No. 08-1200

In the Supreme Court of the United States

KAREN L. JERMAN,
Petitioner,
v.
CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE OHIO CREDITOR'S ATTORNEYS ASSOCIATION AND THE CALIFORNIA CREDITOR'S BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The Ohio Creditor's Attorney Association (OCAA) and the California Creditor's Bar Association (CCBA) represent the shared interests of their member attorneys and law firms whose primary practice is the collection of consumer debt in Ohio and California, respectively. The OCAA and the CCBA educate members and others on the laws that impact legal practices involving the protection and assertion of creditors' rights. Both groups actively encourage compliance with legislation regulating retail collections, including the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq*. (FDCPA). OCAA and CCBA members engage in consumer debt collection, and their conduct is often subject to challenge in lawsuits under the FDCPA.

Amici curiae OCAA and CCBA urge the Court to affirm the Sixth Circuit's decision and find that the bona fide error (BFE) defense set forth in 15 U.S.C. § 1692k(c) applies to legal errors.

ARGUMENT

A. The FDCPA Bona Fide Error Defense Applies to Legal Errors.

Petitioner and her supporting amici base their arguments on the unsupportable fiction that when enacting the FDCPA, Congress adopted the Truth in Lending Act's (TILA's) BFE defense in total.

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Petitioner also argues Congress adopted a phantom proviso not appearing in the text of the FDCPA, due to judicial interpretations of the pre-amendment version of TILA's BFE defense. There are seven reasons why they are clearly wrong.

1. The Absence of a Proviso Excluding an "Error of Legal Judgment" from the FDCPA's Bona Fide Error Defense Precludes the Inference That a Proviso Was Intended.

Congress knows how and why to draft a proviso. "[T]he office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." *Thaw v. Falls,* 136 U.S. 519, 542 (1890) (quoting *Minis v. U. S.*, 40 U.S. 423, 445 (1841)). The plain language of the FDCPA's BFE defense contains no proviso excluding an "error of legal judgment" from its scope, while TILA's BFE defense does. *Compare* 15 U.S.C. § 1692k(c) *with* 15 U.S.C. § 1640(c).

When Congress intends to limit the BFE defense to exclude legal errors, it does so expressly. *Compare* 12 U.S.C. § 2607(d)(3) (1974) (no proviso) (Pub. L. 93-533, § 8, 88 Stat. 1727 (1974)); 12 U.S.C. § 4010(c)(1) (1987) (proviso); 15 U.S.C. § 1640(c) (1980) (proviso, as amended) (Pub. L. 96-221, 94 Stat. 164 (1980)); 15 U.S.C. § 1692k(c) (1977) (no proviso); 15 U.S.C. § 1693h(c) (1978) (no proviso); 15 U.S.C. § 1693m(c) (1978) (no proviso); *see also Standard Oil Co. v. Federal Energy Administration,* 440 F.Supp. 328, 368, nn. 7, 100 (N.D. Ohio 1977) (quoting

Economic Stabilization Act of 1970, 12 U.S.C. § 1904, note § 210(b) (no proviso)).

Because no proviso appears in 15 U.S.C. § 1692k(c), a "legal error" proviso cannot be implied. *TRW Inc. v. Andrews,* 534 U.S. 19, 28 (2001) (*expressio unius est exclusio alterius*); *accord Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (*in pari materia*); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (rule against superfluities).

2. Petitioner's Argument Ignores Dozens of State Consumer Protection Laws That Adhere to the "Error in Legal Judgment" Proviso Dichotomy.

The Petitioner's argument ignores scores of state consumer protection statutes which have BFE defenses that include an "error in legal judgment" proviso. Uniform laws drafted before and after the FDCPA provide a BFE defense with and without a legal error proviso. *Compare* ULA, Uniform Consumer Sales Practices Act § 9(b)(3),[2] § 11(d)(2)[3] (1970) (without proviso) *with* ULA, Uniform Consumer Leases Act § 504(b)[4] (2002) (with proviso);

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[2] "If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error ... ."

[3] "If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error … ."

[4] "A holder is not liable for statutory damages under Section 501(d) if the holder proves by a preponderance of the evidence that the violation was unintentional and resulted from an error in good faith notwithstanding the maintenance of procedures reasonably adapted to avoid the error. For purposes of this subsection, errors in good faith include clerical errors,

ULA, Uniform Debt-Management Services Act § 35(f)[5] (2005) (with proviso). At present, there are 134 state consumer protection and debt collection statutes that provide a BFE defense deriving from these model acts and various federal statutes:[6] of these, 92 contain no legal error proviso,[7] while 42 expressly exclude legal errors from their scope.[8]

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calculation errors, computer malfunctions and programming errors, but an error of legal judgment with respect to a holder's obligations under this [Act] is not a good faith error."

[5] "A provider is not liable under this section for a violation of this [act] if the provider proves that the violation was not intentional and resulted from a good-faith error notwithstanding the maintenance of procedures reasonably adapted to avoid the error. An error of legal judgment with respect to a provider's obligations under this [act] is not a good-faith error."

[6] These statutes all use the phrase - "bona fide error notwithstanding the maintenance of procedures ...."

[7] Ark. Code Ann. § 17-24-512(c) (Michie 2009); Cal. Bus. & Prof. Code § 10248.2(b) (West 2008); Cal. Civ. Code § 2924e(d) (West 1993); Cal. Civ. Code § 2924i(f)(2) (West 1993); Cal. Civ. Code § 2965 (West 1993); Cal. Civ. Code § 2988.5(d) (West 1993); Cal. Fin. Code § 22751(b) (West 1999); Cal. Fin. Code § 22752(b) (West 1999); Cal. Fin. Code § 23061(b) (West 2009); Cal. Fin. Code § 23062(b) (West 2009); Colo. Rev. Stat. § 5-5-201(6) (2002); Colo. Rev. Stat. § 5-5-202(3) (2002); Colo. Rev. Stat. § 12-14-113(3) (2009); Conn. Gen. Stat. § 36a-648(c) (2008); Fla. Stat. Ann. § 501.207(4) (West 2006); Fla. Stat. Ann. § 559.77 (West 2001); Ga. Code Ann. § 10-1-400 (2009); Haw. Rev. Stat. § 476-21(1984); Idaho Code § 28-45-201(7) (2009); Idaho Code § 63-4011(3) (2009); Ind. Code § 24-4.5-5-203(b)(3) (2006); Ind. Code § 24-5-0.5-3(c) (2006); Ind. Code § 28-9-5-1(b) (1996); Iowa Code § 535B.11(5) (1997); Iowa Code § 537.5201(7) (1997); Iowa Code § 537.5203(3) (1997); Iowa Code § 714H.5(7) (2009); Kan. Stat. Ann. § 16a-5-201(7) (2008); Kan. Stat. Ann. § 16a-5-203(3) (2008); Me. Rev. Stat. Ann. tit. 9-A, § 5-201(8) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 6-108(7) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 6-113(2) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 9-405(7) (West 2009); Me. Rev. Stat. Ann. tit. 10, § 1328(5)

