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ATTORNEYS BEWARE: *JERMAN V. CARLISLE* HOLDS YOU LIABLE FOR TECHNICAL LEGAL ERRORS UNDER THE FDCPA

Vartan S. Madoyan*

I. INTRODUCTION

Abusive, deceptive, and unfair debt collection practices have long been a problem for consumers in our society.¹ The need for protection from such practices is particularly high when third-party companies engage in debt collection. Unlike creditors, who are generally restrained by a desire to protect their reputation and goodwill with consumers whom they hope to later transact with, “independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.”² As a result of this dynamic, Congress enacted the Fair Debt Collection Practices Act (FDCPA or “Act”) in 1977 to better regulate third-party debt collectors.³

While the FDCPA did not originally apply to attorneys,⁴ in 1995, the U.S. Supreme Court held that a 1986 amendment to the Act (“1986 Amendment”) brought attorneys firmly within the Act’s reach.⁵ Because the FDCPA imposes strict liability for certain

* J.D. 2011, Loyola Law School Los Angeles; B.A., Economics, 2007, University of California, San Diego. I want to thank Professor Lauren E. Willis for her thoughtful guidance and advice throughout this Comment, for without her, this would not have been possible. I also want to thank the staff and editors of the *Loyola of Los Angeles Law Review* for all of their hard work and effort in putting together this inaugural Supreme Court issue. And finally, I want to thank my friends and family for the continual support they have provided me along the way.

1. See S. REP. NO. 95-382, at 1–2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1695–96; see also *Penney on Harassment*, N.Y. TIMES, Feb. 13, 1985, at C15 (describing the J.C. Penney Company’s debt collectors’ harassment of some of the company’s customers more than twenty-five years ago).

2. S. REP. NO. 95-382, at 2.

3. States may also supplement the FDCPA by providing further protection. *Id.*

4. See Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 *FORDHAM L. REV.* 3107, 3119–21 (2010).

5. *Heintz v. Jenkins*, 514 U.S. 291, 292, 299 (1995).

technical legal errors,⁶ creditors' attorneys may feel forced to hesitate before advocating strongly for their clients' legal positions, lest they risk their own personal liability. Although the FDCPA includes a "bona fide error" exception that excuses unintentional violations that occur despite procedures put in place to avoid such errors,⁷ circuit courts were split as to whether technical legal errors could qualify as bona fide errors under the Act.⁸ If they could not, then attorneys would be subject to strict liability (and potentially large monetary liability) under the FDCPA for otherwise honest errors. As a result, attorneys may strongly hesitate before advocating zealously for their clients.

The Supreme Court resolved this circuit court split in 2010 in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,⁹ by reversing the Sixth Circuit's prior decision in the case and holding that the bona fide error exception *does not* apply to technical (or nontechnical) legal errors.¹⁰ Although the Court's decision was based in part on statutory construction and legislative history, a majority of the Court concluded that its decision would not place "unmanageable burdens on lawyers practicing in the debt collection industry."¹¹ The dissent, however, expressed fear that as plaintiffs file more frivolous lawsuits in hopes of persuading defendants to settle,¹² the majority's decision could turn a segment of the legal system on its head by encouraging creditors' attorneys to "adopt a debtor-friendly interpretation of every question."¹³

Although it is too soon to say which of these opinions will be borne out empirically, this Comment takes seriously the dissent's

6. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1634–35 (2010) (Kennedy, J., dissenting); *Johnson v. Riddle*, 305 F.3d 1107, 1121–22 (10th Cir. 2002); see also Darren W. Ford, Comment, *Secondary Liability Under the Fair Debt Collection Practices Act*, 78 U. CIN. L. REV. 1079, 1087 (2010) ("[T]he majority of the Act's provisions impose strict liability on debt collectors.").

7. 15 U.S.C. § 1692k(c) (2006).

8. Compare *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1605 (2010) (mistakes of law may qualify), and *Johnson*, 305 F.3d at 1122–24 (same), with *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (*per curiam*) (bona fide error defense unavailing), and *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779–80 (9th Cir. 1982) (same).

9. 130 S. Ct. 1605.

10. *Id.* at 1608, 1610–11.

11. *Id.* at 1624.

12. *Id.* at 1631 (Kennedy, J., dissenting).

13. *Id.* at 1634.

concerns. Part II discusses the FDCPA's statutory background and the factual background that led to the Court's decision in *Jerman*. Part III describes the Court's reasoning in holding that the bona fide error exception does not apply to mistakes of law. Part IV analyzes the potential conflict that forces attorneys to choose between zealous advocacy for their own clients and personal liability under the Act. Finally, Part V concludes that Congress should monitor the situation and amend the statute should this conflict prove irreconcilable.

II. STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the FDCPA in 1977 to protect consumers by curbing "abusive, deceptive, and unfair debt collection practices" by third parties who regularly collect debt for others.¹⁴ In addition to the FDCPA's consumer-protection goals, Congress sought, by enacting the FDCPA, to ensure that those debt collectors who abstained from such abusive practices were not competitively disadvantaged in the marketplace.¹⁵ A violation of the FDCPA, whether enforced administratively by the Federal Trade Commission (FTC) or judicially through civil lawsuits, is therefore accompanied by varying and drastic financial implications.¹⁶ In fact, in addition to actual and statutory damages, the Act entitles successful civil plaintiffs to costs and reasonable attorney's fees.¹⁷

14. Federal Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (2006)).

15. *Jerman*, 130 S. Ct. at 1608.

