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ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer

Court Finds Discovery Rule Inapplicable in FDCPA Cases

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The Eastern District of Pennsylvania has weighed in on the issue of FDCPA claims and when the statute of limitations begins to run, holding that the discovery rule does not apply. *Rotkiske v. Klemm et al*., 15-3638, 2016 U.S. Dist. LEXIS 32908 (E.D.P.A. March 14, 2016). In *Rotkiske*, the defendant law firm filed a collection suit in March 2008 against the plaintiff. Service was attempted at Rotkiske's prior address and accepted by an unrelated third party. The lawsuit was dismissed shortly after that but was refiled in January of 2009. The defendants again attempted to serve Rotkiske at the same address, and again service was accepted by an unknown person. The defendants obtained a default judgment against Rotkiske in the second collection suit. Six years later, Rotkiske filed suit against the collection law firm, asserting FDCPA violations and alleging that he did not discover the judgment until September 2014 when he applied for a mortgage.

The defendants moved to dismiss the FDCPA claims alleging that they were time barred. Under the FDCPA, an action must be brought "within one year from the date on which the violation occurs." 15 U.S.C. §1692k(d). The plaintiff opposed the motion, contending that the discovery rule required the court to calculate the statute of limitations from the date when the plaintiff knew or should have known of the violation.

The circuit courts differ on the application of the discovery rule to FDCPA claims. The Fourth and Ninth Circuits currently apply the discovery rule. The Eighth and Eleventh Circuits have expressly rejected the application of the discovery rule to FDCPA claims. Other circuit courts have declined to rule on its application.

In granting the defendants' motion to dismiss, the district court first looked to the express language of the statute, which states the statute of limitations runs upon the "date on which the violation occurs." 15 U.S.C. § 1692k(d). This language does not contemplate the knowledge of the consumer, but rather explicitly states the clock begins to run on the date the violation occurred. Further, the Court considered public policy arguments for both sides. The most important one in the Court's decision was the timing of when the consumer discovered his injury. It can be difficult to verify when a consumer discovers the violation, but it is much easier to determine when the violation occurred. The Court relied on other cases, which hold that the statute of limitations period "should

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

begin to run on the date of 'the debt collector's last opportunity to comply'" with the FDCPA. *Peterson v. Portfolio Recovery Assocs., LLC*, 430 F. App'x 112, 115 (3d Cir. 2011). In this case, the last opportunity for the defendants to comply with the FDCPA occurred in 2009 when they re-filed the lawsuit and served the individual at Rotkiske's old address, thus making his 2015 lawsuit time barred. This decision is a helpful one for debt collectors as it limits their liability for violations to the last year regardless of consumers' knowledge of any alleged violations.

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