No. 05-16840

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEVERLY A. BEUTER,

Plaintiff-Appellee,

v.

CANYON STATE PROFESSIONAL SERVICES, INC.,
an Arizona corporation, and RONALD WILSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE BEVERLY A. BEUTER

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Beverly Beuter requests oral argument. This appeal offers the Court an opportunity to provide needed guidance to district courts within the Ninth Circuit on the strict-liability nature of the Fair Debt Collection Practices Act. The question presented—whether the Court should recognize a new defense to liability under the Act based on a debt collectors' reliance on the creditor—is significant. Such a defense would upset decades of settled interpretation of the Act, frustrate the intent of Congress, place scrupulous debt collectors at a competitive disadvantage, and have negative consequences for consumers throughout the nine Western states.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE HISTORY

BOOKS AND ARTICLES

STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The notice of appeal from the final order and judgment entered on August 8, 2005 was filed on September 7, 2005. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Under the Fair Debt Collection Practices Act, a debt collector may not misrepresent the amount of a debt or seek to collect an amount the consumer does not owe. 15 U.S.C. §§ 1692e(2)(A), f(1). The Act also provides an affirmative defense to liability for debt collectors' unintentional errors that occur despite adequate preventive procedures. *Id.* § 169k(c).

The issue presented is whether a debt collector who does not maintain such procedures may nevertheless avoid liability on the grounds that it relied on the representations of the creditor.

STATEMENT OF THE CASE

A. Factual Background

The facts are undisputed. Katie Jones and her mother, plaintiff-appellee Beverly Beuter, signed a one-year lease for an apartment at the Desert Club

Apartments in Phoenix, Arizona in October 2003. [ER-1, Exh. E].[1] Ms. Beuter co-signed the lease with her daughter, but did not occupy the apartment. [ER-2, Exh. 7 ("Rental Application")]. The monthly rent under the lease, including taxes, was $1,158.48. [ER-1, Exh. E]. The agreement provided that "to enforce the lease, the prevailing party may recover reasonable attorneys' fees[.]" [ER-1, Exh. E].

Just three months later, on January 26, 2004, Desert Club obtained a default judgment against Ms. Jones and Ms. Beuter in the Northeast Phoenix Justice Court. [ER 1, Exh. D]. The judgment authorized Desert Club to immediately retake possession of the apartment and to collect the following amounts:

Rent in the sum of:	$1,190.02
Late charges in the sum of:	$165.00
Attorneys' fees in the sum of	$90.00
Costs in the sum of	$51.00
Other damages in the sum of:	$0.00
Total Judgment:	$1,496.02

[ER-1, Exh. D].

Desert Club assigned the debt to Canyon State Professional Services, Inc., an independent debt collector, sometime in March 2004. [ER-2, Exh. 1, ¶ 2]. Canyon State mailed a collection letter to Ms. Beuter on May 27, 2004. [ER-1,

[1]The pages of Appellants' Excerpts of Record are not consecutively numbered. Citations to the Excerpts of Records (ER) in this brief include the document number and, where appropriate, a reference to the relevant exhibit, page, or paragraph within the document or exhibit.

Exh. B]. At the top of the letter appeared the words "BALANCE DUE: $4,295.95." Canyon State's letter did not explain the discrepancy between the $1,496.02 judgment and the $4,295.95 figure. It said that "[t]he account balance may differ from the judgment balance," but did not elaborate further. [ER 1, Exh. B].

On July 2, 2004, Ms. Beuter's lawyer, Richard Groves, sent a letter to Canyon State. [ER-1, Exh. C]. Groves wrote: "[O]n behalf of Ms. Beuter, I dispute the validity of the charges that you claim due and owing Desert Club Apartments. You may not assume this debt is valid." The letter cited 15 U.S.C. § 1692g, a provision of the Fair Debt Collection Practices Act that permits a consumer to dispute a debt and requires the debt collector to cease collection until the debt collector obtains verification of the debt from the creditor and mails it to the consumer. The letter went on to "demand that you provide strict and complete proof of the validity of *every item* that is included in your collection demand of $4,295.95." Canyon State responded by sending a copy of the default judgment, a copy of the lease agreement, and a statement of charges explaining that the $4,295.95 figure included a charge for legal fees in the amount of $291.00. [ER-2, Exh. 6].

B. Canyon State's Lack of Procedures

Canyon State's co-owner and Vice President, Ronald Wilson, testified at his deposition that when Canyon State is assigned a debt from a creditor, it does not implement any procedures designed to avoid the collection of unauthorized amounts:

> Q: What procedures had Canyon State established and what procedures were you maintaining on July 1st of 2004 reasonably adopted to avoid any error in the data received from your clients?
>
> A: The only procedure we have in place is if it's noted within a file that the claim has been disputed before it comes to us. Then we note that dispute as part of our initial log-in of the client.
>
> We don't verify any balances when we are first assigned. We have no reason to.
>
> Q: You have no policies and procedures?
>
> A: No reason to have them.
>
> Q: But the answer to that is, "No, I have none?"
>
> A: I have none because I have no requirement to.
>
> * * *
>
> Q: When you initially get the file, you have no policies and procedures and you don't contact the client, correct?
>
> A: Correct. We have no requirement to.

