3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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THIRD CIRCUIT SETS PRECEDENT ON FDCPA STATUTE OF LIMITATIONS

Rotkiske v. Klemm, 890 F.3d 422 (3d Cir. 2018)

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When does a federal statute of limitations begin to run? From the violation or the time when the injured party discovers the violation? In *Rotkiske v. Klemm*, 890 F.3d 422 (3d Cir. 2018), the Third Circuit sitting *en banc* issued a unanimous opinion that clarified the court's approach to federal statutes of limitations. Diverging from the approach taken by the Fourth and Ninth Circuits, the court held that the Fair Debt Collection Practices Act's (FDCPA) one-year statute of limitations is an "occurrence based" provision that does not incorporate a discovery rule but rather runs from the date of the violation. However, the court left open the possibility that the FDCPA's statute of limitations is subject to equitable tolling in appropriate cases. In addition to this precedential holding, *Rotkiske* also speaks to appellate strategies that attorneys practicing in the Third Circuit should keep in mind.

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THIRD CIRCUIT ADDRESSES JURISDICTIONAL DEADLINE FOR APPEALS OF ORDERS SUPPRESSING EVIDENCE UNDER 18 U.S.C. § 3731

United States v. Kalb, 891 F.3d 455 (3d Cir. 2018)

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In a criminal matter, the government may file an interlocutory appeal within 30 days of an order suppressing or excluding evidence, pursuant to 18 U.S.C. § 3731. If the government moves for reconsideration of such an order, then the 30-day appeal period runs from the order denying the motion for reconsideration.

In *United States v. Kalb*, 891 F.3d 455 (3d Cir. 2018), the Third Circuit held that a motion for reconsideration filed after the 30-day period elapsed, but considered on the merits by the court, does not keep the appeal period from expiring because the 30-day limitation in § 3731 is a jurisdictional deadline that cannot be excused by the courts.

Background

In September 2014, an unidentified 911 caller reported that a man had been electrocuted near Valley Forge National Historic Park in Montgomery County, Pennsylvania. Police later spotted a vehicle matching the description of a vehicle that reportedly drove away from the scene—driven by Defendant Eric Kalb—and stopped it. Kalb admitted to police that he was the caller and that he had driven his friend to a "scrapping" location (*i.e.*, a location where people remove salvageable scrap metals), saw his friend sitting in front of an electrical box while it was sparking, and drove to use a payphone to call 911.

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THIRD CIRCUIT SETS PRECEDENT ON FDCPA STATUTE OF LIMITATIONS

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Background

Rotkiske accumulated credit card debt between 2003 and 2005. His bank referred the debt to Klemm & Associates ("Klemm") for collection. After serving process at an old address where, unbeknownst to Rotkiske, someone accepted service on his behalf, Klemm sued and obtained a default judgment for about $1,500 in 2009. Rotkiske discovered the judgment when he applied for a mortgage in September 2014, and he brought suit against Klemm and others in June 2015, alleging the debt collection practices violated the FDCPA. Klemm and other defendants moved to dismiss the FDCPA claim as untimely. The district court agreed, rejecting Rotkiske's argument that the statute of limitations incorporates a discovery rule. The district court also rejected Rotkiske's request for equitable tolling, explaining that it was duplicative of his discovery rule argument.

The *En Banc* Decision

After argument, but prior to issuing an opinion, the Third Circuit *sua sponte* ordered rehearing *en banc*. In its unanimous opinion following rehearing, the court began its analysis with the statutory text. The FDCPA's statute of limitations states:

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

15 U.S.C. § 1692k(d). The court found this language to be clear. Explaining that there are two basic models for statutes of limitations—an "occurrence rule" in which the statute runs from the date when the injury actually occurred, and a "discovery rule" in which the statute runs from the date the aggrieved party knew or should have known of the injury—the court rejected Rotkiske's arguments and determined that the plain text of the FDCPA establishes an occurrence rule.

Rotkiske argued that the discovery rule should apply because the statute was silent concerning any discovery rule, and in light of the FDCPA's remedial purpose. The Third Circuit addressed and rejected each of these arguments in turn.

