Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA and the Remaining Applications of the FDCPA's Bona Fide Error Defense

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I. OVERVIEW OF THE FAIR DEBT COLLECTION PRACTICES ACT

A. What Is the FDCPA?

The Fair Debt Collection Practices Act ("FDCPA") is found in 15 U.S.C. § 1692 *et seq.* "The Fair Debt Collection Practices Act ... provides a remedy for consumers who have been subjected to abusive, deceptive, or unfair debt collection practices by debt collectors." *Nicholas v. CMRE Financial Services, Inc.*, No. 08-4857, 2009 WL 1652275, at *2 (D. N.J. June 11, 2009) (quoting *Pollice v. National Tax Funding*, L.P., 225 F.3d 379, 400 (3d Cir. 2000)).

B. What Is the Purpose of the FDCPA?

The FDCPA is "a statute designed to curb aggressive debt-collection practices." *Taylor v. Cavalry Investment, LLC*, 365 F.3d 572, 574 (7th Cir. 2004). Furthermore, it has been held that "[t]he FDCPA is designed to protect against abusive debt collection practices which would likely disrupt a debtor's life." *Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1059 (7th Cir. 2000); *see also* 15 U.S.C. §§ 1692(e) (stating that the purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses").

The purpose of the FDCPA is not only to protect consumers from unfair debt collection practices, but also to avoid "imposing unnecessary restrictions on ethical debt collectors." *Peter v. GC Servs, L.P.*, 310 F.3d 344, 351-352 (5th Cir. 2002) (quoting S. Rep. No. 95-382, at 1-2, reprinted in 1977 U.S.Code Cong. & Admin. News 1695, 1696). Thus, the FDCPA is designed to protect against disruption in a debtor's life, while still allowing a creditor to ethically collect a debt which it is owed.

C. What Are the Elements of an FDCPA Claim?

To establish a prima facie case for a violation of the FDCPA, plaintiffs must prove four essential elements:

1. the plaintiff is a natural person who is harmed by violations of the FDCPA, or is a "consumer" within the meaning of 15 U.S.C.A. §§ 1692a(3), 1692(d) for purposes of a cause of action, 15 U.S.C.A. § 1692c or 15 U.S.C.A. § 1692e(11)[;]
2. the "debt" arises out of a transaction entered primarily for personal, family, or household purposes, 15 U.S.C.A. § 1692a(5)[;]
3. the defendant collecting the debt is a "debt collector" within the meaning of 15 U.S.C.A. § 1692a(6); and
4. the defendant has violated, by act or omission, a provision of the FDCPA, 15 U.S.C.A § 1692a-1692o; 15 U.S.C.A § 1692a; 15 U.S.C.A § 1692k.

Whittiker v. Deutsche Bank Nat. Trust Co., 605 F. Supp.2d 914, 938 -939 (N.D. Ohio 2009). The absence of any one of the four essential elements is fatal to a FDCPA lawsuit. *Id.*

D. Key Sections Governing Liability Under the FDCPA.

1. Key Definitions

- **"Consumer":** Any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. § 1692a(3).

- **"Creditor":** Any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. 15 U.S.C. § 1692a(4).

- **"Debt":** Any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C. § 1692a(5).

- **"Debt collector":** Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

  (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

  (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

  (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

  (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

  (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

  (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. 15 U.S.C.A. § 1692a(6).

2. Communications After Notice of Representation by an Attorney - 15 U.S.C. § 1692c(a)(2).

Under 15 U.S.C. § 1692c(a)(2), a debt collector may not communicate with a consumer if the debt collector knows the consumer is represented by an attorney: "Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt . . . if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer." 15 U.S.C. § 1692c(a)(2).

Even if a debt collector knows a debtor is represented by an attorney, the debt collector may still send a dunning letter to the consumer with respect to a different debt. *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1464 (C.D. Cal. 1991) (holding dunning notices sent by debt collector after it had received notice from debtor's attorney to communicate only with attorney did not violate the FDCPA where they referred to debts other than those which had been assigned to the debt collector at the time of the communication from the attorney; the debt collector would not be charged with knowledge that the attorney represented the debtor with respect to debts assigned to the debt collector after the date of the attorney's letter, even though those debts were assigned by the same creditor which assigned the earlier debts.)

3. Communications with Third Parties - 15 U.S.C. § 1692c(b).

Under 15 U.S.C. § 1692c(b), a debt collector generally may not communicate with third parties regarding a consumer's debt: "Except as provided in section 1692b of this title [governing acquisition of location information], without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, *a debt collector may not communicate*, in connection with the collection of any debt, *with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector*." 15 U.S.C. § 1692c(b) (emphasis added).

4. Harassment or Abuse- 15 U.S.C. § 1692d.

15 U.S.C. § 1692d renders a debt collector liable for engaging in conduct that has the natural consequence of harassing, oppressing, or abusing a debtor in connection with the collection of a debt. Section 1692d lists several nonexclusive examples of such conduct, including, inter alia, threats of violence, use of obscene or profane language, causing a telephone to repeatedly ring with intent to annoy, abuse, or harass a person, and so forth.

The district court of Minnesota found that the natural consequence of language used in debt collector's dunning letter, stating that "in case of an emergency, will you be refused credit because of this unpaid account we have for collection?" was not abusive to an unsophisticated reader under the FDCPA. Although it was arguably abusive to the subjective eyes of an abnormally sensitive reader, the question was not "offensive" in a way that was akin to profanity or obscenity. *Bryant v. Bonded Account Service/Check Recovery, Inc.*, 208 F.R.D. 251 (D. Minn. 2000).

5. False or Misleading Representations - 15 U.S.C. § 1692e.

Most consumers who bring suit against debt collectors under the FDCPA do so under one of the following sections of 15 U.S.C. § 1692e.

- **15 U.S.C. § 1692e**: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."

- **15 U.S.C. § 1692e(2)(A)**: A debt collector may not falsely represent "the character, amount, or legal status of any debt"

- **15 U.S.C. § 1692e(2)(B):** A debt collector may not falsely represent "any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt."

- **15 U.S.C. § 1692e(3)**: A debt collector may not falsely represent or imply "that any individual is an attorney or that any communication is from an attorney."

- **15 U.S.C. § 1692e(5):** A debt collector may not threaten "to take any action that cannot legally be taken or that is not intended to be taken."

- **15 U.S.C. § 1692e(10):** A debt collector may not use "any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

6. Unfair or Unconscionable Acts - 15 U.S.C. § 1692f.

15 U.S.C. § 1692f specifically provides that a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt, including, without limitation, collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f. Along with filing suit under 15 U.S.C. § 1692e, consumers often allege a violation of the relatively broad Section 1692f, which generally prohibits unfair or unconscionable acts. *See Edwards v. McCormick*, 136 F. Supp.2d 795, 806 (S.D. Ohio 2001) (quoting *Adams v. Law Offices of Stuckert & Yates*, 926 F. Supp. 521, 528 (E.D. Pa. 1996)) ("While § 1692d prohibits 'harassment or abuse,' and § 1692e forbids 'false or misleading representations,' § 1692f serves a backstop function, catching those 'unfair practices' which somehow manage to slip by §§ 1692d & 1692e. That is, '§ 1692f allows the court to sanction improper conduct that the FDCPA fails to address specifically.'")

7. Validation of Debts - 15 U.S.C. § 1692g(a)

15 U.S.C. § 1692g(a) sets forth the required notices a debt collector must provide to a consumer within five days of its initial communications with the consumer. The debt validation provisions of section 1692g were included by Congress to guarantee that consumers would receive adequate notice of their rights under the law. *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000) 15 U.S.C. § 1692g(a) states the following:

> (a) Notice of debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
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> (1) the amount of the debt;
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> (2) the name of the creditor to whom the debt is owed;
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> (3) 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;

> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
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> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Failure to provide any of the required notices in the initial validation notice will constitute an FDCPA violation.

Still, "in order to comply with the requirements of section 1692g, more is required than the mere inclusion of the statutory debt validation notice in the debt collection letter --the required notice must also be conveyed effectively to the debtor." *Wilson*, 225 F.3d at 354; s*ee also Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991).

