No. 08-1200

# In the Supreme Court of the United States

KAREN L. JERMAN, PETITIONER

*v.*

CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH, L.P.A. AND ADRIENNE S. FOSTER, RESPONDENTS

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

**BRIEF OF *AMICUS CURIAE***
**DRI—THE VOICE OF THE DEFENSE BAR**
**IN SUPPORT OF RESPONDENTS**


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## QUESTION PRESENTED

Is a debt collector's error in interpreting the law categorically ineligible for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c)?

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The narrow issue in this case has broad and potentially troubling consequences for lawyers and clients in debt collection actions, including those represented by *Amicus* DRI—the Voice of the Defense Bar ("DRI"). Under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"), a person engaged in debt collection may be held personally liable if he takes or threatens to take any action that cannot legally be taken under the Act. Violation of the Act is a strict liability offense. The Act provides a defense to liability, however, if the debt collector can prove that the violation of the Act was unintentional and, despite reasonable efforts to prevent it, "resulted from a bona fide error." 15 U.S.C. § 1692k(c). This case will determine how these provisions apply to errors of law, and thus it will have a direct impact on the risks faced by lawyers and on the attorney-client relationship itself.

Under Petitioner's view, lawyers and their legal judgments *are* subject to liability under the Act, but they *are not* eligible for the Act's bona fide error defense. Thus, according to Petitioner, a lawyer may be held personally liable whenever he takes a position concerning the debtor's rights that is ultimately rejected by a court, even if the lawyer was merely making a good-faith argument for the application or

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[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 one other than *amicus*, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief; letters of consent from both parties are on file with the Clerk.

extension of the law. As discussed in Respondents' brief, this position finds no support in either the plain language of the Act or its legislative history.

From an ethical perspective, moreover, Petitioner's position raises a host of problems for both lawyers and clients, including the membership of DRI. DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. DRI frequently participates as an *amicus curiae* in cases of interest to its membership. Many of DRI's member attorneys represent banks and other clients in collections matters. The Court's decision in this case will determine whether these attorneys must risk personal liability in order to take good-faith legal positions on their clients' behalf.

DRI submits this brief to alert the Court to the ethical implications of this issue, from DRI's unique perspective as the voice of defense lawyers and the clients they represent. As discussed below, Petitioner's view of the statute would create intractable problems for lawyers in debt collection actions, placing their personal interests in direct conflict with the interests of their clients and with the lawyers' own ethical obligations. And the Act's "safe harbor" provision does not obviate that problem. While a debt collector may insulate himself from liability for a legal judgment by obtaining an opinion in advance from the Federal Trade Commission ("FTC"), seeking such an opinion is not a realistic option for lawyers in litigation, nor would it obviate the conflict Petitioner's rule would create between lawyer and client. For these reasons, and those set forth in Respondents' brief, DRI urges this Court to reject Petitioner's view and affirm the decision below.

## STATEMENT

In 2006, Respondents Adrienne Foster and law firm Carlisle, McNellie, Rini, Kramer & Ulrich served a complaint on behalf of their client, Countrywide Home Loans, seeking foreclosure on property owned by Petitioner Karen Jerman. Pet. App. 2a, 19a-20a. Attached to the complaint was a form notice that provided, among other things, that the alleged debt would be assumed valid unless Petitioner disputed the debt "in writing." Petitioner responded with a lawsuit of her own, complaining that Respondents did not provide her with proper notice under the FDCPA. According to Petitioner, the FDCPA did *not* require that she dispute the debt "in writing." On that basis, she argued that the notice and complaint she had received misrepresented her rights and obligations under the FDCPA.

Respondents moved to dismiss the lawsuit, arguing that inclusion of the words "in writing" did not violate the FDCPA. The district court denied the motion, accepting Petitioner's interpretation of the FDCPA's requirements—despite a split of authority on the issue—and holding that Respondents' notice had indeed violated the FDCPA. Pet. App. 36a.

After discovery, Respondents moved for summary judgment, arguing that they were shielded from liability under the FDCPA's "bona fide error" defense. According to Respondents, any "mistake" as to the "in writing" requirement was unintentional and resulted from a good-faith error regarding the meaning of the statute. See 15 U.S.C. § 1692k(c). The district court accepted this argument and granted the motion. Pet. App. 19a-41a.

