

No. 08-1200

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In The  
**Supreme Court of the United States**

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KAREN L. JERMAN,  
*Petitioner,*

v.

CARLISLE, MCNELLIE, RINI, KRAMER  
& ULRICH, LPA AND ADRIENNE FOSTER,  
*Respondents.*

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*On Writ of Certiorari to the United States  
Court of Appeals for the Sixth Circuit*

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**BRIEF OF USFN - AMERICA'S MORTGAGE  
BANKING ATTORNEYS AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENTS**

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November 30, 2009

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**INTEREST OF AMICUS CURIAE**

USFN – America’s Mortgage Banking Attorneys (“USFN”) is a national, not-for-profit association of law firms and trustee companies that specialize in real estate finance matters. Founded in 1988, the USFN consists of organizations that represent the nation’s largest mortgage, and mortgage servicing, companies in matters related to foreclosure, bankruptcy, loan modifications, inventoried properties, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental reform, and through the encouragement of industry standard procedures, technologies, and best practices.

Among the services and products offered to the industry by USFN are industry-focused education seminars, state-by-state desk guides and matrices that address specific industry topics and issues, the National Mortgage Servicer’s Reference Directory, which is a one-of-a-kind compendium of industry information, training DVDs, and in-house staff training programs for mortgage companies.<sup>1</sup>

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended

## **SUMMARY OF THE ARGUMENT**

The purpose of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”), is to eliminate abusive debt collection practices – not to punish good faith harmless errors. 15 U.S.C. § 1692(e). In furtherance of that purpose, Congress provided a broad bona fide error defense to the FDCPA. 15 U.S.C. § 1692k(c).

In this case, Petitioner seeks, on her own behalf and on behalf of her putative class, to hold Respondents liable under the FDCPA for an honest, unintentional, technical legal error that caused her no harm. Petitioner is a borrower who is suing her lender’s lawyers, not for the foreclosure they filed against her, which was promptly dismissed when Respondents confirmed that Petitioner had paid the loan off, but because Respondents included with their foreclosure complaint a technically defective FDCPA notice. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 471-472 (6th Cir. 2008). Although Respondents had crafted their notice in keeping with court decisions in their circuit, the courts below held that (1) the notice violated the FDCPA; but (2) as a result of Respondents’ reliance on the case law, their violation was an unintentional, bona fide, error committed notwithstanding procedures reasonably adapted to avoid violating the Act. *Id.* at 472, 478. The

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to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. Letters reflecting blanket consent of the parties have been filed with the Clerk, and counsel for the parties have received timely notice of the USFN’s intent to file a brief amicus curiae.

district court granted the Respondents' motion for summary judgment, and the Sixth Circuit affirmed. *Id.* Petitioner now claims that the FDCPA's bona fide error defense should not apply to good faith errors of law. Excluding good faith legal errors, however, would create an absurd result for debt collector attorneys not contemplated by this Court; would make debt collector attorneys insurers of their clients' claims to the opposing party; would cause a chilling effect on advocacy; and would disadvantage ethical debt collectors.<sup>2</sup> Such a result is contrary to the intent of Congress and against public policy.<sup>3</sup>

The Supreme Court has acknowledged, in *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995), that the bona fide error defense is a necessary protection for debt collector lawyers engaged in litigation. *Id.* at 295. Without the defense for legal errors, debt collector attorneys could be subject to FDCPA liability for representing clients in unsuccessful cases. *Id.* This would create an absurd result. The Supreme Court's

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<sup>2</sup> The notion that the bona fide error defense of the FDCPA applies to legal errors should not be confused with Petitioner's inapposite proposition that the defense should not be available in situations involving "ignorance of the law." Respondents do not seek protection for ignorance of the law. "Ignorance" is the "condition of being uneducated." THE AMERICAN HERITAGE DICTIONARY 873 (4th Ed. 2000). A "bona fide" "error" is a "good faith" or "sincere" "mistake" or "unintentional violation." *Id.*, at 208, 606. The terms are not synonymous. A person may make a good faith mistake but still be educated regarding the status of the law.

