High Court FDCPA Case Faced Uphill Battle From The Start

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On Oct. 16, the U.S. Supreme Court heard oral arguments in Rotkiske v. Klemm to decide whether the so-called common law discovery rule applies to the one-year statute of limitations of the federal Fair Debt Collection Practices Act.[1] The Supreme Court granted certiorari to address the circuit split between the U.S. Courts of Appeals for the Second and Third Circuits, which held that the discovery rule does not apply, and the U.S. Courts of Appeals for the Fourth and Ninth Circuits, which held that it does apply.

Background

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[2] It provides for a one-year statute of limitations:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court ... within one year from the date on which the violation occurs.[3]

The plain-language of the text states that the limitations period begins to run when the violation occurs. However, the Ninth and Fourth Circuits, held that the time begins to run when the violation is discovered by the plaintiff.[4]

In 2018, this issue was revisited in Rotkiske v. Klemm, where the U.S. Court of Appeals for the Third Circuit disagreed with its sister courts of appeals and held that the discovery rule does not apply to the FDCPA. In Rotkiske, the plaintiff's credit card debt was assigned to the defendant for collections, who sued in 2008, but withdrew that lawsuit and filed another action in 2009.

Unbeknownst to Kevin Rotkiske, someone at his prior address accepted service of the second action, and a default judgment was entered. The plaintiff discovered the judgment in September 2014, and sued the defendant in June 2015 asserting an FDCPA claim.

The district court granted the defendant's motion to dismiss, finding that the claim was time-barred and the discovery rule did not apply. The Third Circuit affirmed, opining that "the Act says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.'"[5]

Based on the text of the FDCPA, the Third Circuit held:

> [When] Congress specifies that the "date on which the violation occurs" starts the limitations period, the occurrence rule plainly applies. Accordingly, we hold that § 1692k(d)'s one-year limitations period begins to run when a would-be defendant

violates the FDCPA, not when a potential plaintiff discovers or should have discovered the violation.

The court acknowledged that the FDCPA does not expressly state that "the discovery rule shall not apply." However, relying on the Supreme Court's decision in TRW Inc. v. Andrews,[6] it explained that "Congress may 'implicitly' provide as much," and "Congress's explicit choice of an occurrence rule implicitly excludes a discovery rule."[7]

With respect to the Ninth and Fourth Circuit decisions, the Rotkiske court posited that, "[most] fundamentally, neither opinion analyzed the 'violation occurs' language of the FDCPA," and the U.S. Court of Appeals for the Ninth Circuit in Mangum v. Action Collection Services Inc. questionably "brushed aside" the Supreme Court's analysis in TRW as "food for thought … worth musing on."

The Third Circuit did not address equitable tolling based on self-concealing conduct because Rotkiske failed to raise it.[8] Ultimately, the Third Circuit relied on the statutory text, and to address any potential issues of inequity, underscored that its holding "does nothing to undermine the doctrine of equitable tolling."

On Feb. 25, the Supreme Court granted certiorari to address the issue of whether the discovery rule applies to the one-year statute of limitations under the FDCPA.

Supreme Court Oral Arguments

At oral argument, each side took substantively divergent views as to the application of the common law discovery rule to the FDCPA's statute of limitations. The petitioner, Rotkiske, took an unanticipated approach, and presented what he called the Holmberg-Bailey rule, arguing that where the claim is based on fraud or concealment — even a statutory claim with an express statute of limitation — the discovery rule should apply.

He offered that his FDCPA claim arose from the respondents' fraud in claiming to have properly served the collection action and obtaining a default judgment against him, and on that basis, the discovery rule should apply. Rotkiske attempted to stay clear of the FDCPA's use of the phrase "violation occurs."

On the other hand, the respondents argued that "the language that Congress used here, 'violation occurs,' would overcome any common law discovery rule," and the Holmberg-Bailey rule proposed by Rotkiske is essentially a guise for the equitable tolling doctrine, which Rotkiske had waived.

Due to Rotkiske's waiver of the equitable tolling doctrine at the lower court level, and the plain language of the FDCPA's statute of limitations, he faced an uphill battle from the start. This was apparent from the questions posed by the justices at oral argument.

According to Rotkiske, Supreme Court precedent requires that any fraud-based claim be subject to the discovery rule.