Petitioner appealed, and the Sixth Circuit affirmed, agreeing with the district court that the bona fide error defense applied in this case. Pet. App. 1a-18a. This Court granted certiorari to resolve whether the bona fide error defense incorporates an exception that bars its application to errors of law.

## SUMMARY OF ARGUMENT

If Petitioner's view of the statute were to prevail, attorneys litigating collections actions would face an irreconcilable ethical dilemma. Without immunity under the bona fide error defense, attorneys who make legitimate (but ultimately unsuccessful) legal arguments on behalf of their clients would do so at their peril, risking personal liability under the Act. This risk would inevitably interfere with the attorneys' ethical duty of zealous advocacy, pit lawyers' interests against their clients', and ultimately impair the development of the law. There is no reason to believe that Congress intended such a perverse result: the language of the statute does not support Petitioner's reading, and this Court's decision in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995) strongly suggests that her reading is wrong.

Contrary to Petitioner's suggestion, the Act's safe harbor provision, 15 U.S.C. § 1692k(e), does not obviate these problems. The safe harbor provision excludes from liability "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission ["FTC"]." *Id.* While this clause does provide immunity under a narrow set of circumstances, in the overwhelming majority of cases—and particularly in the case of debt collections litigation—relying on the safe harbor provision would be both ineffective and impractical. Requiring a lawyer to obtain an FTC advisory opinion whenever the law is not definitively settled (i) underestimates the number of issues on which the law in this area is unsettled or dynamic; (ii) ignores the fact that the FTC's ability to issue opinions is limited by regulation and by its own scarce resources; and (iii) again pits lawyers' interests against those of their clients, giving lawyers an incentive to delay litigation pending word from the FTC, despite their clients' interest in the speedy and efficient resolution of collections matters.

By the same token, the existence of the safe harbor provision does not undermine Respondents' reading of the bona fide error defense. Petitioner suggests that including legal errors among those protected by the bona fide error defense would render the safe harbor provision superfluous. This is incorrect. If the bona fide error provision is applied in a manner consistent with its plain language—as Respondents advocate—the safe harbor provision would still provide a meaningful *additional* avenue for obtaining immunity. Indeed, where a bank or other entity intends to adopt a new, widely applicable collections practice that has not yet been tested in the courts, waiting for application of the bona fide error defense in a suit for FDCPA liability may well present too great a risk. By obtaining FTC approval, however, the entity can resolve the issue of liability in advance, *before* deploying the new practice. Thus, the safe harbor provision remains meaningful under Respondents' reading of the Act.

## ARGUMENT

### I. Petitioner's view of the statute poses an irreconcilable ethical dilemma for attorneys.

The FDCPA imposes liability on any person engaged in debt collection who takes or threatens to take any action that is illegal under the Act's provisions. See 15 U.S.C. § 1692e; *id.* § 1692e(5) (forbidding a debt collector from making a "threat to take any action that cannot be legally taken" under the Act); see also *Wahl* v. *Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009) (recognizing that the FDCPA imposes strict liability and a collector "need not be deliberate, reckless, or even negligent" to violate the Act). Although Congress initially exempted lawyers from the Act's coverage, it removed the exemption in 1986. See *Heintz* v. *Jenkins*, 514 U.S. 291, 294-95 (1995) (citing Pub. L. 95-109, § 803 (6)(F), 91 Stat. 874, 875 and Pub. L. 99-361, 100 Stat. 768).[2] In light of that action by Congress, this Court has held that there is no longer any "implied exemption for those debt-collecting activities of lawyers that consist of litigating." 514 U.S. at 295.

Still, while it is firmly established that lawyers are no different than anyone else in terms of the Act's liability provisions, Petitioner proposes to deny lawyers, *in particular*, the protections of the Act's bona fide error defense. Specifically, Petitioner urges this Court to hold that the bona fide error defense does not protect a lawyer who takes a good-faith position concerning a debtor's rights that is ultimately re-

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[2] As this Court observed in *Heintz*, "when Congress later repealed the attorney exemption, it did not revisit the wording of [the Act's] substantive provisions." *Heintz* v. *Jenkins*, 514 U.S. 291, 295 (1995).

jected by a court. This interpretation is not supported by the Act's plain language. As Respondents' brief discusses in more detail, nothing in the text of the statute suggests an intent to limit the bona fide error defense to clerical errors and other mistakes not involving the exercise of legal judgment.

