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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 FOR THE COMMERCIAL LAW LEAGUE OF AMERICA AND DBA INTERNATIONAL AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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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).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTERESTS OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
1. Respondents' actions did not evidence ignorance of the law; rather, they chose to follow existing case law which had not been rejected in their circuit.	5
2. The text of the FDCPA's *bona fide* error provision mandates the conclusion that it is the "violation" and not the conduct which must be unintentional.	9
3. The defense set forth in 15 U.S.C. 1692k(e) for reliance on FTC opinion letters is illusory.	13
4. Allowing the interpretation favored by Petitioner has the effect of limiting the access of creditors to effective legal representation and to the courts.	14
CONCLUSION	22

TABLE OF CITED AUTHORITIES

Page

Cases:

Alger v. Ganick, O'Brien & Sarin,
35 F. Supp. 2d 148 (D. Mass. 1999) 12

Brady v. Credit Recovery Co.,
160 F.3d 64 (1st Cir. 1998) 7

Briscoe v. LaHue,
460 U.S. 325, 103 S. Ct. 1108,
75 L. Ed. 2d 96 (1983) 16

Burns v. Reed,
500 U.S. 478, 111 S. Ct. 1934,
114 L. Ed. 2d 547 (1991) 17

Butz v. Economou,
438 U.S. 478, 98 S. Ct. 2894,
57 L. Ed. 2d 895 (1978) 17

Camacho v. Bridgeport Fin., Inc.,
430 F.3d 1078 (9th Cir. 2005) 7, 8

Caminetti v. United States,
242 U.S. 470, 37 S. Ct. 192,
61 L. Ed. 442 (1917) 10

Caron v. Maxwell,
48 F. Supp. 2d 932 (D. Ariz. 1999) 12

Page

Castro v. Collecto, Inc,
2009 U.S. Dist. LEXIS 99703
(W.D. Tex. Oct. 27, 2009) 20

Clark v. Capital Credit & Collection Servs., Inc.,
460 F.3d 1162 (9th Cir. 2006) 7

Ditty v. CheckRite,
973 F. Supp. 1320 (D. Utah 1997) 12

Dutton v. Wolpoff & Abramson,
5 F.3d 649 (3d Cir. 1993) 14

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127, 81 S. Ct. 523,
5 L. Ed. 2d 464 (1961) 17

Evory v. RJM Acquisitions Funding L.L.C.,
505 F.3d 769 (7th Cir. 2007) 17

Farber v. NP Funding II L.P.,
No. CV-96-4322, 1997 U.S. Dist. LEXIS 21245,
1997 WL 913335 (E.D.N.Y. Dec. 9, 1997) 12

Fox v. Citicorp Credit Servs., Inc.,
15 F.3d 1507 (9th Cir. 1994) 12, 14

Freyermuth v. Credit Bureau Services,
248 F.3d 767 (8th Cir. 2001) 18

Page

Gearing v. Check Brokerage Corp.,
233 F.3d 469 (7th Cir. 2000) 7

Graziano v. Harrison,
950 F.2d 107 (3d Cir. 1991) 4, 6, 8, 9

Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,
530 U.S. 1, 147 L. Ed. 2d 1,
120 S. Ct. 1942 (2000) 10

Hartman v. Great Seneca Fin. Corp.,
569 F.3d 606 (6th Cir. 2009) 17

Heintz v. Jenkins,
514 U.S. 291, 115 S.Ct. 1489,
131 L.Ed.2d 395 (1995) 1, 4, 14, 15, 16

Hill v. American Express,
289 Ga. App. 576; 657 S.E.2d 547
(Ga. App. 2008) 18, 19

Holmes v. Telecredit Corp.,
736 F.Supp. 1289 (D. Del. 1990) 12

Iselin v. United States,
270 U.S. 245, 70 L. Ed. 566,
46 S. Ct. 248 (1926) 10

Johnson v. Riddle,
305 F.3d 1107 (10th Cir. 2002) 8

Page

Kimber v. Federal Financial Corp.,
668 F.Supp. 1480 (M.D. Ala. 1987) 12, 18

Kizer v. Finance Am. Credit Corp.,
454 F. Supp. 937 (N.D. Miss. 1978) 12

Kort v. Diversified Collection Servs.,
394 F.3d 530 (7th Cir. 2005) 11

Lewis v. ACB Bus. Servs.,
135 F.3d 389 (6th Cir. 1998),
reh. en banc denied, 1998 U.S. App. LEXIS
7698 (6th Cir. 1998) 11, 14

