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Possibility of Applying Fraud-Specific Discovery Rule to FDCPA Suits Left Open

Commentary by Charles M. Tatelbaum and Brittany Hynes

On Dec. 10, 2019, the U.S. Supreme Court ruled 8-1 that the one-year filing deadline for Fair Debt Collection Practices Act (FDCPA) lawsuits is determined from when the alleged violation occurs, not when it is discovered. The case was an appeal of the U.S. Court of Appeals for the Third Circuit's ruling in *Rotkiske v. Klemm*, 890 F.3d 422 (3d Cir. 2018), where the court found that the statute of limitations starts to run when the defendant violates the FDCPA. This resolution will greatly benefit creditors and those collecting debts for the creditors.


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In 2008, a debt collector sued Kevin Rotkiske due to defaulted credit card debt and attempted to serve him at a prior address. At such address, an individual unknown to Rotkiske accepted service on his behalf. As a result, the debt collector eventually withdrew its lawsuit after it was incapable of locating Rotkiske personally.

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In 2009, the debt collector filed a second lawsuit against Rotkiske, again serving the complaint on an individual unknown to Rotkiske at the same address. Because the debt collector chose not to withdraw the suit the second time around, it received a default judgment after Rotkiske failed to answer.

On June 29, 2015, Rotkiske filed his FDCPA action alleging that the debt collector wrongfully collected a default judgment on a debt. According to his complaint, Rotkiske only became aware of the lawsuit and the judgment when he was applying for a mortgage in September 2014, as every notice was sent to his previous mailing address. In the district court, the debt collector argued that the claim was barred by the statute of limitations. Rotkiske responded by arguing that the FDCPA is subject to the discovery rule.

According to the discovery rule, the statute of limitations for specific actions does not start to run until the plaintiff knows or has reason to know of the injury giving rise to the claim. Therefore, under Rotkiske's theory, the one-year statute of limitations did not start until September 2014, which would have made his lawsuit timely. However, the district court rejected his argument finding that the statutory language is clear in suggesting that the one-year time period starts on "the date on which the violation occurs." The district court's ruling was then affirmed by the Third Circuit.

Notably, the Supreme Court considered the operation of the discovery rule in a 2001 ruling involving the Fair Credit Reporting Act. *TRW v. Andrews*, 534 U.S. 19. The Supreme Court reversed a Ninth Circuit ruling by holding that the discovery rule, if to be applied at all, must be justified by the "text and structure" of the statute. Applying that standard, both the Fourth and the Ninth Circuit have ruled that the limitation period for the FDCPA is subject to the discovery rule, generating an apparent divide among lower courts when the Third Circuit held the contrary in the *Rotkiske* case.

When it agreed to review the *Rotkiske* case, the Supreme Court seemed to be driven to settle the circuit split and to establish conformity to the use of the FDCPA's limitations period. Nevertheless, when analyzing the case, the Supreme Court upheld the Third Circuit's ruling by deciding that Rotkiske brought his FDCPA claim too late. Applying a strict textualist reading to the statute by basing the words "violation" and "occurs" on their dictionary definitions, Justice Clarence Thomas stated that the statute "unambiguously sets the date of the violation as the event that starts the one-year limitations period." He further recognized that it is Congress who determines the limitations, and therefore its intent should not be second guessed by the court.

Thomas went on to discuss the use of the "discovery rule" in situations involving fraud, known as the "fraud-based discovery rule," which differs from the traditional equitable tolling doctrine. In the majority opinion, the court reasoned that while the fraud-based discovery rule may apply, Rotkiske failed to preserve the issue before the Third Circuit nor raised it in his petition for certiorari.

In her dissenting opinion, Justice Ruth Bader Ginsburg affirmed the Third Circuit and believes Rotkiske preserved the issue on appeal and adequately raised the question in the certiorari petition. According to Ginsburg, "the ordinary applicable time trigger does not apply when fraud on the creditor's part accounts for the debtor's failure to sue within one year of the creditor's violation."

Meanwhile, in a concurring opinion, Justice Sonia Sotomayor agreed with the majority's opinion that Rotkiske had not preserved the "equitable, fraud-specific discovery rule" and simply mentioned, "nothing in today's decision prevents parties from invoking that well-settled doctrine." As a result, Sotomayor's concurring opinion is the most compelling for future litigation on the FDCPA's statute of limitations.

The decision in *Rotkiske* resolves a split among federal circuit court of appeals by putting an end to the application of the traditional discovery rule in FDCPA cases. This ruling eliminates an ambiguity for creditors and their representatives attempting to collect a debt to the detriment of creditors seeking to assert rights and remedies under the FDCPA. However, the fraud-specific discovery rule may have a narrow application to FDCPA claims. It seems Rotkiske just did not plead the required elements to claim fraud, as the bar is higher to allege a fraudulent act and he did not allege that the debt collector purposely hid the debt collection lawsuit from him.

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