No. 00-1045

In the Supreme Court of the United States

TRW INC., PETITIONER

v.

ADELAIDE ANDREWS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AND THE FEDERAL TRADE COMMISSION
AS AMICI CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether the limitation period under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which allows private damage actions "to enforce any liability created under [the Act]" to be brought "within two years from the date on which the liability arises," begins to run at the time of an alleged violation, even if the potential plaintiff has no reason to know that she has been injured.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act confers public enforcement authority on the Federal Trade Commission with respect to most consumer reporting agencies and others subject to the Act, and on other federal agencies or officers with respect to certain financial institutions and other specified parties. 15 U.S.C. 1681s(a)-(b) (1994 & Supp. V 1999). Private suits under 15 U.S.C. 1681n and 1681*o* (1994 & Supp. V 1999) supplement public enforcement efforts.

STATEMENT

1. In June 1993, respondent Adelaide Andrews saw a doctor in Santa Monica, California. In connection with the appointment she provided the doctor's office with personal information, including her date of birth and

social security number. A receptionist named Andrea Andrews processed that information. Pet. App. 16a.

In 1994 Andrea Andrews moved to Las Vegas. There she rented an apartment under the name "Adelaide (Andrea) Andrews," using respondent's social security number and driver's license number, and obtained telephone and electric service in respondent's name. Pet. App. 16a. She arranged for television service from Prime Cable of Las Vegas, using respondent's social security number. *Id.* at 3a, 17a. She also applied for credit at Dillard's and Express Department Stores and through companies called FCNB Preferred Charge and Commercial Credit, in each case using respondent's social security number, and in one case using respondent's date of birth as well. *Id.* at 2a-3a, 16a-17a.

The companies all requested credit reports on their prospective customer—in four cases from petitioner TRW, and in one case from former defendant Trans Union Corporation, Inc. Pet. App. 16a-17a. Petitioner or Trans Union matched the information supplied to them to the social security number, last name, and first initial associated with credit files they maintained concerning respondent, and provided the requesters with information from those files. *Id.* at 17a. They also noted the requests and disclosures in the files they maintained on respondent. *Id.* at 3a, 19a. Dillard's Department Store then extended credit to Andrea Andrews, and Prime Cable provided her with service. *Id.* at 3a, 17a-18a. Andrea eventually failed to pay what she owed to Dillard's, to Prime Cable, and to her landlord. *Id.* at 17a; Pet. Br. 6.

In May 1995 respondent inquired about refinancing the mortgage on her home, and the bank requested a credit report on her. The report combined information from petitioner's and Trans Union's files, and showed a delinquent Dillard's account in Las Vegas. Pet. App. 18a. Respondent then contacted petitioner and Trans Union to obtain copies of the files they maintained on her. When she saw that petitioner's file showed the Dillard's account and requests for credit reports by other businesses in Las Vegas, she contacted petitioner, Dillard's, and the Las Vegas police. Pet. Br. 7. At respondent's request, petitioner deleted from her file all entries that had arisen from Andrea Andrews' activities. Pet. App. 3a.

2. In October 1996 respondent sued petitioner and Trans Union under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* See Pet. App. 3a. She alleged that petitioner had violated 15 U.S.C. 1681b and 1681e(a) by providing reports on her "without reasonable grounds for believing that the * * * reports were to be used in connection with a credit transaction involving [respondent]." J.A. 15 (Compl. ¶ 23). She also alleged that petitioner had violated Section 1681e(b) by "fail[ing] to maintain and follow 'reasonable procedures to assure maximum possible accuracy of the information concerning' [respondent]" in their files. J.A. 16 (Compl. ¶ 28). She sought actual and punitive damages and an injunction requiring petitioner to comply with the FCRA "by 'requiring a sufficient number of corresponding points of reference' before disseminating an individual's credit history or attributing information to an individual's credit file." Pet. App. 4a (quoting Compl. ¶ 42(a), *reprinted at* J.A. 19).[1]

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[1] The complaint also alleged that Trans Union had violated 15 U.S.C. 1681i(a) by failing to respond appropriately when respondent notified it that the information in its files was inaccurate (J.A. 17), and that the defendants' violations of the FCRA justified equitable relief under California law (J.A. 18-19).

