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.

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As Required by Rule 33.1(h)

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NO. 08-1200

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

BRIEF OF AMERICAN LEGAL AND FINANCIAL NETWORK (AFN) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE [1]

The American Legal and Financial Network, (the "AFN") is a national not for profit corporation whose membership consists of attorneys and other professionals representing residential mortgage banking institutions and loan servicers across the United States. The AFN's mission is to serve the legal and residential mortgage banking industry through leadership, education and professional development. The AFN seeks to educate its members, and others in our industry, on the laws, rules and regulations which impact creditor's rights.

This organization actively encourages responsible and appropriate legislation affecting actions to collect sums owed under residential mortgage loans in default. Since the AFN's members engage in consumer debt collection, their actions are regulated by the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (FDCPA), as well as numerous other federal and state statutes. Accordingly, the AFN and its membership have a substantial interest in the outcome of the decision of this Court.

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[1] Pursuant to Rule 37.6, *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members or its counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Both the FDCPA and the Truth in Lending Act (TILA) authorize a defense based on a bona fide error. However, TILA expressly provides that a bona fide error does not include an error of legal judgment. This exclusion does not appear in the FDCPA and may not be added to the FDCPA by the courts. In essence, the petitioner seeks to impose liability on debt collectors by asking this Court to graft provisions of TILA on to the FDCPA.

An increasing number of courts have reviewed this issue and concluded that a bona fide error under the FDCPA, may include a mistake of law.

The petitioner argues that ignorance of the law is rarely a defense. This argument mischaracterizes the bona fide error defense. The cliché, ignorance of the law is not an excuse, has no applicability.

The bona fide error defense also requires that the error occurred despite the maintenance of procedures reasonably adapted to avoid any such error. The respondents amply demonstrated sufficient procedures designed to avoid such errors.

ARGUMENT

I. AN INCREASING NUMBER OF CASES HAVE CONCLUDED THAT THE BONA FIDE ERROR DEFENSE, UNDER THE FDCPA, INCLUDES MISTAKES OF LAW

In earlier decisions, some courts held that the bona fide error defense did not include mistakes of law. *See* e.g., *Pipiles v. Credit Bureau of Lockport, Inc.,* 886 F.2d 22 (2nd Cir. 1989); *Baker v. G.C. Servs. Corp*., 677 F.2d 775 (9th Cir. 1982). However, the growing trend is to find that a mistake of law can qualify as a bona fide error. *See Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002).

Jerman v. Carlisle, 502 F. Supp. 2d 686 at 694 (N.D. Ohio, 2007) is typical of this trend. The court stated:

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any 'error' that is 'bona fide.' We find no indication in the legislative history that Congress intended this broad language to mean anything other than what it says.

See also *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009); *Miller v. Javitch, Blockand Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Johnson v. Riddle* (Johnson II) 443 F.3d 723 (10th Cir. 2006) (applying bona fide error defense to mistakes of law); *Johnson v. Riddle*, (Johnson I) 305 F.3d 1107 (10th Cir. 2002) (same); *Castro v. Collecto,*