16. See 15 U.S.C. §§ 1692k-1692l. In administrative actions, for example, debt collectors are subject to penalties of up to \$16,000 *per day* if found to have acted with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that [their actions were] unfair or deceptive and [were] prohibited [by the FDCPA]." *Id.* § 45(m)(1)(A)-(C); see also Federal Civil Penalties Inflation Adjustment Act of 1990, 16 C.F.R. § 1.98(d) (2010) (adjusting the maximum civil penalties to \$16,000). In civil cases, in addition to actual damages, courts may award individual plaintiffs statutory damages up to \$1,000, or, in class actions, award up to "the lesser of \$500,000 or 1 [percent] of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2).

17. 15 U.S.C. § 1692k(a)(1), (3). Reasonable attorney's fees are generally deemed mandatory in a successful case, regardless of the violation committed or the damages suffered. See *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164, 1166 (7th Cir. 1997) (reversing lower court's decision to reject reasonable attorney's fees for defendants' de minimis violation); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628-29 (4th Cir. 1995) (finding reasonable attorney's fees mandatory absent unusual circumstances, such as bad faith conduct); *Graziano v. Harrison*, 950 F.2d 107, 114 & n.13 (3d Cir. 1991) (same); *Pipples v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (finding plaintiff was owed attorney's fees unless defendant

Among other prohibitions, the FDCPA bars debt collectors from “making false representations as to a debt’s character, amount, or legal status; communicating with consumers at an ‘unusual time or place’ likely to be inconvenient to the consumer; or using obscene or profane language or violence or the threat thereof.”¹⁸ The FDCPA also contains specific notice provisions that debt collectors must affirmatively follow. With certain exceptions not pertinent here, 15 U.S.C. § 1692g(a) provides that a debt collector must, within five days of its initial communication with a consumer, send the consumer a written notice containing “a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector.”¹⁹ Although courts are split as to whether a consumer must specifically dispute the debt *in writing* to avoid this assumption,²⁰ a *written* notification, if sent within the thirty-day period, will require a debt collector to cease debt-collection activities until providing the debt verification or creditor information requested.²¹

The Supreme Court has fundamentally characterized a violation of any of these provisions as a technical legal error, subjecting attorney debt collectors and their law firms to civil liability if the violations were committed during the course of their representation of a client.²² The FDCPA contains two exceptions, however, to the imposition of legal liability. The first exception, and the one most relevant to this Comment, provides:

A debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error

could assert a successful § 1692k(c) defense on remand). *But see* Johnson v. Eaton, 80 F.3d 148, 151–52 (5th Cir. 1996) (denying attorney’s fees because plaintiff suffered no actual damages).

18. *Jerman*, 130 S. Ct. at 1608–09 (citations omitted) (citing 15 U.S.C. §§ 1692c–1692e).

19. 15 U.S.C. § 1692g(a).

20. *Compare Graziano*, 950 F.2d at 112 (finding that the lower court did not err in determining that only disputes made in writing were effective under the statute), *with* Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1080–82 (9th Cir. 2005) (holding that the statute does not require disputes to be made in writing).

21. 15 U.S.C. § 1692g(b).

22. *See* Heintz v. Jenkins, 514 U.S. 291, 298–99 (1995); Stueben, *supra* note 4, at 3117–18.

notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.²³

The second exception requires defendants to act in good faith and “in conformity with any advisory opinion of the [FTC].”²⁴ However, the FTC has rarely issued such advisory opinions.²⁵

B. Factual Background

In April 2006, Countrywide Home Loans, Inc., represented by respondents Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA, and Adrienne S. Foster (“Foster”), one of the law firm’s attorneys (collectively, “Carlisle” or “law firm”), filed a foreclosure action in an Ohio state court against petitioner Karen L. Jerman (“Jerman”), after one of Carlisle’s representatives called Jerman to verify her address and phone number.²⁶ The summons and complaint served on Jerman included a notice stating that the “mortgage debt would be assumed to be valid unless Jerman disputed it *in writing*.”²⁷ In response, Jerman’s attorney sent a letter to Foster stating that Jerman had paid the debt in full in January 2006 and that Jerman therefore disputed and sought to verify the alleged debt owed.²⁸ After Foster verified with Countrywide that the debt was, in fact, paid in full, Foster quickly withdrew Countrywide’s foreclosure suit.²⁹

Jerman then filed a class action lawsuit against Carlisle in an Ohio district court contending that Carlisle had violated 15 U.S.C. § 1692g by stating in the notice that Jerman’s debt would be assumed valid unless disputed in writing.³⁰ Although § 1692g requires debt collectors to give consumers such notices, it does not specifically

23. 15 U.S.C. § 1692k(c).

24. *Id.* § 1692k(e).

25. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1621 (2010) (noting that in the preceding decade, the FTC has issued only four opinions—in response to seven requests—with a typical response time of three to four months).

26. *Id.* at 1609; Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 3–4, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 502 F. Supp. 2d 686 (N.D. Ohio 2007) (No. 1:06 CV 1397).

27. *Jerman*, 130 S. Ct. at 1609 (emphasis added).

28. Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, *supra* note 26, at 3–4.

29. *See Jerman*, 130 S. Ct. at 1609.

