No. 08-1200

In The
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI,
KRAMER & ULRICH, L.P.A.
AND ADRIENNE S. FOSTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS

GEORGE S. COAKLEY
Counsel of Record
CLIFFORD C. MASCH
BRIAN D. SULLIVAN
MARTIN T. GALVIN
JAMES O'CONNOR
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115
(216) 687-1311

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).

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BRIEF FOR THE RESPONDENTS

Respondents Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A. and Adrienne S. Foster request that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Congress's expressed purpose in enacting the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, was to eliminate abusive debt collection practices while not competitively disadvantaging debt collectors. *See* 15 U.S.C. § 1692(e). The FDCPA imposes liability on a debt collector who violates the statute. *See* 15 U.S.C. § 1692k(a). The debt collector, in turn, may avoid liability by proving 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." *See* 15 U.S.C. § 1692k(c) ("bona fide error defense" or "FDCPA defense").

1. Respondent Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A. is an Ohio law firm concentrating in real estate and foreclosure law. Respondent Adrienne S. Foster was an associate attorney at the firm. Amended Joint Appendix, 87 [hereinafter Joint App.].[1] The law

[1] The Amended Joint Appendix was filed with the Sixth Circuit Court of Appeals on January 11, 2008.

firm's senior principal, Richard McNellie, was responsible for the firm's compliance with the FDCPA. Joint App. 89. McNellie regularly attended industry seminars and conferences on issues relating to the FDCPA. *Id.* The firm subscribed to and circulated numerous periodicals and journals updating firm personnel on relevant developments. *Id.* McNellie periodically modified the firm's FDCPA protocols to comply with evolving case law, including the content of the validation notice required under 15 U.S.C. § 1692g. *Id.* at 90.

2. One question of law that was debated under the FDCPA was whether a debt collector who sends a validation notice may require a consumer to dispute a debt "in writing" under § 1692g(a)(3). In 2004, the Sixth Circuit affirmed a district court decision that authorized debt collectors to require written notice of a dispute. *See Savage v. Hatcher*, 109 Fed.Appx. 759 (6th Cir. 2004), *aff'g Savage v. Hatcher*, No. C-2-01-0089, 2002 WL 484986 (S.D. Ohio 2002). The only other court within the Sixth Circuit to analyze the issue also held that inclusion of the words "in writing" in a validation notice did not violate the FDCPA. *See Diamond v. Corcoran*, No. 5:92-CV-36, 1992 U.S. Dist. Lexis 22793 at *5-6 (W.D. Mich. 1992) (citing *Graziano v. Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991) (holding that "given the entire structure of section 1692g, subsection (a)(3) must be read to

require that a dispute, to be effective, must be in writing")).[2]

3. On April 17, 2006, respondents filed a foreclosure action against petitioner Karen L. Jerman on behalf of their mortgage lender-client. Joint App. 87. Along with the summons and complaint, respondents served petitioner with the firm's validation notice which stated, in part, that the debt would be assumed valid unless the debtor disputed the validity of the debt in writing within thirty days. *Id.* Petitioner retained a lawyer who sent a letter disputing the debt. *Id.* Respondents investigated, discovered from their client that the debt had recently been paid, and dismissed the foreclosure action. *Id.* at 88. The action was pending for twenty-four days. *Id.*

4. Petitioner then filed a class action complaint against respondents for various "unlawful debt collection practices." Joint App. 7. Respondents filed a motion to dismiss the complaint on the basis that inclusion of "in writing" in the notice did not violate the FDCPA. Joint App. 14-20. Despite the fact that all authority within the Sixth Circuit supported respondents' position, the district court found that "the plain meaning of the statute is clear and unambiguous," it did not impose a writing requirement on consumers

[2] Sections 1692g(a)(4) and 1692g(a)(5) contain writing requirements. In addition, § 1692c(c) provides consumers with certain rights if they notify a debt collector "in writing."

and, therefore, respondents' validation notice violated § 1692g(a)(3). Joint App. 256-262.

After informal discovery, petitioner filed an amended class action complaint alleging one violation – that the validation notice sent to petitioner violated § 1692g(a)(3) by requiring her to dispute the debt "in writing," citing *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir. 2005).[3] *Id.* at 61. Petitioner sought: (1) class certification for all Ohio consumers who received a validation notice requiring written notification of a dispute on or after June 6, 2005; (2) actual damages; (3) penalties consisting of the lesser of either $500,000 or one percent of respondents' net worth; and (4) attorney's fees.[4] *Id.* at 64. Respondents denied the alleged violation and further raised the affirmative defense of bona fide error. *Id.* at 66-70.

Respondents then moved for summary judgment on the ground that the bona fide error defense absolved them of liability as a matter of law. *Id.* 71-86. The

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[3] In her Merit Brief, petitioner asserts that *Camacho* is the "only on-point" appellate decision to consider whether a validation notice could properly require written notification of a dispute. *See* Brief for the Petitioner, p. 6 n.1 [hereinafter Pet. Merit Br.]. This is incorrect. After filing her Brief, petitioner notified respondents that her interpretation of *Graziano v. Harrison,* 950 F.2d 107 (3rd Cir. 1991) was mistaken and acknowledged that the Third Circuit explicitly addressed the issue.

[4] Petitioner immediately sought information from respondents concerning their income and thereafter proposed a settlement that included payment of $15,000 for damages, plus $7,500 for attorney's fees. Joint App. 256-262.

district court granted summary judgment. Appendix to Petition for Writ of Certiorari, 19a-41a [hereinafter Pet. App.]. In deciding the threshold issue, the court joined the "growing majority of courts" in concluding that the bona fide error defense encompasses legal error. Pet. App. 32a-33a (citing *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997)).

Next, the district court found that respondents met their evidentiary burden on each of the three showings required under § 1692k(c). The court found that there was no issue of fact as to whether respondents intentionally violated the FDCPA. The court noted that the law on the issue was unsettled, that respondents' reliance on *Graziano* and *Diamond* was reasonable, "and little guidance was provided by the Sixth Circuit." Pet. App. 36a. The court also found that respondents' error was made in good faith because existing authority within the jurisdiction supported their interpretation of § 1692g(a)(3). Pet. App. 37a. Finally, the court concluded that no reasonable procedures could have "lead [respondents] to know that this Court would find an FDCPA violation in the validation notice" and that respondents maintained reasonable procedures adapted to avoid the error. Pet. App. 39a-40a.

5. The Sixth Circuit unanimously affirmed. Pet. App. 1a-18a. While acknowledging that the circuit courts were "divided," the Sixth Circuit observed that those courts which adopted a restrictive view of the defense had failed to thoroughly examine the relevant

issues, and instead "simply dispense[d] with the issue" in reliance on the Ninth Circuit's decision in *Baker*.[5] *Id.* at 8a. As the Sixth Circuit observed, *Baker* "rested its holding entirely" upon the flawed analogy to the bona fide error defense contained in the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. Pet. App. 8a (citing *Johnson,* 305 F.3d at 1122). The Sixth Circuit further recognized "that the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors." Pet. App. 9a-10a (quoting *Johnson*, 305 F.3d at 1123). Finally, the court concluded that protection of attorneys who make bona fide errors of law is consistent with the FDCPA's purpose of eliminating abusive debt collection practices, while also insuring that debt collectors are not competitively disadvantaged. Pet. App. 14a. Petitioner's en banc request was denied. Pet. App. 42a-43a.

This Court granted certiorari on the sole question of whether legal error qualifies for the bona fide error defense. Petitioner has not appealed the factual findings of the Sixth Circuit that respondents' violation of § 1692g(a)(3) was not intentional and resulted from their good faith interpretation of § 1692g(a)(3), notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

[5] *Baker v. G. C. Servs. Corp*., 677 F.2d 775 (9th Cir. 1982).

SUMMARY OF ARGUMENT

1. A plain text analysis of the bona fide error defense in § 1692k(c) shows that it applies to all types of error. The defense refers to "error" without restriction or limitation. A plain reading of the words and phrases "bona fide," "violation not intentional" and "maintenance of procedures reasonably adapted," in context, does not show a congressional intent to exclude legal error from the word "error." Exclusion of legal error from the bona fide error defense has no support in the text and would be contrary to the purposes of the statute (eliminating abusive debt collection practices while not competitively disadvantaging nonabusive debt collectors).

2. The safe harbor provision of the FDCPA does not indicate a congressional intent that legal errors be excluded from the bona fide error defense. Including legal errors in § 1692k(c) does not render the safe harbor provision superfluous. Each contains separate and distinct requirements that are available to debt collectors depending upon the circumstances. Given the internal rules of the Federal Trade Commission ("FTC") providing that advisory opinions will be issued "where practicable" and where there is "no clear Commission or court precedent," the dearth of FTC opinions is understandable. Because advisory opinions are not binding on courts, ethical dilemmas may arise if lawyers are required to choose between the categorical immunity afforded to them by the safe harbor provision and advancing the best interests of

their client by arguing existing case precedent inconsistent with the advisory opinion.

