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Legal Sidebar

# When Does the Clock Start Ticking? Considerations When Drafting Statutes of Limitations

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Many federal laws contain statutes of limitations that bar plaintiffs from filing civil lawsuits after a specified time period. 15 U.S.C. § 15b, for example, provides that certain civil antitrust lawsuits "shall be forever barred unless commenced within four years after the cause of action accrued." These statutes of limitations serve several purposes. For one, time bars mitigate challenges associated with stale evidence. With passing years, memories of an event may fade, physical evidence may deteriorate, and critical witnesses may die or become difficult to locate. Encouraging plaintiffs to file lawsuits promptly can thus help ensure that judges and juries decide cases based on complete and accurate evidence. Statutes of limitations also afford prospective defendants legal peace by relieving them of the threat of liability after a specified time period. However, statutes of limitations necessarily foreclose injured plaintiffs from maintaining otherwise meritorious lawsuits and may therefore allow defendants to escape liability.

As the Supreme Court's recent decision in *Rotkiske v. Klemm* reflects, Congress's choices regarding how to balance these competing interests can have significant practical consequences. The way Congress drafts a statute of limitations affects how courts interpret that provision, which, in turn, affects when judges dismiss cases as time-barred. Some commentators even predict that *Rotkiske*—which arose out of a dispute over the Fair Debt Collection Practices Act (FDCPA)—may have "wide-ranging implications" beyond the specific statute at issue in that case. Using *Rotkiske* as an illustrative example, this Sidebar explores issues Congress may consider when enacting a statute of limitations.

## *Rotkiske v. Klemm*

In *Rotkiske*, a debt collector sued a consumer in 2009 to collect an unpaid credit card debt. Because the debt collector allegedly served the lawsuit on the wrong person, the consumer was unaware of the lawsuit, and the debt collector obtained a default judgment against him. The consumer claimed he did not discover that adverse judgment until 2014. Once he finally learned about the 2009 case, the consumer filed his own lawsuit against the debt collector in 2015. The consumer specifically claimed that the debt collector violated the FDCPA by filing the 2009 lawsuit after the applicable statute of limitations governing debt collection actions had expired.

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However, the consumer encountered statute of limitations problems of his own. 15 U.S.C. § 1692k(d) requires plaintiffs to file FDCPA lawsuits "within one year from the date on which the violation occurs." The debt collector argued that this one-year limitations period had expired because the alleged FDCPA violation occurred in 2009, but the consumer did not file his FDCPA suit until six years later. The consumer, however, claimed his suit was timely because the one-year statute of limitations instead ran from the date he discovered the alleged FDCPA violation—that is, when he learned about the default judgment in 2014.

The Supreme Court, in an opinion by Justice Thomas joined by seven other Justices, agreed with the debt collector and affirmed the lower court's order dismissing the consumer's case. The Court first determined that 15 U.S.C. § 1692k(d) unambiguously states that the plaintiff must bring an FDCPA suit "within one year from the date on which the violation *occurs*," not one year from the date on which the plaintiff *discovered* the alleged violation. The Court reasoned that if Congress intended the statute of limitations to run from the date of discovery, it would have said so explicitly. For example, the Court explained, Congress could have instead drafted 15 U.S.C. § 1692k(d) like 12 U.S.C. § 3416, which allows a plaintiff to sue to enforce certain financial privacy laws "within three years from the date on which the violation occurs *or the date of discovery of such violation*, whichever is later." Because Congress did not do so when enacting the FDCPA, the one-year limitations period ran from the date of the alleged violation itself, and the consumer's lawsuit was therefore untimely.

However, the Court left open the possibility that, in other cases, equitable considerations could justify letting otherwise time-barred FDCPA actions proceed. The Court cited older opinions suggesting that when a defendant engages in fraud that prevents the plaintiff from learning about the defendant's wrongful conduct, the statute of limitations runs from the date the plaintiff discovers the fraud instead of the usual start date. The consumer in *Rotkiske* claimed he qualified for that exception because the debt collector allegedly served the 2009 lawsuit on the wrong person on purpose, thereby fraudulently preventing him from learning about the FDCPA violation until 2014. Because the consumer neither pursued that argument in the lower court nor raised the issue in his certiorari petition, however, the Court determined that he failed to preserve the issue for the Court's consideration.

## Considerations for Congress

*Rotkiske* shows that the way Congress drafts statutes of limitations can significantly affect the viability of private lawsuits that Congress authorizes to enforce its statutory mandates. Accordingly, whenever Congress drafts a federal statute creating a cause of action, it may consider several questions.

The first question is *whether* to include a statute of limitations provision. 28 U.S.C. § 1658(a) establishes a default four-year limitations period for most post-1990 federal statutes without explicit limitations provisions. Thus, if Congress enacts a federal statute creating a private right of action but does not explicitly specify how long plaintiffs have to file suit, a four-year statute of limitations will ordinarily apply by default. When Congress chooses to enact a statute of limitations, however, "it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief." As an alternative to either establishing an express limitations period or implicitly adopting the four-year default period, Congress could also explicitly provide that a cause of action is *not* subject to a limitations period. 38 U.S.C. § 4327(b), for instance, states that "there shall be no limit on the period for filing" a lawsuit alleging a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994.

