

BUSINESS LITIGATION

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The U.S. Supreme Court recently reiterated its commitment to conservative statutory interpretation, this time holding that the Fair Debt Collection Practices Act's one-year limitations period does not include a "discovery rule," but rather begins to run from the date of the alleged violation, not the date the claimant discovers the harm. This case resolve a split among several circuits.

SCOTUS: No "Discovery Rule" Tolling for FDCPA One-Year Limitations Period; Circuit Split Resolved in *Rotkiske v. Klemm*

ABOUT THE AUTHORS



John Dollarhide is a partner with Butler Snow LLP in its Jackson, Mississippi office. John is an experienced courtroom advocate, having tried dozens of bench trials and evidentiary hearings, as well as a recent jury trial. John devotes his time to financial services litigation, fiduciary counseling and advocacy, trade secrets, competition, and insurance coverage. John is a graduate of the 2016 IADC Trial Academy. He can be reached at john.dollarhide@butlersnow.com.



Phillip Sykes is a partner with Butler Snow LLP in the firm's Jackson, Mississippi office. Phillip is the Chairman of the IADC Business Litigation Committee. He is a member of Butler Snow's commercial litigation practice group. He's a Certified Public Accountant and has been recognized by Chambers USA®, Best Lawyers in America®, Martindale-Hubbell® and Super Lawyers®. He can be reached at phillip.sykes@butlersnow.com.

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Kyle Miller
Vice Chair of Publications
Butler Snow LLP
Kyle.miller@butlersnow.com

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Post-modern philosopher Ferris Bueller said that life moves pretty fast. He cautioned a generation of the risk of missing it (implying that some discover, only too late, that oblivion is upon them). I don't know if Justice Clarence Thomas is a John Hughes fan, but one could argue that the two have similar tastes in pragmatism.

Ferris Bueller was about ten years old when Congress passed the Fair Debt Collection Practices Act. It was enacted to eliminate Ed-Rooney-like debt collection practices. In addition to authorizing federal agencies to enforce its provisions, the FDCPA allows private civil actions against debt collectors. The act allows for a claimant to recover actual damages, up to \$1,000 in statutory damages, and attorney's fees. Relevant here is that the text of the FDCPA requires such a private cause of action to be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d).

Prior to the Supreme Court's decision in *Rotkiske v. Klemm*, there existed a split among the circuit courts of appeal about whether that one-year period begins to run when the violation occurred or when the violation is discovered by the claimant. The Third Circuit, where the case came from, held that the one-year period began to run the day the violation occurred. The Fourth and Ninth Circuits held that the one-year period starts when the claimant discovers the violation, an application of the "discovery rule."

Background

The facts of this case fit the FDCPA paradigm. Kevin Rotkiske allegedly failed to pay a credit card debt. His lender referred the debt to Klemm & Associates law firm for collection. Klemm filed suit to collect. Rotkiske was not personally served, though someone at his former address accepted service. Klemm withdrew the suit, re-filed it, and again served someone other than Rotkiske. This second suit was filed more than four years after the debt was due.

In the second suit, Klemm obtained a default judgment even though Rotkiske was actually unaware of the suit. Some five years later, in 2014, Rotkiske was denied a mortgage application because of the default judgment. This was the first time he became aware of the Klemm collection suit, and thus the first time he became aware of a potential FDCPA claim.

Rotkiske sued Klemm under the FDCPA for its collection of a time-barred debt (beyond Virginia's three-year debt collection limitations period). Notably, in his amended complaint, he alleged that Klemm's withdrawing of the first suit because of invalid service, then attempting service of the second suit at the same address, demonstrated that Klemm intentionally concealed the existence of the collection action, warranting equitable tolling.

Lower Court Decisions

The District Court for the Eastern District of Pennsylvania granted Klemm's motion to

dismiss, holding that it was filed beyond the FDCPA's one-year limitations period. The district judge concluded that no discovery rule should apply based on the text of the FDCPA and that no equitable tolling should apply because the same conduct that would invoke equitable tolling also formed the basis of the FDCPA claim.