3. A plain reading of the bona fide error defense to include legal errors is consistent with the purpose of the statute. Congress expressed an intent to equitably balance the interests of consumers and debt collectors in the purposes of the statute. *See* 15 U.S.C. § 1692(e).

The statutory elements favoring consumers include: a wide range of "violations," most of which do not require proof of a culpable mindset, the availability of damages in excess of actual damages sustained, the availability of substantial class action damages, "reasonable" attorney's fees, even in the absence of proof of actual damages and stiff administrative penalties.

The counterbalances afforded debt collectors are the safe harbor provision and bona fide error defense (that applies to legal and other errors), as well as § 1692k(a)(3) (that allows debt collectors to recover reasonable attorney fees from consumers for actions brought in bad faith).

Requiring a debt collector to prove the three elements of the defense by a preponderance of the evidence furthers the purpose of protecting debt collectors who attempt to comply with the FDCPA, while still discouraging abusive conduct.

The checks and balances built into the FDCPA, including a bona fide error defense that applies to

legal and other errors, has and will continue to prevent a "race to the bottom" by either consumers or debt collectors.

Lastly, this Court's holding in *Heintz v. Jenkins*, 514 U.S. 291 (1995), further compels the conclusion that the bona fide error defense encompasses legal errors.

4. There is nothing in TILA that warrants disturbing the plain meaning of the FDCPA defense so as to exclude legal errors. TILA provides creditors with multiple means for curing violations prior to the imposition of liability. These safeguards are not present in the FDCPA. Thus, this Court should not look to the bona fide error provision in TILA for guidance.

Reliance on TILA in interpreting the FDCPA bona fide error defense is misplaced because the judicial interpretations of TILA's bona fide error defense were unsettled at the time the FDCPA was enacted. When enacting the FDCPA, Congress did not express any intent that the bona fide error defense should be construed consistent with existing TILA case precedent. The legislative purposes and history of the FDCPA and TILA are significantly different and show that Congress did not intend to adopt any particular interpretation of TILA's bona fide error defense when enacting the FDCPA.

The 1980 TILA amendments do not support finding a congressional intent to exclude legal error

from the FDCPA defense. Rather, the TILA amendments demonstrate that Congress knows how to express an intent to exclude legal errors from a bona fide error defense and has chosen not to do so with the FDCPA, despite numerous opportunities.

5. Petitioner's interpretation of the FDCPA defense to exclude all legal error breaks down when the definition of legal error is expanded beyond a determination of the requirements of the FDCPA. Petitioner concedes that her definition of legal error would cause disharmony in those cases where the FDCPA is inconsistent with other state or federal statutes.

Petitioner's arguments presuppose that ethical and unethical debt collectors should be treated identically, that intent to violate the statute is not of consequence, and that it is equally blameworthy for a lawyer to rely on law which is later overturned as it is to fail to become educated. These positions are each belied by the FDCPA's bona fide error defense as written.

ARGUMENT

I. THE PLAIN TEXT OF THE FDCPA REQUIRES THAT LEGAL ERRORS BE INCLUDED IN THE BONA FIDE ERROR DEFENSE

Section 1692k(c) provides:

> A debt collector may not be held liable in any action brought under this subsection if the debt collector shows by a preponderance of the 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.

A growing majority of federal courts have concluded that "nothing in the language of the FDCPA bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment." *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002). In fact, respondents are unaware of a single decision that excludes legal errors from the bona fide error defense based on a plain text analysis. It is not surprising then that petitioner, in her effort to remove legal error from the plain language of the statute, advocates a construction that is governed by a criminal law maxim and is dependent upon an interpretation of other federal statutes that neither contain the same relevant language nor were promulgated for a similar purpose. Petitioner's failure to focus on the actual text of the statute is

understandable given that a plain reading of the statute leads to only one conclusion – that the bona fide error defense includes legal errors.

This Court has long recognized that "[t]he pre-eminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). Thus, when interpreting language used by Congress in the absence of statutory definitions, courts construe words in accordance with their ordinary and natural meanings, in context, and with a view of their place in the overall statutory scheme. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Further, "[w]here there is no ambiguity in the words, there is no room for construction [and, as such] a case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (citing *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820)).

Consequently, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v.*

Union Planters Bank, N. A., 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

A. Application Of The Bona Fide Error Defense To Legal Errors Is Consistent With A Plain Reading Of The Express Purposes Of The FDCPA

Bearing in mind these principles of statutory construction, a plain text analysis of the bona fide error provision should begin with a recognition of the stated purposes of the FDCPA. Contrary to petitioner's repeated assertion, the FDCPA was not enacted for the singular purpose of preventing abusive debt collection practices. Instead, Congress expressly declared that the legislation was intended to address three interests:

> It is the purpose of this subchapter *to eliminate abusive debt collection practices by debt collectors*, *to insure that those debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged*, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e) (emphasis added).

Given these purposes of the FDCPA, the bona fide error defense was unquestionably part of Congress's effort to carefully balance the interest of

eliminating abusive debt collection practices while also insuring that scrupulous debt collectors are protected.

B. A Plain Reading Of The Bona Fide Error Defense Includes Legal Errors

Section 1692k(c) is an affirmative defense requiring debt collectors to prove that their "violation" of the FDCPA was: (1) not intentional; and (2) resulted from a bona fide error; (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Petitioner argues that the bona fide error defense excludes legal error. Her argument is based on an interpretation of the phrase "violation was not intentional," which she contends can only mean one of two things: (1) that the "act" constituting the violation (or infraction) of the statute was not intentional; or (2) that the actual violation (or infraction) of the statute itself was not intentional.[6] Petitioner claims that the phrase must be restricted to her first definition.[7] Petitioner's argument requires the

[6] Petitioner also argues that the phrase "maintenance of procedures reasonably adapted to avoid any such error" reinforces the conclusion that the bona fide error defense excludes legal error. This argument is addressed in Part I.E.

[7] Petitioner's argument is contrary to numerous decisions finding that a debt collector must only show that the violation was unintentional, not the act itself was unintentional. *See, e.g., Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)

(Continued on following page)

addition of words to the plain language of the statute along the lines of:

> A debt collector may not be held liable in any action brought under this subsection if the debt collector shows by a preponderance of the evidence that the [*act constituting the*] violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Relying on these inserted words, petitioner asserts that because every legal error results from an intentional act, such an error would never qualify for the bona fide error defense.

The plain language of the bona fide error defense, however, does not restrict the phrase "violation was not intentional" to the "act" constituting the violation. Because the only term in § 1692k(c) that is statutorily defined is "debt collector," the meaning of the other words and terms in this provision must necessarily be derived from their common usage. *See* 15 U.S.C. § 1692a.

("The debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. To hold otherwise would effectively negate the bona fide error defense."); *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Caputo v. Prof'l Recovery Servs., Inc.*, 261 F.Supp.2d 1249, 1255 (D. Kan. 2003). It is also contrary to the legislative history. *See* S. Rep. No. 95-382, at 4-5 (1977) ("A debt collector has no liability . . . when such violation is unintentional. . . .").

As commonly used, "violation" means "[t]he act or an instance of violating or *the condition of being violated*." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1507 (3rd ed. 1997) (emphasis added). Synonyms include "breach, infraction, violation, transgression, trespass and infringement." *Id.* at 171. Thus, the common meaning of "violation" encompasses not only the "act" constituting an infraction, but also the actual "condition being violated," i.e., the infraction or violation itself.

The word "violation" is modified two times in § 1692k(c). First, "violation" is modified by the phrase "not intentional." As commonly used, "intentional" is defined as "[d]one deliberately; intended." *Id.* at 707. Synonyms include "voluntary, intentional, deliberate, *willful, willingly*." *Id*. at 1513 (emphasis added). Again, nothing in the language of the adjective "intentional" suggests that "violation" is restricted to the "act" as opposed to the "infraction" itself.

Second, "violation" is modified by the phrase "and resulted from a bona fide error." "Bona fide" is defined as "[m]ade or carried out in good faith; sincere." *Id*. at 158. "Error" commonly means "1. [a]n act, an assertion, or *a belief* that unintentionally deviates from what is correct, right, or true. 2. *The condition of having incorrect or false knowledge*. 3. The act or an instance of deviating from an accepted code of behavior. 4. A mistake." *Id*. at 467 (emphasis added). Stated differently, "error" includes not only an "act" that deviates from what is correct, but also a "belief." Once more, nothing in the plain meaning of either

"bona fide" or "error" modifies "violation" in a manner consistent with petitioner's restrictive interpretation. "Error" means all types of errors without restriction or limitation.

Further, there is nothing in the common usage of the words contained in the phrase "notwithstanding the maintenance of procedures reasonably adapted to avoid any such error" that indicates a "violation" is restricted to the "act" constituting the violation. In fact, just the opposite is true as the phrase refers to "any such error."

In sum, petitioner removes legal error from the plain language of the bona fide error defense by reading words into the provision. Petitioner wants to have it both ways. At petitioner's urging, the district court refused to add the words "in writing" to the plain and unambiguous language of § 1692g(a)(3). Petitioner now seeks to insert the words "act constituting the" violation into the plain and unambiguous language of the bona fide error defense in order to deny respondents the benefit of the defense.

