

## The Elderlaw Forum: Social Security avoids "unilateral mistake" rule

by Professor\_Michael\_Myers

In contract law a "mistake" is an erroneous belief, at the time of contracting, that certain facts are true.

A "unilateral mistake" is where only one party to a contract is mistaken. The courts will uphold such a contract unless the non-mistaken party was aware of the mistake and tried to take advantage of it. This rule of law seeks to avoid harm to an innocent party acting in good faith.

It applies to all contracting parties, with a notable exception: The federal government, and in a case presented by a senior helpline caller - the Social Security Administration. Here is what happened:

The caller's husband died in 1994 from an unexpected heart attack at age 49. She was widowed with two children, ages 11 and 14. They received survivor benefits; the children's benefits terminating at age 18. Her benefits terminated in 2001.

During the course of such payments, from 1994 to 2001, Social Security sent several notices of "underpayment" and "overpayment" as it adjusted for its own "unilateral" mistakes in payment calculation. The caller assumed that a computerized government agency was capable of making accurate benefit payments.

She was wrong. Last month she received a notice from Social Security alleging that it "overpaid" her in 1998 by some \$2,200 and demanded repayment within 30 days.

In a letter I wrote on her behalf, I stated: "She justifiably assumed the "adjustments" were properly made, taking SSA at its word. She had absolutely no reason to believe the federal government was not capable of making appropriate payments. And now, nine years later she receives this claim. This is a rather remarkable gesture."

It may be remarkable, but the law is on Social Security's side. It is not bound by a statute of limitations. Also, it is not bound by the law of "unilateral mistake." I filed a "Request for Reconsideration," contesting the calculation, objecting to the nine-year delay, and asking for a waiver on the grounds that repayment would impose an unreasonable financial burden upon an elder of modest means approaching retirement.

The law of unilateral mistake and statutes of limitation are intended to provide balance to the scales of justice. Social Security has its thumb on the scales.

(Pro bono legal information and advice is available to persons 55 and older through the USD Senior Legal Helpline, 1-800-747-1895; mmyers@usd.edu; opinions are solely those of the author and not the University of South Dakota

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