First, addressing Rotkiske's textual silence argument, the court explained that the Supreme Court in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), made clear that Congress may implicitly provide that a discovery rule shall not apply by expressly including a more limited one. Thus, "Congress's explicit choice of an occurrence rule [in the FDCPA] implicitly excludes a discovery rule."

Second, the court rejected Rotkiske's policy-based argument. The court disagreed that the principal remedial purpose of the FDCPA was to combat fraudulent deception, observing that the statutory text makes clear that most violations under the Act will be apparent to consumers as soon as they occur (*e.g.*, abusive or repeated debt collection contacts by phone or mail). Therefore, the court declined Rotkiske's invitation to read the Act as though it contemplated only concealed or fraudulent conduct.

Third, the court declined to follow the Fourth or Ninth Circuit decisions that inferred a discovery rule. The court noted that neither sister circuit actually addressed the text of the Act. The Ninth Circuit did not account for *TRW*'s reversal of the precedent that the Ninth Circuit had relied upon to infer the discovery rule. And while the Fourth Circuit's decision found that a discovery rule "would vindicate the policies underlying the FDCPA[,]" it failed to consider the possibility of equitable tolling to address those situations where the defendant had concealed its wrongful acts from a consumer. None of this, the Third Circuit concluded, could overcome what the text of the statute plainly says.

Finally, the court rejected Rotkiske's reliance on *dictum* in *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994), in which the court applied a discovery rule to Title VII despite an occurrence rule statute of limitations. The court explained that, at that time, it had followed an "earlier practice of presuming that statutes of limitations include an implied discovery rule." But *Oshiver* was now in tension with the Supreme Court's decision in *TRW*. In addition, like the decisions of the Fourth and Ninth Circuits, *Oshiver* had failed to consider the statutory text. Accordingly, the court clarified that the *dictum* in *Oshiver* is no longer persuasive in the wake of *TRW*.

The court concluded by emphasizing that nothing in its ruling undermines the potential application of equitable tolling in appropriate cases involving fraudulent, misleading, or self-concealing conduct. Although Rotkiske had raised equitable tolling before the district court, he did not raise the issue on appeal. Therefore, the court did not address the question directly in the context of Rotkiske's lawsuit.

Conclusion

The Third Circuit has acknowledged the effect of *TRW* on statute of limitations analysis and has distanced itself from the earlier practice of inferring a discovery rule in federal statutes of limitations. FDCPA claims must be brought within one year of the violation, but there is a possibility that the statute of limitations will be equitably tolled in appropriate cases.

From a practitioner's perspective, this decision is a reminder that it is crucial to search for authority that may have undermined a general court practice that one is relying upon, as *TRW* undermined the *Oshiver dictum* and practice of inferring a discovery rule in statutes of limitation. Further, *Rotkiske* suggests how important it can be to preserve alternative arguments made below on appeal. Had Rotkiske raised his equitable estoppel argument on appeal, there is a chance the matter would have been remanded for further proceedings rather than being dismissed outright.

3CBA PRESIDENT-ELECT SIMPSON, A V.I. SOLO PRACTITIONER, WINS UNANIMOUS CIV PRO DECISION AT SUPREME COURT

Hall v. Hall, 138 S. Ct. 1118 (2018)

Peter Goldberger, Immediate Past President
Law Office of Peter Goldberger, Ardmore, PA

Conventional wisdom of the last 15 years or so maintains that U.S. Supreme Court practice has become a specialists' game. A handful of big-firm, D.C.-based appellate leaders, sometimes joined by top law schools' Supreme Court clinics, dominate the docket. Their cert petitions are far more likely to be granted than the average, on top of which they snap up many of the cases, once cert is granted, in which they were not previously involved. Or so it is said by legal journalists and bloggers, with public comments by several Justices echoing similar sentiments. Maybe so, but there are still exceptions. One notable example is this Term's decision for the petitioner in *Hall v. Hall*, in which 3CBA President-Elect Andrew Simpson, a sole practitioner in Christiansted, St. Croix, USVI, succeeded in obtaining a cert grant and then in overturning the adverse 3–0, non-precedential opinion of a Third Circuit panel.

