

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN C. ROTKISKE,)
)
 Petitioner,)
)
 v.) No. 18-328
)
 PAUL KLEMM, ET AL.,)
)
 Respondents.)

Pages: 1 through 64
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KEVIN C. ROTKISKE,)
Petitioner,)
v.) No. 18-328
PAUL KLEMM, ET AL.,)
Respondents.)

- - - - -
Washington, D.C.
Wednesday, October 16, 2019

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 11:07 a.m.

APPEARANCES:

SCOTT E. GANT, ESQ., Washington, D.C.; on behalf
of the Petitioner.
SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of
the Respondents.
JONATHAN C. BOND, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
for the United States, as amicus curiae,
supporting the Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-328, Rotkiske versus Klemm.

Mr. Gant.

ORAL ARGUMENT OF SCOTT E. GANT

ON BEHALF OF THE PETITIONER

MR. GANT: Mr. Chief Justice, and may it please the Court:

While this case is about the FDCPA, it is also fundamentally about the relationship between this Court and Congress. That relationship has long been governed in part by two important presumptions relevant here: first, that Congress legislates against the backdrop of the common law and, second, that Congress legislates aware of this Court's decisions.

When Congress enacted the FDCPA in 1977, this Court had long ago adopted a common law rule eventually known as the discovery rule applicable to cases of fraud and concealment.

Citing to and quoting the Bailey decision of this Court from 1875, in Holmberg in

1 1946, this Court stated that it had long ago
2 adopted as its own the old chancery rule, that
3 where a plaintiff has been injured by fraud and
4 remains in ignorance of it without any false or
5 want of diligence or care on his part, the bar
6 of the statute does not begin to run until the
7 fraud is discovered, though there will be no
8 special circumstance or efforts on the part of
9 the party committing the fraud to conceal it
10 from the knowledge of the other party.

11 The Court then continued in Holmberg
12 explaining unequivocally this equitable doctrine
13 is read into every federal statute of limitation
14 and added even those where "an explicit statute
15 of limitation for bringing suit."

16 The United States concedes, as it has
17 in prior cases, that there is a common law
18 discovery rule applicable to fraud and
19 concealment.

20 In the decision below, the Third
21 Circuit never mentioned the Holmberg case. Its
22 analysis began and ended with two words in
23 Section 813(d), "violation occurred." The Third
24 Circuit understood that those two words by
25 implication, not expressly, but by implication

1 -- that's at appendix page 8 -- displaced the
2 common law discovery rule applicable to fraud.

3 In reaching this conclusion, the Third
4 Circuit deployed what I believe is a false
5 dichotomy, what the Third Circuit described on
6 the one hand as an occurrence rule and on the
7 other hand a common law discovery rule. And in
8 the view of the Third Circuit, if a -- Congress
9 deploys in a statute a so-called occurrence
10 rule, a common law discovery rule is presumed to
11 be displaced.

12 The Third Circuit cited no decision of
13 this Court in setting forth this dichotomy
14 between an occurrence rule and a common law
15 discovery rule. The analysis is at page 6 of
16 the appendix. That conclusion of the Third
17 Circuit is also in opposition to this Court's
18 decision in 1918 in the Exploration case, which
19 is discussed at length in our brief and the
20 briefs of the other parties.

21 There, that is, I think, fairly
22 characterized as an occurrence rule. The
23 statute in Exploration ran from the date of
24 issuance of a land patent. So that was a date
25 certain tied to facts.

1 That, under the theory of the Third
2 Circuit and my friends, is an occurrence rule,
3 and there the Court determined that the common
4 law discovery rule should apply.

5 JUSTICE SOTOMAYOR: Mr. Gant, you keep
6 saying fraud and self-concealing as if they're
7 alternative rules. I -- I think of there being
8 multiple equitable doctrines, equitable tolling,
9 equitable estoppel, and what I call the
10 self-concealing fraud, which was the one
11 mentioned in Exploration, argued by the
12 government in Gabelli and in other cases.

13 Are you creating a fourth --

14 MR. GANT: Well, not --

15 JUSTICE SOTOMAYOR: -- that -- that --
16 that every case, every federal statute
17 inherently says for whatever reason, if you
18 didn't discover the fraud, equity could let you
19 have a discovery rule?

20 MR. GANT: No. I'm -- we're not
21 intending to proffer a rule. In fact, what
22 we're attempting to do is advance the
23 application of the already established rule, the
24 Bailey/Holmberg rule, and my refrain --

25 JUSTICE SOTOMAYOR: I call it the

1 self-concealing rule. Is there -- that the
2 fraud you committed is by its nature
3 self-concealing. Is that an accurate way of --

4 MR. GANT: I --

5 JUSTICE SOTOMAYOR: -- stating that
6 rule?

7 MR. GANT: -- I think so. We're not
8 intending to differentiate it.

9 JUSTICE SOTOMAYOR: All right. Then
10 what do you make of Footnote 5 in the Third
11 Circuit's opinion? Because four of the -- I
12 guess they're justices or judges there, judges,
13 would have remanded to allow the district court
14 to consider whether he would be entitled to rely
15 on this doctrine, being the self-concealing
16 rule, because our precedent had not previously
17 recognized that a defendant's self-concealing
18 conduct may be a basis for equitable tolling.

19 That seems to me that they understood
20 the same thing I did, which is that there might
21 be a self-concealing rule but that you had
22 waived it, and that's why those four judges
23 weren't voting to remand.

24 How do you read that any differently?

25 MR. GANT: This is as good a time as

1 any to get to an important issue here, which is
2 the confusion -- understanding the relationship
3 between what I'm calling the common law
4 discovery rule, the Bailey/Holmberg rule, and
5 the refrain I was using of -- of fraud or
6 concealment comes from TRW directly, which is
7 why I was using it but not intending to create a
8 different doctrine.

9 All of the parties here and the
10 scholars' amicus brief that was submitted all
11 agree that there has been at times confusing use
12 of terminology. And I think it is impeding an
13 understanding of what is really going on in the
14 courts below and this case and in the Third
15 Circuit's discussion of these issues, including
16 in Footnote 5 that you referred to, Your Honor.

17 So let me, if I may, set -- in trying
18 to answer your question, set forth what I think
19 is the best understanding of the discovery rule
20 on the one hand, the equitable tolling rule on
21 the other hand, and then try and bring it
22 directly to your question of what I understand
23 the Third Circuit to have been doing in Footnote
24 5.

25 Our view is that the best

1 understanding of the discovery rule is that it
2 applies when the plaintiff is unaware of their
3 cause of action or the facts giving rise to the
4 cause of action, here the violation, because of
5 fraudulent conduct or self-concealing conduct by
6 the defendant. And in that situation, the clock
7 for the statute of limitations does not begin to
8 run at all.

9 Equitable tolling, on the other hand,
10 applies, we think, best understood, in a
11 situation where the plaintiff is aware of the
12 violation giving rise to a cause of action but,
13 for some reason, in applying the elements set
14 forth in this Court, exercised due diligence or
15 was -- diligently pursued his or her rights but
16 was unable because of some extraordinary
17 circumstance to timely file suit. Then, if the
18 doctrine is deemed to apply, then the untimely
19 filing is forgiven.

20 And in that circumstance, the statute
21 of limitations is best understood to have begun
22 to run but then be tolled or abated because of
23 the circumstances.

24 That's our understanding of these
25 rules, and that's the same understanding I think

1 that the scholars' brief sets forth. And it's
2 -- under that view, equitable tolling would be
3 best understood as not applicable to this
4 situation.