<sup>3</sup> Petitioner's position also defies the plain meaning of the FDCPA's bona fide error defense; however, that issue is discussed at length in Respondents' Brief. Resp. Br. 11-30.

analysis is supported by the canons of ethics and civil rules, which provide the bar for ethical advocacy.

The bona fide error defense is a critical balance within the FDPCA to protect ethical debt collectors when the Act provides insufficient guidance. The Act includes only basic statutory guidance, without a viable FTC safe harbor or explanatory regulations. Since 1977 when the FDCPA was enacted, there have been changes in technology that the Act does not specifically address. As a result, debt collectors often have little guidance. If the Court were to narrow the good faith error defense, the number of law suits filed for technical violations would multiply, expanding the cottage industry of professional plaintiffs who sue under the FDCPA.

## **ARGUMENT**

### **I. AN INTERPRETATION OF THE FDCPA BONA FIDE ERROR DEFENSE THAT EXCLUDES GOOD FAITH ERRORS OF LAW CREATES AN ABSURD AND UNJUST RESULT THAT CONGRESS COULD NOT HAVE INTENDED.**

The express purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using 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). Thus, the FDCPA seeks to punish bad actors while, at the same time, ensuring that debt collectors who do not employ abusive tactics will not be disadvantaged as a result. These express purposes underlying the Act must

inform the interpretation of the bona fide error defense set forth in section 1692k(c). *See, Norfolk Redev. and Housing Authority v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) (“As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.” (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979))); *see also, Beecham v. United States*, 511 U.S. 368, 372 (1994) (“[w]e seek to discern [] the plain meaning of the whole statute, not of isolated sentences.”).

The FDCPA’s bona fide error defense provides:

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

15 U.S.C. § 1692k(c). Petitioner’s proposed interpretation of section 1692k(c), that good faith legal errors are excluded from the bona fide error defense, leads to both absurd and unjust results. Well-settled canons of statutory construction caution against statutory interpretations that “would produce absurd and unjust result[s] which Congress could not have intended.” *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

**A. This Court has already acknowledged, in *Heintz v. Jenkins*, that the bona fide error defense is a necessary protection for litigating attorneys to avoid reaching an absurd result.**

The Court recognized the absurd result that would occur if the bona fide error defense does not apply to mistakes by litigating attorneys. *Heintz v. Jenkins*, 514 U.S. at 295. In *Heintz*, the Court discussed the interplay between the good faith error defense and attorney liability as follows:

The [Sixth Circuit] reasoned that, were the Act to apply to litigating activities, this provision automatically would make liable any litigation lawyer who brought, and then lost, a claim against a debtor. But, the Act says explicitly that a “debt collector” may not be held liable if he “shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” § 1692k(c). *Thus, even if we were to assume that the suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers.*

*Id.* at 295 (emphasis added). The Court, relying heavily on the protection the bona fide error defense would afford to losing debt collector attorneys, declined to carve out a “litigation exception” for them. *Id.* The Court’s reasoning, as stated in *Heintz*, is clear: including litigating lawyers as debt collectors under

the FDCPA would be absurd but for the protection of the bona fide error defense.

Petitioner attempts to circumvent the Court's analysis in *Heintz* by insisting that "respondents' collection lawsuit against petitioner failed (or would have failed if they had not dismissed it) not because they misunderstood the law but because they mistakenly believed petitioner was in arrears on her mortgage when, in fact, she had paid it off." Pet. Br. 38. This startling retreat from the basis for her own complaint, which alleges a legal violation of the FDCPA, not a factual error, suggests that Petitioner cannot reconcile her claims here with the Court's rationale in *Heintz*. The bona fide error defense must apply to good faith legal errors to avoid the absurd result that "any litigation lawyer who brought, and then lost, a claim against a debtor" would be automatically liable to that debtor. *Heintz*, 514 U.S. at 295.