[ER 6, Ex. A at 24:10-23; 25:5-7].

Wilson also testified that, even after Canyon State received the July 2, 2004 dispute letter from Ms. Beuter's lawyer, it still made no attempt to contact Desert Club to verify the amount of the debt:

> Q: Did you at any time contact the creditor, Desert Club Apartments, and attempt to obtain any sort of verification concerning the Statement of Security Deposit Accounts which was provided to you?
>
> A: I had no requirement to.
>
> Q: So your answer is, "No, I did not?"
>
> A: No, because I had no requirement to.
>
> Q: Okay. So if the information on the Statement of Security Deposit Accounts . . . was invalid, hypothetically was invalid or did not truly and accurately reflect the amounts due and owing Desert Club Apartments, you would have no way of knowing that?
>
> A: I would have no way of knowing that, no.

[ER 6, Ex. A at 20:8-14].

He confirmed that Canyon State never contacted the apartment complex to verify the amount of Ms. Beuter's debt—neither before attempting to collect, nor after its receipt of her dispute letter, nor at any point in between:

> Q: In this particular case, did you ever contact the apartment complex to verify the information which they provided in their file?
>
> A: In which case?
>
> Q: The case before us, the *Beuter* matter.
>
> A: We've covered that before. We had no reason to contact the client.

Q: So your answer is, "No, we didn't."

A: We didn't because we had no reason to.

[ER 6, Exh. A at 26:13-21].

C. Decision Below

On June 28, 2004, Ms. Beuter sued Canyon State and Wilson in the U.S. District Court for the District of Arizona, alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*. [ER-1, ¶¶ 41-44]. The parties filed cross-motions for summary judgment, which the district court granted in part and denied in part on June 13, 2005. [Notice of Errata at 8].[2] The defendants (collectively referred to here as "Canyon State") presented the same theory that they now press on appeal: that even if the amount they sought to collect from Ms. Beuter was not the amount she lawfully owed, they could not be held liable for violations of the FDCPA at all because they "sought to collect *precisely* the amount they were instructed to collect" by the creditor. [Notice of Errata at 3 (quoting Defs' Mtn.)].

With respect to the claim at issue on appeal—the discrepancy in the charge for attorneys' fees—the district court rejected Canyon State's argument and

[2] Appellants' Excerpts of Record do not contain a complete copy of the district court's summary judgment ruling. Ms. Beuter is not filing a supplemental excerpt of record pursuant to Circuit Rule 30-1.6, however, because appellants have agreed to file a Notice of Errata containing a complete copy of the decision.

concluded that the attempt to collect $291 in fees, after the state court had already entered a judgment for only $90 in fees under the lease, violated two provisions of the FDCPA: 15 U.S.C. § 1692f(1), which forbids "[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law," and 15 U.S.C. § 1692e(2)(A), which prohibits the "false representation of—the character, amount, or legal status of any debt." [Notice of Errata at 3-5]. After denying Canyon State's motion for reconsideration on July 12, 2005, the district court issued a final order and judgment on August 18, 2005, approving the parties' stipulation that Ms. Beuter be awarded the maximum allowable statutory damages of $1,000 and providing that "all remaining undecided issues are dismissed with prejudice." [ER-10]. This appeal followed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*, and may be affirmed on any ground supported by the record. *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1096-97 (9th Cir. 2003).

SUMMARY OF ARGUMENT

This appeal presents a single question of statutory interpretation arising under the Fair Debt Collection Practices Act. Canyon State does not challenge the district court's determination that the amount it attempted to collect was not authorized by the lease agreement and that its representations concerning the debt

were false. Nor does it invoke the affirmative defenses provided by the statute. Instead, it invites this Court to become the first appellate court in the nation to recognize an extra-statutory defense to FDCPA liability for debt collectors who rely blindly on information supplied by their clients.

Canyon State's position runs headlong into the text, structure, and purpose of the FDCPA. The FDCPA is a strict liability statute. For purposes of establishing liability, it does not matter whether Canyon State intended to collect unauthorized amounts and make false statements or whether Canyon State relied entirely on the creditor. The relevant provisions of the FDCPA do not contain any knowledge or intent requirements. That some provisions of the statute *do* refer to intent—most notably, an affirmative defense for unintentional "bona fide errors" by debt collectors who maintain adequate preventive procedures—simply underscores the conclusion that the statute does not require a showing of knowledge or intent to establish liability in the first place.

Canyon State's theory rests on a fundamental misunderstanding of the statute's strict-liability regime. Its arguments proceed from a correct premise: The statute does not impose an affirmative obligation on the debt collector to verify the amount it attempts to collect (at least not before the consumer explicitly requests verification). But it does not follow from that fact that debt collectors who blindly rely on their clients can evade liability. On the contrary, liability under the

FDCPA turns on the defendant's actions and the consequences of those actions; it is the defendant's responsibility to determine what precautions are necessary to avoid errors. To be sure, the statute provides an affirmative defense allowing debt collectors who institute adequate preventive procedures to avoid liability, but the burden to demonstrate such procedures is on the debt collector, and the debt collector here—Canyon State—admits that it has no such procedures.