Rotkiske appealed to the Third Circuit. The case was argued to a three-judge panel before the court *sua sponte* ordered an *en banc* rehearing. The *en banc* Third Circuit unanimously affirmed the dismissal, holding that the one-year limitations period begins when the violation occurred, not upon the claimant's discovery of the violation. Interestingly, at the Third Circuit, Rotkiske did not raise the issue of the district court's handling of his fraud-based equitable discovery rule claim.

All along, Rotkiske relied on the Ninth Circuit's decision in *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935 (9th Cir. 2009), which held that under the discovery rule, limitations periods in federal litigation generally begin to run when the claimant knows or has reason to know of their injury. But the district and circuit courts both held that the Ninth Circuit's general rule does not apply to the FDCPA's limitations period because of the text of the statute.

Resolving the Circuit Split

Justice Thomas, writing for an 8-1 majority, affirmed the Third Circuit. Thomas began by noting that Rotkiske's discovery rule argument was a conflation of two distinct

concepts: a general discovery rule read into every statutory text; and a fraud-specific discovery rule on an equitable basis.

Beginning and ending at the text of the statute, Justice Thomas wrote that the statute "unambiguously sets the date of the violation as the event that starts the one-year limitations period." Firmly declaring that no discovery rule would be read into a statute that left no room for it, Thomas cited Justice Scalia, who in 2001 said that an expansive approach to the discovery rule, like that argued by Rotkiske, is a "bad wine of recent vintage."

Thomas closed by noting that Rotkiske argued his claim should be saved under a fraud-based equitable doctrine because of the circumstances of Klemm's attempted service on him. But because Rotkiske did not raise this issue at the Third Circuit, the Supreme Court could not consider it. Thomas explained that the Court did not decide whether the FDCPA allows for a disc, leaving that question for another day.

Justice Sotomayor's Concurrence

Justice Sotomayor wrote a separate concurring opinion. She agreed with the majority on the basis that Rotkiske forfeited his fraud-specific equitable argument by not raising it at the Third Circuit. But she wrote separately to emphasize that the Court has applied the discovery rule in cases of fraud for over 100 years, and that "[n]othing in [the *Rotkiske*] decision prevents parties from invoking that well-settled doctrine."

Justice Ginsburg's Dissent

Justice Ginsburg dissented. She first explained the difference between a fraud-based discovery rule and "equitable tolling." The former keeps the statutory limitations period, but doesn't start the clock until the injury is discovered. The latter tolls or *extends* the limitations period. Ginsburg disagreed that Rotkiske waived his fraud-based discovery rule at the Third Circuit, even quoting from his supplemental brief there wherein he argued that "the discovery applies . . . based on false or misleading misrepresentations or other self-concealing conduct." Ginsburg closed by stating that she also disagreed with the district court's conclusion that a fraud-based discovery rule cannot apply when the concealment and the FDCPA abuse arise out of the same conduct. She would hold that some prohibited debt collection practices would also conceal the FDCPA claim.

left off and make increasingly creative arguments that the abusive practices also concealed the injury. Some cases, *e.g.*, those alleging too many debt collection phone calls, will self-defeat under that rubric. Others, especially those involving questionable service and default judgments, will be so choice for raising a fraud-based discovery rule.

The Future of FDCPA Time-Bar Disputes

This opinion is a definite win in favor of debt collectors and those sued under the FDCPA. It provides a brighter-line rule and stronger argument that FDCPA claims not brought within one year of the offending conduct are time barred. But the fraud-based discovery rule overtones of the entire appeal, beginning with the district court's decision and ending with Justice Sotomayor's separate concurrence and Justice Ginsburg's dissent, are a lighthouse for FDCPA claimants who find themselves beyond the one-year limitations period. We expect FDCPA claimants to pick up where Justice Ginsburg

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