The panel had held that appellate jurisdiction was absent, for lack of finality, when judgment was entered against Simpson's client on one of two cases arising out of a complex intra-family dispute. The two suits had been consolidated for trial under Fed. R. Civ. P. 42(b), but the other case remained active in the district court as a result of a post-trial motion being granted. Agreeing with Simpson's arguments, Chief Justice Roberts, on March 27, 2018, ruled for a unanimous court that two cases do not lose their character as separate actions simply because they have been "consolidated" under the Civil Rules. 138 S. Ct. 1118. As a result, the judgment against Simpson's client was final and appealable when entered, as he had contended, regardless of the status of the related, consolidated case.

Simpson's adversary in the lower courts took the now more conventional approach to the litigation when it reached the High Court. Once cert was granted, the respondent retained Georgetown Law prof and former Acting Solicitor General Neal Katyal, who is also a partner with the Hogan Lovells firm, as lead counsel. Widely regarded as one of today's top Supreme Court advocates, Katyal has argued more than 35 cases before the High Court. Simpson, by contrast, elected to write the briefs himself and then argue his client's case before the Justices in person.

Although he had no prior Supreme Court experience, Simpson's briefs correctly anticipated the line of analysis that the Chief Justice adopted, as reflected in the Court's opinion. Citing 19th and early 20th Century case law, Simpson emphasized that pre-1937 federal practice supported his client's position regarding the meaning of consolidation. He argued that the Federal Rules of Civil Procedure, adopted thereafter, should be understood to have codified and implemented that prior practice, rather than to have radically altered it without clear notice in the wording of Rule 42 or its Advisory Committee Note. The respondent's brief, by contrast, treated the Rules of Procedure as creating a fresh start, establishing a new approach to consolidation of cases. Ruling about two months after argument, the Court unanimously sided with Simpson's approach and ultimately with his client's position, reversing the Third Circuit.

A founding member of the 3CBA Board of Governors, Andy Simpson will become President of the Third Circuit Bar Association in January 2019. He will be the first Virgin Islander to assume that position. Reflecting his Caribbean affinity, Simpson's law office uses the domain name "coralbrief."

AMENDMENT TO INTERNAL OPERATING PROCEDURES

The Court has adopted an amendment to 3d Cir. I.O.P. 9.2, adding language with respect to communications that currently appears in 3d Cir. I.O.P. 9.4.2 and 9.5.4, to provide a consistent procedure for en banc consideration by the Court:

9.2 Hearing En banc.

Initial en banc hearing is extraordinary; it is ordered only when a majority of the active judges who are not disqualified determines that the case is controlled by a prior decision of the court which should be reconsidered and the case is of such immediate importance that exigent circumstances require initial consideration by the full court. An active judge who does not communicate with the Chief Judge concerning initial en banc hearing within ten (10) days after the date the clerk transmits the petition for initial en banc hearing is presumed not to desire initial en banc hearing.

NOTICE OF ADOPTION OF THE NEW FEDERAL LAW CLERK HIRING PLAN

May 2018

Starting with students who entered law school in 2017, the application and hiring process will not begin until after a law student's second year.

For students who entered law school in 2017 (graduating class of 2020): Judges will not seek or accept formal or informal clerkship applications, seek or accept formal or informal recommendations, conduct formal or informal interviews, or make formal or informal offers before June 17, 2019.

For students who enter law school in 2018 (graduating class of 2021): Judges will not seek or accept formal or informal clerkship applications, seek or accept formal or informal recommendations, conduct formal or informal interviews, or make formal or informal offers before June 15, 2020.

A judge who makes a clerkship offer will keep it open for at least 48 hours, during which time the applicant will be free to interview with other judges.

This is a one-year pilot plan. Participating judges will reconsider their participation after one year.

THIRD CIRCUIT ADDRESSES JURISDICTIONAL DEADLINE FOR APPEALS OF ORDERS SUPPRESSING EVIDENCE UNDER 18 U.S.C. § 3731

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Kalb was indicted on federal charges of depredation against United States property, destruction of property on United States land, and aiding and abetting. He later filed a motion to suppress statements to police and physical evidence obtained after police stopped his vehicle, which the district court granted on October 21, 2016.