Finally, the Court should reject Canyon State's position because it would circumvent the statute's bona fide error defense and upset the system of rewards and incentives created by Congress. By rewarding debt collectors who maintain good procedures and punishing those who do not, the FDCPA creates a powerful incentive to implement scrupulous collection practices. Canyon State's position would scrap Congress's carrot-and-stick approach, encouraging debt collectors to maintain an empty head and putting scrupulous debt collectors at a competitive disadvantage.

ARGUMENT

A DEBT COLLECTOR'S BLIND RELIANCE ON A CREDITOR PROVIDES NO BASIS FOR IMMUNITY FROM FDCPA LIABILITY.

"The Fair Debt Collection Practices Act is an extraordinarily broad statute. Congress addressed itself to what it considered to be a widespread problem, and to remedy that problem it crafted a broad statute." *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992). Canyon State would have the Court "ignore this fact and

read an exception into the statute that is nowhere to be found in its text." *Id.* Even if the proposed exception were "eminently sensible"—which, as explained below, it is not—it is not up to the federal courts to legislate. *Id.* The Court "must enforce this statute as Congress has written it." *Id.; see Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not improve upon it.").

A. THE FDCPA IS A STRICT LIABILITY STATUTE.

Canyon State's brief fails to come to grips with a basic feature of the FDCPA: It is a strict liability statute. Congress responded to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), by enacting a comprehensive, detailed remedial scheme that imposes civil liability on debt collectors who engage in a range of prohibited conduct, *without* regard to their knowledge or intent. *See Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages."). Thus, for purposes of establishing liability under the FDCPA, it does not matter whether Canyon State knew that the amount it sought to collect was unauthorized and intended to make a false representation, or whether it relied blindly on its client.

1. ***The Text of the Statute***. The core liability provisions of the FDCPA contain no knowledge or intent requirements. They prohibit debt collectors from engaging in "any" harassing, oppressive, or abusive conduct, 15 U.S.C. § 1692d; making "any false, deceptive, or misleading representation," *id.* § 1692e; and using "unfair or unconscionable means" to collect "any debt," *id.* § 1692f. In subsections following the general prohibitions, "[e]ach of these provisions includes a non-exhaustive list of examples of proscribed conduct." *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507, 1516 (9th Cir. 1994). Subject to affirmative defenses, a debt collector who violates any of these provisions is liable for actual damages, plus costs and reasonable attorney's fees, as well as statutory damages of up to $1,000. 15 U.S.C. § 1692k(a).

Among the subsections providing examples of proscribed conduct are the two the district court concluded Canyon State had violated─subsections 1692e(2)(a) and 1692f(1). Neither one contains a knowledge or intent requirement. Section 1692e(2)(A) prohibits "[t]he false representation of—the character, amount, or legal status of any debt." By its plain terms, section "1692e(2)(A) creates a strict-liability rule. Debt collectors may not make false claims, period." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004). "[I]gnorance is no excuse." *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 995 (7th Cir. 2003); *see Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th

Cir. 2000) (Section "1692e applies even when a false representation was unintentional."). A contrary conclusion cannot be reconciled with this Court's consistent interpretation of this very provision under an *objective* test, which does not consider whether the debt collector actually intended to deceive the consumer concerning the character, amount, or legal status of the debt. *Dunlap v. Credit Protection Ass'n., L.P.*, 419 F.3d 1011, 1012 (9th Cir. 2005); *Wade v. Regional Credit Assoc.*, 87 F.3d 1098, 1100 (9th Cir. 1996).

Section 1692f(1) is just as straightforward as section 1692e(2)(A). It prohibits "[t]he collection of any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law." As the Seventh Circuit has explained, "[w]hether the collection of a debt violates 1692f(1) depends solely on two factors: (1) whether the debt agreement explicitly authorizes the charge; or (2) whether the charge is permitted by law. The provision is silent as to the debt collector's intent, yet it is clear that a collector who collected a charge unauthorized by the debt agreement or by law, even by accident, would violate § 1692f(1)." *Turner*, 330 F.3d at 996; *see Randolph*, 368 F.3d at 733 ("[E]verything we have said about § 1692e(2)(A) applies equally to § 1692f."); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93, 101 (Wyo. 1989). As with section 1692e, "[t]he weight of authority," including this Court's decision in *Wade*, 87 F.3d at 1100, "applies an objective test to determine liability under 1692f. The

test does not hinge on the defendants' knowledge, but rather upon how a consumer would perceive a demand letter." *Turner*, 330 F.3d at 996 (relying on *Wade*); *see Wade*, 87 F.3d at 1100 (holding that an objective test applies to section 1692f).