**B. Eliminating protection for bona fide legal errors would make litigating attorneys insurers of their clients' claims.**

Petitioner's interpretation of the bona fide error defense would elevate the standard of care that debt collector attorneys owe to adverse parties far above that owed to their own clients.<sup>4</sup> In the context of a legal malpractice action, the duty of care an attorney owes to her client is measured by negligence

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<sup>4</sup>This argument also applies to non-attorney debt collectors to the extent that they have a duty to the creditors they represent to maximize recovery of the amount owed.

standards. 7 AM. JUR. 2D *Attorneys at Law* § 201 (2008). When an attorney makes a legal argument that is rejected by a court, that attorney ordinarily will not face liability exposure to a client for legal malpractice. Under Petitioner's view, debt collector attorneys become absolute insurers of their clients' claims to collect debts, even in situations where those claims involve good faith legal arguments.

For example, if a debt collector attorney includes in a client's debt a fee or charge that the attorney believes in good faith may be recovered from a debtor under a contract, and ultimately a court finds that the fee or charge is prohibited, then the debtor has a cause of action under the FDCPA – not against the creditor – but against the creditor's attorney! Moreover, under Petitioner's reading of the bona fide error defense, the debt collector attorney would have no defense to the FDCPA claim for the good faith error. As a result, the attorney could be liable under the FDCPA to the debtor for the debtor's attorney fees, costs, actual damages, and statutory damages related to the charge. The creditor's attorney would be acting as an insurer to the debtor for the claims made by his client.

Over 125 years ago, this Court recognized the absurdity of holding attorneys to a standard of perfection with respect to their own clients, let alone adverse parties:

Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country; and as such, when they undertake to

conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition; but *attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard.*

*National Savings Bank v. Ward*, 100 U.S. 195, 199 (1880) (emphasis added). Petitioner’s proposed interpretation of the bona fide error defense would hold debt collector attorneys to an impossible ideal far above that owed to their own clients – *i.e.*, legal perfection. Petitioner’s interpretation must be rejected as absurd. *Clinton*, 524 U.S. at 429.

Petitioner argues that ethical attorneys simply should exclude questionable fees and costs from collection communications to “forgo[] practices of questionable lawfulness[,]” (Pet. Br. 35), but Petitioner overlooks that federal and state law can be unclear on what charges are collectible. For example, for many years there was a good faith dispute in Ohio regarding whether the lender’s foreclosure legal fees and costs could be included in a quote of the amount necessary to cure the borrower’s default, or whether this practice violated Ohio public policy. *E.g.*, *Washington Mutual Bank v. Mahaffey*, 796 N.E.2d 39, 45 (Ohio Ct. App. 2003) (“We see nothing against public policy in imposing the requirement of the payment of attorney fees expended in foreclosure proceedings as a condition

of reinstatement of a mortgage loan.”); *but cf.*, *Dollar Bank, FSB v. Petroff (In re Petroff)*, 47 Collier Bankr. Cas. 2d (MB) 665, No. 00-8085, 2001 Bankr. LEXIS 1594, at \*12 (B.A.P. 6th Cir. July 25, 2001) (“Ohio law and public policy prohibit a lender from collecting attorney fees incident to foreclosure in ordinary mortgage transactions such as this one.”) The Ohio Supreme Court finally resolved this issue in *Wilborn v. Bank One Corp.*, 906 N.E.2d 396, syllabus (Ohio 2009) (attorney fees and costs may be included in reinstatement quotes). A contrary ruling, however, would have provided the plaintiff’s bar with broad and indefensible class actions against the lenders’ counsel, who, in good faith, followed the holding and reasoning of *Mahaffey*.

Petitioner’s proposal not only discourages the good faith advocacy that led to the *Wilborn* decision, but also would have the effect of disadvantaging ethical debt collectors. Under Petitioner’s reading of the statute, ethical debt collectors would risk personal exposure for advocating the lawful but controversial claims of their clients. As a result, attorneys with less scruples or less net worth achieve the advantage.