Moreover, the validation notice required by the Act "is to be interpreted from the perspective of the 'least sophisticated debtor.'" *Wilson*, 225 F.3d at 354; *Graziano*, 950 F.2d at 111; *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).[1] A validation notice "is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." *Wilson*, 225 F.3d at 354; *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34-35 (2d Cir. 1996). The Court of Appeals for the Second Circuit elaborated that a collection letter "is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate."

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[1] Almost all jurisdictions have adopted the least sophisticated consumer standard. *See, e.g., Savino v. Computer Credit, Inc.*, 164 F.3d 81 (2d Cir. 1998); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34-35 (2d Cir. 1996); *United States v. National Financial Serv., Inc.*, 98 F.3d 131, 136 (4th Cir. 1996); *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999); *Terran v. Kaplan*, 109 F.3d 1428, 1431-32 (9th Cir. 1997). The Sixth Circuit has adopted the least sophisticated consumer standard *Miller v. Javitch, Block & Rathbone* , 561 F.3d 588, 592 (6th Cir. 2009); *Kistner v. Law Offices of Michael P. Margelefsky LLC*, 518 F.3d 433, 438-39 (6th Cir. 2008). According to the Sixth Circuit, this standard "protects naive consumers [while] prevent[ing] liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Miller*, 561 F.3d at 592. Stated differently, courts "will not 'countenance lawsuits based on frivolous misinterpretations or nonsensical interpretations of being led astray.'" *Id.* (quoting *Fed. Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 514 (6th Cir. 2007)); *See also Belile v. Allied Med. Accounts Control Associated Bureaus (In re Belile)*, 209 B.R. 658, 662 (E.D. Pa. 1997) (Violations of the FDCPA are assessed from the perspective of the "least sophisticated consumer.")

A minority of courts apply the unsophisticated consumer standard to determine whether a validation notice impermissibly overshadows a consumer's rights. The Seventh Circuit has long been a proponent of the "unsophisticated consumer standard." The Seventh Circuit adopted the unsophisticated consumer standard rather than the least sophisticated consumer standard because it held that standard better "admits an objective element of

The "least sophisticated debtor" standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor." *Wilson*, 225 F.3d at 354 (quoting *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir. 1999). In this context, the contents of a validation notice may not overshadow a debtor's rights to dispute the debt, or else the debt collector violates the FDCPA. For example, in *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1227 (9th Cir. 1988), a debt collector made a demand for payment within 10 days and threatened the debtor's credit rating if the debt was not paid. The court found this language directly conflicted with the statutory validation requirements in violation of the FDCPA.

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reasonableness" into the determination of whether a "reasonable" consumer would perceive the collection message to be "deceptive or misleading." *Gammon v. GC Servs. Ltd. P'Ship*, 27 F.3d 1254, 1257 (7th Cir. 1994). The Seventh Circuit held that the unsophisticated consumer standard serves a dual purpose: it "protects the consumer who is uninformed, naïve, or trusting, yet [also] . . . shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection [communications]." *Id.*; *see also Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1060, 1061–62 (7th Cir. 2000) (holding that the standard assumes the "uneducated debtor possesses rudimentary knowledge about the financial world, is wise enough to read collection notices with added care, possesses 'reasonable intelligence,' and is capable of making basic logical deductions and inferences . . . [and that] a statement will not be confusing or misleading unless a significant fraction of the population would be similarly misled"); *see also Strand v. Diversified Collection Serv.*, 380 F.3d 316, 317-318 (8th Cir. 2004) (citations omitted) ("A violation of the FDCPA is reviewed utilizing the unsophisticated-consumer standard which is 'designed to protect consumers of below average sophistication or intelligence without having the standard tied to the very last rung on the sophistication ladder.' (citations omitted). This standard protects the uninformed or naive consumer, yet also contains an objective element of reasonableness to protect debt collectors from liability for peculiar interpretations of collection letters. ")

Similarly, in *Graziano*, the debt collector was an attorney who maintained a debt collection practice. The attorney sent Graziano a notice of a delinquent debt which included the required statements under section 1692g(a). The letter also threatened legal action unless the debt was resolved within 10 days. The validation notice was printed on the reverse side of the document; however, a statement appeared at the bottom of the front page as follows: "See reverse side for information regarding your legal rights!" The Third Circuit held that a reasonable probability existed that "the least sophisticated debtor, faced with a demand for payment within ten days and a threat of immediate legal action if payment is not made in that time, would be induced to overlook his statutory right to dispute the debt within thirty days." 950 F.2d at 111. The Third Circuit held that "the notice must be in print sufficiently large to be read, and must be sufficiently prominent to be noticed." *Id.* A collection letter will not meet the requirements of the Act where the validation notice is printed on the back and the front of the letter does not contain any reference to the notice, or one in which the validation notice is overshadowed or contradicted by accompanying messages or notices from the debt collector. *Id.* Thus, the Third Circuit concluded that a notice of rights is not effectively communicated to the debtor when it is presented in conjunction with a contradictory demand such as the one in *Graziano*.

E. Damages.

Any debt collector who violates the FDCPA with respect to any person is liable to such person for: (1) any actual damages sustained as a result of the violation; (2) statutory damages; and (3) costs and reasonable attorney fees. *Foster v. D.B.S. Collection Agency*, 463 F. Supp.2d 783, 806 (S.D. Ohio 2006); 15 U.S.C. § 1692k(a). Section 1692k states:

> [A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of-
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> (1) any actual damage sustained by such person as a result of such failure;
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> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
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> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a). In assessing the amount of damages, the court must consider, among other factors, "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." 15 U.S.C. § 1692k(b)(1).

Statutory damages are limited to $1,000 "per proceeding" rather than "per violation." *Wright v. Finance Service of Norwalk, Inc.*, 22 F.3d 647, 651 (6th Cir. 1994).

Consumers often allege that actual damages encompass not only out of pocket losses, but also damages for anxiety, emotional suffering, embarrassment, and distress. Generally, a court will only award actual damages for emotional distress where it finds that "the illegal debt collection practice was extreme and outrageous." *See e.g., Foster v. D.B.S. Collection Agency* 463 F. Supp.2d 783, 806 (S.D. Ohio 2006) (holding a genuine issue of material fact existed whether a debt collector's FDCPA violations rose to the level of extreme and outrageous conduct to justify an award of actual damages for mental distress for all of the class members)**;** *Boyce v. Attorney's Dispatch Serv.*, Case No. C-3-94-347, 1999 WL 33495605, at *1 (S.D. Ohio 1999) (awarding actual damages for emotional distress; "Of the more than 100 cases under the FDCPA and the OCSPA that have been filed with this Court, this particular lawsuit involves the most egregious conduct by any defendant"). Some courts require more than a consumer's self-serving testimony to recover actual damages for emotional distress. For example, the Seventh Circuit found that when "the injured party's own testimony is the only proof of emotional damages, he must explain the circumstances of his injury in reasonable detail; he cannot rely on mere conclusory statements." *Denius v. Dunlap*, 330 F.3d 919, 929 (7th Cir. 2003); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610-11 (7th Cir. 2005) (same); *Bassett v. I.C. Sys.*, No. 09 C 0301, 2010 U.S. Dist. LEXIS 53697, at *18 (N.D. Ill. June 1, 2010). Thus, courts have held that "bare allegations by a plaintiff that the defendant's conduct made him 'depressed,' 'humiliated,' or the like are not sufficient to establish injury unless the facts underlying the case are so inherently degrading that it would be reasonable to infer that a person would suffer emotional distress from the defendant's action." *Bassett*, 2010 U.S. Dist. LEXIS 53697 at *18 (quoting *Denius*, 330 F.3d at 929 (citations omitted)).