From an ethical perspective, moreover, Petitioner's reading of the Act would put lawyers between a rock and a hard place. The canons of ethics require attorneys to engage in zealous advocacy. See, *e.g.*, Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2006) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); New York Lawyer's Code of Prof'l Responsibility EC 7-1 (2007) ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law."); Texas Disciplinary R. Prof'l Conduct preamble para. 3 (West 2005) ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."). To fulfill this duty, lawyers are permitted—and in some circumstances are ethically *required*—to urge legal constructions favorable to their clients even where the law is unclear. See New York Lawyer's Code of Prof'l Responsibility EC 7-4. Such arguments are permitted so long as the position is supported by the law or by a good-faith argument for an extension, modification, or reversal of the law. See *id.*, EC 7-4; see also *id.* DR 7-101 (stating that an attorney should not intentionally fail to seek the lawful objectives of his clients through reasonably available means permitted by law and consistent with the attorney's ethical obligations). Under Petitioner's view of the FDCPA, however, if the court ultimately rejects the lawyer's good-faith position, the debtor may be able to hold the lawyer personally liable by claiming that the lawyer took action that the Act (as ultimately interpreted by the court) does not permit.

This is the point at which the bona fide error defense becomes so critical. Under its plain language, this defense *should* provide lawyers with the same protection as any other person involved in debt collection—protection from liability if the erroneous legal judgment was made in good faith and despite reasonable procedures to prevent such errors from taking place. Without that defense, a lawyer could be held liable for taking a position that the rules of ethics permit—and, in some circumstances, *require*—him to take. See 15 U.S.C. § 1692e; *id.* § 1692e(5); see also *Green* v. *Hocking*, 9 F.3d 18, 21 (6th Cir. 1993) (per curiam) (recognizing that under the broad language of the FDCPA, if an attorney brings a lawsuit seeking the collection of a debt, "and the consumer prevails to any extent, it would appear that the law has been broken, as the creditor threatened to take action that apparently, as a result of the judgment, 'cannot legally be taken'").

Denying lawyers and legal judgments the protection of this important defense would thus create a host of negative consequences. Lawyers would find themselves limited by their own personal interests in making good-faith legal arguments on behalf of their clients—and indeed may find it impossible to meet their ethical obligation of zealous advocacy while also avoiding liability under the Act. And the development of the law would also be impaired. If an attorney faces personal liability for litigating and losing an unsettled issue of law, he may avoid the issue altogether, thus depriving the courts of the opportunity to resolve the issue for future cases. There is no reason to believe that Congress intended such an absurd result.

This Court has already recognized the critical role the bona fide error defense plays for lawyers, and indeed, it relied on the availability of the defense in applying the Act's liability provisions to litigation in the first place. In *Heintz* v. *Jenkins*, the lawyers opposing application of the Act's liability provisions expressed concern that lawyers who brought and lost collections cases in court would be liable for "threat[ening] to take action that cannot legally be taken." *Id.* at 295. This Court was not concerned, in light of the bona fide error defense. Consistent with Respondents' position in this case, the *Heintz* court reasoned:

> [T]he Act says explicitly that a "debt collector" may not be held liable if he "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." § 1692k(c). Thus, even if we were to assume that [appellant's] suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers.

*Id.* at 295-96.[3] *Heintz* thus strongly suggests that the bona fide error defense should provide the same protection to lawyers as it provides to anyone else. See *Johnson* v. *Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002) (stating that *Heintz* suggests that lawyers' errors of law are covered by the bona fide error defense); *Taylor* v. *Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F. Supp. 2d 761, 764-65 (S.D. Ohio 1999) (concluding, based on *Heintz*, that "the Supreme Court of the United States believes that the bona fide error defense is available to a lawyer who commits an unintentional violation of the FDCPA by asserting in good faith a claim that is later rejected by a court").

As Respondents' brief explains, neither the language nor the history of the Act supports the conclusion that Congress intended to put lawyers in an ethical bind. Nor is there any reason to believe that Congress intended to provide a disincentive for lawyers to make good-faith arguments on unsettled issues of law. Applying the plain language of the Act—and declining Petitioner's invitation to create an unwritten exception to the bona fide error defense—would avoid these absurd consequences.

[3] The Court also suggested that a debtor would have to do more to impose liability on an attorney than merely pointing out that a collections action "turn[ed] out ultimately to be unsuccessful." *Id.* at 295-96. As the instant case demonstrates, however, lawyers certainly do face claims of liability when they take a specific legal position on an unsettled issue and ultimately do not prevail.