30. *Id.*

require a consumer to dispute the debt *in writing*.³¹ Jerman sued on this basis and, although she did not claim to have suffered harm as a result of Carlisle's actions, sought class certification, actual damages, and statutory damages equal to the lesser of \$500,000 or 1 percent of Carlisle's net worth, plus attorney's fees and costs.³² To assist her in calculating Carlisle's net worth, during discovery Jerman "sought information from [Carlisle] concerning the income and net worth of each partner in the firm."³³

Jerman later proposed to settle the case if Carlisle paid her \$15,000 in damages and \$7,500 in attorney's fees.³⁴ After settlement talks failed, the trial court granted summary judgment for Carlisle.³⁵ Despite the "division of authority on the question," the trial court agreed with Jerman that Carlisle had violated § 1692g by including the "in writing" requirement in the notice.³⁶ Nevertheless, the court ruled in Carlisle's favor because it concluded that § 1692k(c) "shielded [the law firm] from liability because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error."³⁷ On appeal, the Sixth Circuit affirmed, holding that the bona fide error exception shielded Carlisle from liability for its technical legal error.³⁸ The Supreme Court granted certiorari to resolve a circuit split as to whether the bona fide error exception extended to mistakes of law.³⁹

31. See 15 U.S.C. § 1692g(a)(3) (2006); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 464 F. Supp. 2d 720, 725 (N.D. Ohio 2006).

32. See Jerman, 130 S. Ct. at 1631 (Kennedy, J., dissenting) (citing Amended Class Action Complaint: Unfair Debt Collection Practices at 4, Jerman, 464 F. Supp. 2d 720 (No. 1:06-CV-01397), 2007 WL 681482).

33. *Id.*

34. *Id.* (citing to the record).

35. See Jerman, 464 F. Supp. 2d at 720.

36. Jerman, 130 S. Ct. at 1609–10 (citing Jerman, 464 F. Supp. 2d at 722–25).

37. *Id.* at 1610 (citing Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 502 F. Supp. 2d 686, 695–97 (N.D. Ohio 2007)).

38. See *id.* (citing Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 538 F.3d 469, 473–76 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1605).

39. See *supra* note 8 and accompanying text. Courts are also split as to whether consumers are required to dispute debts in writing. See *supra* note 20. Because this issue was not raised on appeal, however, the Court expressed no view on the matter. Jerman, 130 S. Ct. at 1610 & n.3.

III. REASONING OF THE COURT

A. *Construction of Statutory Language*

The majority began by reiterating the “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”⁴⁰ It is likely for this reason, the majority opined, that “when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here.”⁴¹

One such example is evident in the administrative penalty provisions of the Federal Trade Commission Act (“FTC Act”), which Congress incorporated into the FDCPA.⁴² The FTC Act explicitly holds debt collectors liable only when acting with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that their actions were unlawful.⁴³ Given the absence of similar language in the FDCPA’s bona fide error provision, the majority concluded:

[I]t is a fair inference that Congress chose to permit injured consumers to recover . . . for ‘intentional’ conduct, including violations resulting from [a] mistaken interpretation of the FDCPA, while reserving the more onerous penalties of the FTC Act for debt collectors whose intentional actions also reflected . . . [knowledge] that the conduct was prohibited.⁴⁴

The majority also noted that Congress did not confine liability under the FDCPA to only “‘willful’ violations, a term more often understood in the civil context to excuse mistakes of law.”⁴⁵ It observed that even in the criminal context, references to “a ‘knowing’ or ‘intentional’ ‘violation’ . . . has not necessarily implied a defense for legal errors.”⁴⁶ The majority drew additional support for its finding from § 1692k(c)’s requirement that a debt collector

40. *Jerman*, 130 S. Ct. at 1611 (quoting *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833)).

41. *Id.* at 1612.

42. *Id.*

43. *Id.* (quoting 15 U.S.C. § 45(m)(1)(A), (C) (2006)).

44. *Id.* For the dissent’s countervailing view, see *infra* note 61 and accompanying text.

45. *Jerman*, 130 S. Ct. at 1613.

46. *Id.* (citations omitted).

maintain “procedures reasonably adapted to avoid any such error.”⁴⁷ Since the term “procedure” is defined as “a series of steps followed in a regular orderly definite way,” the majority reasoned that the FDCPA is more naturally interpreted as applying to mechanical, clerical, or factual errors, rather than legal errors, which can be more complex in nature.⁴⁸

Finally, the majority rejected Carlisle’s reliance on *Heintz v. Jenkins*.⁴⁹ In *Heintz*, the Court first held that the 1986 Amendment meant that the Act’s definition of “debt collector” now included attorneys who regularly (even through litigation) attempt to collect consumer debts.⁵⁰ In addition, the *Heintz* Court held that § 1692e(5) of the FDCPA—the provision prohibiting debt collectors from making any “threat to take action that cannot legally be taken”—would not necessarily render an attorney liable for filing an unsuccessful claim against a debtor, rejecting the argument that such a scenario would involve an attorney taking an action void of legal support.⁵¹ The *Heintz* Court was skeptical that § 1692e(5) itself demanded such a result, but assuming it did, the decision suggested that an attorney’s potential liability was not “so absurd” or disruptive to the legal system as to warrant implying a categorical exemption because the bona fide error defense could save an attorney from such potential liability.⁵² In the instant case, the majority stated that Carlisle’s reliance on *Heintz* was unavailing because *Heintz* implied that, at most, attorneys could only invoke the FDCPA’s bona fide error defense for factual errors, not mistakes of law (such as a misinterpretation of the FDCPA’s requirements).⁵³

The dissent in *Jerman*, on the other hand, concluded very differently on many of these points. The dissent reasoned that in the civil context, the word “willful,” as opposed to the word “intentional,” has been used to impose a lower—not higher—threshold for liability because even reckless acts have been deemed

47. *Id.* at 1614.