Despite the unambiguous language of these provisions, Canyon State half-heartedly asserts for the first time in its brief to this Court (at 21-22) that sections 1692e(2)(A) and 1692f(1) require a showing of knowledge or intent. By failing to raise this argument below, Canyon State has waived it. *Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002). But even assuming it is properly presented, the argument should be rejected because it has no basis in the text of the statute. [3]

The conclusion that the FDCPA is, in general, a strict-liability statute is underscored by the fact that a few provisions of the statute expressly refer to the debt collector's knowledge or intent. "[T]he extent to which the debt collector's noncompliance was intentional," for example, is listed among the factors to be

[3] Canyon State does not even attempt to identify language in the statute to support its argument. Instead, it offers a block quotation from *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 462-63 (M.D. La. 1996) (concluding, without further analysis, that the terms "false, deceptive or misleading representation" "clearly contemplate a knowing and intentional act"); *accord Simmons v. Miller*, 970 F. Supp. 661, 665 (S.D. Ind. 1997). *Ducrest* and *Simmons* contain virtually no reasoning on this point, and both decisions have been discredited. *See Turner*, 330 F.3d at 996 & n.1 (identifying *Ducrest* and *Simmons* as contrary to the "weight of authority"); *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp.2d 582 (D. Md. 1999) ("*Simmons* . . . is an outlier."). Indeed, the judge who authored *Simmons* recognizes that the decision was erroneous. *Frye v. Bowman, Heintz, Boscia, Vician, P.C.*, 193 F. Supp.2d 1070 (S.D. Ind. 2002). Inexplicably, Canyon State also cites *Jenkins v. Heintz*, 124 F.3d 824 (7th Cir. 1997).

considered by the court in setting the amount of statutory damages. 15 U.S.C. § 1692k(b); s*ee Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2nd Cir. 1993) ("The FDCPA is a strict liability statute, and the degree of a defendant's culpability may only be considered in computing damages.").[4] And several subsections of the statute contain express intent requirements. *See*, *e.g.*, 15 U.S.C. § 1692d(5) ("Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously *with intent to* annoy, abuse, or harass any person at the called number."); *id.* § 1692e(5) ("The threat to take any action that cannot legally be taken or that is not *intended* to be taken.") (emphasis added). This Court recognized that "section 1692e(5) delineates two types of prohibited threats: a threat to take any action that cannot legally be taken *or* that is not intended to be taken," and that an objective test—one that does not consider the debt collector's intent—applies to the former but not the latter. *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1227 (9th Cir. 1988) (emphasis in original).

The most important reference to the debt collector's intent in the FDCPA is section 1692k(c), which permits debt collectors to escape liability for an

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[4] In this case, Canyon State waived its right to argue that damages should be reduced based on the degree to which its conduct was intentional by stipulating to the maximum amount of statutory damages. [ER-10 (Final Order and Judgment)].

unintentional violation provided that they have in place adequate procedures designed to prevent the type of violation that occurred. *See Picht v. John R. Hawks, Ltd.*, 236 F.3d 446 (8th Cir. 2001) ("The bona fide error defense exists as an exception to the strict liability imposed upon debt collectors by the FDCPA."); *Randolph*, 368 F.3d at 729 ("[T]he FDCPA uses a strict-liability approach (with a due care defense)."). The defense applies to all violations under the statute and places the burden to demonstrate adequate procedures squarely on the debt collector:

> **Intent**—A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of the 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). This intent requirement necessarily excludes intent as a general requirement of liability under the FDCPA; to read the statute otherwise would render the bona fide error defense superfluous. *See Turner*, 330 F.3d at 99; *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000); *see also Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); *Dep't of Revenue of Oregon v. ACF Indus.*, 510 U.S. 332, 340-41 (1994) (discussing "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Taken together, the FDCPA's references to intent make clear that Congress took care to expressly require knowledge or intent where it deemed such requirements necessary. *Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005) (explaining that the FDCPA "need not contain parallel language in all of its subsections in order to be internally consistent."). To paraphrase *Camacho*, "[i]f Congress had intended to impose [an intent] requirement in [§§ 1692f(1) or 1692e(2)(A)], it could have done so in the subsection itself, as it did in the later subsections of [sections 1692e and 1692f]." *Id.* "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted).

* * * *

2. *Legislative Purposes and the Strict Liability Rationale.* There are significant differences, to be sure, between the strict liability of modern consumer protection statutes and common law strict liability for those who, say, keep dangerous wild animals or use explosives. But the basic rationale is the same: Those who engage in activities with a serious risk of harming consumers are generally in the best position to take precautions to minimize the harmful consequences of their conduct and absorb the costs of those precautions. *See*

William L. Prosser, *Law of Torts* § 75 (4th ed. 1971). In enacting the FDCPA, Congress relied on extensive evidence showing that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," 15 U.S.C. § 1692(a), and that "the suffering and anguish" that "unscrupulous debt collectors . . . regularly inflict is substantial." S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (1977) (describing Congressional findings). "Independent debt collectors," Congress concluded, were "the prime source of egregious collection practices." *Id.* Congress was particularly sensitive to the fact that, absent federal regulation, these independent collectors would continue to have a strong incentive to profit from unscrupulous collection practices. The invisible hand of the market was an insufficient check, because the behavior of independent debt collectors, unlike that of other businesses, is not "restrained by the desire to protect their good will" or "the consumer's opinion of them." *Id.* Moreover, "[c]ollection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means." *Id.*