## II. The irreconcilable ethical dilemma posed by Petitioner's interpretation of the Act is not resolved by the safe harbor provision.

Anticipating the ethical dilemma posed by her position, Petitioner points to the Act's safe harbor provision, 15 U.S.C. § 1692k(e), suggesting that if an attorney is not absolutely certain of the legal correctness of a collections practice or legal theory, the attorney can obtain immunity by requesting an advisory opinion from the FTC in advance. See Pet. Brief 34. The safe harbor provision shields from liability

> any act done or omitted in good faith in conformity with an advisory opinion of the [Federal Trade] Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C. § 1692k(e).

While this provision provides debt collectors with a method of obtaining immunity in a narrow range of circumstances, it does not resolve the ethical dilemma posed by Petitioner's interpretation of the statute. Requiring attorneys to obtain an FTC advisory opinion before litigating any unsettled issue under the Act would be impractical, if not impossible, and it would exacerbate—rather than resolve—the conflict Petitioner's reading would pose for lawyers and clients.

### A. The sheer number of unsettled issues under the FDCPA make the safe harbor provision an utterly impractical solution.

The suggestion by Petitioner and her *amici* that an attorney should seek an FTC opinion every time he faces legal uncertainty in a collections action greatly underestimates the number of issues under the Act on which the law is unsettled or, at the very least, susceptible to good-faith arguments for modification or reversal. The *amici* States, for example, suggest that debt collectors only risk liability when they "go perilously close to an area of proscribed conduct." States' *Amicus* Brief 15. But in reality, legal certainty is the exception, not the rule. The clarity of law in this area ranges from well-settled doctrine through areas of conflicting authority to areas entirely without precedent. Moreover, the bounds of the law in a given case are often difficult to ascertain; the application of the Act or a judicial opinion interpreting it may be uncertain with respect to any particular factual scenario.

The instant case provides a perfect example. As noted above, Respondents were held liable for stating in their notice that the debtor's objection would have to be "in writing." But in the Third Circuit, a debt collector is *required* to include such language. See *Graziano* v. *Harrison*, 950 F.2d 107, 112 (3d Cir. 1991) (holding that the notice provisions of the FDCPA "must be read to require that a dispute, to be effective, must be in writing"); see also, *e.g.*, *Register* v. *Reiner, Reiner & Bendett, PC*, 488 F. Supp. 2d 143, 147 (D. Conn. 2007) (noting, fifteen years after *Graziano*'s publication, the continuing split of authority regarding whether a debtor must dispute the validity of a debt "in writing"). Thus on the very issue that led to Respondents' liability, there remains a split of authority—and, therefore, Respondents had at *least* a good-faith basis for taking the position they took.

The split of authority on the "in writing" requirement is but one example of legal uncertainty under the FDCPA. Courts are currently divided on a number of issues, including the fairly fundamental questions of whether a debt collector's communications to a debtor's lawyer can be the subject of an FDCPA suit, see *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 772 (7th Cir. 2007), and whether a party enforcing a security interest is a debt collector, see *Maynard* v. *Cannon*, No. 2:05-CV-335DAK, __ F. Supp. 2d __, 2008 WL 2465466, *3 (D. Utah June 16, 2008); see also, *e.g.*, *Gonzalez* v. *Kay*, 577 F.3d 600, 604-07 (5th Cir. 2009) (acknowledging, in light of varying precedents, that case was "close," but holding that a letter which printed a disclaimer on reverse side of page could be deceptive); *id.* at 607 (Jolly, J., dissenting) (concluding that letter conformed with standards of legality recognized in *Greco* v. *Trauner, Cohen & Thomas, LLP*, 412 F.3d 360 (2d Cir. 2005) and stating his view that the majority's decision created a circuit split).

It simply is not the case that legal uncertainty is rare in collections claims. If lawyers are expected to pursue an FTC advisory opinion every time the law reveals a degree of ambiguity, consumer collections claims would grind to a halt. For this reason alone, the safe harbor provision could not possibly avoid the ethical dilemma posed by Petitioner's position in this case.

### B. FTC opinions can only address a narrow range of issues and have limited legal force.

The regulatory limitations on the FTC's opinion process also render the safe harbor provision inadequate to protect lawyers. The regulations governing FTC advisory opinions provide as follows:

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.
>
> (1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or
>
> (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

16 C.F.R. § 1.1. These regulations, along with inherent limitations on the FTC's advisory authority, significantly confine the advice the FTC can provide.