McKinney v. Cadleway Props., Inc.,
548 F.3d 496 (7th Cir. 2008) 12

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618, 98 S. Ct. 2010,
56 L. Ed. 2d 581 (1978) 10

Nielsen v. Dickerson,
307 F.3d 623 (7th Cir. 2002) 11

Parkis v. Arrow Financial Services, LLS,
2008 U.S. Dist. LEXIS 1212,
2008 WL 94798, at *7 (N.D. Ill. 2008) 18

Pollice v. Nat'l Tax Funding LP,
225 F.3d 379 (3d Cir. 2000) 12

Page

Ramirez v. Palisades Collection LLC,
2008 U.S. Dist. LEXIS 48722,
2008 WL 2512679, at 5 (N.D. Ill. 2008) 18

Randle v. GC Servs.,
25 F. Supp. 2d 849 (N.D. Ill. 1998) 12

Richards v. United States,
369 U.S. 1, 82 S. Ct. 585,
7 L. Ed. 2d 492 (1962) 10

Richburg v. Palisades Collections, LLC,
Civil Action 07-7 (E.D.Pa. Jan. 28, 2007) ... 19, 20

Rubin v. United States,
449 U.S. 424, 101 S. Ct. 698,
66 L. Ed. 2d 633 (1981) 10

Russell v. Equifax ARS,
74 F.3d 30 (2d Cir. 1996) 7

Sayyed v. Wolpoff & Abramson,
485 F.3d 226 (4th Cir. 2007) 17

Scally v. Hilco Receivables, LLC,
392 F. Supp. 2d 1036 (N.D. Ill. 2005) 12

Sial v. Unifund CCR Partners,
2008 U.S. Dist. LEXIS 66666,
2008 WL 4079281 (S.D. Cal. 2008) 17

Page

Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232 (5th Cir. 1997) 7

Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006) 16

Turner v. J.V.D.B. & Assocs., Inc, 330 F.3d 991 (7th Cir. 2003) 8

United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965) 17

United States v. Locke, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) 10

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) 10

Statutes, Rules, and Regulations:

Fair Debt Collection Practices Act

15 U.S.C. 1692 *et seq.* 1

15 U.S.C. § 1692a(6) 12

15 U.S.C. § 1692e(2)(A) 14

Page

15 U.S.C. § 1692g(a) 5

15 U.S.C. § 1692g(a)(3) 3, 6

15 U.S.C. §§ 1692g(a)(4) and (5) 5

15 U.S.C. § 1692k 4, 13

15 U.S.C. 1692k(c) ..... i, 9

15 U.S.C. § 1692k(e) 4, 13, 14

15 U.S.C. § 1692l 13

42 Pa. Con. Stat. Ann. § 5525(a)(1) 19

42 Pa. Con. Stat. Ann. § 5527(b) 19

Fed. R. Civ. P. 11 ..... 11, 21

OCGA § 9-3-24 18

OCGA § 9-3-25 18

Page

Other Authorities:

Robert J. Hobbs, *Fair Debt Collection* (6th ed. 2008) 13

Moore's Federal Practice - Civil § 329.11 (Matthew Bender 3d ed.) 2

M. Newburger and B. Barron, *Fair Debt Collection Practices: Federal and State Law and Regulation*, ¶ 1.05[1][i] (A.S. Pratt & Sons 2002-2009) 7

FTC Web Site http://www.ftc.gov/os/statutes/fdcpajump.sht 13

INTERESTS OF THE AMICI CURIAE[1]

The Commercial Law League of America (CLLA) was founded 1895 and is the oldest creditors' rights organization in the United States. Today the CLLA is an international organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as *amicus curiae* before this and other federal courts in a number of cases, including *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). The vast majority of the League's membership represents credit grantors in collection disputes, and the Court's ruling in this case will have a significant impact on the League's members and their clients.