Punitive damages are not available for violation of the FDCPA. *Boyce v. Attorney's Dispatch Serv.*, Case No. C-3-94-347, 1999 WL 33495605, at *2 (S.D. Ohio 1999) ("The Plaintiffs are not entitled to recover punitive damages under the FDCPA. That statute expressly sets forth the types of relief that a plaintiff can recover, to wit: compensatory damages, statutory damages and costs, including reasonable attorney's fees. [citation omitted]. However, neither the FDCPA nor its legislative history (see Senate Report 95-382, reprinted in 1977 U.S.C.C.A.N. 1695) remotely suggests that a prevailing plaintiff can recover punitive damages for a violation of that statute. Indeed, courts have indicated that statutory damages are punitive in nature."); *Aronson v. Creditrust Corp.*, 7 F. Supp.2d 589 (W.D. Pa.1998); *Thomas v. Pierce, Hamilton and Stern, Inc.*, 967 F. Supp. 507 (N.D. Ga.1997).

II. THE BONA FIDE ERROR DEFENSE TO THE FDCPA

A. Overview of the Bona Fide Error Defense.

Because the FDCPA imposes strict liability on a debt collector, a consumer need not show intentional conduct by a debt collector to be entitled to damages; however, a debt collector may escape liability if it can demonstrate, by preponderance of evidence, the defense of bona fide error. *Russell v Equifax A.R.S.*, 74 F3d 30 (2d Cir. 1996). The bona fide error defense is affirmative defense for which defendant debt collector has burden of proof at trial. *Fox v Citicorp Credit Servs.*, 15 F3d 1507 (9th Cir. 1994). Under the bona fide error defense, the FDCPA shelters a debt collector from liability arising out of actions which would otherwise violate the statute. 15 U.S.C. § 1692k(c) states:

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

15 U.S.C. § 1692k(c). Thus, under the bona fide error defense, "a debt collector cannot be held liable under the FDCPA if it shows by a preponderance of the evidence the following three elements: (1) the violation was not intentional; (2) the violation resulted from a bona fide (or good faith) error; and (3) the violator maintained procedures reasonably adapted to avoid any such error." *E.g. Foster v. D.B.S. Collection Agency*, 463 F. Supp.2d 783, 794-795 (S.D. Ohio 2006).

B. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA.*

1. The Facts

In April 2006, a law firm (Carlisle, McNellie, Rini, Kramer, & Ulrich, LPA) and one of its attorneys (Adrienne S. Foster) filed a complaint in Ohio state court on behalf of a client, Countrywide Home Loans, Inc. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1609 (2010). The law firm and attorney sought foreclosure of a mortgage held by Countrywide in real property owned by Karen L. Jerman. *Id.* The foreclosure complaint included a "Notice," later served on Jerman, stating that the mortgage debt would be assumed to be valid unless Jerman disputed it in writing. *Id.* Jerman's lawyer sent a letter disputing the debt, and the law firm and attorney sought verification from Countrywide. When Countrywide acknowledged that Jerman had, in fact, already paid the debt in full, the attorney and law firm withdrew the foreclosure lawsuit. *Id.*

Jerman then filed her own lawsuit seeking class certification and damages under the FDCPA. She alleged that the law firm and attorney violated the FDCPA, § 1692g(a), by stating that her debt would be assumed valid unless she disputed it "in writing." *Id.*

2. The District Court Decision

The district court for the Northern District of Ohio held that the law firm and attorney violated § 1692g by requiring Jerman to dispute the debt "in writing." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 464 F. Supp.2d 720, 722-725 (N.D. Ohio 2006).[2] However, the district court granted summary judgment in favor of the law firm and attorney, concluding the bona fide error defense in § 1692k(c) shielded them from liability. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 502 F. Supp.2d 686, 695-697 (N.D. Ohio 2007). The district court concluded the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid such errors. *Id.*

[2] The district court recognized a division in authority whether § 1692g(a) imposes an "in writing" requirement on consumers. The district court adopted the reasoning of *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1080-1082 (9th Cir. 2005), which held that the plain language of § 1692g(a)(3) does not impose an "in writing" requirement on consumers. However, *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991) held that a consumer's dispute of a debt under § 1692g must be in writing to be effective. The Supreme Court in *Jerman* did not address whether inclusion of the "in writing" requirement violated § 1692g.

3. The Sixth Circuit Decision

The Sixth Circuit affirmed and held that the bona fide error defense applies to mistakes of law, not just to procedural or clerical errors. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476-477 (6th Cir. 2008). The parties agreed that the defendant-law firm's mistake as to the written dispute requirement was a question of law, as opposed to a clerical error. The Sixth Circuit affirmed the district court's decision that the bona fide error defense applies to questions of law, and that the law firm was entitled to the bona fide error defense under the facts of the case. *Id.* at 476. As evidence of good faith, the court noted that the defendant law firm designated its senior principal as the individual responsible for compliance with the FDCPA; he regularly attended conferences and seminars that focus on FDCPA issues; the firm subscribed to "Fair Debt Collection," a part of "The Consumer Credit and Legal Practice Series," together with the supplements thereto; the senior principal routinely distributed copies of cases relevant to the firm's practices and procedures to all attorneys at the firm; all new employees, attorneys and non-attorneys, were advised of the firm's obligations under the FDCPA and provided with the firm's FDCPA Procedures Manual, and encouraged to seek the senior principal's advice with questions regarding the FDCPA; and the senior principal conducted a mandatory meeting at least twice a year for all available employees wherein FDCPA issues and developments were discussed. *Id.* at 477.

In its opinion, the Sixth Circuit did recognize that district courts within the Sixth Circuit were divided on the scope of the bona fide error defense. *Compare Dunaway v. JBC & Assoc, Inc.*, No. 03-73597, 2005 U.S. Dist. LEXIS 37885, 2005 WL 1529574, at *6 (E.D. Mich. Dec. 19, 2005) (finding that the "the bona fide error defense applies only to clerical errors"), and *Edwards v. McCormick*, 136 F. Supp. 2d 795, 800 (S.D. Ohio 2001) (explaining that "were the mistake an error in legal judgment, it could not be erased by [the bona fide error defense]" and reasoning that, under *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025 (6th Cir. 1992), the defense applies only to clerical errors), with *Miller v. Javitch, Block & Rathbone, LLP*, 534 F. Supp. 2d 772, 777 (S.D. Ohio 2008) (stating that the bona fide error defense "is applicable to mistakes of law as well as clerical errors" and finding a defendant was shielded by the defense for an alleged mistake of law; *Delawder v. Platinum Fin. Serv. Corp.*, 443 F. Supp. 2d 942, 952 (S.D. Ohio 2005) (holding that the defense applies to debt-collection attorneys who unintentionally violate the FDCPA by asserting in good faith a legal claim that was later rejected by a court); *Lee v. Javitch, Block & Rathbone, LLP*, No. 1:06-CV-585, 2007 U.S. Dist. LEXIS 97699, 2007 WL 4591961, at *1 (S.D. Ohio Dec. 28, 2007) (explaining that recent and more persuasive case authority has permitted the defense for mistakes of law as well as fact); *Kelly v. Great Seneca*, 443 F. Supp. 2d 954, 960 (S.D. Ohio 2005) ("FDCPA liability is not imposed for good faith mistakes or errors of law or mathematics."); and *Taylor v. Luper, Sheriff & Niedenthal Co.*, L.P.A., 74 F. Supp. 2d 761, 765 (S.D. Ohio 1999) ("There is nothing in the language of [the defense] which limits its application to clerical mistakes or ministerial errors.").

The Sixth Circuit also recognized a split of authority among the Courts of Appeal regarding the scope of the bona fide error defense. *Jerman*, 538 F.3d at 473 (citing *Johnson v. Riddle*, 305 F.3d 1107, 1121 n.14 (10th Cir. 2002)).[3] The Sixth Circuit stated, "Although the 'majority view is that the defense is available for clerical and factual errors' only, 'a growing minority of courts . . . have concluded that mistakes of law can be considered bona fide errors under section 1692k(c).'" *Jerman*, 538 F.3d at 473 (quoting *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002)). The court noted that the Tenth Circuit held the bona fide error defense applies to legal errors. *Id.* at 474 (citing *Johnson v. Riddle*, 305 F.3d at 1121-1122.) However, the Eighth, Second, and Ninth Circuit held that the bona fide error defense does not apply to legal errors. *Id.* at 474 (citing *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (citing *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984)); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982).