Inc., NO. EP-08-CA-215-FM, 2009 WL 3617557 (W.D. Texas, October 27, 2009) (applying bona fide error defense to mistakes of law); *Gaisser v. Porfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297 (S.D. Fla. 2009); *Midland Funding LLC v. Brent*, No. 3:08 CV 1434, 2009 WL 2437243 (N.D. Ohio Aug. 11, 2009). *Brazier v. Law Offices of Mitchell N. Kay*, No. 8:08-cv-156-t-17 MAP, 2009 WL 764161 (M.D. Fla. March 19, 2009); *Pincus v. Law Offices of Erskine and Fleischer*, No.: 8:81357-CIV, 2009, 2009 WL 2244215 (S.D. Fla. July 29, 2009); *McCorriston v. L.W.T., Inc*., 536 F. Supp 2d 1268 (M.D. Fla. 2008); *Pescatrice v. Orovitz*, 539 F. Supp. 2d 1375 (S.D. Fla. 2008); *Lee v. Javitch, Block & Rathbone, LLP*, No. 1:06-CV-585, 2007 WL 4591961 (Dec. 28, 2007); *Kelly v. Great Seneca Financial Corp*., 443 F. Supp. 2d 954 (S.D. Ohio 2005); *Delawder v. Platinum Fin. Serv. Corp*., 443 F. Supp. 2d 942 (S.D. Ohio 2005); *Rosado v. Taylor* , 324 F. Supp. 2d 917 (N.D. Ind. 2004) (FDCPA should not be compared to TILA because it does not contain the same language); *Frye v. Bowman, Heintz, Boscia, Vician, P.C*., 193 F. Supp. 2d 1070 (S. D. Ind. 2002) (TILA provisions concerning bona fide error defense do not apply to FDCPA analysis); *Filsinger v. Upton, Cohen & Slamowitz*, No. 99-CV-1393, 2000 WL 19822 (N.D.N.Y. Feb. 18, 2000) (nothing in plain language limits the defense to clerical errors); *Countryman v. Solomon and Solomon*, No. 99-CV-1548, 2000 WL 156837 (W.D.N.Y. February 8, 2000)(same); *Pollice v. National Tax Funding, L.P*., 59 F. Supp. 2d 474 (W.D. Pa. 1999) (overruled in part on other grounds) ; *Watkins v. Peterson Ent*., 57 F. Supp. 2d 1102 (E.D. Wash. 1999) (debt collector's mistake of law

arose from an official interpretation of state law, to which the court applied the bona fide error defense); *Aronson v. Commercial Financial Services, Inc.*, No. CIV. A. 96-2113, 1997 WL 1038818 (W.D. Pa. December 22, 1997) (violation of FDCPA was mistake of law that was not intentional and resulted from bona fide error).

In *Johnson I*, 305 F.3d 1107 (10th Cir. 2002), the Tenth Circuit engaged in extensive analysis of this issue and held that, unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. The *Johnson* court also noted that, if mistakes of law were not protected by the bona fide error defense, ethical duties of zealous advocacy could result in debt collecting lawyers asserting claims that would expose them to FDCPA liability. Specifically, the court recognized that debt collectors are susceptible of making mistakes of law to which the bona fide error defense might apply. The *Johnson* court acknowledged that it is more common to speak of procedures adapted to avoid clerical errors than to speak of procedures adopted to avoid mistakes of law. However, the court found, "absent a clearer indication that Congress meant to limit the defense to clerical errors," it would "instead adhere to the unambiguous language of the statute as supported by the available legislative history." *Id.*

A. THE AUTHORITIES HOLDING THAT THE BONA FIDE ERROR DEFENSE INCLUDES MISTAKES OF LAW ARE FOUNDED ON PRECEDENT, CONGRESSIONAL INTENT AND SOUND PUBLIC POLICY.

The recent decisions reflect a more refined understanding of Congressional intent and the distinction between the provisions of the FDCPA and TILA. Examples of this thoughtful analysis of Congressional intent are found in *Johnson v. Riddle* (Johnson I) 305 F. 3d 1107 (10th Cir. 2002); *Jerman v. Carlisle*, 502 F. Supp. 2d 695 (N.D. Ohio, 2007); *Rosado v. Taylor*, 324 F. Supp. 2d 917, 932 (N.D. Ind. 2004); *Frye v. Bowman, Heintz, Boscia, Vician, P.C*, 193 F. Supp. 2d 1070 (S. D. Ind. 2002); *Aronson v. Commercial Financial Services, Inc.*, No. CIV. A. 96-2113, 1997 WL 1038818 (W.D. Pa. Dec. 22, 1997) at *4. Some of these decisions focus strongly on the fact that denying debt collectors the opportunity to raise the bona fide error defense places them in an untenable position. They include *Johnson v. Riddle* (Johnson I) 305 F 3d 1107 (10th Cir. 2002); *Taylor v. Luper, Sheriff and Niedenthal Co. LPA*, 74 F Supp. 2d 761 (S.D. Ohio 1999); and *Watkins v. Peterson Ent.*, 57 F. Supp. 2d 1102, 1107-8 (E.D. Wash. 1999).

