

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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4 Petitioner,)

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9 Washington, D.C.

10 Wednesday, October 16, 2019

11

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

15

16 APPEARANCES:

17

18 SCOTT E. GANT, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.

20 SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of
21 the Respondents.

22 JONATHAN C. BOND, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.;
24 for the United States, as amicus curiae,
25 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 the -- of
25 these rules, and that's the same understanding I

1 think that the scholars' brief sets forth. And
2 it's -- under that view, equitable tolling would
3 be 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
19 the 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, did you -- who did you fraud?
11 The judge?

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

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

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

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

6 MR. GANT: Yes. The --

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

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

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

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

24 MR. GANT: Right.

25 JUSTICE BREYER: That's what I want to

1 know.

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

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

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

13 JUSTICE BREYER: Yeah.

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

16 JUSTICE BREYER: And who makes the
17 representations?

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

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

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

24 JUSTICE BREYER: Is that their client?

25 MR. GANT: It -- it is not. That was

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

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

13 MR. GANT: Yes.

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

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

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

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

1 it's at page 26 --

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

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

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

15 MR. GANT: I don't know whether it's
16 wrong because I haven't read it, so I will not
17 --

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

25 I thought an element of that is that

1 the basic underlying thing is common law fraud.
2 And that's what I'm trying to investigate now.
3 But, if you have nothing more to say, I have
4 nothing more --

5 MR. GANT: I -- I --

6 JUSTICE BREYER: -- to say because, if
7 I knew more about it, I wouldn't ask the
8 question.

9 MR. GANT: I -- I don't have a case.
10 I wish I did. Obviously, that is something that
11 could be and we respectfully submit should be
12 addressed on remand.

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

1 urban areas. There --

2 JUSTICE GINSBURG: But you said -- you
3 said the statement was the process server. The
4 process server was told by the creditor serve
5 process at this address. So it wasn't -- the
6 process server didn't make it up. The process
7 server was told where the process should be
8 served.

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

15 It was the same process --

16 JUSTICE GINSBURG: But it was still --
17 the prosecutor -- the process server was just
18 following the directions of the person who --
19 who engaged the process server.

20 MR. GANT: Well, they were certainly
21 following the direction to serve process. We
22 don't know -- there's nothing in the record that
23 indicates the substance of the discussion. We
24 do know that the first service was attempted at
25 an address and it falsely represented that the

1 defendant -- the plaintiff was personally
2 served. He was not. It also represented he was
3 black, according to the affidavit of service.
4 He's not. He's Caucasian. It represented he
5 was 51 years old. He was in his late 30s at the
6 time. That was at a -- and so they had reason
7 -- and then that suit was withdrawn, we believe
8 because they knew that the affidavit of service
9 was false and that the plaintiff didn't actually
10 live at that address.

11 Then a new suit was filed and a new
12 affidavit of service, the one at issue, was --
13 was filed.

14 JUSTICE SOTOMAYOR: Mr. Gant.

15 MR. GANT: Yes.

16 JUSTICE SOTOMAYOR: I -- I note it is
17 terribly confusing because of the confusion of
18 the use of terms. That's why I -- I called it a
19 self-concealing fraud.

20 MR. GANT: Yes.

21 JUSTICE SOTOMAYOR: It's not the
22 violation at issue that's self-concealing. It's
23 how the violation came about that's -- that
24 could be by self-concealing fraud, correct?

25 MR. GANT: Yeah.

1 JUSTICE SOTOMAYOR: Isn't that your --
2 your point?

3 MR. GANT: Yes. We -- we believe that
4 the common law discovery rule, the
5 Bailey/Holmberg rule, can apply either if the
6 fraud is an element of the offense --

7 JUSTICE SOTOMAYOR: Right.

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

20 But we believe that this is close --
21 what -- the decision below was you don't get a
22 -- a common law discovery rule applied to this
23 statute, period. That was wrong. That should
24 be reversed, and we should have an opportunity
25 then to have arguments about these issues,

1 whether the approach of -- the view of Justice
2 Breyer is right or at least -- or you're --
3 you're arguing, hypothetically, for argument's
4 sake, the view of Judge Posner, that this might
5 fall outside common law fraud.

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

21 JUSTICE KAVANAUGH: You've referred to
22 remand a few times. I think the other side's
23 argument is that the statute itself does not
24 have a discovery rule and that any equitable
25 discovery rule or, as you're terming it, common

1 law discovery rule that might exist, unless
2 Congress expressly displaces it, was not raised
3 in the Third Circuit. Your response to that?

