

IADC 2022 Midyear Meeting

A Mistake of State Law: Is Bona-fide Error a Bona-fide Defense?

Presented by:

Avanti Bakane | Andrew Schwartz | Mary Curtin
Gordon Rees Scully Mansukhani LLP

LEGAL DISCLAIMER

- This information is for the use of meeting attendees only. Any distribution, reproduction, copying or sale of this material or the contents hereof without consent is expressly prohibited.
- This information is not to be construed as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to ensure that this information is up-to-date as of the date of publication.
- It is not intended to be a full and exhaustive explanation of the law in any area. This information is not intended as legal advice and may not be used as legal advice. It should not be used to replace the advice of your own legal counsel.
- The opinions expressed are the views of the authors alone and should not be attributed to any other individual or entity.

A Mistake of State Law: Is Bona-fide Error a Bona-fide Defense?

I. Introduction

The Fair Debt Collection Practices Act, a favorite of Plaintiff's counsel for its broad language, statutory damages, and fee-shifting provision, is widely recognized as a strict liability statute. There is, however, one exception: the "Bona Fide Error Defense." ("BFE") To avail itself of this affirmative defense, a defendant must prove (1) an unintentional FDCPA violation, (2) violation was from a bona fide error, and (3) collector maintained procedures reasonably adapted to avoid violation. See 15 U.S.C. 1692k(c).

Here, "procedures" means a series of steps followed in a regularly orderly definite way. The relevant procedures are ones that help collectors avoid clerical or factual mistakes. For example:

- subjecting account information to automated scrubs that cull out stale debts;
- segregating principal and interest from creditors to avoid charging interest on interest;
- sending employees and staff to training seminars and subjecting them to compliance testing; and
- Posting required disclosures on all telephones.

For purposes of the BFE only "reasonable precautions," not "every conceivable precaution" to avoid the error are required. But say even with all the best procedures in place, one slips through the cracks and a debtor comes knocking with an FDCPA claim. One key question remains in the liability assessment – was the mistake "bona fide"? That is, what types of errors can be excused via the bona fide error defense?

II. Bona Fide Error Defense across the Circuits

As to this question, the federal circuits are split. In fact, even within some circuits, district courts cannot agree. Some courts have held that the bona fide error defense applies to clerical or factual mistakes only, such as _____. See _____. Some

courts, however, have gone further, finding that the bona fide error defenses may also apply to certain mistakes of law. In general

Clerical/Factual Mistake Only	Mistakes of Law
<ul style="list-style-type: none"> • 2nd Circuit (Eastern District) • 4th Circuit • 5th Circuit • 6th Circuit (Ohio) • 7th Circuit (Wisconsin & Illinois) • 8th Circuit • 9th Circuit (COA) 	<ul style="list-style-type: none"> • 1st Circuit • 2nd Circuit (Northern District) • 3rd Circuit (Western District) • 6th Circuit (Ohio) • 7th Circuit (Indiana) • 9th (Eastern District CA) • 10th Circuit

III. Leading Supreme Court Authority

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), the defendant (Carlisle) filed a complaint for its client, Countrywide, to foreclose on a mortgage on property owned by Jerman. Jerman disputed the debt and Countrywide acknowledged that the debt was paid. Carlisle withdrew the lawsuit.

Thereafter, Jerman filed a class action for violations of FDCPA section 1692g. The district court granted summary judgment to Carlisle, concluding that BFE shielded it from liability, as Jerman was mistaken about whether its actions violated the FDCPA. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed, holding that the FDCPA error defense applies to mistakes of law.

The Supreme Court disagreed with the two lower courts, holding that the bona fide error defense in the FDCPA does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. As they say, ignorance of the law is no excuse.

After *Jerman*, however, the door was left open as to whether other mistakes of law

may constitute a bona fide error. In particular, collectors began to assert BFE defenses based on mistakes of law regarding the applicable statute of limitations.

