890 F.3d 422
United States Court of Appeals, Third Circuit.

Kevin C. ROTKISKE, Appellant
v.
Paul KLEMM, Esq., DBA Nudelman, Klemm & Golub, P.C., DBA Nudelman, Nudelman & Ziering, P.C., Klemm & Associates; Nudelman, Klemm & Golub, P.C., DBA Nudelman, Nudelman & Ziering, P.C., DBA Klemm & Associates; Nudelman, Nudelman & Ziering, P.C., DBA Nudelman, Klemm & Golub, P.C., Klemm & Associates; Klemm & Associates, DBA Nudelman, Klemm & Golub, P.C., Nudelman, Nudelman & Ziering, P.C.; John Does 1-10

No. 16-1668
|
Argued January 18, 2017
|
En Banc Rehearing Ordered September 7, 2017
|
Reargued En Banc February 21, 2018
|
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Attorneys and Law Firms

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Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and FISHER*, Circuit Judges

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

This appeal requires us to determine when the statute of limitations begins to run under the Fair Debt Collection Practices Act (FDCPA or Act), 91 Stat. 874, 15 U.S.C. § 1692 *et seq.* The Act states that "[a]n action to enforce any liability created by this subchapter may be brought in any appropriate United States district court . . . within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). The United States Courts of Appeals for the Fourth and Ninth Circuits have held that the time begins to run not when the violation occurs, but when it is discovered. *See Lembach v. Bierman*, 528 Fed.Appx. 297 (4th Cir. 2013) (per curiam); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935 (9th Cir. 2009). We respectfully disagree. 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." 15 U.S.C. § 1692k(d).

* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

I

The relevant facts of this case are undisputed. Appellant Kevin Rotkiske accumulated credit card debt between 2003 and 2005, which his bank referred to Klemm & Associates (Klemm) for collection. Klemm sued for payment in March 2008 and attempted service at an address where Rotkiske no longer lived, but eventually withdrew its suit when it was unable to locate him. Klemm tried again in January 2009, refiling its suit and attempting service at the same address.[1] Unbeknownst to Rotkiske, somebody at that residence accepted service on his behalf, and Klemm obtained a default judgment for around $1,500. Rotkiske discovered the judgment when he applied for a mortgage in September 2014.

On June 29, 2015, Rotkiske sued Klemm and several associated individuals and entities asserting, *inter alia*, that the above-described collection efforts violated the FDCPA. Defendants moved to dismiss Rotkiske's FDCPA claim as untimely and the United States District Court for the Eastern District of Pennsylvania agreed. The District Court rejected Rotkiske's argument that the Act's statute of limitations incorporates a discovery rule which "delays the beginning of a

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[1] In a certification accompanying Defendants' motion to dismiss, Klemm's managing partner stated that by the time of the second suit he had moved to a new firm named Nudelman, Nudelman & Ziering. Because Rotkiske has sued (among others) both Klemm and Nudelman, and the complaint's allegations do not distinguish between them, for the sake of simplicity we refer only to Klemm.

limitations period until the plaintiff knew of or should have known of his injury." *Rotkiske v. Klemm*, No. 15-3638, 2016 WL 1021140, at *3 (E.D. Pa. Mar. 15, 2016). It found the "actual statutory language" sufficiently clear that the clock began to run on Defendants' "last opportunity to comply with the statute," not upon Rotkiske's discovery of the violation. *Id.* at *4. The Court also rejected Rotkiske's request for equitable tolling as duplicative of his discovery rule argument. *Id.* at *5.

Rotkiske timely appealed the judgment of the District Court and a panel of this Court heard oral argument on January 18, 2017. Prior to issuing an opinion and judgment, on September 7, 2017, the Court sua sponte ordered rehearing en banc, and argument was held on February 21, 2018.

II[2]

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, ___ U.S. ___, 136 S.Ct.

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[2] The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our review of an order dismissing a complaint for failure to state a claim is plenary, *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005), as is our review of questions of statutory interpretation, *United States v. Zavrel*, 384 F.3d 130, 132 (3d Cir. 2004). We will affirm an order dismissing a complaint only when the complaint fails to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

1850, 1856, 195 L.Ed.2d 117 (2016). The text at issue in this appeal reads:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court . . . within one year from the date *on which the violation occurs*.