As indicated above, however, "[i]t is well established that when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie,* 540 U.S. at 534 (internal quotations omitted) (citations omitted). Given the number of federal courts that have specifically determined that the bona fide error defense does not exclude legal error, it cannot be

reasonably argued that the result of this interpretation is absurd.

C. Petitioner's Attempt To Remove Legal Errors From The Bona Fide Error Defense Is Inconsistent With A Plain Reading Of The Text Of The FDCPA

1. Congress could have limited the bona fide error defense to an "act."

When viewed in the context of the plain language of the FDCPA, the bona fide error defense does not restrict the phrase "violation was not intentional" to an "act" constituting the violation of the statute. A review of the FDCPA's safe harbor provision at § 1692k(e) reveals that when Congress intended to limit application of a defense to an "act," it knew how to do so. Section 1692k(e) provides:

> No provision of this section imposing any liability shall apply to any *act done or omitted* in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such *act or omission* has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason. (Emphasis added).

Had Congress intended to limit the bona fide error defense to an unintentional "act or omission," it could have used language consistent with § 1692k(e).

2. Petitioner's restrictive interpretation of the bona fide error defense fails to harmonize the defense with other provisions within the FDCPA.

Petitioner's interpretation of the phrase "violation was not intentional" renders the bona fide error defense meaningless as to various violations enumerated in the FDCPA. Petitioner's position not only fails to give due credence to the language of all provisions contained in the FDCPA, but it also fails to interpret the statute so that each provision operates in harmony with the other. *See Thomas v. Crosby*, 371 F.3d 782, 811 (11th Cir. 2004) ("Courts undoubtedly have an obligation to harmonize the various provisions within a statutory scheme.").

The requirement that a debt collector must have a culpable mindset of either knowledge or intent to commit an "act" that violates one of the provisions of the FDCPA varies. In this case, petitioner alleged respondents violated § 1692g(a)(3). This subsection provides that within five days of an initial communication, a debt collector shall send:

> [A] statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector[.]

The district court determined that respondents' validation notice requiring a written response from the consumer violated the FDCPA. Joint App. 60.

Section 1692g(a)(3) is violated by an act alone. Other provisions require more – proof of an act coupled with a culpable mindset, i.e., knowledge and/or intent to commit the act. For example, § 1692d(5) identifies a violation as conduct "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent* to annoy, abuse or harass. . . ."[8] (Emphasis added). The fact that some violations require a "knowing" or "intentional" mindset is problematic with respect to application of the bona fide error defense.

A dilemma arises when attempting to reconcile the defense's applicability to "any action brought under this subchapter," with violations requiring proof of a knowing or intentional mindset. By way of example, if a plaintiff proves that a debt collector violated § 1692d(5) by: (1) "engaging . . . in [a] telephone conversation repeatedly or continuously;" and (2) "with intent to annoy, abuse, or harass . . . ;" then, under the petitioner's narrow interpretation, the bona fide error defense is rendered per se meaningless because the debt collector could never prove that the "act" was not intentional in the context of the affirmative defense. While intent to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of the phone call or the

[8] Other examples of similar provisions include §§ 1692b(6); 1692c(1); 1692c(2); 1692c(3); 1692c(8); 1692f(2); 1692f(6)(B); and 1692j(a).

place to where phone calls are made,[9] a debt collector could never establish that he did not intend to commit the act that violated this provision because the consumer would have already established this fact in proving the violation.

This apparent conflict between the bona fide error defense and certain other provisions within the FDCPA is removed when one gives meaning to the plain text of § 1692k(c) to include all bona fide errors. Under this construction, when a particular violation requires a debtor to prove only that the act was committed, then the bona fide error defense can be asserted by the debt collector to prove that either the act constituting the violation, or the violation itself, "was not intentional and resulted from bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." When a particular violation, however, requires a debtor to prove both that an act was committed and that it was committed with knowledge and/or intent, the bona fide error defense can only logically be asserted by the debt collector to prove that the violation itself "was not intentional and resulted from bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

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[9] *See Kuhn v. Account Control Tech.*, 865 F.Supp 1443, 1452-53 (D. Nev. 1994); *Chiverton v. Fed. Fin. Group, Inc.*, 399 F.Supp.2d 96, 101 (D. Conn. 2005); *Pittman v. J.J. MacIntyre Co. of Nevada, Inc.*, 969 F.Supp. 609, 612 (D. Nev. 1997).

By way of the above example, while the debtor may prove that the debt collector violated § 1692d(5) by "engaging . . . in [a] telephone conversation repeatedly or continuously with intent to annoy, abuse or harass . . . ," this "act or conduct" may have been premised on case precedent holding that such conduct did not violate the FDCPA. As the bona fide error defense is applicable to "any action brought under this subchapter," the debt collector must be permitted to show that the violation or infraction "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

3. Interpreting "violation not intentional" to exclude legal error conflicts with similar language in § 1692k(b).

Petitioner's interpretation of the phrase "violation was not *intentional*" leads to similar problems when construed with the phrase "the extent to which the debt collector's non-compliance was *intentional*" in § 1692k(b). (Emphasis added).

Section 1692k sets forth the parameters of a debt collector's civil liability for FDCPA violations. The damage sections would apply where a debt collector was found to have violated an FDCPA provision and was unsuccessful in asserting either the bona fide error or safe harbor defenses. Section 1692k(a) provides that "any debt collector who fails to comply with

any provision of this subchapter . . . is liable. . . ." Section § 1692k(a)(1) provides that the consumer is entitled to an award of "any actual damage sustained by such person as a result of such failure." In addition to actual damages, § 1692k(a)(2)(A) permits a court to award "such additional damages as the court may allow, but not to exceed $1,000" with respect to individual violations, while § 1692k(a)(2)(B) permits additional damages "as the court may allow . . . not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector" for class action violations. Section 1692k(b) defines "factors" that may be considered by a court in awarding additional damages, including "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was *intentional*." *See* §§ 1692k(b)(1) and (2) (emphasis added).

"'It is a settled principle of statutory construction that "[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place."'" *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1030 (2nd Cir. 1990) (quoting *United States v. Nunez*, 573 F.2d 769, 771 (2nd Cir. 1978), in turn quoting *Meyer v. United States*, 175 F.2d 45, 47 (2nd Cir. 1949), in turn quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3rd Cir. 1929)). As such, the adjective "intentional" should be read to modify "noncompliance" in § 1692k(b) in the same manner it modifies "violation"

in § 1692k(c). Under petitioner's suggested interpretation, the following words must be added to § 1692k(b):

> the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which [the act constituting] such noncompliance was intentional.

This construction again leads to an internal conflict. Using the previous example of a violation under § 1692d(5), a debt collector's intent to commit the "act" constituting a violation of the statute cannot logically be viewed as a factor justifying the assessment of additional damages under § 1692k(b). The debt collector's liability for the violation of § 1692d(5) would have, by necessity, already required proof of the debt collector's "intent to annoy, abuse, or harass." Petitioner's inconsistent construction of the adjective "intentional" is problematic when juxtaposed with the factors a court considers in awarding additional damages under § 1692k(b).

D. The Plain Language Of The Bona Fide Error Defense Does Not Exculpate Debt Collectors Who Are Ignorant Of The Law

Petitioner resorts to sources outside the plain text of the FDCPA in attempting to demonstrate that the bona fide error defense excludes legal errors. Petitioner argues that the phrase "violation was not intentional" must be restricted to "acts" constituting

an infraction of the statute, based on the criminal law maxim that "ignorance of the law is no defense." Petitioner relies on this argument as a means to inject a meaning into the bona fide error defense that is otherwise not apparent from the actual text. The reliance on this criminal law maxim is unpersuasive because it is predicated on a false premise – that respondents' error in legal judgment was the result of "ignorance of the law." The characterization of respondents' violation as "ignorance of the law" is absurd. The conduct found to be in violation of the FDCPA (the issuance of a letter requiring a response "in writing") was predicated upon a reasonable analysis of existing case law in an effort to comply with the statute.

Importantly, the bona fide error defense is not an exception to the criminal law maxim that "ignorance of the law is no defense." Although this affirmative defense includes legal errors, it excludes ignorance as a basis for establishing the defense. In ordinary English, "ignorance" means "[t]he condition of being uneducated, unaware, or uninformed." THE AMERICAN HERITAGE COLLEGE DICTIONARY 675 (3rd ed. 1997). While ignorance may be asserted to establish that a legal error was unintentional under the bona fide error defense, by its very definition, ignorance would prove that a debt collector did not act in good faith or maintain procedures reasonably adapted to avoid any such error. *See, e.g., Seeger v. AFNI*, 548 F.3d 1107, 1114 (7th Cir. 2008) (holding that the defendant's procedures to avoid the error were not reasonable

and, thus, application of the bona fide error defense would reward the defendant's ignorance of the law).

