No. 18-2399

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAUREEN VAN HOVEN, for herself and class members,

Plaintiff – Appellee,

v.

BUCKLES & BUCKLES, P.L.C.; GERALDINE C. BUCKLES; MICHAEL H.R. BUCKLES,

Defendants – Appellants.

On Appeal from the U.S. District Court for the Western District of Michigan
Case No. 1:14-cv-00060 (Honorable Robert J. Jonker)

BRIEF OF NATIONAL CREDITORS BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *amicus curiae*, National Creditors Bar Association, states that is not a corporation and that it is not a subsidiary or affiliate of any publicly owned corporation not named in the appeal.

Respectfully submitted,

Date: May 3, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

ADDITIONAL RESOURCES

INTEREST OF *AMICUS CURIAE*

The National Creditors Bar Association™ ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors in all areas of creditor's rights law.[1] Its members include over 500 law firms, all of which must meet association standards designed to ensure experience and professionalism. Members are also guided by the NCBA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of applicable laws, regulations, professional codes and rules of professional conduct.[2]

Members of the NCBA are regularly involved in the lawful collection of past-due consumer debts. For this reason, NCBA members must interpret and comply with the often-unsettled requirements of applicable federal law, principally the Fair Debt Collection Practices Act ("FDCPA" or "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977). Members of the NCBA have a strong interest in ensuring that the Act is interpreted and applied in a way that allows creditor's rights attorneys to execute their ethical duty to advance their clients' legitimate interests – within the bounds of existing law – without constantly exposing themselves to substantial

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

personal liability. The NCBA has participated as amicus curiae in other cases involving the interpretation or application of the Act. *See, e.g., Obduskey v. McCarthy & Holthus, LLP*, 139 S. Ct. 1029 (2019); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

The NCBA is the only national bar association dedicated solely to the needs of creditor's rights attorneys. An affirmance of the District Court's ruling would erroneously and unfairly expose the attorney and law firm members of the NCBA, and many creditor clients of those members, to individual and class action claims under the FDCPA. The NCBA thus has a direct interest in this litigation, and it has authorized the filing of this brief.[3]

SUMMARY OF ARGUMENT

The NCBA urges this Court to reverse the District Court's opinion. In doing so, the NCBA asks this Court to adopt the reasoning of the courts that have held the FDCPA's "bona fide error" defense can apply to mistaken interpretations of state law. This will allow the Court to create a bright line rule within this Circuit,

[3] The NCBA does not take the position with this brief that the FDCPA can never apply to its members. Rather, the NCBA submits this brief asking the Court to clarify the scope of the FDCPA's bona fide error defense.

and will provide critical guidance to NCBA attorneys and other collectors who seek to comply with the FDCPA.

Each day, in thousands of courthouses across the country, NCBA attorneys represent their clients, pursuing recovery of unpaid financial obligations. With every complaint they file, every pleading they serve, every motion they file, every discovery request they propound, and every hearing and trial they attend, NCBA attorneys must comply with myriad state statutory, procedural, and court requirements and restrictions, as well as judicial interpretations of those requirements and restrictions. While doing so, NCBA attorneys necessarily must establish policies and employ procedures to ensure they and their staff understand and comply with these state law requirements and restrictions. For example, NCBA attorneys must determine appropriate causes of action to assert; they must determine the statutes of limitation that apply to their client's claims; they must determine the appropriate venue for the lawsuit; they must determine the proper method of service of process; they must determine how they will prove their case and obtain judgment; and ultimately, they must determine how to lawfully enforce any judgment that is entered. Like every attorney, NCBA attorneys research and analyze the state law that applies to them and their clients, and they create procedures designed to satisfy these legal requirements, while zealously protecting their clients' interests.

As epitomized by this case, the requirements and restrictions relating to creditor's rights law, like any other area of the law, are often ambiguous and complex, and courts have not always explained or clarified their meaning. Trial courts within the same state may reach differing and contradictory conclusions on how to interpret the same statute or rule. This is a normal, and indeed expected, challenge faced by any litigation attorney. What makes things different for NCBA attorneys, however, is that they are routinely sued by their client's adversaries – the consumers – under the FDCPA, when the NCBA attorneys allegedly fail to comply with the ambiguous requirements of state law.