48. *Id.* at 1614–15 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1976)).

49. 514 U.S. 291 (1995).

50. *Jerman*, 130 S. Ct. at 1618 (citing *Heintz*, 514 U.S. at 292).

51. *Heintz*, 514 U.S. at 295 (quoting 15 U.S.C. § 1692e(5) (1988)).

52. *Jerman*, 130 S. Ct. at 1618 (citing *Heintz*, 514 U.S. at 295).

53. *See id.* at 1618–19.

“willful.”⁵⁴ Moreover, it surmised that even if the majority’s proffered distinction between “intentional” and “willful” exists, the Court’s precedent has specifically tailored such a distinction to the criminal context—not to civil cases.⁵⁵

The dissent also placed great weight on Congress’s use of the word “violation” in § 1692k(c).⁵⁶ Under the dissent’s theory, the FDCPA’s juxtaposition of language denoting the mens rea requirement (in other words, its use of the word “intentional”) with the word “violation” created a mistake-of-law defense because a “violation” alludes to the notion of a legal infraction.⁵⁷ The dissent therefore reasoned that, while the general maxim that ignorance of the law is no excuse remains true, the Act provided an express exception to this general prohibition.⁵⁸

Finally, the dissent stated that *Heintz* provided a further reason to interpret § 1692k(c) to include good faith legal errors.⁵⁹ The dissent was troubled that the majority’s decision in *Jerman* undermined *Heintz* by concluding that “[a]ttorneys may now be held liable for taking reasonable legal positions in good faith if those positions are ultimately rejected.”⁶⁰ In order to prevent such a result, the dissent read the FDCPA to provide the following statutory scheme:

- (1) intentional violations are punishable under the heightened penalties of the FTC Act;
- (2) unintentional violations are generally subject to punishment under the FDCPA; and
- (3) a defendant may escape liability altogether by proving that a violation [including a mistake of law] was based on a bona fide error and that reasonable error-prevention procedures were in place.⁶¹

54. *Id.* at 1630 (Kennedy, J., dissenting). Thus, “[a]voiding liability under a statute aimed at intentional violations should . . . be easier . . . than avoiding liability under a statute aimed at willful violations.” *Id.*

55. *Id.* (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007)).

56. *Id.* at 1629.

57. *Id.* at 1629–30 (“The FDCPA’s use of [the word] ‘violation’ thus distinguishes it from most of the authorities relied upon by the [majority] to demonstrate that mistake-of-law defenses are disfavored.”).

58. *Id.* at 1636.

59. *See id.* at 1633.

60. *Id.*

61. *Id.* at 1637.

B. Legislative History

While the majority and dissent each purported to find sufficient support for their positions from their differing interpretations of the statutory text, they each analyzed the FDCPA's legislative history in an attempt to bolster their respective positions. Carlisle too, in advancing its position that mistakes of law were bona fide errors under the FDCPA, relied on legislative history in the form of a Senate Committee Report stating that "[a] debt collector has no liability . . . if he violates the [A]ct in *any* manner, *including with regard to the [A]ct's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations."⁶² Carlisle asserted that because a mistake "with regard to the [A]ct's coverage" would be a mistake of law, Congress intended the bona fide error defense to apply to such mistakes.⁶³ The majority rejected this argument, however, stating that such a reading could have contemplated mistakes of fact affecting the Act's coverage, not mistakes of law, particularly because the FDCPA did not originally apply to attorneys.⁶⁴

The majority, however, generally found the legislative record vague and uncertain when viewed in its entirety.⁶⁵ On one hand, a Senate Banking Committee member who was a primary sponsor of the Act stated his view that "certain things ought not to happen, period," implying a more limited bona fide error exception.⁶⁶ On the other hand, a chairman in a legislative markup session confirmed from a staffer that the defense did not simply concern mathematical errors, but applied to "any violation of the act which was unintentional," including "technical error[s]."⁶⁷ Due to this uncertainty, the majority declined to give controlling weight to the legislative history.⁶⁸

Despite declaring that it would not give controlling weight to it, the majority looked to additional areas of legislative history and

62. *Id.* at 1619 (majority opinion) (emphasis added) (citing S. REP. NO. 95-382, at 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699-700).

63. *See id.*

64. *See id.*

65. *Id.*

66. *Id.* at 1619 n.14.

67. *Id.*

68. *Id.*

believed that any remaining doubt about the proper interpretation of § 1692k(c) was “dispelled by evidence of the meaning attached to the language Congress copied into the FDCPA’s bona fide error defense.”⁶⁹ The bona fide error defense in TILA was copied verbatim, nine years later, into the FDCPA.⁷⁰ During the nine-year period between TILA’s enactment and the FDCPA’s passage, the three circuit courts to consider the question (the Second, Seventh, and Ninth Circuits) interpreted TILA’s bona fide error defense as referring to only clerical errors.⁷¹ According to the majority, “repetition of the same language in a new statute indicates . . . [congressional] intent to incorporate its . . . [well-settled] judicial interpretations”⁷² While the majority acknowledged that interpretations by three circuit courts may not have “settled” the meaning of TILA’s bona fide error defense, it nevertheless concluded that there was no reason to suppose Congress disagreed with those interpretations when enacting the FDCPA.⁷³ Thus, the majority found it reasonable to infer that, based on these three holdings, Congress understood the statutory formula it chose for the FDCPA.⁷⁴

The dissent attacked the majority’s assertion that the bona fide error defense’s language was well settled. It avowed that, given that this assumption was based on three appellate decisions, “which are contradicted by several District Court opinions and a State Supreme Court opinion[, this is] hardly a consistent legal backdrop against which to divine legislative intent.”⁷⁵ While damages for technical

69. *Id.* at 1615.