Moreover, petitioner does not cite any authority applying the criminal law maxim, "ignorance of the law is no defense," in the context of a civil statute containing an affirmative defense.[10] In fact, the very existence of the bona fide error defense in the FDCPA constitutes an expression of congressional intent that a debt collector should not be liable if the criteria of the defense are satisfied. The rigors of the bona fide error defense ensure this result. While the intent prong of the defense is a subjective test, the good faith and reasonable procedures prongs are subject to an objective test. *See Drossin v. Nat'l Action Fin. Servs.*, 641 F.Supp.2d 1314, 1321 (2009). A debt collector's satisfaction of both the subjective and objective prongs of this affirmative defense ensures that a debt collector cannot be exempted from civil liability based on "ignorance of the law."

The absurdity of petitioner's proposition is best illustrated by the holding in this case. The district court did not find that respondents were ignorant of

[10] Further, petitioner's suggestion that the bona fide error defense operates as a "qualified immunity" is specious. A "qualified immunity" exists until such time as the immune party acts outside the scope of the immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Thomas v. Whalen*, 51 F.3d 1285, 1289 (6th Cir. 1995). The bona fide error defense, however, is not implicated until a debt collector satisfies, by a preponderance of the evidence, the three prongs of the defense.

the law – rather it found just the opposite – that respondents had knowledge and awareness of existing case law. Stated differently, respondents' violation of the statute was subjectively found to be unintentional because they relied on existing case law. In addition, their reliance was objectively found to be made in good faith while maintaining procedures reasonably adapted to avoid any such error. This is precisely why the district court concluded that "[g]iven the unsettled law that existed on this issue, no procedure could have lead defendants to know that this Court would find an FDCPA violation in the validation notice sent to plaintiff." Pet. App. 39a.

1. Petitioner's analysis of unrelated federal statutes is a red herring and based on a false premise.

Petitioner asserts that a survey of language utilized in various federal statutes demonstrates that when Congress wants to exempt a criminal or civil violation from the maxim "ignorance of the law is no defense," it does so through the use of an express term of art. Specifically, petitioner contends that when Congress uses the phrase "willful violation" in a statute, it intends the violation to require proof that a defendant acted with knowledge that his conduct was unlawful. Conversely, when Congress uses the phrase "knowing violation" in a statute, it means "'factual knowledge as distinguished from knowledge of the law.'" Pet. Merit Br. 18 (citing *Bryan v. United States,* 524 U.S. 184, 192 (1998)). According to petitioner, a

"knowing violation" only requires a showing that the "act" violating a statute was intentional – not that the violation itself was intentional. Petitioner concludes that because Congress failed to use the word "willful" in § 1692k(c), the phrase "violation was not intentional" must only require a showing that the "act" constituting the violation was not intentional.

1. This argument is a red herring for several reasons. First, it focuses on statutory language not contained in the bona fide error defense. Second, petitioner fails to cite a single case analyzing the word "intentional" in conjunction with the word "violation." Third, petitioner's "survey" does not analyze the maxim "ignorance of the law" in the context of a statutory affirmative defense. Finally, petitioner's entire discussion fails to recognize important distinctions between statutory construction of criminal and civil statutes. A proper recognition of these differences eviscerates petitioner's argument.

2. Further, petitioner's position is based on the false premise that "willful" has a distinct statutory meaning. In *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), this Court examined use of the word "willfully" in the context of the Fair Credit Reporting Act ("FCRA") and stated "[w]e have said before that "willfully" is a "word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at 57. This Court went on to note that the term "willful" has different meanings in criminal and civil statutes. In the context of a civil statute, "willfulness" generally applies to both reckless and

knowing violations. In the criminal context, "willful" means "limiting liability to knowing violations."[11] *Id*. at 59, n.9. This Court concluded that the term "knowing violations" of the FCRA must be a "more serious subcategory of willful ones," meaning that a knowing violation requires actual knowledge that the conduct was unlawful.[12] This is in direct contradiction to petitioner's argument that a "knowing violation" only requires "factual knowledge as distinguished from knowledge of the law." Pet. Merit Br. 18.

In sum, petitioner's linguistic exercise focuses on language not contained in the bona fide error defense, wrongfully presumes a standardized meaning of statutory terms, and fails to give recognition to the different usage of the terms in civil and criminal statutes. Moreover, petitioner's authority focuses on

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[11] Like petitioner, the United States argues that Congress uses the word "willfully" as a term of art when it intends to require a defendant to have knowledge of his unlawful conduct. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, 11 [hereinafter U.S. Br.]. Notably, however, the United States later concedes that: "In *Bryan v. United States*, 524 U.S. 184 (1998), [the] Court rejected the contention that, in a criminal statute, 'the statutory language – "*willfully violates* any other provision of this chapter" – indicates a congressional intent to attach liability only when a defendant possesses specific knowledge of the "provision[s] of [the] chapter."' " *Id.* at 15 (emphasis added).

[12] The United States also recognized this distinction, stating that "when Congress intends for a defendant's knowledge or reckless disregard of the law to be considered, it commonly uses the term 'knowingly' or 'willfully.' " U.S. Br. 13 (citing *Safeco,* 551 U.S. at 57).

the necessary criteria to establish liability under a statute, not the elements of an affirmative defense intended to excuse liability upon proof of a good faith mistake, including legal error.

E. Procedures Reasonably Adapted To Avoid Any Such Error

1. Petitioner argues that the bona fide error defense excludes legal errors because it is "awkward" to speak in terms of maintaining procedures reasonably adapted to avoid legal errors. The fallacy of this argument was directly addressed in this case by the Sixth Circuit:

> We acknowledge that it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted to avoid mistakes of law. *However, absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available legislative history. Johnson*, 305 F.3d at 1123.
>
> We agree with the persuasive reasoning and analysis set forth in *Johnson*. Indeed, debt collectors may set up "procedures" more often to avoid clerical mistakes, *but there is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law.*

Pet. App. 13a (emphasis added).

2. Petitioner also contends that the bone fide error defense should exclude legal errors because courts have struggled to define what constitutes "reasonable procedures." A court's consideration of "reasonable procedures" in the context of legal errors, however, is no different than the evaluation of a party's reasonable conduct in most tort cases, including legal malpractice cases. Thus, the inquiry into the maintenance of procedures reasonably adapted to avoid legal errors is not so difficult as to produce an "absurd" result. Given the number of courts that have evaluated the reasonable procedures prong of the bona fide error defense, the workability of the standard has been proven. See *infra* at Part III, nn.21-23.

3. Finally, petitioner asserts that applying the reasonable procedures requirement to legal errors puts federal courts "in the awkward position of having to establish standards for the professional conduct of attorneys, an area traditionally left to the states." Pet. Merit Br. 27. Just the opposite is true. If legal errors are removed from the plain language of the bona fide error defense, Congress will have effectively imposed liability on lawyers to non-clients for exercising their professional judgment. *See* discussion *infra* at Part III.C.

II. A PLAIN READING OF THE BONA FIDE ERROR DEFENSE DOES NOT RENDER THE FDCPA'S SAFE HARBOR PROVISION INEFFECTIVE OR SUPERFLUOUS

Petitioner argues that the Sixth Circuit's decision in this case renders the bona fide error defense incompatible and/or superfluous with the safe harbor provision set forth in § 1692k(e). Petitioner broadly characterizes the safe harbor provision as a means for a debt collector to obtain clarification about the FDCPA's meaning and application, where "legal uncertainty puts debt collectors at risk for liability." Pet. Merit Br. 28. Petitioner's suggestion, however, that an advisory opinion is available for all situations involving "legal uncertainty" is overstated. On this point, petitioner acknowledges that the FTC's authority to render advisory opinions is limited to the requirements of the FDCPA.[13] Petitioner further concedes that when a debt collector is faced with uncertainty relative to state or other federal law impacting the FDCPA, the debt collector cannot seek an FTC advisory opinion.

1. Petitioner's broad characterization of the remedy provided by the safe harbor provision further ignores the FTC's internal requirements governing the issuance of advisory opinions. FTC Rules of Practice 1.1, 16 C.F.R. § 1.1(a), provides in relevant part:

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[13] *See* Pet. Merit Br. Part V.

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, *where practicable*, under the following circumstances:
>
> > (1) The matter involves a substantial or novel question of fact or law and *there is no clear Commission or court precedent*; or
> >
> > (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest. (Emphasis added).

The "practicability" of obtaining an advisory opinion from the FTC is highly questionable, especially in situations where a lawyer is engaged to initiate litigation and a delay in obtaining an opinion could impact a statute of limitations or otherwise adversely compromise a client's rights. Obtaining an advisory opinion would be especially troublesome in situations such as foreclosures where time is of the essence and any delay in litigation could result in the value of collateral being substantially impaired.

This "practicability" is also impacted by the FTC's internal rule that there be "no clear Commission or court precedent." Given this requirement, it is understandable that the FTC would be reluctant to issue an advisory opinion when there is existing case

law. *See, e.g., Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 399 (6th Cir. 1998) (observing that the federal courts have uniformly held that an FTC opinion is not binding precedent).[14] Further, courts have rejected FTC opinions that conflict with the plain language of the FDCPA.[15] *See, e.g., Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 654 (3rd Cir. 1993); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994); *Scott v. Jones,* 964 F.2d 314, 317 (4th Cir. 1992).