Requiring debt collector attorneys to act as insurers of the legal validity of their clients’ claims would result in an injustice to the public and the legal profession by discouraging good faith advocacy. Courts across the country have noted that making attorneys liable to opposing parties discourages ethical advocacy of clients. *E.g.*, *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171 (Ohio 2008) (“an 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 interest against the possibility of third-party lawsuits."); *Clark v. Druckman*, 624 S.E.2d 864, 868-69 (W. Va. 2005) (an attorney does not owe a duty of care to an opposing party such that the adversary may sue the attorney for negligence); *Shealy v. Lunsford*, 355 F. Supp.2d 820, 829 (M.D.N.C. 2005) (quoting *Petrou v. Hale*, 260 S.E.2d 130, 135 (N.C. Ct. App. 1979)) ("if mere negligence in protecting the rights of an adverse party becomes the standard of liability, attorneys will be fearful of instituting lawsuits on behalf of their clients. The end result would be limitation of free access to the courts."); *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984) ("Where an attorney represents a client in litigation the public interest demands that attorneys in the proper exercise of their functions as such, not be liable to adverse parties for acts performed in good faith and for the honest purpose of protecting the interests of their clients."); *Guthrie v. Buckley*, 79 Fed. Appx. 637, 638 (5th Cir. 2003) (quoting *Bradt v. West*, 892 S.W.2d 56, 73 (Tex. Ct. App. 1994)) (allowing claims by a party against an opposing counsel "would 'favor *tentative* representation, not the *zealous* representation that our profession rightly regards as an ideal and that the public has a right to expect."").

Authorities throughout the country agree that lawyers must be answerable only to their clients' needs without having to balance their own exposure. Petitioner proposes to make these lawyers strictly liable to the opposing party, which is an absurd result to be avoided in statutory construction. This Court has already observed the absurdity of this result. *Heintz*, 514 U.S. at 295.

**C. Eliminating protection for bona fide legal errors would create disharmony with the civil rules and canons of ethics.**

The civil rules already provide the bar for ethical advocacy. *E.g.*, FED. R. CIV. P. 11. An interpretation of the bona fide error defense to include good faith legal errors harmonizes section 1692k(c) with Rule 11. *See, e.g., Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435 (1974) (this Court “can and should” interpret federal removal statute “in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with ... Rule 65(b).”).

Federal Rule 11(b)(2) permits attorneys to pursue claims that “are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]” In permitting such claims, the rule recognizes the public policy interest in zealous advocacy and balances this interest with the objective of limiting frivolous lawsuits. After all, “the rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” *Benedict v. Allen*, No. 00-1923 (CKK), 2001 U.S. Dist. LEXIS 26292, at \*13-14 (D.D.C. Aug. 7, 2001) (quoting FED. R. CIV. P. 11, Advisory Comm. Notes on 1983 Amend.). However, in the absence of a bona fide error defense that applies to mistakes of law, debt collector attorneys could no longer pursue claims that seek a good faith “extension, modification, or reversal of existing law” without significant risk of FDCPA liability. Petitioner’s request that this Court hold debt collector attorneys to a stricter standard than that set forth in Rule 11

abrogates Rule 11(b)(2), which is designed to promote healthy – and good faith – advocacy.

Petitioner and her amici further argue that if the bona fide error defense applies to errors of law, then it will create a “race to the bottom.” Pet. Br. 32; Amicus Brief of Public Citizen, Inc., AARP, NACA, NCLC and US PIRG, p. 18. Petitioner and amici overlook, however, that “the bottom” is still governed by the civil rules, the canons of ethics, and the FDCPA’s requirements that the legal error be bona fide, unintentional, and have occurred “notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c). Thus, the “race to the bottom” argument is both absurd and melodramatic.

An interpretation of the FDCPA’s bona fide error defense that excludes good faith errors of law creates an absurd and unjust result for creditors’ lawyers that Congress could not have intended. For this reason alone, this Court should affirm the decision of the Sixth Circuit Court of Appeals.