4 MR. GANT: I'm sorry, what wasn't
5 raised in the Third Circuit?

6 JUSTICE KAVANAUGH: Equitable --
7 equitable discovery.

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

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

20 There may be still an equitable
21 discovery rule, but you didn't separately -- I
22 think they're saying this. You didn't
23 separately raise that kind of equitable
24 discovery argument.

25 MR. GANT: Right.

1 JUSTICE KAVANAUGH: Your response to
2 that? Is that wrong?

3 MR. GANT: Under -- they are wrong in
4 their understanding of the operation of the two
5 words "violation occurred" and its effect on
6 whether the common law discovery rule applies.

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

21 JUSTICE KAGAN: And what about your
22 petition in this Court? Because, as I read your
23 petition in this Court, it was more about the
24 general statutory interpretation question,
25 whether there is a discovery rule that applies

1 generally in this statute, than it is about
2 whether certain equitable exceptions might
3 continue to exist.

4 MR. GANT: Yes. You're referring to
5 the petition for certiorari? Yeah. The
6 petition for certiorari clearly presented the
7 discovery rule for consideration. And that --

8 JUSTICE KAGAN: Well, but, again, what
9 did that mean?

10 MR. GANT: Well, I think --

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

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

21 What -- may I finish?

22 CHIEF JUSTICE ROBERTS: Sure.

23 MR. GANT: What was intended with the
24 petition was to raise the question precisely as
25 I attempted to present it this morning, which is

1 whether or not Congress intended to permit or
2 foreclose the application of the common law
3 discovery rule to the statute. And we contend
4 that Congress clearly did not intend to
5 foreclose it.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. GANT: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Dvoretzky.

10 ORAL ARGUMENT OF SHAY DVORETZKY

11 ON BEHALF OF THE RESPONDENTS

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

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

20 That answers the question presented in
21 the cert petition. The plain meaning of
22 "violation occurs" concerns when the defendant
23 commits the violation, not when the plaintiff
24 learns of it. Unlike more ambiguous phrases,
25 like "claim accrues" or "liability arises,"

1 "violation occurs" simply can't be read any
2 other way.

3 And we know Congress itself
4 understands "violation occurs" that way because,
5 in other statutes, including the 1978 Right to
6 Financial Privacy Act, Congress used the phrase
7 "violation occurs" to distinguish an
8 occurrence-based limitations period from a
9 discovery-based one.

10 But --

11 JUSTICE SOTOMAYOR: Is your position
12 simply -- did I let you finish?

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

15 JUSTICE SOTOMAYOR: Oh, sorry.

16 MR. DVORETZKY: Like Justice Ginsburg
17 and Justice Kagan, I understand the question
18 presented here to be whether an across-the-board
19 discovery rule applies to the FDCA. The --
20 that's the only issue that the Third Circuit
21 decided.

22 The cert petition does not cite Bailey
23 or Holmberg, doesn't mention the word "fraud."
24 If it had, we might have had an argument in our
25 brief in opposition for why this case doesn't

1 present a fraud case and, therefore, would be an
2 inadequate vehicle to consider that question.

3 So the only question before this Court
4 is whether -- should be whether there's an
5 across-the-board discovery rule.

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

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

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

1 engaged in.

2 Equitable tolling is about excusing
3 noncompliance with the words that Congress has
4 chosen. It is an application of courts'
5 inherent equitable powers, confirmed in the
6 Judiciary Act, which exist independent of what
7 Congress has said in any particular statute of
8 limitations.

9 As a result of that -- and this is my
10 second point -- the discovery rule and equitable
11 tolling have different scopes. The discovery
12 rule --

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

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

25 The words "violation occurred" --

1 "occurs," have to mean the same thing no matter
2 what the underlying type of FDCPA violation. It
3 can't mean violation occurs in a non-fraud
4 claim, but violation occurs or is discovered in
5 a fraud claim.

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

13 JUSTICE KAGAN: But --

14 MR. DVORETZKY: -- on a particular
15 fact.

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

23 And then a different one would be this
24 kind of: I couldn't possibly have known that
25 the statute of limitations had even started to

1 run because there was fraud committed against
2 me. Is that right?