5 Now this Court, I respectfully submit,
6 has sometimes used the label of "equitable
7 tolling" to describe circumstances that I think
8 are best understood as the Bailey/Holmberg
9 discovery rule, and that has caused confusion
10 here and -- and in courts below. And I think it
11 did cause confusion in the Third Circuit.

12 And the Third Circuit appeared to
13 operate under the view, at the time this case
14 was decided, that self-concealing conduct did
15 not qualify, that there had to be some separate
16 act, apart from the elements of the offense, in
17 addition that was concealing.

18 An example that I'm familiar with from
19 my own practice is in antitrust cases, where
20 although they use the label of fraudulent
21 concealment, which I think is best understood
22 separately as a close cousin of the discovery
23 rule, in those circumstances, you have a
24 violation alleged of, say, Section 1 of the
25 Sherman Act, a conspiracy.

1 And most cases, when there's a statute
2 of limitations argument that the conduct went
3 back more than the four years provided in the
4 statute, there's an argument about whether the
5 conspiracy was concealed.

6 Most courts there require some
7 additional action in addition to the -- the --
8 there the conspiracy itself.

9 JUSTICE KAVANAUGH: Is the --

10 MR. GANT: Here, what --

11 JUSTICE KAVANAUGH: -- discovery --
12 I'm sorry to interrupt -- is the discovery rule
13 equitable?

14 MR. GANT: I believe it is. But I
15 think it -- it is equitable but also properly
16 understood as an exercise in statutory
17 interpretation. I don't think they're mutually
18 exclusive.

19 JUSTICE KAVANAUGH: I grant you that.
20 So the discovery rule could be part of a
21 statute, but, if it's not part of a statute,
22 there exists, I think you're saying, an
23 equitable discovery rule as well that is akin to
24 but maybe not the same as equitable tolling.

25 Is that your argument?

1 MR. GANT: Yes to the last part of
2 that, that equitable --

3 JUSTICE KAVANAUGH: Can you just give
4 me real clear on the answer?

5 MR. GANT: Yes.

6 JUSTICE KAVANAUGH: Because clarity,
7 we do need clarity.

8 MR. GANT: I -- I will do my best and
9 I -- I agree that that's useful for everybody.
10 There's a distinction between statutory
11 discovery rule, obviously, and the common law
12 discovery rule.

13 The statutory discovery rule is
14 employed by Congress from time to time. It was
15 present in TRW, for example. That was in my
16 understanding the basis for the ruling in that
17 case, principally, was that Congress had -- had
18 decided to statutorily write in a discovery rule
19 and then, applying traditional tools of
20 statutory interpretation, determine that it
21 wouldn't then also add on the common law
22 discovery rule.

23 So, when there is an absence like here
24 of a statutory discovery rule, then the question
25 becomes did Congress intend to permit or

1 displace the addition or, in the words of
2 Gabelli, the grafting on to, which I don't view
3 as pejoratively, but I think my friends on the
4 other side attempt to use that way, grafting on
5 or -- on to or importing into the statute a
6 common law discovery rule.

7 JUSTICE KAVANAUGH: When you use
8 common law discovery, is that equivalent to
9 equitable discovery?

10 MR. GANT: I -- I think it's the --
11 the doctrine that originated in equity, but also
12 applied to cases of law, the Court said that
13 back in Bailey, the doctrine had its origins in
14 equity, applied to law, and it is applied, and I
15 -- and here is where I think that it -- that
16 it's both equitable in origins and I think in
17 nature, but -- but also fundamentally an
18 exercise in statutory interpretation because the
19 touchstone is whether or not intended --
20 Congress intended to foreclose or permit the
21 application of the common law doctrine to the
22 statute in the absence of some express
23 indication.

24 JUSTICE GINSBURG: Well, if -- if you
25 are arguing an across-the-board discovery rule

1 applies to the FDCPA, I think that TRW weighs
2 very heavily against you. So you could -- you
3 could be arguing across-the-board discovery rule
4 or you could accept that there is a fraud
5 exception.

6 You seem to be arguing the first, that
7 in -- that -- that the -- there's a discovery
8 rule for all FDCPA cases.

9 MR. GANT: Justice Ginsburg, we -- we
10 mean the latter. So --

11 JUSTICE GINSBURG: Before you --
12 except the fraud exception. But then the
13 government tells us that this case doesn't fit
14 within the fraud exception.

15 MR. GANT: And -- and it clearly does.
16 So, just to be clear, we're -- we're not arguing
17 that every FDCPA action is timely so long as the
18 plaintiff was unaware. What we're saying is
19 that, if they were unaware, because of
20 circumstances that fit within the
21 Bailey/Holmberg framework, fraud that prevented
22 the plaintiff from knowing about their cause of
23 action, under that long-standing doctrine, then
24 the plaintiff is permitted to file out of time.

25 JUSTICE GINSBURG: Is it -- it's not a

1 violation -- what -- what happened here serving
2 the debtor at an address that was not the
3 debtor's, that's not a violation of the FDCPA,
4 is it?

5 MR. GANT: Unto itself it might not
6 be, but we have a very different circumstance in
7 this case. So the facts that are alleged, and
8 you'll recall that this case comes to the Court
9 on a ruling on a 12(b)(6) motion.

10 So, of course, the Court construes the
11 allegation -- accepts the allegations as true.
12 The allegations as made and as understood by the
13 lower courts were as follows: The Respondent
14 retained a process server to serve -- file the
15 complaint against my client. There was an
16 affidavit of service filled out that said that
17 the head of the household had been served.

18 And that was false. And they had --
19 and we allege and the facts below assert that
20 they had reason to know that that was false.

21 So they filed a false affidavit of
22 service, and that false affidavit of service was
23 then the basis for a default judgment. So it's
24 those two actions together, the filing of a
25 false affidavit of service and then obtaining a

1 default judgment on that basis, that we contend
2 violates Sections 807 and 808 of the statute
3 which are codified at Section 1692(e) and (f).

4 Those prohibit -- (e) prohibits any
5 false, deceptive, or misleading representation
6 or means of pursuing a debt.

7 JUSTICE BREYER: That isn't the issue.
8 I don't think the issue is, is your basic claim
9 a claim of fraud. And it doesn't sound it.

10 I mean, who did you fraud? The judge?

11 MR. GANT: Yes. The -- it was --

12 JUSTICE BREYER: Have you ever heard
13 of a case brought under this where the fraud --
14 you -- I mean, the cases that were brought where
15 somebody said give me your land and I will,
16 because the land has gold or something on it,
17 that was a lie, so buy my land, it has gold on
18 it, and they sell the land and it doesn't have
19 gold on it. That sort of fraud. Okay?

20 But I've never heard of a fraud case.
21 I'm not saying you -- it may be actionable. I
22 mean, it may be that you recover under the
23 statute, it may be a bad thing, but it doesn't
24 sound like common law fraud to me.

25 So is there something that -- where

1 the person defrauded is a judge because the
2 process server rightly or wrongly filed the
3 wrong name? But that's what you're saying is a
4 common law fraud?

5 MR. GANT: Yes. The --

6 JUSTICE BREYER: And what is the --
7 what is the case that says a process server who
8 fills in the wrong name and fools the judge is
9 -- the person who hired the process server is --
10 has committed common law fraud?

11 MR. GANT: Well, it's not -- with
12 respect, Justice Breyer, it's not just the
13 process server and -- and the allegations go
14 further than an innocent mistake.

15 And the other side argues that this
16 was an innocent mistake.

17 JUSTICE BREYER: I'm asking you what
18 here brings your case within the rubric of
19 common law fraud. So, if we had Lord Coke in
20 front of us, you see, he would say, oh, I
21 recognize this old man still recognizes that --
22 that this is common law fraud.