2. Next, the fact that advisory opinions are not binding on courts may create an irreconcilable conflict of interest between attorneys and their clients where a lawyer seeks the protection of the safe harbor provision despite the existence of court precedent favorable to a client's best interest. In such a situation, a conflict would necessarily arise if the advisory opinion turns out to be inconsistent with existing court precedent, as a lawyer would be placed in the impossible ethical dilemma of deciding whether to assert the favorable court precedent in the best interest of the client, or to act in a manner consistent with the advisory opinion in order to gain personal

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[14] *See also Pressley v. Capital Credit & Collection Serv., Inc.*, 760 F.2d 922, 925 (9th Cir. 1985); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1372, n.2 (11th Cir. 1998); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327, n.8 (7th Cir. 1997).

[15] Further, this Court concluded in *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995), that Congress did not intend to authorize the FTC to construe the FDCPA in a manner that falls outside the range of reasonable interpretations of the express language.

protection from civil liability under the safe harbor provision.[16]

3. Finally, petitioner's characterization of the alleged broad remedy available under the safe harbor provision ignores the undeniable complexity of the meaning and application of the FDCPA.[17] This legislation contains few definitions and is applied without the benefit of governing administrative rules and regulations.[18] As a result, the complexity of the FDCPA has lead to litigation on virtually every aspect of the Act. *See, e.g.,* 104 AM. JUR. 3D 1 PROOF OF FACTS (2009).

Recognizing this vast complexity, petitioner's suggestion that a debt collector err on the side of caution or seek a formal advisory opinion from the FTC every time an ambiguity arises to resolve a "legal uncertainty" is both impractical and cost prohibitive, especially when there is existing case law precedent. This position also contravenes a purpose of the FDCPA by failing to provide protection to ethical debt collectors.

Common sense dictates that the bona fide error and safe harbor defenses are not incompatible and superfluous, but rather can and should be construed

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[16] For further discussion of an attorney's ethical duties *see infra* at Part III.C.2.

[17] *See* U.S. Br. 17, referencing the FDCPA as a "complex statutory scheme."

[18] 15 U.S.C. § 1692*l*(d).

to work hand-in-hand.[19] While debt collectors can seek to insulate themselves from civil liability under the safe harbor provision when there is no existing precedent, the bona fide error defense provides an affirmative defense against civil liability for debt collectors not engaged in abusive debt collection practices. Good faith reliance on existing case law is not an abusive practice.

III. A PLAIN READING OF THE BONA FIDE ERROR DEFENSE TO INCLUDE LEGAL ERRORS IS CONSISTENT WITH THE PURPOSE OF THE FDCPA

A. The Bona Fide Error Defense Is Consistent With The Purpose Of The Statute To Balance The Rights Of Ethical Debt Collectors And Consumers

1. Notwithstanding the remedial purpose of the FDCPA, Congress was also sensitive to the rights of ethical debt collectors. Congress expressly acknowledged that there are two important purposes: (1) to eliminate abusive debt collection practices; while

[19] The Senate Committee on Banking, Housing and Urban Affairs commented: "A debt collector has no liability, however, if he violates the act in any manner, including with regard to the Act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector *also* has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade Commission." S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700. (Emphasis added).

(2) not competitively disadvantaging ethical debt collectors. *See* 15 U.S.C. § 1692(e). The FTC recently acknowledged the necessary role that debt collectors fulfill:

> If consumers do not pay their debts, creditors will become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE iii (2009).[20]

Petitioner argues that the proverbial apple cart will be upset if the bona fide error defense is applied as broadly as it is written. This argument begs the question. Petitioner assumes the premise she is trying to prove – that Congress intended for the goal of consumer protection to outweigh the interest of an ethical debt collector who relied on a legal error. Not only is her reasoning circular, but it ignores that Congress created the bona fide error to protect good faith, mistaken debt collectors. This defeats any argument that enforcing this defense somehow frustrates the purpose of the statute.

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[20] *Available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

If Congress meant what it said – that ethical debt collectors warrant protection – it is petitioner who asks the Court to disrupt the balance struck in § 1692k(c). Petitioner does not even try to characterize respondents' conduct as abusive or harassing. Respondents' conduct was responsible, conservatively based on case law, and unquestionably ethical. In fact, respondents' conduct was consistent with the FTC's recent suggestion that Congress amend the FDCPA to require debt collectors to inform consumers in validation notices that, among other things, "if they send a timely written dispute or request for verification, the debt collector must suspend collection efforts until it has provided the verification in writing." FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 27 (2009).

2. The bona fide error defense does not, as petitioner argues, undermine the statute's deterrent effect, nor will it create "a race to the bottom that will leave the field to collectors with the fewest scruples." Pet. Merit Br. 32. Petitioner's assertion that the Sixth Circuit's decision will embolden debt collector's to act unethically in a "race to the bottom," ignores the serious financial penalties contained in the FDCPA under the civil (both individual and class action) and administrative provisions. As the United States indicates, there are significant administrative penalties available under the statute (up to $16,000 a day) for a violation made with actual knowledge. *See* U.S. Br. 13-14. It is noteworthy that the bona fide

error defense has no application to an administrative violation.

Indeed, petitioner's fear that the floodgates will be opened to unscrupulous debt collectors has not materialized. Since the Sixth Circuit's decision in this case, respondents have found twenty-one cases where federal courts have considered the bona fide error defense as applied to legal errors. Seven courts denied the defense as a matter of law,[21] eleven found issues of fact,[22] and three granted

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[21] *See Edwards v. Niagara Credit Solutions, Inc.*, ___ F.3d ___, 2009 WL 3273300 (11th Cir. 2009); *Herkert v. MRC Receivables Corp.*, ___ F.Supp.2d ___, 2009 WL 2998557 (N.D. Ill. 2009); *Midland Funding LLC v. Brent*, ___ F.Supp.2d ___, 2009 WL 2437243 (N.D. Ohio 2009); *Drossin v. Nat'l Action Fin. Servs., Inc.*, 641 F.Supp.2d 1314 (S.D. Fla. 2009); *Ruth v. Triumph P'ships*, 577 F.3d 790 (7th Cir. 2009) (although the court did not specifically hold that mistakes of law are included in § 1692k(c), it stated that, even if they are, the debt collector nevertheless failed to establish the defense); *Seeger v. AFNI, Inc.*, 548 F.3d 1107 (7th Cir. 2008) (same); *Edwards v. Niagara Credit Solutions, Inc.*, 586 F.Supp.2d 1346 (N.D. Ga. 2008).

[22] *See Elder v. David J. Gold, P.C.*, No. 08CV733A, 2009 WL 2580320 (W.D.N.Y. 2009); *Campbell v. Hall*, 624 F.Supp.2d 991 (N.D. In. 2009); *N. Star Capital Acquisitions, LLC v. Krig*, 611 F.Supp.2d 1324 (M.D. Fla. 2009); *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F.Supp.2d 842 (N.D. Ill. 2009); *Brazier v. Law Offices of Mitchell N. Kay, P.C.*, No. 8:08-cv-156-t-17MAP, 2009 WL 764161 (M.D. Fla. 2009); *Gaisser v. Portfolio Recovery Assocs., LLC*, 593 F.Supp.2d 1297 (S.D. Fla. 2009); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Parkis v. Arrow Fin. Servs., LLS*, No. 07 C 410, 2008

(Continued on following page)

summary judgment for the debt collector.[23]

Further, any perceived "race to the bottom" is not being run by ethical debt collectors. As the Sixth Circuit has recognized, the FDCPA has given rise to a class of professional plaintiffs specializing in suing ethical debt collectors for trivial violations:

> Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, . . . nor to ferret out collection abuse. . . . Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .
>
> It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt

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WL 94798 (N.D. Ill. 2008); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457 (E.D. Pa. 2008); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 WL 2512679 (N.D. Ill. 2008).

[23] *See Castro v. Collecto, Inc.*, ___ F.Supp.2d ___, 2009 WL 3617557 (W.D. Tex. 2009); *Pescatrice v. Orovitz, P.A.*, 539 F.Supp.2d 1375 (S.D. Fla. 2008); *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268 (M.D. Fla. 2008).

> which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and rather than simply pay what he owes – repairs to his lawyer's office to vindicate a perceived "wrong." "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. State of Ind.*, 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949).

See Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cir. 2009) (quoting *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 778-779 (S.D. Ohio 2008) (noting that the plaintiff "fits the description of [the] hypothetical consumer to a tee, and we will not 'countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray.' ") (citation omitted)).

Congress recognized the potential for abuse of the FDCPA in § 1692k(a)(3), which permits a court to award attorney's fees against plaintiffs who bring claims in bad faith. Because the statute generally favors the consumer, it is more susceptible to abuse by consumers than debt collectors.