15 U.S.C. § 1692k(d) (emphasis added). In declining Rotkiske's request to read the statute to imply a discovery rule, the District Court found that this language spoke clearly. We agree, and will affirm its judgment dismissing Rotkiske's untimely FDCPA claim.

Statutes of limitation provide "security and stability to human affairs" and are "vital to the welfare of society." *Gabelli v. S.E.C.*, 568 U.S. 442, 448–49, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (citations omitted). The standard rule is that a statute of limitations "commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 85 L.Ed. 605 (1941)). By fixing an end point for civil liability, Congress advances "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli*, 568 U.S. at 447–48, 133 S.Ct. 1216 (quoting *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000)).

We recently summarized the two basic models that "a legislature may choose" in fixing the start of a limitations period. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 613 (3d Cir. 2015). First, a statute can run from "the date the injury actually occurred, an approach known as the 'occurrence rule.'" *Id.* Alternatively, Congress may delay the start of the limitations period until "the date the aggrieved party knew or should have known of the injury, that is, the 'discovery rule.'" *Id.*

Sometimes Congress clearly picks one model or another. When a statute of limitations begins to run only when "the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action," the discovery rule plainly applies. *See, e.g.*, 29 U.S.C. § 1451(f)(2); *Bay Area Laundry*, 522 U.S. at 204, 118 S.Ct. 542 (interpreting 29 U.S.C. § 1451(f)(2) to impose a discovery rule); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) (interpreting similar language in 28 U.S.C. § 1658(b)(1)). Likewise, when Congress specifies that the "date on which the violation occurs" starts the limitations period, the occurrence rule plainly applies. Accordingly, we hold that § 1692k(d)'s 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.

Congress does not, of course, always express statutes of limitations so directly. Instead of expressly enacting an occurrence or a discovery rule, Congress

often articulates statutes of limitations in terms somewhere between those two poles. Some statutes of limitations begin when a "claim first accrue[s]." *See, e.g.*, *Gabelli*, 568 U.S. at 447–48, 133 S.Ct. 1216 (interpreting 28 U.S.C. § 2462). Others start when the "cause of action arises" or when "liability arises." *See, e.g.*, *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 96 L.Ed. 26 (1951) (interpreting Suits in Admiralty Act); *Bay Area Laundry*, 522 U.S. at 201, 118 S.Ct. 542 (interpreting 29 U.S.C. § 1451(f)(1)). And we have little doubt that an exhaustive search would yield still other variations—some subtle, some stark. This appeal does not implicate the less-determinate language of those statutes, however.

III

Despite the "occurrence" language of the FDCPA, Rotkiske insists that the discovery rule applies. His argument relies on the text of the FDCPA, the policies underlying the Act, decisions of two of our sister courts of appeals finding a discovery rule in the FDCPA, and decisions of this Court applying a discovery rule to other federal statutes. We consider each point in turn.

A

For starters, we reject summarily Rotkiske's assertion that the text of the FDCPA is silent on the discovery rule. *See* Rotkiske Supp. Br. 6. While it is true that the Act does not state *in haec verba* that "the discovery rule shall not apply," the Supreme Court made

clear in *TRW Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), that Congress may "implicitly" provide as much. In that Fair Credit Reporting Act (FCRA) case, the Court held that Congress had "implicitly excluded a general discovery rule by explicitly including a more limited one." 534 U.S. at 28, 122 S.Ct. 441. The same natural reading applies to the FDCPA in this appeal: Congress's explicit choice of an occurrence rule implicitly excludes a discovery rule. A quotidian example illustrates why this is so. When a bill states that payment is timely if it is "received at the bank by 5:00," it goes without saying that a check arriving at 6:00 is late even if it was postmarked a week earlier. Short of the express command that *TRW* tells us is not required, it is hard to imagine how Congress could have more clearly foreclosed the discovery rule.

B

Rotkiske also highlights the remedial purpose of the FDCPA, which was enacted to combat the national problem of abusive debt-collection practices. Rotkiske Supp. Br. 10–11. Rotkiske emphasizes that those practices may involve fraud, deception, or self-concealing behavior such that the failure to apply the discovery rule would thwart the principal purpose of the Act. *Id.* at 11–13. He warns that "[a]bsent the discovery rule, vulnerable consumers will be left without redress if the harm caused by debt collectors' abusive or deceptive acts remains concealed for over a year." *Id.* at 16. We disagree for two reasons.

