No. 08-1200

In The Supreme Court of the United States

KAREN L. JERMAN,

Petitioner,

v.

CARLISLE, McNELLIE, RINI, KRAMER & ULRICH, LPA AND ADRIENNE S. FOSTER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE MISSISSIPPI CREDITORS' ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LESTER F. SMITH
SMITH & MCARTY, PLLC
721 Avignon Dr.
Suite D
Ridgeland, MS 39157
601-853-8851
Attorneys for Amicus Curiae Mississippi Creditors' Attorneys Association

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) reads as follows in 15 U.S.C. Section 1692k(c)

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

Is an error of law excluded from the word "error"?

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INTEREST OF *AMICUS CURIAE*[1]

The Mississippi Creditors' Attorneys Association is composed of attorneys who practice law in the area of debt collection and are dedicated to the ethical and responsible collection of debts. The Association is involved in the education of businesses, banks, law schools, creditors, consumers and the public in general in the proper methods for collection of debts. Members deal daily with the Fair Debt Collection Practices Act and are frequent speakers at seminars and lectures concerning the FDCPA.

SUMMARY OF ARGUMENT

Carlisle acted as an attorney in a foreclosure action against Jerman.[2] Pursuant to the Fair Debt Collection Practices Act (FDCPA), Carlisle sent Jerman a document referred to as a validation notice. Part of the purpose of the FDCPA is to determine that the consumer does indeed owe the debt that is being

[1] 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* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the blanket consent of the parties have been filed with the Clerk.

[2] In this Brief the Respondent/Defendant/debt collector/ attorney is sometimes referred to as "Carlisle" and the Petitioner/Plaintiff/consumer as "Jerman".

attempted to collect. The purpose of the validation notice is so that the debtor can notify the debt collector if the debt has been paid. Jerman received the validation notice and did what the FDCPA was intended to accomplish – Jerman notified Carlisle that the debt had been paid. Carlisle received this notification, investigated the matter to make sure that this notification was correct, determined that the debt had been paid, and then ceased further collection efforts. The FDCPA worked in this case.

Nevertheless, Jerman sued Carlisle. Jerman contended that there was a technical wording error in the validation notice that was sent by Carlisle to Jerman. In at least four circumstances, the FDCPA requires when a consumer gives notice to a debt collector, that notice must be in writing. Another circumstance does not require that a particular notice be in writing. Pursuant to Section 1692g, if the consumer does not dispute the debt within 30 days after receiving the validation notice, then the debt collector can assume that the debt is valid.[3] Even though other notices by the consumer must be in writing, the words of the FDCPA do not state this particular notice from the consumer to be in writing.[4]

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[3] Pursuant to Section 1692g(c), the failure of consumer to dispute the validity of the debt under this section may not be construed by any court as an admission of liability by consumer.

[4] It should be noted that Jerman did give notice in writing to Carlisle. Thus, even though the FDCPA does not require that this notice be in writing, Jerman did so in writing. In fact,

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The validation notice that Carlisle sent stated that this particular notice by Jerman was to be in writing. This is the "error" that is the basis of this lawsuit.[5]

In preparing his validation notice, Carlisle researched the law. He found several cases that held that it was proper to put the words "in writing" in the place that he did in his validation notice. Even though there was conflicting case law, the District Court ruled that it was an error of law for Carlisle to have inserted the words "in writing" where Carlisle did. However, the Court found that Carlisle was not liable since (a) he had a bona fide reason for having inserted the words "in writing", (b) he had done legal research on this issue and thus the violation was not intentional, and (c) he had procedures that were adapted to avoid such error.

The FDCPA provides a defense for just a situation as in this case. Carlisle did not act maliciously or egregiously, and there is no contention that he did. He acted responsibly and did what an attorney should do. He researched the law and arrived at a legal conclusion. Even though the District Court disagreed with Carlisle's legal conclusion, the Court acknowledged that there were legal authorities and

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Jerman contacted an attorney who gave this written notice to Carlisle.

[5] It takes a very close reading of the FDCPA to notice that the words "in writing" are omitted from the first sentence in the statute but included in the next two sentences. A reader of this case upon first impression probably wonders where the error is.

cases that supported Carlisle's conclusion. Carlisle fits all elements of the bona fide error provision of the FDCPA – (1) he had a bona fide reason for inserting the words "in writing"; (2) he did legal research and therefore did not commit an intentional violation; and, (3) he had procedures to avoid legal errors. Carlisle should be protected by the plain language of the FDCPA.

ARGUMENT

The statute is clear. Its words do not exclude an error of law as a defense.

15 U.S.C. Section 1692k(c) is clear. It provides that a "bona fide error" is a defense to an FDCPA action. It does not exclude an error of law as a defense.

All the Circuits that have ruled that an error of law is a defense have done so on this simple point. *Johnson v. Riddle,* 305 F.3d 1107, 1123 (10th Cir. 2002) states that

> *the plain language of the FDCPA* suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 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 is says*. [Emphasis added.]