To the extent there is any disagreement in the courts, it is because the courts are wrestling with conflicting interests. It is recognized that consumers should be protected from abusive debt collection practices. On the other hand, debt collectors, including attorneys, have an ethical obligation to zealously represent the interests of their client. The

petitioner seems to be concerned that if the bona fide error defense includes mistakes of law, then unscrupulous debt collectors will be shielded from liability by assertion of this defense.

Debt collectors are held to an objective standard of reasonableness, which means that they still have the burden to plead and prove this affirmative defense. *Johnson v. Riddle* (Johnson I), 305 F.3d 1107 (10th Cir. 2002). Thus, even courts recognizing the defense for mistakes of law will find some debt collectors liable on the facts of those particular cases. As early as 1895, in *Davis v. Wakelee*, 156 U.S. 680 (1895), this Court recognized that it is insufficient for a litigant to avoid liability through the mere assertion of a bona fide mistake of law; instead, the court looks to the evidence, including the conduct of the litigant asserting the defense, to decide whether the mistake was really "bona fide." In this particular context, the Sixth Circuit in both *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009) and *Midland Funding LLC v. Brent*, No. 3:08 CV 1434, 2009 WL 2437243 (N.D. Ohio Aug. 11, 2009) recognized that the bona fide error defense applies to mistakes of law. Nevertheless, in both cases the court found the defendant debt collectors' evidence of their procedures inadequate to qualify for the defense. In *Miller v. Javitch, Block and Rathbone*, 561 F.3d 588 (6th Cir. 2009) the Sixth Circuit recognized the defense could apply on the facts of the particular case before it—but did not find that it necessarily applied or that the mere assertion of the defense precluded liability. In the same case, at the trial court level, the Southern District of Ohio

painstakingly examined the motive and conduct of the debt collector in deciding that its conduct supported the bona fide error defense. *Miller*, 534 F. Supp. 2d at 772. *Ruth v. Triumph Partnerships*, 577 F 3d 790 (N.D. Ill. 2009), is a Seventh Circuit opinion in which the court declined to decide whether or not the bona fide error defense applies to mistakes of law, but found that the defense would not help the debt collector in that its conduct in relying on advice in a pamphlet published by the Debt Buyers Association was not "reasonably adapted to prevent legal error." Thus, the availability of the bona fide error defense for mistakes of law will not automatically relieve debt collectors of liability under the FDCPA.

Debt collectors are being forced to interpret a statute that is both unclear in many respects and interpreted in a variety of ways by courts across the country. As the *Jerman* court below acknowledged in a gross understatement concerning this issue, the case law interpreting the FDCPA is "not settled" and the statute "not unambiguous." *Jerman*, 502 F. Supp. 2d at 686. Debt collectors must implement procedures that affect hundreds or thousands of debtors, based upon a hope that the courts will interpret the law in the same manner. They are subject to the crushing burden and expense of class actions whenever debtor's counsel interpret the law differently. They are forced to wait years for judicial determinations, without knowing if their interpretation is correct. If this case is decided as petitioner posits, they would be subjected to strict liability in the event they are wrong about their interpretation of the law.

A debt collector has a substantial burden to establish that its mistake of law resulted from a bona fide error, that it was not intentional, and that it had procedures reasonably adapted to avoid the error. If the debt collector satisfies its burden, the debt collector should not be held liable, as intended by Congress.