[3] The *Johnson* court collected cases ruling on the scope of the FDCPA defense. 305 F.3d at 1121 n.14 ("Compare *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (stating that bona fide error defense does not apply to mistakes of law) (citing *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (per curiam)); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) (same); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (mistake of law "insufficient by itself to support the bona fide error defense"); *Hartman v. Meridian Fin. Servs.*, Inc., 191 F. Supp. 2d 1031, 1045-46 (W.D. Wis. 2002) (does not apply to mistakes of law and generally is limited to clerical mistakes); *Arroyo v. Solomon & Solomon, P.C.*, 2001 U.S. Dist. LEXIS 12180, 2001 WL 984940, at *6 (E.D.N.Y. July 19, 2001) (does not apply to mistakes of law, and collecting cases); *Wilkerson v. Bowman*, 200 F.R.D. 605, 608-09 (N.D. Ill. 2001) (does not apply to mistaken view of the obligations imposed by the FDCPA); *Edwards v. McCormick*, 136 F. Supp. 2d 795, 800 (S.D. Ohio 2001) (limited to clerical errors); *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 591 (D. Md. 1999) (does not apply to mistakes of law and generally is limited to clerical mistakes); *Booth v. Collection Experts, Inc.*, 969 F. Supp. 1161, 1165 (E.D. Wis. 1997) (same) with *Jenkins v. Heintz*, 124 F.3d 824, 832 & n.7, 833 (7th Cir. 1997) (stating that bona fide error defense not limited to clerical errors and can apply to mistakes of law); *Frye v. Bowman, Heintz, Boscia & Vician*, 193 F. Supp. 2d 1070, 1085-86 (S.D. Ind. 2002) (same); *Filsinger v. Upton, Cohen, & Slamowitz*, 2000 U.S. Dist. LEXIS 1824, 2000 WL 198223, at *2 (N.D.N.Y. Feb. 18, 2000) (not limited to clerical errors); *Taylor v. Luper, Sheriff & Niedenthal Co.*, 74 F. Supp. 2d 761, 765 (S.D. Ohio 1999) (not limited to clerical errors and can apply to mistakes of law); *Watkins v. Peterson Enters., Inc.*, 57 F. Supp. 2d 1102, 1107-08 (E.D. Wash. 1999) (can apply to mistakes of law where the mistake stemmed from an official interpretation of the law); *Aronson v. Commercial Fin. Servs, Inc.*, 1997 U.S. Dist. LEXIS 23534, 1997 WL 1038818, at *5 (W.D. Pa. Dec. 22, 1997) (not limited to clerical errors and can apply to mistakes of law). See also 17 Am. Jur. 2d Consumer and Borrower Protection § 224 (2002) ("[A] mistake of law is not included in the intentional and bona fide error defense of [the FDCPA]." (citation omitted)); Janet Flaccus, Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense, 2001 Ark. L. Notes 95, 96 & passim (2001) (noting that cases applying the bona fide error defense to attorney mistakes of law "seem in disarray," but arguing that results may be harmonized because courts generally have rejected the defense where the violation was reasonably clear from the controlling law and allowed the defense where violation was not at all clear).")

Regardless of the circuit split, the Sixth Circuit held that the bona fide error defense applies to mistakes of law. *Id.* at 473-476. The Sixth Circuit found "nothing unusual" about attorney debt collectors maintaining "procedures" within the meaning of § 1692k(c) to avoid mistakes of law. *Id.* at 476. The Sixth Circuit noted that a parallel bona fide error defense in the Truth in Lending Act (TILA), 15 U.S.C. § 1640(c), expressly excluded legal errors, and the court noted that Congress amended the FDCPA several times since 1977 without excluding mistakes of law from § 1692k(c). 538 F.3d at 476.

4. The United States Supreme Court Decision

Federal circuit courts had been split on whether the bona fide error defense applies to mistakes of law. On June 29, 2009, the United States Supreme Court granted a petition for writ of certiorari to resolve the issue. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 129 S.Ct. 2863 (2009). It issued its opinion April 21, 2010 reversing and remanding the Sixth Circuit decision and holding the bona fide error defense did *not* apply to violations of the FDCPA resulting from a debt collector's incorrect interpretation of the legal requirements of the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605 (2010).

a. The Majority Opinion: Justice Sotomayor

Importantly, the Supreme Court only addressed a very narrow issue: "[W]hether the 'bona fide error' defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608 (2010). The Court concluded it does not. *Id.*

The Court set forth five reasons for its decision. First, the Court reasoned that when Congress intended to provide a mistake-of-law defense to civil liability, it did so more explicitly than in § 1692k(c). *Id.* at 1612. For example, the Federal Trade Commission Act's (FTC Act) administrative penalty provision, which Congress incorporated into the FDCPA, applied only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis on objective circumstances" that its action was "prohibited by [the FDCPA.]" *Id*. (quoting 15 U.S.C. §§ 45(m)(1)(A), (C).) Given the absence of similar language in the FDCPA's bona fide error defense, the Court concluded that Congress chose to permit injured consumers to recover modest statutory damages ($1,000 per action), actual damages, costs, and fees for "intentional" conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving more onerous penalties under the FTC Act, where civil penalties are civil penalties are enforced by the FTC and capped at $16,000 per day. *Id.* at 1609, 1612.

Second, the Court reasoned that Congress did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to include mistakes of law. *Id.* at 1613.

Third, the Court reasoned that the bona fide error defense does not include mistakes of law because it contains a requirement that the debt collector maintain "procedures reasonably adapted to avoid any such error. *Id.* at 1614. The Court stated that the statutory phrase was most naturally read to apply to processes that have a "mechanical" or other such "regular orderly" steps to avoid mistakes, such as controls to ensure that employees do not communicate with consumers at the wrong time of day (§ 1692c(a)(1)) or make false representations as to the amount of the debt (§ 1692e(2)). *Id.* The Court stated that "legal reasoning is not a mechanical or strictly linear process[,]" so the relevant procedures are the ones that avoid clerical or factual mistakes. *Id.* at 1614-1615.

Fourth, the Court supported its conclusion by looking at the context and history of the FDCPA. *Id.* at 1615. The Court noted that, in addition to the bona fide error defense, the FDCPA contains a defense for "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." *Id.* (citing 15 U.S.C. § 1692k(e)). Debt collectors would have no reason to request advisory opinions from the FTC if they could simply rely on advice from counsel, and debt collectors may choose not to seek opinions regarding ambiguities in the law as such opinions would prevent them from asserting good faith immunity from liability. *Id.*

Fifth, the Court supported its holding by looking at a parallel provision in TILA, which contained a bona fide error defense. *Id.* In the nine years between the enactment of TILA and the enactment of the FDCPA, all federal courts to consider the bona fide error defense held that it only referred to clerical errors and did not extend to a mistaken legal interpretation of the Act. *Id.* at 1616.

