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U.S. Supreme Court Ruling on FDCPA Limitations Period Leaves Issues Unresolved

By Stuart I. Gordon and Matthew V. Spero*

The U.S. Supreme Court's decision in Rotkiske v. Klemm *is unlikely to be the Court's final word on the statute of limitations for suits against debt collectors under the Fair Debt Collection Practices Act.*

The U.S. Supreme Court, in an opinion by Justice Clarence Thomas, has ruled that, "absent the application of an equitable doctrine," the limitations period for private civil actions against debt collectors under the federal Fair Debt Collection Practices Act ("FDCPA") begins to run on the date on which the alleged FDCPA violation occurs and not on the date on which the alleged FDCPA violation is discovered.

As a practical matter, the Court's decision, in *Rotkiske v. Klemm*,[1] is likely to decrease the number of FDCPA lawsuits filed against debt collectors, at least in the near future.

The decision, however, is not likely to be the Court's final word on the limitations period for actions against debt collectors under the FDCPA. Indeed, it is quite probable that the Court will have to revisit the limitations issue in the future to explain how to calculate the limitations period when a complaint alleges that an "equitable doctrine" (such as the fraud-based discovery rule, discussed below) does apply.

THE LAW

Congress enacted the FDCPA in 1977 in a stated effort "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

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[1] *Rotkiske v. Klemm*, 205 L. Ed. 2d 291; 2019 U. S. LEXIS 7521 (Dec. 10, 2019).

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[2]

The FDCPA imposes affirmative requirements on debt collectors and prohibits a range of debt collection practices.[3] It also authorizes the Federal Trade Commission, the Consumer Financial Protection Bureau, and other federal agencies to enforce the FDCPA's provisions.[4]

Moreover, the FDCPA authorizes private civil actions against debt collectors that engage in certain prohibited practices.[5] These private civil actions "may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction." Importantly, these actions must be brought "within one year from the date on which the violation occurs."[6]

The issue at the heart of *Rotkiske v. Klemm* is when the FDCPA's limitations period for a civil action against a debt collector begins to run.

THE CASE

After Kevin Rotkiske allegedly failed to pay approximately $1,200 in credit card debt, his credit card company referred the debt to Klemm & Associates for collection. In March 2008, Klemm sued Rotkiske, seeking to collect the unpaid debt. Rotkiske alleged that Klemm attempted service at an address where Rotkiske no longer lived, and that a person whose description did not match Rotkiske's accepted service of the complaint. Klemm later withdrew the suit.

Klemm refiled a lawsuit against Rotkiske in January 2009 and a process server allegedly attempted service at the same address. Once again, according to Rotkiske, someone other than Rotkiske accepted service. Rotkiske failed to respond to the summons, and Klemm obtained a default judgment.

Rotkiske claimed that he was not aware of Klemm's 2009 debt collection lawsuit until September 2014, when he was denied a mortgage because of the default judgment against him.

On June 29, 2015, more than six years after the default judgment, Rotkiske

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[2] 15 U. S. C. § 1692(e).

[3] 15 U. S. C. §§ 1692b-1692j.

[4] 15 U. S. C. § 1692l.

[5] 15 U. S. C. § 1692k(a).

[6] 15 U. S. C. § 1692k(d).

sued Klemm[7] under the FDCPA. Rotkiske alleged that equitable tolling excused his otherwise untimely lawsuit because Klemm had purposely served process in a manner that ensured that he would not receive service. The sole FDCPA claim in Rotkiske's complaint asserted that Klemm had commenced the 2009 debt collection lawsuit after the state law limitations period had expired and, therefore, that Klemm had "violated the FDCPA by contacting [Rotkiske] without lawful ability to collect."

Klemm moved to dismiss the action as barred by the FDCPA's one-year statute of limitations.[8]

In response, Rotkiske argued that the court should apply a "discovery rule" to delay the beginning of the limitations period until the date he knew or should have known of the alleged FDCPA violation.

To support this contention, Rotkiske relied on the decision by the U.S. Court of Appeals for the Ninth Circuit in *Mangum v. Action Collection Serv., Inc.*[9] In that case, the Ninth Circuit held that, under the "discovery rule," limitations periods in federal litigation generally begin to run when plaintiffs know or have reason to know of their injury.