3 I mean, you can put them all under an
4 umbrella label, but those are two different
5 things, aren't they?

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

12 But Congress would be excusing
13 compliance with the language that Congress --
14 I'm sorry, the court would be excusing
15 compliance with the language that Congress
16 wrote, based on either the earthquake or fraud.

17 What those have in common is that they
18 are under the bucket of equitable relief from
19 what Congress wrote --

20 JUSTICE KAGAN: And is your --

21 MR. DVORETZKY: -- rather than an --

22 JUSTICE KAGAN: -- and is your view
23 that those are foreclosed by this statute, or is
24 your view simply that those arguments were
25 waived and this case has nothing to do about

1 them -- with them?

2 MR. DVORETZKY: Our argument is that
3 those arguments were waived. They're not
4 properly before this Court. The only question
5 before this Court is how to read the words that
6 Congress wrote.

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

11 JUSTICE KAGAN: So you're --

12 MR. DVORETZKY: Not --

13 JUSTICE KAGAN: -- not taking a
14 position one way or the other about whether
15 those equitable defenses can be raised?

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

22 JUSTICE KAVANAUGH: But that's --

23 MR. DVORETZKY: -- not part of this
24 case.

25 CHIEF JUSTICE ROBERTS: So -- so it's

1 an open question, if you have a typical -- I
2 don't know if it's typical -- but equitable
3 tolling situation, the hurricane, you know,
4 whatever, the -- even the courthouse is closed
5 sort of thing, even though you're dealing with a
6 statute of the sort you have here, that those
7 claims could certainly be raised? Or at least
8 you think it's an open question?

9 MR. DVORETZKY: We are not arguing
10 that that's foreclosed by this statute. We're
11 saying that issue is simply not presented by
12 this case.

13 CHIEF JUSTICE ROBERTS: So --

14 JUSTICE KAGAN: And, similarly, the
15 Bailey kind of equitable rule? You're also
16 saying where -- you're -- you're also saying
17 that you're just not saying?

18 (Laughter.)

19 MR. DVORETZKY: We're saying that it
20 wasn't preserved and, therefore, is not properly
21 before this Court at this stage. There's no --
22 there's no reason to remand on a question that
23 all -- all members of the en banc Third Circuit
24 Court held was waived. Four members went out of
25 their way to point out in Footnote 5 that they

1 would have remanded if only it had been
2 preserved, but -- but it wasn't.

3 CHIEF JUSTICE ROBERTS: But I suppose
4 what you have to maintain, though, is that
5 equitable tolling has a higher or different
6 threshold than simply a discovery rule?

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

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

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

24 JUSTICE BREYER: Should -- look, my
25 recollection of *Cada* and so forth, one, the

1 statute might provide for tolling. That's the
2 argument in front of us. You say no; he says
3 yes. You're going on the words.

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

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

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

22 Now, one, was that ever raised
23 clearly? Probably not. Two, is the basic claim
24 here was a claim that this is a -- an
25 uncollectible debt, not that it was a fraudulent

1 debt? I take it that the basic claim was not
2 fraud, but I'm not sure on either of those
3 points.

4 So should we send it back on those
5 points?

6 MR. DVORETZKY: No. And -- and let me
7 unpack that question and make three different
8 points about it.

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

14 JUSTICE BREYER: Yes.

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

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

1 petition itself. So that's one answer.

2 JUSTICE GINSBURG: But --

3 MR. DVORETZKY: And the second point

4 --

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

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

21 JUSTICE SOTOMAYOR: He's turning over
22 in his grave hearing that.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: Battle wordsmith.

25 MR. DVORETZKY: Where it has mattered,

1 where it has been dispositive of an issue, such
2 as in ANZ, the Court has been careful to
3 distinguish between equitable doctrines,
4 equitable tolling, and the discovery rule.

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

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

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

23 In -- in any event, even if there were
24 some sort of a fraud discovery rule, that still
25 wouldn't help here for three reasons, one of

1 which is the waiver, which I've talked about.
2 Two, even if there is a background -- even if
3 there were a background fraud discovery rule,
4 Congress could still overcome that. It would
5 still only be a presumption.