The Court rejected the law firm and attorney's argument that the Court's reading would have unworkable practical consequences for debt collecting lawyers. *Id.* at 1620. The law firm and attorney argued that the FDCPA's private enforcement mechanism's fostered a "cottage industry" of professional plaintiffs who sue debt collectors for trivial violations of the Act, and that the Court's holding will open the courts to a flood of new lawsuits for reasonable misinterpretations of the requirements of the Act. *Id.*

The Court found that its holding did not portend "such grave consequences." *Id.* The Court reasoned that the FDCPA contains several provisions that expressly guard against abusive lawsuits and mitigate the financial risks to counsel in filing collection actions. *Id.* First, when a violation is "trivial," the actual damages sustained will be minimal or zero. *Id.* at 1621. Second, the Act sets a cap on statutory damages (§ 1692k(a)(2)) and vests the court with discretion to adjust damages where a violation is based on a good faith error. *Id.* Third, courts have discretion to determine a "reasonable" attorney fee for prevailing consumers, so attorneys fees should not shape financial incentives when statutory or actual damages are modest. *Id.* Fourth, § 1692k(a)(3) authorizes courts to award attorneys' fees to the defendant if a plaintiff's suit "was brought in bad faith and for purposes of harassment." *Id.* Fifth, debt collectors have recourse to § 1692k(c) for qualifying factual errors. *Id.* The Court concluded, "We do not foresee that our decision today will place unmanageable burdens on lawyers practicing in the debt collection industry." *Id.* at 1624. To the extent that the policy concerns require a "recalibration of the FDCPA's statutory scheme," the Court noted that Congress was "free to amend the statute accordingly." *Id.* The Court recognized that "congress has wide latitude . . . to revise § 1692k to excuse some or all mistakes of law or grant broader discretion to district courts to adjust a plaintiff's recovery." *Id.* But, the Court refused to read more into § 1692k(c) "than the statutory language naturally supports." *Id.* The Court concluded, "We therefore hold that the bona fide error defense in § 1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." *Id.*

The Court did not address whether § 1692k(c) applies when a violation results from a debt collector's misinterpretation of the legal requirements of state law or federal law other than the FDCPA. *Id.* at 1611, n.4. The Court made clear that its opinion only applied to "an alleged misinterpretation of the requirements of the FDCPA[;]" here, whether § 1692g contained an "in writing" requirement. *Id.*

b. Justice Breyer's Concurring Opinion

Justice Breyer joined the majority opinion, but issued his own concurring opinion. He recognized that the majority's opinion could create practical concerns for lawyers who regularly engage in debt collection. *Id.* at 1625 (Breyer, J., concurring). Justice Breyer stated, "Can those lawyers act in the best interests of their clients if they face personal liability when they rely on good-faith interpretations of the Act that are later rejected by a court? Or will that threat of personal liability lead them to do less than their best for those clients?" *Id.* Justice Breyer stated that a lawyer should turn to the FTC for an advisory opinion. *Id.* (citing 16 C.F.R. §§ 1.1 to 1.4 (2009)). If the attorney follows the opinion, he will then be free from liability under § 1692k(e). *Id.* If the attorney fails to follow the opinion, he has not acted in good faith and can be fairly liable. *Id.*

Justice Breyer recognized that the FTC had issued only four opinions in response to seven requests in the last decade, but "would expect the FTC to receive more requests and to respond to them, thereby reducing the scope of the problem to the point where other available tools, *e.g.*, damages caps and vicarious liability, will prove adequate." *Id.*

c. Justice Scalia's Opinion Concurring in Part and Concurring in the Judgment

Justice Scalia filed an opinion concurring in part and concurring in the judgment. He reasoned that the majority's textual analysis should stand on its own, without resort to two legal fictions. *Id.* at 1628 (Scalia, J., concurring). First, Justice Scalia disagreed that three federal courts' interpretations of the bona fide error defense in TILA were known by Congress and considered when enacting the FDCPA. *Id.* at 1626. Second, Justice Scalia rejected the majority's reliance on legislative history. *Id.* at 1626-1627. Were the majority to consider legislative history, which Justice Scalia does not suggest, the Court should have looked at the most persuasive legislative history -- the Senate Committee Report on the FDCPA -- rather than legislative history relating to TILA. *Id.* at 1627. The Senate Committee report on the FDCPA stated that "[a] debt collector has no liability . . . 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 to avoid such violations." *Id.* (quoting S.Rep. No. 95-382, p. 5 (1977), U.S. Code Cong. & Admin.News 1977, pp. 1695, 1699). This history most plausibly indicates that Congress intended to include mistakes of law in the bona fide error defense. *Id.*

d. Justice Kennedy's Dissenting Opinion

Justice Kennedy drafted a dissenting opinion, in which Justice Alito joined. The dissent stated that the most natural reading of the bona fide error defense includes mistakes of law because a mistaken belief about the law, if held in good faith, is a "bona fide error." *Id.* at 1629 (Kennedy, J., dissenting). By linking the *mens rea* requirement ("not intentional") with the word "violation"- rather than with the conduct giving rise to the violation- the Act by its terms indicates that the bona fide error exception applies to legal errors as well as factual ones. *Id.*

The dissent disagreed with the majority's view that a "willful," rather than "intentional," violation indicated an excuse for mistakes of law. *Id.* at 1630. The dissent reasoned that, in the civil (as opposed to criminal) context, the word "willful" imposed a *mens rea* requirement lower, not higher, than an intentional requirement. *Id.* Avoiding liability under a statute aimed at intentional conduct should be easier, rather than harder, than avoiding liability under a statute aimed at willful violations. *Id.*

Even if the dissent's interpretation was simply a permissible reading of the statute (as opposed to the most reasonable reading), the dissent noted that its interpretation should be adopted to avoid the adverse consequences flowing from the majority's decision. *Id.* The plaintiff in *Jerman* suffered no actual damages as a result of the technical violation in the validation notice. The dissent stated, "Today's holding gives new impetus to this already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Id.* at 1631. The bona fide error defense was meant to address that troubling dynamic. *Id.* The dissent rejected the majority's view that that the FDCPA guarded against abusive suits brought "in bad faith and for the purpose of harassment" by allowing a fee award to the defendant. *Id.* at 1632. According to the dissent, this does not address the situation, like in *Jerman*, where there are technical but harmless violations of the statute. *Id.* The dissent stated, "It seems unlikely that Congress sought to create a system that encourages costly and time-consuming litigation over harmless violations committed in good faith despite reasonable safeguards." *Id.*

The dissent stated that a further reason to include good faith legal mistakes is to avoid the situation where a collection attorney is held liable for taking reasonable legal positions if those legal positions are ultimately rejected. *Id.* at 1633.

C. Post-*Jerman* Decisions

As of August 30, 2010, only four cases substantively analyzed the Supreme Court's *Jerman* decision when determining the applicability of the bona fide error defense:

1. ***Silver v. Law Offices of Howard Lee Schiff, P.C.*, No. 3:09CV912, 2010 U.S. Dist. LEXIS 76072 (D. Conn. July 28, 2010).** In *Silver*, judgment was entered against a consumer in two collection actions. The consumer made payments on both accounts, but the debt collector credited one payment to the wrong debt. The consumer sued the debt collector for violation of the FDCPA for demanding a greater balance than actually owed in violation of § 1692e(2) and failing to properly allocate the consumer's payments in violation of § 1692h. The debt collector did not dispute that it failed to follow the consumer's directions regarding which account to credit the payments, but argued that it credited payments to the wrong account based upon a bona fide error. The district court noted that this case did not present an assertion of a legal error or mistake of law. *Id.* at *14-*15. Although this was an alleged mistake of fact, the district court nevertheless held there was a genuine issue of material fact whether the debt collector committed a bona fide error. In particular, there were genuine factual issues regarding whether the violation was intentional, whether the error was reasonable, and whether the procedures employed to avoid such errors was reasonable. *Id.* at * 13-*17.

2. ***Ballou v. Law Offices of Howard Lee Schiff, P.C.*, No. 3:09CV913, 2010 U.S. Dist. LEXIS 58247 (D. Conn. May 21, 2010).** In *Ballou*, a judgment was entered against a consumer in two collection actions, and the court ordered the consumer to pay in installments. The defendant debt collector sought a bank execution against the consumer and directed the marshal to add interest to the amount owed, despite the fact that the small claims court had not entered an order awarding post-judgment interest. The consumer sued the debt collector for overstating the debt in violation of the FDCPA when it added interest. The court stated that "[t]he only issue in this case is whether Defendant's attempt to have interest added to the execution was a violation of the FDCPA." *Id.* at *2.