23 MR. GANT: Right.

24 JUSTICE BREYER: That's what I want to
25 know.

1 MR. GANT: And our allegation is that
2 the -- the -- the knowing misrepresentation on
3 the affidavit of service or reckless
4 representation, we cite to laws like --

5 JUSTICE BREYER: Who -- who
6 represented, who writes the representation? The
7 process server or the -- your -- your -- or the
8 other person?

9 MR. GANT: The process server signs --
10 signs under -- effectively under penalty of
11 perjury --

12 JUSTICE BREYER: Yeah.

13 MR. GANT: -- that the representations
14 are true. They were false. And we contend --

15 JUSTICE BREYER: And who makes the
16 representations?

17 MR. GANT: The process server makes
18 the representation.

19 JUSTICE BREYER: Oh, so is your client
20 the process server?

21 MR. GANT: No. That -- that's what I
22 was getting to.

23 JUSTICE BREYER: Is that their client?

24 MR. GANT: It -- it is not. That was
25 the next point, which was that then the

1 attorneys are the ones who file the affidavit of
2 service, which we contend they had reason to
3 know was false, and then the -- the attorneys
4 then prosecute the case in obtaining a court to
5 judge --

6 JUSTICE BREYER: No, I know the latter
7 part. I -- I -- I got the latter part. That's
8 the harm. But -- but the -- the -- the fraud
9 consists of an attorney making a -- knowingly
10 accepting the false statement of a process
11 server?

12 MR. GANT: Yes.

13 JUSTICE BREYER: Now the closest case
14 that you have found that calls that activity
15 common law fraud is?

16 MR. GANT: We didn't look for a
17 specific case, Your Honor.

18 JUSTICE BREYER: Oh, you didn't
19 because it's so obvious that it's common law
20 fraud?

21 MR. GANT: Well, if -- if -- you may
22 not find this satisfactory, but we weren't the
23 only ones here who thought that this constituted
24 fraud. The solicitor general's brief, I believe
25 it's at page 26 --

1 JUSTICE BREYER: No, no, I'm not --
2 I'm not -- I'm just trying to find out for
3 myself. And I -- and I'm not certain. That's
4 why I'm asking.

5 MR. GANT: Right. And -- and so the
6 solicitor general called this akin to fraudulent
7 concealment.

8 JUSTICE BREYER: Akin to. Now wait.
9 Well, that's a totally different thing. Your
10 discovery -- look, I -- my bible on this is
11 Judge Posner's opinion in the Cada case. So, if
12 that's wrong, you better stop me now. But I've
13 read that about --

14 MR. GANT: I don't know whether it's
15 wrong because I haven't read it, so I will not
16 --

17 JUSTICE BREYER: Well, it's a very
18 good list of all these different doctrines,
19 equitable estoppel, equitable this, and there
20 are like six of them or something, and one of
21 them, the thing that you're talking about now,
22 is a special thing called -- what's it called?
23 Undiscovered fraud.

24 I thought an element of that is that
25 the basic underlying thing is common law fraud.

1 And that's what I'm trying to investigate now.

2 But, if you have nothing more to say, I have
3 nothing more to say because, if I knew more
4 about it, I wouldn't ask the question.

5 MR. GANT: I -- I don't have a case.
6 I wish I did. Obviously, that is something that
7 could be and we respectfully submit should be
8 addressed on remand.

9 The -- not only the solicitor general
10 but one of the amici, the trade -- the major
11 trade association for the creditors, the ACA,
12 also acknowledged in their brief that what's --
13 what's at issue here -- it has a name, it's
14 called "sewer service" -- it's so prevalent that
15 it has a name. There was testimony before
16 Congress when the FDCPA was enacted. A
17 representative from the FTC came to Congress at
18 the beginning of the hearings that led to the
19 enactment of the statute and, in August of 1976,
20 said that this phenomenon, which is at issue
21 here, sewer service, is a major problem in many
22 urban areas. There --

23 JUSTICE GINSBURG: But you said -- you
24 said the statement was the process server. The
25 process server was told by the creditor serve

1 process at this address. So it wasn't -- the
2 process server didn't make it up. The process
3 server was told where the process should be
4 served.

5 MR. GANT: The -- the process server
6 -- and I think it's helpful to understand for
7 context here, there was an original suit that
8 was withdrawn which also had a defective
9 affidavit of service and then a subsequent one
10 that led to the default judgment at issue here.

11 It was the same process --

12 JUSTICE GINSBURG: But it was still --
13 the prosecutor -- the process server was just
14 following the directions of the person who --
15 who engaged the process server.

16 MR. GANT: Well, they were certainly
17 following the direction to serve process. We
18 don't know -- there's nothing in the record that
19 indicates the substance of the discussion. We
20 do know that the first service was attempted at
21 an address and it falsely represented that the
22 defendant -- the plaintiff was personally
23 served. He was not. It also represented he was
24 black, according to the affidavit of service.
25 He's not. He's Caucasian. It represented he

1 was 51 years old. He was in his late 30s at the
2 time. That was at a -- and so they had reason
3 -- and then that suit was withdrawn, we believe
4 because they knew that the affidavit of service
5 was false and that the plaintiff didn't actually
6 live at that address.

7 Then a new suit was filed and a new
8 affidavit of service, the one at issue, was --
9 was filed.

10 JUSTICE SOTOMAYOR: Mr. Gant.

11 MR. GANT: Yes.

12 JUSTICE SOTOMAYOR: I -- I note it is
13 terribly confusing because of the confusion of
14 the use of terms. That's why I -- I called it a
15 self-concealing fraud.

16 MR. GANT: Yes.

17 JUSTICE SOTOMAYOR: It's not the
18 violation at issue that's self-concealing. It's
19 how the violation came about that's -- that
20 could be by self-concealing fraud, correct?

21 MR. GANT: Yeah.

22 JUSTICE SOTOMAYOR: Isn't that your --
23 your point?

24 MR. GANT: Yes. We -- we believe that
25 the common law discovery rule, the

1 Bailey/Holmberg rule, can apply either if the
2 fraud is an element of the offense --

3 JUSTICE SOTOMAYOR: Right.

4 MR. GANT: -- which it effectively is
5 here under our view under subsections (e) and
6 (f), or it can be separate and apart, in
7 addition to the elements of the offense. So,
8 here, this seems -- there have been several
9 questions, so I want to, if I could, just make
10 this clear because I think the facts are
11 important and they should be addressed on
12 remand. We're not saying we win on remand.
13 We're -- the other side will get to make its
14 arguments, including that we don't fit within
15 the contours of fraud.

16 But we believe that this is close --
17 what -- the decision below was you don't get a
18 -- a common law discovery rule applied to this
19 statute, period. That was wrong. That should
20 be reversed, and we should have an opportunity
21 then to have arguments about these issues,
22 whether the approach of -- the view of Justice
23 Breyer is right or at least -- or you're --
24 you're arguing, hypothetically, for argument's
25 sake, the view of Judge Posner, that this might

1 fall outside common law fraud.

2 We don't think it does. We cited
3 Black's Law Dictionary. In -- in my view, this
4 falls squarely within the contours of common law
5 fraud as described in Black's Law Dictionary,
6 which is a misrepresentation. It was a knowing
7 misrepresentation to the court. They served at
8 an address that they knew was not his. They
9 said they served the head of the household. And
10 that was false. And then they used that false
11 affidavit, made -- sworn under oath. The
12 attorneys then went into court and used it as
13 the basis for obtaining a default judgment,
14 which then prevented my client from obtaining a
15 mortgage, which he still doesn't have to this
16 day.