6 And the language that Congress used
7 here, "violation occurs," would overcome any
8 common law discovery rule.

9 JUSTICE SOTOMAYOR: Well, how --

10 JUSTICE KAVANAUGH: Do you really
11 think that? I'm --

12 JUSTICE SOTOMAYOR: If a patent --

13 JUSTICE KAVANAUGH: Go ahead.

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

19 So how do you separate Exploration
20 from here?

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

1 This -- this goes to the fundamental
2 question of what is the Court doing? Is it
3 interpreting the language like "patent issued"
4 or "violation occurred" to mean something other
5 than what it says, or is it exercising the
6 Court's inherent equitable power to override
7 what the language says? And that --

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

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

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

1 law self-concealing fraud there?

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

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

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

1 With -- with respect to this case,
2 though, it's not just the waiver in this Court
3 and in the Third Circuit. I'd also direct the
4 Court to the complaint in this case. It's a
5 three-page complaint, and it's in the court of
6 appeals appendix at 6a.

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

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

22 JUSTICE KAVANAUGH: Can I make sure --

23 MR. DVORETZKY: The --

24 JUSTICE KAVANAUGH: -- I have the
25 terminology correct -- sorry -- on a couple of

1 the legal points? So, on the discovery rule,
2 there's a discovery rule linked to fraud, as
3 Justice Ginsburg said. You first look to
4 whether it's in the statute. You say no.

5 If it's not in the statute, if you're
6 correct about that, you see if there's some kind
7 of -- there's an equitable discovery doctrine,
8 also linked to fraud, that can apply. But your
9 argument is that no equitable doctrines were
10 raised here and, therefore, we shouldn't
11 consider the scope of how that might apply. Is
12 that accurate?

13 MR. DVORETZKY: I think that would be
14 a good opinion.

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

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

1 MR. DVORETZKY: That -- so that's
2 actually not the argument that I am intending to
3 make.

4 JUSTICE KAVANAUGH: Okay.

5 MR. DVORETZKY: I don't think that
6 Congress needs to expressly say no discovery
7 rule in order to foreclose the discovery rule.
8 If you had more ambiguous --

9 JUSTICE KAVANAUGH: Well --

10 MR. DVORETZKY: -- language --

11 JUSTICE KAVANAUGH: -- I --

12 JUSTICE KAGAN: In order to foreclose
13 --

14 JUSTICE KAVANAUGH: -- I know you're
15 not saying that --

16 JUSTICE KAGAN: -- an equitable
17 doctrine. You don't think that Congress has to
18 say no equitable doctrines?

19 MR. DVORETZKY: But even for the
20 statutory discovery rule, I don't think Congress
21 has to expressly foreclose a statutory discovery
22 rule.

23 JUSTICE KAGAN: Oh, sorry.

24 MR. DVORETZKY: In -- in a situation
25 where, let's say, you had language like --

1 JUSTICE KAVANAUGH: Yeah. I agree
2 with you on that, on the statutory discovery.

3 MR. DVORETZKY: Oh.

4 JUSTICE KAVANAUGH: Okay? So just
5 assume I'm with you.

6 MR. DVORETZKY: Okay.

7 JUSTICE KAVANAUGH: But there still
8 exists, I think you just said, a kind of
9 equitable discovery rule unless Congress has
10 displaced that. And I would assume there's a
11 higher bar for Congress to expressly displace
12 the equitable discovery than there is for
13 whether it's in the statute in the first place.

14 MR. DVORETZKY: I -- I agree, and --
15 and the only tweak that I would make to, I
16 think, the way that you've formulated all of
17 that, I view the equitable discovery rule just
18 as a species of equitable tolling.

19 JUSTICE KAVANAUGH: Got it.

20 MR. DVORETZKY: If, like Judge Posner,
21 you want to list out all seven different kinds
22 of equitable doctrines that allow a court to
23 override what Congress has written, that would
24 be one of them. But I think the more helpful
25 way to think of it is that there are two

1 categories.

2 There's statutory interpretation.
3 What has Congress provided as -- as the -- the
4 rule to apply across this statute in every FDCA
5 case. As to that question, "violation occurs"
6 means violation occurs, not discovered.

7 Then there's another bucket of various
8 equitable doctrines that can be invoked under
9 the courts' authority to override statutory
10 language.

11 JUSTICE KAGAN: So I -- I --

12 MR. DVORETZKY: None of those are
13 presented.

14 JUSTICE KAGAN: -- I think that that
15 distinction is helpful, but I want to push back
16 on it a little because it's all statutory
17 interpretation, isn't it?