Neilsen v. Dickerson, 307 F.3d 623, 641 (7th Cir. 2002) holds that "*The FDCPA's provision does not expressly remove legal mistakes* from the realm of errors that can be considered bona fide" and further succinctly ruled that "a legal mistake can qualify as a bona fide error under the FDCPA." *Jerman v. Carlisle,* 538 F.3d 469, 476 (6th Cir. 2008) holds that "the FDCPA's bona fide error defense applies to mistakes of law." *Jerman*, at 473, cited several Ohio District Courts decided in 1999, 2005, 2007 and 2008 which also ruled the same, and quoted with approval from these cases which held that the bona fide error defense applies to debt collection attorneys who unintentionally violate the FDCPA by asserting in good faith a legal claim that was later rejected by a court. *Jerman*, at 473, explained that recent and more persuasive cases have held that the defense is available for mistakes of law, and concluded by stating "*[t]here is nothing in the language of [the bona fide error defense] which limits its application to clerical mistakes* or ministerial errors." [Emphasis added.]

The Supreme Court has noted that courts shall enforce statutes according to their plain wording. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). *Heintz v. Jenkins,* 514 U.S. 291, 294 (1995) requires the use of "ordinary English" in construing statutes. *Heintz* applied the FDCPA to lawyers. Since FDCPA has a bona fide error defense, it would be unfair, inconsistent, and illogical to apply FDCPA to a lawyer, have a

bona fide error provision, and not allow a lawyer error.

The Petitioner and others advocating their position evidently want to change the statute. They contend that what the statute really means is that a "bona fide error is a defense, *except for an error of law*." However, the statute clearly does not state this. The statute simply says "error". It does not limit the type of error. If Congress had intended to say "except for an error of law", then Congress clearly knows how to say that. Congress did not say that.

Petitioner and others go through strained interpretations to get to their conclusion that an error of law is not a defense to an FDCPA action. Respondent does not have to resort to a strained interpretation. Respondent simply reads the statute. This case can be resolved by simply following the statute. There is no need to try to rationalize the statute. There is no need to guess or argue about what Congress intended. All we have to do is read the statute. It is clear. It does not say what Petitioner and others say that it says.

Safeco.

Safeco Ins. Co. of America v. Burr, 551 U.S. 47 (2007) supports the proposition that an error of law is a defense. The Supreme Court held that there was not a "willful" violation of the Fair Credit Reporting Act ("FCRA") where an act was taken by Safeco Insurance Company based on a point of law, but

Safeco was wrong as to that point. The Supreme Court held that Safeco misread the FCRA but such misreading had a legitimate basis and "therefore" was not "willful".

FCRA uses the word "willful".[6] FDCPA uses the word "intentional". Petitioner and accompanying *amici* parties contend that there is a material difference between "willful" and "intentional". Webster's Dictionary defines "intentional" as "a determination to act in a certain way". This sounds like "willful". It defines "willful" as "done deliberately". This sounds like "intentional". *Webster's Dictionary lists as the only synonym of "willful" the word "intentional". Safeco*, at 58, requires that a common law term in a statute should be given its common law meaning.

Thus, Safeco stands for the proposition that an error of law is a defense for a "willful" or "intentional" violation. The opposing *amici* Briefs allude to some criminal cases in trying to distinguish the word "willful" from the word "intentional". But *Safeco*, at 60, succinctly and briefly points out that "the criminal side . . . is beside the point in construing the civil side."

Analysis of cases – pro and con.

This case arrives at the Supreme Court via certiorari, because there is a split of authority among

[6] 15 U.S.C. Section 1681n.

the Circuits. Three Circuits say that an error of law is a defense to an FDCPA lawsuit, and three Circuits say that an error of law is not a defense to an FDCPA lawsuit. Therefore, it is appropriate to analyze the cases in these Circuits to see why they held as they did.

Analysis of cases which hold that an error of law is not a defense.

The leading case for this proposition is *Baker v. G.C. Services Corp.,* 677 F.2d 775 (9th Cir. 1982).[7] It relied primarily on the TILA analogy.[8] It also relied on the theory that in an FDCPA case "That defendant . . . mistook the law does not make its *action* any less intentional", at 779 [Emphasis added.][9]

Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2nd Cir. 1989) did not decide the bona fide error portion of FDCPA which is Section 1692k(c). It specifically stated that "There was no consideration,

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[7] Even though *Baker* is the leading case for this proposition, notice that Petitioner does not cite or discuss *Baker*, nor *Pipliles, Hulshizer, infra* or *Picht*, *infra.*

[8] This analogy has been rejected by several subsequent cases. See *Johnson, Neilsen,* and *Jerman, supra.*

[9] *Baker* misstates the law here. It is not the *act* that must be intentional. It is the *violation* that must be intentional. In the instant *Jerman* case, even though Carlisle may have intentionally inserted the words "in writing", he did legal research and had a legitimate basis for doing so. Thus, he did not intentionally *violate* the FDCPA. *Safeco.*

however, of the specific requirements of section 1692k(c) . . . " The Court commented that "We note that the Bureau [defendant debt collector] did not plead a section 1692k(c) defense in its answer, or argue it on appeal." The Court did state that "In any event, it is likely that the violation which we have found resulted from a mistaken view of the law, which section 1692k(c) does not excuse." It then simply referred to *Hulshizer* and *Baker*, which cases are discussed in this Brief.