In response to this state of affairs, Congress created a remedial scheme that did not require intent to establish liability, but gave debt collectors an escape hatch for "unintentional" violations that "occurred despite procedures designed to avoid such violations." *Id.* at 5, 1977 U.S.C.C.A.N. at 1700. Congress rejected an

alternative version of the Act, sponsored by Senator Jake Garn of Utah, that would have required a showing of intent to establish liability, and, in the final markup session before the full Senate Banking Committee, again rejected an amendment that would have required that violations be knowingly made. *See* 123 Cong. Rec. S4884 (daily ed. March 25, 1977); Robert J. Hobbs, *Fair Debt Collection* § 3.2.2 at 64 (5th ed. 2004) (describing legislative history in detail). The FDCPA's approach was patterned after that of the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 45, *et seq.*, and "courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA." *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2d Cir. 1993) ("[u]nder the FTC Act, there is no requirement of intent or negligence."); *Baker v. C.G. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (drawing upon TILA to interpret FDCPA).

Congress's choice of a strict-liability regime is particularly apt in the context of debt collection. *See* Richard A. Posner, *The Economics of Justice* 199 (1983) (identifying "four factors bearing on the choice between a strict and a fault approach to liability."). *First*, "[s]trict liability shifts the accident-avoidance responsibility wholly from potential victims to potential injurers," and therefore makes sense where the "injury could not have been avoided by the victim at a lower cost than to the injurer." *Id.* at 200. Debt collectors—not debtors—have the

power to institute preventive procedures, so the FDCPA encourages them to adopt procedures that are "reasonably adapted" to avoid error and holds them liable if they don't. *Second*, "[s]trict liability makes the injurer the insurer of the injured," and therefore makes sense where the relative cost of insurance is lower for the defendant. *Id.* Debt collectors—not debtors—are in a position to absorb the costs of preventive procedures because they, and they alone, can pass such costs onto their creditor-clients, take out liability insurance, and/or enter into indemnification agreements with creditors. *See Russell*, 74 F.3d at 35 (FDCPA reflects Congress's judgment that debt collectors' "shall take the risk" that their conduct will harm consumers). This is especially so given the wide range of debt collectors' compensation arrangements—all of which are based on a calculation of the risk and likelihood of collection involved—from flat fees, to the 50-percent contingent fee norm, to arrangements in which the creditor receives only pennies on the dollar. *See* Hobbs, *Fair Debt Collection* § 1.4.3.2 at 4-5. *Third,* strict liability makes sense because intent would be extremely difficult to prove—i.e. "the cost of adjudicating fault issues are likely to be high." Posner, *Economics of Justice* at 200 (discussing "information costs").

The *fourth* and final factor is the "ratio of avoidable to unavoidable errors. If this ratio is very low, a rule of strict liability will be unattractive because it will require a lot of costly legal activity having no allocative effect." *Id.* By creating a

safe harbor—the bona fide error defense—for unavoidable errors, Congress took this factor off the table.

B. CANYON STATE'S THEORY RESTS ON A MISUNDERSTANDING OF THE FDCPA'S STRICT-LIABILITY REGIME.

1. Canyon State's brief (at 10-20) makes several interrelated arguments in support of a novel reliance-on-the-creditor defense, all of which fail for the same reason: They rest on a misunderstanding of the strict-liability nature of the FDCPA. The arguments proceed from a single premise, a statement not about what the FDCPA actually provides but about what it does *not* provide. Canyon State correctly observes (at 10-11) that the statute does *not* impose an affirmative obligation on the debt collector to verify the amount it attempts to collect (at least not before the consumer explicitly requests verification). From that fact, Canyon State—parsing the language in a trio of unpublished district court orders rather than the language of the statute—leaps to the following conclusions:

- Because the FDCPA does not affirmatively require the debt collector to interpret the agreement creating the debt or analyze state law, a court interpreting section 1692f(1) need not interpret the agreement or analyze state law to determine whether the amount charged is actually authorized by the agreement or permitted by law. Br. at 11-12 (citing *Anderson v. Canyon State Prof'l Servs.*, No. CV-03-PHX-JWS (D. Ariz. Sept. 1, 2003)).

- Because the FDCPA does not impose an affirmative obligation on the debt collector to verify the amount of the debt in the first place, it would be "incongruous" to impose liability on the debt

> collector for collecting the same amount that the creditor asks it to collect. Br. at 18.