IV. Statute of Limitations and BFE: A Body of Case Law Emerges

In March 2021, the Ninth Circuit held that mistakes of law regarding the statute can constitute a BFE. *Kaiser v. Cascade Capital, LLC et al.*, 989 F.3d 1127 (9th Cir. 2021). In *Kaiser*, Plaintiff purchased a car under a retail installment sale contract. He defaulted on his payments, and his car was repossessed and sold. The proceeds from the sale failed to cover the outstanding balance under the contract, and Kaiser did not pay the remaining amount due. Years later, the creditor, Defendant Cascade Capital, LLC, sought to collect that deficiency balance and, through collections counsel, sent Kaiser a letter demanding payment of the outstanding debt. Kaiser failed to pay, and Defendants sued him in Oregon state court.

The collection attempts—both the letter and the lawsuit—occurred between four and six years after Kaiser's default. Kaiser responded to Cascade's state court lawsuit by arguing that the debt was time barred under Oregon's four-year statute of limitations for sale-of-goods contract claims, Or. Rev. Stat. § 72.7250. Cascade countered that Oregon's six-year statute of limitations for other contract claims, Or. Rev. Stat. § 12.080, applied instead. The state court ruled for Kaiser.

Kaiser then filed a putative class action in Oregon district court. He alleged that Cascade violated the FDCPA by threatening litigation over time-barred debt in its collection letter and by filing a lawsuit to collect time-barred debt. The district court dismissed for failure to state a claim, reasoning in part that Cascade did not violate the FDCPA because the state statute of limitations had been unclear when Cascade attempted to collect the debt.

In considering the Supreme Court's reasoning in *Jerman*, the Ninth Circuit concluded "that mistakes about the status of a debt under a state statute of limitations are substantively different from mistakes about the requirements of the FDCPA itself and therefore can be bona fide errors." *Kaiser*, 989 F3d at 1138.

In the year since *Kaiser* was decided, defendant collectors have successfully used the bona fide error defense to defeat FDCPA claims based on collection of time-barred debts. *See also Sprayberry v. Portfolio Recovery Assoc.*, 2021 WL 1109388

(D. Or. May 7, 2021) (finding mistake of law as to statute of limitations and granting summary judgment in favor of defendant pursuant to the BFE).

We expect this trend to continue and that other “mistake-of-law” circuits will follow suit. For clients with business in many jurisdictions, the likelihood of confusion surrounding the applicable statute of limitations is high, as state and federal courts continue to address the question of which statute of limitations applies to a particular debt. Some notable cases are below:

Case law supporting application of six- year Statute of Limitations

- *Portfolio Recovery Assocs., LLC v. Sanders*, 366 Ore. 355 (Ore. Sup. Ct. 2020).
- *Harris Trust & Sav. Bank v. McCray*, 316 N.E.2d 209, 212 (Ill. Ct. App. 1974).
- *Cach, LLC v. Moore*, 133 N.E.3d 661, 664 (Ill. Ct. App. 2019).
- *May Co. v. Trusnik*, 375 N.E.2d 72, 75 (Ohio Ct. App. 1977).
- *Fulk v. LVNV Funding LLC*, 55 F. Supp. 3d 967, 971 (E.D. Ky. 2014).
- *Fisher Sand & Gravel Co. v. Neal A. Newbie, Inc.*, 837 N.W.2d 244, 254 (Mich. Sup. Ct. 2013).

Case law supporting application of UCC’s Statute of Limitations

- *Midland Funding LLC v. Thiel*, 144 A.3d 72, 75 (N.J. Super. Ct. App. Div. Aug. 29, 2016);
- *New Century Fin. Servs., Inc. v. McNamara*, A-2556-12T1, 2014 WL 1057076, at *4 (N.J. Super Ct. App. Div. Mar. 20, 2014).

Recent SOL case law

- *Reddick v. Capouano*, No. 2:19-cv-512-JTA, 2021 U.S. Dist. LEXIS 51113, at *26 (M.D. Ala. Mar. 18, 2021)

V. Conclusion

Though this area of law remains very much in flux, in this instance, one thing certain: offense is the best defense. The goal, of course, is to avoid errors in the first place. We can help our clients can achieve this by:

- Reviewing policies and procedures and to necessary changes based on current requirements, legislation, statutes, and court rulings
- Educating staff regularly
- Updating systems
- Maintaining all necessary and supporting documentation of procedures and efforts and methods for keeping them up to date

And, when the inevitable case comes in where the debt at issue is arguably time-barred, don't forget to raise the bona fide error defense.