18 I mean, as long as we understand that
19 Congress could say, "and no equitable doctrines
20 shall apply either," then, in some sense, we're
21 doing statutory interpretation even when we say
22 that Congress didn't displace statute --
23 equitable doctrines, aren't we?

24 MR. DVORETZKY: Sure. There's always
25 the question of whether Congress has overridden

1 the long-standing equitable power of the court
2 to itself override the statutory terms that
3 Congress has used. So there -- there is a
4 statutory interpretation question there.

5 But the difference between the
6 equitable doctrines and the discovery rule, as
7 I'm using that term, is that there is a
8 presumption in favor of the availability of the
9 court's equitable powers. And there's a higher
10 bar that Congress has to use --

11 JUSTICE KAVANAUGH: You'd need a --

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

14 JUSTICE KAVANAUGH: -- you'd need
15 something akin to a plain statement to get rid
16 of the equitable doctrines in the statute. You
17 probably are going to frown on the phrase "plain
18 statement" but something clearer.

19 MR. DVORETZKY: Something clearer.
20 This Court has often looked to the sort of
21 two-part --

22 JUSTICE KAVANAUGH: Because they're --

23 MR. DVORETZKY: -- structure --

24 JUSTICE KAVANAUGH: -- equitable, so
25 we're not going to assume silence displaces

1 these equitable doctrines, right?

2 MR. DVORETZKY: Correct. You're not
3 going to assume silence does. This Court has
4 typically looked to a sort of two-part structure
5 where you would have a shorter discovery-based
6 limitations period, coupled with a longer
7 statute of repose. And -- and if you have that,
8 this Court has read into that sort of situation
9 that Congress meant to displace equitable
10 powers.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. DVORETZKY: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Bond.

15 ORAL ARGUMENT OF JONATHAN C. BOND
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE RESPONDENTS

18 MR. BOND: Mr. Chief Justice, and may
19 it please the Court:

20 The question on which this Court
21 granted review and the only question the Third
22 Circuit decided is whether the FDCPA should be
23 interpreted to impose a statute-wide rule that
24 the limitations period does not begin to run
25 until a violation is discovered. That's a

1 question about what the statute means, and the
2 text supplies a clear answer: No.

3 Now Petitioner appears to be
4 abandoning reliance on that broad theory and is
5 now relying exclusively on this argument from
6 Bailey's fraud rule. We agree with Respondent
7 that Bailey's fraud rule does not apply in this
8 case, at least as it's been teed up for the
9 Court, for three reasons -- or -- or -- or three
10 points I'd like to make.

11 First, we agree with Respondent that
12 the fundamental distinction that matters is
13 between interpreting the way a statute of
14 limitations operates and equitable relief from
15 that statute. It's the distinction this Court
16 drew in ANZ in describing American Pipe. You've
17 got interpreting and enforcing statutes, and
18 you've got equitable relief from the -- the
19 operation of the statute.

20 And it's true that those are all
21 statutory interpretation questions, but they're
22 very different questions because, on the one
23 hand, a discovery rule that comes out of the
24 statute has to be in the text and context of the
25 statute, whereas equitable relief, whether it's

1 viewed as one umbrella doctrine or subdivided
2 into several different species, are all
3 exercises of courts' traditional free-standing
4 powers, courts of equity, to relieve parties
5 from the operation of a statute.

6 And we -- we agree with Respondent
7 that that difference matters, not just with
8 respect to how clear a statute must be to
9 displace or make clear that that doctrine
10 doesn't apply, but also the scope of the rule
11 that results, as the Court observed in *Rotella*.

12 So, to put it in terms of Judge
13 Posner's opinion in *Cada*, the first category of
14 the statute's accrual rule set forth in the
15 statute, that's our first bucket. Everything
16 else fits into that second bucket. And it's
17 simply a question of whether you subdivide into
18 -- to subsidiary categories or not.

19 Now the second point is where *Bailey*
20 fits in this taxonomy. Now we acknowledge that
21 language in the Court's opinions over the -- of
22 the past number of years have sent some mixed
23 signals. To the extent you address it here, we
24 think the better view is that those cases are
25 understood as applications of equitable

1 principles, whether equitable tolling or a close
2 cousin, for three reasons.

3 First, the rule arose at equity,
4 starting in courts of chancery, and later
5 carried over to courts at law.

6 Second, that's really the only way to
7 understand cases like Exploration Company, where
8 the statute by its terms doesn't run from
9 discovery, doesn't leave room for a discovery
10 rule. That can't be read to impose a discovery
11 rule, but it certainly can be understood not to
12 displace background equitable principles.