The district court granted partial summary judgment in favor of petitioner, based in part on the statute of limitations that applies to private actions under the FCRA. Pet. App. 22a-25a. The court concluded (*id.* at 25a) that the limitation period, which is generally "two years from the date on which the liability arises," 15 U.S.C. 1681p, began to run on the date that petitioner made each challenged disclosure of information about respondent. Respondent thus could not pursue any claim based on petitioner's disclosures of information to FCNB and Prime Cable, because each of those disclosures was made more than two years before respondent filed her complaint. Pet. App. 23a, 25a.

The court rejected respondent's contention that the Act should be construed to include a "discovery rule," under which the limitation period would not begin to run until respondent learned or should have learned that a disclosure had been made, and under which all of respondent's claims would have been timely. Pet. App. 23a-25a. The court pointed out that the FCRA limitation provision includes a "specific exception" (*id.* at 23a) for situations in which a defendant has "materially and willfully misrepresented" information that the Act requires it to disclose to a potential plaintiff and that is material to establishing the defendant's liability. See 15 U.S.C. 1681p. The court held that "the discovery rule does not apply to the FCRA except in the one * * * circumstance" set out in the Act. Pet. App. 23a, 25a.

The district court made various other pre-trial rulings, including that disclosure of information in connection with a credit application by someone impersonating a consumer does not violate 15 U.S.C. 1681b (Pet. App. 25a-29a), and that petitioner's general procedures for deciding what files to disclose in response to requests for credit reports, and its disclosure of respondent's files in this case, were "reasonable as a matter of law" (*id.* at 34a n.15), and did not violate 15 U.S.C. 1681e(a). See Pet. App. 29a-34a.[2] Trans Union then settled with respondent. See J.A. 5. Respondent's remaining claims against petitioner were tried to a jury, which found for petitioner. Pet. App. 5a.

3. The court of appeals reversed in part and remanded for trial on respondent's remaining claims. Pet. App. 1a-9a. The court rejected the district court's conclusion that the FCRA's limitation period began to run from the date of each disclosure of information about respondent, without regard to when respondent knew or should have known of the disclosure. *Id.* at 5a-6a. The court held that construction of the limitation provision was governed instead by "[t]he general federal rule * * * that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured," because "unless Congress has expressly legislated otherwise, the equitable doctrine of discovery 'is read into every federal statute of limitations.'" *Ibid.* (quoting *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946)). The court noted (*id.* at 6a)

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[2] The district court also held that there were issues of fact with respect to respondent's claims against Trans Union under 15 U.S.C. 1681e(b) and 1681i(a) (Pet. App. 35a-45a, 45a-48a); that petitioner was entitled to judgment that the report it furnished to the bank when petitioner was considering refinancing her home had not caused her any economic damage (*id.* at 48a-51a); that petitioner was entitled to summary judgment on respondent's claim for punitive damages, but Trans Union was not (*id.* at 53a-57a); and that respondent was potentially entitled to disgorgement of profits under state law (*id.* at 52a-53a), and to injunctive relief against Trans Union but not against petitioner, which was no longer engaged in the credit reporting business (*id.* at 57a-64a).

that it had "followed this approach in interpreting an analogous statute," the Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. V 1999). Applying the discovery rule, none of respondent's claims was time-barred. Pet. App. 6a.

The court also held that petitioner's disclosures of respondent's information in response to requests generated by Andrea Andrews' activities violated Section 1681b, and that the jury should have been allowed to consider whether petitioner's procedures for deciding to make such disclosures were nonetheless reasonable enough to insulate petitioner from liability under Section 1681e(a). See Pet. App. 6a-8a. The court affirmed the judgment entered for petitioner on those claims that had been tried, and remanded the case for trial of respondent's remaining claims. *Id.* at 8a-9a.