Pipiles does underscore the basic principle urged by Respondent. *Pipiles,* at 26, stated that "the starting point for our interpretation of a statute is always its language" and that "absent a clear expressed legislative intention to the contrary, [the language] must ordinarily be regarded as conclusive." It then used this principle of law to conclude, at 27, that since the FDCPA uses the words "all communications", then it meant "all communications". It commented that to allow certain communications to omit a required disclosure, then the clear and unambiguous language "all communications" would effectively be changed to "some communications". It concluded by stating that "We are not at liberty to substitute a view different from that expressed by Congress *in the legislative enactment.*"[10]

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[10] The same principle is appropriate in the instant case. Since FDCPA states "error", then it means "error". It does not mean "error, except error of law". We are not at liberty to

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Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984) is a one page, four paragraph case which really did not involve an error of law. The debt collector in that case did not do any legal research and did not base its action on any case interpretation of the FDCPA. Rather the debt collector "chose to follow the informal advice of a Commission staff attorney and representatives of the American Collectors Association rather than the clear language of the statute", at 1038.[11] The debt collector based his position on the FTC Opinion portion of the statute and contended that the opinion of an FTC attorney was the same as an FTC Opinion. But again, the FDCPA is clear – it says FTC Opinion, not an opinion from an FTC attorney.[12] *Hulshizer* relied on *Baker,* which is discussed in this Brief.

Picht v. Hawks, 236 F.3d 446 (8th Cir. 2001) does not give any analysis of its holding that an error of

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substitute a view different from the express wording of the FDCPA.

[11] Opposing parties argue that Respondent (Carlisle) should (and perhaps must) have followed some publication by the American Collectors Association (ACA) in order to qualify for the bona fide error defense. Understandably, they cite no legal authority for such suggestion. It is furthermore ironic that they would argue that some ACA advice should have been followed, because in *Hulshizer* a debt collector was found liable in part for having followed ACA advice.

[12] Similarly, FDCPA says "error", not "error, except error of law". *Hulshizer* is based on the principle to "follow the statute".

law is not a defense. It simply refers to *Baker* and *Hulshizer,* both of which are discussed in the Brief.

Analysis of cases which hold that an error of law is a defense.

Johnson v. Riddle, 305 F.3d 107 (10th Cir. 2002) is one of the leading cases on this subject matter and holds that an error of law is a defense. It ruled as follows: (a) bona fide error language of FDCPA is clear and unambiguous, (b) is supported by legislative history, (c) responds to and rejects the TILA argument of *Baker* on the basis that the language of TILA is different from FDCPA, (d) cites and relies on the logic of *Heintz v. Jenkins,* 514 U.S. 295 (1985), (e) states that not allowing an error of law as a defense would lead to absurd results, e.g. would in some cases make liable a litigating lawyer who lost a claim against a debtor, at least an error of law may contribute to the reasons why some debt collection cases are lost, and could lead to a compromise of an attorney's ethical duty to advocate claims that would zealously represent his client for fear that such advocacy could expose the attorney to liability under FDCPA, (f) responds to and rejects the notion that the use of the word "procedures" in the bona fide error provision means that an error of law is not a defense and cites several cases that support this conclusion, and (g) notes that most all of the cases that do not allow errors of law as a defense rely on *Baker* and then respectfully disagrees with *Baker*.

Neilsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002) ruled that an error of law is a defense. It made the following rulings: (a) considered but rejected the TILA argument at 640-41, (b) held that nothing in the bona fide error provision limits it to clerical errors and not legal errors at 641, and (c) noted that in order for the bona fide error defense not to apply the *violation* must be intentional, not the *act*, and stated that the 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", at 641.

Jerman v. Carlisle, 538 F.3d 469 (6th Cir. 2008) points out that the more recent and persuasive cases hold that an error of law is a defense. It cites and relies on *Johnson* and *Neilsen* and rejects the holdings of the three Circuit cases which hold that an error of law is not a defense – *Baker, Picht*, and *Pipiles*. It noted that *Picht* and *Pipiles* relied on *Baker*, and then specifically rejected the reasoning of *Baker. Baker* relied on the TILA argument put forth by Petitioner. *Jerman* rejected this TILA argument because TILA contained a bona fide error defense which specifically excepted "an error of legal judgment", but "[t]he FDCPA provision does no such thing", at 474. It concluded by stating that

> The plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 1692k(c) refers by its terms to any 'error' that is 'bona fide.'

It looked to legislative history and found "no indication . . . that Congress intended this broad language to mean anything other than what it says." *Jerman* noted that "the FDCPA's provision does not expressly remove legal mistakes from the realm of errors that can be considered bona fide", at 475.