13 And, third, the Court has repeatedly
14 and recently cited Bailey and Holmberg and other
15 cases, including in contexts where it mattered,
16 as Mr. Dvoretzky was explaining, on the
17 equitable side of the line.

18 The most recent example, as he noted,
19 is ANZ. And in that case, it mattered whether
20 American Pipe was equitable or statutory in
21 nature. And the Court relied on the fact that
22 American Pipe had cited Holmberg, which ANZ
23 called a paradigm application of equitable
24 tolling.

25 So we think the Court's most recent

1 and repeated word on this is that it falls on
2 the equitable side of the line.

3 But even if you think there are cases
4 where there -- you have an ambiguous statutory
5 provision and you can look to equitable
6 principles to help you figure that out, that's
7 fine, but the underlying principle is still
8 equitable in nature. And that would be like the
9 Court's opinion in Merck, where you had an
10 express discovery rule and the question is what
11 does discovery mean.

12 So the Court surveyed equitable
13 practice, state statutes, and all manner of
14 things that were relevant to figuring out what
15 Congress meant in that provision.

16 JUSTICE SOTOMAYOR: Do you think that
17 that equitable principle is the same as the way
18 the Court has defined equitable tolling, meaning
19 we have very -- we have very strict construction
20 under equitable tolling and certain elements to
21 it.

22 Do you think the same apply more
23 broadly to all the equitable principles, or is
24 it a separate principle all together?

25 MR. BOND: So our -- our view -- and

1 I'm not sure anything turns on it here -- is
2 that it's a subset of that broader equitable
3 principle. You might think of it in terms of
4 the kind of fraud that satisfies Bailey, which
5 is fraud that is either concealed affirmatively
6 or self-concealing, satisfies by itself the
7 extraordinary circumstance requirement of
8 tolling.

9 And then the second element,
10 diligence, is just the same across both -- both
11 contexts.

12 So it seems like a subset of the
13 broader principle of equitable tolling, which
14 explains why the Court's decisions in cases
15 where it mattered, not just in ANZ but in Lampf
16 and in Rotella, described cases like Holmberg
17 and Bailey as falling into this bucket.

18 So we -- we understand it to fall in
19 the equitable tolling or the equitable relief
20 side of the line, but, at the end of the day, to
21 decide this case, I don't think you need to
22 resolve that particular question.

23 If it's any kind of equitable relief,
24 I think Petitioner has disclaimed reliance on
25 that and certainly didn't present that below or

1 in the petition, but even if you think it's a --
2 a -- a statutory rule that could be read into
3 every statute, we don't think this falls within
4 the category of fraud claims.

5 As Mr. Dvoretzky was explaining, I
6 don't think the complaint here, the single
7 allegation that concerns improper service,
8 paragraph 14 of the complaint, doesn't allege
9 any kind of misrepresentation, isn't premised on
10 fraud.

11 And to the point of amendment, when
12 the district court asked Petitioner's counsel if
13 he would like to amend -- and this is at page
14 104-A of the court of appeals appendix, Volume 2
15 -- Petitioner's counsel emphatically said no.
16 So I think that ship has sailed.

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

25 If the Court has no further questions.

1 JUSTICE KAGAN: I have one.

2 (Laughter.)

3 JUSTICE KAGAN: Why does it matter
4 that it is a fraud claim, rather than, whatever
5 the claim is, fraud has been used to prevent the
6 plaintiff from noticing it?

7 MR. BOND: So, if you understand
8 Bailey as an application of more general
9 equitable principles that grant relief not just
10 from fraud but from fraudulent concealment and
11 other kinds of extraordinary circumstances, like
12 the earthquake, then we don't think it does
13 matter.

14 Bailey, I think, is best understood as
15 applying those general principles in the
16 particular context that was recurring at the
17 time of fraud claims.

18 So, if you understand it that way,
19 there's no rigid boundary. Bailey is simply
20 explaining how those general principles apply in
21 a particular setting.

22 If instead you understand Bailey,
23 however, as a rule of statutory interpretation
24 that departs from the way we ordinarily read --
25 read statutes, then we'd suggest you should

1 apply that exception, that departure on its own
2 terms rather than expanding it, as I think
3 Petitioner had suggested in the briefing.