The premise is correct, but the conclusions don't follow. These arguments assume that a defendant cannot be held liable for the result of its failure to undertake some action that it was not affirmatively obliged to take in the first place. But that assumption misunderstands the nature of strict liability. Strict liability is concerned with the defendants' actions and the *consequences* of those actions, regardless of intent; it does *not* depend on whether the defendant failed to undertake some particular set of affirmative steps to prevent those consequences. "[I]n cases of strict liability, the defendant acts 'at his peril' and is an insurer against the consequences of his conduct." Prosser, *Law of Torts* § 75 at 517. As the Second Circuit has explained, the FDCPA embodies a legislative judgment that a debt collector "shall take the risk that he may cross the line" between prohibited and permissible conduct. *Russell*, 74 F.3d at 35. The harshness of the FDCPA's strict-liability regime is tempered by the availability of the bona fide error defense, which rewards debt collectors who maintain preventive procedures. But the burden is on the *debt collector* to demonstrate that it has instituted adequate procedures, not on the *consumer* to identify an affirmative obligation to take specific precautions. Canyon State's view of the statute would turn Congress's design on its head.

An alternative premise on which Canyon State also appears to rely is an assumption that the conduct at issue was not really the debt collector's, but the creditor's. *See* Br. at 15-16 (citing *Palmer v. I.C. Sys., Inc.*, No. C-04-03237 RMW (N.D. Cal. Nov. 8, 2005)). "A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all." *Randolph*, 368 F.3d 729. So if the conduct at issue here really *was* the creditor's, then there should be no liability under the FDCPA. Canyon State, however, fails to explain how it is Desert Club's conduct that is at issue. The district court found FDCPA liability based on *Canyon State*'s attempt to collect an amount that was not "expressly authorized by the agreement . . . or permitted by law," and *Canyon State*'s "false representation" of the "character, amount, or legal status" of Ms. Beuter's debt. 15 U.S.C. §§ 1692e(2)(A), f(1). It was not the apartment complex that sent the collection letter to Ms. Beuter. That Canyon State relied blindly on its client suggests only that Canyon State's actions may have been unintentional, but they were still Canyon State's actions. Along the same lines, Canyon State appears to suggest that the district court's decision was based on vicarious liability (Br. at 16). Vicarious liability imputes *another*'s actions—usually an agent's—to the defendant. The suggestion makes no sense here, however, because the apartment complex owed Ms. Beuter no duties under the FDCPA. And again, the conduct complained of here was the defendant's, not anyone else's.

2. Because Canyon State's theory is based on a misunderstanding of strict liability, the majority of the case law cited in its brief is inapposite. Its brief (at 17, 20) relies heavily on passages from *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999), but these passages interpret only section 1692g(b), the provision of the FDCPA that requires debt collectors, upon a consumer's request, to cease collection activity until a debt has been verified.[6] The same is true of *Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197 (9th Cir. 1999), *Bleich v. The Revenue Maximization Group, Inc.*, 233 F. Supp. 2d 496 (E.D.N.Y. 2002), and *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), which Canyon State quotes at length (at 17). Section 1692g(b) is not at issue in this appeal.

Canyon State also cites decisions holding that debt collectors can escape liability for their unintentional actions, but downplays the fact that, in those cases, the debt collectors successfully invoked the bona fide error defense of section 1692k(c) because they had preventive procedures in place. *See*, *e.g.*, *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025 (6th Cir. 1992); *Jenkins v. Heintz,*124 F.3d 824 (7th Cir. 1997). Canyon State—apparently because it did not implement such procedures [ER-6, Ex. A at 24-25:10-23]—did not raise the defense below, and

[6] Aside from being irrelevant, Canyon State's discussion of *Chaudhry* is misleading. *Chaudhry* holds that after a consumer has disputed a debt, the debt collector must "confirm with his client that a particular amount is being claimed," 174 F.3d at 406—a step that Canyon State never took in this case. [ER 6, Exh. A at 26:13-21 (Wilson Deposition)].

thereby waived its right to do so. *Picht*, 236 F.3d at 451 (holding that a debt collector waived the defense by not raising it in response to the plaintiff's summary judgment motion or in its own cross-motion and by later stipulating to statutory damages); Def's Reply Br. (Dkt. 20) at 3-4 (disclaiming reliance on bona fide error defense).

Finally, Canyon State relies on *Transamerica Fin. Servs., Inc. v. Sykes*, 171 F.3d 553 (7th Cir. 1999). Br. at 12, 13, 16. But there, the agreement creating the debt, unlike here, *did* authorize the amount the debt collector sought to collect. The plaintiff's allegation was that the contract itself was a forgery. The court concluded that the plaintiff stated no claim because—although the practice might otherwise be illegal and might, for instance, violate section 1692e, which prohibits misrepresentations—the plaintiff had made the mistake of relying exclusively on section 1692f, which, in the court's view, did not reach that unique set of circumstances. 171 F.3d at 555.

