No. _____

In The

Supreme Court of the United States

KEVIN ROTKISKE,

Petitioner,

v.

PAUL KLEMM, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "discovery rule" applies to toll the one (1) year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq., as the Fourth and Ninth Circuits have held but the Third Circuit (*sua sponte en banc*) has held contrarily.

PARTIES TO THE PROCEEDING

Petitioner, Appellant-Plaintiff below, is: Kevin Rotkiske.

Respondents, Appellees-Defendants below, are: Paul Klemm, Esquire, doing business as Nudelman, Klemm, Golub, P.C., doing business as Nudelman, Nudelman & Ziering, P.C.; Klemm & Associates; Nudelman, Klemm & Golub, P.C., doing business as Nudelman, Nudelman & Ziering, P.C., doing business as Klemm & Associates; Nudelman, Nudelman & Ziering, P.C., doing business as Nudelman, Klemm & Golub, P.C.; Klemm & Associates; Klemm & Associates, doing business as Nudelman, Klemm & Golub, P.C.; Nudelman, Nudelman & Ziering, P.C.; and John Does 1-10.

RULE 29.6 STATEMENT

Petitioner, Kevin Rotkiske is not a business organization but rather a natural individual.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner (Appellant-Plaintiff), Kevin Rotkiske respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The *sua sponte en banc* rehearing opinion of the United States Court of Appeals for the Third Circuit is published at 890 F.3d 422 (C.A.3 2018). (App. A). The opinion of the Eastern District of Pennsylvania (App. B) is unpublished at 2016 WL 1021140 (E.D.Pa. 2016).

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 2018. (App. A). The time for petitioning this Honorable Court for Certiorari was enlarged by Circuit Justice, Samuel A. Alito to: September 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

15 U.S.C. §§ 1692, et seq., the Fair Debt Collection Practices Act ("FDCPA") states that "[a]n 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) (emphasis added).

STATEMENT OF THE CASE

I. THE UNDERLYING EVENTS

Petitioner (Appellant-Plaintiff below), Kevin Rotkiske accumulated credit card debt between 2003 and 2005. The debt was referred by his bank to Respondent (Appellee-Defendant below), Klemm & Associates, et al. (collectively, "Klemm") for collection.

Klemm sued for payment in March 2008 and attempted service at an address where Rotkiske no longer lived.

Klemm withdrew its suit when it was unable to locate Rotkiske.

In January 2009, Klemm re-filed its suit and attempted service at the same address.

Unbeknownst to Rotkiske, an unrelated incorrect addressee accepted service on Rotkiske's behalf.

Rotkiske discovered the judgment when he applied for a mortgage in September 2014.

II. THE DISTRICT COURT PROCEEDINGS

On June 29, 2015, Rotkiske filed his underlying Complaint claiming these collection efforts violated the FDCPA. That is, it is an FDCPA violation for a "debt collector" to obtain a (default) judgment upon a debt against an individual knowingly (or should have been known) served at an incorrect address.

Below Defendants moved to dismiss the operative Complaint as barred by the one-year FDCPA statute of limitations. The District Court rejected Rotkiske's argument that the FDCPA's limitations incorporates the discovery rule: which " . . . delays the beginning of a limitations period until the Plaintiff knew of or should have known of his injury." (E.D.Pa. March 15, 2016).

The District Court found the "actual statutory language" sufficiently clear that the limitations period began to run on Defendants' "last opportunity to comply with the statute," not upon Rotkiske's discovery of the violation.

III. THE APPELLATE PROCEEDINGS

Rotkiske timely appealed the judgment of the District Court to a panel of the Third Circuit Court of Appeals. That panel heard oral argument on January 18, 2017.

Prior to issuing its opinion and judgment, on September 7, 2017 the Third Circuit *sua sponte* ordered rehearing *en banc*. That *en banc* argument was held on February 21, 2018.

The Third Circuit reasoned that this Honorable Court mandated that when " . . . the text [of the statute] and reasonable inferences from it give a clear answer, [that is] the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120 (1994). In the Third Circuit's view, " . . . the [FDCPA] says what it means and means what it says: the statute of limitations runs from 'the date on which the violation occurs.' "

REASONS FOR GRANTING THE WRIT

Contrary to the Third Circuit's rejection of the discovery rule, the Fourth and Ninth Circuits embrace it (as to the FDCPA): a circuit split. Notwithstanding the circuit split, the Third Circuit was incorrect by either ignoring or improperly expanding this Honorable Court's holding in *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001). Indeed, the application of discovery rule presents an issue of fundamental importance as having been recognized uniformly by the inferior federal courts but not by this Honorable Court as a matter of federal common law.