This case concerns the interpretation of an affirmative defense to liability under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. § 1692 *et seq.* CLLA has a substantial interest in the correct interpretation of the *bona fide* error provision of the FDCPA as its members are attorneys who litigate

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[1] The parties have consented to the filing of *amici* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

collection cases in every state and territory of the United States. Denial of a *bona fide* legal error defense to attorneys impairs the ability of CLLA member attorneys to represent their clients as zealous advocates.

DBA International (DBA) is a non-profit corporation which serves as the principal nationwide trade group for collection industry members who specialize in the purchase of "charged-off" debts. DBA's 502 member firms are dedicated to building a professional, ethical, and compliant market for delinquent receivables. The membership of the DBA includes debt buyers, collection agencies, collection attorneys and investors from across the United States who collect consumer debts both directly and indirectly through lawful collection techniques, including litigation, in an effort to collect debts that they have purchased from credit grantors or other debt sellers.

DBA has a substantial interest in the correct interpretation of the *bona fide* error provision of the FDCPA as the position proposed by Petitioner impairs the ability of DBA members to secure legal representation and adequate access to the courts.

SUMMARY OF ARGUMENT

It has been said that the "classic role of an *amicus curiae* is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration." Moore's Federal Practice - Civil § 329.11 (Matthew Bender 3d ed.). The parties have briefed the

history and text of the FDCPA, and the *amici* will not waste the Court's time by restating that information; rather, this brief will be confined to four arguments.

1. This is not a case, as Petitioner suggests, of ignorance of the law being no excuse. Instead, this is a case invoking the fundamental duty of attorneys to select the law which most favors and applies to their clients' issues when the law is unsettled or a split of authority exists, which is what occurred in the instant case. At the time of the conduct giving rise to this litigation the Sixth Circuit Court of Appeals had not ruled on the propriety of including "in writing" in the disclosure required by 15 U.S.C. § 1692g(a)(3). However, the Third Circuit Court of Appeals had expressly *permitted* the inclusion of "in writing," and while the Ninth Circuit subsequently rejected that decision, the Third Circuit decision remains valid to this day. Creating liability under the circumstances presented will chill the ability of creditors to secure the development of case law and the ability of collection attorneys to secure clarification of their clients' rights and their own obligations under the FDCPA.

2. The wording of the FDCPA is simply inconsistent with the interpretation offered by Petitioner. Congress chose to provide a *bona fide* error defense when a "violation" is "unintentional." Petitioner's proposed interpretation effectively seeks to substitute the word "conduct" for the word "violation" in order to have the Act interpreted as she proposes. Such an approach is inconsistent with the rules of legislative construction.

3. Petitioner's suggestion that *bona fide* legal error is unnecessary because of the availability of the FTC Opinion Letter defense set forth in 15 U.S.C. 1692k(e) is a "red herring" argument. Although theoretically available, that defense is in reality unavailable in virtually all situations.

4. The consequences of this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) has been the abrogation in FDCPA cases of fundamental doctrines such as witness immunity, litigation immunity and the *Noerr-Pennington* doctrine. Allowing the interpretation favored by Petitioner would further erode these well-established defenses and thus the access of creditors to effective legal representation and to the courts.

ARGUMENT

The FDCPA provides a statutory scheme regulating, at a national level, the activities of individuals and businesses (including attorneys and law firms) engaged in the collection of defaulted consumer debts. Section 813 of the Act, 15 U.S.C. § 1692k allows consumers the ability to bring individual and class actions under the Act, effectively serving as "private attorneys general" to right the wrongs that the state and federal governments do not have the time, inclination, or resources to address. *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991).

Although it is a strict liability statute the Act provides a defense to a debt collector who shows by a preponderance of evidence that a violation was not

intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Decisions from multiple appellate courts have recognized that this *bona fide* error is not limited merely to clerical mistakes. CLLA and DBA urge the Court to recognize the availability of the defense in the case of *bona fide* legal errors.