NCBA does not suggest that their attorneys should not be expected to comply with the law. Instead, they contend that, when an attorney can establish that the failure to comply with a state law or procedure resulted from a bona fide error – one that was unintentional and occurred even though the attorney employed procedures reasonably adapted to avoid it – the attorney should be excused from liability under the FDCPA. Congress did not limit the bona fide error defense to factual, clerical, or mechanical mistakes. There is no reason to strip attorneys of the defense simply because they mistakenly interpret state law, so long as counsel proves that they established and utilized procedures designed to avoid the mistake. The District Court's ruling should be reversed.

ARGUMENT

The FDCPA contains a single affirmative defense, known as the "bona fide error" defense. *See* 15 U.S.C. § 1692k(c). There is no liability under the statute if a defendant shows by a preponderance of the evidence that a violation was not intentional and occurred despite procedures reasonably adapted to avoid the error. *See id*. This Court has repeatedly recognized the defense. *See Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 537 (6th Cir. 2014) (bona fide error defense failed where defendant had no procedures in place to avoid error); *Hartman v. Great Seneca Fin. Corp.,* 569 F.3d 606, 614 (6th Cir. 2009) (under then-existing circuit precedent, defense applied "to mistakes of law as well as to clerical errors," but concluding defendant did not show violation was unintentional or that it employed procedures designed to avoid mistakes of law); *Lewis v. ACB Bus. Servs., Inc.,* 135 F.3d 389, 401 (6th Cir. 1998) (applying defense to "coding error" committed by defendant's client); *Smith v. Transworld Sys., Inc*., 953 F.2d 1025, 1031 (6th Cir. 1992) (applying defense to "clerical error").

To prevail on the "bona fide error" defense, the "debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. To hold otherwise would effectively negate the bona fide error defense." *Lewis*, 135 F.3d at 402. The determination of a collector's intent is a

subjective test, not an objective one. *See Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006).

The procedures themselves, meanwhile, need only be "reasonably adapted" to avoid the mistake. *See, e.g., Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 497-98 (7th Cir. 2007) (affirming summary judgment for collector; rejecting notion that collector must prove procedures were "state of the art" to prevail). The reasonableness of the procedures, in contrast, are measured objectively. *See Johnson*, 443 F.3d at 729.

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 478 (6th Cir. 2008), this Court held that the bona fide error defense applied to a mistaken interpretation of federal law, specifically, the FDCPA. The Supreme Court subsequently reversed that decision, holding that an error of law regarding the application of the FDCPA could not constitute a bona fide error. That Court, however, did not decide whether a collector may rely on the defense regarding an error of state law. *See Jerman v. Carlisle McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 580 n.4 (2010); *see also Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 713 (6th Cir. 2015) (noting that Supreme Court did not address whether bona

fide error defense may apply to errors of state law). The Sixth Circuit has never squarely addressed this issue,[4] and other courts are split.

The Tenth Circuit has held that mistakes of state law may support the bona fide error defense, and its holding was not disturbed by the Supreme Court's decision in *Jerman*. *See Johnson v. Riddle*, 305 F.3d 1107, 1121-24 (10th Cir. 2002) (bona fide error defense applied to collector's misinterpretation of Utah dishonored check statute, remanding for district court to determine in first instance if defendant was entitled to defense). A more recent, post-*Jerman* decision by the Eighth Circuit allowed that the bona fide error defense may apply to errors of state law. *See Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 572 (8th Cir. 2015) (reversing order certifying FDCPA class, where district court, inter alia, "failed to address a legal question whose resolution may depend on the facts of a particular class member's claim – whether the affirmative defense in 15 U.S.C. § 1692k(c) applies to FDCPA violations caused by the debt collector's misinterpretation of what is 'permitted by' state law, a question the Supreme Court declined to decide in [*Jerman*].").[5]

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[4] In *Wise*, the Court remarked, in passing, that the Supreme Court's "discussion of the affirmative defense makes clear that mistakes of state law can give rise to liability." *Wise*, 780 F.3d at 713. The Court did not, however, analyze, let alone, decide that question.