17 JUSTICE KAVANAUGH: You've referred to
18 remand a few times. I think the other side's
19 argument is that the statute itself does not
20 have a discovery rule and that any equitable
21 discovery rule or, as you're terming it, common
22 law discovery rule that might exist, unless
23 Congress expressly displaces it, was not raised
24 in the Third Circuit. Your response to that?

25 MR. GANT: I'm sorry, what wasn't

1 raised in the Third Circuit?

2 JUSTICE KAVANAUGH: Equitable --
3 equitable discovery.

4 MR. GANT: It is true that equitable
5 tolling per se was not addressed in the Third
6 Circuit. But Holmberg and Bailey were both
7 cited to the Third Circuit, and at the time, it
8 was clear in the Third Circuit --

9 JUSTICE KAVANAUGH: But I think what
10 they're saying -- and this may not be a winning
11 argument, but I just want to get your response
12 to it. I think what they're saying is those
13 were raised in the context of statutory
14 interpretation. Reading the statute, it does
15 not contain a discovery rule.

16 There may be still an equitable
17 discovery rule, but you didn't separately -- I
18 think they're saying this. You didn't
19 separately raise that kind of equitable
20 discovery argument.

21 MR. GANT: Right.

22 JUSTICE KAVANAUGH: Your response to
23 that? Is that wrong?

24 MR. GANT: Under -- they are wrong in
25 their understanding of the operation of the two

1 words "violation occurred" and its effect on
2 whether the common law discovery rule applies.

3 We say that that language is
4 inconclusive with respect to the question of
5 whether or not Congress intended to permit or
6 preclude the application of the common law
7 discovery rule, and we then urge the Court to
8 apply traditional tools of statutory
9 interpretation, to look to the statute's purpose
10 to eliminate these Debt Collection Practice Act
11 practices that are prohibited, the structure of
12 the statute. We discussed this at length in our
13 briefs. And based on those factors, we believe
14 it's clear that Congress would have intended for
15 the common law discovery rule to apply to this
16 issue.

17 JUSTICE KAGAN: And what about your
18 petition in this Court? Because, as I read your
19 petition in this Court, it was more about the
20 general statutory interpretation question,
21 whether there is a discovery rule that applies
22 generally in this statute, than it is about
23 whether certain equitable exceptions might
24 continue to exist.

25 MR. GANT: Yes. You're referring to

1 the petition for certiorari? Yeah. The
2 petition for certiorari clearly presented the
3 discovery rule for consideration. And that --

4 JUSTICE KAGAN: Well, but, again, what
5 did that mean?

6 MR. GANT: Well, I think --

7 JUSTICE KAGAN: As I read the
8 petition, it really did not address whether
9 there was an equitable exception of -- of -- of
10 the -- of the kind that the Third Circuit might
11 have thought had been waived.

12 MR. GANT: Well, that certainly wasn't
13 how it was intended. And you may know, I didn't
14 draft that, as I -- I don't read it that way,
15 and I -- I know for certain that that's -- was
16 not intended to exclude that.

17 What -- may I finish?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. GANT: What was intended with the
20 petition was to raise the question precisely as
21 I attempted to present it this morning, which is
22 whether or not Congress intended to permit or
23 foreclose the application of the common law
24 discovery rule to the statute. And we contend
25 that Congress clearly did not intend to

1 foreclose it.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. GANT: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky.

6 ORAL ARGUMENT OF SHAY DVORETZKY

7 ON BEHALF OF THE RESPONDENTS

8 MR. DVORETZKY: Mr. Chief Justice, and
9 may it please the Court:

10 Mr. Gant and I agree that this case is
11 about the relationship between this Court and
12 Congress. Congress provided in the FDCPA that
13 the statute of limitations would begin to run
14 when the violation occurs, not when it is
15 discovered.

16 That answers the question presented in
17 the cert petition. The plain meaning of
18 "violation occurs" concerns when the defendant
19 commits the violation, not when the plaintiff
20 learns of it. Unlike more ambiguous phrases
21 like "claim accrues" or "liability arises,"
22 "violation occurs" simply can't be read any
23 other way.

24 And we know Congress itself
25 understands "violation occurs" that way because,

1 in other statutes, including the 1978 Right to
2 Financial Privacy Act, Congress used the phrase
3 "violation occurs" to distinguish an
4 occurrence-based limitations period from a
5 discovery-based one.

6 But --

7 JUSTICE SOTOMAYOR: Is your position
8 simply -- did I let you finish?

9 CHIEF JUSTICE ROBERTS: I -- I think
10 you still have a little time left, don't you?

11 JUSTICE SOTOMAYOR: Oh, sorry.

12 MR. DVORETZKY: Like Justice Ginsburg
13 and Justice Kagan, I understand the question
14 presented here to be whether an across-the-board
15 discovery rule applies to the FDCPA. The --
16 that's the only issue that the Third Circuit
17 decided.

18 The cert petition does not cite Bailey
19 or Holmberg, doesn't mention the word "fraud."
20 If it had, we might have had an argument in our
21 brief in opposition for why this case doesn't
22 present a fraud case and therefore would be an
23 inadequate vehicle to consider that question.

24 So the only question before this Court
25 is whether -- should be whether there's an

1 across-the-board discovery rule.

2 Despite all of that, Mr. Gant focuses
3 his argument this morning on the fraud cases.
4 There are a number of reasons why the fraud
5 cases don't ultimately help him. I'd like to
6 start out focusing on one, which is those cases
7 are properly understood as equitable tolling
8 cases, not as discovery rule cases.

9 That's how this Court most recently
10 characterized them in cases like ANZ and in
11 Lozano. And it matters for four reasons that
12 the terminology be used correctly and that we
13 distinguish between discovery rule and equitable
14 tolling.

15 The four reasons are the following.
16 First, the two doctrines, the discovery rule and
17 equitable tolling, are different concepts with
18 different sources. The discovery rule was about
19 how to read the words Congress writes in a
20 statute. It's a statutory interpretation
21 question. That's the exercise that TRW was
22 engaged in.

23 Equitable tolling is about excusing
24 noncompliance with the words that Congress has
25 chosen. It is an application of courts'

1 inherent equitable powers, confirmed in the
2 Judiciary Act, which exist independent of what
3 Congress has said in any particular statute of
4 limitations.

5 As a result of that, and this is my
6 second point, the discovery rule and equitable
7 tolling have different scopes. The discovery
8 rule --

9 JUSTICE GINSBURG: But I thought --
10 but I thought that the -- Justice Scalia and my
11 opinion in TRW spoke about the discovery rule,
12 not equitable tolling, exception to the
13 discovery. The discovery rule could apply in
14 cases of fraud.

15 MR. DVORETZKY: Well, I think what TRW
16 is talking about was that the discovery rule
17 might apply to fraud statutes. That's different
18 from saying that there is a discovery rule in
19 any case of fraud that happens to arise under a
20 non-fraud statute, like the FDCPA.

21 The words violation occurred --
22 occurs, have to mean the same thing no matter
23 what the underlying type of FDCPA violation. It
24 can't mean violation occurs in a non-fraud
25 claim, but violation occurs or is discovered in

1 a fraud claim.