II. THE RESPONDENTS DO NOT CLAIM THAT IGNORANCE OF THE LAW IS A DEFENSE TO VIOLATION OF THE FDCPA

The principle cited by petitioner, and its supporters, that "ignorance of the law is no excuse" is not relevant in determining the applicability of the bona fide error defense. The bona fide error defense requires a finding, *inter alia*, that the error was "not intentional." However, "not intentional" cannot be equated with "ignorance." Webster's dictionary defines "ignorance" as **"**lack of knowledge, education, or awareness". "Intentional", as stated in the brief of the United States, means an act foreseen and desired by the actor. Petitioner does not even attempt to define the term "intentional" but merely tries to equate it with terms like "knowledge" or "willfulness".

Ignorance implies a complete lack of knowledge of the law. For example, a defendant's ignorance of the time to bring a habeas petition did not excuse a late filing. *See e.g. Marsh v. Soares,* 223 F.3d 1217 (10th Cir. 2000). In the criminal context, the possession of substances which endanger the public welfare but whose illegal character was

unknown to the defendant was not a defense to criminal prosecution. *See Staples v. United States,* 511 U.S. 600 (1994).

By contrast, an intentional violation of the law requires the defendant to act deliberately to violate the law. For example, in *Johnson v. Riddle,* 443 F.3d 723, 728 (2006), the court held that a violation was unintentional for purposes of the FDCPA's bona fide error defense if the debt collector could establish the lack of specific intent to violate the FDCPA. *See also Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002) finding that a debt collector may avail itself of the bona fide error defense because it had no intent to violate the FDCPA, although its actions were deliberate.

The petitioner cites *Bueno v. Mattner,* 829 F.2d 1380 (6th Cir. 1987), for the proposition that defendants can be found to have intentionally violated the law even where they were ignorant of its terms. This case is readily distinguishable. In *Bueno*, the defendants admittedly failed to comply with disclosure provisions of the Migrant and Seasonal Agricultural Worker Protection Act. The defendants argued that since they were unaware of the existence of this Act, their lack of knowledge precluded a finding that they intentionally violated this Act. The court rejected the claim that a defendant may not be liable where a defendant was unaware of the existence or applicability of the statute. Such a scenario has no bearing on the determination to be made in the matter at bar. The respondents do not claim to have been unaware of the existence of the FDCPA. Moreover, *Bueno* is further distinguishable because the statute at issue

in that case did not provide a defense based on a bona fide error.

The petitioner's contention that the respondents' conduct was "intentional" is contradicted by the very language of the statute. Congress drafted the FDCPA so as to provide a debt collector with a defense where the "*violation* was not intentional". It would be illogical to conclude that the term "violation" in the statute refers to some form of conduct. The term "violation" must refer to a violation of the FDCPA. Indeed, the cases cited by petitioner and the United States involving the violation of criminal statutes all addressed the level of intent necessary to convict under the respective statutes. Each of these cases held that the defendant had to have knowledge that its actions were illegal. *See Bryan v. United States,* 524 U.S. 184 (1998), *Ratzlaf v. United States,* 510 U.S. 135 (1994) and *Staples v. United States,* 511 U.S. 600 (1994).

The issue presented in both of the FDCPA cases cited by the petitioner, *Johnson v. Riddle,* 443 F.3d 723 (10th Cir. 2006) and *Kort v. Diversified Collection Services,* 394 F.3d 530 (7th Cir. 2004) was not whether the debt collector was ignorant of the law, but whether the debt collector erred in applying the law. Although the petitioner seeks to distinguish *Kort,* its reasoning is sound. In *Kort*, the recipient of a student loan contended that a garnishment notice violated the FDCPA. The debt collector asserted the bona fide error defense stating that the text in the garnishment notice was taken word for word from a form issued by the Department of Education. The court found that by following this form, the debt

collector did not intentionally violate the FDCPA.