Rotkiske's argument was not a model of clarity. He struggled (perhaps intentionally) to differentiate between the common law discovery rule (what Rotkiske called the Holmberg-Bailey rule) and the equitable tolling doctrine, and argued that he relied on the former, and not the latter, to establish that his claim was not time-barred.

Citing the court's prior decisions in Bailey v. Glover, Exploration Co. v. United States, and Holmberg v. Armbrecht, Rotkiske argued that "where a plaintiff has been injured by fraud and remains in ignorance of it without any false or want of diligence or care on this part, the bar of the statute does not begin to run until the fraud is discovered."[9] He explained that the Third Circuit did not take this line of cases into account, and relied merely on the text of Section 1692k(d) in deciding that the FDCPA claim must be brought within one year of when the violation occurred.

Without mentioning TRW v. Andrews, Rotkiske proffered that the "Third Circuit understood that those two words by implication, not expressly … displaced the common law discovery rule applicable to fraud." He argued that by doing so, the Third Circuit created a "false dichotomy … described on the one hand as an occurrence rule and on the other hand a common law discovery rule."

This false dichotomy, according to Rotkiske, was not supported by law and was misapplied by the Third Circuit to displace the common law discovery rule with the occurrence rule. In essence, based on what Rotkiske calls the Holmberg-Bailey rule, where the claim is based on fraud or concealment, the discovery rule should apply to postpone the running of the limitations period.

Justice Sonia Sotomayor pointed to footnote five of the Third Circuit's opinion, which stated that Rotkiske had waived an equitable tolling argument arising from the defendant's self-concealing conduct, and asked him to explain how his application of the Holmberg-Bailey rule is any different from the equitable tolling doctrine based on self-concealment.

Rotkiske explained that equitable tolling applies where the plaintiff is aware of the violation giving rise to the cause of action, and diligently pursues their rights, but is unable to timely file suit due to some extraordinary circumstance. And for that reason, Rotkiske's understanding was that equitable tolling would not apply here, because Rotkiske was not aware of the violation. Rotkiske went on to assert that the court has "sometimes used the label of 'equitable tolling' to describe circumstances that … are best understood as the Bailey-Holmberg discovery rule."

Justice Ruth Bader Ginsburg offered that if Rotkiske was "arguing an across-the-board discovery rule that applies to the FDCPA … TRW weighs very heavily against you," and inquired whether Rotkiske was "arguing across-the-board discovery rule or … a fraud exception" to the Section 1692k.

Rotkiske responded that he was not arguing that every FDCPA action is timely where the plaintiffs were unaware. Instead, he asserted that if the plaintiff was unaware of the claim due to "fraud that prevented the plaintiff from knowing about their cause of action, under that long-standing doctrine [the Holmberg-Bailey rule], then the plaintiff is permitted to file out of time."

Suggesting that the discovery rule applies only to claims of common law fraud, Justice Stephen Breyer challenged Rotkiske about the allegedly fraudulent aspect of the claim. He asked, "[Is] your basic claim a claim of fraud. And it doesn't sound it … it doesn't sound like common law fraud to me."

In response, Rotkiske delved into the factual bases for the FDCPA claim. Justice Sotomayor noted the "[terrible] confusion] because of the confusion of the use of the terms." Rotkiske responded that the "common law discovery rule, the Bailey-Holmberg rule, can apply … if the fraud is an element of the offense," which he claimed was the case with his FDCPA claim

because he alleged that a false affidavit of service had been filed to obtain the default judgment, in violation of two sections of the FDCPA, which prohibit the use of false or misleading representations and unfair means in collecting a debt.

According to the respondents, the statute means what it says, and as a result, the phrase "violation occurs" must apply to any FDCPA claim, whether fraud-based or not.

The respondents' argument focused on the distinct role of Congress in creating legislation versus the judiciary's interpretive role. The respondents relied on the plain language of the statute to argue that the common law discovery rule could not apply to the FDCPA: "The plain meaning of 'violation occurs' concerns when the defendant commits the violation, not when the plaintiff learns of it."

The respondents also challenged Rotkiske's attempt to present an entirely new argument based on the theory that he had brought a fraud claim, asserting that, "The cert petition does not cite Bailey or Holmberg, doesn't mention the word 'fraud.' If it had, we might have had an argument in our brief in opposition for why this case doesn't present a fraud case."

The respondents then argued that Rotkiske's reliance on Bailey, Holmberg and Exploration Co. was misplaced because they "are properly understood to be equitable tolling cases, not ... discovery rule cases," and that while the discovery rule might apply to fraud statutes, "[that's] different from saying that there is a discovery rule in any case of fraud that happens to arise under a non-fraud statute, like the FDCPA."