SUMMARY OF ARGUMENT

A credit reporting agency may become subject to private civil liability under the FCRA by failing to follow reasonable procedures to assure that the information it maintains is accurate, and that information is disclosed to third parties only as permitted by the Act. When a report containing inaccurate information is released, however, or information concerning a consumer is inappropriately disclosed, considerable time often elapses before the affected consumer has any reason to learn of the violation. The issue is whether, in light of this circumstance, the Act's two-year statute of limitations should begin to run only once the potential plaintiff knows or should know that she has been harmed.

The first question to be addressed is whether the language of the Act will bear that construction. Under 15 U.S.C. 1681p, a private action must be brought "within two years from the date on which the liability arises." This Court has endorsed the use of a "discovery rule," under otherwise appropriate circumstances, when a limitation period runs from the time a "claim" or "cause of action" "accrues." Courts of appeals have also applied the rule under the very similar limitation provision in the Privacy Act, which requires that an action "to enforce any liability created under" that Act be brought "within two years from the date on which the cause of action arises." 5 U.S.C. 552a(g)(5). The "liability arises" language of Section 1681p does not differ from the language in those other provisions in any way that precludes the use of a discovery rule.

That conclusion does not change because Section 1681p—like the Privacy Act—includes an express anti-concealment provision. That provision is not, as petitioner contends, simply a "limited discovery rule." It incorporates a version of the judicial doctrine of "equitable estoppel," which is distinct both from the discovery rule and from the related doctrine of equitable tolling. Because each principle has its own domain, and because the circumstances under which FCRA claims typically arise strongly support the use of a discovery rule, Congress's inclusion of an express version of one principle does not compel the conclusion that it intended to exclude application of the others. Nor would the use of a discovery rule render the express provision "superfluous."

Because the text of the Act neither requires nor precludes use of a discovery rule, the question becomes how the limitation provision is best interpreted, "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading*

Co. v. *Koons*, 271 U.S. 58, 62 (1926). A primary purpose of limitations—to encourage the prompt presentation of claims—is not implicated until events may fairly be expected to put a potential plaintiff on notice of the need for diligence in discovering and presenting the claim. Accordingly, this Court has applied the discovery rule to cases involving medical malpractice and latent occupational injuries—cases in which potential plaintiffs often will not learn of their injuries until some time after they have been inflicted. The FCRA, like the Privacy Act, fits that model.

That conclusion is consistent with Congress's selection of a relatively short limitation period, and with the history and structure of the Act. Although Congress expected potential plaintiffs to be diligent in pursuing *suspected* claims, there is no reason to think that it intended to impose a limitation period that would begin to run against claims that even a diligent consumer had no reason to suspect. Moreover, because enforcement of the Act's provisions relies to a significant extent on private litigation, use of a discovery rule serves the public interest, as well as the interests of private litigants. Such a rule strikes the proper balance between potential defendants' legitimate interest in repose, and the private and public interests in ensuring that potential plaintiffs have a fair opportunity to discover and present claims under the Act.

ARGUMENT

The Fair Credit Reporting Act requires, among other things, that credit reporting agencies maintain reasonable procedures both to assure "maximum possible accuracy" of the information in their consumer credit files and to avoid releasing that information to any third party except as specifically permitted by the Act. 15 U.S.C. 1681e(a)-(b). Those obligations are enforced in large part through private damage suits under the Act. 15 U.S.C. 1681n-1681*o* (1994 & Supp. V 1999). The Act operates in a context, however, in which an individual will frequently have no immediate reason to know if a credit report containing inaccurate information has been released, or if a report is released to an unauthorized person or for an unauthorized purpose. The question presented here is whether, in that unusual statutory context, the Act's two-year statute of limitations on private enforcement actions should begin to run only once the potential plaintiff becomes (or should become) aware that she has suffered some injury.

