Discovery Rule Does Not Apply to FDCPA Statute of Limitations

A recent decision from the U.S. Court of Appeals for the Third Circuit has created a circuit split in how the federal circuit courts have interpreted the statute of limitations as it applies to the Fair Debt Collection Practices Act ("*FDCPA*"). In an *en banc* decision, the Third Circuit overruled its prior precedent, breaking with the Fourth and Ninth Circuits, in finding that the discovery rule does not apply to cases brought under the FDCPA.[1] This means, at least in the Third Circuit, that even if a party does not know the FDCPA has been violated, the statute of limitations, which is one year under the FDCPA, still begins to run.[2]

The discovery rule allows for a statute of limitations to run from the time that the injured party discovers or reasonably should have discovered the injury. In other words, if the discovery rule applies, the clock starts running from the time the claimant discovered (or should have discovered) the injury. If the discovery rule does not apply, the clock starts running when the injury happened, regardless of whether the party knew about it.

In *Rotkiske*, a judgment debtor ("*Rotkiske*") brought suit against the law firm that had obtained the judgment, alleging the law firm's collection suit violated the FDCPA. In the collection suit, Rotkiske had been served via substitute service when someone residing in Rotkiske's former residence purported to accept service on his behalf. Default judgment was later entered against Rotkiske, unbeknownst to him.

Only when Rotkiske applied for a mortgage loan in 2014 did he find out that the 2009 judgment existed. While Rotkiske's FDCPA suit was filed less than one year after he applied for the mortgage loan, it had been almost six years after the state court had entered the default judgment against him in the collections suit. The U.S. District Court found that the statute of limitations applied, noting that because the suit had been filed six years after the default judgment was entered, the FDCPA's one-year statute of limitations barred Rotkiske's suit.

On appeal, the Third Circuit wrote, "In our view, the Act says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.'" Because the discovery rule is not explicitly incorporated in the text of the FDCPA, the Third Circuit refused to apply it.[3]

The Third Circuit was unconvinced by Rotkiske's arguments that the FDCPA's silence on the discovery rule prevented the Court from barring its application. The Third Circuit countered that Congress' explicit choice of an occurrence rule ("*the date on which the violation occurs*") implicitly excludes a discovery rule; Congress could not "have more clearly foreclosed the discovery rule."[4]

The debtor then tried to appeal to the general purpose of the FDCPA, arguing that without the discovery rule, the FDCPA's purpose of protecting consumers could not be reached. The Third Circuit was again unconvinced. The court pointed to the plain text of the statute, noting that much of the conduct that the FDCPA prohibits cannot by its nature be fraudulent or concealed. Further, the Third Circuit noted that in the event such actions are fraudulent or concealed, equitable tolling, another way a court can "stop the clock" on a statute of limitations, could provide relief. However, the Third Circuit noted that Rotkiske had not attempted to argue equitable tolling.

The Third Circuit also discredited Rotkiske's citation to the Fourth and Ninth Circuit decisions that applied the discovery rule to the FDCPA. According to the Third Circuit, neither opinion analyzed the "violation occurs" language of the FDCPA. In *Mangum v. Action Collection Service, Inc.*, the Third Circuit explained, the Ninth Circuit relied on the principle that all federal laws generally implied a discovery rule, which has since been discredited by the Supreme Court.[5] In *Lembach v. Bierman*, a non-binding unpublished opinion, the Fourth Circuit only looked to the FDCPA's consumer protection goals and not to the statute's plain language.[6] The Third Circuit disagreed with this approach as well, and again noted that it relied on previously discredited case law.

Finally, the *en banc* Third Circuit wrote that the language addressing this issue in its own opinion in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (1994), was dicta and, worse, suffered from the same problem as Mangum: the proposition that the discovery rule applied to all federal statutes has been overruled by the Supreme Court.

Thus, at least in the Third Circuit, the discovery rule cannot be used to extend the statute of limitations in FDCPA cases. However, creditors should still be wary, because the Third Circuit did mention the viability of an equitable tolling argument in FDCPA cases. Alleging "fraudulent, misleading, or self-concealing conduct," according to the Third Circuit, could save an FDCPA claim from the one-year statute of limitations.

For More Information

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1 *Rotkiske v. Klemm*, 16-1668, 2018 WL 2209120, at *1 (3d Cir. May 15, 2018), hereinafter, *"Rotkiske."*

2 15 U.S.C. § 1692k(d).

3 *Id.* at *1.

4 *Id.* at *3.

5 *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 937 (9th Cir. 2009); *see TRW Inc.* v. Andrews, 534 U.S. 19, 27, 122 S. Ct. 441, 447, 151 L. Ed. 2d 339 (2001) (overruling *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1266 (9th Cir. 1998), upon which *Mangum* relied).

6 *Lembach v. Bierman*, 528 Fed. Appx. 297, 302 (4th Cir. 2013).