1. Respondents' actions did not evidence ignorance of the law; rather, they chose to follow existing case law which had not been rejected in their circuit.

15 U.S.C. § 1692g(a) requires that within five days of a debt collector's initial communication with a consumer the debt collector must provide the five disclosures commonly known as the "validation notice." Section 1692g(a)(3) states that one of the required disclosures is

> a statement that unless the consumer, within 30 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

Section 1692g(a) (4) and (5) also mandate disclosures to consumers offering to provide certain information if the consumer makes a written dispute or request within thirty days of receipt of the validation notice. Unlike Section 1692g(a) (3), which is silent as to the requirement of a writing, Section 1692g(a) (4) and (5) each expressly require a consumer's dispute or request to be in writing in order to be effective.

In *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) the Court of Appeals was confronted with a collection attorney's notice which stated that he would presume the debt to be valid unless the debtor disputed the debt in writing. The Third Circuit held that the attempt to require a written dispute to avoid the presumption of validity was not a violation of section 1692g, notwithstanding the fact that Section 1692g(a)(3) does not use the words "written" or "in writing."

> Adopting Graziano's reading of the statute would thus create a situation in which, upon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts. We see no reason to attribute to Congress an intent to create so incoherent a system. We also note that there are strong reasons to prefer that a dispute of a debt collection be in writing: a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts. We therefore conclude that subsection (a)(3), like subsections (a)(4) and (a)(5), contemplates that any dispute, to be effective, must be in writing. The district court was not in error in determining that the requirement of a writing did not render the statutory notice invalid.

Graziano at 112.

Other courts, however, have reached a contrary conclusion and forbidden the imposition of a writing requirement to avoid the assumption of validity. *See, e.g., Camacho v. Bridgeport Fin., Inc.,* 430 F.3d 1078 (9th Cir. 2005); *Brady v. Credit Recovery Co.,* 160 F.3d 64 (1st Cir. 1998). Nevertheless, the Third Circuit Court of Appeals has not, to this day, disaffirmed the holding in *Graziano*.

CLLA and DBA will readily concede that the outcome in *Camacho* is more consistent with the express wording of the FDCPA. The inclusion of the words "in writing" and "written request" in Section 1692g(a)(4) and (5) and the omission of such words in Section 1692g(a)(3) is indicative of a Congressional intent that there be a distinction in the obligations imposed upon consumers to invoke their rights. At least one treatise has acknowledged the superiority of the Ninth Circuit's reasoning. *See* M. Newburger and B. Barron, *Fair Debt Collection Practices: Federal and State Law and Regulation,* ¶ 1.05[1][i] (A.S. Pratt & Sons 2002-2009). The merit of Plaintiff's underlying claim, however, is not the issue which is of concern to these *amici*.

Courts have repeatedly stated that the FDCPA is a strict liability statute. *See, e.g., Russell v. Equifax ARS*, 74 F3d 30 (2d Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238-39 (5th Cir. 1997); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006). ("§ 1692e applies even when a false representation was unintentional"); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000) (holding unintentional misrepresentation of debt

collector's legal status violated FDCPA). *See also Turner v. J.V.D.B. & Assocs., Inc,* 330 F.3d 991, 995 (7th Cir. 2003) (holding unintentional misrepresentation that debtor was obligated to pay a debt discharged in bankruptcy violated FDCPA). Whether or not *Camacho* was the better-reasoned decision *Graziano* remains good law in the Third Circuit. Petitioner's position would make Respondents strictly liable for their loss in asserting a position already decided in their favor by at least one federal appellate court. Ironically, Petitioner asks this Court to resolve a split in authority between Circuits, but she would deny to Respondents the ability to seek similar relief without facing strict liability for being wrong.

Choosing to follow the Third Circuit and then having the Sixth Circuit choose to follow the Ninth Circuit can hardly be characterized as "ignorance of the law" as suggested by Petitioner. This is not a situation such as *Johnson v. Riddl*e, 305 F.3d 1107 (10th Cir. 2002), in which there was no appellate authority on which the collection attorney attempted to base a *bona fide* legal error defense. In *Johnson* the collection attorney's reliance upon a few unappealed test cases that he had filed was the basis of his *bona fide* error defense. In contrast, regardless of whether this Court agrees with the holding in *Graziano*, Respondents' actions were consistent with a published decision of a federal appellate court which had not been disaffirmed by that court nor rejected in their own circuit.