(West 2009); Me. Rev. Stat. Ann. tit. 10, § 1477(2)-(3) (West 2009); Me. Rev. Stat. Ann. tit. 10, § 1490(2) (West 2009); Me. Rev. Stat. Ann. tit. 32, § 11054(3) (West 1998); Me. Rev. Stat. Ann. tit. 33, § 526(2) (West 1999); Md. Code Ann., Com. Law § 12-707(f) (1989); Md. Code Ann., Com. Law § 12-1110(c)(1) (1989); Md. Code Ann., Com. Law § 14-1213 (2006); Mass. Gen. Laws ch. 167B, § 19(c) (2003); Mass. Gen. Laws ch. 167B, § 20(c) (2003) (amended 2008); Mich. Comp. Laws § 14.320(4) (2004); Mich. Comp. Laws § 14.321(6) (2004); Mich. Comp. Laws § 445.910(4) (2002); Mich. Comp. Laws § 445.911(6) (2002); Mich. Comp. Laws § 445.963(4) (2002); Mich. Comp. Laws § 445.964(6) (2002); Mich. Comp. Laws § 550.1211a(10) (2002); Mich. Comp. Laws § 550.1402(11) (2002); Minn. Stat. § 13B.06(d) (2005); Minn. Stat. § 47.59(14)(f) (2009); Mo. Rev. Stat. § 407.100(6) (2001); Mo. Rev. Stat. § 407.1076(1) (2001); Neb. Rev. Stat. § 45-1024(4) (2000); Neb. Rev. Stat. § 45-1039 (2001); Neb. Rev. Stat. § 45-1025(3) (1998); Neb. Rev. Stat. § 45-1058 (2001); Nev. Rev. Stat. § 100.115(3) (2007); N.H. Rev. Stat. Ann. § 361-D:22 (1996); N.Y. Gen. Bus. Law § 396-u(7) (McKinney 1996); N.Y. Real Prop. Law § 265-a(10)(b) (McKinney 2006); N.C. Gen. Stat. § 24-11.1 (1987); N.C. Gen. Stat. § 24-11.2 (1987); Ohio Rev. Code Ann. § 1334.10(D) (Banks-Baldwin 1979); Ohio Rev. Code Ann. § 1345.11(A) (Banks-Baldwin 1978); Okla. Stat. 14A, § 5-202(8) (1969)(amended 2004); Or. Rev. Stat. § 646A.244(2)(a) (2003); 73 Pa. Cons. Stat. § 2270.5(d) (2000); R.I. Gen. Laws § 19-14.9-13(4)(a) (2007); S.C. Code Ann. § 37-5-202(7) (Law Co-op. 1999); S.C. Code Ann. § 37-5-203(3) (Law Co-op. 1996) (amended 2003); S.C. Code Ann. § 37-10-105 (Law Co-op. 1997); S.C. Code Ann. § 40-58-78 (Law Co-op. 2003) (amended 2005); Tex. Fin. Code Ann. § 349.101(a)(1)(B) (West 2006); Utah Code Ann. § 7-17-8(3) (1979); Utah Code Ann. § 13-11-17(2)(d) (2004); Utah Code Ann. § 13-11-19(4)(c) (1995); Vt. Stat. Ann. tit. 9, § 206(b) (2001); Va. Code Ann. § 56-231.34:2(C) (Michie 1999); Va. Code Ann. § 56-231.50:2(C) (Michie 1999); Va. Code Ann. § 56-235.8(G)(7) (Michie 1999); Va. Code Ann. § 56-593(F) (Michie 2000); Va. Code Ann. § 59.1-207 (Michie 1995) (amended 2008); Wis. Stat. § 425.301(3) (2005); Wis. Stat. § 428.106(3) (1973)(amended 2003); Wis. Stat. § 766.56(4)(c) (2009); Wis. Stat. § 812.41(3) (2007); Wyo. Stat. Ann. § 40-14-522 (Michie 1988); *see also* V.I. Code Ann. tit. 12A, § 108(e) (1973).

[8] Ariz. Rev. Stat. § 44-6812(C) (1996); Ark. Code Ann. § 23-53-106(e)(2)(B) (Michie 2003); Cal. Civ. Code § 1812.637(a) (West

The distinction drawn by state legislatures across the country between statutory BFE provisions which expressly reference an error in legal judgment limitation, and those that do not, would be lost if they were all interpreted to mean the same thing. These differences in express statutory language cannot be ignored without concluding the distinction is attributable to widespread legislative inadvertence, assumption or error, rendering the express "error in legal judgment" proviso language superfluous. This

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2009); Cal. Fin. Code § 866.4 (West 1999); Cal. Health & Safety Code § 18036.5(e) (West 2006); Cal. Ins. Code § 12413.1(i) (West 2005); Conn. Gen. Stat. § 36a-683(c) (2004); Conn. Gen. Stat. § 36a-760i(a)(2) (2008); Fla. Stat. Ann. § 494.00796(2) (West 2009); Fla. Stat. Ann. § 559.730 (West 2009); Ga. Code Ann. § 7-6A-9(2) (2009); Haw. Rev. Stat. § 449-4 (1967) (amended 1992); Haw. Rev. Stat. § 480D-4 (1987); 815 Ill. Comp. Stat. 636/75(2) (West 1997); Ky. Rev. Stat. Ann. § 360.100(4)(b) (Banks-Baldwin 2008); Me. Rev. Stat. Ann. tit. 9-A, § 8-206-E(7)(B) (West 2009); Me. Rev. Stat. Ann. tit. 9-A, § 8-208(3) (West 2009); Mass. Gen. Laws ch. 93, § 93(c) (2006); Mass. Gen. Laws ch. 140D, § 32(c) (2002); Mich. Comp. Laws § 445.871a (2002); Mich. Comp. Laws § 445.1641(1) (2002); Mich. Comp. Laws § 445.1862(1) (2002); Mich. Comp. Laws § 484.2506(3) (1998); Mich. Comp. Laws § 484.3314(2) (1998)**;** Mich. Comp. Laws § 491.1119(14) (2005); Miss. Code Ann. § 75-24-173(1) (1995); Nev. Rev. Stat.§ 604A.930(4) (2007); N.H. Rev. Stat. Ann. § 358-P:12(I) (1994); N.J. Stat. Ann. 46:10B-29(c)(2) (West 2009); N.M. Stat. Ann. § 57-26-12 (Michie 1995); N.Y. Banking Law § 6-l(b) (McKinney 2008); N.Y. Gen. Bus. Law § 89-v (McKinney 2004); N.Y. Gen. Bus. Law § 89-hh (McKinney 2004); N.Y. Pers. Prop. Law § 346 (McKinney 2009); N.C. Gen. Stat. § 24-1.1E(e)(2) (1999) (amended 2009); N.C. Gen. Stat. § 24-1.1F (2008) (amended 2009); Ohio Rev. Code Ann. § 1349.30(B) (Banks-Baldwin 2009); Okla. Stat. tit. 14A, § 5-203(3) (1996); Okla. Stat. tit. 59, § 1955(F) (2000); R.I. Gen. Laws § 6-44-9(b) (1989); S.C. Code Ann. § 37-23-85 (Law Co-op. 1976) (amended 2003); Tenn. Code Ann. § 45-20-108(a)(2), (b) (2006).