70. *Id.* at 1615–16.

71. *Id.* at 1616 & n.10.

72. *Id.* at 1616 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

73. *Id.* However, as previously stated, other circuit courts have since held differently. *See, e.g., Johnson v. Riddle*, 305 F.3d 1107, 1122–24 (10th Cir. 2002) (holding bona fide error provision applies to mistakes of law).

74. *Jerman*, 130 S. Ct. at 1616 & n.11.

75. *Id.* at 1639 (Kennedy, J., dissenting). Justice Scalia’s concurring opinion went even further in attacking the majority’s assertion that TILA’s history can provide some guidance in interpreting the FDCPA. According to Justice Scalia, it is “legal fiction” to assume that Congress understood the judicial interpretation of the bona fide error language based on merely three appellate decisions. *Id.* at 1625 (Scalia, J., concurring in part and concurring in the judgment). Although noting that the majority discounted what seemed to him as the most persuasive piece of legislative history (the “with regard to the Act’s coverage” debate), Scalia concluded that *no weight* should be given to the legislative record as it invariably disrupts the more appropriate textual analysis. *Id.* at 1625–28.

violations may be small, the dissent opined that the pressure to settle such cases to avoid litigation costs can be quite high.⁷⁶ Moreover, the FDCPA requires courts to award reasonable attorney's fees to any successful plaintiff regardless of the extent of the damages.⁷⁷ As a result, attorneys acting in good faith but making technical legal errors under the Act are unfairly disadvantaged.⁷⁸

C. Policy Concerns

As applied to an attorney's technical legal error, the FDCPA has the potential to distort our legal system—a system based on zealous advocacy. The majority, however, found no such grave consequences from its reading of the Act's bona fide error defense, focusing instead on other FDCPA provisions that could potentially curb such absurd results: (1) when an alleged violation is trivial, actual damages will likely be *de minimis*; (2) the FDCPA places a cap on statutory damages and vests courts with discretion to adjust such damages; and (3) although the FDCPA contemplates an award of costs and reasonable attorney's fees, courts have discretion in calculating what is reasonable, and “§ 1692k(a)(3) authorizes courts to award attorney's fees to the *defendant* if a plaintiff's suit ‘was brought in bad faith and for the purpose of harassment.’”⁷⁹ The majority also observed that attorneys could avoid liability by obtaining advisory opinions from the FTC under § 1692k(e) but did not place significant weight on such a remedy because of the FTC's impractical response time and, its frequent penchant for declining to even issue an opinion.⁸⁰

Finally, the majority surmised that an attorney's interest in avoiding FDCPA liability will not always be adverse to his or her client's interest, as some courts have held clients vicariously liable for their attorneys' FDCPA violations.⁸¹ The majority also stated

76. *Id.* at 1632–33 (Kennedy, J., dissenting).

77. *Id.*

78. *Id.*

79. *Id.* at 1620–21 (majority opinion) (emphasis added) (citing 15 U.S.C. § 1692k(a)(1)–(3) (2006)).

80. *Id.* at 1621. Justice Breyer placed a greater burden on the FTC to more readily issue advisory opinions; because he assumed the FTC would do so in the future, Breyer concurred with the majority. *Id.* at 1625 (Breyer, J., concurring).

81. *Id.* at 1622 (majority opinion) (citing *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (9th Cir. 1994)).

that, to the extent the FDCPA constrains an attorney's advocacy on behalf of a client, such constraints are not new since attorneys are subject to judicial sanctions for harassment and improper actions during litigation and also must generally comply with standards of professional conduct.⁸²

In sum, the majority predicted that its decision would not unnecessarily burden attorney debt collectors.⁸³ Absent a showing that “the result [would be] so absurd as to warrant’ disregarding the weight of textual authority,” the majority held that the bona fide error defense did not apply to legal errors, leaving it to Congress to address any policy concerns.⁸⁴

The dissent, however, opined that the *Jerman* decision would create impractical real-world scenarios for attorney debt collectors, conflict with attorneys’ ethical duties, and entrench the most troubling aspects of our legal system.⁸⁵ Often a plaintiff does not seek a trial verdict and “will be just as happy with a settlement, as will his or her attorney (who will receive fees regardless).”⁸⁶ A defendant may also prefer a quick settlement to the burdens of a protracted trial with high litigation costs and greater potential liability, particularly in class actions.⁸⁷ Indeed, the dissent found that the present case precisely illustrated this point.⁸⁸

The dissent stated that Congress enacted the bona fide error defense precisely because it too was troubled by this dynamic.⁸⁹ That trial courts have discretion to calculate reasonable attorney’s fees—and can award fees to a *defendant* if a lawsuit is brought in bad faith—provides no bulwark against these concerns.⁹⁰ The dissent explained that a fee award is not, in practice, rigorously adjusted based on a court’s assessment of a suit’s utility.⁹¹ Moreover, if a plaintiff obtains a favorable judgment or settlement, “then by

82. *Id.*

83. *Id.* at 1624.