First, to the extent Rotkiske contends that the collection practices the FDCPA proscribes are inherently fraudulent, deceptive, or self-concealing, the statute belies his argument. Debtors are often vexed by overzealous or unscrupulous debt collectors precisely because of repetitive contacts by phone or mail. As the language of the FDCPA makes clear, many violations will be apparent to consumers the moment they occur. *See, e.g.*, 15 U.S.C. § 1692c(a)(1) (proscribing communication regarding debt collection "at any unusual time or place"); *id.* § 1692d (proscribing various forms of harassment in the service of debt collection, including "[t]he use of obscene or profane language" and "[t]he publication of a list of consumers who allegedly refuse to pay debts"); *id.* § 1692f(7) (proscribing "[c]ommunicating with a consumer regarding a debt by post card"). The Act's statute of limitations applies to all of its provisions, so we decline Rotkiske's invitation to interpret the Act as if it contemplated only concealed or fraudulent conduct.[3]

Second, to the extent that FDCPA claims *do* deal with "false, deceptive, or misleading representation[s],"

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[3] The fact that the conduct proscribed by the FDCPA will usually be obvious to its victims distinguishes this case from our decision in *Stephens v. Clash*, 796 F.3d 281 (3d Cir. 2015). There, we considered a child sexual abuse claim governed by a statute that required a filing "within six years after the right of action first accrues." 796 F.3d at 285 (quoting 18 U.S.C. § 2255(b) (2012)). We reasoned that since "child pornography is most often distributed in secret and without the victim's immediate knowledge," the statute's fundamental objective of providing redress to exploited children would most often "be thwarted without the discovery rule." *Id.* at 285–86.

id. § 1692e, nothing in the Act impairs the discretion district courts possess to avoid patent unfairness in such cases. As we shall explain, equitable tolling remains available in appropriate cases.

C

In addition to his textual and purposive arguments, Rotkiske asks us to follow the Ninth Circuit's decision in *Mangum v. Action Collection Service, Inc.*, and the Fourth Circuit's decision in *Lembach v. Bierman*, both of which implied a discovery rule in the Act's statute of limitations. We respectfully decline to do so.

Most fundamentally, neither opinion analyzed the "violation occurs" language of the FDCPA. In *Mangum*, the Ninth Circuit did not engage the text of the Act, relying instead on its expansive holding in *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1266 (9th Cir. 1998), that "the discovery rule applies to statutes of limitations in federal litigation." *Mangum*, 575 F.3d at 940. The Ninth Circuit did acknowledge that the Supreme Court had reversed its application of the *Norman-Bloodsaw* rule to the FCRA in *TRW*. *Id*. at 940–41. Nevertheless, after brushing aside *TRW*'s analysis as "food for thought . . . worth musing on," *id*. at 941, the majority of the panel in *Mangum* concluded that *TRW* neither overruled nor undermined that

circuit's prior precedent regarding the general applicability of the discovery rule, *id.*[4]

Like the Ninth Circuit in *Mangum*, the Fourth Circuit in *Lembach* failed to engage the statutory text on its way to determining that a discovery rule would vindicate the policies underlying the FDCPA. *Lembach*, 528 Fed.Appx. at 302. The Court reasoned—without mentioning equitable tolling—that because plaintiffs "had no way of discovering the alleged violation," the defendant "should not be allowed to profit from the statute of limitations when its wrongful acts have been concealed." *Id.* For these reasons, we decline to join either the Ninth or the Fourth Circuits in holding that the statute means something other than what it plainly says.

D

In addition to the opinions of our sister courts in *Mangum* and *Lembach*, Rotkiske places substantial weight on our opinion in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). In dictum in that case, we applied the discovery rule to Title VII, even though the statutory language required charges to be filed within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e).

[4] Judge O'Scannlain disagreed, relying on essentially the same reading of the statutory text that we adopt here. *Mangum*, 575 F.3d at 944 (O'Scannlain, J., specially concurring).