Determination of an FDCPA violation turned on whether, under Connecticut law, post-judgment interest is automatically applied to any unpaid balance of a judgment when a court enters an installment payment order, and the court recognized that both sides of the argument had merit. The court then noted that, in the Second Circuit, "a mistake of law is not a defense under the FDCPA." Thus, if the debt collector misinterpreted the statute governing interest, then it violated the FDCPA. The court noted that the Supreme Court in *Jerman* recently held that a mistaken interpretation of the FDCPA itself is not a defense under the statute. The *Ballou* court recognized that the Supreme Court explicitly stated that its holding did not apply to mistakes of state law or federal law other than the FDCPA; however, it stated that "the reasoning of *Jerman* would seem to apply to all mistakes of law." The court continued that it need not decide whether *Jerman* covers all mistakes of law since prior Second Circuit precedent holds that a mistake of law is not a defense. *Id.* at * 10.

The district court certified a question to the Connecticut Supreme Court regarding whether a Connecticut statute provided for the automatic accrual of post-judgment interest. *Id.* at *12. The district court stated, "Before this Court holds that every collector who added interest to a judgment to be paid in installments is in violation of Connecticut law, and thus the FDCPA if within the one-year statute of limitations, the Court seeks to clarify this unsettled question of Connecticut law by certifying it to the Connecticut Supreme Court." *Id.* at *11-*12.

Therefore, even though the Connecticut statute could be interpreted reasonably to allow automatic accrual of interest, the debt collector will nevertheless be liable under the FDCPA if the Connecticut Supreme Court determines its interpretation of the statute was wrong.

3. ***Bassett v. I.C. System, Inc.*, No. 09 C 0301, 2010 U.S. Dist. LEXIS 53697 (N.D. Ill. June 1, 2010).** In *Bassett*, a debt collector made 31 collection calls to a consumer over a twelve day time period. The consumer filed a lawsuit alleging the debt collector violated § 1692d(5), which prohibits a debt collector from causing a telephone to ring continuously with the intent to annoy, abuse, or harass. *Id.* at * 11, * 22. The debt collector argued it could not be held liable under the bona fide error defense. *Id.* at * 21. The district court noted the recent Supreme Court holding in *Jerman* that the bona fide error defense does not apply to a mistake of law, namely, a violation of the FDCPA that results from a debt collector's mistaken interpretation of the FDCPA. *Id.* at * 22. "In other words, a debt collector's conduct may be intentional even if he lacked the actual knowledge that his conduct violated the FDCPA." *Id*. Thus, the district court reasoned that the bona fide error defense only applied to procedural or clerical errors. The debt collector did not argue that it committed a procedural or clerical error in placing the calls. Instead, it argued under the pre-*Jerman* paradigm that it had procedures and policies in place to avoid such errors. The court held that "[b]ecause [the debt collector] admits it made thirty-one calls, its defense is not based on a clerical or procedural error." *Id.* Accordingly, the court denied the debt collector's motion for summary judgment.

4. ***Copeland v. Kramer & Frank, P.c.*, No. 4:09CV310, 2010 U.S. Dist. LEXIS 53484 (E.D. Mo. June 1, 2010).** In *Copeland*, a consumer attended court for a hearing on a collection matter. At the court, the debt collector asked the consumer to step outside to discuss a "payment plan," then had him sign a "judgment" acknowledging the debt, told him he did not need to stay for the hearing, told him she would send him a copy of the paperwork, altered the document he signed, and never sent it to the consumer. *Id.* at * 7-*8. When the consumer missed a payment, the debt collector executed on the judgment and garnished his bank account. The consumer sued for violation of § 1692e, prohibiting the use of false or deceptive means in the collection of a debt. The court held there was a genuine issue of material fact whether the debt collector violated the FDCPA. *Id.* at *8. The court further held there was a genuine issue of material fact whether any alleged violation of the FDCPA was the result of a bona fide error. Citing *Jerman*, the court stated, outright, that the "bona fide error defense does not apply to mistakes of law." *Id.* at *9.

D. What Is *Not* A Bona Fide Error?

The Supreme Court held that "the bona fide error defense in § 1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." 130 S. Ct. at 1624. Arguably, the Supreme Court's holding is limited such that only mistakes of law interpreting the requirements of the FDCPA are not bona fide errors. However, at least one court has concluded that "the reasoning of *Jerman* would seem to apply to *all* mistakes of law." *Ballou*, 2010 U.S. Dist. LEXIS 53697, at *10 (emphasis added). While it is unclear whether the Court's holding in *Jerman* applies to *all* mistakes of law, there is no doubt that mistakes of law interpreting the requirements of the FDCPA are not entitled to the defense of bona fide error.

For example, in *Stojanovski v Strobl & Manoogian, P.C.*, 783 F Supp 319 (E.D. Mich. 1992), the district court held that a law firm was not liable under the FDCPA based on a bona fide error. In particular, the law firm failed to include the "mini-Miranda" language in a debt collection letter warning it was attempting to collect a debt and it would use any information obtained for that purpose, in violation of § 1692e(11). The district court held the debt collector was entitled to the bona fide error defense. *Id.* at 324. The district court stated, "The provisions of the Act may not have been meticulously followed, but it is difficult to see how defendant's lack of fastidiousness and attention to detail could be construed as intentional . . . Because defendant has shown that its one violation of the Act was unintentional, this court will not hold defendant liable under the Act." *Id.* Unaware of a change in the law, the law firm argued that it was not required to include the FDCPA's language because attorneys were excluded from the definition of debt collector. To the extent that the court based its decision on the law firm's mistake of law (that it was not subject to the act), were these same facts before a court post-*Jerman*, a court would likely find that the failure to comply with the legal requirements of the FDCPA requiring the "mini-Miranda" language was *not* a bona fide error. However, as set forth below in *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 390 (D. Del. 1991), to the extent the law firm recognized its need to comply with the act and enacted reasonable procedures that, through clerical error, were not followed, these facts would still constitute a bona fide error.

In *Ruth v Triumph Partnerships*, 577 F3d 790 (7th Cir. 2009), the Seventh Circuit held that debt collectors that sent out a false and deceptive notice were not protected by the bona fide error defense under 15 U.S.C. § 1692k(c) because the debt collectors could point to no evidence that they sought legal or regulatory advice as to whether the communication was in compliance with the FDCPA. At issue in this case were letters sent by the collectors that included a privacy notice indicating that nonpublic information about the debtor could be shared with third parties unless the debtor opted out. The debtors alleged that the notice violated 15 U.S.C. § 1692e as a false or misleading representation in connection with collection of a debt, because the collectors did not have a legal right to disclose non-public information about the debtors. The Seventh Circuit noted that the debt collector's error was an "error of law: They misconstrued whether the notice satisfied the statute's requirements." The Seventh Circuit recognized the pre-*Jerman* split of authority whether the bona fide error defense applied to questions of law. The Seventh Circuit concluded it need not decide whether the defense applied to mistakes of law, because the steps the debt collector took were not sufficient to qualify for the defense. The debt collector could point to no evidence that it sought legal or regulatory advice as to whether the communication was in compliance with the FDCPA. Were this case decided post-*Jerman*, the court would likely still conclude that the debt collector was not entitled to the bona fide error defense; however, the reasoning would change. Rather than analyzing the steps the debt collector took to ensure compliance with the Act, the court would likely find the defense did not apply since the debt collector committed an error of law regarding the legal requirements of the Act.

In *Kort v. Diversified Collection Servs.*, 270 F. Supp. 2d 1017, 1026-1027 (N.D. Ill. 2003), a debtor alleged that a debt collector's "Notice Prior to Wage Withholding" letter violated the FDCPA by misstating the date by which the debtor must enter into a repayment plan or pay off a student loan to avoid administrative wage garnishment under the Higher Education Act. The undisputed evidence showed that the letters sent by the collection agency were identical to a form prescribed by the Department of Education. The court stated that even if the DOE's language concerning the steps a debtor must take to receive the unemployment exemption falls afoul of the FDCPA, any such error by the debt collector would be inadvertent. Reliance on the DOE's interpretation of the statute as expressed by its form letter would be a procedure reasonably adapted to avoid such error. Accordingly, the debt collector was entitled to the bona-fide error defense. Were this matter decided post-*Jerman*, a court would more likely hold that the debt collector's violation of the FDCPA resulted from the debt collector's incorrect interpretation of the requirements of that statute and, therefore, it would not be entitled to the bona fide error defense.