3. Contrary to petitioner's assertions, a plain reading of the bona fide error defense will not necessarily increase the scope of discovery or render private enforcement cost prohibitive. First, regardless of whether the bona fide error defense includes legal errors, a plaintiff has a right and an incentive to seek

discovery supporting a claim for additional damages – including the "frequency and persistence of the noncompliance, the nature of the noncompliance, and whether the noncompliance was intentional." 15 U.S.C. § 1692k(b). Thus, as a practical matter, the overlapping issues regarding a debt collector's bona fide legal error will not significantly expand the scope of discovery.

Second, similar to other consumer legislation, Congress has provided within the FDCPA that a successful plaintiff may be entitled to an award of attorney's fees. Petitioner's argument then that even the most "stalwart plaintiff and her attorneys" will be deterred is wrong. As the Sixth Circuit noted in *Miller*, the exact opposite has occurred, a cottage industry has arisen for the sole purpose of collecting attorney fees. *See* 561 F.3d at 596.

In short, petitioner has failed to show that the express purpose of the FDCPA will be undermined if the bona fide error defense is found to include legal errors. Petitioner's arguments in this respect are inconsistent with the clear and unambiguous language of the statute. Even if it is assumed that failing to remove legal mistakes from the plain language of the bona fide error defense somehow leads to harsh results, this Court has long recognized an "unwillingness to soften the import of Congress's chosen words even if [it is] believe[d] the words lead to a harsh outcome. . . . It results from 'deference to the supremacy of the Legislature, as well as recognition

that Congressmen typically vote on the language of a bill.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

B. The Legislative History Reinforces The Conclusion That The Bona Fide Error Defense Includes Mistakes Of Law

The legislative history demonstrates that the plain language of the bona fide error defense includes legal errors. The Senate Report provides:

> A debt collector has no liability, however, if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations.

S. Rep. No. 95-382, at 5 (1977) *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 (emphasis added).[24] The chief sponsor of the FDCPA, Senator Riegle, also confirmed that if a debt collector violates the FDCPA "by accident" and "didn't intend for the effect to be as it was," it could avoid liability by invoking the bona fide error defense. Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session*: S. 1130 – Debt Collection Legislation 60 (July 26, 1977); *see*

[24] Petitioner seeks to trivialize the importance of this statement by asserting that it is only a "single sentence in the report of one house of Congress." Pet. Merit Br. 37. Nonetheless, it is part of the legislative history and, to that extent, provides relevant insight into congressional intent.

also Johnson v. Riddle, 305 F.3d 1107, 1123 (10th Cir. 2002) ("We find no indication in the legislative history [of the FDCPA] that Congress intended this broad language to mean anything other than what it says.").

C. *Heintz v. Jenkins* Compels The Conclusion That The Bona Fide Error Defense Includes Legal Errors

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), this Court concluded that the FDCPA applies to lawyers regularly engaged in debt collection litigation. *Id.* at 299. This Court, applying a plain text analysis, held that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Id.* at 294. This Court also reasoned that lawyer liability under the FDCPA does not constitute an "absurd" result because: (1) "the Act says explicitly that a 'debt collector' may not be held liable if he 'shows . . . that the violation was not intentional and resulted from a bona fide error . . . '"; and (2) there is no reason to believe that "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot be taken.'" *Id.* at 295-96. The Sixth Circuit's determination below is consistent with both the plain text analysis and

ultimate conclusion in *Heintz*.[25] Further, the result in both cases makes abundant sense given the potential liability faced by lawyers.

1. If legal errors are removed from the bona fide error defense, lawyers will face potential liability to non-clients for the exercise of their professional judgment.

A lawyer's potential liability under the FDCPA will generally be a consequence of claimed legal error. Thus, petitioner's proposal to restrict the bona fide error defense to exclude legal errors essentially removes the conduct of lawyers from the ambit of the bona fide error defense – providing them with no protection from liability for even the most unintentional and good faith errors in professional judgment. This is tantamount to congressional control of attorney advocacy under the FDCPA, subjecting even the most ethical attorneys to lawsuits by non-clients for exercising professional judgment.

Recently, the Ohio Supreme Court surveyed not only Ohio case law, but similar precedent from numerous states, and concluded that attorneys

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[25] Numerous courts have concluded that, based upon the Court's comments in *Heintz,* the bona fide error defense must apply to legal errors. *See, e.g., Johnson v. Riddle,* 305 F.3d 1107, 1123 (10th Cir. 2002).

should not be preoccupied, or even concerned with potential third party claims. The court reasoned:

> [A]n attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third-party lawsuits.

Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1171 (Ohio 2008).

In the same vein, most states recognize a litigation privilege which generally shields an attorney from a third party claim arising from litigation activities. *See, e.g.*, CAL. CIV. CODE § 47(b); *see also* Joan Teshima, *Attorney's Liability To One Other Than Immediate Client, For Negligence In Connection With Legal Duties*, 61 A.L.R. 4th 618 (1988). Petitioner's attempt to remove the vast majority of attorney errors from the bona fide error defense would necessarily drive a wedge between debt collection lawyers and their clients. Likewise, a restrictive interpretation would subordinate the States' strong interest in regulating the legal profession to the federal courts' interpretation of a consumer protection statute.

2. If the bona fide error defense does not include legal errors, then clients' interests are subordinated to those of their attorneys and third parties.

Petitioner's suggestion that a lawyer must err on the side of caution ignores the fact that the interests of the attorney in avoiding liability cannot be paramount to the best interests of the client. An attorney owes his client an ethical duty of uncompromised and zealous representation. *See Johnson v. Riddle*, 296 F.Supp.2d 1283, 1290 (D. Utah 2003). This duty not only requires "the assertion of the client's best case,"[26] but also mandates that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer." OHIO RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (2010).[27] These principles of loyalty and independent judgment are fundamental to the attorney-client relationship. "Neither [a] lawyer's personal interest . . . nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." *Id.* at 1.7, cmt. 1. The best interests of the client should be paramount to the attorney's interest in avoiding liability.

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[26] *Johnson,* 296 F.Supp.2d at 1291 (quoting Janet Flaccus, *Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense*, 2001 ARK. L. NOTES 95, 97 (2001)).

[27] Ohio's Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct. *See In re Perrin*, 361 B.R. 853, 857 n.3 (6th Cir. BAP 2007).

Petitioner's effort to exclude legal errors from the bona fide error defense creates a Hobson's choice for attorneys that would create an irreconcilable ethical conflict of interest, increase claims of legal malpractice, expose lawyers to third party claims inconsistent with the litigation privilege, and generally induce a second "round" of litigation under the FDCPA by any debtor who successfully defends the underlying case. These undesirable consequences will not be mitigated by any countervailing societal benefit.

IV. THE TRUTH IN LENDING ACT DOES NOT WARRANT SETTING ASIDE THE PLAIN MEANING OF THE FDCPA

A. Petitioner's Analogy To The Bona Fide Error Defense In TILA Is Flawed.

Petitioner argues that § 1692k(c) excludes legal errors because: (1) Congress "borrowed" the language from TILA's then current bona fide error defense when it enacted the FDCPA; and (2) Congress understood the allegedly "settled" interpretation of the pre-1980 TILA defense to exclude legal errors. Petitioner's argument is mistaken for several reasons.

1. A plain language analysis dispenses with the need for comparisons to predecessor statutes.

This Court has made clear that the starting point for determining congressional intent is the statutory text itself. *See Lamie v. U.S. Trustee,* 540 U.S. 526,

534 (2004). The sole function for the Court, if the language of the statute is plain and the disposition required by the text is not absurd, is to enforce the language of the statute according to its terms. *Id.* In *Lamie,* this Court declined to engage in the very method of statutory interpretation advocated by petitioner – a comparison with the language of a predecessor statute. *Id.* at 533. Nonetheless, petitioner's argument demands that this Court delve into the "pitfalls that plague too quick a turn to the more controversial realm of legislative history," as opposed to restricting its review to "the plain meaning since that approach respects the words of Congress." *Id.* at 536. This Court should reject this invitation because the plain language of § 1692k(c) alone determines its meaning.

2. Petitioner has not established Congress's intent to incorporate judicial interpretations of TILA's bona fide error defense into the FDCPA.

Petitioner posits that § 1692k(c) excludes legal errors because Congress adopted existing judicial interpretations of TILA's bona fide error defense. This position wrongly assumes that when Congress utilizes language from an existing statute in a new statute, there is a presumption that Congress intended to adopt existing judicial interpretations of that language. Rather, this Court has recognized several factors that must be considered in determining whether Congress intended to adopt existing

judicial interpretations. These factors include: (1) whether the judicial interpretations are settled; and (2) whether congressional intent has been expressed in the legislative history or stated purpose of the statute.

a. The judicial interpretation of TILA's bona fide error defense was unsettled.

Petitioner mistakenly relies upon this Court's decision in *Rowe v. N.H. Motor Transp. Ass'n*, 128 S.Ct. 989, 994 (2008), which held that: "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." In the instant case, unlike the statutory phrase that was analyzed in *Rowe,* the judicial interpretation of TILA's bona fide error defense was not settled when the FDCPA was enacted.