Jerman noted and rejected the FTC Opinion argument in one sentence and stated, at 478, that

> if seeking an [FTC] advisory opinion is the only 'meaningful procedure' that can be adapted in order to avoid liability for bona fide legal errors under Section 1692k(c), then the FDCPA's separate safe-harbor provision for collectors who act upon the advice of the Commission would be superfluous.

Jerman also held that there are indeed "procedures" that can be used to avoid legal errors and specifically noted several such procedures, e.g. the considerable time, effort and legal research that Carlisle spent in evaluating the validity of the "in writing" requirement, Carlisle's compliance officer regularly attended FDCPA seminars, examined and distributed relevant case law, regularly held meetings, encouraged open discussion of FDCPA issues, and took good faith steps to comply with the law.

Jerman v. Carlisle, 502 F. Supp. 2d 686 (N.D. Ohio 2007) ruled that if a word in a statute is not limited, then it is to be given a "broad" definition, and an exception to a word is only to be given effect if

there is an exception specifically mentioned in the statute.[13]

This Court discussed the word "intentional" within the bona fide error provision of FDCPA and concluded that in order to deprive the debt collector of this defense that *the violation must be intentional, not the act*. "A debt collector must only show that the violation was intentional, not that the communication [act] itself was unintentional," at 693.

This Court noted the contrary ruling in *Baker* and declined to follow *Baker*.[14] *Jerman,* at 694, considered but rejected *Baker's* holding which was based on the TILA argument. Citing *Johnson, Jerman* at 694 held that "the TILA analogy is faulty". It further stated that the TILA bona fide error provision is expressly limited to errors of fact and specifically excepted errors of law and "The FDCPA provision does no such thing. This, along with the statutes' different purposes, distinguishes the two." Citing and relying on the logic of *Johnson, Jerman* at 694 concluded that

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[13] The Court did this in its discussion of the word "communication" in the FDCPA. This same principle of statutory interpretation points out that the word "error" in the FDCPA is to be given "broad" meaning, and exceptions (e.g., an error of law) are not to be engrafted into the FDCPA since there are no exceptions specifically stated therein.

[14] This Court observed, at 694, that "Of the cases that hold that the defense does not apply to mistakes of law, almost all dispense with the issue by citing earlier cases back to the Ninth Circuit's decision in *Baker v. G.C. Servs. Corp.*"

> Unlike TILA, the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, Section 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. This Court agrees with this reasoning and, accordingly, finds that the bona fide error defense applies to mistakes of law.

The same FTC Opinion argument that Petitioner is making in this appeal was made to the District Court, who had little trouble in disagreeing with it. In one short paragraph, the Court at 696 stated

> Finally, plaintiff [Jerman] claims that defendants [Carlisle] could have requested an advisory opinion from the Federal Trade Commission, thereby ensuring that they acted in good faith. However, defendants were not obligated to do so, and the issue herein is not whether defendants should have insulated themselves from liability but whether they acted in good faith.

Majority rule.

It appears that the majority rule now is that an error of law is a defense. Petitioner states that the majority rule is that error of law is not a defense. This is highly questionable. The Circuits are evenly split. The 2nd, 8th, and 9th hold that way. The 6th, 7th, and 10th hold that error of law is a defense.

The 2002 case of *Johnson* did state that the majority rule was that an error of law is not a defense, but that was in 2002. Even if that was correct in 2002, it is highly unlikely that such is true at the time of this appeal in 2009. It appears that more cases are now holding that error of law is a defense than to the contrary. One thing is clear – the more recent cases are deciding that an error of law is a defense. Indeed, the last three (3) Circuits to have considered this issue have ruled that an error of law is a defense.[15]

As a further illustration of the trend of court rulings, notice that of the 21 recent cases cited in footnotes 21 and 22 of Respondent's Brief, none of them held that an error of law defense was not available as a matter of law, i.e. none of them held that an error of law was not a defense. The seven cases in footnote 21 either did not involve an error of law as a defense or ruled on summary judgment that the debt collector did not prove that his procedures were adequate, not that the bona fide error defense was not available.

Petitioner cannot "read into" the statute.

Petitioner and others want to read into the statute something that is simply not there. They want to "read into" the statute their argument of

[15] *Safeco*, decided in 2007, further illustrates the trend of courts in allowing an error of law defense.

"except errors of law", but those words clearly are not in the statute. However, Petitioner's entire case is based on the argument that the words "in writing" placed into the debt collector/attorney's initial communication are not in the statute. Petitioner and accompanying *amici* parties argue that the words "in writing" should not be "read into" the statute. In other words, they argue "Follow the statute." They argue that simply because the statute does not state "in writing", then the attorney's communication was incorrect and therefore formed a violation of the FDCPA. For Petitioner's case to prevail she must and does strongly argue and shout – "Read the statute! Read the statute! The statute does not contain the words 'in writing' at the place where Defendant's letter put them, but yet the Defendant attorney/debt collector's communication included those words." Petitioner wants to convince this Court that even though the FDCPA statute [Section 1692g(b)] should be interpreted and applied *as it is written*, that the FDCPA statute [Section 1692k(c)] should not be interpreted *as it is written*. Petitioner cannot have it both ways.