In *Piper v Portnoff Law Assocs.* (2003, ED Pa) 274 F Supp 2d 681 (E.D. Pa. 2003), aff'd, 396 F3d 227 (3d Cir. 2005), a law firm and individual attorneys were not entitled to assert bona fide error defense in a property owner's claims that they violated the FDCPA in sending letters to recover delinquent water and sewer bills owed to city where law firm and attorneys *intentionally* excluded language required under 15 U.S.C. §§ 1692e(11) (this is an attempt to collect a debt and any information will be used for that purpose) and 1692g(a) (validation of debts). This result would remain unchanged post-*Jerman* because the debt collector's violation of the FDCPA resulted from the debt collector's incorrect interpretation of the requirements of that statute.

In *Carvana v MFG Fin., Inc.*, 547 F Supp 2d 1219 (D. Utah 2008), vacated, in part, 2008 U.S. Dist LEXIS 46993 (D. Utah 2008), a district court rejected a corporation and officers' argument that summary judgment was improper on an individual's claim for violation of the venue provision of the FDCPA, 15 U.S.C. § 1692i. The court found a genuine issue of material fact existed as to whether the bona fide error defense derived from 15 U.S.C. § 1692k(c) shielded the corporation and officers from liability since the only statement that the corporation and officers provided for invocation of defense was a blanket statement that the corporation maintained written rules and procedures which were reasonably adapted to avoid violation of FDCPA. Were this decided post-*Jerman*, the result would likely be different. A court would more likely hold as a matter of law that the corporation could not assert the bona fide error defense because failure to file a collection action in the appropriate venue was a mistake of law regarding the requirements of the FDCPA.

E. What Is Still A Bona Fide Error?

Under the bona fide error defense, "a debt collector cannot be held liable under the FDCPA if it shows by a preponderance of the evidence the following three elements: (1) the violation was not intentional; (2) the violation resulted from a bona fide (or good faith) error; and (3) the violator maintained procedures reasonably adapted to avoid any such error." *E.g. Foster v. D.B.S. Collection Agency*, 463 F. Supp.2d 783, 794-795 (S.D. Ohio 2006). There is no doubt that "qualifying factual errors" are still protected by the bona fide error defense in § 1692k(c), so long as a debt collector demonstrates all other elements of the defense (i.e., the violation was unintentional and the violator maintained procedures reasonably adapted to avoid such errors). *See Jerman*, 130 S. Ct. at 1621.

For example, *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997), a consumer alleged that an attorney debt collector violated § 1692e of the FDCPA by falsely representing the character of her debt when it attempted to collect insurance premiums that a bank procured without authorization on the consumer's behalf. *Id.* at 826. The debt collector argued that it was entitled to the bona fide error defense because it relied on the original creditor's representations that the charges were legally valid. *Id.* at *7. The consumer argued that the debt collector made a legal error in seeking to collect her debt, which was not protected by § 1692k(c). *Id.* at *22. The Seventh Circuit noted that mistakes of law could form the basis of a bona fide error defense, but a mistake of law was not at issue in the case. *Id.* at *22-*23, n.7. The debt collector methodically processed a collection of the account based upon information it was entitled to rely upon. *Id.* at *23. The court found that a debt collector was not required to "conduct an independent investigation into the legal intricacies of the client's contract with the consumer." *Id.* at * 28. Even post-*Jerman*, reliance on information received from the original creditor is a factual error that may be protected by the bona fide error defense.

In *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 390 (D. Del. 1991), a district court held that any failure by a debt collector to give the "mini-Miranda disclosure in § 1692e(11) during communications with debtors was excusable under § 1692k(c). The evidence conclusively showed that the debt collector maintained procedures intended to ensure compliance with the FDCPA. In particular, employees of the debt collector periodically attended seminars which provided training to aid them in complying with the FDCPA. In addition, the debt collector's employees were provided with various editions of the Fair Debt Collection Practices Act manual. There was also a three-page memorandum entitled "Statement of Collection Policy for Fair Debt Collection Practices Act." With respect particularly to compliance with the disclosure requirement of § 1692e(11), there was a posted 5" x 8" card with the following language: "This is an attempt to collect a debt and any information obtained will be used for that purpose" over every telephone at the debt collector's office. Standard procedure at the debt collector's office required that employees recite the language on the card immediately after introducing themselves when conducting collection business by telephone. Employees referred to this procedure as "citing the memo." The debt collector asserted that the memo was cited in conversation with the debtors and any failure to do so was unintentional. The court stated, "Clerical errors and misstatements of this kind are the kinds of 'violations' of the Act for which section 1692k(c) was intended to provide a defense." The debtors failed to present any evidence that the debt collectors intended not to give the disclosure. Therefore, even though this was a violation of the legal requirements of the Act, it was not based upon a misinterpretation of the requirements of the Act. Therefore, even post-*Jerman* a court would likely consider this unintentional failure to provide the statutorily required language a "bona fide error," in light of the reasonable procedures maintained to avoid the error.

In *Ross v RJM Acquisitions Funding LLC*, 480 F3d 493 (7th Cir. 2007), the Seventh Circuit held a debt collector was not liable under the FDCPA even though it sent two dunning letters in reference to a debt discharged in bankruptcy because the letters were sent due to an error regarding the debtor's name that could not have been detected with the collector's procedures. The debtor was named Delisa Ross, and the debt collector searched for bankruptcies under the name provided to it when it purchased the debt, which was Lisa Ross. The court held the debt collector satisfied its burden under § 1692k(c) where it showed that violation was not intentional and resulted from a bona fide error that its procedures for avoiding errors could not reasonably detect. Post-*Jerman*, such mistakes of fact will remain bona fide errors, assuming the mistake was unintentional and the debt collector employed procedures reasonably adapted to avoid such errors.

In *Edwards v McCormick*, 136 F Supp 2d 795 (S.D. Ohio 2001), a debt collector who relied on information provided by an original creditor when sending a collection letter to a debtor's wife demanding payment of the husband's debts was entitled to bona fide error defense under § 1692k(c). The debt collector demanded and received assurance from the creditor that the wife was, in fact, financially responsible for the deceased husband's debts before proceeding with a collection action against her. Thus, the debt collector relied on the information it received from the original creditor regarding the amount of the debt and the parties responsible for the debt. The court stated, "The Sixth Circuit has held that a debt collector may rely upon information provided by his client, and that § 1692k(c) will protect a debt collector who is not willfully blind to the inaccuracy of such information from liability directly attributable to mistakes of the client." Post-*Jerman*, a debt collector may still receive protection of the bona fide error defense when it relies on factual information it received from the original creditor or client.

In *Moya v Hocking*, 10 F Supp 2d 847 (W.D. Mich. 1998), the court held that a debtor's FDCPA action against a debt collection agency and its attorney must fail, even though defendants filed suit on, and reported to credit reporting agencies, debts that were barred by the statute of limitations, because the agency and attorney both reasonably relied upon incorrect information regarding last payment dates furnished by account sellers and creditors. Therefore, the debt collection agency was entitled to rely on the bona fide error defense. Post-*Jerman*, a debt collector may still receive protection of the bona fide error defense when it relies on factual information it received from the original creditor.

In *Wilhelm v Credico Inc.*, 426 F Supp 2d 1030 (D. N.D. 2006), a debt collector was entitled to summary judgment on a debtor's claim that it collected compound interest in violation of N.D. Cent. Code § 47-14-09(1) where undisputed evidence showed that the error made by the debt collector in the posting of individual's account was inadvertent clerical error. In particular, the debt collector submitted affidavits setting forth the procedure for posting accounts like the debtor's account and showing that the principle and interest were to be separately entered into the debt collector's records, and that the debt collector's employee unintentionally applied the wrong interest calculation method. Post-*Jerman*, a debt collector may still receive protection of the bona fide error defense for such clerical errors.