**II. APPLICATION OF THE BONA FIDE ERROR DEFENSE TO GOOD FAITH LEGAL ERRORS IS A NECESSARY BALANCE WITHIN THE FDCPA, BECAUSE THE ACT CONTAINS ONLY BASIC STATUTORY GUIDANCE WITHOUT A VIABLE SAFE HARBOR OR EXPLANATORY REGULATIONS.**

The FDPCA has been termed “static legislation” because the Act curbed existing debt collection abuses when enacted in 1977, but does not evolve with changes in technology and the debt collection industry. Lauren Goldberg, *Note, Dealing in Debt: the High-*

*Stakes World of Debt Collection after FDCPA*, 79 S. CAL. L. REV. 711, 718 (2006). The Act itself prohibits the FTC, or any other governmental agency, from promulgating regulations that would explain how the three-decade-old Act should be applied today. 15 U.S.C. § 1692l(d).

The FTC has acknowledged that “the passage of time and changes in technology and markets have created problems and uncertainties in the debt collection legal system for creditors, debt collectors, consumers, and others.” FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE viii (Feb. 2009). Courts agree that the Act provides insufficient guidance. Some courts have taken the unusual step of drafting safe harbor language to provide instruction going forward. *See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 876 (7th Cir. 2000) (Judge Posner crafted safe harbor language that, if used by a debt collector in a dunning letter, would be sufficient to “discharge[] his duty to state clearly the amount due” under the FDCPA as a matter of law.).

One example of the Act’s failure to adapt to the changing times involves telephone answering machines, which were not in widespread use when the FDCPA was enacted. Shera Erskine, *Note and Comment, Please Leave a Message After the Tone: How Florida Lawyers Should Approach the “Mini-Miranda” Warning Requirement of the Fair Debt Collection Practices Act*, 32 NOVA L. REV. 245, 246 (2007). Section 1692d(6) requires a debt collector, upon “placement of telephone calls,” to make “meaningful disclosure of the caller’s identity,” while section 1692c(b) prohibits a debt collector from communicating with third parties

concerning a consumer's debt. Because a message left by a debt collector on a consumer's answering machine may be heard by third parties, "debt collectors who use automated messages do so at the peril of violating the FDCPA, either by not leaving enough information for the debtor in violation of sections 1692d(6) and 1692e(11), or by leaving too much information for a possible third party in violation of section 1692c(b)." *Berg v. Merchants Ass'n Collection Div.*, 586 F. Supp.2d 1336, 1343 (S.D. Fla. 2008).

Even if a debt collector simply hangs up when greeted by an answering machine, it has arguably violated the Act because a call was "placed" without "meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d(6). Caller identification devices that may disclose some information about the caller add further complications to telephone communications that could not have been contemplated by Congress at the time the Act was drafted. *See, e.g., Saltzman v. I.C. System, Inc.*, No. 09-10096, 2009 U.S. Dist. LEXIS 90681, at \*24-25 (E.D. Mich. Sept. 30, 2009) (Not only did the debt collector provide identification during a call, but debtor recognized the debt collector's phone number on caller-ID; as a result, there was no FDCPA violation). Although the Act clearly contemplates telephonic communication, the Act has not kept pace with changes in technology.

Against this backdrop, the American Collectors Association requested an advisory opinion from the FTC "on the answering machine message issue" in 2005. John H. Bedard, Jr., *Update on FDCPA Compliance and Litigation*, 61 CONSUMER FIN. L.Q. REP. 25 (2007). The FTC rejected the request, citing decisions of district courts addressing the issue, such

as decisions in California, Florida, New York, and Virginia. *Id.* The FTC's inability to provide uniform national guidance on this issue has left consumers "and debt collectors alike confused about the ability to leave a message in an attempt to collect a debt." Erskine, 32 NOVA L. REV. at 250.

