The Court’s Narrow Holding

The Supreme Court in [Rotkiske v. Klemm][1], 2019 WL 6703563 (U.S. Dec. 10, 2019), with only Justice Ginsburg dissenting, clarifies the calculation of the statute of limitations for a Fair Debt Collection Practices Act (FDCPA) lawsuit. The Court affirmed the Third Circuit’s en banc ruling that, absent the application of an equitable doctrine, the FDCPA’s one-year statute of limitations generally runs from when the violation occurs, not when the consumer discovers the violation.

Importantly, the Court left open extending the statute of limitations based on equitable principles, such as equitable tolling and an equitable fraud-specific discovery rule. In fact, the Court’s ruling specifically acknowledges the existence of the equitable fraud-specific discovery rule. That rule dictates that the limitations period does not begin to run until the plaintiff discovers the violation, if the failure to discover the violation involved the defendant’s fraud.

The Court cites to a number of Supreme Court cases supporting the existence of this rule, but does not apply the rule to this case simply because the consumer failed to raise the issue in his petition for certiorari. There is no question then that [Rotkiske][2] does not foreclose the equitable fraud-specific discovery rule. [Rotkiske] can instead be seen as supporting the rule, because it cites to a number of earlier Supreme Court cases interpreting the equitable fraud-specific discovery rule.

The Third Circuit en banc had also recognized equitable tolling in FDCPA cases, stating that “our holding today does nothing to undermine the doctrine of equitable tolling. Indeed, we have already recognized the availability of equitable tolling for civil suits alleging an FDCPA violation.” [Rotkiske v. Klemm][2], 890 F.3d 422, 428 (3d Cir. 2018).

This article will examine both the equitable fraud discovery rule and equitable estoppel as they apply to FDCPA cases, and will also consider other FDCPA statute of limitations issues. These other issues include when the limitations period begins to run for a series of violations, whether the consumer can raise an FDCPA claim by way of recoupment after the limitations period has run, and various technical timing issues. Finally, the article examines an important approach to avoiding the impact of the FDCPA one-year statute of limitations period by bringing claims under state law.

The Equitable Fraud-Specific Discovery Rule

As mentioned above, the majority opinion avoids the consumer’s claims under the equitable fraud-specific discovery rule, but cites a number of Supreme Court decisions accepting the doctrine. Justice Ginsburg’s dissent, in arguing for the application of the rule in this case, provides an excellent analysis of the reach of the fraud-specific discovery rule.

In [Rotkiske][1], Justice Ginsburg would have applied the fraud-specific discovery rule to the facts in that case. The collector knowingly arranged for service of an allegedly time-barred complaint at an address where the consumer no longer lived and also filed a false affidavit of service. Justice Ginsburg quotes an earlier Supreme Court case “where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered.” [Holmberg v. Armbrecht][3], 327 U.S. 392, 397 (1946). Quoting [Holmberg][3] Justice Ginsburg’s dissent also states that “the fraud-based discovery rule operates as a statutory presumption ‘read into every federal statute of limitations.’” [Id][4].

Justice Ginsburg also cites Justice Scalia’s concurrence supporting the notion that 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.” [TRW Inc. v. Andrews][5], 534 U.S. 19, 37 (2001) (concurring in judgment) (an FCRA case). She clarifies in her opinion that the consumer’s claim did not have to be one for fraud, as long as fraud prevented the consumer from discovering the violation.

As Justice Ginsburg noted, [Rotkiske][1] provides two examples of fraud preventing the consumer from discovering a violation. The first is sewer service, where a collector intentionally prevents the consumer from learning a collection lawsuit has been filed against the consumer. The second is filing false affidavits about whether the consumer has been served.

But there are many other ways in which collectors may conceal important information from consumers, and as a result their FDCPA or state statute violations may not become apparent for years. One example is where collectors promise to take actions that are never taken and the consumer does not realize it until years later. See [Holmes v. TRS Recovery Services, Inc.][6], 2007 WL 4481274 (M.D. Tenn. Dec. 18, 2007). Other times collectors may tell consumers they need not appear in an action, but then the collector takes a default judgment, that does not become apparent for years. See [Scott v. Greenberg][7], 2017 WL...