2 And -- and that's why the way to think
3 of excusing non-compliance with a limitations
4 period in a situation that did present fraud
5 would be as equitable tolling, because equitable
6 tolling is a case-by-case doctrine in which
7 courts use their inherent equitable powers to
8 excuse non-compliance with the statute --

9 JUSTICE KAGAN: But --

10 MR. DVORETZKY: -- on a particular
11 fact.

12 JUSTICE KAGAN: I mean, there might be
13 variants of equitable tolling, mightn't there?
14 I mean, one -- one variant is there were
15 extraordinary circumstances, an earthquake hit,
16 and so I couldn't file this suit in time, and so
17 you should toll the statute of limitations until
18 I can. I mean, that would be one.

19 And then a different one would be this
20 kind of: I couldn't possibly have known that
21 the statute of limitations had even started to
22 run because there was fraud committed against
23 me. Is that right?

24 I mean, you can put them all under an
25 umbrella label, but those are two different

1 things, aren't they?

2 MR. DVORETZKY: I agree that they
3 would be under the same category of equitable
4 relief because in both situations what a court
5 would be doing is not applying the language that
6 Congress wrote. Congress didn't say anything
7 about earthquakes.

8 But Congress would be excusing
9 compliance with the language that Congress --
10 I'm sorry, the court would be excusing
11 compliance with the language that Congress
12 wrote, based on either the earthquake or fraud.

13 What those have in common is that they
14 are under the bucket of equitable relief from
15 what Congress wrote.

16 JUSTICE KAGAN: And is your --

17 MR. DVORETZKY: That is a --

18 JUSTICE KAGAN: And is your view that
19 those are foreclosed by this statute or is your
20 view simply that those arguments were waived and
21 this case has nothing to do about them -- with
22 them?

23 MR. DVORETZKY: Our argument is that
24 those arguments were waived. They're not
25 properly before this Court. The only question

1 before this Court is how to read the words that
2 Congress wrote.

3 And when Congress wrote the words
4 "violation occurred," it didn't leave the door
5 open to read that across the board in every
6 FDCPA case as violation occurs or is discovered.

7 JUSTICE KAGAN: So you're --

8 MR. DVORETZKY: Not --

9 JUSTICE KAGAN: -- not taking a
10 position one way or the other about whether
11 those equitable defenses can be raised?

12 MR. DVORETZKY: I -- I don't think
13 that is presented by this -- by this case. The
14 issue hasn't been briefed. The Third Circuit
15 didn't -- the Third Circuit held that it was
16 waived. It's not presented in the cert petition
17 and it's simply not --

18 JUSTICE KAVANAUGH: But that's --

19 MR. DVORETZKY: -- not part of this
20 case.

21 CHIEF JUSTICE ROBERTS: So -- so it's
22 an open question, if you have a typical -- I
23 don't know if it's typical -- but equitable
24 tolling situation, the hurricane, you know,
25 whatever, the -- even the courthouse is closed

1 sort of thing, even though you're dealing with a
2 statute of the sort you have here, that those
3 claims could certainly be raised? Or at least
4 you think it's an open question?

5 MR. DVORETZKY: We are not arguing
6 that that's foreclosed by this statute. We're
7 saying that issue is simply not presented by
8 this case.

9 CHIEF JUSTICE ROBERTS: So --

10 JUSTICE KAGAN: And, similarly, the
11 Bailey kind of equitable rule? You're also
12 saying -- you're -- you're also saying that
13 you're just not saying?

14 (Laughter.)

15 MR. DVORETZKY: We're saying that it
16 wasn't preserved and, therefore, it's not
17 properly before this Court at this stage.
18 There's no -- there's no reason to remand on a
19 question that all -- all members of the en banc
20 Third Circuit Court held was waived. Four
21 members went out of their way to point out in
22 footnote 5 that they would have remanded, if
23 only it had been preserved, but -- but it
24 wasn't.

25 CHIEF JUSTICE ROBERTS: But I suppose

1 what you have to maintain, though, is that
2 equitable tolling has a higher or different
3 threshold than simply a discovery rule?

4 MR. DVORETZKY: And -- and that is
5 actually -- I said I have four reasons why I
6 think the discovery rule and equitable tolling
7 are different doctrines. That's the third of
8 them, is that I think equitable tolling has a
9 higher bar.

10 Equitable tolling applies only in
11 extraordinary circumstances, which as this Court
12 said in *Rotella*, which distinguished between the
13 discovery rule and equitable tolling, that's a
14 virtue of equitable tolling, that it's the
15 exception, not the rule.

16 If -- if the Court is going to
17 exercise its inherent equitable powers to
18 override the language that Congress has written,
19 that should be something that only happens in
20 unusual, exceptional circumstances.

21 JUSTICE BREYER: Should -- my
22 recollection of *Cada*, and so forth, one, the
23 statute might provide for tolling. That's the
24 argument in front of us. You say no; he says
25 yes. You're going on their words.

1 A second basis would be equitable
2 tolling. The -- the courthouse blows up or
3 something, hurricane. That's not here. Forget
4 it.

5 The third is sometimes called
6 equitable estoppel. And that's no man should
7 benefit from his own wrong. Hmm, that might
8 apply here, except for the fact that the Third
9 Circuit said absolutely waived, he never raised
10 it, and so forth, and he doesn't even claim he
11 raised that one.

12 But there is a fourth one. And the
13 fourth one, which Justice Scalia said in this
14 case is out of Bailey, which applied from Lord
15 Coke or something and his -- the ancient
16 origins, and that's if your basic claim is a
17 claim of fraud.

18 If your basic claim is a claim of
19 fraud, there is a tolling rule. Now, one, was
20 that ever raised clearly? Probably not. Two,
21 is the basic claim here was a claim that this is
22 an -- an uncollectible debt, not that it was a
23 fraudulent debt? I take it that the basic claim
24 was not fraud, but I'm not sure on either of
25 those points.

1 So should we send it back on those
2 points?

3 MR. DVORETZKY: No. And -- and let me
4 unpack that question and make three different
5 points about it.

6 First, the Bailey -- the Bailey line
7 of authority, as Judge Posner described it in
8 that Seventh Circuit case, still fits within the
9 category of equitable relief from the statute,
10 rather than interpreting the statute.

11 JUSTICE BREYER: Yes.

12 MR. DVORETZKY: And the only question
13 presented in the cert petition, set aside even
14 what happened in the Third Circuit, in the cert
15 petition here is the question of statutory
16 interpretation.

17 The cert petition doesn't cite --
18 Bailey doesn't mention fraud. It would be quite
19 out of the ordinary for this Court to remand for
20 consideration of a question that the lower court
21 considered waived and didn't decide and that the
22 Petitioner didn't even raise in the cert
23 petition itself. So that's one answer.

24 JUSTICE GINSBURG: But --

25 MR. DVORETZKY: And the second point

1 --

2 JUSTICE GINSBURG: But if we don't
3 agree with you that this is under the rubric of
4 equitable tolling, I mean, I thought Justice
5 Scalia was very clear when he said the discovery
6 rule as a general matter doesn't toll when your
7 statute of limitation triggered by the -- what
8 was the occurrence -- of the violation, but, he
9 said, there is an exception to the
10 non-application of the discovery rule for fraud.
11 We have recognized historical -- historical
12 exception for cases based on fraud.

13 MR. DVORETZKY: Justice Ginsburg, the
14 Court -- and it pains me to say this -- Justice
15 Scalia, were not -- have not always been precise
16 in their use of this terminology, but where it
17 has mattered --

18 JUSTICE SOTOMAYOR: He's turning over
19 in his grave hearing that.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: Battle wordsmith.

22 MR. DVORETZKY: Where it has mattered,
23 where it has been dispositive of an issue, such
24 as in ANZ, the Court has been careful to
25 distinguish between equitable doctrines,

1 equitable tolling and the discovery rule.