On November 29, 2016, more than 30 days after the district court granted the motion to suppress, the government moved for reconsideration. Despite the delay in filing, the district court found the reconsideration motion timely, reviewed it on the merits, and affirmed its suppression order. In finding the motion timely, the district court reasoned that the government could have interpreted a conference call discussion with the court as granting a 30-day extension the time and that "[r]igid enforcement of the Local Rule governing timeliness of motions for reconsideration would be inconsistent with the collegial manner in which counsel have dealt with each other, and dealt with this Court." The government then appealed the order granting the motion to suppress along with the order denying the motion to reconsider pursuant to § 3731.

No Appellate Jurisdiction

In an opinion authored by Judge Scirica, and joined by Judges Jordan and Hardiman, the Third Circuit dismissed the government's appeal on the motion to suppress for lack of appellate jurisdiction.

The Court first addressed the distinction between "jurisdictional" and "claim-processing" rules. According to the Court, jurisdictional objections ordinarily may be raised at any time, and courts are obligated to raise jurisdictional issues *sua sponte* if not raised by the parties. Further, courts may not extend jurisdictional deadlines for equitable reasons. By contrast, a claim-processing rule serves to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. Properly invoked, such rules must be enforced, but they may be waived or forfeited if not raised. If not barred by Congress, the failure to comply with claim-processing rules may be excused by courts.

Based on the statute's text and structure, relevant case law, and the statute's legislative history, the Court held that the 30-day appeal period in § 3731 is jurisdictional.

The Court recognized that the 30-day appeal period stems from a statute (as opposed to a court rule or rule of civil procedure) and is included in the same statutory section as the grant of jurisdiction to courts of appeals. Further, the language setting forth the 30-day appeal period uses mandatory, rather than permissive, terms. *See* 18 U.S.C. § 3731 ("The appeal in all such cases shall be taken within thirty days . . . .").

As for relevant precedent, the Court found *Bowles v. Russell*, 551 U.S. 205 (2007), instructive. There, the Supreme Court held that a district court lacked the power to reopen the period for appeal in civil cases for an amount of time longer than the 14 days provided by statute. The Third Circuit acknowledged that, following *Bowles*, it had treated limits set by statutes as jurisdictional in several cases.

Finally, the Court examined relevant legislative history. It found that in 1944 the Supreme Court interpreted the first Criminal Appeals Act as setting forth a 30-day appeal period that could not be extended, and that in 1970 Congress significantly amended the Act in many respects but left the 30-day appeal period intact.

The government argued that the jurisdictional nature of the 30-day appeal period was not dispositive, because the district court deemed the motion for consideration "timely," thus satisfying the prerequisites for stopping the appeal period. The Third Circuit disagreed, concluding that a district court's characterization of a motion cannot override the application of jurisdictional rules. The Court emphasized that, contrary to the government's assertions, this scenario equates to an attempt to rejuvenate an extinguished right to appeal.

After dismissing the government's appeal of the suppression order for lack of jurisdiction, the Third Circuit addressed the merits of the government's appeal of the denial of the motion for reconsideration and concluded that the district court did not abuse its discretion in denying the government's motion.

Questions Remain

The Third Circuit's *Kalb* opinion notes that "[w]e need not address the potential effect of a motion for extension of time under Federal Rule of Appellate Procedure 4(b)(4) in this case." Rule 4(b)(4) provides that in criminal cases "[u]pon a finding of excusable neglect or good cause, the district court may—before *or after the time has expired*, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

The Court may in the future be faced with a question of how § 3731 squares with Rule 4(b)(4). In particular, does Rule 4(b)(4) apply to appeals taken pursuant to § 3731 and, if so, is a district court's use of Rule 4(b)(4) to rejuvenate an appeal after the 30-day period has passed consistent with the holding of *Kalb*? Although questions remain, practitioners should remain mindful of jurisdictional rules, no matter the district court's apparent power to extend deadlines.