In *Rowe,* this Court found that Congress deliberately copied the pre-emption provision of the Airline Deregulation Act of 1978 ("ADA of 1978") when drafting the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), "[a]nd it did so fully aware of this Court's interpretation of that language as set forth in *Morales* [*v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992)]." *Id.* at 994; *see also Reina v. United States,* 364 U.S. 507, 510 (1960).

In this case, the language petitioner claims was lifted from the pre-1980 version of TILA and "inserted" into the FDCPA, however, was never reviewed by this

Court. Nor was there a consensus among the lower courts. Of the eleven circuit courts, only the Second and Seventh,[28] had found that § 1640(c) applied to clerical errors prior to the FDCPA's enactment. A district court from the Eleventh Circuit, however, found that § 1640(c) applied to legal errors. *See Welmaker v. W. T. Grant Co.*, 365 F.Supp. 531 (N.D. Ga. 1972). Numerous courts had also commented on the unsettled state of the law. *See, e.g., Lirtzman v. Speigel, Inc.,* 493 F.Supp. 1029, 1034 (N.D. Ill. 1980) (noting "some conflict regarding the type of bona fide error to which the statutory defense . . . is applicable. . . .").[29]

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[28] *See Ives v. W.T. Grant Co.,* 522 F.2d 749 (2nd Cir. 1975); *Haynes v. Logan Furniture Mart, Inc*., 503 F.2d 1161 (7th Cir. 1974). Only after the FDCPA was enacted did the Fifth and Tenth Circuits find that § 1640(c) was restricted to clerical errors. *See McGowan v. King, Inc.,* 569 F.2d 845 (5th Cir. 1978); *Herrera v. First N. Sav. & Loan Ass'n,* 805 F.2d 896 (10th Cir. 1986). Petitioner claims the Fifth and Ninth Circuits had decided the issue prior to the FDCPA's enactment, citing *Palmer v. Wilson,* 502 F.2d 860 (9th Cir. 1974) and *Turner v. Firestone Tire & Rubber Co.,* 537 F.2d 1296 (5th Cir. 1976). Pet. Merit Br. 22. These cases, however, do not stand for this proposition. In *Palmer*, the court simply cites *Ratner v. Chem. Bank New York Trust Co.,* 329 F.Supp. 270 (S.D.N.Y. 1971) for the proposition that § 1640(c) applies to clerical errors only. *Palmer,* 502 F.2d at 861. There is no analysis as to whether the creditor relied upon the advice of counsel or whether the omitted credit terms were based on a legal error. *Id.* Similarly, the *Turner* case is devoid of any reference to a legal error. *Turner* was merely cited by subsequent courts for the proposition that § 1640(c) is "the so-called clerical error defense." *Turner,* 537 F.2d at 1298.

[29] *See also Forbes Credit Union v. Mewhinney,* 638 P.2d 383, 388 (Kan. Ct. App. 1982); *Hinkle v. Rock Springs Nat'l Bank,*

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Further, even those courts limiting § 1640(c) to clerical mistakes recognized the unsettled nature of the issue. *See Ives,* 522 F.2d at 757 (noting "[t]he 'unintentional violation' provision has been the subject of substantial litigation and two different analyses have emerged."); *see also Herrera,* 805 F.2d at 900 (finding that Congress resolved the unsettled status of the law when it amended § 1640(c) in 1980 to specifically exclude errors of legal judgment as to the requirements of the Act.). Thus, unlike the statutory provision analyzed in *Rowe*, the case law interpreting § 1640(c) was unsettled when the FDCPA was enacted in 1977.

b. Congress did not express an intent in the FDCPA's legislative history to adopt any particular judicial interpretation of TILA's bona fide error defense.

In *Rowe*, this Court concluded, based on legislative history, that when Congress "borrowed language" from the pre-emption provision in the ADA, Congress expressly referenced this Court's prior interpretation in *Morales. See Rowe,* 128 S.Ct. at 994-95 (citing H.R. Conf. Rep., at 83-85, U.S. Code Cong. & Admin. News 1994, pp. 1676, 1755; *see also Lorillard v. Pons,* 434 U.S. 575, 582 (1978) (citing 113 Cong.Rec. 31254 (1967)).

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538 F.2d 295, 297 (10th Cir. 1976); *Hernandez v. O'Neal Motors, Inc.,* 480 F.Supp. 491, 497 (D.N.M. 1979).

Plainly, when Congress intends to adopt judicial interpretations it knows how to express that intent. In *Bragdon v. Abbott,* 524 U.S. 624 (1998), the Court observed that Congress defined "disability" in the Americans with Disabilities Act of 1990 ("ADA of 1990") by using the same language contained in the Rehabilitation Act, and stated that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act. . . ." *Id.* at 631-32. The *Bragdon* Court also found Congress adopted the judicial interpretation of "disability" in the legislative history of the ADA of 1990. *Id.* at 645 (citing H.R.Rep. No. 101-485, pt. 2, p. 52 (1990)).

When enacting the FDCPA, Congress did not indicate in the legislative history that the bona fide error defense should be construed consistent with the Second and Seventh Circuits' interpretations of TILA. In fact, the legislative histories of TILA and the FDCPA are significantly different. The legislative history of TILA reflects Congress's inclusion of the bona fide error defense in response to complaints from creditors that clerical errors would be inevitable due to the complexity of mathematical computations. *See e.g.*, *Ratner v. Chem. Bank New York Trust Co.,* 329 F.Supp. 270 (S.D.N.Y. 1971) (citing Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 64 ff., 226, 374, 426-427, 529, 584, 698 (1967)).

Conversely, the legislative history of the FDCPA shows that Congress granted more expansive protection, stating that "[a] debt collector has no liability

. . . if he violates the act *in any manner, including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." *See Johnson,* 305 F.3d at 1123 (citing S. Rep. No. 95-382 at p. 5) ("We find no indication in the legislative history [of the FDCPA] that Congress intended this broad language to mean anything other than what it says."). The fact that Congress chose not to amend the FDCPA to exclude legal errors – despite having amended the statute several times – defeats any attempt to draw parallels between the defenses now.

Contrary to petitioner's assertion, if Congress had intended to restrict the FDCPA's bona fide error defense to clerical errors it could have done so in 1977 by: (1) incorporating § 1640(c) as it did in the Consumer Leasing Act of 1976; or (2) expressing its intent to adopt § 1640(c) as it did in the Expedited Funds Availability Act of 1987 ("EFAA").[30] The legislative history of the FDCPA does not evidence a congressional intent to adopt TILA's bona fide error defense or the judicial interpretations of the Second and Seventh Circuit Courts.

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[30] Congress expressly adopted the language of § 1640(c) in the EFAA. *See* S. Rep. No. 100-19, at 6 (1987), *reprinted in* 1987 U.S.C.C.A.N. 489, 560 ("The penalties and exceptions to them are drawn from the Truth in Lending Act.").

c. The express purpose of the FDCPA demonstrates that Congress did not adopt TILA's bona fide error defense.

This Court has been keenly aware that congressional adoption of judicial interpretation is only appropriate when analyzing statutes with the same or similar objectives. *Rowe,* 128 S.Ct. at 995-996. In *Rowe*, the Court found that the similarities in the legislative purposes of the FAAAA and ADA of 1978 could not have been more apparent, as both preemption provisions were intended to promote reliance on competitive market forces. *Id*.

In stark contrast, the purposes of TILA and the FDCPA are fundamentally different. The express purpose of TILA is exclusively to protect consumers through "a meaningful disclosure of credit terms." *See* 15 U.S.C. § 1601. The FDCPA, on the other hand, was drafted to balance the purposes of: (1) eliminating abusive debt collecting practices; while (2) not competitively disadvantaging nonabusive debt collectors. *See* 15 U.S.C. § 1692(e). These differing legislative purposes between the FDCPA and TILA support the inclusion of legal errors within the FDCPA's bona fide error defense.

d. TILA provides creditors with several avenues to avoid liability for legal errors.

Even though TILA did not address concerns of "competitively disadvantaging" creditors, Congress

provided creditors with several methods to avoid liability for violations. First, under TILA, a consumer must prove both that a mistake was material and that it was detrimentally relied upon to recover damages. *See Turner v. Beneficial Corp.,* 242 F.3d 1023, 1027-28 (11th Cir. 2001). Second, with certain limitations, creditors are given sixty days to correct errors. *See* 15 U.S.C. § 1640(b). Third, the Federal Reserve Board is required to issue model forms which, if relied upon by a creditor, provide a defense to liability. *See* 15 U.S.C. § 1604(b). Fourth, TILA provides an advisory opinion procedure. *See* 15 U.S.C. § 1640(f).

Thus, unlike TILA, if legal mistakes are removed from the plain language of the FDCPA's bona fide error defense, ethical debt collectors will be left with only the safe harbor defense which, as already demonstrated, is often impracticable or unavailable. As such, to give effect to the FDCPA's express purposes of balancing the interests of both consumers and ethical debt collectors, legal errors cannot be removed from the plain language of the bona fide error defense.