In *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 395 (6th Cir. 1998), a consumer had sent a letter to a debt collector insisting that the collector "cease further communications" with him, which is an option that the FDCPA provides. While the collector did cease most of its collection activities, one letter and one phone call went out after that point. The court allowed the bona fide error defense, finding that the phone call was due to the nature of the case going from the credit card company to the collector, back to the credit card company, then back to the collector. On the final transfer it was put in the system as a new account and the consumer was called in spite of the fact that he had insisted on no communication. An employee of the collector caught the fact that the account was put in as new and corrected it, but not before the phone call went out to the consumer. The court found "that [the debt collector's] manual and computer systems were 'reasonably adapted' to avoid the error that occurred in this case and in fact were able to catch the error in a very short period of time." In evaluating whether the debt collector is free of intent and entitled to the bona fide defense, the Court found that the intent to make the phone call was not relevant; the intent to violate the FDCPA was the essential element. Post-*Jerman*, a debt collector may still receive protection of the bona fide error defense for such input errors.

In *Kujawa v Palisades Collection, L.L.C.*, 614 F Supp 2d 788 (E.D. Mich. 2008), the court held that, even assuming a debt collection agency and law firm violated the FDCPA, the bona fide error defense would have applied because there was no dispute that the defendants were not attempting to collect on a debt owed by the plaintiff, but rather by another person with plaintiff's same name. The court noted that, under § 1692k(c), a "debt collector must only show that the violation was unintentional, not that the communication itself was unintentional." The bona fide error defense applied because communications from the debt collector were clearly sent to the plaintiff unintentionally and in error. Post-*Jerman*, a debt collector may still receive protection of the bona fide error defense for such mistakes in identity, assuming the mistakes were unintentional debt collector employed procedures reasonably adapted to avoid such errors.

Also, as the majority opinion in *Jerman* noted, the FDCPA contains two defenses to a debt collector's liability: (1) the bona fide error defense; and (2) the FTC advisory opinion defense. Under the FTC advisory opinion defense, none of the FDCPA's provisions imposing liability apply to "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission." *Jerman*, 130 S. Ct. 1609 (quoting 15 U.S.C. § 1692k(e).) However, this defense is not often litigated, and no published opinions are available in the federal courts interpreting this defense. In fact, the Supreme Court in *Jerman* noted that the FTC received only seven requests for such advisory opinions in the past decade, and it issued only four opinions. The FTC's response time was typically three to four months, which even the Court recognized would not allow it "to place significant weight on § 1692k(e) as a practical remedy" to avoid mistakes of law. *Id.*

F. What *Might* Still Be A Bona Fide Error?

The Supreme Court held that "the bona fide error defense in § 1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." *Id.* at 1624. Arguably, the Supreme Court's holding is limited such that only mistakes of law *interpreting the requirements of the FDCPA* are not bona fide errors. Therefore, one could argue that mistakes of law, *other than* those interpreting the FDCPA, are still protected by the bona fide error defense. Of course, this argument would be ineffective in jurisdictions that historically only applied the bona fide error defense to mistakes of fact or clerical mistakes, such as the Ninth, Eighth, and Second Circuits. *See Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). But, this argument may be effective in jurisdictions that previously held that the bona fide error defense applies to mistakes of law, such as the Sixth, Seventh, and Tenth Circuits. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476-477 (6th Cir. 2008); *Jenkins v. Heintz*, 124 F.3d 824, 832 and n.7, 833 (7th Cir. 1997); *Johnson v Riddle*, 305 F3d 1107 (10th Cir. 2002); but see *Ruth v. Triumph Partnerships*, 577 F.3d 790, 803 (7th Cir. 2009) ("We have not taken a side in this intercircuit split. Although we occasionally have assumed, in cases where it made no difference to the outcome, that the defense applies to legal errors, we have not yet resolved the question definitively.")

For example, in *Johnson v. Riddle*, the Tenth Circuit held that the bona fide error defense applied to mistakes of law. 305 F.3d 1107, 1122 (10th Cir. 2002). In *Johnson*, a debt collector attempted to collect a shoplifting penalty in excess of a service charge permitted by a Utah dishonored check statute. The court held remand was necessary to determine applicability of the bona fide error defense, which applied to mistakes of law. *Id.* at 1122-1124. Even post-*Jerman*, courts that previously found that the bona fide error defense applied to mistakes of law may conclude that the bona fide error defense was applicable in this situation. The debt collector's "mistake of law" was a mistake regarding the service charge permitted by a state dishonored check statute. It was *not* a mistaken interpretation of the requirements of the FDCPA.

In *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1277-1278 (M.D. Fla. 2008), debt collectors brought a collection action against a debtor, which had been dismissed as time-barred under Delaware's three-year statute of limitations. The court granted the debt collector's motion for summary judgment in part. The court concluded that defendants demonstrated that they acted in bona fide error and did not intentionally file a suit that was time-barred. The debt collector's researched the statute of limitations issue and reasonably believed that Florida's longer statute of limitations applied and, alternatively, if Delaware's statute of limitations applied, it was tolled. Although the legal analysis was wrong, the court found it was a good faith mistake in their interpretation of an unsettled question of law, and defendants were entitled to summary judgment pursuant to 15 U.S.C. § 1692k(c). Even post-*Jerman*, courts that previously found that the bona fide error defense applied to mistakes of law may conclude that the bona fide error defense was applicable in this situation. The debt collector's "mistake of law" was a mistake regarding the applicable statute of limitations to collect a debt. It was *not* a mistaken interpretation of the requirements of the FDCPA.

In *Frye v Bowman*, 193 F Supp 2d 1070 (S.D. Ind. 2002), recipients of a summons from a law firm debt collector alleged that the law firm violated the FDCPA because its summons misstated the law and their rights under the Indiana Rules of Trial Procedure. In particular, the summons stated that the recipient had 23 days from the date of "receipt" of the summons within which to file an answer, rather than 23 days from the date of mailing. The plaintiff's alleged this was a false and misleading representation in connection with collection of a debt, in violation of § 1692e. The firm contended that even if the summons violated the Act, it was entitled to the bona fide error defense because the language challenged in its summons was consistent with language in the summons forms available from the state court clerks' offices submitted in this case. As a result, the alleged defects or mistakes in the summons were tacitly approved by the state court clerks. Since "mistakes of law may in some circumstances entitle a debt collector to the defense," the court concluded the debt collector was entitled to raise the bona fide error defense to the alleged violations of the FDCPA. Even post-*Jerman*, courts that previously found that the bona fide error defense applied to mistakes of law may conclude that the bona fide error defense was applicable in this situation. The debt collector's "mistake of law" was a mistake regarding the Indiana's Rules of Trial Procedure. It was *not* a mistaken interpretation of the requirements of the FDCPA.

In *Shapiro v Haenn*, 222 F Supp 2d 29 (D. Me. 2002), an attorney who failed to give a borrower proper notice and opportunity to cure default before a bank began to foreclose on the borrower's property did not violate the FDCPA. The attorney's error was based upon his judgment that the subject debt was a commercial debt, rather than consumer debt. The court stated that, although the attorney's "decision to treat Plaintiff's loan as a commercial debt does not fall neatly into either category [of clerical error versus mistake of law], to the extent that he erred, his decision was more akin to an error in legal judgment than a purely clerical error." Relying on *Johnson v. Riddle*, the court stated that "debt collectors may raise the bona fide error defense based on errors in legal judgment." The court stated that the attorney was entitled to rely on the loan documents provided by his client in determining the character of the plaintiff's loan. His standard procedure of reviewing loan documents personally and applying his legal experience and training with an eye to distinguishing the type of loan was reasonably calculated to avoid a loan classification error. Thus, the bona fide error defense applied, and the attorney was entitled to summary judgment on Plaintiff's FDCPA claims. Even post-*Jerman*, courts that previously found that the bona fide error defense applied to mistakes of law may conclude that the bona fide error defense was applicable in this situation. The attorney's "mistake of law" was a mistake regarding loan classification. It was *not* a mistaken interpretation of the requirements of the FDCPA.