conclusion flies in the face of the rule against superfluities. *Hibbs v. Winn*, supra.

3. The Legislative History of the FDCPA Demonstrates That Congress Borrowed from Existing State Laws Governing Debt Collection, Not from the TILA.

The FDCPA's legislative history provides evidence that Congress borrowed from existing state law, not from the TILA, when it drafted the FDCPA. *See Debt Collection Practices Act of 1976, Hearings on H.R. 11969 Before the House Comm. on Banking, Currency & Housing,* 94th Cong. (March & April 1976) (hereinafter "*Hearings on H.R. 11969*") pp. 144-55, 183-84 (Statement of John W. Johnson, Model Legislation Exhibits B & C); pp. 230-34 (Statement of Jay I. Ashman); pp. 237-41 (Statement of Joel Weisberg); pp. 252-56 (Statement of Richard Gross); pp. 264-65 (Statement of Thomas Raleigh);[9] pp. 274-75 (Statement of Lewis Goldfarb); *see also* H.R. 10191, 94th Cong. (1975); H.R. 11969, 94th Cong. (1976); H.R. 13720, 94th Cong. (1976); *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation 61 (June 30, 1977) (Mr. Taffer (referring to the general prohibitions in Sections 806, 807): "It is lifted from the West Virginia debt collection law. It is also similar in concept to 14 other state laws which set forth general prohibitions like this.");[10] p. 64 (Senator Riegle: "[A]s was pointed out by counsel, this is patterned after what are thought to be some of the best state laws where

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[9] Stating there were 10 states with laws that had "value to the consumer;" identifying Illinois and Texas, expressly.

[10] *See* W.Va. Code Ann. §§ 46A-2-123 to 46A-2-128 (Michie 1974).

states have moved in to deal with these problems. There are fourteen states who now have these general prohibitions. One of them is the state of New Mexico. One is my own home state of Michigan. This is not a new invention."); William Richard Carroll, *Debt Collection Practices: The Need for Comprehensive Legislation*, 15 Duq. L. Rev. 97, 116 (1976).[11]

Legislation to address extrajudicial debt collection first appeared in state law and federal regulations in the late 1960s and early 1970s.[12] John M. Connolly, *Recent Statutes Regulating Debt Collection, or Nunc, De Minimis Curat Lex*, 14 B.C. Indus. & Com. L. Rev. 1274, 1280-89 (1972-1973) (hereinafter "*Recent Statutes*"); *see also* 16 C.F.R. §§ 237.0-237.6 (1968);[13] *see generally* FTC, *Guide*

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[11] Discussing precursors to H.R. 5294, 95th Cong. (1977) (citing H.R. 10191, 94th Cong. (1975); H.R. 13720, 94th Cong. (1976)).

[12] At common law, wrongful extrajudicial debt collection abuses were actionable under a variety of tort theories. William F. Julavits & Clinton A. Stuntebeck, *Effectively Regulating Extrajudicial Collection of Debts*, 20 Me. L. Rev. 261, 264-73 (1968); Charles E. Hurt, *Debt Collection Torts*, 67 W. Va. L. Rev. 201 (1965); Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. Chi. L. Rev. 572, 579-87 (1956).

[13] The FTC's Debt Collection Deception Guides were promulgated under 15 U.S.C. § 45; the Guides were repealed in 1995 as superseded by the FDCPA. 60 Fed. Reg. 40263-01 (1995); *see Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173 (11th Cir. 1985) (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 n. 29 (Alaska 1980) (citing numerous cases brought by the FTC under the Debt Collection Deception Guides)); *see also, e.g.*, *In the Matter of State Credit Control Bureau, Inc.*, 68 F.T.C. 560 (1965) (outlining a defense to Debt Collection Deception Guides). The FTC viewed the proposed legislation as codifying its prior orders against debt collectors issued under Section 5 of the FTC Act. *Hearings on H.R. 11969*, p. 274.

Against Debt Collection Deception, 71 Com. L.J. 17 (1966). By the time Congress took up consideration of debt collection legislation in the mid 1970s, state debt collection practices statutes were available to and evaluated by Congress. *See* H.R. Rep. No. 95-131, at 2-3 (1977); S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-97 (1977); *see generally Hearings on H.R. 11969.*[14] Early state laws addressing extrajudicial collection were modeled after the National Consumer Act, the Model Consumer Credit Act, and the Model Consumer Debt Collection Fair Practices Act. *Recent Statutes, supra*, at nn. 50-65 (citing Fla. Stat. Ann. §§ 559.55-.78 (West Supp. 1972);[15] Md. Ann. Code art. 83, § 167 (Supp. 1972); Mass. Gen. Laws Ann. ch. 93, §§ 24-28, 49; ch. 93A §§ 9-10 (1972); Wash. Rev. Code §§ 19.16.100-.950, 19.86.090 (1972); Wis. Stat. §§ 427.101-.105, 425.304 (Spec. Pamphlet 1973));[16]

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[14] The state statutes were criticized because they varied in scope and available remedies, and they could not be enforced across state lines. *Hearings on H.R. 11969,* pp. 264-65; Carroll, 15 Duq. L. Rev. at 99-108; Seth D. Shenfield, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. Indus. & Com. L. Rev. 698, 698-700 (1968-69); *Abusive Debt Collection, supra*, 15 Wm. & Mary L. Rev. at 567-78. The objective of these statutes was to identify and ban collection activities that were viewed as unreasonable, impermissible and intolerable at common law, and to thereby codify existing tort law. Carroll, *supra*, 15 Duq. L. Rev. at 114-19; *Abusive Debt Collection, supra*, 15 Wm. & Mary L. Rev. at 581-90.