84. *Id.* (quoting *Heintz v. Jenkins*, 514 U.S. 291, 295 (1995)).

85. *Id.* at 1628–29 (Kennedy, J., dissenting).

86. *Id.* at 1631.

87. *Id.*

88. *Id.* (referring to *Jerman* filing suit despite suffering no injuries and, after merits-related discovery, offering to settle the case for \$22,500); *see supra* notes 33–34 and accompanying text.

89. *Jerman*, 130 S. Ct. at 1631 (Kennedy, J., dissenting).

90. *Id.* at 1631–32.

91. *Id.* at 1632.

definition the suit will *not* have been brought in bad faith.”⁹² Thus, a potential fee award is highly unlikely and will not deter plaintiffs from alleging ostensibly frivolous FDCPA claims.

Next, the dissent feared that the *Jerman* decision would subject attorneys to liability when they had done nothing wrong, indeed, “even when they have acted in accordance with their professional responsibilities.”⁹³ The instant case offered proof of such an outcome, as Carlisle had acted reasonably, had acted in good faith, and had not injured Jerman.⁹⁴ This problem is further underscored because, “even where a particular practice is compelled by existing precedent, the attorney may be sued if that precedent is later overturned.”⁹⁵ This is so, the dissent reasoned, because the majority deemed the conduct actionable as an “intentional ‘violation.’”⁹⁶ For these reasons, the dissent concluded that the majority opinion would create an unworkable reality for attorney debt collectors.

IV. ANALYSIS

A. The Court’s Reading of the FDCPA’s Text and Legislative History Places Too Little Weight in Some Areas and Too Much in Others

The majority inferred from its construction of the statutory text and the history of the bona fide error provision that appears in both the FDCPA and TILA that Congress did not intend the defense to apply to mistakes of law. This conclusion seems improper. While three circuit courts had held, during the nine-year period between TILA’s enactment and the FDCPA’s passage, that *TILA*’s bona fide error provision applied only to clerical errors,⁹⁷ that is hardly sufficient to conclude that the judicial interpretation of the language of this provision was well settled.⁹⁸ In fact, the Sixth and Tenth

92. *Id.* (emphasis added).

93. *Id.* at 1634–35.

94. *Id.* at 1635.

95. *Id.* at 1634.

96. *Id.*

97. *Id.* at 1616 & n.10 (majority opinion); *see supra* text accompanying notes 70–74.

98. *Id.* at 1626 (Scalia, J., concurring in part and concurring in the judgment) (“It seems to me unreasonable, however, to assume that, when Congress has a bill before it that contains language used in an earlier statute, it is aware of, and approves as correct, a mere three Court of Appeals decisions interpreting that earlier statute over the previous nine years.”).

Circuits recently issued decisions conflicting with those of the three prior circuit courts.⁹⁹ The majority essentially acknowledged this fact, yet stated that “there is [also] no reason to suppose that Congress disagreed with those [prior] interpretations [of the Second, Seventh, and Ninth Circuits] when it enacted the FDCPA.”¹⁰⁰ Perhaps the majority’s supposition is correct. However, this analysis tells us nothing about whether Congress intended to so limit the scope of the bona fide error defense as applied to an attorney’s mistake of law because, when originally enacted, the FDCPA exempted attorneys from liability altogether.¹⁰¹ In creating the FDCPA, Congress simply did not consider the ramifications of failing to give attorney debt collectors a bona fide error defense for technical legal errors.

Although undervalued by the Court, the amendments to the FDCPA represent another crucial factor in the analysis. While *Heintz* held that the 1986 Amendment brought litigating attorneys within the Act’s scope,¹⁰² Congress did not expressly state that the bona fide error exception excluded mistakes of law despite the *eight* amendments it has made (thus far) to the FDCPA.¹⁰³ Although it seems difficult to infer from Congress’s silence that it intended this exception to apply to legal errors, Congress has, on the other hand, expressly stated that mistakes of law are inapposite in TILA.¹⁰⁴ It is not surprising that a similar statement is absent from the FDCPA given its goals of curbing unfair debt-collection practices and ensuring that honest debt collectors are not competitively disadvantaged. Bona fide legal mistakes, particularly technical mistakes causing no damage, cannot be called “unfair debt collection practices,”¹⁰⁵ nor do debt collectors “gain a competitive advantage by making good-faith legal errors any more than by making good-faith factual errors.”¹⁰⁶ The absence of similar language in TILA and the

99. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476 (6th Cir. 2008), *rev’d*, 130 S. Ct. 1605 (2010); *Johnson v. Riddle*, 305 F.3d 1107, 1122–24 (10th Cir. 2002).

100. *Jerman*, 130 S. Ct. at 1616.

101. *See Stueben*, *supra* note 4, at 3119–20.

102. *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995).

103. *See Jerman*, 130 S. Ct. at 1617, 1624 n.22.

104. 15 U.S.C. § 1640(c) (2006).

105. *Jerman*, 130 S. Ct. at 1632 (Kennedy, J., dissenting).

106. *Id.* at 1633.

FDCPA suggests that Congress recognizes this dynamic. The attorney exemption in the original FDCPA resolved any conflict that might have otherwise existed between an attorney's duty to a client and that attorney's compliance with the FDCPA. The order of events here means one can infer nearly nothing from this legislative history.