I. THE COURTS OF APPEALS REMAIN DIVIDED ON THIS QUESTION

As indicated, the Third Circuit held the discovery rule does not apply to the FDCPA's one-year statute of limitations.

Contrarily, the Fourth Circuit has held the discovery rule does apply to the FDCPA. *Lembach v. Bierman*, 528 F.App'x 297 (C.A.4 2013) (*per curiam*).

Consistent with the Fourth Circuit, the Ninth Circuit likewise embraces the discovery rule as applicable to the FDCPA. *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935 (C.A.9 2009); *Lyons v. Michael & Assocs.*, 824 F.3d 1169 (C.A.9 2016).

The aforesaid circuit split respectfully requires this Honorable Court's resolution.

Indeed, the other lower courts – outside the Third, Fourth and Ninth Circuits – are also likewise divided. *See generally*, *Oyegbole v. Advantage Assets, Inc. II*, 2009 WL 4738074, n.1 (D.Mass. 2009) (unpublished); *Vincent v. Money Store*, 304 F.R.D. 446, n.4 (S.D.N.Y. 2015); *McNair v. Maxwell & Morgan, P.C.*, 142 F.Supp.3d 859, 865-68 (D.Ariz. 2015).

To wit, the application of the occurrence rule to the instant facts (e.g., whereby Rotkiske – by Klemm's misconduct – could not have learned of the violation) counsels an absurd result: which result the Third Circuit affirmed.

II. *TRW, INC. V. ANDREWS*, 534 U.S. 19 (2001), REQUIRES A CONTRARY FINDING TO THE THIRD CIRCUIT'S – WHICH METHODOLOGY BY THE THIRD CIRCUIT IN EITHER IGNORING OR EXPANDING *TRW* IS FLAWED

In *TRW*, this Honorable Court held the discovery rule does not apply to the Fair Credit Reporting Act ("FCRA").

The Third Circuit held *TRW*'s methodology supported the Third Circuit's judgment.

However, *TRW* actually counsels directly opposite to the Third Circuit's conclusion. That is, this Court held in *TRW* that the FCRA's *embedded* statute of limitations precludes application of the discovery rule. Said differently, *TRW* recognized that Congress in enacting the FCRA therein created – textually – its own statute of limitations paradigm.

On the contrary to the FCRA, the FDCPA does not contain an embedded statute of limitations. Indeed, in comparing the FCRA with the FDCPA, the FCRA's statutory limitations' text should have required the Third Circuit's contrary holding (i.e., that the discovery rule while applicable to the FCRA per *TRW* does not apply to the FDCPA as the FDCPA does not contain its own embedded limitations).

As the Third Circuit either ignored or improperly expanded *TRW*, this Honorable Court should accept

certiorari to reverse the judgment of the Third Circuit Court of Appeals.

III. THE QUESTION PRESENTED IS OF FUNDAMENTAL IMPORTANCE

In *TRW*'s concurrence, Justice Scalia (joined by Justice Thomas) specifically noted that the discovery rule – though uniformly adopted by the inferior federal courts – has never been adopted by this Honorable Court. *TRW*, at 37 ("The injury-discovery rule applied by the Court of Appeals is bad wine of recent vintage").

To wit, the concurrence was directly brought to bear upon Rotkiske before the Third Circuit at argument.

While this question presented remains narrow to the FDCPA, the inferior federal courts' application of the discovery rule – despite this Honorable Court's never so mandating – presents an issue of fundamental importance. That is, is there a federal discovery rule?

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The circuits are split and the lower courts are further dividing. The Third Circuit incorrectly applied *TRW* – respectfully suggested as requiring this Honorable Court's reversal of the Third Circuit's affirmance.

The discovery rule at large presents an issue of fundamental importance.

Rotkiske could not have learned of the "occurrence" of Klemm's violation of the FDCPA (i.e., a default judgment arising from intended re-service at a known incorrect address of the underlying debt collection Complaint). Thus, whether the FDCPA's statutory *occurrence* text effectively creates a statute of repose precluding the discovery rule – as the Third Circuit found; or otherwise requires the discovery rule for situations such as this – as the Fourth and Ninth Circuits held: makes this (simplistic factual) matter a perfect vehicle for this Court's determination.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted.

Respectfully submitted,

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