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No. 08-1200

IN THE
Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER
& ULRICH LPA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ACA INTERNATIONAL AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae ACA International ("ACA") is a non-profit corporation founded in 1939 and based in Minneapolis, Minnesota. ACA is an association of credit, collection, and debt-purchasing professionals who provide a wide variety of accounts-receivable management services. ACA's interests in this matter are both public and private.

ACA represents approximately 5,200 third-party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Also included among its membership are 3,400 third-party debt collection companies, 750 credit grantors, eighty asset buyers, and more than 800 in-house, compliance, defense, or collection attorneys.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ close to 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state as well as the very

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately 2,000 of the company members of ACA maintain fewer than ten employees. Many of the companies are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA continually educates its members and others on the law governing debt collection practices, including the Fair Debt Collection Practices Act.

In the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services delivered to consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses and, by extension, the local and national economies in general are threatened; at the very least, citizens would be forced to pay inflated prices to compensate for uncollected debts.

Finally, ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

SUMMARY OF THE ARGUMENT

The Fair Debt Collection Practices Act is not unique in that its proper interpretation is frequently unsettled. A myriad of conflicting federal cases, published and unpublished, are being handed down by the federal appellate circuits and district courts on a regular basis. But the interpretation of the Act's bona fide error defense that Petitioner advances would unjustly punish those in the collection industry who are actually working hard on a daily basis to comply with the Act in spite of its unsettled state, to the competitive advantage of those who do not. The bona fide error defense is best viewed as an application of the longstanding rule of judgmental immunity, under which a lawyer is protected from liability when he or she exercises reasoned judgment as to an unsettled issue of law. The concerns that Petitioner and other amici raise about this interpretation of the bona fide error defense are unfounded. Accordingly, amicus ACA respectfully urges the Court to affirm the judgment of the Sixth Circuit in this case.

ARGUMENT

Amicus curiae ACA does not intend to discuss at great length the case law and legislative history that support affirming the judgment below on the ground that the bona fide error defense[2] in the Fair Debt Collection Practices Act applies to mistakes of law. Those arguments are covered comprehensively by the briefs of Respondents and the other amici arguing in favor of affirmance. Instead, this brief provides a real-life factual context for the issue

2. *See* Fair Debt Collection Practices Act § 813(c), 15 U.S.C. § 1692k(c).

presented and focuses on the several rationales and policies that should govern any interpretation of the bona fide error language of the statute.

The bona fide error defense protects the exercise of good-faith, reasoned judgment by collection professionals interpreting the frequently unsettled state of FDCPA law.

To be sure, one purpose of the Fair Debt Collection Practices Act ("FDCPA" or "Act") is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2006). Petitioner and the amici supporting her stress only *that* purpose of the Act and ignore the second stated purpose: "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* In other words, it was a specific intent of Congress that the Act *not* be interpreted to place those debt collectors who endeavor to comply with the law at a competitive disadvantage to those who do not. But that is precisely what Petitioner's position would do – impose a competitive disadvantage on those who devote considerable time and resources in a genuine effort to conform their practices to the requirements of the Act.

The ACA represents collectors, both attorneys and non-attorneys, who work diligently to comport their conduct to the law. But sometimes *knowing* with certainty what the law requires at any given point in time is impossible precisely because of unclear statutes and conflicting judicial interpretations.

This case is a good example of how the muddled and shifting state of FDCPA law can entrap even conscientious lawyers and collectors who do their best to comply with the Act. In 1991, the Third Circuit held that a consumer's dispute of a debt under the FDCPA must be in writing to be effective. *See Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991). Over the next few years, a number of district courts that addressed the same issue chose to disagree with *Graziano*. Then, in September 2004, the Sixth Circuit affirmed a finding that a form validation notice did not violate the FDCPA even though the notice stated that any dispute had to be in writing. *See Savage v. Hatcher*, 109 F. App'x 759, 762 (6th Cir. 2004), *aff'g in part and rev'g in part*, No. C-2-01-0089, 2002 WL 484986, at *4 (S.D. Ohio Mar. 7, 2002). The very next year, the Ninth Circuit held to the contrary, ruling that a debt collector's notice that stated the dispute must be in writing violated the FDCPA. *See Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1081-82 (9th Cir. 2005).