First, for an opinion to issue, the conduct inquired about must be prospective in nature. See 16 C.F.R. § 1.1(a) (allowing debt collectors to "request advice from the Commission with respect to any action which the requesting party *proposes* to pursue") (emphasis added). The regulations do not allow debt collectors or their attorneys to request advice regarding a course of action that has already been taken, severely limiting a lawyer's ability to clarify the law by this method. Thus, for many legal issues, the safe harbor provision would provide attorneys no help at all.

Second, FTC advisory opinions are limited in terms of the substantive legal questions they can address. As Petitioner admits, the FTC has no authority to render opinions interpreting state law. Pet. Brief 47-48. Thus, the safe harbor clause provides no refuge to lawyers caught between conflicting FDCPA and state law requirements. Moreover, the applicable regulations limit FTC opinions to questions involving "substantial or novel question[s] of fact or law" on which "there is no clear Commission or court precedent." 16 C.F.R. § 1.1(a)(1). The FTC determines whether these criteria are met, and their decisions appear to be final. See, *e.g.*, Letter from Christopher W. Walker, Division of Credit Practices, Federal Trade Commission, to Bernard Fagin, President, National Credit Management (April 22, 1988) (available at http://www.ftc.gov/os/statutes/fdcpa/letters/fagin.htm) (acknowledging Fagin's request for advice made pursuant to the safe harbor provision but stating that the Commission "doubt[ed] that [his] request would meet the requirements necessary for a formal advisory opinion"). The FTC provides no guidance as to how it will determine the novelty or substance of issues, nor as to how it evaluates the clarity of Commission or court precedent.

Finally, even if an attorney succeeds in obtaining an advisory opinion from the FTC about a prospective course of action, such an opinion would not resolve the lawyer's ethical issue, because the obligation of zealous advocacy may still require the lawyer to challenge the FTC's opinion in litigation. The courts, not the FTC, are the final arbiters of the meaning of the Act. See 15 U.S.C. § 1692k(e) (FTC opinions can be "amended, rescinded, or determined by judicial or other authority to be invalid"); see also *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 225 (3d Cir. 2008) ("[T]he FTC's advisory opinions are not entitled to deference in FDCPA cases except perhaps to the extent that their logic is persuasive.") (internal quotation marks and citation omitted); *Lewis* v. *ACB Bus. Servs, Inc.*, 135 F.3d 389, 399 (6th Cir. 1983) (same, collecting cases). Thus, an FTC opinion declaring a legal position to be invalid would not necessarily relieve the attorney of his ethical obligation to advance that position in court.

**C. The FTC is not equipped to undertake the volume of cases Petitioner expects it to address, much less to do so within the time required for lawyers in individual collections matters – and thus the safe harbor provision would exacerbate rather than solve the ethical dilemma posed by Petitioner's reading.**

If Petitioner's view of the statute were to prevail, there would likely be a dramatic increase in the requests for advisory opinions from the FTC. But if past experience is any guide, the FTC will be unable to keep up with this new demand, and it certainly could not do so within the timeframe necessary to make such opinions useful in individual collections matters.

To DRI's knowledge, in the thirty-two years since the FDCPA was enacted, the Commission has issued only *four* advisory opinions.[4] See FTC.org, Fair Debt Collection Practices Act Links, http://www.ftc.gov/os/statutes/fdcpajump.shtm (last visited November 25, 2009). This paucity of guidance belies Petitioner's contention that the safe harbor provision provides a viable avenue for clarification of legal issues.

Moreover, even when the FTC takes an issue under consideration, it often does not issue its advisory opinion until months or even a year has elapsed. The FTC's most recent advisory opinion (which was only two pages long) was issued more than sixteen months after it was requested. See Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Rozanne M. Anderson and Andrew M. Beato (June 23, 2009), available at http://www.ftc.gov/os/statutes/andersonbeatoletter.pdf (responding to attorneys' February 11, 2008 request). While this time frame may be adequate to clarify the legality of new collections practices that a collector may be hoping to implement on a broad scale, it is utterly inadequate for purposes of legal issues in individual collections matters.