[15] *See* § 559.77(3) "A person shall not be held liable in any action brought under this section if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

[16] *See* § 425.301(3): "Notwithstanding any other section of chs. 421 to 427, a customer shall not be entitled to recover specific

David F. Maxwell, *Model Consumer Debt Collection Fair Practices Act*, 80 Com. L.J. 184, 184-87 (1975);[17] Robert E. Scott & Diane M. Strickland, *Abusive Debt Collection: A Model Statute for Virginia*, 15 Wm. & Mary L. Rev. 567, 575-77, 594-600 (1973-1974) (hereinafter "*Abusive Debt Collection*"); National Conference of Lawyers & Collection Agencies, *A Model Act to License & Regulate Collection Agencies*, 70 Com. L. J. 38, 38-40 (1965).[18]

Among the state debt collection practices laws in effect prior to adoption of the FDCPA, several included a BFE defense in terms substantively identical to that adopted by Congress when it enacted the FDCPA. *See supra notes* 15-18; *see e.g.* Fla. Stat. Ann. § 559.77(3) (West Supp. 1972) (quoted *supra* n. 15); *Fair Debt Collection Practices Act*: *Hearings on S. 656, S. 918, S. 1130, & H.R. 5294 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing & Urban Affairs*, 95th Cong. (May 12-13, 1977) (hereinafter "*Senate*

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penalties … if the person violating chs. 421 to 427 shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

[17] Section 3 of the Model Act provided: "No person shall be guilty of a violation of this Act if the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such error." Maxwell, *supra*, 80 Com. L.J. at 187.

[18] *See also Central Adjustment Bureau, Inc. v. Gonzales*, 528 S.W.2d 314, 316 (Tex. Civ. App. 1975) (quoting Tex. Rev. Civ. Stat. Ann. art. 5069-11.08 (Supp. 1975) (repealed 1997): "No person shall be guilty of a violation of this Act if the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such error.").

Hearings") (Statement of John B. Conlan, pp. 187-94, 194) (discussing Florida collection law).[19]

There is simply no support in the legislative history that Congress modeled the FDCPA's BFE defense on TILA's BFE defense.

4. Senate Report No. 95-382 Demonstrates That Congress Rejected the TILA Analogy.

The statement appearing in the Senate Report that the BFE defense was to apply to when a debt collector "violates the act in any manner, including with regard to the act's coverage" must be understood in context. S. Rep. No. 95-382, *supra*, at 1, 5. Each of the bills under consideration by Congress contained a substantially similar BFE defense. *Compare Senate Hearings*, *supra*, pp. 625-710 (reprinting S. 656 § 813(c), S. 918 § 813(c), S. 1130 §805(e), & H.R. 5294 § 812(c), all from 95th Cong. (1977)). The three bills

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[19] Legislation containing a BFE defense first appeared in state usury, consumer lending and credit statutes in the 1940s. *See* Barbara A. Curran, *Trends in Consumer Credit Legislation*, 16, 34, 153 (Univ. of Chicago Press 1965) (hereinafter *"Trends"*) (quoting Uniform Small Loan Law §13(c), (7th Draft, 1942); *ibid.* at Charts 1, 5, 140-43 & 172-93 (listing state small loan laws adopting U.S.L.L. §13(c)); *ibid.* at 118 & Chart 27, 361-78 (retail installment sales). Section 13(c) of the Uniform Small Loan Law provided in pertinent part, "[i]f any amount in excess of the charges permitted by this Act is charged, … except as the result of a bona fide error of computation, the contract or loan shall be void ... ." Small loan laws providing a BFE defense were expressly limited by their terms to "…bona fide error[s] in computation ... ." Uniform Small Loan Law § 13(c); *see, e.g., Katsaros v. O. E. Saugstad Co.*, 197 Cal.App.2d 745, 746, (1961) (quoting Cal. Civ. Code § 2982(c), (e); 2983.1); *Dusenberry v. Taylor's*, 325 P.2d 910, 912, n. 3 (Utah 1958) (quoting Title 15-1-2a, subd. B(5), Utah Code Ann.1953); Note, *Prepayments, Refunds and Confusion under the Automobile Sales Act*, 2 Stan. L. Rev. 362, 366 (1950).

introduced in the Senate each provided a BFE defense, however the language of the defense in the Senate versions differed from the House versions in one respect – the last clause of the defense required "the maintenance of procedures reasonably adapted to assure compliance." S. 918, §813(c) (emphasis added); S. 656 §813(c); S. 1130 §805(c). This language is similar to the defense provided in the Fair Credit Reporting Act, 15 U.S.C. §§ 1681d(c), 1681m(c).

Congressman Annunzio testified and offered a statement in support of the House Bill, stating his view that the BFE defense was intended to ensure that "there is no liability under the civil liability section for good faith unintentional violations." *Senate Hearings, supra*, 16-28, 19 (Statement of Frank Annunzio).[20] In addition, the American Retail Federation (ARF) was asked:

> Both you and Senator Garn mentioned that the civil liabilities sections of these bills will serve as a tool for harassment. Why are you not protected, as Congressman Annunzio claims, by the provisions of the bills that excuse unintentional violations?

*Senate Hearing*s, *supra*, 201-02 (Statement of Julia Boyd).

In response, ARF prophesied that the BFE defense could be construed as limited to clerical

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[20] *See also Hearings on H.R. 11969,* at pp. 255-56 (Statement of Richard Gross). The bills were also criticized because of criminal penalties, regulatory costs, vagueness, due process, and First Amendment concerns. *Senate Hearings, supra*, 179-87, 185 (Statement of Congressman Charles E. Wiggins).

errors, as the TILA BFE had been, and not protect "against errors in interpreting the meaning of the legislation." *Id.* at pp. 202 (citing cases holding § 130(c) of TILA was limited to clerical errors).

During the markup session, the following discussion took place:

> The Chairman: I think Mr. Abshire would like to comment.
> Mr. Abshire: The problem under Truth in Lending with this section, which is fairly similar, (C), on page 19, has been that the courts have construed that as only protecting against a mathematical error. Now it would be helpful if - as I gather this is not Senator Riegle's intention here - that this go beyond that - that the legislative history of this bill show that this section in debt collection is intended to go beyond that and allow the court discretion to dismiss a violation where it was a technical error.
> Senator Riegle: Lew, why don't you respond to this before I do?
> Mr. Taffer: Well, the wording of the section I think is quite clear that it would apply to *any violation of the act which was unintentional*. In the truth in lending it refers to clerical errors, but that's only because of the nature of truth in lending. We have a different type of statute here.