2 And that is -- that is really the only
3 way to read these cases, Bailey, and Holmberg,
4 and Exploration Co. They are best understood as
5 equitable cases because throughout those
6 opinions the Court is talking about the exercise
7 of traditional equitable powers.

8 And -- and those cases are not engaged
9 in statutory interpretation. If you look at a
10 case like Bailey or Holmberg, it is not doing
11 the same thing as TRW. It's not even --
12 Holmberg, for example, was not even asking the
13 question how do we parse the words "liability
14 arises" or -- or in Bailey, I think it was
15 "cause of action accrued."

16 It is not even a question of what that
17 language means. It's simply creating an
18 exception to that. And that is the better way
19 to understand those -- those cases.

20 In -- in any event, even if there were
21 some sort of a fraud discovery rule, that still
22 wouldn't help here for three reasons, one of
23 which is the waiver, which I have talked about.
24 Two, even if there is a background -- even if
25 there were a background fraud discovery rule,

1 Congress could still overcome that. It would
2 still only be a presumption.

3 And the language that Congress used
4 here, "violation occurs," would overcome any
5 common law discovery rule.

6 JUSTICE SOTOMAYOR: Well, how --

7 JUSTICE KAVANAUGH: Do you really
8 think that? I'm --

9 JUSTICE SOTOMAYOR: If a patent --

10 JUSTICE KAVANAUGH: Go ahead.

11 JUSTICE SOTOMAYOR: -- issued, which
12 is like what a violation -- when a violation
13 occurs, we still apply the equitable doctrine,
14 the concealment doctrine in Exploration, even
15 though the languages are almost identical.

16 So how do you separate Exploration
17 from here?

18 MR. DVORETZKY: Because I think what
19 the Court was doing in Exploration Co. is best
20 understood as equitable tolling, not as reading
21 that language about the patent issuing to mean
22 patent issuing or is discovered.

23 This -- this goes to the fundamental
24 question of what is the Court doing? Is it
25 interpreting the language like "patent issued"

1 or "violation occurred" to mean something other
2 than what it says, or is it exercising the
3 Court's inherent equitable power to override
4 what the language says?

5 JUSTICE SOTOMAYOR: So are you saying
6 there's no self-concealing fraud whatsoever?
7 That the very act that you do -- this is what
8 they're claiming -- the very act that they --
9 that you are alleged to have done doesn't --
10 wouldn't qualify?

11 Assuming -- and I know that you take
12 issue with whether you really knew that was his
13 address or not and whether the lawyer just made
14 a mistake in not seeing his regular files. I
15 want to put all of that aside.

16 Let -- let us assume for the sake of
17 argument that the lawyer knew this wasn't the
18 address, that the lawyer knew the process server
19 had effected sewage service, and yet he lied,
20 intentionally lied, to the court and held on to
21 his judgment until the statute of limitation
22 passed. Do you believe that there's no common
23 law self-concealing fraud there?

24 MR. DVORETZKY: I don't think that
25 that is common law self-concealing fraud. I

1 think that that might well qualify for equitable
2 tolling. You don't need to put the fraud label
3 on it for it to be equitable tolling in a case
4 where the court actually decided that equitable
5 tolling was properly presented and preserved.
6 But I don't think that that would be common law
7 fraud because it does not involve an intentional
8 misrepresentation. That's -- that's not alleged
9 here --

10 JUSTICE SOTOMAYOR: Not to the
11 defendant but to the court. It's still conduct
12 that would be fraudulent, maybe not on the -- on
13 -- on -- on the defendant but certainly on the
14 court. And why should that deprive the
15 defendant of a cause of action?

16 MR. DVORETZKY: Well, perhaps it
17 shouldn't if that's what's actually alleged and
18 if it's dealt with as equitable tolling, rather
19 than -- rather than reading language like
20 "violation occurs" to trigger the limitations
21 period upon anything other than when the
22 violation occurs.

23 With -- with respect to this case,
24 though, it's not just the waiver in this Court
25 and in the Third Circuit. I'd also direct the

1 Court to the complaint in this case. It's a
2 three-page complaint, and it's in the court of
3 appeals appendix at 6a.

4 The operative complaint itself does
5 not allege what is now being described as
6 so-called sewer service. The -- the operative
7 complaint alleges that the -- the debt
8 collection lawsuit here was filed out of time
9 and that, as a result of the -- as a result of
10 what happened with the improper service, the --
11 the plaintiff was entitled to equitable tolling
12 on that claim because he didn't learn of the
13 untimely lawsuit.

14 So on a 12(b) motion, which is what
15 we're dealing with here, we are miles removed
16 from the sorts of allegations in some of the
17 amicus briefs about different cases involving
18 sewer service.

19 JUSTICE KAVANAUGH: Can I make sure I
20 have the terminology correct, sorry, on a couple
21 of the legal points? So on the discovery rule,
22 there's a discovery rule linked to fraud, as
23 Justice Ginsburg said. You first look to
24 whether it's in the statute. You say no.

25 And if it's not in the statute, if

1 you're correct about that, you see if there's
2 some kind of -- there's an equitable discovery
3 doctrine, also linked to fraud, that can apply.
4 But your argument is that no equitable doctrines
5 were raised here and, therefore, we shouldn't
6 consider the scope of how that might apply. Is
7 that accurate?

8 MR. DVORETZKY: I think that would be
9 a good opinion.

10 JUSTICE KAVANAUGH: Okay. The other
11 part of that is you were making an argument that
12 the words of the statute here expressly
13 displaced equitable discovery. And I think
14 that's a shakier argument because that would
15 mean any time it's not in the statute itself,
16 it's also -- meaning discovery, it's also
17 expressly displaced.

18 You don't need this argument to win,
19 but you are giving it as an alternative, and I
20 want to press you on that.

21 MR. DVORETZKY: That -- so that's
22 actually not the argument that I am intending to
23 make.

24 JUSTICE KAVANAUGH: Okay.

25 MR. DVORETZKY: I don't think that

1 Congress needs to expressly say no discovery
2 rule in order to foreclose the discovery rule.

3 If you had more ambiguous --

4 JUSTICE KAVANAUGH: Well --

5 MR. DVORETZKY: -- language --

6 JUSTICE KAVANAUGH: I --

7 JUSTICE KAGAN: In order to foreclose

8 --

9 JUSTICE KAVANAUGH: I know you're not
10 saying that --

11 JUSTICE KAGAN: -- an equitable
12 doctrine. You don't think that Congress has to
13 say no equitable doctrines?

14 MR. DVORETZKY: Even for the statutory
15 discovery rule, I don't think Congress has to
16 expressly foreclose a statutory discovery rule.

17 JUSTICE KAGAN: Oh, sorry.

18 MR. DVORETZKY: In -- in a situation
19 where, let's say --

20 JUSTICE KAVANAUGH: Yeah. I agree
21 with you on that, on the statutory discovery.

22 MR. DVORETZKY: Oh.

23 JUSTICE KAVANAUGH: Okay? So just
24 assume I'm with you.

25 MR. DVORETZKY: Okay.

1 JUSTICE KAVANAUGH: But there still
2 exists, I think you just said, a kind of
3 equitable discovery rule unless Congress has
4 displaced that. And I would assume there's a
5 higher bar for Congress to expressly displace
6 the equitable discovery than there is for
7 whether it's in the statute in the first place.

8 MR. DVORETZKY: I -- I agree, and the
9 only tweak that I would make to, I think, the
10 way that you've formulated all of that, I view
11 the equitable discovery rule just as a species
12 of equitable tolling.