The problem with Rotkiske's reliance on *Oshiver* is that its dictum is in obvious tension with the Supreme Court's decision in *TRW*. Instead of focusing on the statutory text (which we relegated to a footnote, 38 F.3d at 1385 n.3), we described a "general rule" that "the statute of limitations begins to run . . . [on] the date on which the plaintiff *discovers*" an injury rather than "the date on which the wrong that injures the plaintiff occurs," *id.* at 1385 (emphasis in original). The Supreme Court's approach in *TRW* counsels in favor of reconsidering our earlier practice of presuming that federal statutes of limitations include an implied discovery rule. Indeed, to the extent that our decisions have relied on such a general presumption in applying a discovery rule to statutes that expressly begin to run when a violation "occurs," they cannot be reconciled with the Supreme Court's mandate that when "the text [of a statute] and reasonable inferences from it give a clear answer," that is "the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (citations omitted). *See Oshiver*, 38 F.3d at 1385 (presuming applicability of discovery rule); *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 590 (3d Cir. 2005) (same, following *Oshiver*).

Rather than imply a discovery rule by rote "in the absence of a contrary directive from Congress," *see, e.g.*, *Disabled in Action of Pa. v. S.E. Pa. Transp. Auth.*, 539 F.3d 199, 209 (3d Cir. 2008), we must parse each limitations period using ordinary principles of statutory analysis—beginning with the statutory text and then proceeding to consider its structure and context. *See,*

e.g., *TRW*, 534 U.S. at 28–33, 122 S.Ct. 441. As part of that inquiry into context, it may sometimes prove appropriate to consider whether there are "historical[ ] or equitable reasons" to adopt either an occurrence or a discovery rule. *Gabelli*, 568 U.S at 454, 133 S.Ct. 1216. *See, e.g.*, *TRW*, 534 U.S. at 27–28, 122 S.Ct. 441 (noting that latent disease and medical malpractice, but not the FCRA, are contexts that "cr[y] out for application of a discovery rule"); *Stephens v. Clash*, 796 F.3d 281, 285–88 (3d Cir. 2015) (noting the secretive nature of trade in child pornography and the likelihood that an occurrence rule would frustrate Congress's objective to provide a remedy to blameless minor victims). This is not such a case, however, because the text of § 1692k(d) plainly incorporates an occurrence rule.

IV

We conclude by emphasizing 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. *See Glover v. F.D.I.C.*, 698 F.3d 139, 151 (3d Cir. 2012) (considering and rejecting an equitable tolling argument where no extraordinary barrier existed to plaintiff's suit). We do not reach the question in this case only because Rotkiske failed to raise it on appeal. Accordingly, our opinion should not be read to foreclose the possibility that equitable tolling might apply to FDCPA violations that involve fraudulent, misleading, or self-concealing conduct. *See, e.g.*, *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22

L.Ed. 636 (1874) ("[W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar . . . does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it. . . .").[5]

V

Civil actions alleging violations of the Fair Debt Collection Practices Act must be filed within one year from the date of the violation. Because Rotkiske's action was filed well after that period expired, his action was untimely. We will affirm the judgment of the District Court.

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[5] If Rotkiske had preserved reliance on equitable tolling on appeal, then Judges McKee, Ambro, Vanaskie, and Shwartz would have remanded to allow the District Court to consider whether he would be entitled to rely on this doctrine because our precedent had not previously recognized that a defendant's self-concealing conduct may be a basis for equitable tolling.

2016 WL 1021140
Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

Kevin C. Rotkiske, Plaintiff,
v.
Paul Klemm et al., Defendants.

CIVIL ACTION No. 15-3638
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Signed March 14, 2016
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Filed 03/15/2016

MEMORANDUM

GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Kevin Rotkiske claims that Paul Klemm Esq., Nudelman, Klemm & Golub, P.C., Nudelman, Nudelman & Ziering, P.C., Klemm & Associates ("K&A"), and John Does 1-10 have violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. ("FDCPA"). Mr. Rotkiske alleges that the Defendants wrongfully obtained a default judgment against him which then caused him financial damage when his mortgage application was rejected. The Defendants move to dismiss the Amended Complaint with prejudice.

The Court concludes that Mr. Rotkiske's claim is barred by the FDCPA's statute of limitations and will be dismissed with prejudice.