Petitioner seeks to abandon the legal principle that has gotten her thus far in this case.

Petitioner contends that the word "error" should be *limited* only to an error of fact, and does not include an error of law. Respondent contends that since "error" is not limited within the statute, then it

is not limited. Respondent contends that the legal principle here is that if a word is not limited – then it is not limited.

In order to test and analyze the above legal principle, it is interesting to note what has happened previously in this instant case. One of the issues early on in this case was an interpretation of the word "communication." Plaintiff (Jerman) contended that there was an FDCPA violation because Defendant (Carlisle) did not make certain disclosures that must be made by the debt collector when the debt collector makes a "communication." See Section 1692g(a). Plaintiff contended that these required disclosures were not made in a pleading that Defendant (Carlisle) filed. Jerman contended that the pleading that Carlisle filed was a "communication." Jerman contended this, because the word "communication" was *not limited* in the FDCPA. The District Court ultimately agreed with Jerman and held that the pleading filed by Carlisle was indeed a "communication" since it was not limited and fit the common, English language definition of the word "communication". The Court held that since the word "communication" was not limited in the statute – then it was not limited. Jerman contended that the word "communication" did not mean "communication, *except for a pleading*." Jerman contended that one could not "read into" the statute words that were not there. The Court agreed with Jerman and held that there was no exception in the statute, and words could not be "read into" the statute. Thus, it is

remarkably inconsistent for Jerman to now argue that the word "error" is somehow limited only to errors of fact.

The same legal principle is also illustrated by the history of the FDCPA itself. When originally enacted, the FDCPA in 1977 specifically provided that the definition of "debt collector" meant "debt collector, except for an attorney." This attorney exception was specifically stated in the FDCPA. In 1986, Congress changed this portion of the FDCPA by merely eliminating the attorney exception. The language of "except for an attorney" was taken out. Thus, the phrase "debt collector" became unlimited. *Heintz, supra*, ruled that attorneys could indeed be debt collectors, because the phrase "debt collector" was not limited. It previously was limited so that it specifically excluded attorneys. But the change in the statute simply eliminated the exception. Thus, the legal principle that "if a word is not limited – then it is not limited" is illustrated by the very history of the FDCPA.

It is ironic that now Jerman wants to abandon the legal principle that has gotten her this far in this case. The legal principle of interpreting the word "communication" without limitation since there was no limitation within the statute, enabled Jerman to survive Carlisle's initial Motion to Dismiss in this case. Also, the legal principle of interpreting the word "debt collector" without limitation since there is no limitation specifically in the FDCPA, enabled Jerman to successfully argue that Carlisle is a debt collector,

even though Carlisle is an attorney. Now Jerman wants to jettison and abandon this legal principle.

Intentional.

Petitioner argues that the insertion of the words "in writing" was done intentionally by Respondent (Carlisle) and therefore Respondent does not meet the "unintentional" part of the bona fide error defense. However, this portion of the FDCPA states that there must be an "unintentional *violation*", not an unintentional "*act*". Even assuming that the insertion of the words "in writing" was intentionally done, Carlisle did not make an intentional "violation". To the contrary, Carlisle thought that it was proper and legal to do this. Even if this was an error, it was done on the basis of legal research and a legal opinion by the Defendant attorney (Carlisle). Thus, the "violation" was not done "intentionally".[16]

The Circuit cases of *Neilsen* and *Jerman* and the District Court case of *Jerman* all considered this "intentional" argument that Petitioner is making. All these Courts had no trouble in ruling that there is a difference between an intentional violation and an intentional act. These Courts noted that the debt

[16] *Safeco* points out this principle of law. In *Safeco* the complained of act of failing to give a certain notice was done intentionally. However, the Supreme Court held that there was no willful violation because the defendant did legal research and came to the legal conclusion that such notice was not required.

collector must only show that the violation was unintentional, not that the act itself was unintentional. *Neilsen,* at 641, *Jerman* (Cir.) at 477, *Jerman* (Dist.) at 693, 695.

Procedures.

The FDCPA bona fide error defense requires that there be established procedures. Petitioner argues that it is not logical to think in terms of "procedures" to avoid legal errors.[17] The District Court and the 6th Circuit in *Jerman* had no problem in rejecting this argument and found that there are indeed procedures that can be used to avoid legal errors.[18] Numerous other courts have ruled likewise. See *Johnson,* at 1123-24, which cited five other cases and noted that "this [procedures] requirement is not incompatible with application of bona fide error defense to mistake of law".

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[17] Petitioner argues that adapting procedures is simply not compatible with an error of law defense. Understandably, neither Petitioner nor her *amici* parties cite any cases which so hold. To the contrary, numerous cases cited throughout all Briefs have factually ruled on the adequacy of the procedures used by the debt collector in particular cases, but more of them held that this procedures concept was legally incompatible with an error of law defense.