VACANCY ANNOUNCEMENT - TEMPORARY STAFF ATTORNEY #2 (PHILADELPHIA, PA) – CLOSING DATE: AUGUST 8, 2018

Announcement Date: July 25, 2018

Position Title: Staff Attorney

Number of Positions: 2-3

Vacancy Number: LD-07/18-02

Location: Philadelphia, PA

Type of Appointment: Full-time. Temporary (late August/early September, 2018 through mid/late November, 2018; an extension is possible)

Classification Level: CL 27-28

Salary: $66,110 – $79,239, based upon qualifications and experience

This position is located in the Legal Division, U.S. Court of Appeals for the Third Circuit. The staff attorney will be responsible for drafting per curiam opinions, memoranda, and orders for the judges of the Court of Appeals under the supervision of a Supervisory Staff Attorney.

Primary Duties

- Drafting memoranda, per curiam opinions, and orders for the judges, in civil pro se cases, largely in the areas of civil rights and constitutional law;
- Responding to questions from judges concerning individual cases, as needed; and
- Managing assigned cases.

Qualification Requirements

Applicants must have a Juris Doctor degree from an accredited law school. For appointment at a CL 28, one year of progressively responsible specialized experience in the practice of law, legal research, legal administration, or equivalent experience, gained after graduation from law school and equivalent to work at CL 27, is required.

Ideal candidates possess:

- A strong academic background;
- Demonstrated research and writing ability;
- A prior federal clerkship;
- Demonstrated ability to work efficiently and independently;
- Excellent oral and written communication skills;
- Maturity, good judgment, high ethical standards; and
- Motivation and a positive work attitude.

Benefits

Federal benefits include paid vacation based on years of service and/or experience, paid holidays, sick leave, and health insurance. Telework may be available.

Conditions of Employment

Must be a United States citizen, or must meet the requirements established by current appropriations law. Positions with the U.S. Courts are excepted service appointments. Excepted service appointments are "at will" and can be terminated with or without cause. Employees will be hired provisionally pending the results of an FBI fingerprint check. Direct deposit of pay is required.

Application Instructions

The following application materials are required and must be emailed to SA_Hiring@ca3.uscourts.gov:

- Cover Letter; include position vacancy number.
- Resume;
- Law school transcript;
- Writing sample, self-edited, demonstrating your ability to analyze a discrete legal issue (no more than 10 pages); and
- List of two or three references.

Candidates selected for an interview will be notified by email. Telephone inquiries to the Court about this position are discouraged.

The Federal Judiciary recognizes the importance and value of diversity in its workforce. Applicants from diverse groups and backgrounds are strongly encouraged to apply. The Court of Appeals for the Third Circuit is committed to equal opportunity for all applicants.

PRESIDENT'S NOTE

Charles "Chip" Becker
Kline & Specter PC, Philadelphia, PA

This current edition of the newsletter highlights the terrific victory of 3cba president-elect Andy Simpson in *Hall v. Hall*, a U.S. Supreme Court decision addressing when an order is final and appealable in the context of consolidated cases. I thank Peter Goldberger for expressing his thoughts about Andy's journey at a time when U.S. Supreme Court practice appears to be increasingly specialized. I also thank Patrick Yingling, Kristen Ashe, and Arleigh Helfer for their reflections on recent developments in federal law concerning statues of limitations and when orders are appealable. Their articles are timely and informative. I offer my thanks above all to Patrick as well as Colin Wrabley for their steady hand in developing and managing the newsletter for so many years. They do a great job! I learn something every time a newsletter is published.

The issue of attorney admissions is more mundane but still important. In a recent development, the Third Circuit now allows attorneys to apply online for bar admission. You can find information about the process on the Court's website. This is yet another demonstration of how the Court continues to streamline its operations and make the Court more efficient and user-friendly. We remain fortunate to have such dedicated and effective people working at the Court, and leading it into the future.

I hope this finds everybody well and enjoying the summer! If you have any questions or would like to become more involved in the work of the Third Circuit Bar Association, please write or give me a call. I will look forward to speaking with you.

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