II. ALLEGATIONS IN THE AMENDED COMPLAINT[1]

Between 2003 and 2005 Mr. Rotkiske incurred credit card debt with Capital One Bank. Once the debt was deemed in collection status, Capital One Bank referred the debt to K&A. K&A initiated a lawsuit against Mr. Rotkiske in March 2008, seeking payment on the debt in the amount of $1,500. K&A attempted to serve Mr. Rotkiske at a prior residence. At that residence, a male individual unknown to and unassociated with Mr. Rotkiske accepted service of the complaint. K&A then allegedly withdrew the lawsuit because it could not locate Mr. Rotkiske.

In January 2009, the Defendants refiled the collection lawsuit and again attempted to serve Mr. Rotkiske at the same address. Again, an individual unknown to Mr. Rotkiske accepted service on his behalf. The Defendants obtained a default judgment against Mr. Rotkiske in the second collection suit.

Allegedly, Mr. Rotkiske was unaware of either of the actions against him and of the default judgment until September 2014, when he applied for a mortgage.

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[1] The factual summary is based on the allegations in the Amended Complaint, which the Court assumes to be true for purposes of this motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

His mortgage application was rejected because of the outstanding judgment against him, as reflected on his credit report. The Amended Complaint alleges that the Defendants deliberately made sure that Mr. Rotkiske would not be properly served and thus wrongfully obtained the default judgment against him in violation of the FDCPA.[2]

III. LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. Although Federal Rule of Civil Procedure 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal quotation marks omitted) (alteration in original), the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citation omitted).

To survive a motion to dismiss, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for

[2] Mr. Rotkiske's Amended Complaint also alleged that the second debt collection suit was filed outside the applicable statute of limitations; however, in his response to the Defendant's Motion, Mr. Rotkiske withdrew the allegation. Plf.'s Resp. 4 (Docket No. 17) ("Plaintiff withdraws its statute of limitations argument and corresponding allegations without prejudice until discovery commences herein").

the misconduct alleged." *Iqbal*, 556 U.S. at 678. Specifically, "[f]actual allegations must be enough to raise a right to relief above the speculative level. . . ." *Twombly*, 550 U.S. at 555 (citations omitted). The question is not whether the claimant will ultimately prevail, but whether the complaint is "sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

When deciding a Rule 12(b)(6) motion to dismiss, the Court may look only to the facts alleged in the complaint and its attachments. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). Likewise, the Court must accept as true all reasonable inferences that may be drawn from the allegations, and view those facts and inferences in the light most favorable to the non-moving party. *See Rocks v. City of Phila.*, 868 F.2d 644, 645 (3d Cir. 1989).

IV. DISCUSSION

The Defendants make two arguments in their Motion to Dismiss: (1) Mr. Rotkiske's claim is time-barred; and (2) Mr. Rotkiske's action violates the *Rooker-Feldman* doctrine, and should be dismissed for lack of subject matter jurisdiction.[3] Because Defendants'

[3] The Defendants also argued that the second collection lawsuit was timely filed; however, because Mr. Rotkiske has

Rooker-Feldman argument calls on the Court to determine if it has subject matter jurisdiction, that argument will be addressed first.

A. *Rooker-Feldman* Doctrine

The *Rooker-Feldman*[4] doctrine jurisdictionally bars claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Four requirements must be met for the doctrine to apply: "(1) the federal plaintiff lost in state court; (2) the plaintiff 'complain[s] of injuries caused by [the] state-court judgments'; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010) (quoting *Exxon Mobil*, 544 U.S. at 284)). "The Supreme Court has emphasized that *Rooker-Feldman* is a 'narrow doctrine' that 'applies only in limited circumstances.' +" [sic] *Giles v. Phelan, Hallinan & Schmieg, L.L.P.*, 901 F. Supp. 2d 509, 521 (D.N.J. 2012) (citing *Lance v. Dennis*, 546 U.S. 459, 464-66 (2006)).

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withdrawn allegations relating to the timeliness of that suit the Court will not address this argument.