Thus, by April 2006, when the Respondent attorneys (who practice in the Sixth Circuit) filed the action against Petitioner, at least one other Circuit had held that a dispute must be in writing and the only Sixth Circuit decision on point suggested that a notice requiring a written dispute would not violate the FDCPA. The record below shows that Respondent lawyers, after careful research, made a judgment about the then-state of the law. (Br. of Resp. at 1-2.) As a result of later developments, it turned out that their judgment – a judgment based on unsettled law – was in error. But it was certainly an unintentional error, and it was a bona fide error – an error made notwithstanding the

maintenance of procedures reasonably adapted to avoid such errors.

The simple fact is this: later courts disagreed with prior law. The law became unsettled on this point. With all due respect, we submit that if the learned courts cannot agree on what the law is, it is manifestly wrong to impose strict liability under the FDCPA on lawyers and collectors who rely on such judicial decisions in good faith. The Respondent lawyers made a legal judgment after careful research about what the law required. Their legal judgment was deemed to be in error only in light of subsequently decided cases. Nonetheless, there was a legitimate legal basis for their acts and interpretations of the law at the time they made the supposed "error."

Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997), presents another example of the practical problems posed by Petitioner's position here. There, in an opinion authored by Judge Richard A. Posner, the court took it upon itself to draft an "initial communication" or "dunning letter" and recommended that debt collectors could avoid liability under the FDCPA by "stick[ing] close to" the language of this recommended letter. *Id.* at 501-02. At a minimum, any collector within the Seventh Circuit could then, of course, rely on the *Bartlett* letter (and collectors outside of the Seventh Circuit would naturally rely on the sample letter as well). After all, the *Bartlett* letter had received the official imprimatur of the United States Court of Appeals, and Judge Posner is considered "a brilliant jurist, among the most respected in the United States." Joel Brinkley, *Microsoft Case Gets U.S. Judge as a Mediator*, N.Y.

Times, Nov. 20, 1999. Even so, a district court outside the Seventh Circuit later concluded that use of the *Bartlett* letter violated the FDCPA. *See Tipping-Lipshie v. Riddle*, No. CV 99-4646, 2000 WL 33963916 (E.D.N.Y. Mar. 2, 2000). Such liability under these circumstances defies logic. At worst a bona fide error occurred for which no FDCPA liability should have attached.

ACA's members ought to be able to rely on judicial determinations about what the statute means and when liability will be found. If they rely in good faith on a facially valid judicial opinion, and proceed accordingly, they should not be held liable under the FDCPA when a subsequent judicial decision "goes the other way." In other words, it should be permissible to be both (1) mistaken in predicting the resolution of an unsettled legal question and (2) not liable under the FDCPA. One should be able to have a good-faith bona fide statutory interpretation that a chosen course of conduct is permitted under FDCPA, based on careful study and case law research, without running the risk of being held liable if a different court later goes the other way on the issue.

After all, for the bona fide error exception to apply in the first instance, it must be true by definition that an "error" occurred. In addition, the burden always remains on the defendant to establish facts that would trigger the exception: that the legal error was (1) unintentional and (2) made as a result of a bona fide error, (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. *See* 15 U.S.C. § 1692k(c). Where those facts are all established, however, it makes no logical sense to

separate "legal errors" from "factual errors" with respect to the bona fide error defense.

In practice, an attorney or collector must occasionally make a judgment about how to proceed when the law is unsettled. If her analysis about what the law requires or allows turns out to be in error, should she be subject to a damage award under the FDCPA for incorrectly predicting the resolution of an unsettled point of law?

Such a holding would fly in the face of well-established law. As the preeminent treatise on legal malpractice notes: "The rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized." 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 1226 (Thomson West 2009) (giving a detailed account of the reason for the rule and how it developed). The treatise continues:

> What an attorney thinks the law is today may not be what a court decides tomorrow. Subjecting attorneys to liability simply because a judge disagrees can be unfair. After all, judges are lawyers who have the additional responsibility of declaring the law. Even judges concede that the infallibility of their opinions depends solely on the finality of their rulings.

Id. (footnotes omitted). This salient principle[3] has been recognized in the Anglo-American legal system for more than 200 years:

> Lord Mansfield concluded that the language of the relevant statute was unclear and reasoned that attorneys should not be liable for errors of judgment on debatable propositions: "Not only counsel, but judges may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." Thus, the rule was established that an attorney would not be liable for an error concerning a doubtful or debatable proposition of law.

Id. at 1231 (quoting *Pitt v. Yalden*, 98 Eng. Rep. 74 (K.B. 1767)).