[18] Some of these procedures are discussed in the 6th Circuit opinion at *Jerman* page 478 and the District Court opinion at 695.

Ignorance of the law.

Petitioner uses the phrase "ignorance of the law is no excuse." This is not the issue. Parties and attorneys may disagree as to the law, but this does not mean they are ignorant of the law. Even if a court ultimately agrees with one attorney and disagrees with another attorney, this does not mean that one was ignorant of the law and the other was not. A dissenting judge disagrees with the majority, but this does not mean that he is ignorant of the law. He just disagrees as to what the law is.

Petitioner uses this phrase as a basis for trying to convince this Court to rule for her. She equates "ignorance of the law is no excuse" with "error of law is not a defense." She then argues that since ignorance of the law is no excuse, then error of law is not a defense. If ignorance of the law is no excuse as used in this sense, then *Safeco* would not have been decided as it was.

Abusive and unethical.

Petitioner and her *amici* parties state that the FDCPA is intended to curb "abusive and unethical acts." They then argue what the attorney (Carlisle) did was a violation of FDCPA and therefore constitutes "an abusive and unethical act." The "act" involved in this case is that Carlisle did legal research and arrived at a considered legal opinion. As it turns out, the Court basically told Carlisle that he was mistaken in his legal opinion and therefore committed an

"error of law." The question presented in this appeal is whether Carlisle should be liable for having done such.

Doing legal research and coming to a legal opinion, even if that opinion is wrong, is hardly "abusive and unethical." In fact, it is the opposite of that. It is the exact thing that an attorney would in good faith do. Indeed, it is the same thing that Jerman and her attorneys and *amici* parties have done. They turned this matter over to their attorneys who have all done legal research and arrived at a legal opinion. Even if their opinion is wrong, they should not be found liable for having done so. Up until this point in this case, Jerman and her attorneys have been "wrong" and have committed "errors of law", since the Courts have ruled against them.

If the "act" done by Carlisle is abusive and unethical, then surely Jerman, her attorneys, and *amici* parties have done this to this point in this case. Thus, under this theory, they should be liable pursuant to Rule 11. By their own definition, they have thus far acted in an "abusive and unethical" manner. More generally, in *any case* if researching the law and forming a legal opinion is "abusive and unethical", then any time a party loses a case, that party should be assessed sanctions under Rule 11.

FTC Opinion.

Petitioner argues that if an attorney/debt collector (or a non-lawyer debt collector or an unsophisticated person) suspects that there might be an error of law in what he is contemplating doing (or not doing), his recourse (in fact his exclusive and only recourse) is to contact FTC and get an FTC Opinion before proceeding any further.[19] The debt collector must say "Wait a minute. Before I do this thing, I will write the FTC and get an FTC Opinion."

FTC Opinions concerning FDCPA are very, very rare. Since the enactment of the FDCPA in 1977, there have been a total of four Opinions rendered by FTC concerning FDCPA. This fact alone reveals that persons have not considered using the FTC Opinion defense as a prelude to taking action. See the FTC website at www.ftc.gov/os/statutes/fdcpajump.shtm. Indeed, there was only one (1) FTC Opinion concerning FDCPA in the first 23 years of the FDCPA's existence. Furthermore, the lack (virtual nonexistence) of FTC Opinions concerning FDCPA matters, shows that attorneys and the public in general do not use this FTC Opinion route in the manner and for the purpose suggested by Petitioner.

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[19] There is mention in *Safeco* about getting an opinion from FTC concerning an FCRA matter. Safeco Insurance Company did not seek an FTC opinion, even though it could have. But the Supreme Court did not seem disturbed that the insurance company could have gone to the FTC but did not. The availability of an FTC Opinion did not seem to matter at all.

The time that it takes to get an FTC Opinion is way too long and infrequent to make this FTC Opinion route a meaningful and practical consideration in the real world. The FTC web site shows that it takes about 16 months to even get an FTC Opinion. For instance, the FTC Opinion rendered on June 23, 2009, was pursuant to a request on February 11, 2008, for such Opinion – about 16½ months.

Furthermore, the FTC refuses to issue an Opinion for most every request that is made. This is demonstrated by a review of the FTC web site where there are about 100 Staff opinions for April 1988-May 2002. See www.ftc.gov/os/statutes/fdcpa/letters.shtm. It appears Staff opinions were issued because the FTC declined to issue an official FTC Opinion. There are currently no FTC Opinions concerning the issue in this case. There are no Staff opinions either.[20] Thus, the attorney/debt collector in this case (Carlisle) would not have been able to get an FTC answer to his dilemma by checking with the FTC. Of course, a Staff opinion does not qualify under the FTC Opinion defense portion of FDCPA.[21]

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[20] It appears that the FTC has even stopped the Staff from issuing Staff interpretations of the FDCPA. See the above web site where the FTC stated "[e]xcept in unusual circumstances the staff will no longer issue informal written interpretations of the FDCPA." Indeed, it appears there have been no Staff opinions or interpretations since May 2002.