[4] *D.C. Ct. of App. v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

A complaint which alleges "injury caused by the defendant's actions and not by the state-court judgment" does not implicate *Rooker-Feldman*. *Great W. Mining & Mineral Co.*, 615 F.3d at 167. If the injury complained of existed prior to the state-court proceedings, such proceedings cannot be the source of the injury. *Id*. By way of example, in *Conklin v. Anthou*, 495 F. App'x 257 (3d Cir. 2012), the plaintiff sued various defendants alleging that they had participated in a scheme to illegally foreclose on the plaintiff's property through the use of fraudulent mortgage documents. *Id*. at 260. To the extent the plaintiff was soliciting direct federal review of the state court decisions, his claims were barred by *Rooker-Feldman*. However, the court also held that the plaintiff was "not prevented from otherwise attacking the parties to the foreclosure proceedings or alleging that the methods and evidence employed were the product of fraud or conspiracy, regardless of whether his success on those claims might call the veracity of the state-court judgments into question." *Id*. at 262; *See also Giles*, 901 F. Supp. 2d at 522 (declining to dismiss the plaintiff's claims based on the *Rooker-Feldman* doctrine because "[p]laintiffs here are not challenging the state court judgments; they are challenging the Defendants' actions in procuring those judgments").

In this case, Mr. Rotkiske alleges that the Defendants violated the FDCPA by fraudulently obtaining the default judgment through their efforts to make sure that Mr. Rotkiske would not be properly served. While the first and third *Great W. Mining & Mineral Co.*

elements are clearly met – the Defendants obtained a default judgment against Mr. Rotkiske and that judgment was rendered before Mr. Rotkiske filed this lawsuit – Mr. Rotkiske's Amended Complaint does not complain of injuries caused by the state court judgment. Rather, like the plaintiffs in *Conklin* and *Giles*, Mr. Rotkiske is challenging the Defendants' actions in procuring the default judgment. As a result, the Court concludes that this case falls outside of the limited circumstances under which the *Rooker-Feldman* doctrine will bar a plaintiff's claims. Therefore, the Court will turn to the Defendants' statute of limitations arguments.

B. Statute of Limitations

The Defendants argue that Mr. Rotkiske's lawsuit was filed six years after the alleged violation of the FDCPA, and thus is timed-barred.

Under the FDCPA, an action must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Mr. Rotkiske argues that the discovery rule, which delays the beginning of a limitations period until the plaintiff knew of or should have known of his injury, applies to FDCPA claims. Under the discovery rule as articulated by Mr. Rotkiske, his action would be timely, as Mr. Rotkiske allegedly only became aware of the violation in September 2014, ten months before he commenced this suit. In the alternative, Mr. Rotkiske contends that the Court should

apply the doctrine of equitable tolling to the same effect.

i. Discovery Rule

The actual language of the statute weighs against the application of the discovery rule. Absent a contrary directive from Congress, the discovery rule applies to federal statutes of limitations. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 613 (3d Cir. 2015) (holding that the discovery rule applies to a statute which requires a plaintiff to act "within 2 years of the date the [plaintiff] knew or should have known about the alleged [violation]"). In the FDCPA, Congress explicitly used the phrase, "from the date *on which the violation occurs*." 15 U.S.C. § 1692k(d) (emphasis added). The Defendants argue that this language serves as a contrary directive from Congress with respect to the application of the discovery rule and cuts against any argument that a plaintiff's awareness of the violation should factor into the calculation of the accrual date. The Defendants further assert that this explicit language signifies that the FDCPA is an occurrence statute, meaning that the claim accrues at the time of the alleged violation regardless of when a plaintiff discovers it.

Circuit courts have split when determining whether the discovery rule applies to the one-year limitations period of the FDCPA. The Fourth and Ninth Circuits have held that the discovery rule applies to the FDCPA's one-year statute of limitations. *Lembach*