C. CANYON STATE'S POSITION WOULD CIRCUMVENT THE FDCPA'S DEFENSES AND REVERSE THE INCENTIVES THEY CREATE.

The Court should also reject Canyon State's request to create a new reliance-on-the-creditor defense because doing so would undermine the defenses that Congress actually included when it enacted the statute: a defense for reliance in "good faith" on Federal Trade Commission advisory opinions and, most

importantly, a defense for unintentional bona fide errors that occur despite the maintenance of adequate preventive procedures. 15 U.S.C. §§ 1692k(c), (e); *see* S. Rep. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1702 ("Two defenses are provided: good faith reliance on an F.T.C. advisory opinion; and bona fide error notwithstanding procedures to avoid the error."); Therese G. Franzen and Robert S. Carlson, *Defense Strategies in Fair Debt Collection Practices Act Litigation*, 53 Consumer Fin. L. Q. Rep. 34, 36 (1999) ("[T]he only defenses available against FDCPA claims are provided by the Act. Any purported defense not expressly provided by the FDCPA is not available to defeat a FDCPA claim."). Congress could easily have added a third good-faith defense, based on "good faith reliance on the representations of a creditor," but it did not do so. Adding such a defense would radically transform the statute.

1. To take advantage of the bona fide error defense, a debt collector must show by a preponderance of the evidence that it maintains "procedures reasonably adapted to avoid" the error. 15 U.S.C. 1692k(c). This Court has described the debt collector's burden to demonstrate the existence of preventative procedures as "an essential element" of the defense. *Fox*, 15 F.3d at 1514. Courts generally conclude that, to qualify for the defense, "the defendant must not only demonstrate that there are procedures in place designed to ensure compliance with the Act, but also that there is in place a system of checks and reviews to guard against errors

that can result in a violation. An empty-headed approach to collection efforts will not serve as a basis for asserting inadvertence or a good faith effort to comply with the Act." Franzen and Carlson, *Defense Strategies*, 53 Consumer Fin. L. Q. Rep. at 37.[7]

For instance, in *Jenkins*, 124 F.3d at 827, *on remand from Heintz v. Jenkins*, 514 U.S. 291 (1995)—a case on which Canyon State inexplicably relies (Br. at 22)—the defendants, as here, "moved for summary judgment contending that they did not know the nature of the unauthorized [charges] . . . and simply collected amounts which the bank claimed were due." The "defendants did not contend that" the charges were "validly imposed under [the] contract. Rather, they argued that even if some of the . . . charges were unauthorized, they [were] not liable." *Id.* at 828. So the court of appeals assumed, without deciding, that the charges were

[7] The question of whether adequate procedures exist is the central question in most cases involving the bona fide error defense. *See, e.g., Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461, 463, 467 (S.D.N.Y. 1988) (debt collector's "extensive systems and procedures," which included the use of an independent auditing agency to ensure compliance with FDCPA requirements, were adequate); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 389 (D. Del. 1991) (procedures were adequate where debt collector held periodic seminars and provided training on FDCPA requirements, gave employees various editions of FDCPA manuals, issued a memorandum delineating its FDCPA policy, and posted cards on telephones citing language required by the FDCPA); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992) (debt collector introduced an employee's procedural manual and two employee affidavits, which showed that the error was at most a clerical error); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 401-02 (6th Cir. 1998) (debt collector's procedure manual and computer system were adequate to establish a bona fide error defense).

unauthorized. *Id.* Unlike here, however, the defendants in *Jenkins* were entitled to the bona fide error defense because their errors were unintentional *and* they maintained "extensive systems" and "elaborate procedures . . . to avoid collecting unauthorized charges" and even went so "far as to insist that their client[s] verify under oath that each of the charges was true and correct." *Id.* at 834 (describing procedures including "an in-house fair debt compliance manual, updated regularly and supplied to each firm employee; training seminars for firm employees collecting consumer debts; and an eight-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act."). Under Canyon State's theory, the Seventh Circuit's examination of these procedures was entirely unnecessary; the case should have come out the same way even if the debt collectors had implemented *no* procedures designed to avoid collecting unauthorized charges.

But, in fact, lower courts regularly reject the suggestion that blind reliance on the creditor is sufficient to meet the requirements of section 1692k(c). *See*, *e.g.*, *Turner v. J.V.D.B. & Assocs., Inc.*, 318 F. Supp. 2d 681, 684-86 (N.D. Ill. 2004) (holding, where debt collector's "principal alleged procedure" was to "rely on its creditor clients to provide it with all relevant, current and accurate information on a debtor's account," that this, "respectfully, is not even a procedure," but "merely an unfounded assumption."); *Foster v. Sherman Acquisition, LP*, 2005 WL 588995, at

*3 (N.D. Ill. 2005) (holding that debt collector's "naked assertion that it relied on information provided by [its client]" was insufficient); *Green v. Hocking*, 792 F. Supp. 1064, 1066 n.5 (E.D. Mich. 1992), *aff'd on other grounds*, 9 F.3d 18 (6th Cir. 1993) (concluding that an affidavit stating that "the error occurred because [the debt collector] relied blindly on the [creditor's] representation [of the amount owed]" is inadequate). In *Turner*, this conclusion was reinforced by the fact that, as here, the debt collector had "even gone so far as to admit that it 'did not affirmatively ask'" the creditor about the status of the debt. 318 F. Supp. at 684. Again, if Canyon State's view were correct, the debt collectors in cases like *Turner, Foster*, and *Green* could simply have circumvented the requirements of the bona fide error defense and avoided liability on the basis of their blind reliance on their clients.