B. The 1980 TILA Amendments Do Not Support A Restrictive Interpretation Of The FDCPA's Bona Fide Error Defense.

Congress amended TILA to provide that legal errors concerning the Act's coverage were not protected. The FDCPA was not so amended despite Congress having the opportunity to do so on

numerous occasions. Petitioner's assertion that the 1980 amendments to TILA demonstrate a congressional intent to exclude legal errors from the FDCPA's bona fide error defense presumes that "[i]n all likelihood, the issue *never occurred* to Congress. . . ." Pet. Merit Br. 43-44 (emphasis added). Congress's failure to amend § 1692k(c) since 1980, however, leads to the opposite conclusion.

In 1986, Congress amended the FDCPA to repeal the exemption for attorneys. *See* Pub. L. No. 99-361 (1986). In 1995, this Court highlighted the "clerical versus legal error" debate in *Heintz,* when it held that lawyers are liable under the FDCPA as debt collectors. *See Heintz,* 514 U.S. at 299. Since *Heintz,* the vast majority of circuit and district courts have determined that § 1692k(c) is not limited to clerical errors.[31] Nevertheless, Congress has remained silent on this issue.[32]

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[31] *See, e.g., Jenkins,* 124 F.3d at 832; *Johnson,* 305 F.3d at 1122-24; *Neilsen,* 307 F.3d 623; *Rosado v. Taylor,* 324 F.Supp.2d 917, 931-33 (N.D. Ind. 2004); *Edwards v. Niagara Credit Solutions, Inc.,* ___ F.3d ___, 2009 WL 3273300 (11th Cir. 2009).

[32] In all, Congress has amended the FDCPA on eight occasions since its enactment in 1977. *See* Pub. L. No. 98-442 (1984); Pub. L. No. 99-361 (1986); Pub. L. No. 101-73 (1989); Pub. L. No. 102-242 (1991); Pub. L. No. 102-550 (1992); Pub. L. No. 104-88 (1995); Pub. L. No. 104-208 (1996); Pub. L. No. 109-351 (2006). Congress specifically addressed lawyers and litigation in 2006 when it clarified that a legal pleading is not an "initial communication." There is also a proposed amendment to the FDCPA for 2009 which makes no provision for amending the

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It is well recognized that the silence of Congress, when it has authority to speak, gives rise to an inference as to legislative purpose. For example, this Court has held that the failure of Congress to express disapproval of a judicial interpretation by amendment bolsters the construction of the statute. *See Elec. Storage Battery Co. v. Shimadzu,* 307 U.S. 5, 14 (1939).[33] Additionally, it is recognized that when Congress has had abundant opportunity to give further expression of its will, the failure to do so amounts to legislative approval and ratification of the construction given the statutes by the courts. *See Missouri v. Ross,* 299 U.S. 72, 75 (1936); *see also Francis v. Southern Pac. Co.,* 333 U.S. 445, 450 (1948). These principles of statutory construction are especially applicable where, as in this case, the statute has undergone amendments. *See e.g., Kukman v. Baum,* 346 F.Supp. 55, 64 (N.D. Ill. 1972).

Thus, petitioner's assertion that Congress forgot to amend the FDCPA is unpersuasive. The fact that Congress did not amend the bona fide error defense in the FDCPA to exclude legal mistakes on eight

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language of § 1692k(c). *See* H.R. 3126, 111th Cong., 1st Sess. (2009).

[33] *See also Reynolds v. Comm'r of Internal Revenue,* 114 F.2d 804, 811 (4th Cir. 1940) ("when a statute has been amended from time to time and language which has been construed by the courts is retained, it must be assumed that Congress is satisfied with and has adopted the construction given by the courts."); *Wolfe v. E.F. Hutton & Co., Inc.,* 800 F.2d 1032, 1038 (11th Cir. 1986).

occasions since the 1980 TILA amendments signifies its ratification and approval of the construction placed upon § 1692k(c) by a growing majority of courts.

C. The Ninth Circuit's Decision In *Baker* Is Based On A Flawed Analysis[34]

Only two circuits have held that the FDCPA's bona fide error defense does not apply to legal errors. *See Baker v. G. C. Servs. Corp*., 677 F.2d 775 (9th Cir. 1982); *Hulshizer v. Global Credit Servs., Inc.,* 728 F.2d 1037 (8th Cir. 1984). Both based their decisions on a flawed analogy between TILA and the FDCPA. In *Baker*, the Ninth Circuit erroneously relied on *Ratner v. Chem. Bank New York Trust Co.*, 329 F.Supp. 270, 281 (S.D.N.Y. 1971).

The *Ratner* court was asked to review whether a creditor's failure to disclose a mandated nominal annual percentage rate could be excused based on a mistake of law. *Ratner,* 329 F.Supp. at 272. In determining that TILA's bona fide error defense did not apply to legal mistakes, *Ratner* examined the "sparse" legislative history. *Id.* at 282. As discussed above, the legislative history reflected a concern with a lender's potential liability for purely mathematical and clerical errors. *Id.*

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[34] Although petitioner does not cite *Baker* in her Merit Brief, she principally relied upon *Baker* in her Petition for a Writ of Certiorari.

Baker also relied on the Seventh Circuit's decision in *Haynes* that limited TILA's bona fide error defense to clerical errors. *See Haynes v. Logan Furniture Mart, Inc*., 503 F.2d 1161 (7th Cir. 1974). Significantly, since *Haynes*, the Seventh Circuit has declined to extend this holding to the FDCPA's bona fide error defense. *See Jenkins*, 124 F.3d 824; *Nielsen*, 307 F.3d 623, 641 (noting that "nothing in the language of the FDCPA bona fide error provision limits the reach of the defense to clerical errors and other mistakes not involving the exercise of legal judgment."); *Seeger v. AFNI*, 548 F.3d 1107, 1114 (7th Cir. 2008); *Ruth v. Triumph P'ships*, 577 F.3d 790 (7th Cir. 2009).

Baker's unwarranted reliance on cases interpreting TILA is no match for the plain meaning of the FDCPA. Further, the 1980 TILA amendments do not support finding a congressional intent to exclude legal error from the FDCPA defense. Rather, the TILA amendments demonstrate that Congress knows how to express an intent to exclude legal errors from a bona fide error defense, and has chosen not to do so with the FDCPA.

V. THE BONA FIDE ERROR DEFENSE APPLIES TO ALL LEGAL ERRORS.

In her final argument, petitioner contends that the bona fide error defense excludes all legal errors, including mistakes relating to construction of other state and federal laws impacting the FDCPA. Petitioner concedes, however, that there are fundamental

inconsistencies with her arguments. Pet. Merit Br. 47-48.

First, petitioner admits that because the FTC has no authority to render advisory opinions interpreting other state and federal laws, the FDCPA's safe harbor and bona fide error defenses are not superfluous. Second, petitioner concedes "to the extent that the Court looks to the amended version of TILA to construe the meaning of the FDCPA, that statute provides only that its bona fide error defense does not include errors regarding a 'person's' obligations under this subchapter." Pet. Merit Br. 48 (quoting 15 U.S.C. § 1640(c)). Given these concessions petitioner's reliance on TILA becomes even more tenuous.

Petitioner's remaining argument for excluding legal errors from the FDCPA defense in connection with other state and federal laws is, yet again, that "ignorance of the law is no defense." As previously established, however, this criminal law maxim has no bearing on the FDCPA's bona fide error defense because ignorance can never be a basis for asserting the defense.

Petitioner also overlooks problems caused by excluding legal errors from the bona fide error defense in the context of construing other state and federal laws, as highlighted in *Watkins v. Peterson Enterp., Inc.*, 57 F.Supp.2d 1102 (E.D. Wash. 1999); *see also Frye v. Bowman, Heintz, Boscia, & Vician, P.C.,* 193 F.Supp.2d 1070 (S.D. Ind. 2002). In *Watkins,* the plaintiff alleged that the defendant violated the

FDCPA by using pay orders instead of obtaining judgments. *Watkins*, 193 F.Supp.2d at 1106. A pay order is an order from a state judge directing a debtor's employer to pay a sum of money to the court. *Id*. at 1105. In response, the defendant, in asserting the bona fide error defense, presented evidence that it only used the pay orders because it was required to do so by the State courts. *Id*. at 1107.

Watkins recognized that the debt collector was placed between the proverbial rock and hard place in trying to determine the proper course of action. The debt collector had one of two choices: (1) to either comply with state law by relying on an "official interpretation" of a State statute and violate the FDCPA; or (2) to violate State law in order to comply with the FDCPA. Given this quandary, *Watkins* correctly determined that the plain language of the FDCPA defense necessarily includes legal errors. *Id*.; *see also Frye,* 193 F.Supp.2d at 1085-90.

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CONCLUSION

The text, structure, purpose and history of the FDCPA all dictate that the statute's bona fide error defense includes legal errors. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GEORGE S. COAKLEY
Counsel of Record
CLIFFORD C. MASCH
BRIAN D. SULLIVAN
MARTIN T. GALVIN
JAMES O'CONNOR
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115
(216) 687-1311

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