v. Bierman, 528 F. Appx. 297, 302 (4th Cir. 2013); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 941 (9th Cir. 2009) (discussing the Supreme Court's skepticism about general application of the discovery rule in *TRW Inc. v. Andrews*, 534 U.S. 19, 33 (2001), yet holding that the discovery rule applies). Conversely, the Eighth and Eleventh Circuits have rejected the application of the discovery rule to FDCPA claims. *Maloy v. Phillips*, 64 F.3d 607, 608 (11th Cir. 1995) (holding that the accrual date for the plaintiff's FDCPA claim was the date on which the defendant mailed an unlawful collection letter rather than the date on which the plaintiff received the letter); *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992) (holding the same and stating that the one-year period should be calculated from the defendant's "last opportunity to comply with the FDCPA"). Several other circuits have declined to rule on the issue. *See Benzemann v. Citibank N.A.*, 806 F.3d 98, 103 n.2 (2d Cir. 2015) ("[W]e need not address Benzemann's alternative argument that his claim was timely because Section 1692k(d) is subject to the "discovery rule" of federal common law"); *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 446 n.12 (5th Cir. 2013) ("Importantly, we need not and do not decide whether a discovery rule applies to § 1692k(d)'s one-year limitations period"); *Johnson v. Riddle*, 305 F.3d 1107, 1114 n.3 (10th Cir. 2002) ("[I]t is unnecessary for us to consider whether a discovery rule applies to the FDCPA statute of limitations").

While the Third Circuit Court of Appeals has not explicitly addressed whether the discovery rule applies to the FDCPA, one unpublished decision is instructive. In *Peterson v. Portfolio Recovery Assocs., LLC*, 430 F. App'x 112 (3d Cir. 2011), the court examined whether, following an initial communication that violated the FDCPA, subsequent communications that were not direct violations of the FDCPA could serve as "continuing violations" that would re-set the statute of limitations. *Id*. at 115. The court cited to *Mattson*, *Maloy*, and *Nass v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997), stating, "Other circuits have held, entirely reasonably, that the FDCPA statute of limitations should begin to run on the date of 'the debt collector's last opportunity to comply' with the Act." *Id*. Based on that proposition, the court held that the defendant's last opportunity to comply with the act came when it sent the initial communication, thus the subsequent communications did not extend the limitations period.[5] *Id*.

Both parties here advance public policy arguments in support of their relative positions. Mr. Rotkiske argues that the discovery rule should apply because the alternative would cause adverse incentives for debt collectors to wrongfully obtain judgments against debtors and then wait for the statute of limitations to run before attempting to collect on the judgment. The Defendants counter that such a public policy

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[5] Then, in *Glover v. F.D.I.C.*, 698 F.3d 139 (3d Cir. 2012), the court held that the *defendant's* lack of knowledge or intent regarding the FDCPA violation has no bearing on the date of accrual of a claim. *Id*. at 149.

argument is not realistic because debt collects [sic] are just that: their job is to collect debts rather than to secure and then sit on judgments in hopes of relying on a statute-of-limitations defense in a potential FDCPA lawsuit that may or may not materialize. Furthermore, the Defendants argue that the rule in *Mattson* and *Maloy* creates a more certain date by which to calculate the statute-of-limitations period and would prevent factual disputes over when the plaintiff became aware of or reasonably should have become aware of the FDCPA violation.[6] This argument becomes more persuasive when one considers that, based on the necessity of the plaintiff challenging not the default judgment itself but rather the defendant's conduct in obtaining that judgment, verifying when the plaintiff discovered such conduct is even more difficult than verifying when the plaintiff became aware of the judgment itself.

The Court is persuaded by the actual statutory language, buttressed by the Defendants' arguments that the discovery rule does not apply to a FDCPA claim. The language used in the statute by Congress is consistent with beginning the one-year limitations period on the date of the defendant's last opportunity to comply with the statute, rather than the date on which the plaintiff discovers or should have discovered the

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[6] The Defendants attempt to distinguish the adverse *Mangum* decision because that case involved a difference of six *days* between when the violation occurred and when the plaintiff discovered the violation, whereas this case involves a difference of six *years* between the violation and discovery.

violation. Additionally, the limited caselaw from the Third Circuit Court of Appeals appears to embrace the rule stated in *Mattson* and *Maloy* which declines the application of the discovery rule.