[21] In fact, a debt collector was found liable in part for relying on a Staff Opinion in *Hulshizer, supra.*

Thus, it is highly likely that if Carlisle had requested an FTC Opinion that such request would not have been granted. It is also likely that if the request had been granted that the time it would have taken to actually get an FTC Opinion would have been so long that it would not have been feasible to go this route.

Petitioner argues that the only error of law defense that is available under FDCPA is via FTC Opinion. Even if the FTC is wrong in its opinion, such FTC Opinion is still a valid defense; thus, an error of law is a defense, as long as it is committed by FTC.[22] However, Petitioner and her *amici* parties have not cited a single case where an FTC Opinion has been used as a defense. More specifically to the facts of this case, they have not cited a single case where FTC was wrong as a matter of law but such FTC Opinion was still a defense.

Concept of FDCPA is that an error of law is a defense.

Petitioner and others argue that in enacting the FDCPA, Congress did so with the concept that an

[22] Error of law is a defense under two provisions of FDCPA. There is no liability if a debt collector commits a violation of FDCPA but such violation is (1) based on an FTC Opinion, even if the FTC Opinion is wrong as a matter of law, i.e. even if there is an error of law [15 U.S.C. Section 1692k(e)] or (2) not intentional and results from a bona fide error notwithstanding the maintenance of procedures adapted to avoid such error, i.e. even if there is an error of law [15 U.S.C. Section 1692k(c)].

error of law should not be a defense. To the contrary, other than rejecting such a concept, Congress embraced the concept that an error of law should be a defense. The reason for this statement is as follows:

Section 1692k(e) provides that reliance on an FTC Opinion is a defense to an FDCPA action. This is true whether the FTC Opinion is right or wrong.[23] It is a defense even if the FTC is wrong as a matter of law. Reliance on an FTC Opinion is still a defense. Congress recognized that an error of law conceptually can form the basis of a valid defense. Indeed, that is the very cornerstone and basis of 1692k(e). The only time that an FTC Opinion defense is needed is when the FTC is wrong as a matter of law. This is so, because if the FTC is right, then there simply is no error of law to begin with. It is only when the FTC is wrong as a matter of law (i.e. there is an error of law) that the FTC Opinion defense is needed. The FTC Opinion defense is based on the concept that an error of law is and should be a defense. Thus, Congress has not rejected the concept of an error of law being a defense.

Page 17 of Petitioner's Brief states that "providing debt collectors with a mistake of law defense under FDCPA would be a very unexpected thing for Congress to do." To the contrary, this is

[23] It is still a defense, even if the act was done pursuant on FTC Opinion that is subsequently declared incorrect by a court. 15 U.S.C. Section 1692k(e).

exactly what FTC Opinion defense in FDCPA does. Even if the FTC is wrong as a matter of law, this is still a defense. Section 1692k(e) even bolsters this point by further specifically stating that FTC Opinion is still a defense even if an FTC Opinion is declared incorrect as a matter of law by a court.

Petitioner's interpretation leads to impractical results.

Following established cases.

Under Petitioner's theory, if there was a long, established line of cases (both District and Circuit) as to a point of law and a debt collector took that position, but that position was overturned on appeal to the U.S. Supreme Court, then that debt collector would be liable. Whereas, if a debt collector took a position in accordance with an FTC Opinion, the debt collector would not be liable, even if that position was overturned by a court. The same point can be made even if there was a U.S. Supreme Court ruling on a position, because that position could be overturned by a subsequent U.S. Supreme Court ruling.[24]

[24] It should be noted that FTC Opinions are decided by Commissioners, who are not necessarily attorneys. Yet under Petitioner's theory, an FTC Opinion as to a legal issue is vaulted over opinions of attorneys and judges, even the U.S. Supreme Court.

Quandary for the reader of the FDCPA.

Under Petitioner's version of the statute, how does a reader of the statute conclude that errors of fact are included, yet somehow "errors of law" are excluded? This is particularly pertinent when considered via the mind set of an "unsophisticated" person, which is the standard by which FDCPA violations are judged. The public, lawyers, debt collectors and unsophisticated persons should not be put to the requirement of somehow discerning what is *not* in the statute. Indeed, to conclude that errors of law are not included within the word "error" is not only a mistake, but should not equitably or legally mandate liability for doing so.

Mixed errors of fact or law.

Under Petitioner's version of the statute, how is a *mixed* error of law and fact judged? Just as issues of law and fact are many times mixed, it could very well be that errors are mixed and intertwined. Under Petitioner's version, this would be an impossible task to unravel. Under the Respondent's version, it is not. Under Respondent's version, an error is an error, regardless of whether it is fact, law, or mixed.

Likewise, under Petitioner's version, what happens when it is impossible to determine if the error is an error of law or an error of fact? Courts have noted the difficulty in distinguishing between an issue of fact from an issue of law. See *Miller v. Fenton*, 474 U.S. 104, 113 (1985) where the Supreme Court noted

that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive", and the Court has "yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

The same error can be one of fact or law.