Another example might be where a consumer relies on the defendant’s misrepresentations that entering into a payment plan will satisfy the debt and resolve the collection. The consumer will not realize until years later when the collector starts garnishing the consumer’s wages that the collector instead had immediately obtained a default judgment. See In re Humes, 468 B.R. 346 (Bankr. E.D. Ark. 2011).

Fraud-specific discovery can also apply where the consumer seeks information from the collector to determine if there is a violation and the collector intentionally conceals the information. See Rivera v JP Morgan Chase & Co., 2015 WL 12851710 (S.D. Fla. July 9, 2015).

Another example would be a collector’s false affidavits about the affiant’s personal knowledge of account records. The affidavit deceives the consumer into believing the collector has a basis for submitting the records, preventing the consumer from raising the FDCPA claim that the collector filed suit with inadequate knowledge whether the amount was due. See Toohey v. Portfolio Recovery Associates, L.L.C. [6], 2016 WL 4473016 (S.D.N.Y. Aug. 22, 2016).

**Equitable Tolling Is an Independent Basis to Extend the Limitations Period**

As Justice Ginsburg noted, fraud-based discovery is different from equitable tolling. It is important to clarify the distinction even though courts may label fraud-based discovery as equitable tolling. Fraud-based discovery relates to when the limitations period begins to run, delaying the running until the consumer discovers the fraud. Equitable tolling pauses or “tolls” a statutory limitations period after it commences. The Supreme Court has defined equitable tolling as a litigant establishes “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Menominee Indian Tribe of Wis. v. United States [7], 136 S. Ct. 750, 755 (2016).

Here are a number of examples of equitable tolling:

- The consumer timely filed a case, but must re-file the case more than one year after the violation occurred, because a class action was dismissed, the case was removed to federal court, or the case must be re-filed in a different venue;
- The consumer refrained from timely filing the suit based on the defendant’s inducement;
- A case was not filed in time because of the consumer’s illness;
- Discovery delays prevented the consumer from learning of the role of a previously unnamed defendant.

For more examples and case citations, see NCLC’s Fair Debt Collection § 12.3.5 [8].

**When Does the Limitations Period Begin to Run Where There Are a Series of Violations**

Courts reach different conclusions as to treatment of the limitations period for a series of violations. Does the one year begin to run from the first violation? Do later violations each start their own one year period? Or does the one-year period run for all violations starting with the last violation? Most courts find that there is a separate running of the limitations period for each violation, so that some later violations might be actionable while earlier ones might not. See NCLC’s Fair Debt Collection § 12.3.4.2 [9].

A number of courts though find that in the case of litigation misconduct the limitations period begins to run from the filing of a lawsuit even if violations occur later in the lawsuit, as long as the violations are of a similar nature to those involving in the collection suit’s filing. See NCLC’s Fair Debt Collection § 12.3.4.3 [10].

This rule though is not followed where the violations later in a litigation are of a different nature than those occurring when the case was filed. For example if one violation is filing the collection lawsuit after the limitations period has run and another is submitting false affidavits later in the litigation, each may have its own limitations period. See NCLC’s Fair Debt Collection § 12.3.4.4 [11].

In addition, some courts adopt a continuing violation approach where there is a pattern of misconduct. If the first violation begins more than a year prior to the filing of the FDCPA case and violations making up the same pattern continue to occur
within one year of the filing the FDCPA suit, then the FDCPA case can raise all of the violations—even those occurring more than a year earlier. See NCLC’s Fair Debt Collection § 12.3.4.5 [12].

Raising Claims by Way of Recoupment After the Limitations Period Has Run

When a creditor or debt buyer brings a collection action against a consumer, the consumer may wish to raise FDCPA counterclaims against the debt buyer for earlier collection conduct. If the limitations period has run on the consumer’s FDCPA claims, then the question arises whether those claims can be raised by way of recoupment to offset the debt buyer’s recovery in the collection action. (In a recoupment action, the consumer can only offset the other party’s claim and not recover affirmatively.)