Petitioner argues that debt collectors should rely exclusively on advisory opinions of the FTC as insulation from civil liability for an alleged violation of the Act. Pet. Br. 34. However, two criteria must be satisfied before the FTC will render such an opinion. First, the matter upon which an opinion is sought must "involve[] a substantial or novel question of fact or law and there is no clear Commission or court precedent[.]" 16 C.F.R. § 1.1(a)(1). Second, "[t]he subject matter of the request and consequent publication of Commission advice [must be] of significant public interest." § 1.1(a)(2).

Because the existence of court precedent forecloses the issuance of advisory opinions, this option is not a viable one for a debt collector seeking guidance on an issue that has been already been addressed by a court, as demonstrated by the FTC's decision not to issue an advisory opinion concerning the answering machine conundrum. The FTC has issued only four advisory opinions since the FDCPA was enacted in 1977,<sup>5</sup> and

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<sup>5</sup> [Http://www.ftc.gov/os/statutes/fdcpajump.shtm](http://www.ftc.gov/os/statutes/fdcpajump.shtm). The FTC has issued more than 211 informal staff opinion letters. But, such informal opinions do not provide any guaranteed protection for debt collectors. *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). And, the Commission has indicated that "[e]xcept in unusual circumstances, the staff will no longer issue informal written interpretations of the FDCPA. However,

the topics on which the FTC is authorized to issue opinions will decrease as case law develops.

Petitioner's argument that Congress adequately dealt with those situations "when legal uncertainty puts debt collectors at risk for liability" by granting the FTC permission to issue advisory opinions is unrealistic. Pet. Br. 28. Similarly, Petitioner's description of this process as a "simple" and "low-cost" solution to the debt collector's quandary is equally unrealistic. Pet. Br. 34. The exacting criteria that must be met before the Commission will issue an advisory opinion mean that such opinions will only be issued in exceedingly limited circumstances. Only a handful of FDCPA advisory opinions – four since 1977 – have been issued since the FDCPA was enacted. Both the language of the regulation governing the FTC's issuance of advisory opinions and the frequency of advisory opinions issued demonstrate that this option was obviously intended to *complement* the protection the bona fide error defense affords to mistakes of law. It could not have been intended as the exclusive protection for mistakes of law. The experience of the advisory opinion process further reveals that it is insufficient to accommodate technological advances and changes in the debt collection industry.

The bona fide error defense is a necessary balance within the Act to protect ethical debt collectors. Congress prohibited implementation of regulations

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the staff may issue informal opinions or revise its Staff Commentary as necessary to provide guidance regarding significant amendments to the FDCPA in the future." [Http://www.ftc.gov/os/statutes/fdcpajump.shtm](http://www.ftc.gov/os/statutes/fdcpajump.shtm).

and included only basic instructions in the text of the FDCPA. As a result, debt collectors face myriad situations in which there is no clear instruction in the Act or state contract law. Congress built into the FDCPA the bona fide error defense which serves as a “narrow exception” to the otherwise strict liability imposed by the Act. *Reichert v. National Credit Sys.*, 531 F. 3d 1002, 1005 (9th Cir. 2008); *Kistner v. Law Offices of Michael P. Margelefsky*, 518 F.3d 433, 438 (6th Cir. 2008). Application of the FDCPA’s bona fide error defense to those mistakes or misinterpretations of law that are made in good faith is a necessary balance to protect ethical debt collectors, and this balance will be subverted if protection for bona fide legal errors is abolished.

### **III. ELIMINATING LEGAL ERRORS FROM THE PROTECTION OF THE BONA FIDE ERROR DEFENSE WOULD MULTIPLY THE “COTTAGE INDUSTRY” OF SOPHISTICATED CONSUMERS AND THEIR COUNSEL PREYING UPON TECHNICAL VIOLATIONS OF THE FDCPA.**

Legal writers have observed a spike in FDCPA lawsuits in recent years. *E.g.*, Sheri Qualters, *Debt Firms Slammed by Consumer Lawsuits*, LAW.COM (June 12, 2007).<sup>6</sup> TransUnion, working with FDCPA Case Listing Service, LLC, has found that “5,383 cases were filed in 2008 against collection agencies in U.S. District Court for alleged violations of the Fair Debt Collections Practices Act (FDCPA). This represents a 41 percent increase in FDCPA litigation in 2008 in

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<sup>6</sup> Available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005555661>.