> The Chairman: **So it's not simply a mathematical error but any bona fide error without intent**?
> Mr. Taffer: That's correct.

Senate Comm. on Banking, Housing & Urban Affairs, Markup on Debt Collection Legislation 20-21 (July 26, 1977) (emphasis added).

Had the Senate endorsed the view expressed by ARF that the BFE defense would be narrowly construed in the same manner as TILA, it certainly could have said so. Instead, the Senate Report endorsed the view presented by Congressman Annunzio and expressly rejected the notion that the BFE defense would not apply to "errors in interpreting the meaning of the legislation," by stating that the BFE defense was available when a debt collector "violates the act in any manner, including with regard to the act's coverage" when the violation was "unintentional and occurred despite procedures designed to avoid such violations." S. Rep. No. 95-382, *supra*, at 5.

a. Legislation *in pari materia* supports the view that Congress intended the FDCPA BFE defense to be construed independently of TILA. Congress has amended TILA's § 1640 several times, including in 1976 when it added Part E to the Consumer Credit Protection Act, Consumer Leasing Act of 1976, Pub. L. 94-240, 90 Stat. 257 (1976). *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 55 (2004). Rather than restate remedies and defenses to claimed violations of the Consumer Leasing Act in a separate section, Congress amended TILA to provide that Consumer Leasing Act violations were subject to the same remedies and

defenses available under TILA. *Id.*; *see* 15 U.S.C. § 1640(a), as amended.[21]

If Congress wanted to provide a consumer with TILA remedies and defenses for a violation of the FDCPA, it could have done so in the same manner it utilized when enacting the Consumer Leasing Act in 1976. Instead, the legislative history shows that Congress intended the FDCPA BFE defense to depart from prior interpretations of TILA's BFE defense and to apply to errors of law.[22]

5. The Availability of a Good Faith Legal Error Inclusive BFE Defense Will Not Thwart the FDCPA Policy of Consumer Protection.

When TILA was enacted in 1968, it provided consumers with a right of rescission for non-disclosure under 15 U.S.C. § 1635, along with an action for damages as a remedy for any other form of non-compliance under 15 U.S.C. § 1640. TILA provided that states could obtain an exemption as long as state law provided substantially similar consumer protection. 15 U.S.C. § 1633. Oklahoma was one of seven states to seek an exemption from TILA by adopting the 1968 version of the Uniform Consumer Credit Code (UCCC), drafted by the National Conference of Commissioners on Uniform

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[21] "Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, *including any requirement under section 1635 of this Title, subsection (f) or (g) of section 1641 of this Title, or part D or E of this subchapter ...* .") (emphasis added); *see also* 15 U.S.C. § 1667d (1980).

[22] *See generally Hearings on H.R. 11969, supra;* S. Rep. No. 95-382, *supra*, at 2; H.R. Rep. No. 95-131, at 3 (1977).

State Laws.[23] Like TILA, the UCCC provided consumers with a right of rescission under UCCC section 5.202 and a right of action for damages under section 5.203, both of which were subject to a BFE defense. UCCC §§ 5.202(7), 5.203(3). Section 1640 was expressly amended to restrict the BFE defense to clerical errors in 1980.[24] Pub. L. 96-221, Title VI, § 615, 94 Stat. 180 (1980); S. Rep. No. 96-368, at 31-32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 267-268. "In 1982 the Oklahoma legislature amended section 5-203(3) [but not 5-202(7)] to follow an identical amendment to the BFE defense contained in [TILA], 15 U.S.C. § 1640 (1982)." *Rea v. Wichita Mortg. Corp.,* 747 F.2d 567, 574-75 (10th Cir. 1984). The Tenth Circuit was confronted with two BFE defenses, one of which was limited expressly to clerical errors, the other was not. *Id.* The Appellants argued that the absence of a clerical error limitation in section 5-202(7) meant that an error in legal judgment could constitute a bona fide error within the meaning of that section, while the Appellees argued errors in legal judgment were not included, as a result of the amendment to section 5-203(3), and settled interpretations of 15 U.S.C § 1640. *Rea*, *supra*, 747

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[23] *See* ULA, Consumer Credit Code (1968) refs. & annots. (citing Colo. Rev. Stat. §§ 5-1-101 to 5-9-10; Ind. Code §§ 24-4.5-1-101 to 24-4.5-7-414; S.C. Code Ann. §§ 37-1-101 to 37-6-415; Utah Code Ann. §§ 70C-1-101 to 70C-9-102; Wis. Stat. §§ 421.101-427.105; Wyo. Stat. Ann. §§ 40-14-101 to 40-14-702).

[24] At the same time, Congress enlarged the time for voluntary correction of errors from 15 days to 60 days, and limited creditor liability under TILA to those material nondisclosures that were, in fact, detrimentally relied on by consumers, with the intent of eliminating technical violations as a source for TILA liability. S. Rep. No. 96-368, at 31-32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 267-268.

F.2d at 575. Siding with Appellants, the Court observed:

> To begin with, we find it controlling that the Oklahoma legislature expressly amended section 5-203(3) so as to preclude bona fide legal error as a defense, and at the same time left section 5-202(7) untouched. In the absence of any evidence or authority to the contrary, we are unwilling to attribute this simply to legislative inadvertence or error. … By negative inference, … errors [in legal judgment] may be a defense where other types of UCCC violations are concerned and section 5-202(7) is applicable.

Id. at 575; *see also Johnson v. Riddle*, 305 F.3d 1107, 1122-23 (10th Cir. 2002) (quoting *Jenkins v. Heintz*, 124 F.3d 824, 832 n. 7 (7th Cir. 1997)).

The *Rea* Court noted that the 1982 amendment to section 1640 was intended to settle a conflict in interpretations, with "the weight of authority apparently supported the views espoused in *Ratner v. Chemical Bank*, 329 F.Supp. 270 (S.D.N.Y. 1971) ... that 15 U.S.C. § 1640(c) applied only to clerical types of errors." 747 F.2d at 575, n. 8. Addressing *Ratner's* observation that ignorance of or mistakes about the law are no excuse, the *Rea* Court observed:

> [R]eliance on the advice of legal counsel is recognized as a valid defense in both civil and criminal contexts. While such reliance is not an

> absolute defense, it is a factor to be considered in determining a defendant's good faith, willfulness, or illegal intent ….
> Because reliance on advice of legal counsel may be relevant to a creditor's good faith, we hold that such reliance is within the scope of the section 5-202(7) defense.