Indeed, petitioner does not provide a single example where Congress' use of "intentional violation" is limited solely to the act committed regardless of the individual's knowledge of the law. Rather, petitioner focuses on Congress' usage of the word "knowing," even though this word is not contained in 15 U.S.C § 1692k. Petitioner argues that when Congress employs the word "knowing" in conjunction with "violation," it is referring to "factual knowledge as distinguished from knowledge of the law." *See* Petitioner's Brief at p. 18 (citing *Bryan v. United States*, 524 U.S. 184, 192 (1998). However, when Congress intends that a defendant's knowledge or reckless disregard of the law is to be considered, it commonly uses the term "knowingly" or "willfully". *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

III. THE RESPONDENTS MAINTAINED PROCEDURES WHICH WERE REASONABLY ADAPTED TO AVOID BONA FIDE ERROR

A. The Bona Fide Error And Safe Harbor Defenses Are Not Mutually Exclusive

The FDCPA allows debt collectors to obtain clarification of any ambiguities or uncertainties in the statute by seeking advisory opinions from the Federal Trade Commission (FTC). *See* 15 U.S.C. § 1692k(e). The petitioner, along with the United States, as amicus curiae, contend that the FTC's role would be diminished or usurped if debt

collectors relied on their own procedures to avoid legal errors. Petitioner's concerns are unfounded. Her argument rests on the assumption that many debt collectors will manipulate or circumvent the FDCPA's requirements and avoid liability by exploiting the bona fide error defense. Congress has built in enough protection in the FDCPA to guard against abuse by such unethical collectors. Unscrupulous debt collectors will not be afforded refuge under the bona fide error defense.

The rigorous requirements of the bona fide error defense adequately protect against manipulation of the FDCPA. A mere showing by a debt collector that there was no clear precedent prohibiting its actions is insufficient to satisfy the defense, as held by the Tenth Circuit's ruling in *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006). As with other legal issues, the courts are well-positioned to determine whether a debt collector's efforts "amount to genuine precautions or are purely self-serving." *See Richburg v. Palisades*, 247 F.R.D. 457, 468 (E.D. Pa. 2008). Moreover, it is in the debt collector's best interests to ensure that its compliance efforts are genuine and comprehensive because an incorrect interpretation of the statute when coupled with self-serving procedures could result in the imposition of costly statutory penalties.

The fact that Congress has provided an avenue through which statutory ambiguities may be resolved does not aid the petitioner's position. Numerous other federal statutes contain similar provisions endowing governmental agencies with the requisite authority to interpret a federal statute. For example, Congress allows taxpayers to seek

formal guidance from the Internal Revenue Service (IRS) pursuant to private letter rulings. These private letter rulings are written statements issued to the requesting taxpayer and interpret and apply the tax laws to the taxpayer's specific fact pattern. Nonetheless, taxpayers are not required to seek private letter rulings from the IRS, and they may, in fact, rely on their own understanding of the tax laws without being subject to penalties under Section 6694 of the Internal Revenue Code of 1986, as amended, as long as there is "substantial authority" for their position. *See* 26 U.S.C. § 6694. Like the Internal Revenue Code, the FDCPA sets forth a mechanism through which ambiguities may be resolved, but it is unlikely that Congress intended this to be the only manner by which interpretations of the FDCPA can be made without fear of statutory penalties. In both statutes, Congress has provided affirmative defenses – in the Internal Revenue Code under the guise of the "substantial authority" standard, and in the FDCPA under the guise of the bona fide error defense. As the Code demonstrates, there is no incongruity with Congress establishing different procedures through which the public may resolve statutory uncertainties.

B. What Procedures, To Avoid A Bona Fide Error, Will be Considered Sufficient?

Petitioner contends that the circuit courts are deeply divided as to the procedures that will be considered sufficient to satisfy the bona fide error defense. A review of recent case law shows a

consensus that law firm debt collectors need to have a review by an attorney well-informed of the FDCPA's requirements in order for their procedures to qualify as "reasonably adapted to prevent the error." The respondents herein satisfied this standard. For non-law firm debt collectors, courts appear to be in agreement that they should seek the opinion of either an attorney, well versed in FDCPA's requirements, or a governmental agency.