[5] District courts have also split on the issue, but numerous courts have held that an error of state law will support the bona fide error defense. *See, e.g., Hare v. Hosto & Buchannan*, 774 F. Supp. 2d 849, 855-56 (S.D. Tex. 2011) (summary judgment on bona fide error defense; collector made error of state law regarding

It is critical for creditor's rights attorneys to be able to rely upon the bona fide error defense with respect to mistakes of state law, particularly where, as this case so perfectly depicts, the legal issues are unsettled or have not been addressed by the highest court of the state.[6] Like all attorneys, NCBA attorneys owe a duty to advocate the most favorable position available to their clients, so long as they do so in good faith and do not take frivolous positions. *See Model Rules of Prof'l Conduct* R. 3.1 (lawyer shall not "assert or controvert an issue . . . unless there is basis in law and fact for doing so that *is not frivolous, which includes a good faith argument for an extension*, modification or reversal of existing law") (italics added); *accord Michigan Rules of Prof'l Conduct* R. 3.1 ("A lawyer shall not . . . assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law."); *id*. Cmt. ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. . . . *However, the law is not always clear and never*

appropriate statute of limitations); *Puffinberger v. Commercion, LLC*, 2014 WL 120596, at *5 (D. Md. Jan. 10, 2014) (triable issues of fact on whether collector's error in calculating statute of limitations was bona fide error).

[6] Indeed, as explained in Appellants' opening brief, no court had interpreted the state court rules at issue here as the district court interpreted them, and the state Supreme Court subsequently clarified them in a manner consistent with the approach taken by Appellants.

is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." (italics added)).

The decision in *Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283, 1289 (E.D. Wash. 2015), is particularly apt here. That court explained the importance of the bona fide error defense where there is no controlling or persuasive authority from the state supreme court, recognizing that "[t]he trend in the case law appears to be toward allowing the bona fide error defense where the law is not clear . . . ." *Id*.

Likewise, the defense should be available where there may be conflicting legal authorities on a particular question of state law. For example, in *Puffinberger*, the plaintiff claimed the defendant violated the FDCPA by filing a suit against her that was barred by the applicable state statute of limitations. The parties agreed as to the length of the applicable limitations period but disagreed on when the period began to run. "Because both parties cite legal and factual support for their respective positions," said the court, "the issue [of whether the bona fide error defense had been satisfied] is not appropriate for resolution on summary judgment." 2014 WL 120596 at *5. The court also noted defendants had policies and procedures in place – requiring an attorney to review each complaint to confirm it was within the limitations period – that were designed to prevent filing suit on a time-barred debt. *See id*.

Although some courts have suggested the defense should not apply to mistaken interpretations of the law, because legal analysis is not "mechanical," "clerical," or "linear" in nature, respectfully, that interpretation is not supported by the language of the FDCPA. *See Johnson*, 443 F.3d at 729-30 (discussing dichotomy).[7] A "procedure" is simply an established way of doing something. *See Webster's New Collegiate Dictionary* 910 (1979). A lawyer can certainly have a "procedure" for avoiding errors of state law. Regardless, the fact that some procedures may relate to mechanical or clerical matters is not a reason to deny application of the defense when it arises in the context of a legal error. *See Johnson*, 443 F.3d at 730 (stating that "in order for [lawyer's] mistake to have been bona fide, [lawyer] *himself* must have employed procedures to avoid committing an error, and those procedures must have been reasonably adapted to avoiding the core *legal* error that occurred").

It may be true that legal analysis does not always proceed in a step-by-step or checklist fashion. Every lawyer, however, has procedures they follow when considering application of the law to a particular set of facts. Oftentimes, those

[7] It is also possible that an interpretation of state law may implicate factual determinations or decisions of a clerical or mechanical nature. *See Werbicky v. Green Tree Serv., LLC*, 2016 WL 1248697, *10 & n.86 (D. Nev. Mar. 28, 2016) (finding that if defendant misinterpreted state law, any determinations it made "with respect to the 'existence, character and status' of the debt were factual errors, and not mistakes of law," and declining to address "whether the bona fide error defense also excludes mistakes of state law"). *Werbicky* illustrates the danger of relying on a characterization of the type of steps taken to determine whether the defense is or is not available.