Petitioner's version of the statute also mandates that it is necessary for there to be a determination as to when an error is an error of fact and when an error is an error of law. For instance, in regard to the facts of the instant case, what if a lawyer researched this point and simply made an error in doing his research? The attorney doing research then came up with a conclusion that the words "in writing" were proper to include in the letter where he did. However, he simply made an error by inserting in a wrong code section or phrase or something which resulted in him not finding law which stated that the words "in writing" were not proper to put in the letter. Perhaps the attorney in doing the legal research included a phrase but did not include the right phrase. There could indeed be a factual error in doing legal research. If the words "in writing" were inserted by mistake in the attorney/debt collector letter by the secretary in typing the letter, then this would be an error of fact. Perhaps the secretary inserted "in writing" because the secretary thought that these words had been inadvertently omitted in the draft given to the secretary, since the words "in writing" were in other portions of the letter. This would be an

error of fact. The point here is that the same "error" can be either an error of law or an error of fact. Under Petitioner's theory, one is a defense where the other is not. This illustrates that Petitioner's theory is not logical, consistent, or desirable.

Bona fide.

Petitioner argues that if an error of law is allowed as a defense, then a debt collector/attorney can just dream up a position and then be protected, and the floodgates will be opened for any ridiculous error than may be imagined by the debt collector. This is not true. There are several safeguards for such a fear. The position taken must be genuine, in good faith, and not frivolous. Indeed, the most basic requirement for the bona fide error defense is that the position must be "bona fide."

Bona fide error of law is and should be a defense to "additional" damages under FDCPA.

The provision of "additional" damages under FDCPA illustrates the fallacy of Petitioner's position. The FDCPA uses the unusual term of "additional damages" to delineate a category of damages that are recoverable under FDCPA. Section 1692k(a)(2)(A) states that a consumer can recover from a debt collector who violates FDCPA

> in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000.00;

The elements for awarding these "additional" damages are set out in Section 1692k(b)(1) which states that

> In determining the amount of liability in any action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;

Cases hold that "additional damages" under FDCPA are punitive damages. *Johnson v. Eaton*, 80 F.3d 148, 152 (5th Cir. 1996) specifically calls these "additional damages" as "punitive damages", and states that these

> 'additional' or punitive damages are designed to punish Eaton [debt collector] for his wrongful acts.

Thrasher v. Cardholder Services, 74 F. Supp. 2d 691, n. 2 (S. D. Miss. 1999) ruled that these "additional" damages are actually a "limitation on punitive damages". *Thomas v. Pierce,* 967 F. Supp. 507 (N.D. Ga. 1997) provides that these "additional" damages are intended for "reprehensible conduct", to "punish and deter" wrongdoers, are judged by the "very factors a court would address when considering punitive damages," and are "punitive in nature." At least two federal publications also label these FDCPA "additional damages" as punitive damages. See Consumer Compliance Handbook published by the Federal Reserve Board at www.federalreserve.gov/boarddocs/

supmanualcch/200601/fairdebt.pdf and FDIC Compliance Handbook at www.fdic.gov/regulations/compliance/handbook/manual%20403-404.pdf, both of which state that the damages in Section 1692k(a)(2) are properly called "punitive damages".

The U.S. Brief appears to be the only opposing brief that discusses the penalty aspect of the FDCPA, and it recognizes that the FDCPA does indeed contain a penalty provision. U.S. comments on page 14 that there are a "general set of penalties" under FDCPA. The only "penalty" under FDCPA to which this could refer is "additional" damages. FDCPA provides for three categories of damages – actual damage, additional damage, and attorney fees. Actual damage and attorney fees are compensatory damages, not penalty damages. "Additional" damage is the only other category of damages under FDCPA. Thus, the only penalty damage to which U.S. could be referring is "additional" damage. Consequently, even U.S. refers to "additional" damages as "penalty" damages that penalize or punish the offending debt collector, not compensate the consumer debtor for his loses.

Punitive damages are not recoverable where a person has acted on advice of an expert, including an attorney, particularly where one has acted on the basis of a legal opinion, even if that opinion or advice is wrong. Thus, an error of law is clearly a defense to

"additional" damages under FDCPA.[25] Petitioner's position would prevent the use of reliance on advice of an attorney as a defense to punitive (additional) damages. This is contrary to well established state and federal law.[26]

CONCLUSION

The Judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

LESTER F. SMITH
SMITH & MCARTY
721 Avignon Dr.
Suite D
Ridgeland, MS 39157
601-853-8851
Lestersmit@aol.com

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[25] On page 8 U.S. acknowledges that BFE is a defense to a civil penalty and states that "Congress provided that ignorance of the law would shield a debt collector only from civil penalties."

[26] For example, see *Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 102 (2nd Cir. 2001); *Henderson v. USF&G*, 695 F.2d 109, 114 (5th Cir. 1983); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579 (Fed. Cir. 1996); *Murphree v. Federal Ins. Co.*, 707 So. 2d 523 (Miss. 1997).