Consequently, Mr. Rotkiske's FDCPA claim is untimely. Based on the allegations in the Amended Complaint, the Defendants' alleged violation of the FDCPA occurred "[o]n or about January 2009." Mr. Rotkiske filed his initial complaint in this case on June 29, 2015, well outside the one-year limitations period.[7] Having concluded that the discovery rule does not apply and that Mr. Rotkiske's claim was not filed within the one-year statute of limitations found in the FDCPA, the Court must address Mr. Rotkiske's alternative argument – that the statute of limitations should be equitably tolled due to fraudulent concealment by the Defendants.

ii. Equitable Tolling

"Equitable tolling, if available, can rescue a claim otherwise barred as untimely by a statute of limitations when a plaintiff has 'been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Santos ex rel. Beato v. United States*, 559 F.3d 189, 197 (3d Cir. 2009) (citing *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999)). Fraudulent concealment, one type of equitable tolling,

[7] This conclusion would likewise be appropriate even if the Court were to flexibly construe the "[o]n or about January 2009" date.

is an equitable doctrine that is read into every federal statute of limitations. *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 256 (3d Cir. 2001). The doctrine should be used sparingly and requires a plaintiff to prove "(1) 'active misleading' by the defendant, (2) which prevents the plaintiff from recognizing the validity of her claim within the limitations period, (3) where the plaintiff's ignorance is not attributable to her lack of 'reasonable due diligence in attempting to uncover the relevant facts.' +" [sic] *Id*. (quoting *Forbes v. Eagleson*, 228 F.3d 471, 486 (3d Cir. 2000)).

As an initial matter, the statute of limitations clause in the FDCPA falls under the heading, "Jurisdiction," and, consequently, there is split authority among the circuits regarding whether or not the limitations period is jurisdictional, meaning that it would not be subject to equitable tolling. *Compare Mattson*, 968 F.2d at 262 *with Marshall-Mosby v. Corp. Receivables, Inc.*, 205 F.3d 323, 327 (7th Cir. 2000). However, at least two Third Circuit Court of Appeals cases have considered equitable tolling arguments related to FDCPA claims. *See Kliesh v. Select Portfolio Servicing, Inc.*, 527 F. App'x 102, 104 (3d Cir. 2013); *Glover*, 698 F.3d at 151. Therefore, the Court will consider whether the doctrine of equitable tolling should be applied to Mr. Rotkiske's claim.

Mr. Rotkiske's sole allegation regarding fraudulent concealment is the fact that the second collection suit was filed at the same address as the first collection suit, even though the Defendants knew this was no longer Mr. Rotkiske's residence. The Defendants argue

that this conduct, even accepted as true, does not amount to "active misleading" on their part. In his response, Mr. Rotkiske does not address Defendants' arguments that equitable tolling should not apply, but rather only notes that the doctrine of equitable tolling applies to federal statutes of limitations and then focuses on the application of the discovery rule. Mr. Rotkiske's assertion that the doctrine of equitable tolling should save his time-barred claim is merely a reiteration of his discovery-rule argument, suggesting that he conflates the two. However, in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994), the court explained the difference between the discovery rule and equitable tolling: "The discovery rule keys on a plaintiff's cognizance, or imputed cognizance, of actual injury. Equitable tolling, on the other hand, keys on a plaintiff's cognizance, or imputed cognizance, of the facts supporting the plaintiff's cause of action." *Id*. at 1390. The court goes on to note that for the purposes of equitable tolling, "cognizance of the facts supporting the plaintiff's cause of action presumes cognizance of actual injury." *Id*. at 1390 n.8.

In this case, there are no allegations of active misleading on the part of the Defendants regarding the facts supporting Mr. Rotkiske's cause of action. Rather, the actions Mr. Rotkiske claims amount to active misleading are the same actions that form the basis of the alleged violation of the FDCPA. This is not a case where Mr. Rotkiske was cognizant of his actual injury and was himself misled regarding the facts supporting his cause of action. Mr. Rotkiske's arguments

supposedly supporting application of equitable tolling are no more than a second attempt to apply the discovery rule to his FDCPA claim. Having concluded that the discovery rule does not apply, and bearing in mind that the doctrine is to be used sparingly, the Court finds that the doctrine of equitable tolling by way of fraudulent concealment, even though technically available, cannot save Mr. Rotkiske's time-barred FDCPA claim because he was not misled by any conduct committed by any defendant.

V. CONCLUSION

The claim asserted in Mr. Rotkiske's Amended Complaint is barred by the statute of limitations. For the foregoing reasons, the Court grants the Defendants' Motion to Dismiss with prejudice.