The U.S. District Court for the Eastern District of Pennsylvania dismissed Rotkiske's action. The district court held that the Ninth Circuit's general rule does not apply to Section 1692k(d), relying on the FDCPA's "plain language." The district court also concluded that Rotkiske was not entitled to equitable tolling because, even accepting the truth of the allegations in the complaint, he had not been misled by the conduct he alleged that Klemm had taken.

On appeal, the U.S. Court of Appeals for the Third Circuit *sua sponte* reviewed the case *en banc* and unanimously affirmed.[10] The Third Circuit held that, under the text of Section 1692k(d), the FDCPA's one-year limitations period runs from the date on which the alleged violation occurs, not from the date the plaintiff discovers or should have discovered the violation.

The Third Circuit expressly rejected the Ninth Circuit's approach, stating that there is no default presumption that all federal limitations periods run from the date of discovery. Rotkiske did not raise the application of equitable

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[7] Rotkiske sued Paul Klemm, the managing partner of Klemm & Associates; Klemm & Associates; Nudelman, Nudelman & Ziering, the firm to which Paul Klemm moved; and Nudelman, Klemm & Golub, which Nudelman, Nudelman & Ziering was renamed after Paul Klemm joined. The Court referred to the defendants as "Klemm," as does this article.

[8] 15 U. S. C. § 1692k(d).

[9] *Mangum v. Action Collection Serv., Inc.*, 575 F. 3d 935 (2009).

[10] *Rotkiske v. Klemm*, 890 F.3d 422 (3d Cir. 2018).

doctrines on appeal, so the Third Circuit did not address that issue.

Given the conflict between the Third and Ninth Circuits as to whether the "discovery rule" applies to the FDCPA's limitations period, the Supreme Court granted certiorari.

THE COURT'S DECISION

The Court's opinion, affirming the Third Circuit's judgment, was relatively brief and to the point. The Court observed that the text of Section 1692k(d) "clearly" states that an FDCPA action "may be brought . . . within one year from the date on which the violation occurs." According to the Court, that language "unambiguously sets the date of the violation as the event that starts the one-year limitations period."

The Court pointed out that, at the time of the FDCPA's enactment, the term "violation" referred to the "[a]ct or instance of violating, or state of being violated."[11] The term "occur," the Court continued, meant "to happen" and described "that which is thought of as definitely taking place as an event."[12] Read together, the Court said, these dictionary definitions confirmed what was "clear" from the face of Section 1692k(d)'s text: "The FDCPA limitations period begins to run on the date the alleged FDCPA violation actually happened."

The Court rejected Rotkiske's argument that Section 1692k(d) should be interpreted to include a general "discovery rule" applicable to all FDCPA actions. The Court observed that Congress has enacted statutes that expressly include the language Rotkiske asked the Court to read in, setting limitations periods to run from the date on which the violation occurs or the date of discovery of such violation.[13] In fact, the Court noted, when Congress enacted the FDCPA, many statutes included provisions that, in certain circumstances, would begin the running of a limitations period upon the discovery of a violation, injury, or some other event.[14]

Finally, the Court addressed Rotkiske's contention that his filing should be treated as timely under an equitable, fraud-specific discovery rule, relying on a

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[11] Webster's New International Dictionary 2846 (2d ed. 1949).

[12] *Id.,* at 1684.

[13] *See, e.g.,* 12 U. S. C. § 3416; 15 U. S. C. § 1679i.

[14] *See, e.g.*, 15 U. S. C. §77m (1976 ed.); 19 U. S. C. §1621 (1976 ed.); 26 U. S. C. §7217(c) (1976 ed.); 29 U. S. C. § 1113 (1976 ed.).

line of decisions beginning with *Bailey v. Glover*.[15] Rotkiske claimed that *Bailey* and its progeny applied an equitable doctrine that delayed the commencement of the statute of limitations in fraud actions, and that he had pleaded (or could plead) a claim within the scope of this doctrine.

The Court noted the existence of decisions applying a discovery rule in "fraud cases" that was distinct from the traditional equitable tolling doctrine,[16] which it has characterized as applying an "equity-based" doctrine.[17]

However, the Court ruled that Rotkiske had not preserved this issue before the Third Circuit and had not raised this issue in his petition for certiorari. Accordingly, the Court held that Rotkiske could not rely on this doctrine to excuse his otherwise untimely motion to dismiss.