747 F.2d at 576.

Rejecting the argument that permitting legal errors to underlie BFE defenses was contrary to the consumer protection aims of the UCCC, the *Rea* Court held:

> We do not believe that the availability of good faith legal error as a defense will serve to thwart the policy of consumer protection that underlies the UCCC. Any creditor attempting to use this affirmative defense must establish good faith error by a preponderance of the evidence. *See* Okla. Stat. tit. 14A, § 5-202(7). In addition, where, as in this case, the error is predicated upon reliance on legal advice, a creditor must show that such reliance was reasonable under the circumstances.

Id. at 576 (collecting cases).

This Court should follow the reasoning of the *Rea* Court that including legal errors within the scope of the FDCPA's BFE defense does not undercut consumer protection public policies.

6. The Common Law Origin and Use of the Phrase *Bona Fide* Error Included Errors of Legal Judgment.

The common law origin and use of the phrase *bona fide* error also supports the notion that the phrase was intended to include errors of legal judgment. "[A] common law term in a statute comes with a common law meaning, absent anything pointing another way ... ." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58 (2007). Referring to an error which was "bona fide," this Court observed in *Stewart v. Sonneborn*, 98 U.S. 187, 196 (1878) (involving a malicious prosecution claim): "These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide* upon legal advice, their defence is perfect." There is no basis to argue that Congress was unaware that the common law interpretation of a "bona fide" error included an error in law as observed by the Court in *Stewart*. Indeed, the failure to set forth an express exclusion of legal errors supports the conclusion that Congress did understand that at common law, a bona fide error included legal errors as well.

7. Allowing a Bona Fide Error to Include an "Error of Legal Judgment" Is Consistent with Congressional Intent.

When the FDCPA is read as a whole, permitting the BFE defense to be premised on a good faith error in legal judgment is consistent with the purpose and scope of the Act. The FDCPA provides that the BFE defense can be raised "in any action brought under" the FDCPA for a failure to comply with any provision of the FDCPA. 15 U.S.C. § 1692k(c). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some

indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831, 835-36 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Courts have addressed many FDCPA cases that arise from errors involving the exercise of legal judgment, alone or as a mixed question of law and fact. There is no reason to conclude that when Congress said the BFE defense can be raised in "any" action, it really meant that it could not be raised in any of these myriad of actions.

a. In recent years, Courts have found everything penned by lawyers in litigation to be actionable under the FDCPA, including summons;[25] pleadings, affidavits, forms and attachments;[26] motions;[27] interrogatories, admissions and deposition notices;[28] and writs of garnishment.[29] Courts have reasoned that since *Heintz v. Jenkins*, 514 U.S. 291 (1995) found the Act contained no implied exception

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[25] *Senftle v. Landau*, 390 F.Supp.2d 463, 472 (D. Md. 2005); *Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F.Supp.2d 1070, 1080-81, n. 7 (S.D. Ind. 2002).

[26] *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 612-14 (6th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 534 F.Supp.2d 772, 776 (S.D. Ohio 2008); *Gionis v. Javitch, Block & Rathbone, LLP*, 405 F.Supp.2d 856, 864-68 (S.D. Ohio 2005), *aff'd* 238 Fed.Appx. 24 (6th Cir. 2007), *cert. denied* 128 S.Ct. 1259 (2008).

[27] *Riley v. Giguiere*, 631 F.Supp.2d 1295, 1304-05 (E.D. Cal. 2009).

[28] *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 227 (4th Cir. 2007); *McCollough v. Johnson, Rodenberg & Lauinger*, 610 F.Supp.2d 1247, 1255-56, (D. Mont. 2009).

[29] *Lee v. Javitch, Block & Rathbone, LLP*, 522 F.Supp.2d 945, 953-54 (S.D. Ohio 2007); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 395 (S.D. Ohio 2008); *Gallagher v. Gurstel, Staloch & Chargo, P.A.*, No. 08-CV-1189 (PJS/RLE), -- F.Supp.2d --, 2009 WL 2337130, *5-6 (D. Minn. July 29, 2009).

for litigation attorneys, by necessity, all collection litigation is regulated by the FDCPA, subject only to the BFE defense. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230-31 (4th Cir. 2007); *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 615-16 (6th Cir. 2009).

b. Under the FDCPA, 15 U.S.C. § 1692i requires a lawsuit to be filed in a "judicial district" where the consumer resides when the action was commenced or where the contract was signed. *See* 15 U.S.C. § 1692i(a)(2)(A),(B); *see also* S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699;[30] *Hester v. Graham, Bright & Smith, P.C.*, 289 Fed.Appx. 35, 37 (5th Cir. 2008); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1511 (9th Cir.

[30] Throughout the 1970s, the FTC pursued claims against creditors under the FTC Act for "forum abuse," that is, the practice of collecting allegedly defaulted debts by filing lawsuits in forums far distant from the consumer's residence. Alan K. Chen, *Due Process as Consumer Protection: State Remedies for Distant Forum Abuse*, 20 Akron L. Rev. 9, 10-20 (1986). FTC Staff Report on Debt Collection Hearings (April 1973), *quoted in In re Spiegel, Inc.*, 86 F.T.C. 425, 441-43 (1975). The FTC developed its "fair venue standards" to combat this practice, and ordered violating companies to "cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon." *Spiegel v. FTC*, 540 F.2d 287, 290 (7th Cir. 1976); *accord In the Matter of Montgomery Ward & Co., Inc.*, 84 F.T.C. 1337 (1974); *In the Matter of West Coast Credit Corp.*, 84 F.T.C. 1328 (1974); *In the Matter of New Rapids Carpet Center*, 90 F.T.C. 64 (1977); *In the Matter of State Credit Association, Inc.*, 86 F.T.C. 502 (1975); *In the Matter of Commercial Service Co., Inc.*, 86 F.T.C. 467 (1975). When it enacted Section 1692i of the FDCPA, Congress intended to "adopt[] the 'fair venue standards' developed by the Federal Trade Commission." S. Rep. No. 95- 382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