1. The Tenth Circuit Court of Appeals

In *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006), the debt collector characterized a dishonored check claim as a shoplifting charge, which allowed it to recover a higher statutory penalty. The debt collector's lawsuit against the plaintiff was ultimately dismissed, but the plaintiff filed a class action lawsuit against the debt collector, claiming that "the practice of bringing shoplifting charges against the maker of a dishonored check violated the FDCPA." *Johnson*, 443 F.3d at 725. The debt collector argued that it had employed two procedures aimed at avoiding legal error. First, the debt collector had previously researched whether the state permitted the practice of claiming shoplifting penalties for a dishonored check and had come to the qualified conclusion that state law was silent on the issue. *Id.* at 730. Second, the debt collector had filed a "test case," which resulted in a default judgment and an unpublished opinion awarding statutory shoplifting penalties. *Id.* The Tenth Circuit ruled that these procedures were "conceivably sufficient" to satisfy the bona fide error requirement, but it reversed the district court's order granting summary

judgment in favor of the debt collector because there remained issues of triable fact. *Id.* at 731.

2. The Seventh Circuit Court of Appeals

In *Seeger v. AFNI, Inc.*, 548 F.3d 1107 (7th Cir. 2008), the Seventh Circuit reviewed whether a debt collector's practice of including a separate collection fee in its letters to debtors violated both Wisconsin law and the FDCPA. *Id.* at 1110. The debt collector invoked the bona fide error defense and as proof of its reasonable procedures to prevent violation of the FDCPA, pointed to its creation of a compliance committee that "review[ed] legal summaries prepared by the American Creditor Association (ACA) and the Debt Bar Association." *Id.* at 1114. The debt collector also alleged that it had submitted its forms to the ACA and that one of its employees "regularly read excerpts of the relevant Wisconsin statutes." *Id.* The Seventh Circuit held that these procedures were not reasonable because the debt collector had attempted to keep itself informed only through its trade association communications. *Id.*

In *Ruth v. Triumph Partnership*, 577 F.3d 790 (7th Cir. 2009), the Seventh Circuit articulated a more precise standard as to what procedures would be considered reasonable. *Ruth* concerned a notice letter that was sent by a debt collector to numerous consumers informing them that the debt collector, by law, "could disclose certain nonpublic information about the debtor without the debtor's permission and would do so unless the debtor expressly opted out." *Id.* at 794. The plaintiffs argued that these

statements were false and in violation of the FDCPA. *Id.* In addressing the debt collector's bona fide error defense, the Seventh Circuit stated that if a bona fide error defense is available at all for legal errors, it is only available to debt collectors "who can establish that they reasonably relied on either (1) the legal opinion of an attorney who has conducted the appropriate legal research, or (2) the opinion of another person or organization with expertise in the relevant area of law - for example, the appropriate governmental agency." *Id.* at 804. In *Ruth*, the debt collector's procedures were insufficient to qualify for the defense because the debt collector did not provide any evidence that it "ever sought legal or regulatory advice as to whether the collection letter and notice were in compliance with the FDCPA." *Id.* at 805.

3. Pennsylvania District Court

In *Richburg v. Palisades Collection, LLC*, 247 F.R.D. 457, 468 (E.D. Pa. 2008), the debt collector initiated a debt collection action against the plaintiff approximately five and a half years after the plaintiff's debt went into default. *Id.* at 461. The plaintiff subsequently filed a class action lawsuit seeking determination of whether a four or six year statute of limitations applies to debt collection actions on consumer debt. *Id.* at 462. In determining whether the debt collector is entitled to the bona fide error defense, the district court reviewed the debt collector's procedures, which included the creation of "a nationwide survey of statutes of limitation to aid attorneys in determining the applicable law." *Id.* at 467. The court noted that the debt collector had not

adopted a regulator or third party interpretation of the law that would permit the court to find that the survey constitutes a reasonable procedure as a matter of law. *Id.* at 468. Because the debt collector relied on its own interpretation and efforts in generating the survey, the court held that a reasonable jury could find the debt collector's measures were insufficient. *Id.*