Federal Court over 2007 case volumes.” Dave Blumberg, *TransUnion Alerts Collectors of Accounts Involved in Collection Litigation*, REUTERS, TRANSUNION, June 22, 2009.<sup>7</sup> In many instances, the claims asserted in such suits involve “technical violations” of the Act. Roger M. Whelan and Robert M. Zinman, *Suggested Reading: Complete Guide to Credit and Collection Law*, 23-5 AMERICAN BANKR. INST. L.J. 38 (June 2004) (quoting Arthur Winston and Jay Winston, COMPLETE GUIDE TO CREDIT AND COLLECTION LAW (2d. ed. 2004)). If the bona fide error defense’s applicability to mistakes of law is eliminated, there would undoubtedly be an increase in cases involving minor technical violations of the Act where the law is unsettled. Such an interpretation of the defense would encourage costly litigation that would not further the underlying purpose of the FDCPA.

Even now, courts have indicated distress that the parties who sue under the FDCPA are often not the parties who Congress meant to protect. The Sixth Circuit has noted that:

‘[i]ronically, it is often the extremely sophisticated consumer as opposed to the least-sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, 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[.]’

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<sup>7</sup> Available at <http://newsroom.transunion.com/index.php?s=43&item=530>.

*Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (quoting *Jacobson v. Healthcare Fin'l Servs., Inc.*, 434 F. Supp.2d 133, 138 (E.D.N.Y. 2006)); *Murphy v. Equifax Check Servs., Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999) (“there is nothing in the Act suggesting that it was intended to create a cottage industry for the production of attorney’s fees.”); *Miller v. Javitch, Block, & Rathbone*, 561 F.3d 588 (6th Cir. 2009).

The Appendix to this brief contains a table compiled from a LexisNexis search of FDCPA suits filed in the federal courts over the last eleven years. The table shows that FDCPA suits increased gradually throughout the early part of this decade, but doubled in frequency between 2006 and 2009. The biggest increase in FDCPA suits has occurred this year.

Petitioner argues that if this Court allows good faith legal errors to receive the protection of the FDCPA bona fide error defense, aggrieved debtors will be dissuaded from seeking redress for their valid claims. Pet. Br. 33-34. Petitioner offers no support for this claim. *Id.* In fact, the numbers indicate that this argument has no merit. *See*, Chart of Federal FDCPA cases, attached Appendix.

The only circuit, prior to this case, to hold unequivocally that the bona fide error defense applies to mistakes of law is the Tenth Circuit. *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002). Although the sample is small, new federal FDCPA complaints in the Tenth Circuit have increased 391.04% since 2002 (134 per year to 524 per year), while cases throughout the country have increased 313.14% (2,900 per year to 9,081 per year) over the same period. There is simply

no evidence that the broader defense is discouraging meritorious filings. To the contrary, there is plenty of evidence of a “cottage industry” of professional plaintiffs looking for a windfall at the expense of good faith debt collector attorneys.

The case at bar presents a perfect example of a case filed by a consumer based upon a purely technical question under the FDCPA. At the time the foreclosure complaint was filed, the Sixth Circuit had not decided the issue of whether borrowers need to dispute a debt in writing under the FDCPA, and so the Respondents did not have clear instructions with which to interpret the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 502 F. Supp. 2d 686, 695-96 (N.D. Ohio 2007). Respondents chose to follow existing case law within their circuit that held the writing requirement proper. *Jerman*, 505 F. Supp. 2d at 696; *Savage v. Hatcher*, 109 Fed. Appx. 759, 762 (6th Cir. 2004) (unreported); *see also, Graziano v. Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991) (holding that for Section 1692g to be coherent, the communication disputing a debt must be in writing). The two words Respondents included in their notice had absolutely no impact on Petitioner. Nevertheless, Petitioner paid off the debt and, shortly thereafter, filed a putative class action against the creditor’s attorney. *Jerman*, 538 F.3d at 471-72. The district court found Respondents had technically violated the Act.