If this Court rejects the application of the *bona fide* error defense under such circumstances creditors' attorneys will become a special class of disadvantaged

lawyers who will be able to follow only decisions which are least advantageous to their firms and clients, even when there is contrary legal authority to support different conduct. Even in the face of *Graziano*, a collection attorney practicing law inside the Third Circuit would be subjected to FDCPA liability for relying upon a decision of that Court of Appeals merely because another court has reached a different outcome. CLLA and DBA respectfully assert that such a rule of law should not be tolerated. Although they believe that the Court below ruled correctly on the *bona fide* legal error defense, should this Court decide otherwise CLLA and DBA urge the Court to consider a narrower ruling to recognize, at a minimum, the applicability of the *bona fide* error defense to a debt collector's reliance upon case law which has not been rejected in the debt collector's jurisdiction.

2. The text of the FDCPA's *bona fide* error provision mandates the conclusion that it is the "violation" and not the conduct which must be unintentional.

The text of 15 U.S.C. 1692k(c) provides:

> (c) Intent
>
> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponder-ance 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.

When a 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." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Caminetti v. United States,* 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917). When the words of a statute are unambiguous "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981).

Amici submit that there is no justification for disregarding the plain wording of the Act even if the Court agrees with Petitioner's concerns about the consequences of ruling in favor of Respondents. Given a choice between effecting an undesirable outcome or disregarding the express wording of an unambiguous statute, the Court should neither enlarge nor restrict the effect of the Congressional Act. *See Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978). The rationale for this policy is that this Court traditionally grants deference to "the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985), *citing Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

Federal courts have repeatedly recognized that the *bona fide* error defense can be triggered when the

violation is unintentional, even if the conduct giving rise to the violation was intentional. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389 (6th Cir. 1998), *reh. en banc denied*, 1998 U.S. App. LEXIS 7698 (6th Cir. 1998); *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002); *Kort v. Diversified Collection Servs.*, 394 F.3d 530 (7th Cir. 2005) Such an interpretation is necessary in order to give any meaning to the defense.

In the context of the law of trespass one might well have a meaningful discussion of whether the relevant intent should be the intent to enter upon property or to commit a trespass. However, in the debt collection context such distinctions have no meaning. A debt collector does not ordinarily send a letter, place a call, or speak words "unintentionally." If it is the collector's conduct which must be "unintentional" then there are virtually no circumstances under which the defense will apply as the "procedures reasonably adapted" requirement would make it necessary to have a procedure of never calling or writing a consumer in order to invoke the defense.

For collection attorneys the problem is even worse. Attorneys do not ever "unintentionally" file pleadings; indeed, they are forbidden to do so. *See, e.g.,* Fed. R. Civ. P. 11. Given the strict liability nature of the FDCPA, the *bona fide* error defense would ***never*** be available to a collection attorney in the case of a pleadings-based FDCPA claim because the filing of pleadings simply is not unintentional. Petitioners' construction of the Act would deny the defense to attorneys. Such an outcome will chill the ability of creditors to secure access to the courts. In the case of debt buyers it subjects every debt

buyer to the potential of vicarious liability for the actions of its attorneys.