4 But, again, if you understand it as an
5 application of equitable principles, you don't
6 need to draw a line between the gravamen of the
7 underlying claim, which is what Bailey focused
8 on, the object or foundation of the suit, or
9 other examples, like Holmberg, which wasn't a
10 fraud action but involved fraudulent
11 concealment.

12 If you view those cases of a piece as
13 involving general principles of equitable
14 relief, then everything hangs together.

15 If the Court has no questions.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Five minutes, Mr. Gant.

19 REBUTTAL ARGUMENT OF SCOTT E. GANT

20 ON BEHALF OF THE PETITIONER

21 MR. GANT: Thank you, Mr. Chief
22 Justice.

23 Perhaps ambitiously I will try and
24 quickly make five points that I hope address
25 some of the questions raised by the Court this

1 morning.

2 First, there's no question that this
3 Court, although, when Bailey and Holmberg were
4 decided, didn't use the label discovery rule.
5 In more recent cases, like Merck and Gabelli,
6 has clearly identified a discovery rule which I
7 think under the best reading is separate from
8 equitable tolling.

9 The second point is that there's an
10 argument advanced in the briefs and today by
11 both counsel for the Respondent of the United
12 States that the issue is whether a statute is
13 all or nothing. Either a -- a common law
14 discovery rule applies to every claim under the
15 statute or to none at all.

16 That -- that view is unsupported and
17 contradicted by Bailey, Exploration, and
18 Holmberg itself. Bailey was a bankruptcy court
19 -- a bankruptcy act case. Exploration dealt
20 with a statute concerning land patents. And
21 Holmberg concerned the Federal Farm Loan Act.

22 Those were not cases -- the
23 Holmberg/Bailey rule applied to a subset of
24 cases under the statute where the doctrine
25 otherwise applied. It wasn't all or nothing, as

1 my friends suggest.

2 The third point concerns confusion
3 about the relationship of the doctrines. Mr.
4 Bond said that the Court has in the past sent
5 mixed signals. I think that's a fair
6 characterization. And I think that,
7 unfortunately, those mixed signals caused
8 confusion both on the part of the parties and in
9 the courts below.

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

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

25 So the Third Circuit, which, by the

1 way, had gone en banc sua sponte, was
2 recognizing that previously its own cases had
3 said that there had to be some additional acts,
4 not that self-concealment alone wasn't
5 sufficient for equitable tolling, that was the
6 reason why that equitable tolling was not
7 pressed below, because, under existing Third
8 Circuit law, there was a requirement for some
9 additional action, which Petitioner's counsel
10 did not believe was present here.

11 The next point is -- concerns this
12 question of whether the discovery rule is a
13 matter of an exception, an equitable exception
14 to a statute which is imposed by courts
15 themselves, or whether it's statutory
16 interpretation.

17 The touchstone in either case, as
18 Justice Kagan, I believe, was -- was alluding
19 to, is congressional intent. And we believe
20 that Congress here, when you look at the statute
21 as a whole, not ignoring the language in 813(d)
22 but the statute as a whole, including its
23 purposes, including its exhortation that it
24 wanted to eliminate the practices at issue,
25 clearly would not have meant to foreclose a

1 lawsuit by -- which presented facts like
2 Petitioner's facts here.

3 The final point I'd like to raise
4 concerns -- sorry, one final -- other point
5 related to that.

6 I believe I heard counsel for the
7 Respondent say that under his view the discovery
8 rule is a subset of equitable tolling. I could
9 understand why one would come to that view given
10 the confusion in the doctrine. I've set out a
11 different view, which we think is the better
12 understanding.

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

20 So I think the assertion that the
21 arguments that we're presenting here were waived
22 are -- are incorrect.

23 The final point concerns Respondent's
24 challenge to the sufficiency of the complaint.

25 The district -- the district court in

1 the Third Circuit here understood exactly what
2 was at issue.

3 I must candidly acknowledge that the
4 complaint here was not a paragon of clarity. It
5 could have been done better. And if we were
6 given the opportunity on remand, which we would
7 because Rule 15 provides for liberal amend --
8 amendment of pleadings, we would make clear that
9 the challenged conduct violates 1692(e) and (f)
10 of the statute, which we believe clearly falls
11 within the ambit of the common law discovery
12 rule.

13 Unless the Court has further
14 questions, I thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

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

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