If a lawyer must obtain an FTC advisory opinion on an unsettled issue in order to protect himself from personal liability, the conflict between the lawyer and client would be exacerbated, rather than eliminated. The process of obtaining an advisory opinion inevitably takes time and would delay resolution of

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[4] Informal staff commentary and opinions on the FDCPA do not provide immunity under the safe harbor provision, see 15 U.S.C. § 1692k(e); *Hulshizer* v. *Global Credit Services, Inc*, 728 F.2d 1037, 1037-38 (8th Cir. 1984), and, in any case, have been discontinued by the FTC except in "unusual circumstances." See Fair Debt Collection Practices Links, http://www.ftc.gov/os/statutes/fdcpajump.shtm (last visited November 25, 2009).

collections matters for reasons related only to the lawyer's personal interest in avoiding liability. But under the canons of ethics, a lawyer should not accept employment if there is a reasonable possibility that the lawyer's own interests will adversely affect the services rendered to the client. See Model Rules of Prof'l Conduct R. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); New York Lawyer's Code of Prof'l Responsibility EC 5-2 ("A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."); Hawaii Rules of Prof'l Conduct R. 1.7 cmt. 6 ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client."). And it is not only the client's preference for speedy resolution that would be jeopardized; waiting for an FTC opinion could imperil the collections claim under the statute of limitations, and could also result in the devaluation of collateral or the inability to locate missing debtors. Again, from the perspective of lawyers in individual collections matters, the safe harbor provision is no substitute for the bona fide error defense.

## III. A proper construction of the safe harbor provision does not undermine Respondents' argument that mistakes as to the meaning of the law are "bona fide errors" within the meaning of the FDCPA.

The safe harbor provision does not provide a way out of the ethical dilemma created for attorney debt collectors by Petitioner's desired interpretation of the statute. But neither does the FDCPA's inclusion of the safe harbor provision undermine Respondents' reading of the bona fide error defense. Petitioner argues that Respondents' reading of the bona fide error defense renders the safe harbor provision superfluous because "every application of the safe harbor defense is covered by the bona fide error provision." Pet. Brief 29. That is not the case. Even under Respondents' reading of the bona fide error defense, the safe harbor provision retains independent value as an *additional* protection in narrow circumstances.

As the legislative history makes clear, Congress intended that there be two independent sources of immunity under the Act: the bona fide error defense, which provides immunity in retrospect, and the safe harbor provision, which immunizes collection practices in advance. See S. Rep. No. 95-382, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1700 ("A debt collector has no liability, however, if he violates the act in any manner, *including with regard to the act's coverage*, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector *also* has no liability if he relied in good faith on an advisory opinion issued by the Federal Trade Commission.") (emphasis added); see also Federal Deposit Insurance Corporation, *FDIC Compliance Handbook* VII-4.3 (2006) ("A debt collector is not liable for a violation if a preponderance of the evidence shows it was not intentional and was the result of a bona fide error that arose despite procedures reasonably designed to avoid any such error. The collector is *also* not liable if he or she, in good faith, relied on an advisory opinion of the Federal Trade Commission . . . .") (emphasis added). The fact that one applies in retrospect and the other in advance is by itself enough to defeat any suggestion that the two are duplicative.

Indeed, for all its limitations, the safe harbor provision may still provide an important source of comfort for debt collectors who are considering whether to adopt a new collections practice more broadly than in an individual case. In that instance, the potential liability arising from an error might be crippling based on the breadth of its implementation (15 U.S.C. § 1692k(b)), and waiting until litigation to determine whether the bona fide error defense will apply would create too much risk. In an individual collections matter, in contrast, the safe harbor provision—while technically available—is both too restrictive and too cumbersome to provide any meaningful protection.

## CONCLUSION

This case has dramatic implications for attorneys litigating collections cases. If Petitioner's view prevails, these attorneys risk personal liability for acting consistent with their ethical obligation of zealous advocacy. Although Petitioner attempts to deflect attention from lawyers' predicament by pointing to the safe harbor provision, requiring lawyers to obtain an FTC advisory opinion whenever the law is less than fixed is an untenable solution. It underestimates the number of legal issues implicated by such a scheme, overestimates the conclusiveness of the FTC's opinions and practical capacity to handle the demand for such advice, and pits lawyers' interest in immunity against clients' interest in the efficient collection of debts. Although the safe harbor provision plays a meaningful role in immunizing debt collectors' conduct prospectively, it should not be read to limit the immunity provided by the bona fide error defense. For all these reasons, and the reasons set forth in Respondents' brief, DRI urges this Court to affirm the decision below and hold that the bona fide error defense applies with equal force to errors of law.

Respectfully submitted.

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