Respondents were held to a stricter standard of pleading under the FDCPA than under the ethical canons or Rule 11, and Respondents were protected from liability only by the bona fide error defense. *Jerman*, 502 F. Supp. 2d at 697. Petitioner seeks to enrich her position, and that of her attorneys, based

upon two words included in the foreclosure complaint's validation notice that caused her no actual harm. Petitioner seeks to hold the Respondents to a standard of legal perfection under the FDCPA based upon a question of unsettled law. To eliminate Respondents' only affirmative defense under the FDCPA would defeat the purpose of the Act and unfairly punish a good faith debt collector. As demonstrated by the case at bar, application of the bona fide error defense to good faith legal errors is a necessary protection for debt collectors. 15 U.S.C. §§ 1692(e), 1692k(c).

### **CONCLUSION**

For the foregoing reasons, the Sixth Circuit's decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469 (6th Cir. 2008) must be affirmed.

Respectfully submitted,

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## **APPENDIX**

## APPENDIX

Federal FDICPA Lawsuits Filed By Circuit*											
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>1st Cir.</b>	32	34	22	27	38	45	64	72	67	61	117
<b>2nd Cir.</b>	359	389	405	475	484	526	601	608	458	522	718
<b>3rd Cir.</b>	100	162	203	250	322	381	429	409	426	654	706
<b>4th Cir.</b>	118	108	112	130	155	167	151	177	157	187	297
<b>5th Cir.</b>	211	161	185	223	231	280	216	243	263	315	416
<b>6th Cir.</b>	125	134	135	156	165	223	372	223	472	653	791
<b>7th Cir.</b>	535	495	489	533	707	849	895	952	889	840	1103
<b>8th Cir.</b>	198	260	305	297	283	257	213	275	284	399	698
<b>9th Cir.**</b>	307	330	349	431	522	505	680	810	787	1082	2161
<b>10th Cir.</b>	92	106	118	134	160	150	158	280	376	539	524
<b>11th Cir.</b>	260	269	267	244	294	393	387	486	968	1349	1550
<b>TOTAL</b>	<b>2337</b>	<b>2448</b>	<b>2590</b>	<b>2900</b>	<b>3361</b>	<b>3776</b>	<b>4166</b>	<b>4535</b>	<b>5147</b>	<b>6601</b>	<b>9081</b>

\* This chart was prepared from a LexisNexis search. The end date of the search is November 20, 2009. The LexisNexis search criteria was “U.S. District Courts, Civil Filings (Docket Summary)” database under the Public Records category. As of 1998, this database provides case summaries for all U.S. District Court filings except Alaska. Cases filed in Alaska are *not* included in the table. The summaries provide the court name, district or division, docket number, filing date, judge, nature-of-suit, litigants involved, and their respective attorneys.

To replicate the search, select the search tab in LexisNexis. In “Option 2,” choose the Public Records tab; then choose “Find Filings;” then choose “Civil & Criminal Court Filings and Regulatory Actions;” then click “Filing Extracts.” Next, choose “U.S. District Courts, Civil Filings (Docket Summary);” then choose “New Search.” Next, input the appropriate search string in the “Terms and Connectors” box for a circuit. For example, the search query performed for the First Circuit was “FDCPA or F.D.C.P.A. or Fair Debt Collections or (15 pre/3 1692) and DISTRICT COURT OF MAINE or DISTRICT OF MASSACHUSETTS or DISTRICT OF NEW HAMPSHIRE or DISTRICT OF RHODE ISLAND or DISTRICT OF PUERTO RICO.” Finally, under “Restrict by Date” put the applicable date range (*i.e.*, 01/01/1999 – 12/31/1999).

\*\* Does not include data from Alaska