The second question is *how long* the limitations period should be. A longer limitations period gives injured plaintiffs more time to "recover from their injuries, consult with counsel, assess the merits of their claims and consider alternatives to litigation before their opportunity to commence suit expires." Additionally, a longer limitations period can reduce the likelihood that the applicable statute of limitations will bar plaintiffs from pursuing meritorious lawsuits. Allowing lawsuits to proceed can also potentially deter defendants from engaging in undesirable conduct and help ensure that plaintiffs receive compensation for their injuries. On the other hand, longer limitations periods can exacerbate the challenges posed by stale evidence. Furthermore, when plaintiffs have more time to bring lawsuits, prospective defendants face lingering uncertainty over their liability exposure and may need to expend more resources preserving evidence to defend themselves at an unknown future date.

The third question raised by statutes of limitation is *when the limitations period begins*. For example, Congress can set the start date as the day the violation *occurs*. As *Rotkiske* indicates, however, designating the date of occurrence as the date the limitations period begins can penalize plaintiffs who neither know nor promptly investigate whether another party has injured them. Alternatively, Congress can enact a *discovery rule* so that the statute of limitations runs from the date the plaintiff discovers (or when a reasonably diligent plaintiff would have discovered) his injury. A discovery rule may be particularly appropriate in contexts when the plaintiff may not immediately realize that the defendant has harmed him, such as when defendants surreptitiously commit unlawful acts that are difficult to detect. A potential downside, however, is that a discovery rule does not set a fixed date when the plaintiff's claim becomes time-barred. Instead, the bar date may vary depending on when the plaintiff learns the relevant facts. A discovery rule can thereby create uncertainty and unpredictability for plaintiffs and defendants alike. Furthermore, by pushing the filing deadline out into the indefinite future, a discovery rule may exacerbate stale evidence problems and deny defendants the security and peace that statutes of limitations are intended to safeguard. Significantly, existing judicial precedent—including *Rotkiske*—suggests that if a statute does not explicitly specify when the limitations period begins, courts will presume that it runs from the date the alleged violation occurs, rather than the date the plaintiff discovers (or should have discovered) the violation.

Another question is *whether the statute of limitations is subject to exceptions*. Congress can, for instance, establish exceptions in the statutory text itself. A prior version of the Fair Credit Reporting Act's statute of limitations, for example, contained both "a general rule and an exception": although the plaintiff ordinarily had two years from the date the defendant's liability arose to file suit, if the defendant materially and willfully misrepresented certain information to the plaintiff, the two-year limitations period would instead run from the date the plaintiff discovered the defendant's misrepresentation.

Not all exceptions to the statute of limitations must be expressly articulated in statutory text, however. Courts have identified at least two legal doctrines that can potentially save lawsuits from dismissal on timeliness grounds. First, the Supreme Court has stated that most statutes of limitations presumptively authorize *equitable tolling*, which lets courts "pause the running of a limitations statute" when "a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline." For example, if prison officials fail to promptly provide a prisoner with a document that he needs to file a lawsuit challenging his confinement, a court may forgive that prisoner's failure to file his suit on time. The rule that federal statutes generally authorize equitable tolling is merely a presumption, however. Congress can override that presumption by, for example, clearly stating in the statute's text that a litigant's failure to sue within the specified time period destroys the court's jurisdiction to adjudicate the case. Secondly, as the *Rotkiske* Court observed, several older Supreme Court decisions apply a separate equitable doctrine providing that when a defendant's fraudulent actions prevent the plaintiff from discovering his injury, the limitations period does not begin until the plaintiff discovers the fraud. At least one opinion from 1946 suggests that this exception applies to every federal statute of limitations. The Supreme Court has emphasized, however, that this exception only "tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption" that statutes of limitations generally run from the date of discovery. Furthermore, as noted above, the *Rotkiske* Court explicitly declined to decide whether this fraud-based tolling doctrine applies to the FDCPA's statute of limitations. It is therefore unclear whether *Rotkiske* signals that the Court may eventually reconsider this doctrine's continued vitality.

Notably, the Supreme Court has suggested that where Congress *does* enumerate specific exceptions to a statute of limitations in the statutory text, courts should presume that Congress did not intend judges to read additional, unstated exceptions into the statute. Thus, when drafting a statute of limitations, Congress may consider whether explicitly creating particular exceptions may foreclose judicial recognition of others.

Finally, besides the foregoing considerations regarding statutes of *limitations*, Congress may also consider enacting statutes of *repose*. While statutes of limitations bar plaintiffs from filing lawsuits after a specified time period measured from when the *plaintiff* either sustains or discovers an injury, statutes of repose instead bar plaintiffs from filing lawsuits after a specified time period measured from the *defendant's* last culpable act or omission—even if that period ends before the plaintiff is injured. For instance, with various exceptions, the General Aviation Revitalization Act of 1994 prohibits plaintiffs from suing aircraft manufacturers for injuries resulting from certain aviation accidents if more than eighteen years elapsed since the manufacturer delivered the aircraft to its first purchaser or lessee. As the Supreme Court has explained, statutes of repose reflect "a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" For that reason, while statutes of limitations are generally subject to equitable tolling, statutes of repose are not, even if the plaintiff's reasons for failing to file suit before the statute of repose expires are wholly outside his control. As some courts and commentators have observed, however, Congress rarely includes statutes of repose in federal legislation.

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