



## After Oral Argument, U.S. Supreme Court Seems Poised to Preserve FDCPA SOL Status Quo

October 24th, 2019 | and

In *Rotkiske v. Klemm*, the Supreme Court has the opportunity to do what many plaintiffs' attorneys have dreamed of for years: effectively expand the FDCPA's one-year statute of limitations by applying the "discovery rule" to all FDCPA claims. Under the discovery rule, the limitations period begins to run (that is, the one-year clock starts ticking) not upon the occurrence of the statutory violation, as specifically called for by the law, but only when the plaintiff discovers the alleged violation. This could have the effect of exposing debt collectors and others to liability under the statute long after the one-year period Congress intended.

At oral argument, however, none of the nine justices appeared convinced that the discovery rule applies broadly to all FDCPA claims. With the usual caveat-that predicting how the Supreme Court may rule in any case is always hazardous-the high court seems unlikely to disrupt the normal application of the FDCPA's one-year limitations period, although it may leave the door open to applying the discovery rule to FDCPA claims in certain, limited situations.

### Case Background

The case centers on a credit card debt owed by Kevin Rotkiske that was referred for collection in 2008 to Klemm & Associates. After an initial failed attempt to effectuate service, Klemm eventually served the debt collection suit on an adult at what turned out to be Rotkiske's prior address. After filing an affidavit of service and other necessary papers in the Philadelphia Municipal Court, Klemm obtained a default judgment in March 2009. Rotkiske claims he was never served with the lawsuit and only learned about the default judgment when he applied for a mortgage loan years later, in September 2014.

In June 2015-within one year of learning about the default judgment-Rotkiske filed an FDCPA action against Klemm in federal court alleging that Klemm wrongly obtained the default judgment. The FDCPA provides that a lawsuit to enforce the statute may be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In this case, the alleged violation (obtaining the default judgment despite allegedly deficient service of process) occurred years earlier, in 2009. Rotkiske, however, argued for application of the "discovery rule," a doctrine that delays the beginning of a limitations period until the point when the plaintiff knew or should have known of the alleged violation. Applying the discovery rule, Rotkiske argued, his claim was timely because the one-year limitations period did not begin until he discovered the default judgment in 2014.

The District Court rejected Rotkiske's argument and dismissed the case as untimely. On appeal, the

Third Circuit affirmed the lower court's decision, noting that the "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." Rotkiske appealed to the U.S. Supreme Court, which agreed to hear the case in light of a clear split of opinion on this issue among the lower courts of appeal. Both the Fourth and Ninth Circuits have held that FDCPA claims are subject to the discovery rule, in contrast to the Third Circuit's holding in Rotkiske's case.

### Oral Argument

The Supreme Court held oral argument on October 16. The justices and the advocates for each side spent considerable time defining and attempting to explain the many different doctrines that may affect how a statute of limitations is interpreted. Statutory wording, common law principles, and equitable doctrines are all part of the calculus. (For those interested in reviewing the finer points of the discovery rule, equitable tolling, equitable estoppel, and other related doctrines, Justice Breyer at oral argument referred to the Judge Posner opinion in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) as his "bible" on the issues.)

At bottom, in light of the oral argument, the outcome of the case seems likely to turn on three issues.

The first is whether the common law discovery rule applies to FDCPA claims across the board. This was Rotkiske's primary argument in his merits brief. To pursue this angle, Rotkiske differentiates his FDCPA claim from the Supreme Court's decision in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), involving the Fair Credit Reporting Act. In that case, the Court held that the common law discovery rule does not generally apply to FCRA claims. Rotkiske argues that the *TRW* ruling depended heavily on the fact that the FCRA—unlike the FDCPA—contains an express exception to its normal two-year limitations period, allowing claims for willful misrepresentations to be brought within two years of the plaintiff's discovery of the misrepresentation. The inclusion of an express exception, the Supreme Court noted in *TRW*, forecloses application of any other unstated exception. Rotkiske's lawyer argued in court that, without any express exceptions, in enacting the FDCPA "Congress clearly did not intend to foreclose" application of the common law discovery rule. Justice Ginsburg noted, however, that "if you are arguing an across-the-board discovery rule applies to the FDCPA, I think that *TRW* weighs very heavily against you."

The second issue is whether a "fraud exception" to the statute of limitations applies in this case. As described by Rotkiske's lawyer, in the case of "fraud that prevented the plaintiff from knowing about their cause of action" a plaintiff may file an otherwise untimely claim. The crux of the issue here is whether Klemm's attempts at service of process—coupled with his eventual filing of an affidavit of service, which led to a default judgment—constituted fraud sufficient to justify an equitable extension of the limitations period. Justice Breyer probed Rotkiske's attorney on this repeatedly, stating that even if there was a mistake in the service of process "it doesn't sound like common law fraud to me."

The third issue is whether Rotkiske waived his arguments with respect to any equitable doctrine that could enlarge the limitations period. Justices Kavanaugh and Kagan pressed this issue to Rotkiske's lawyer, who conceded that equitable tolling was not an issue before the Third Circuit below. Instead, he argued that the inclusion in Rotkiske's briefs of certain cases involving equitable extensions of time should be enough to warrant remanding the case for further briefing on the application of those doctrines. Klemm's lawyer noted in response that the word "fraud" was

not mentioned at all in Rotkiske's petition for review by the court. "If it had, we might have had an argument in our brief in opposition for why this case doesn't present a fraud case." He continued by stressing that "the only question before this Court is [...] whether there's an across-the-board discovery rule" in FDCPA cases.

While the justices appeared generally skeptical of Rotkiske's arguments, Klemm's lawyer also faced pointed questions from the bench. Justice Breyer, for example, wondered whether the issues relating to fraud or the application of equitable doctrines should at least be remanded to the lower courts for further consideration. Justice Ginsburg suggested that the fraud exception may apply and, if so, it wouldn't matter whether the discovery rule applies or not. Klemm's lawyer emphasized that those arguments were waived and, in any event, Congress's deliberate choice to peg the limitations period to when a violation occurs "would overcome any common law discovery rule."

## **Conclusion**

To some degree, the potential application of common law and equitable principles will always inject a measure of uncertainty in the calculation of a limitations period. However, it became clear at oral argument that the FDCPA's express appeal to the moment when a "violation occurs," as the basis for calculating the one-year limitations period, creates a formidable presumption against the broad imposition of a discovery rule in all FDCPA claims, as sought by Rotkiske. His apparent waiver of some arguments relating to equitable relief also likely will weigh heavily in the Court's final decision. The case is *Rotkiske v. Klemm*, No. 18-328.

This article was originally published in *insideARM* on October 24, 2019.