

[Banking and Finance Law Daily Wrap Up, TOP STORY—3rd Cir.: Debt collection protection act has no time limit discovery rule, \(May 16, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The statute of limitations on the ability to sue for a violation of the Fair Debt Collection Practices Act is one year from the date the Act is violated, according to the U.S. Court of Appeals for the Third Circuit. Rejecting contrary decisions by the Fourth and Ninth Circuits, the Third Circuit, sitting *en banc*, said there is no discovery rule under the FDCPA. As a result, the time limit on a consumer's cause of action expired approximately four years before he knew the Act had been violated ([Rotkiske v. Klemm](#), May 15, 2018, Hardiman, T.).

According to the opinion, a debt collecting attorney secured a default judgment for the consumer's unpaid credit card charges in state court in 2009. However, the default judgment was premised on service of the summons and complaint on an individual who lived at the consumer's former address and who accepted service on the consumer's behalf.

The consumer did not learn of the 2009 judgment until he applied for a mortgage loan in 2014. He then sued the attorney for FDCPA violations. The suit was filed less than one year after the mortgage loan application but roughly six years after the default judgment was entered. The U.S. district court judge dismissed the suit, saying that six years after the judgment was entered violated the one-year statute of limitations.

No discovery rule. The opinion made the Third Circuit's point of view clear—"In our view, the Act says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.'" The consumer's arguments based on the Act's text, its consumer protection purpose, and other court decisions all were rejected.

The court easily rejected the consumer's claim that the FDCPA was silent on whether there was a discovery rule. When Congress created an explicit occurrence rule, it implicitly excluded any discovery rule, the court said.

The FDCPA's consumer protection goals offered the consumer no help. The Act applies to debt collection activities that are abusive without being concealed or fraudulent, but the occurrence rule explicitly covers all violations, the court noted. To the extent that fraud or concealment was present, a consumer could rely on equitable tolling to bring an otherwise tardy suit, so the occurrence rule effectively applied only to types of violations like harassment or abuse that are not concealed. This consumer had not raised an equitable tolling argument, the court also observed.

Other opinions rejected. The consumer also relied on previous FDCPA opinions by the Fourth and Ninth Circuits, as well as on an earlier Third Circuit opinion interpreting the federal civil rights act. These arguments failed as well.

The Fourth and Ninth Circuits actually did not analyze the relevant FDCPA language, the court said. In [Mangum v. Action Collection Service, Inc.](#), the Ninth Circuit relied on a broad, and discredited, principal that federal laws generally implied a discovery rule, the Third Circuit said. In [Lembach v. Bierman](#)—an unpublished and nonbinding opinion—the Fourth Circuit relied solely on the FDCPA's consumer protection goals. As a result, they were deemed not to be persuasive.

In the Third Circuit's own opinion in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (1994), a discovery rule was applied to suits under the civil rights laws generally referred to as Title VII. The statute of limitations language was dictum, the court said, and again failed to address properly the relevant statute's language. Rather, it rested on the same discredited principal used in *Mangum*.

Equitable tolling. The opinion was careful to say that its interpretation of when the statute of limitations begins and ends has no effect on the availability of equitable tolling for FDCPA suits. Equitable tolling stops the running of a statute of limitations when a wrong has been concealed from a victim. This relief still could be available to a consumer if an FDCPA violation involved "fraudulent, misleading, or self-concealing conduct," the court said.

The case is [No. 16-1668](#).

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