According to the respondents, the words "violation occurred" must apply equally across the board, whether the FDCPA claim is fraud-based or not. To that end, the respondents posited that in situations where fraud was the basis for the untimely filing, courts could apply equitable tolling to excuse the untimely filing.

According to the respondents, "equitable tolling is a case-by-case doctrine in which courts use their inherent equitable powers to excuse non-compliance with the statute … on a particular fact." The respondents further argued that equitable tolling has a higher burden of proof than the common law discovery rule because "if the Court is going to exercise its inherent equitable powers to override the language that Congress has written, that should be something that only happens in unusual, exceptional circumstances."

In response to Justice Elena Kagan's and Chief Justice John Roberts' questions about whether an equitable relief argument is foreclosed by the FDCPA or waived by Rotkiske, the respondents answered that the issue was not properly before the court, and the FDCPA's text barred the application of the discovery rule.

On rebuttal, Rotkiske posited that the common law discovery rule as applied to statutory claims was not an all-or-nothing proposition, and that Bailey, Exploration and Holmberg contradict that interpretation. He went on to explain that, "when you look at the [FDCPA] as a whole," Congress did not intend to foreclose the application of the discovery rule.

Further, Rotkiske attempted to capitalize on the confusion with the equitable tolling doctrine, and posited that if "the Holmberg-Bailey rule is a subset of equitable tolling," then "the assertion that the arguments that we're presenting here were waived are … incorrect." Finally, Rotkiske requested an opportunity to amend the complaint, presumably to more clearly allege the fraudulent aspects of the claims under FDCPA.

The FDCPA's plain language is difficult to overcome.

On balance, the justices presented Rotkiske with tougher questions. To his credit, he attempted to focus on precedent and analogize his FDCPA dispute to a fraud claim subject to the common law discovery rule.

However, it appears that Rotkiske's waiver of the equitable tolling doctrine was the death knell for his case, and the justices appeared to revisit this point throughout the arguments. The FDCPA's use of the phrase "violation occurs" implicitly forecloses the application of the discovery rule.

As such, if the court finds that TRW v. Andrews is controlling (and it should), then "by implication from the structure [and] text of the" FDCPA, the discovery rule should not apply.[10] Notably, in a similar case, the U.S. Court of Appeals for the Second Circuit recently opined, "[The] statutory text is unambiguous: FDCPA claims must be brought 'within one year from the date on which the violation occurs.' A 'violation' — '[a]n infraction or breach of the law' — 'occurs' when it 'take[s] place.'"[11]

As the Third Circuit explained, the FDCPA "says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.'" And unfortunately for Rotkiske, the equitable tolling doctrine is not in play. For that reason, the court is likely to defer to Congress and the express terms of the FDCPA, and affirm the Third Circuit's ruling. We expect that the Supreme Court will issue its decision by June 2020.

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[1] 15 U.S.C. §§ 1692 et seq.

[2] 15 U.S.C. §1692(e).

[3] 15 U.S.C. §1692k(d).

[4] Mangum v. Action Collection Serv., Inc., 575 F.3d 935 (9th Cir. 2009); Lembach v. Bierman, 528 Fed.Appx. 297 (4th Cir. 2013) (per curiam).

[5] Rotkiske v. Klemm, 890 F.3d 422, 424 (3d Cir. 2018), cert. granted 139 S.Ct. 1259 (2019).

[6] 534 U.S. 19 (2001).

[7] Id. at 426 (citing TRW Inc. v. Andrews, 534 U.S. 19, 27–28 (2001) ("We have also observed that lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.' But we have not adopted that position as our own. And, beyond doubt, we have never endorsed the Ninth Circuit's view that Congress can convey its refusal to adopt a discovery rule only by explicit command, rather than by implication from the

structure or text of the particular statute.") (citations omitted)).

[8] Id. at 428, fn. 5.

[9] Bailey v. Glover, 88 U.S. 342 (1874); Exploration Co. v. United States, 247 U.S. 435 (1918); Holmberg v. Armbrecht, 327 U.S. 392 (1946).

[10] TRW, Inc., 534 U.S. at 27–28.

[11] Benzemann v. Houslanger & Associates, PLLC, 924 F.3d 73, 80 (2d Cir. 2019).