In answering that question, the first inquiry is whether the language of the Act will permit such a construction. If it will, then the question becomes whether that is the best interpretation of the Act, "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co.* v. *Koons*, 271 U.S. 58, 62 (1926)).

I. THE LANGUAGE OF THE FAIR CREDIT REPORTING ACT PERMITS THE USE OF A DISCOVERY RULE IN DETERMINING WHEN THE STATUTORY LIMITATION ON PRIVATE ENFORCEMENT ACTIONS BEGINS TO RUN

A. Use Of A Discovery Rule Is Consistent With The Act's Provision That The Time For Suit Runs From The Time That "Liability Arises"

Section 618 of the Act, 15 U.S.C. 1681p, provides that:

> An action to enforce any liability created under this [Act] may be brought * * * within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

That language does not foreclose the use of a discovery rule, under which a "liability" under the Act would first "arise[]," so as to start the running of the limitation period, when a potential plaintiff first learns (or with due diligence should learn) that she has been injured by the conduct of a potential defendant.

This Court has not previously interpreted a statute of limitations that uses the particular "liability arises" language that is found in Section 1681p. The Court has, however, held that where it is otherwise appropriate, a discovery rule is compatible with similar language under which a limitation period begins to run when a "claim" or a "cause of action" "accrues." In *United States* v. *Kubrick*, 444 U.S. 111, 113, 119-122 (1979), the Court rejected the argument that a "claim" for medical malpractice under the Federal Tort Claims Act "accrue[d]," under the applicable statute of limitations, 28 U.S.C. 2401(b), only when the plaintiff learned that he might be entitled to *legal relief* for his injury. The Court concluded that such a generous rule would unduly undermine the purposes of the Act's limitation provision. 444 U.S. at 123. The Court endorsed, however, the rule that a malpractice "claim 'accrues' within the meaning of the [FTCA] when the plaintiff knows both the existence and the cause of his injury." *Id.* at 113; see *id.* at 122. Thus, the statute of limitations on Kubrick's claim began to run when he learned that his loss of hearing was probably caused by earlier treatment with an antibiotic—neither earlier, at the time of the treatment itself, nor later, when Kubrick was first told that the treatment had been improper. *Id.* at 113-114, 118-123. That rule, the Court concluded, properly balanced the interests in fairness and repose in the malpractice context.[3]

In first interpreting the FTCA's limitation provision to include a discovery rule for malpractice cases, lower

[3] By contrast, the "standard rule" in most circumstances is that "the limitations period commences when the plaintiff has 'a complete and present cause of action,'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997), which normally occurs once all the elements giving rise to the cause of action have come into existence, see Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200-1201 (1950). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-342 (1971); *United States* v. *Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence[.]").

federal courts relied on this Court's decision in *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949). See *Kubrick*, 444 U.S. at 120 n.7. *Urie* involved an action under the Federal Employers' Liability Act by a plaintiff who sought compensation for the disabling effects of long-term exposure to silica dust at work. 337 U.S. at 165-166. The Court held that the employee's "cause of action" did not "accrue[]" for purposes of the FELA's limitation provision, 45 U.S.C. 56, until he became disabled and was diagnosed with silicosis. 337 U.S. at 168-171.

The Court rejected the argument that because Urie "must unwittingly have contracted silicosis long before" it disabled him, his cause of action must have "accrued" at that time. 337 U.S. at 169. The Court concluded that in framing a "humane legislative plan" such as the FELA, Congress would not have "intended such consequences to attach to blameless ignorance." *Id.* at 170. Moreover, a holding that the limitation period began to run before the employee had any reason to know he had been injured would be inconsistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights." *Ibid.* (emphasis added). Instead, the Court agreed with the statutory construction adopted by a state court in an analogous workers' compensation case, under which "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." *Ibid.* (quoting *Associated Indemnity Corp.* v. *State Indus. Accident Comm'n*, 12 P.2d 1075, 1076 (Cal. Ct. App. 1932), disapproved in part on other grounds, *Colonial Ins. Co.* v. *Industrial Accident Comm'n*, 172 P.2d 884 (Cal. 1946)).

