



After CFPB Refuses to Change FDCPA's Strict Liability, Ninth Circuit Permits Bona Fide Error Defense for Statute of Limitations Mistake

The Consumer Financial Protection Bureau (CFPB) recently considered eliminating strict liability for one category of claims under the Fair Debt Collection Practices Act (FDCPA): claims asserting that a debt collector brought or threatened to bring legal action to collect a time-barred debt. The proposed revision to Regulation F would have required consumers to show that a debt collector knew or should have known the debt was outside the statute of limitations. Advocates for the change argued that strict liability was inappropriate because a debt collector can reach the wrong conclusion about a state's application of the statute of limitations even after a thorough investigation and a consumer can raise the issue as an affirmative defense if he/she disagrees with the collector's conclusion. Debt Collection Practices (Regulation F), 86 FR 5766-01 (Jan. 19, 2021).

Earlier this year, the CFPB refused to adopt the knows-or-should-know standard. *Id.* The Bureau recognized that "determining whether a debt is time barred can be challenging or costly in certain circumstances," but ultimately concluded that a standard other than strict liability would be inconsistent with the FDCPA. *Id.* It noted that debt collectors had other avenues for avoiding liability, including (1) continuing with only non-litigation collection activities if the statute of limitations is unclear and/or (2) relying on the defense outlined in section 1692k if a mistake regarding the statute of limitations results from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. *Id.*

Following that guidance, the Ninth Circuit approved of the bona fide error defense for time-barred debt claims in [Kaiser v. Cascade Capital, LLC](#). This is good news for debt collectors as consumers have routinely argued that Supreme Court precedent

bars the bona fide error defense when based on a mistake of law. The Ninth Circuit explained an important distinction based on the type of law underlying the mistake. The Supreme Court case involved a debt collector's incorrect interpretation of the FDCPA—a mistake about the very statute that conferred a private cause of action to the consumer. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 604-05 (2010). In contrast, time-barred debt claims involve a mistake regarding state law. The Ninth Circuit labeled a statute of limitations mistake as a mistake of fact since it related to “a collateral legal element of [a FDCPA] offense.” *Kaiser*, 2021 WL 868522, at *7-9.

“Courts of Appeals have...expressed different views about whether 15 U.S.C. § 1692k(c) applies to violations of the FDCPA resulting from a misinterpretation of the requirements of state law,” but the Supreme Court declined to resolve that issue in *Jerman*. 559 U.S. at 580 n.4. We will wait to see if the Supreme Court gets a chance to weigh in now that a circuit court has held that mistakes about the time-barred status of a debt under state law can be bona fide errors.

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