1994). Failure to file suit in the correct court constitutes noncompliance with the FDCPA. *See, e.g.*, *Canady v. Wisenbaker Law Offices, P.C.*, 372 F.Supp.2d 1379, 1384 (N.D. Ga. 2005). Courts have recognized that picking the correct venue involves a mixed question of law and fact, to which the BFE defense applies. *See Chrysler Financial Co. v. Bergstrom*, 703 N.W.2d 415, 417-23 (Iowa 2005).[31]

c. Sections 1692e(2)(A), 1692f(1) of the FDCPA prohibit the false representation of "the character, amount, or legal status of any debt" and "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 995 (7th Cir. 2003); *Johnson*, *supra*, 305 F.3d at 1117-18. If the debt collector attempts to collect an amount before the right to a fee accrues; if state law prohibits the collection of fees, or if the amount sought is a fixed sum as opposed to a reasonable sum, the attempt to do so could violate 15 U.S.C. sections 1692e, 1692e(2)(A), (5), (10), as well as 1692f and 1692f(1). *See Gathuru v. Credit Control Services, Inc.*, 623 F.Supp.2d 113, 117-21 (D. Mass. 2009); *Gionis v. Javitch, Block & Rathbone, LLP*, 405 F.Supp.2d 856, 864-65 (S.D. Ohio 2005), *aff'd* 238 Fed.Appx. 24 (6th Cir. 2007), *cert. denied* 128 S.Ct. 1259 (2008); *Som v. Daniels Law Offices, P.C.*, 573 F.Supp.2d 349, 358, (D. Mass. 2008). Evaluation of the debt, the governing agreement and state law made in an effort to comply

[31] Construing Iowa Code § 537.5201(7) (modeled after the 1974 version of the UCCC).

with sections 1692e(2)(A) and 1692f(1) is not clerical – it is substantively legal, and the BFE defense must apply to the action. *See Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 770 (8th Cir. 2001); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000).

d. Similarly, courts have held that filing a lawsuit subject to any affirmative defense can violate 15 U.S.C. sections 1692e, 1692e(2)(A), (5), (10), as well as 1692f and 1692f(1). *See* Fed. R. Civ. P. 8(c)(1); *see, e.g., Turner v. J.V.D.B. & Associates, Inc.*, 202 Fed.Appx. 123, 125 (7th Cir. 2006) (bankruptcy); *Pincus v. Law Offices of Erskine & Fleisher*, 617 F.Supp.2d 1265, 1267-70 (S.D. Fla. 2009) (estoppel); *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1276-77 (M.D. Fla. 2008) (statute of limitations); *Conner v. Howe,* 344 F.Supp.2d 1164, 1173 (S.D. Ind. 2004) (illegality); *Eckert v. LVNV Funding LLC*, No. 4:08CV01802(ERW), -- F.Supp.2d --, 2009 WL 2253518, *5 (E.D. Mo. July 28, 2009) (uncredited payment). Courts have also held that filing suit and seeking more than a debtor is legally obligated to pay, violates the FDCPA. *See Eckert v. LVNV Funding LLC*, supra at *5.

e. The FDCPA prohibits a debt collector from making a "representation … that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person **unless such action is lawful** and the debt collector or creditor intends to take such action." 15 U.S.C. §1692e(4) (emphasis added). Similarly, the FDCPA forbids a debt collector from threatening "to take any action that **cannot legally be taken** or that is not

intended to be taken." 15 U.S.C. § 1692e(5) (emphasis added.) These sections require the exercise of legal judgment. *Compare Guidry v. Clare*, 442 F.Supp.2d 282, 290 (E.D. Va. 2006) *with Gradisher v. Check Enforcement Unit, Inc.*, 210 F.Supp.2d 907, 917 (W.D. Mich. 2002).

f. The FDCPA prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." 15 U.S.C. §1692f(6). Making the determination that property is subject to an enforceable security interest, that it can be repossessed, and that it is not subject to any exemption at law involves legal decision-making. *Krajewski v. American Honda Finance Corp.*, 557 F.Supp.2d 596, 601, 604-05, 618 (E.D. Pa. 2008).

If a lawyer can be held liable in an FDCPA action for these traditionally legal activities (that cannot be performed by those without a law license), then the BFE defense must be read to include "errors in legal judgment." J. Flaccus, *Fair Debt Collection Practices Act: Lawyers And The Bona Fide Error Defense*, 2001 Ark. L. Notes 95, 96-103. Otherwise, courts are crafting a nonexistent exception to the statutory language of the BFE defense, limiting its application from "*any*" claim to something significantly less than "*any*" claim.

B. Framework for Evaluating Whether a Legal Error Was the Result of a Bona Fide Error.

Three elements are required to establish the BFE defense: (1) an unintentional violation; (2) a bona fide error and (3) maintenance of procedures reasonably adapted to avoid "any such error." 15 U.S.C. §1692k(c); *Johnson*, *supra*, 305 F.3d at 1121.

Circuit decisions have uniformly held the first prong has a subjective focus, and requires only a negation of specific intent to violate the FDCPA. *Johnson v. Riddle*, 443 F.3d. 723, 728 (10th Cir. 2006); *Lewis v. ACB Bus. Serv., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir. 2005).

Regarding the second element, a "bona fide error", is one "made in good faith; a genuine mistake, as opposed to a contrived mistake." *Kort, supra,*, 394 F.3d at 538. In light of the types of errors that the FDCPA addresses, "whether the debt collector's mistake was bona fide will often turn on the debt collector's due diligence practices." *Johnson, supra,* 443 F.3d at 729. As applied to legal errors, only attorneys "may make a core legal decision as to whether a particular practice is permitted by law. Thus, in order for … [a legal] mistake to have been bona fide … [the attorney] must have employed procedures to avoid committing an error, and those procedures must have been reasonably adapted to avoiding the core legal error that occurred." *Johnson*, *supra*, 443 F.3d. at 723-30.

Exercising legal judgment in the course of collecting debt so as to avoid violating the law, is no less a 'procedure reasonably adapted' because it is performed by an attorney, rather than a computer.

Well-established frameworks for evaluating whether an attorney acted in "good faith" exist under Section 1983's qualified immunity "clearly established law" standard, in criminal cases to negate unlawful intent, in tort proceedings involving legal malpractice, and under Fed.R.Civ. P. Rule 11. Each is addressed in turn.

1. The "Clearly Established Law" Standard under 42 U.S.C. Section 1983.

Under 42 U.S.C. section 1983, government actors are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

> The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." ...
> This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." ...
> In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for

> picking the losing side of the controversy." 526 U.S., at 618, 119 S.Ct. 1692. Likewise, here, where the divergence of views … was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

Pearson, *supra*, 129 S.Ct. at 822 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) and *Wilson v. Layne*, 526 U.S. 603, 614, 618 (1999)); *see also* Flaccus, *supra*, 2001 Ark. L. Notes at 96-103.

The "clearly established law" standard requires precedent from the U.S. Supreme Court, the controlling circuit, the highest court in the state; "a consensus of cases of persuasive authority" from other jurisdictions, or in the absence of controlling precedent, where the conduct is obviously unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999). A conflict in the lower courts is a strong indication that the law was not clearly established. *Wilson*, *supra*, 526 U.S. at 617-18.

