include the costs of prior unsuccessful garnishments. Michigan law, at the time, was unclear as to whether a creditor could include the costs of the present garnishment in their calculation of costs. At the trial court level, the consumer and the class she represented were successful and were awarded a total of $3,662.00 in damages and $186,600.00 in attorney's fees. The law firm appealed.

On appeal, the Sixth Circuit was left to address whether "an inaccurate statement about state law counts as a 'false … representation'?" *Id.* at *8. The Court started by noting that not every violation of state law is a violation of the FDCPA. In order for an inaccurate statement about state law to be actionable, the statement must be both inaccurate and material.

While the Court quickly determined the statements at issue were material, it ultimately concluded they were not false. "Even though the Act covers 'false' material statements about state law, that does not mean it extends to every representation about the meaning of state law later disproved." *Id.* at *9. While the Court considered the Supreme Court's holdings in *Jerman v. Carlisle,* 559 U.S. 573 (2010) and *Heintz v. Jenkins,* 514 U.S. 291 (1995), it veered away from employing the bona fide error defense when

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considering the law firm's interpretation of Michigan law. In doing so, the Court explained that "[t]he key question ... is not whether the bona fide error defense applies to interpretations of state law; it is whether this is a cognizable "false representation." *Id.* at *21.

Instead, the Court turned to Rule 11, stating that "[m]ore helpful is the analogy to sanctions based on attorneys' statements in litigation" and noting that it is only sanctionable to advance legal contentions that are not warranted by existing law. *Id.* at *13. Key to the Court's determination that the statements were not false was the fact that at the time the statements were made (and the costs sought), the law was unsettled.[1] The Court noted that

[i]n dealing with open questions of state law, excellent arguments sometimes will appear on either side. And we generally don't think of a position on the meaning of state law as false at the time it was issued whenever a higher court over time takes a different position in a later case ... A representation of law is not actionably false every time it turns out wrong."

Id. at *14. Drawing from Rule 11 and its threshold for sanctions, the Court held that "a lawyer does not 'misrepresent' the law by advancing a reasonable legal position later proved wrong. This logic applies with even more force to representations of law given the frequent before-the-case difficulty, sometimes indeterminacy of legal questions." *Id.*

Applying this rationale, the Court reversed the district court on the issue as to whether the law firm made misrepresentations in seeking its current garnishment costs. The Court additionally remanded the remaining issue (whether the law firm improperly sought costs for prior unsuccessful garnishments) to the district court to determine whether that claim was subject to the bona fide error defense.

The opinion provides an excellent road map for law firms dealing with unsettled areas of law and should provide law firms with additional avenues for defense.

[1] Michigan later amended its rules to clarify that creditors may include their current costs in their garnishment requests.

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