procedures are reduced to writing and followed according to a specified routine. Other attorney procedures for avoiding errors in the law may be less "mechanical" or "linear" in nature. They may include subscribing to and monitoring various sources that notify them of relevant judicial decisions and statutory and regulatory enactments and amendments. They may involve regular research and analysis of discrete legal questions that may have widespread impact on their practice (using well-known research tools, such as Westlaw or Lexis). *See, e.g., Stratton v. Portfolio Recovery Assocs., LLC*, 171 F. Supp. 3d 585, 603-04 (E.D. Ky. 2016). Procedures designed to avoid errors of law include consulting and debating with other attorneys regarding the law, as well as seeking guidance from judges and independent third parties. *See Johnson*, 443 F.3d at 726 (describing how attorneys met with two local judges regarding legality of position). Attorneys rely on judicial pronouncements, and act accordingly. To declare that a lawyer's method for avoiding mistakes of law is not the result of a procedure, simply because it may be the product of a non-linear or non-mechanical undertaking makes no sense.

Creditor's rights attorneys often must predict how courts will decide issues of state law. That task is complicated when the law is unsettled or a state's highest court has not resolved a particular issue.[8] Attorneys owe their clients a duty of

[8] In its ruling, the District Court relied on the maxim that "ignorance of the law" is not an excuse. *See Verburg v. Weltman, Weinberg & Reis Co.*, 295 F. Supp. 3d 771, 774 (W.D. Mich. 2018). An attorney cannot fairly be characterized as

zealous advocacy, and they often take well-founded, well-reasoned positions, after conducting extensive research and analysis, with which courts ultimately disagree.[9] Stripping attorneys of the protection afforded by the bona fide error defense, thereby exposing them (and their clients) to FDCPA liability when they misapprehend how a court will rule, forces them to choose between their own interests (in not being subjected to FDCPA liability) and their clients' interests (in prevailing) and may ultimately discourage them from vigorously representing their clients' interests.

There is no evidence that Congress sought to force this untenable set of choices on creditor's rights attorneys. The FDCPA was intended to protect the rights of both debtors and creditors. *See* 15 U.S.C. § 1692(e) (explaining that the purpose of FDCPA is "to eliminate abusive debt collection practices by debt collectors" and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged"). Courts have repeatedly and correctly interpreted the statute in a way that preserves the rights of creditors to pursue legitimate claims. *See, e.g., Hill v. Accounts Receivable Servs.,*

"ignorant" of the law when the law is unresolved and is susceptible to different, yet reasonable, interpretations.

[9] *See, e.g., Meza v. Portfolio Recovery Assocs., LLC*, 6 Cal. 5th 844 (2019) (interpreting statute governing use of declarations in lieu of testimony in low-stakes cases); *cf. Portfolio Recovery Assocs., LLC v. Sanders*, 292 Or. App. 463 (2018) (rejecting argument that debt collector could not pursue claim for account stated to recover unpaid credit card debt).

LLC, 888 F.3d 343 (8th Cir. 2019) (rejecting argument that debt collector violated FDCPA by attempting to collect interest in collection lawsuit pursuant to state statute; whether statute applied to collector's claim was question of state law that "has not been decided by the [state] Supreme Court"); *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 820 (8th Cir. 2012) (fact that creditor's lawsuit against debtor is not successful should not automatically lead to FDCPA liability, *citing Heintz v. Jenkins*, 514 U.S. 291, 295-96 (1995)). Acknowledging the application of the bona fide error defense to mistakes of state law will encourage creditor's rights attorneys to continue to establish policies, and develop and implement procedures, designed to avoid violating state law and the FDCPA.

CONCLUSION

For the foregoing reasons, the NCBA respectfully submits that the District Court's decision should be reversed.

Respectfully submitted,

Date: May 3, 2019

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 32(a)(7)(C) AND CIRCUIT RULE 32(g)(1) FOR CASE NUMBER 18-2399

Pursuant to Federal Rules of Appellate Procedure, Rule 32 (a)(7)(C) and Sixth Circuit Rule 32(g)(1), I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,185 words.

Dated: May 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the Brief of National Creditors Bar Association as *Amicus Curiae* in Support of Appellants was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF System. Participants in the case who are registered CM/ECF users will be served by the Court's CM/ECF system.

Dated this 3rd day of May, 2019

s/Jeffrey A. Topor

Jeffrey A. Topor