The BFE defense involves a balancing of interests similar to those involved in the qualified immunity context; debt collectors must be permitted to proceed lawfully when seeking to collect money due from a consumer, but they should be held accountable if they exercise their power unreasonably. *Pearson v. Callahan*, 129 S.Ct. 808, 815.

Unlike the qualified immunity doctrine, the BFE defense does not provide an immunity from suit; it is only a defense to liability. Thus, using the

"clearly established law" standard in assessing the BFE defense under the FDCPA, would not alter the framework established by Congress.

2. Advice of Counsel Used to Negate Specific Intent.

Federal Circuit Courts recognize that a mistaken view of the law's requirements premised on the advice of counsel can be used to negate a specific intent required as an element of a criminal offense. *See, e.g., United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States. v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006); *United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005); *United States v. West,* 392 F.3d 450, 457 (D.C. Cir. 2004); *United States v. Petrie*, 302 F.3d 1280, 1287 (11th Cir. 2002); *United States v. Smith*, 7 Fed.Appx. 772, *1 (9th Cir. 2001); *United States v. Polytarides*, 584 F.2d 1350, 1352-53 (4th Cir. 1978). In this context, good faith is made out when a defendant shows:

> (1) before taking action, (2) he in good faith sought advice of attorney whom he considered competent, (3) for purpose of securing advice on lawfulness of his possible future conduct, (4) and made full and accurate report to his attorney of all material facts which defendant knew, (5) and acted strictly in accordance with advice that his attorney gave after receiving this full report.

Van Allen, *supra*, 524 F.3d at 823 (quoting *United States v. Al-Shahin*, 474 F.3d 941, 947 (7th Cir. 2007)).

As in the cited criminal cases, the first prong of the BFE defense has an intentional element. *See, e.g.*, *Johnson*, *supra*, 443 F.3d at 728. Similarly, the reasoning behind applying an advice of counsel defense in the criminal context is equally applicable in the context of FDCPA violations.

3. The Legal Malpractice Standard.

In the legal malpractice context, when an attorney makes a mistake which is the result of an honest exercise of professional judgment, no liability attaches so long as the attorney "acts with a proper degree of skill, and with reasonable care and to the best of his knowledge." *National Sav. Bank v. Ward*, 100 U.S. 195, 198 (1879); *see, e.g.*, *Kirsch v. Duryea*, 578 P.2d 935, 938 (Cal. 1978); *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 665-66 (D.C. 2009).

> An attorney is not liable for an error of judgment regarding an "unsettled proposition of law" and that if "reasonable attorneys could differ with respect to the legal issues presented, the second-guessing after the fact of ... professional judgment [i]s not a sufficient foundation for a legal malpractice claim." … The law is not static, it ever-evolves and changes, and so "[b]ecause of those concerns, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized."

Biomet Inc., *supra*, 967 A.2d at 665-66 (citations

omitted); *compare* 7 Am. Jur. 2d *Attorneys at Law* § 208 (2009) *with In re TCW/Camil Holding L.L.C.*, 330 B.R. 117, 128-29 (D. Del. 2005); *see also* Restatement (Second) of Torts § 666 (1977) (good faith reliance on advice of counsel is available as a defense to malicious prosecution).

The sound public policy underpinnings of this legal malpractice defense, sometimes referred to as the "attorney judgment rule," are equally applicable in the FDCPA context. Collection attorneys have duties to their client to assert legally tenable positions. And yet, if those positions are ultimately rejected by the Court, the collection attorney can face FDCPA liability. This Court recognized this critical issue in *Heintz v. Jenkins*, but ultimately determined that the BFE defense would prevent such anomalies. *Heintz*, 514 U.S. at 295-96.

4. The Rule 11 Standard.

Rule 11 also provides a framework established by this Court and approved by Congress that balances the competing needs of advocates, the judicial system and adversaries. *See* Fed. R. Civ. P. 11. An attorney's duty of inquiry required by Rule 11 and its state counterparts is measured by an objective "reasonableness under the circumstances" standard. *See Napier v. Thirty or More Unidentified Agents*, 855 F.2d 1080, 1090-91 (3d Cir. 1988); *see also* Advisory Committee on Rules, 1983 Amendment, Fed. R. Civ. P. 11, *reprinted in* 97 F.R.D. 165, 199. In applying this standard, the "court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." 97 F.R.D. 165, 199; *accord Cooter & Gell v. Hartmarx*

Corp., 496 U.S. 384, 393 (1990); *see also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 542-43 (1991).

This same balance between the competing interests of advocates, the judicial system, and adversaries can only be achieved in the context of FDCPA actions if the BFE defense applies to legal errors. In the absence of a robust BFE defense, collection attorneys will be repeatedly torn between their fiduciary duties to the clients and duties to their client's adversaries created by the FDCPA.

5. Integrated "Reasonable Under the Circumstances" Standard.

In light of the foregoing, an objective test, considering what was reasonable for an attorney to believe at the time and under the circumstances, would be a proper test for evaluating good faith mistakes of law, mistakes of fact, or mistakes based on mixed questions of law and fact. This would be entirely consistent with the intent of the FDCPA. *See, e.g., Charbonneau v. Mary Jane Elliott, P.C.*, 611 F.Supp.2d 736, 743 (E.D. Mich. 2009); *Kirk v. Gobel,* 622 F.Supp.2d 1039, 1049 (E.D. Wash. 2009).

In making the determination in this case, a reasonable person in respondents' position would not have known or have been able to predict how the Sixth Circuit would rule on the question in the face of a circuit conflict. It would be improper to expose respondents to money damages for "picking the losing side of the controversy." *Pearson v. Callahan*, 129 S.Ct. 808, 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614, 618); *compare Hope v. Pelzer*, 536 U.S. 730, 741 (2002). It is hard to imagine that Congress intended debt collectors to send one form of letter to people in the Third Circuit, following the holding in

Graziano and another form of notice in the Ninth Circuit because the holding under *Camacho* requires a different notice.

Because there is no indication that Congress believed debt collectors or their attorneys were endowed with prescience, amici OCAA and CCBA urge the Court to affirm the Sixth Circuit's decision and find that the BFE defense applies to legal errors, and that a debt collector may avoid liability under the FDCPA's BFE defense by showing the law on the subject in controversy was not clearly established.

CONCLUSION

The judgment below should be affirmed. Congress did not mean to impose liability on debt collectors who do not correctly anticipate the ultimate resolution of issues that have divided the federal courts in ways that could trigger strict liability in either direction. Nor did Congress intend to chill a collection attorney's representation of his client because of the potential for liability under the FDPCA.

Respectfully Submitted,

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