Although 15 U.S.C. § 1692a(6) exempts creditors from the definition of "debt collector," debt buyers who purchase debts after default do not enjoy the benefits of that exemption and they are treated as "debt collectors" for FDCPA purposes. *See, e.g., Pollice v. Nat'l Tax Funding LP*, 225 F.3d 379, 403–404 (3d Cir. 2000); *Kizer v. Finance Am. Credit Corp.*, 454 F. Supp. 937 (N.D. Miss. 1978); *Holmes v. Telecredit Corp.*, 736 F.Supp. 1289 (D. Del. 1990). *See also McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008). Courts across the country have held that a debt collector may be held vicariously liable for the collection activities of attorneys working on its behalf. *See Fox v. Citicorp*, 15 F.3d 1507, 1516 (9th Cir. 1994); *Scally v. Hilco Receivables, LLC*, 392 F. Supp. 2d 1036, 1039 (N.D. Ill. 2005); C*aron v. Maxwell*, 48 F. Supp. 2d 932, 936 (D. Ariz. 1999); *Alger v. Ganick, O'Brien & Sarin*, 35 F. Supp. 2d 148, 153 (D. Mass. 1999); *Randle v. GC Servs.*, 25 F. Supp. 2d 849, 851 (N.D. Ill. 1998); *Ditty v. CheckRite*, 973 F. Supp. 1320, 1333 (D. Utah 1997); *Farber v. NP Funding II L.P.*, No. CV-96-4322, 1997 U.S. Dist. LEXIS 21245, 1997 WL 913335 (E.D.N.Y. Dec. 9, 1997); *Kimber v. Fed. Fin. Corp.*, *supra*. If the Court adopts the construction favored by Petitioner and rules that it is the conduct and not the violation which must be unintentional, the *bona fide* error defense will not only cease to exist for collection attorneys but for their debt buyer clients also.

3. The defense set forth in 15 U.S.C. 1692k(e) for reliance on FTC opinion letters is illusory.

Petitioner asserts that a *bona fide* legal error defense is completely unnecessary because the FDCPA provides a form of such defense based upon formal FTC opinions. The private remedies Section of the Act, 15 U.S.C. § 1692k provides in pertinent part:

> (e) Advisory opinions of Commission. 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.

In reality, the FTC opinion letter defense does not exist as the FTC has repeatedly refused to issue such opinions. The Federal Trade Commission is the federal agency charged with enforcement of the FDCPA. *See* 15 U.S.C. § 1692l. In the 32 and-a-half years since the FDCPA was enacted the FTC has issued 417 letters in response to requests for opinion letters. *See* http://www.ftc.gov/os/statutes/fdcpajump.sht; Robert J. Hobbs, *Fair Debt Collection, 647-64* (6th ed. 2008). However, only ***four*** of those letters have been formal advisory opinion letters that satisfy the requirements of 15 U.S.C. § 1692k(e) (one of which was obtained by the law firm which is filing this brief). In all other instances the FTC has avoided issuing a formal advisory opinion and issued instead a non-binding statement of

enforcement position which does not give rise to a defense under Section 1692l. Advisory opinions of the FTC are not entitled to deference in FDCPA cases except perhaps to the extent that their logic is persuasive. *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 654 (3d Cir. 1993). *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 399 (6th Cir. 1998); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1513 n.4 (9th Cir. 1994).

The advisory opinion defense is dependent upon the whims of the FTC in deciding whether to issue such an opinion in a particular case and the politics of whether the Commission is willing to issue such opinions generally. Given the fact that in response to over 99% of the requests directed to it the Commission has failed or refused to provide an opinion that satisfies the Section 1692k(e) defense the Court should recognize that Petitioner's argument on this point is disingenuous.

4. Allowing the interpretation favored by Petitioner has the effect of limiting the access of creditors to effective legal representation and to the courts.

As is discussed above the FDCPA is a strict liability statute. In its *amicus curia* brief in *Heintz v. Jenkins*, 514 U.S. 291 (1995) CLLA expressed its concern that the consequence of making attorneys "debt collectors" under the FDCPA is that they would become the strictly liable insurers of the success of their client's cases. The FDCPA forbids misrepresenting the character or amount of a debt, 15 U.S.C. § 1692e(2)(A); therefore, an attorney who fails to secure a judgment for 100% of her client's claim faces the very real danger that she will be sued for misrepresenting the amount of the debt.

In *Heintz* this Court rejected such arguments, stating:

> Many of Heintz's "anomalies" are not particularly anomalous. For example, the Sixth Circuit pointed to § 1692e(5), which forbids a "debt collector" to make any "threat to take action that cannot legally be taken." The court reasoned that, were the Act to apply to litigating activities, this provision automatically would make liable any litigating lawyer who brought, and then lost, a claim against a debtor. *Green, supra*, at 21. 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. In any event, the assumption would seem unnecessary, for we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an "action that cannot legally be taken."