Although the "liability arises" language used in Section 1681p is not the same as that construed in *Urie* and *Kubrick*, it does not differ in any way that precludes the use of a discovery rule.[4] To the contrary, because the legal rights that may be vindicated through litigation are inversely related to legal duties subject to judicial enforcement, one would normally expect a potential defendant's legal "liability" to "arise," at least for purposes of a statute of limitations, at the same time that the potential plaintiff's "claim" or "cause of action" "accrues." That expectation is reenforced in this case by the first phrase of Section 1681p, which refers to the plaintiff's potential action not as a "claim" or a "cause of action," but as "[a]n action to enforce any liability created under" the Act. Similarly, the Section's express anti-concealment provision applies, by its terms, when misrepresented information is "material to the establishment of the defendant's liability" to a potential plaintiff. Thus, in drafting Section 1681p, Congress simply spoke consistently in terms of legal "liability" rather than in terms of a legal "claim" or "cause of action."

It is instructive to compare the language of Section 1681p with the very similar limitation provision in the Privacy Act of 1974, 5 U.S.C. 552a(g)(5). That provision

[4] There are some statutes whose language in context leaves little doubt about when a limitation period begins to run, or that the only applicable discovery rule is one expressed in the text. See *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); *United States* v. *Brockamp*, 519 U.S. 347, 350-352 (1997) ("unusually emphatic" and detailed language concerning date tax return was filed or tax was paid excluded even equitable tolling); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 & n.6, 362 n.8, 363 (1991); *Herget* v. *Central Nat'l Bank & Trust Co.*, 324 U.S. 4 (1945). This is not such a case.

also refers to actions "to enforce any liability created under" the Act, and includes a concealment provision that refers to establishment of the defendant's "liability." While the limitation period under the Privacy Act runs from the date on which the cause of action arises, rather than the date on which the *liability* arises, as in the FCRA, there is no reason to suspect that Congress attached significance to that difference in phraseology. To the contrary, the use of the different phrases in otherwise directly comparable provisions strongly suggests that Congress viewed the terms as interchangeable. Cf. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997) (construing statute that speaks in terms of when a "cause of action" "arose"); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (not reaching question "[w]hen the liability, if any, accrued in this case"). As the court below in this case noted (Pet. App. 6a), courts of appeals have uniformly construed the Privacy Act limitation provision to incorporate a discovery rule. See *Englerius* v. *Veterans Admin.*, 837 F.2d 895, 898 (9th Cir. 1988) (citing cases); *Tijerina* v. *Walters*, 821 F.2d 789, 797-798 (D.C. Cir. 1987); see also *Akutowicz* v. *United States*, 859 F.2d 1122, 1126 (2d Cir. 1988). The United States has long acquisced in that holding.

Thus, under this Court's cases, the language of Section 1681p neither compels nor precludes a determination that liability does not "arise[]," or the limitation period begin to run, "until the plaintiff has discovered both [her] injury and its cause." *Kubrick*, 444 U.S. at 120; cf. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 192-193 (1997) (noting that language of a borrowed limitation provision "does not necessarily provide all the answers," and deferring consideration of "various [possible] discovery accrual rules"). Although every statute must be considered on its own terms, appellate decisions construing the Privacy Act confirm that such an interpretation of the language is permissible, and suggest that it would be appropriate here as well.