4. Indiana District Court

In *Frye v. Bowman*, 193 F.Supp.2d 1070 (S.D. Ind. 2002), a law firm debt collector filed suit to collect a debt owed by the plaintiffs. The summons stated that the plaintiffs' answer was due twenty-three days from the date of "receipt," as opposed to the correct twenty-three days from the date of service. The plaintiffs contended that the misstatement constituted a violation of the FDCPA because it was a false, deceptive or misleading representation in connection with the collection of a debt. *Id.* at 1078. The debt collector argued that it was entitled to the bona fide error defense and that its summons was "similar if not identical to that used in summons forms issued by a large number of clerks of state courts in Indiana." *Id.* at 1086.

The district court found that the debt collector had established the following procedures to protect against the error: (1) the debt collector published an "in-house" Fair Debt compliance manual, updated on a regular basis and supplied to every attorney, paralegal, collector and employee of the firm who dealt with the direct collection of consumer loan accounts; and (2) the debt collector provided in-house training seminars to specifically inform paralegals,

collectors, and other staff persons working on the collection of consumer debt accounts as to information to ensure compliance with the FDCPA and any recent developments thereunder. *Id.* at 1076. The district court further noted that the debt collector maintained specific procedures to ensure use of the correct summons forms, which included: (1) an attorney, paralegal or staff person selecting a summons form from the firm computer system; and (2) an attorney reviewing the complete collection file, including the specific summons form to be filed against a consumer debtor, to ensure that the correct form was used. *Id.* Emphasizing that the FDCPA does not require procedures to be "fool proof," but rather reasonably adapted to avoid such errors, the district court granted the debt collector's motion for summary judgment, concluding that its procedures were reasonable to avoid the errors in the summons claimed by the plaintiffs. *Id.* at 1089.

All of these cases point in the direction of debt collectors seeking the advice of knowledgeable counsel and having documented, extensive procedures in place to show that the debt collectors genuinely attempted to establish procedures aimed at preventing the mistake of law. When compared against this newly emerging case law, it is evident that the respondents' procedures are more than sufficient.

To ensure compliance with the FDCPA and its "ever-changing" body of law: (a) the respondent designated its senior principal as the individual responsible for compliance with the FDCPA; (b) this compliance officer regularly attended conferences and seminars that focused on FDCPA issues; (c) the

respondent subscribed to "Fair Debt Collection," a part of the "The Consumer Credit and Legal Practices Series," together with the supplements thereto; (d) the compliance officer regularly distributed copies of cases relevant to the firm's practices and procedures to all attorneys at the firm; (e) all new employees, attorneys and non-attorneys, were advised of the respondent's obligations under the FDCPA, provided with the FDCPA Procedures Manual, and encouraged to seek the compliance officer's advice with questions regarding the FDCPA; and (f) the compliance officer conducted mandatory meetings at least twice a year for all available employees wherein FDCPA issues and developments were discussed. *Id.* at 477.

In none of the above-cited cases did the debt collector follow more than a few of these procedures, but in the present case, the Sixth Circuit found that the respondent had followed all six, which the court found to be sufficient to avoid an error of law. Unlike the debt collectors in *Ruth* and *Richburg*, the respondent did not merely rely on its own interpretation of the statute; rather, the respondent's compliance officer actively sought the insight of third parties, as is evident by the officer's attendance of various FDCPA conferences and seminars and the respondent's subscription to informative news sources, such as "Fair Debt Collection." *See id.* When viewed in the aggregate, the respondent's procedures are thorough and create an open and informed environment wherein all employees were able to address any concerns or issues arising under the FDCPA. The Sixth Circuit specifically cited with approval these actions in

affirming the district court's ruling. Further, the petitioner has presented no evidence that the respondent's extensive efforts in researching the issue and enacting policies in accordance with the statute's requirements were "self-serving" or fraudulent. A careful review of the facts reveals that the respondents were cognizant of the consequences of noncompliance and that they undertook their research and investigatory efforts earnestly to ensure proper compliance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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