13 JUSTICE KAVANAUGH: Got it.

14 MR. DVORETZKY: If, like Judge Posner,
15 you want to list out all seven different kinds
16 of equitable doctrines that allow a court to
17 override what Congress has written, that would
18 be one of them. But I think the more helpful
19 way to think of it is that there are two
20 categories.

21 There's statutory interpretation.
22 What has Congress provided as -- as the -- the
23 rule to apply across this statute in every FDCA
24 case. As to that question, "violation occurs"
25 means violation occurs, not discovered.

1 Then there's another bucket of various
2 equitable doctrines that can be invoked under
3 the courts' authority to override statutory
4 language.

5 JUSTICE KAGAN: So I -- I --

6 MR. DVORETZKY: None of those are
7 presented.

8 JUSTICE KAGAN: I think that that
9 distinction is helpful, but I want to push back
10 on it a little because it's all statutory
11 interpretation, isn't it?

12 I mean, as long as we understand that
13 Congress could say, "and no equitable doctrines
14 shall apply either," then in some sense we're
15 doing statutory interpretation even when we say
16 that Congress didn't displace statute --
17 equitable doctrines, aren't we?

18 MR. DVORETZKY: Sure. There's always
19 the question of whether Congress has overridden
20 the long-standing equitable power of the court
21 to itself override the statutory terms that
22 Congress has used. So there -- there is a
23 statutory interpretation question there.

24 But the difference between the
25 equitable doctrines and the -- the discovery

1 rule, as I'm using that term, is that there is a
2 presumption in favor of the availability of the
3 court's equitable powers. And there's a higher
4 bar that Congress has to use --

5 JUSTICE KAVANAUGH: You'd need a --

6 MR. DVORETZKY: -- in order to
7 foreclose that if we're in the equitable bucket.

8 JUSTICE KAVANAUGH: You'd need
9 something akin to a plain statement to get rid
10 of the equitable doctrines in the statute. You
11 probably are going to frown on the phrase "plain
12 statement" but something clearer.

13 MR. DVORETZKY: Something clearer.
14 This Court has often looked to the sort of
15 two-part --

16 JUSTICE KAVANAUGH: Because they're --

17 MR. DVORETZKY: -- structure --

18 JUSTICE KAVANAUGH: -- equitable, so
19 we're not going to assume silence displaces
20 these equitable doctrines, right?

21 MR. DVORETZKY: Correct. You're not
22 going to assume silence does. This Court has
23 typically looked to a sort of two-part structure
24 where you would have a shorter discovery-based
25 limitations period, coupled with a longer

1 statute of repose. And -- and if you have that,
2 this Court has read into that sort of situation
3 that Congress meant to displace equitable
4 powers.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. DVORETZKY: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Bond.

9 ORAL ARGUMENT OF JONATHAN C. BOND
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING THE RESPONDENTS

12 MR. BOND: Mr. Chief Justice, and may
13 it please the Court:

14 The question on which this Court
15 granted review and the only question the Third
16 Circuit decided is whether the FDCPA should be
17 interpreted to impose a statute-wide rule that
18 -- that the limitations period does not begin to
19 run until a violation is discovered. That's a
20 question about what the statute means, and the
21 text supplies a clear answer: No.

22 Now, Petitioner appears to be
23 abandoning reliance on that broad theory and is
24 now relying exclusively on this argument from
25 Bailey's fraud rule. We agree with Respondent

1 that Bailey's fraud rule does not apply in this
2 case, at least as it's been teed up for the
3 Court, for three reasons -- or -- or -- or three
4 points I would like to make.

5 First, we agree with Respondent that
6 the fundamental distinction that matters is
7 between interpreting the way a statute of
8 limitations operates and equitable relief from
9 that statute. It's the distinction this Court
10 draw in ANZ in describing American Pipe. You've
11 got interpreting and enforcing statutes, and
12 you've got equitable relief from the -- the
13 operation of the statute.

14 And it's true that those are all
15 statutory interpretation questions, but they're
16 very different questions because, on the one
17 hand, a discovery rule that comes out of the
18 statute has to be in the text and context of the
19 statute; whereas equitable relief, whether it's
20 viewed as one umbrella doctrine or subdivided
21 into several different species, are all
22 exercises of courts' traditional free-standing
23 powers, courts of equity, to relieve parties
24 from the operation of a statute.

25 And we -- we agree with Respondent

1 that that difference matters, not just with
2 respect to how clear a statute must be to
3 displace or make clear that that doctrine
4 doesn't apply, but also the scope of the rule
5 that results, as the Court observed in Rotella.

6 So, to put it in terms of Judge
7 Posner's opinion in Cada, the first category of
8 the statute's accrual rule set forth in the
9 statute, that's our first bucket. Everything
10 else fits into the second bucket. And it's
11 simply a question of whether you subdivide into
12 -- to subsidiary categories or not.

13 Now, the second point is where Bailey
14 fits in this taxonomy. Now, we acknowledge that
15 language in the Court's opinions over the -- of
16 the past number of years have sent some mixed
17 signals. To the extent you addressed it here,
18 we think the better view is that those cases are
19 understood as applications of equitable
20 principles, whether equitable tolling or a close
21 cousin, for three reasons.

22 First, the rule arose at equity,
23 starting in courts of chancery, and later
24 carried over to courts at law.

25 Second, that's really the only way to

1 understand cases like Exploration Company, where
2 the statute by its terms doesn't run from
3 discovery, doesn't leave room for a discovery
4 rule. That can't be read to impose a discovery
5 rule, but it certainly can be understood not to
6 displace background equitable principles.

7 And, third, the Court has repeatedly
8 and recently cited Bailey and Holmberg and other
9 cases, including in contexts where it mattered,
10 as Mr. Dvoretzky was explaining, on the
11 equitable side of the line.

12 The most recent example, as he noted,
13 is ANZ. And in that case, it mattered whether
14 American Pipe was equitable or statutory in
15 nature. And the Court relied on the fact that
16 American Pipe had cited Holmberg, which ANZ
17 called a paradigm application of equitable
18 tolling.

19 So we think the Court's most recent
20 and repeated word on this is that it falls on
21 the equitable side of the line.

22 But even if you think there are cases
23 where there -- you have an ambiguous statutory
24 provision and you can look to equitable
25 principles to help you figure that out, that's

1 fine, but the underlying principle is still
2 equitable in nature. And that would be like the
3 Court's opinion in Merck, where you had an
4 express discovery rule and the question is what
5 does discovery mean.

6 So the Court surveyed equitable
7 practice, state statutes, and all manner of
8 things that were relevant to figuring out what
9 Congress meant in that provision.

10 JUSTICE SOTOMAYOR: Do you think that
11 that equitable principle is the same as the way
12 the Court has defined equitable tolling, meaning
13 we have very -- we have very strict construction
14 under equitable tolling and certain elements to
15 it.

16 Do you think the same apply more
17 broadly to all the equitable principles, or is
18 it a separate principle all together?

19 MR. BOND: So our -- our view -- and
20 I'm not sure anything turns on it here -- is
21 that it's a subset of that broader equitable
22 principle. You might think of it in terms of
23 the kind of fraud that satisfies Bailey, which
24 is fraud that is either concealed affirmatively
25 or self-concealing, satisfies by itself the

1 extraordinary circumstance requirement of
2 tolling.

3 And then the second element,
4 diligence, is just the same across both -- both
5 contexts.

6 So it seems like a subset of the
7 broader principle of equitable tolling, which
8 explains why the Court's decisions in cases
9 where it mattered, not just in ANZ but in Lampf
10 and in Rotella, described cases like Holmberg
11 and Bailey as falling into this bucket.