Moreover, as the dissent points out, the plain language of § 1692k(c) provides a bona fide error defense specifically for unintentional "violations," rather than unintentional "conduct."¹⁰⁷ This language, combined with a Senate Committee Report stating that the bona fide error provision also applies "with regard to the [A]ct's coverage," makes the Court's decision even more peculiar.¹⁰⁸ A violation regarding the FDCPA's coverage or scope seems to be Congress's way of including mistakes of law as bona fide errors.¹⁰⁹ This reading should be particularly favored given that the other possible exception under the FDCPA—seeking an advisory opinion from the FTC and acting in reliance upon it—has proven impractical, as the FTC has issued only four opinions in response to seven requests in the decade preceding *Jerman*, with a typical response time of three to four months.¹¹⁰ In practice, if the FTC even chooses to respond to an attorney's request, a three- to four-month delay before an attorney can advise a client as to how to act makes the process essentially unusable.

The majority, however, seemed to ignore the FTC's failures in this area, focusing instead on the "role Congress evidently contemplated for the FTC in resolving ambiguities in the Act."¹¹¹

107. *Id.* at 1629; *see* 15 U.S.C. § 1692k(c).

108. *Jerman*, 130 S. Ct. at 1619 (quoting S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700); *id.* at 1627 (Scalia, J., concurring in part and concurring in the judgment) ("The Court claims that a mistake about 'the [A]ct's coverage' in this passage might refer to factual mistakes The Court's explanation seems to me inadequate. No lawyer—indeed, no one speaking accurately—would equate a mistake regarding the Act's coverage with a mistake regarding whether a particular fact situation falls within the Act's coverage.")

109. That the FDCPA did not originally apply to attorneys does not undermine this argument, since non-attorneys may also make legal errors. Non-attorneys "sometimes receive and rely upon erroneous legal advice from attorneys. Indeed, if anyone could satisfy the defense's requirement of maintaining 'procedures reasonably adapted to avoid' a legal error, it would be a non-attorney [who directs] . . . all legal questions to his attorney." *Id.* at 1628 (Scalia, J., concurring in part and concurring in the judgment).

110. *See id.* at 1621, 1624 (majority opinion) (citing FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGE OF CHANGE 67 (2009)); *id.* at 1635 (Kennedy, J., dissenting).

111. *Id.* at 1615 (majority opinion).

Since § 1692k(e) exempts acts done or omitted in conformity with any advisory opinion of the FTC, the majority reasoned that debt collectors “would rarely need to consult the FTC if [the bona fide error defense] . . . offer[ed] immunity for good-faith reliance on advice from private counsel.”¹¹² However, this analysis ignores the possibility that Congress intended to include two separate alternatives to immunity, and that these alternatives may overlap. If, for example, the FTC’s response is lacking or is unreasonably delayed through no fault of the debt collector, it seems sensible for Congress to provide that debt collector with another road to immunity. In this sense, the dissent’s proposed statutory scheme¹¹³ seems more reasonable.

*B. The Potentially Untenable
Consequences of the Majority’s Decision*

The FDCPA’s difficult and imprecise text and legislative history do not unequivocally support one interpretation of the Act. Nevertheless, the potential disruption to an attorney’s ethical duties may ultimately carry the day. Imagine a scenario in which an attorney collecting an alleged debt for a client follows the current legal precedent and interpretation of one of the FDCPA’s many technical provisions. Shortly thereafter, this precedent is overturned. The consumer allegedly owing the debt then files an FDCPA-based lawsuit against the attorney for violating a technical aspect of the FDCPA. Under the *Jerman* decision, the attorney cannot rely on the FDCPA’s bona fide error provision to excuse this legal error. While actual damages may be small or nonexistent, the potentially high cost of defending such a suit gives attorney-defendants great incentive to settle the matter. This is true particularly because a trier of fact may nevertheless award statutory damages and may in fact be *required* to award the plaintiff costs and reasonable attorney’s fees.¹¹⁴ *Jerman* teaches that this scenario is quite possible, as Jerman herself brought an FDCPA-based lawsuit “despite suffering no harm,” and quickly sought to settle her case for \$22,500.¹¹⁵

112. *Id.*

113. *See supra* note 61 and accompanying text.

114. *See supra* note 17 and accompanying text.

115. *Jerman*, 130 S. Ct. at 1631 (Kennedy, J., dissenting).

This very real threat presents attorneys with a host of conflicts. While an attorney “must be given some latitude to zealously advocate for his or her client,”¹¹⁶ under the majority’s reading of the FDCPA, the Act holds attorneys liable for technical legal errors that do not truly touch on the abusive practices that Congress designed the Act to prevent. Thus, attorneys may be found liable under the Act for technical legal errors despite having acted in good faith. Although the majority noted that other constraints on judicial advocacy exist, these constraints assume that an attorney acted not in good faith but with an improper purpose.¹¹⁷ This further constraint on judicial advocacy means that an attorney cannot foreclose the possibility of a seemingly frivolous, but sanctioned, lawsuit without taking a debtor-friendly approach to a given situation presented by a debt-collecting client.

The majority discounted such consequences of its holding by noting that a trial court has discretion to determine statutory damages and that only “reasonable” attorney’s fees are awarded under the FDPCA.¹¹⁸ However, any suit that is technically successful, even one that nets a plaintiff next to nothing in damages, requires an award of costs and reasonable fees.¹¹⁹ Moreover, in the Ninth Circuit (as in other jurisdictions), a district court *must* calculate attorney’s fees under the lodestar method.¹²⁰ The lodestar figure is calculated by multiplying the reasonable hourly rate of the prevailing party’s attorney by the number of hours the attorney reasonably expended on the litigation.¹²¹ This figure is considered presumptively reasonable and may only be adjusted upward or downward in *rare* cases.¹²² This system of calculating fees presents an attorney-defendant with an

116. *People v. Kalnoki*, 9 Cal. Rptr. 2d 827, 829 (Super. Ct. 1992).