The questions during oral argument in *Heintz* suggested that this Court may have made the mistake of assuming that the lower courts would treat "good

faith" as relevant to the question of a collection attorney's ultimate liability under the FDCPA.

> Justice Breyer: "It would be helpful to me if you could go back to Justice O'Connor's question and list what would be in this chamber of horrors. I mean, I did feel that the brief had quite a few, what you called anomalies, but then when I went through the statute, it didn't seem they were quite so anomalous, and that's why I wonder which—what bad things will happen if it does cover attorneys? For example, the attorney would be liable if it turned out that the debt wasn't real, but there is a good faith exception, I gather, so that the attorney would be liable only when he didn't act in good faith.."

Transcript of Oral Argument for *Heintz v. Jenkins*, 1995 WL 117619, at *16 (Feb. 21, 1995).

However, in the intervening years the intermediate appellate courts have permitted (even created) the absurd results that this Court considered unlikely. In the context of FDCPA litigation courts have rejected well-established common law defense doctrines such as witness immunity,[2] *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006), litigation

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[2] Witness immunity serves the strong public interest in ensuring that witnesses will come forward to testify and that when they do so, they will not shade their testimony or tell less than the whole truth. *See Briscoe v. LaHue,* 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

immunity,[3] *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007), and the *Noerr-Pennington* doctrine.[4] *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606 (6th Cir. 2009); *Sial v. Unifund CCR Partners*, 2008 U.S. Dist. LEXIS 66666, 2008 WL 4079281 (S.D. Cal. 2008). Even communications between attorneys have become the subject of actions permitted by the courts. *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007). The tortured reasoning in *Evory* actually creates liability distinctions for debt collectors based upon how knowledgeable or competent a consumer's attorney is.

Creditors are as entitled to access to the courts as any other litigants. However, access to the courts requires access to legal representation. The elimination

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[3] The common law recognizes that "witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.". *Burns v. Reed*, 500 U.S. 478, 489-90, 111 S. Ct. 1934, 1941, 114 L. Ed. 2d 547, 560 (1991) "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L. Ed. 2d 895, 919 (1978)

[4] The *Noerr-Pennington* doctrine derives from the Petition Clause of the First Amendment. Persons who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

of the aforesaid privileges leaves creditors as a unique class of litigants who are unprotected from the very dangers against which the privileges were intended to protect.

The problems presented by the lack of a *bona fide* legal error defense are most clear when one considers an issue as basic as the statute of limitations to sue on a debt. Case law has consistently held that it is a violation of the FDCPA to sue or threaten to sue on a time-barred debt. *See e.g., Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1488 (M.D. Ala. 1987); *Freyermuth v. Credit Bureau Services*, 248 F.3d 767 (8th Cir. 2001); *Parkis v. Arrow Financial Services, LLS*, 2008 U.S. Dist. LEXIS 1212, 2008 WL 94798, at *7 (N.D. Ill. 2008); *Ramirez v. Palisades Collection LLC*, 2008 U.S. Dist. LEXIS 48722, 2008 WL 2512679, at 5 (N.D. Ill. 2008). However, what is an attorney to do to protect the rights of her client when the statute of limitations on a debt is not certain?

This is not an obscure hypothetical situation. Credit card debts represent a substantial portion of the debts sued upon in the United States, and the majority of the debts purchased by DBA's members. In Georgia, the issue was only recently decided in *Hill v. American Express*, 289 Ga. App. 576; 657 S.E.2d 547 (Ga. App. 2008). In *Hill*, the consumer asserted that a credit card debt had to be treated as an action on an open account which would be subject to the four-year statute of limitations set forth in OCGA § 9-3-25. The creditor's attorney argued that a credit card account was a claim sounding in contract and therefore subject to the six- year statute of limitations set forth in OCGA § 9-3-24.

The Court of Appeals concluded that the position taken by American Express' attorney was the correct one; however, had the case turned out differently, the attorneys representing the creditor would have been subject to a suit under the FDCPA.