There is extensive Truth in Lending Act (TILA) case law providing for such recoupment claims after the TILA limitations period has run. See NCLC’s Truth in Lending § 12.2.5 [13]. There is little or no such case law examining the issue under the FDCPA, but the outcome will likely be determined by how related the FDCPA claims are to the collection action, and how the forum state where the collection action is brought interprets its law of recoupment. NCLC’s Fair Debt Collection § 12.3.8 [14].

Other Timing Issues

When a limitations period is about to expire in a matter of days, some very technical timing issues are likely to arise. Where, for example, a letter is mailed to the consumer, courts reach different conclusions as to when the one-year period begins to run—the day it is mailed, the next day, the day it is received, etc. See NCLC’s Fair Debt Collection § 12.3.2.1 [15]. Similar issues arise as to when the limitations period begins to run regarding the filing of a collection lawsuit—when it is filed or when the consumer is served. NCLC’s Fair Debt Collection § 12.3.2.2 [16].

Most courts follow the modern doctrine found in Federal Rule of Civil Procedure 6(a)(1) that the day of the violation is not counted—so that a suit filed on the violation’s anniversary date is not time-barred. If the anniversary date is a Saturday, Sunday, or legal holiday, the deadline is extended to the next business day. Some courts though do not follow this rule. See generally NCLC’s Fair Debt Collection § 12.3.6 [17].

State Law Often Provides a Longer Limitations Period

Where an action cannot be brought under the FDCPA, state claims may still be available because of their longer limitations periods, including claims for intentional torts and violations of a state debt collection or UDAP statute. (A UDAP or unfair and deceptive acts and practices statute is a state’s general consumer protection statute or deceptive practices statute.) While these claims do not offer federal subject matter jurisdiction, a class action alleging violation of a UDAP or state debt collection statute can obtain federal jurisdiction under the Class Action Fairness Act (CAFA). See generally NCLC’s Consumer Class Actions § 2.4 [18].

As a general rule, state limitation periods for infliction of emotional distress are quite short, often being one year like the FDCPA. But, unlike the FDCPA, the discovery rule may be applicable to extend the limitations period. Whether the discovery rule applies to an intentional tort is a matter of state law and the Supreme Court’s decision in Rotkiske should have little or no relevance to this question. A state is likely to have well-developed precedent in this area already, and the Rotkiske decision should not overrule this precedent since it is based solely on the specific language of the FDCPA’s limitations period. A claim of an intentional tort has another advantage—it typically provides for punitive damages.

All but six states have state debt collection statutes prohibiting various forms of collection abuse, but not all statutes provide for a private right of action. See NCLC’s Fair Debt Collection Appx. D [19] for a state-by-state summary of these statutory provisions.

The statute of limitations for a state debt collection statute will generally be longer than the FDCPA’s one year, and the application of the discovery rule will depend on state law, including the interpretation of a specific state statute’s language. In addition, many state debt collection statutes will not specify a limitations period, and a state’s general law regarding the statute of limitations will apply, which may be longer than a year and may allow for the discovery rule.

Every state provides a private right of action under a state’s UDAP statute. A state-by-state summary of UDAP statutes is
found at NCLC’s *Unfair and Deceptive Acts and Practices Appx A* [20]. Most UDAP statutes offer statutory, treble, or punitive damages, and also attorney fees to the prevailing consumer.

UDAP statutes often have their own limitations periods that tend to be in the two-year to four-year range, but Connecticut, for example, has a six-year limitations period. Where a UDAP statute does not provide for a limitations period, courts select an applicable state limitations period, such as one for statutory violations, that in some states can be as long as six years. For a survey of decisions as to the applicable limitations period where the UDAP statute does not provide an explicit period, see NCLC’s *Unfair and Deceptive Acts and Practices § 11.2.1.2* [21].

Whether the discovery rule applies to a UDAP statute of limitations will again vary from state to state. The most common approach is that the period does not begin to run until a reasonable person would be put on notice concerning the violation. See NCLC’s *Unfair and Deceptive Acts and Practices § 11.2.2.1* [22].

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Supreme Court Clarifies FDCPA Statute of Limitations

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