2. The bona fide error defense creates a powerful incentive for debt collectors to maintain proper procedures. If they maintain such procedures, they can avoid liability for all unintentional violations that result from bona fide errors. If they don't—if, for example, they take no precautions to ensure that consumers from whom they seek to collect debts are not in bankruptcy, or that the amounts they seek to collect are not inflated or incorrect, or that their telephone calls will not reach consumers in the middle of the night—they risk liability even for minor unintentional clerical errors. This carrot-and-stick approach promotes the purposes

of the statute and benefits consumers by ensuring accuracy. "Adherence to the strict-liability approach is important to maintain some modicum of accuracy in the information conveyed from creditor to debt collector. Debt collectors who are responsible for the accuracy of the creditor's information will take steps to assure accuracy." Hobbs, *Fair Debt Collection* § 5.2.2 at 120.

By contrast, "those who are not held responsible for their ignorance will devise methods to maintain an empty head." *Id*. If the FDCPA were rewritten to conform to Canyon State's position, debt collectors would be encouraged to blindly rely on the information provided by their clients, without regard for the impact that their activities would have on consumers, and the purposes of the statute would be greatly undermined. And the new defense would also create an incentive for creditors to contract with overly aggressive and unscrupulous debt collectors, without fear that the costs of liability would be passed on to them as a cost of doing business.

Although they do not say so explicitly, the undercurrent of defendants' arguments is that it is inequitable to saddle debt collectors with liability for errors that are really the fault of the creditor. Canyon State has it backwards. In fact, it is Canyon State's proposal that would create inequity, not only for consumers—who would be forced to bear the harmful consequences of decreased care on the part of debt collectors—but also for those scrupulous debt collectors who incur the costs

necessary to implement good collection practices. One of the purposes of the FDCPA is "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Under Canyon State's proposed rule, however, debt collectors who do the right thing would have a higher cost of doing business, but would face no less risk of liability. These collectors would be forced to choose between abandoning their preventive procedures or risk being put out of business.

In enacting the FDCPA, Congress carefully balanced the equities and structured the incentives of debt collectors, creditors and consumers in a way that advances the statute's purposes. This Court has appropriately rejected the suggestion that it should "impose equitable considerations" on a strict liability consumer protection statute, because "the statute already contains these considerations as defenses." *Semar v. Platte Valley Federal Sav. & Loan Ass'n*, 791 F.2d 699, 705 (9th Cir. 1986) (interpreting TILA); *see also Baker v. C.G. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) (describing FDCPA's and TILA's bona fide error defenses as "nearly identical"). Like the defendant in *Semar*, Canyon State "overstates the potential harshness of requiring strict compliance" by disregarding the fact that the statute "provides a good-faith defense." *Semar*, 791 F.2d at 705. And here, as in *Semar*, "the district court correctly rejected" the

defendants' "suggestion of carving a wide exception" to the statute's "detailed provisions." *Id*

* * * *

Just last year, this Court emphasized that the plain meaning of the FDCPA must be enforced unless "the result of the statute's plain meaning is absurd." *Camacho*, 430 F.3d at 1082. There is nothing absurd about a statutory scheme that affords greater protection from liability for debt collectors who maintain procedures designed to reduce harm to consumers than for those who do not.

CONCLUSION

Because the district court properly rejected defendants' argument that a debt collector's blind reliance on a creditor provides an absolute defense to FDCPA liability, this Court should affirm the decision below.

Respectfully submitted,

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March 10, 2006

APPENDIX OF RELEVANT STATUTORY PROVISIONS

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., provides in relevant part:

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices
There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

* * * *

(e) Purposes
It is the purpose of this subchapter 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.

* * * *

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> **(1)** The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
>
> **(2)** The false representation of—
>
> > **(A)** the character, amount, or legal status of any debt; or
> >
> > **(B)** any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * * *

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

> **(1)** The collection of 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.

* * * *

§ 1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any 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–

> **(1)** any actual damage sustained by such person as a result of such failure;
> **(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
>
> * * * *
>
> **(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.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors–

> **(1)** in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
>
> * * * *

(c) Intent

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.

* * * *

(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the 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.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 7,504 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

March 10, 2006 Deepak Gupta

STATEMENT OF RELATED CASES

Appellee is aware of one related case pending before this Court: *Reichert v. National Credit Systems, Inc., et al*., on appeal from the U.S. District Court for the District of Arizona, Case No. CV-03-1740 PHX RGS. The notice of appeal in *Reichert* was filed on February 4, 2006. As of this date, the case does not have a new case number in this Court. A previous appeal in *Reichert*, Case No. 05-15976, was dismissed by this Court for lack of jurisdiction on December 13, 2005.

The district court in *Reichert* concluded that the debt collector defendants violated the Fair Debt Collection Practices Act by attempting to collect from the plaintiff an amount in attorneys' fees that was not authorized by a lease agreement between plaintiff and the creditor landlord. As in this case, the defendants argued that they did not violate the Act because they sought to collect the same amount they were instructed to collect by the creditor, and the district court rejected the defendants' argument.

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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