In a footnote concluding its opinion, the Court specifically stated that it did "not decide whether the text of 15 U. S. C. § 1692k(d) permits the application of equitable doctrines or whether the claim raised in this case falls within the scope of the doctrine applied in *Bailey* and its progeny."

Importantly, Justice Sonia M. Sotomayor, in a concurrence, and Justice Ruth Bader Ginsburg, in a partial dissent, felt compelled to explore that subject in some detail.

JUSTICE SOTOMAYOR'S CONCURRENCE

Justice Sotomayor agreed with the majority that Section § 1692k(d) is a one-year statute of limitations that typically begins to run when the alleged violation "occurs," not when the plaintiff discovers it.

Justice Sotomayor also agreed with the majority that the Ninth Circuit fairly found that Rotkiske had failed to preserve, and therefore had forfeited reliance on, an "equitable, fraud-specific discovery rule" that forgives otherwise untimely filings.

Justice Sotomayor then pointed out that the Court has long "recogni[zed]"

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[15] *Bailey v. Glover*, 88 U. S. 342, 22 L. Ed. 636, 21 Wall. 342 (1875).

[16] *Merck & Co. v. Reynolds*, 559 U. S. 633, 644, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010); *Gabelli v. SEC*, 568 U. S. 442, 450, 133 S. Ct. 1216, 185 L. Ed. 2d 297 (2013) (referring to the "fraud discovery rule").

[17] *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U. S. ___, ___-___, 137 S. Ct. 2042, 198 L. Ed. 2d 584 (2017) (slip op., at 10–11); *Lozano v. Montoya Alvarez*, 572 U. S. 1, 10–11, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014); *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U. S. 221, 226–227, 132 S. Ct. 1414, 182 L. Ed. 2d 446 (2012); *Young v. United States*, 535 U. S. 43, 49–50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002).

and applied this "historical exception for suits based on fraud."[18]

She concluded her concurrence by declaring that, "Nothing in [the Court's] decision prevents parties from invoking that well-settled doctrine."

JUSTICE GINSBURG'S PARTIAL DISSENT

Justice Ginsburg's partial dissent took an even stronger position than Justice Sotomayor regarding the potential applicability of an equitable fraud rule to FDCPA claims.

At the beginning of her opinion, Justice Ginsburg stated that she "[g]enerally" agreed with the Court that the "discovery rule" does not apply to the FDCPA's one-year statute of limitations, and that the limitations period "ordinarily" begins to run on the date "the violation occurs."

However, in Justice Ginsburg's view, the "ordinarily 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.

She conceded that Rotkiske's FDCPA claim did not rest on any fraud inherent in the claim Klemm stated in its debt collection suit. Rather, she noted, Rotkiske alleged that Klemm had filed suit too late. Justice Ginsburg reasoned, however, that Rotkiske could not assert that defense in Klemm's suit because he alleged that he had never received notice of that suit and, therefore, that he had no opportunity to defend against it. For the same reason, Justice Ginsburg continued, Rotkiske was estopped from raising an FDCPA claim challenging Klemm's suit within the one year limitations period. Justice Ginsburg added that Rotkiske alleged that, by knowingly arranging for service of the complaint against him at an address where he no longer lived, and by filing a false affidavit of service, Klemm had engaged in fraud. In Justice Ginsburg's opinion, "[s]uch fraud, . . . warrants application of the discovery rule to time Rotkiske's FDCPA suit from the date he learned of the default judgment against him."

The fraud-based discovery rule, Justice Ginsburg declared, operates as a statutory presumption "read into every federal statute of limitation" and is distinct from the general discovery rule in that it governs only "case[s] of fraud."[19] Unlike the general discovery rule, she said, there was "no reason to

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[18] *See, e.g., Holmberg v. Armbrecht*, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946); *Exploration Co. v. United States*, 247 U. S. 435, 38 S. Ct. 571, 62 L. Ed. 1200 (1918); *Bailey v. Glover*, 88 U. S. 342, 22 L. Ed. 636, 21 Wall. 342 (1875); *Sherwood v. Sutton*, 21 F. Cas. 1303, F. Cas. No. 12782 (No. 12,782) (CC NH 1828) (Story, J.).