This Honorable Court recognized and approved this rule of law 130 years ago in *National Savings Bank of District of Columbia v. Ward*:

> When a person adopts the legal profession, and assumes to exercise its duties in behalf of

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3. The principle of judgmental immunity, which applies to lawyers, is not the only longstanding doctrine that defers to a professional's good-faith exercise of judgment while using due care. *See, e.g.*, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (explaining business judgment rule); *Gregory v. Kilbride*, 565 S.E.2d 685, 696 (N.C. Ct. App. 2002) (discussing statutory immunity for physicians in the exercise of professional judgment).

> another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties . . . *but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause.* Instead of that, the rule is that if he acts with a proper degree of skill, and with reasonable care and to the best of his knowledge, he will not be held responsible.
>
> . . . .
>
> 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 all 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.*

100 U.S. 195, 198-200 (1879) (emphasis added).

This rule has been applied consistently across the country since its inception. *See* Mallen & Smith, *supra*, at 1226 & n.4 (citing four pages of appellate decisions from across the country). The judgmental immunity defense is based on two predicates: (1) the status of the legal proposition being unsettled and (2) that the lawyer acted upon informed judgment. *Id.* at 1226, 1230. In that context, an error in predicting the resolution of unsettled law must not result in legal liability:

> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

Hodges v. Carter, 80 S.E.2d 144, 146 (N.C. 1954).

In *Crosby v. Jones*, the Florida Supreme Court noted that good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity, noting that the rule is premised on the understanding that an attorney who acts in good faith and makes a diligent inquiry into an area of law should not be held liable for providing advice or taking action in an unsettled area of law. 705 So. 2d 1356, 1359 (Fla. 1998); *see also Davis v. Damrell*, 174 Cal. Rptr. 257, 260-61 (Ct. App. 1981) ("[T]he failure to anticipate correctly the resolution of an unsettled legal principle does not

constitute culpable conduct. . . . In short, the exercise of sound professional judgment rests upon consideration of legal perception and not prescience.").

Note the anomalous and counter-intuitive result that would follow from the position argued by Petitioner: a lawyer could be held liable in damages to a non-client under the FDCPA for an error in exercising legal judgment even though *the lawyer's own client* would not have a claim against the attorney based on the same exercise of legal judgment. That is yet another reason supporting affirmance here.

Petitioner and amicus United States suggest that simple "ignorance of the law" is involved here. (Br. of Pet. at 14-15; Br. of United States at 12.) Nonsense. Of course the bona fide error defense does not protect collectors and attorneys who are ignorant of the law – no one has suggested that. Rather, the bona fide error defense only protects those mistakes of law that satisfy the three-prong test in 15 U.S.C. § 1692k(c): when the legal mistake is (1) not intentional and (2) made as a result of a bona fide error, (3) notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. When the error, even if unintentional, is the result of ignorance of the law, the defense is simply not available.

Petitioner and the United States also suggest that a mistake should be deemed "intentional" for purposes of the bona fide error defense if the collector has merely a general intent to collect the debt as opposed to a specific intent to violate the FDCPA. (Br. of Pet. at 20; Br. of United States at 11.) To date, three Circuits have

held directly to the contrary, ruling that a collector need only show that the violation was unintentional, not that the challenged communication itself was unintentional. *See Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005); *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10th Cir. 2006).

That is indeed the better view. As the Tenth Circuit persuasively noted in *Johnson*, the text of § 1692k(c) itself plainly speaks of "the violation" being unintentional, not "the conduct." 443 F.3d at 728-29; *see also* S. Rep. No. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 ("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 a violation is unintentional* and occurred despite procedures designed to avoid such violations" (emphasis added)); *see also Caputo v. Prof'l Recovery Servs., Inc.*, 261 F. Supp. 2d 1249, 1255 (D. Kan. 2005) (recognizing that both the language of the FDCPA and the legislative history are more consistent with a specific intent requirement); *see also* Br. of Resp. at 43-44.

Petitioner next contends that the second prong of 15 U.S.C. § 1692k(c) – "maintenance of procedures reasonably adapted to avoid any such error" – cannot reasonably be applied to mistakes of law because the phrase would be "linguistically awkward" if used in that context, and that it would be "difficult to develop standards for what constitutes reasonable procedures." (Br. of Pet. at 10.) Yet every day in law firms across this country, there are ethics partners, risk avoidance partners, compliance officers, professional development

partners, and law firm general counsel who are directly responsible for devising procedures reasonably adapted to avoid legal error by their firm's lawyers. Such procedures include repeated and timely training on developments in specific areas of the law. Compliance with state mandatory continuing legal education requirements is another "procedure reasonably adapted to avoid" mistakes of law.