The certainty of this assertion can be found by considering the summary judgment rendered by the District Court in *Richburg v. Palisades Collections, LLC*, Civil Action 07-7 (E.D.Pa. Jan. 28, 2007). In *Richburg*, the defendants (a debt buyer and its attorneys) were sued in an FDCPA class action based upon the alleged filing of suits after the expiration of the applicable statute of limitations. The *Richburg* defendants had taken the position that a credit card debt could be sued as an open account (the very position taken by the ***consumer*** in *Hill*), and that such debts were subject to the six-year limitations period provided for in 42 Pa. Con. Stat. Ann. § 5527(b). Richburg argued that a credit card debt must be treated as a contract action subject to the four-year limitations period set forth in 42 Pa. Con. Stat. Ann. § 5525(a)(1)

The District Court in *Richburg* sided with the plaintiff, concluding that the contract statute of limitations applied to the underlying collection efforts. That court held, as a matter of law, that the defendants had violated the FDCPA by filing suit under the account stated theory, even though no appellate court in Pennsylvania had ever determined this limitations issue.

The *Richburg* Court denied the defendants summary judgment on their *bona fide* legal error defense but at least recognized the availability of the

defense, leaving it to the jury to determine if the defense was available. Had that court taken the position asserted by Petitioner the defendants in that case would have been left with no way to seek a determination of the applicable statute of limitations without incurring strict liability under the FDCPA in the event of a loss.[5]

The debt collectors in *Richburg* took the same legal position *vis-à-vis* limitations that the consumer had taken in *Hill*, and the consumer plaintiff in *Richburg* took the same position taken by the debt collector in *Hill*. There is no consequence to the consumer bar for taking inconsistent legal positions in different jurisdictions in order to make law. However, if this Court adopts the position taken by Petitioner then no collection attorney will be able to engage in the same sort of advocacy for his or her client, and no retail creditor will have the ability to secure experienced counsel to advocate for the limitations period which it believes to be correct. Petitioner would create two classes of litigants – consumer debtors, who would have unfettered access to counsel and the courts and retail creditors,

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[5] Credit cards are not the only type of debt for which the statute of limitations has been problematic. In the last forty-five days the United States District Court for the Northern District of Texas ruled on the complex issues inherent in the statute of limitations applicable to to cell phone bills, granting summary judgment to a collection agency and a debt buyer. *Castro v. Collecto, Inc,*, 2009 U.S. Dist. LEXIS 99703 (W.D. Tex. Oct. 27, 2009). Had that court ruled differently, Petitioner's interpretation of the *bona fide* error defense would have left the defendants in *Castro* strictly liable for asserting a legal position where the law was unsettled. Imdeed, that is precisely what the plaintiff Castro attempted to accomplish.

whose access to the courts would be hampered by the chilling effect of strict liability for their attorneys when courts disagree with their legal positions. The role of the attorney as a zealous advocate recognized in ABA Model R. of Prof'l Conduct, Preamble (2004) will cease to exist in collection cases as zealous advocacy will be suppressed by the FDCPA. *How can an attorney zealously advocate when the consequence of being wrong is strict liability for his client's lack of success?* Such a consequence only serves to chill effective legal representation.

Had the intermediate appellate courts heeded this Court's caution in *Heintz* to avoid absurd results this situation might not exist. However, in light of the elimination of witness immunity, litigation immunity, and the *Noerr-Pennington* doctrine as defenses to FDCPA suits creditors and their attorneys must be fearful of incurring liability for individual statutory damages, class statutory damages, mandatory attorney's fee awards, and even possible actual damages merely for arguing unresolved legal positions.

The same exposure would exist for taking positions supported by good-faith arguments for the extension, modification, or reversal of existing law. Petitioner would supplant the right to access to the courts inherent in Fed. R. Civ. P. 11 with a strict liability standard which leaves no room for being the loser in a good-faith dispute over a legal issue. There is no indication in the Act or its history that Congress intended to create a new class of litigants, held to a higher standard than Rule 11, yet simultaneously deprived of long-recognized common law

defenses to liability. This Court should not create such a class by denying recognition of the *bona fide* legal error defense.

CONCLUSION

CLLA and DBA urge that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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