117. *See Jerman*, 130 S. Ct. at 1622.

118. *Id.* at 1620–21.

119. *See supra* note 17 and accompanying text.

120. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008) (quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) (per curiam)); *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

121. *Camacho*, 523 F.3d at 978 (quoting *Ferland*, 244 F.3d at 1149 n.4).

122. *Id.* at 982 (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1402 (9th Cir. 1992)); *see* Kristin A.C. Olin, Comment, *Unreasonable Calculations of “Reasonable” Fees: Perdue v. Kenny A. ex rel. Winn and the Supreme Court’s Ongoing Struggle with 42 U.S.C. § 1988*, 44 LOY. L.A. L. REV. 1113, 1117–24 (2010) (discussing the facts, reasoning, limitations on lodestar adjustment, and weaknesses in the holding of *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010), the U.S. Supreme Court’s most recent opinion addressing lodestar enhancement).

even greater risk of liability if he or she refuses to settle a sanctioned yet frivolous lawsuit, particularly because a trial court's attorney's fee award under § 1692k is reviewed on appeal under a lenient abuse-of-discretion standard.¹²³

Although the majority appeared to assume otherwise,¹²⁴ at least in counteracting the dissent, a mistake-of-law defense need not apply to all third-party debt collectors (such as non-attorneys) or absolve all legal errors. Limiting the defense to only *technical* legal errors and only to attorneys (or third-party debt collectors who act pursuant to an attorney's advice) is sufficient to counteract the potential consequences of the majority's decision. Such a careful rewriting of the Act is an assignment best left to Congress but seems to align more properly with the goals stated in the FDCPA. This limited exception would allow attorneys to advocate for their clients appropriately while avoiding the evisceration of the FDCPA that would occur if all debt collectors could claim a bona fide mistake-of-law defense.

In so limiting the scope of the defense, and in remembering that a defendant must also maintain procedures reasonably adapted to avoid such errors,¹²⁵ the FDCPA's practical effect will better coincide with Congress's objectives. It will also coincide with the *Heintz* Court's declaration that its interpretation of the FDCPA (as applied to attorneys) will not produce absurd results.¹²⁶ While it remains to be seen whether the *Jerman* decision will produce absurd results or whether the FTC will continue to reluctantly issue advisory opinions, Congress would be wise to so amend the FDCPA should empirical evidence point in either of these directions.

V. PROPOSAL

As Justice Kennedy eloquently stated, “[w]hen statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished.”¹²⁷ When a reading

123. *Jerman*, 130 S. Ct. at 1621 n.16; see also *Camacho*, 523 F.3d at 977–78 (“If we conclude that the district court applied the proper legal principles and did not clearly err in any factual determination, then we review the award of attorneys’ fees for an abuse of discretion.” (quoting *Ferland*, 244 F.3d at 1148)).

124. See *Jerman*, 130 S. Ct. at 1623.

125. See 15 U.S.C. § 1692k(c) (2006).

126. See *Heintz v. Jenkins*, 514 U.S. 291, 295–98 (1995).

127. *Jerman*, 130 S. Ct. at 1634 (Kennedy, J., dissenting).

of federal law “would seriously undermine the attorney-client relationship,” the law should be “narrowly construed.”¹²⁸ *Jerman* opens the door precisely to this danger. As such, the situation must be monitored carefully, and if the danger is borne out empirically, Congress must resolve it by amending the FDCPA before the conflict proves irreconcilable.

First, Congress must monitor whether the FTC amends its practice of failing to issue advisory opinions to some requests and responding too late to others. While the seven requests mentioned above present quite a small sample size, an average delay of three to four months is impractical for attorney debt collectors.¹²⁹ If, as Justice Breyer assumed,¹³⁰ the FTC increases the number of advisory opinions it issues and reduces delays, the need to include legal errors within the FDCPA’s bona fide error defense will be substantially lessened.

Second, because *Jerman* interprets the FDCPA to subject attorneys to personal liability for technical legal errors under the Act, Congress must monitor whether the foundation of zealous advocacy on which our legal system relies is overtly undermined. It can do so through traditional methods (organizing subcommittees dedicated to such observation, polling constituents, or speaking to experts on the matter) or by monitoring the courts (conducting empirical studies on the rise of related FDCPA-based lawsuits or the rate at which attorneys more often face civil suits or state bar charges for relevant ethical violations).

If Congress finds a mounting disruption to our system of zealous advocacy, it would be wise to include legal errors within the FDCPA’s bona fide error defense. Limiting this expanded defense to only attorney debt collectors or debt collectors acting pursuant to an attorney’s advice and only to technical legal errors (rather than all legal errors), will likely effectuate Congress’s stated goals in enacting the FDCPA while minimizing undesired and negative consequences to our legal system. On the whole, non-attorneys will also benefit greatly from such a change as their attorneys will better

128. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1338 n.5 (2010).

129. *See supra* note 110 and accompanying text.

130. *See supra* note 80.

be able to represent their interests without fear of personal or professional conflict.