Several decisions have discussed various procedures that can effectively be maintained to avoid legal errors in the FDCPA context:

> The defendants have offered unrebutted evidence of the procedures they followed when preparing to file suit to collect a debt to avoid errors and omissions that could result in an FDCPA violation. These include the publication of an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act. After suit is filed, the firm assigns an attorney to review all issues relating to a particular deficiency, and stops all collection efforts on a disputed balance before judgment to verify all disputed items with the client.

Jenkins v. Heintz, 124 F.3d 824, 834 (7th Cir. 1997); *see also Kort*, 394 F.3d at 538 (holding reasonable

procedure to avoid misinterpreting and misapplying a federal statute is to adopt the legal interpretation of the federal agency charged with regulating under the statute in question); *Taylor v. Luper, Sheriff & Niedenthal Co.*, 74 F. Supp. 2d 761, 766 (S.D. Ohio 1999) (ruling that regular attendance at seminars regarding FDCPA and receiving and reviewing newsletters regarding the Act held sufficient to satisfy defendant's burden of proof on "procedures reasonably adapted" prong).

Here, Respondent law firm designated its senior principal as the person responsible for FDCPA compliance, and he in turn regularly attended conferences and seminars on changes to the FDCPA and subscribed to and routinely consulted periodicals that update counsel on the numerous issues that arise under the Act. The senior principal was charged with instructing other lawyers in the firm on updates and changes to the FDCPA and its attendant case law. (See generally Br. of Resp. at 1-2.) Maintaining procedures reasonably adapted to avoid legal errors is a commonplace feature of practicing law in this country and is an effective method of reducing the risk of mistakes of law.

Petitioner also raises federalism issues, claiming that if the federal courts were to begin deciding whether particular procedures are reasonably adapted to avoid mistakes of law, the courts would become enmeshed in the traditional state function of regulating the practice of law and setting standards for professional conduct. (Br. of Pet. at 27.) However, the states have already adopted uniform standards for the practice of law – the

rule of judgmental immunity. It is rather Petitioner's position – that the federal FDCPA was intended to overrule that ancient common law rule – that threatens principles of federalism.

Petitioner maintains that if the bona fide error defense applied to mistakes of law, it would "encourage debt collectors to take an aggressive view of the law when its requirements are not clear, knowing that there will be no liability." (Br. of Pet. at 11, 31.) This grossly distorts what ACA and its collector and attorney members strive to do on a daily basis. Where the law is genuinely unsettled, there is nothing "aggressive" about adopting the interpretation that favors the client's interest. Indeed, Petitioner's view – that a lawyer in that situation must select the least "aggressive" interpretation – has the potential to chill zealous advocacy within the bounds of the law, and could well place the lawyer in a conflict situation. For example, under Petitioner's view, a lawyer would be well counseled *not* to advance a reasonable argument for changing or extending existing law on behalf of a client because he or she may face *personal* liability under the FDCPA because the law is unsettled. That is the opposite of zealous advocacy. *See Taylor*, 74 F. Supp. 2d at 764 (noting that an "irreconcilable ethical dilemma" would be presented if a lawyer who in good faith asserts a claim in litigation on behalf of her client could be held personally liable under the FDCPA).

Similarly, Petitioner's argument that collectors and lawyers who take an "aggressive view" would have a competitive advantage is unpersuasive. To suggest that collectors and lawyers who carefully analyze uncertain

and unsettled law and exercise their professional judgment in deciding how to proceed somehow have a competitive advantage over others who ignore such legal developments would turn the bona fide error defense on its head. The defense *was* specifically intended to protect lawyers and collectors who are trying to do the right thing.

Finally, Petitioner's claim that affirmance of the decision below will undermine the private enforcement efforts under the FDCPA that Congress intended to deter improper collection practices is misplaced. (Br. of Pet. at 33.) Petitioner raises the concern that rebutting a mistake-of-law defense could be costly and might dissuade plaintiffs from pursuing meritorious claims. But Congress saw it differently when it enacted the FDCPA. Congress chose to include a bona fide error defense precisely to afford collectors a limited defense in this scenario. Hence, pursuit of a case that ultimately is defeated via proof of a bona fide error, is precisely how Congress saw this as playing out. While the FDCPA does, in many respects, favor of the consumer, in this instance Congress chose to afford a defense to level the playing field.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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