12 So we -- we understand it to fall in
13 the equitable tolling or the equitable relief
14 side of the line, but at the end of the day, to
15 decide this case, I don't think you need to
16 resolve that particular question.

17 If it's any kind of equitable relief,
18 I think Petitioner has disclaimed reliance on
19 that and certainly didn't present that below or
20 in the petition, but even if you think it's a --
21 a -- a statutory rule that could be read into
22 every statute, we don't think this falls within
23 the category of fraud claims.

24 As Mr. Dvoretzky was explaining, I
25 don't think the complaint here, the single

1 allegation that concerns improper service,
2 paragraph 14 of the complaint, doesn't allege
3 any kind of misrepresentation, isn't premised on
4 fraud.

5 And to the point of amendment, when
6 the district court asked Petitioner's counsel if
7 he would like to amend -- and this is at page
8 104-A of the court of appeals appendix, Volume
9 2, Petitioner's counsel emphatically said no.
10 So I think that ship has sailed.

11 Ultimately, we don't have a strong
12 interest in whether you apply that rule here or
13 leave it to the Third Circuit, but I think
14 respect for the court of appeals and the
15 integrity of the certiorari process suggests
16 that you should take the Petitioner -- the
17 petition at its word and decide the case on
18 those terms.

19 If the Court has no further questions.

20 JUSTICE KAGAN: I have one.

21 (Laughter.)

22 JUSTICE KAGAN: Why does it matter
23 that it is a fraud claim, rather than, whatever
24 the claim is, fraud has been used to prevent the
25 plaintiff from noticing it?

1 MR. BOND: So, if you understand
2 Bailey as an application of more general
3 equitable principles that grant relief not just
4 from fraud but from fraudulent concealment and
5 other kinds of extraordinary circumstances like
6 the earthquake, then we don't think it does
7 matter.

8 Bailey, I think, is best understood as
9 applying those general principles in the
10 particular context that was recurring at the
11 time of fraud claims.

12 So, if you understand it that way,
13 there is no rigid boundary. Bailey is simply
14 explaining how those general principles apply in
15 a particular setting.

16 If instead you understand Bailey,
17 however, as a rule of statutory interpretation
18 that departs from the way we ordinarily read --
19 read statutes, then we'd suggest you should
20 apply that exception, that departure on its own
21 terms rather than expanding it, as I think
22 Petitioner had suggested in the briefing.

23 But, again, if you understand it as an
24 application of equitable principles, you don't
25 need to draw a line between the gravamen of the

1 underlying claim, which is what Bailey focused
2 on, the object or foundation of the suit, or
3 other examples, like Holmberg, which wasn't a
4 fraud action but involved fraudulent
5 concealment.

6 If you view those cases of a piece as
7 involving general principles of equitable
8 relief, then everything hangs together.

9 If the Court has no questions.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Five minutes, Mr. Gant.

13 REBUTTAL ARGUMENT OF SCOTT E. GANT

14 ON BEHALF OF THE PETITIONER

15 MR. GANT: Thank you, Mr. Chief
16 Justice.

17 Perhaps ambitiously I will try and
18 quickly make five points that I hope address
19 some of the questions raised by the Court this
20 morning.

21 First, there's no question that this
22 Court, although when Bailey and Holmberg were
23 decided, didn't use the label discovery rule.
24 In more recent cases, like Merck and Gabelli,
25 has clearly identified a discovery rule which I

1 think under the best reading is separate from
2 equitable tolling.

3 The second point is that there's an
4 argument advanced in the briefs and today by
5 both counsel for the Respondent of the United
6 States that the issue is whether a statute is
7 all or nothing. Either a -- a common law
8 discovery rule applies to every claim under the
9 statute or to none at all.

10 That -- that view is unsupported and
11 contradicted by Bailey, Exploration, and
12 Holmberg itself. Bailey was a bankruptcy court
13 -- a bankruptcy act case. Exploration dealt
14 with a statute concerning land patents. And
15 Holmberg concerned the Federal Farm Loan Act.

16 Those were not cases -- the
17 Holmberg/Bailey rule applied to a subset of
18 cases under the statute where the doctrine
19 otherwise applied. It wasn't all or nothing, as
20 my friends suggest.

21 The third point concerns confusion
22 about the relationship of the doctrines. Mr.
23 Bond said that the Court has in the past sent
24 mixed signals. I think that's a fair
25 characterization. And I think that,

1 unfortunately, those mixed signals caused
2 confusion both on the part of the parties and in
3 the courts below.

4 In Gabelli in Footnote 2, this Court
5 observed that the Second Circuit in the case
6 being reviewed had -- had -- was adding to an
7 equitable tolling claim the requirement that
8 there be some action in addition to the cause of
9 action that caused the concealment. That is the
10 same idea that is present in Footnote 5 in the
11 Third Circuit's decision below.

12 The Third Circuit said -- and this
13 wasn't -- this was for the Court, it wasn't just
14 on behalf of those four members who would have
15 wished to review equitable tolling. The court
16 as a whole said our precedent has not previously
17 recognized that a defendant's self-concealing
18 conduct may be the basis for equitable tolling.

19 So the Third Circuit, which, by the
20 way, had gone en banc sua sponte, was
21 recognizing that previously its own cases had
22 said that there had to be some additional acts,
23 not that self-concealment alone wasn't
24 sufficient for equitable tolling, that was the
25 reason why that equitable tolling was not

1 pressed below, because, under existing Third
2 Circuit law, there was a requirement for some
3 additional action, which Petitioner's counsel
4 did not believe was present here.

5 The next point is -- concerns this
6 question of whether the discovery rule is a
7 matter of an exception, an equitable exception
8 to a statute which is imposed by courts
9 themselves, or whether it's statutory
10 interpretation.

11 The touchstone in either case, as
12 Justice Kagan, I believe, was -- was alluding
13 to, is congressional intent. And we believe
14 that Congress here, when you look at the statute
15 as a whole, not ignoring the language in 813(d)
16 but the statute as a whole, including its
17 purposes, including its exhortation that it
18 wanted to eliminate the practices at issues,
19 clearly would not have meant to foreclose a
20 lawsuit by -- which presented facts like
21 Petitioner's facts here.

22 The final point I'd like to raise
23 concerns -- sorry, one final -- other point
24 related to that.

25 I believe I heard counsel for the

1 Respondent say that under his view the discovery
2 rule is a subset of equitable tolling. I could
3 understand why one would come to that view given
4 the confusion in the doctrine. I've set out a
5 different view, which we think is the better
6 understanding.

7 But, if their view was correct, then I
8 don't know how they can argue it was waived. If
9 the discovery -- the Holmberg/Bailey rule is a
10 subset of equitable tolling, we pressed the
11 Bailey/Holmberg rule below. Those cases were
12 cited in the supplemental briefing after the
13 Court decided to go en banc.

14 So I think the assertion that the
15 arguments that we're presenting here were waived
16 are -- are incorrect.

17 The final point concerns Respondent's
18 challenge to the sufficiency of the complaint.

19 The district -- the district court in
20 the Third Circuit here understood exactly what
21 was at issue.

22 I must candidly acknowledge that the
23 complaint here was not a paragon of clarity. It
24 could have been done better. And if we were
25 given the opportunity on remand, which we would

1 because Rule 15 provides for liberal amend --
2 amendment of pleadings, we would make clear that
3 the challenged conduct violates 1692(e) and (f)
4 of the statute, which we believe clearly falls
5 within the ambit of the common law discovery
6 rule.

7 Unless the Court has further
8 questions, I thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 12:05 p.m., the case
12 was submitted.)

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