[19] *Merck & Co. v. Reynolds*, 559 U. S. 633, 644, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010).

believe the FDCPA displaced the fraud-based discovery rule." Justice Ginsburg then declared that the Court did "not hold otherwise."

Justice Ginsburg explained that the fraud-based discovery rule has "a thrust different from equitable tolling," and that they often are confused. "Equitable tolling," Justice Ginsburg continued, describes a doctrine that pauses, or "tolls," a statutory limitations period after it has commenced.[20] Litigants qualify for equitable tolling only if they establish that they have been pursuing their rights diligently and that some "extraordinary circumstance" stood in their way and prevented a timely filing.

By contrast, Justice Ginsburg added, the fraud-based discovery rule sets the time at which a claim accrues, that is, the time when the statute of limitations commences to run. It is "an exception to the standard rule" that "a claim accrues when the plaintiff has a complete and present cause of action."[21] Accordingly, Justice Ginsburg said, when a plaintiff is injured by fraud, "the bar of the statute does not begin to run until the fraud is discovered."

Justice Ginsburg then said that, in her view, Rotkiske had properly preserved a fraud-based discovery rule argument in the Third Circuit. Justice Ginsburg said that Rotkiske had raised the issue and had argued that "[a]t the very least, . . . the discovery rule applies to [FDCPA] claims based on false or misleading misrepresentations or other self-concealing conduct." According to Justice Ginsburg, the circuit court apparently declined to address that argument because Rotkiske had failed to raise "equitable tolling" in his appellate briefs. Justice Ginsburg said, however, that the failure to raise "equitable tolling" should pose no obstacle to determining whether the discrete fraud-based discovery rule applied to Rotkiske's claim.

Moreover, Justice Ginsburg said, she disagreed that Rotkiske had forfeited the issue by not raising it in his petition for certiorari, finding that "[g]enerously read," Rotkiske had asked whether a discovery rule of any kind applies to the FDCPA's one-year statute of limitations.

In Justice Ginsburg's view, Rotkiske's FDCPA complaint fell "comfortably within the fraud-based discovery rule's scope" when it alleged that Klemm had engaged in "sewer service"—intentionally serving process in a manner designed to prevent Rotkiske from learning of the collection suit—and that he had done so to ensure that Klemm's untimely suit would result in a default judgment that would remain undiscovered until time to oppose that judgment, and to

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[20] *Lozano v. Montoya Alvarez*, 572 U. S. 1, 10, 134 S. Ct. 1224, 188 L. Ed. 2d 200 (2014).

[21] *Gabelli v. SEC*, 568 U. S. 442, 448–449, 133 S. Ct. 1216, 185 L. Ed. 2d 297 (2013) (internal quotation marks omitted).

commence an FDCPA suit, ran out. In Justice Ginsburg's opinion, the fraud-based discovery rule does not apply only when the fraudulent conduct is itself the basis for the plaintiff's claim for relief but, rather, the rule governs if either the conduct giving rise to the claim is fraudulent or if fraud infects the manner in which the claim is presented.

Justice Ginsburg concluded that if Rotkiske could prove that Klemm had employed fraudulent service to obtain and conceal the default judgment that precipitated Rotkiske's FDCPA claim, that should suffice, under the fraud-based discovery rule, to permit adjudication of Rotkiske's claim on its merits.

No member of the Court, however, joined Justice Ginsburg's opinion.

CONCLUSION

The Court's majority opinion confirms that, generally speaking, the limitations period for private civil actions against debt collectors under the FDCPA begins to run on the date on which the alleged FDCPA violation occurs and not on the date on which the alleged FDCPA violation is discovered. This should provide at least some degree of comfort to debt collectors.

Yet Justice Ginsburg's partial dissent, and the majority's decision not to opine on the applicability of the fraud-based discovery rule to FDCPA claims against debt collectors given its conclusion that Rotkiske had failed to preserve that argument, highlight the relatively narrow nature of the Court's ruling. It should not take too long for courts to begin to decide whether FDCPA complaints against debt collectors specifically seeking to rely on the fraud-based discovery rule may move forward. If they divide on that question, the Supreme Court may once again have to get involved.