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FDCPA's Bona Fide Error Defense Applies to a Mistake of Law in Determining the Appropriate Statute of Limitations

The FDCPA, as well as state laws, can present a complex path when it comes to statutes of limitation.

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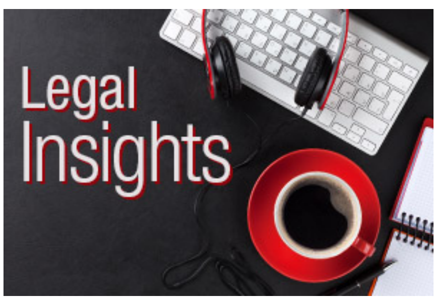

Is a mistake of law that results in the filing of a lawsuit after the expiration of the applicable statute of limitations a bona fide error under the Fair Debt Collection Practices Act? This question has been hotly debated since the U.S. Supreme Court held in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LP (*559 U.S. 573, 604–05 (2010). that the bona fide error defense does not apply to a mistake in interpreting the FDCPA.

In an issue of first impression, the U.S. Court of Appeals for the 9th Circuit answered in the affirmative, holding that the defense could apply to a mistake of law in determining the appropriate state statute of limitations. **See Kaiser v. Cascade Capital, LLC et al.** , No 19-35151 (March 9, 2021).

Statutes of limitation (how much time you have to file your claim in court) are relatively straightforward on one level. They tell you precisely how many years you have to file your claim in court.

That's where the simplicity ends and the complexity begins, however. For example, determining the statute of limitations for a breach of contract claim for an unpaid credit card debt typically requires a plaintiff to first assess which state's statute of limitations governs.

This assessment includes a complex workflow/waterfall approach that considers many factors, including whether the contract contains a governing or choice of law provision, whether that provision incorporates procedural law (many states consider statute of limitations procedural), and if the state in which you intend to file suit has a statute that requires another state's shorter statute of limitations to apply if the cause of action occurred in that state. And, even if you know which state's law applies, the law in that state could be unsettled about which of two different statutes of limitation—one shorter than the other—applies.

For many plaintiffs, a ruling that they filed suit after the expiration of the statute of limitations means the litigation is over. For plaintiffs regulated either by the FDCPA or state statutes akin to the FDCPA, a dismissal based on the statute of limitations often means the next phase of litigation in which they become the defendant is about to begin. The 9th Circuit's decision in *Kaiser* offers the perfect illustration.

In *Kaiser*, a deficiency balance remained on the debtor's automobile retail installment contract after the car was repossessed and sold. The creditor sought to collect the debt first through a letter sent by its attorneys and then a state court lawsuit filed in Oregon by the same attorneys. Kaiser moved to dismiss the lawsuit, claiming it was filed after the four-year statute of limitations in the Uniform Commercial Code for the sale of goods, as adopted in Oregon. The creditor argued the suit was timely under Oregon's six-year catch-all contract statute of limitations. The state court agreed with the debtor and dismissed the lawsuit.

Kaiser wasted no time in filing a class-action lawsuit in federal court accusing the creditor and its attorneys of threatening to sue and suing on time-barred debt in violation of the FDCPA.

The district court dismissed the case for failure to state a claim, finding that the law was unsettled in Oregon regarding which statute of limitations applied, and thus there was no improper, unfair or misleading collection attempt.

The 9th Circuit reversed, holding that: (i) the FDCPA prohibits filing suit on a time-barred debt; and (ii) consistent with the recent publication of Regulation F (Reg F) by the CFPB, a plaintiff does not have to prove the debt collector "knew or should have known" that the statute of limitations had expired when the lawsuit was filed because strict liability applies under the FDCPA.

Although the 9th Circuit reversed, it gave defendants a potential defense on remand. The court ruled that *Jerman* did not prohibit debt collectors from using the bona fide error defense to raise a mistake in determining the appropriate state statute of limitations. It limited *Jerman* to prohibiting the use of that defense only when claiming a mistake in interpreting the requirements of the FDCPA.

To avoid liability under the FDCPA's bona fide error defense, the defendants in *Kaiser* must show they mistakenly applied the wrong statute of limitations and maintained procedures (preferably written) to determine the right statute of limitations and avoid filing lawsuits after it expired. *Kaiser* appropriately recognizes the difficulties inherent in determining the correct statute of limitations and the unfairness of a congressional scheme that would impose strict liability without the ability to excuse good-faith mistakes in legal judgment.

The ability to raise the bona fide defense to a mistake in determining the appropriate statute of limitations does not mean it should always be pled as an affirmative defense. Before pleading the defense, consideration should be given to understanding the evidence supporting each element of the defense. For example, did the debt collector conduct a legal analysis to decide which statute of limitations to use before filing the underlying lawsuit or at least that type of lawsuit? Does the legal analysis support or contradict the defense? Is there a written policy or procedure requiring an attorney to evaluate that the right statute of limitations is applied to the debt and that the claim is not stale under that statute of limitations? Is there a written policy prohibiting the filing of lawsuits after the expiration of the statute of limitations? And, perhaps most critically, a debt collector should assume that if it raises the defense it will be considered to have waived the attorney-client privilege for all communications with counsel on the issue before it filed the underlying suit by placing the advice at issue in the FDCPA case. If those communications do not support the defense, the defense should not be raised because the communications will likely have to be produced.

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