B. Inclusion Of An Express Anti-Concealment Provision In Section 1681p Does Not Imply A Congressional Intention To Prohibit Use Of A Discovery Rule

The foregoing conclusion does not change because Section 1681p—like Section 552a(g)(5)—includes an express anti-concealment provision. That provision is not, as petitioner contends (Br. 20-21), simply a "limited discovery rule." It incorporates, instead, a version of the judicial doctrine of equitable estoppel. That doctrine is distinct both from the discovery rule and from the related doctrine of equitable tolling. Congress's decision to include an express version of one principle in the text of the Act does not compel the conclusion that it intended to exclude application of the others—at least here, where the particular circumstances under which FCRA actions typically arise otherwise support the use of a discovery rule. See pp. 24-30, *infra*. Nor would the use of a discovery rule render the anti-concealment provision "superfluous" (Pet. Br. 23).

1. In *United States* v. *Brockamp*, 519 U.S. 347, 348-349 (1997), two taxpayers claimed that they suffered from disabilities (senility or alcoholism) that had prevented them from complying with the statutory deadline for filing tax refund claims under 26 U.S.C. 6511, and that their time for filing suit should be extended under principles of "equitable tolling." The Court concluded that such tolling would be inconsistent with the structure and purpose of the relevant tax laws. See 519 U.S. at 350-354. The Court's opinion does not itself define "equitable tolling." The Court instead relied, for

that purpose, on citations to two authorities: 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1056 (2d ed. 1987 & Supp. 1996) (Wright & Miller), and Judge Posner's opinion for the Seventh Circuit in *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (1996).

Both those authorities draw a distinction, important here, between the doctrines of "equitable tolling" and "equitable estoppel." See Wright & Miller § 1056, at 48-58 nn.25.1-25.3 (Supp. 2001); *Wolin*, 83 F.3d at 852-853; see also 2 C. Corman, *Limitation of Actions*, chs. 8-10 (discussing tolling), 11 (discussing discovery rule) (1991 & Supp. 1993). *Wolin* explains that "[e]quitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit," whereas "[e]quitable estoppel * * * is invoked when the prospective defendant * * * make[s] * * * a special effort to cover up [a] fraud or does something else to prevent the prospective plaintiff from suing in time, such as promising not to plead the statute of limitations as a defense," 83 F.3d at 852, or actively "conceal[ing] his identity or other facts that the plaintiff needed in order to be able to file suit" (*id.* at 850). The two doctrines

> differ critically in scope in the following respect: when the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course of the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; if he does not, he has no equitable claim to avoid the time bar. In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent.

Id. at 852. The particular form of "active misconduct" in which a defendant conceals its identity or other facts critical to the plaintiff's ability to bring suit is a "part of [the equitable estoppel doctrine] that goes by the name 'fraudulent concealment.'" *Id.* at 850; see also *id.* at 855 (fraudulent concealment "is not a synonym for equitable estoppel, though it overlaps with it").

From this discussion, it is clear that the anti-concealment provision that Congress included in Section 1681p addresses issues of equitable estoppel, and in particular of fraudulent concealment. Cf. *Wolin*, 83 F.3d at 850 (discussing analogous provision in 29 U.S.C. 1113(a)); 83 F.3d at 855 (noting possible effect of inclusion of express statutory provision concerning concealment on continued applicability of other aspects of equitable estoppel doctrine). The provision does not apply unless the defendant has "willfully misrepresented" to the plaintiff information that it had a duty to disclose under the FCRA, and that is "material to the establishment of the defendant's liability"—and, accordingly, of the plaintiff's right to sue—under the Act. 15 U.S.C. 1681p. When it does apply, the limitation period runs from "discovery by the [plaintiff] of the misrepresentation"—without regard to the plaintiff's diligence in uncovering the defendant's misconduct. In enacting those provisions, Congress may well have "modifie[d] and supplant[ed] the judge-made doctrine" of equitable estoppel. Cf. *Wolin*, 83 F.3d at 850 (discussing analogous provision). There is, however, no reason to conclude in this case that in addressing fraudulent concealment, Congress meant to preclude use of the discovery rule in construing or applying Section 1681p.

That rule is "another judge-made doctrine of statute of limitations law generally applicable in federal cases (unless of course modified by statute * * *)," and it "must be distinguished from" both equitable estoppel and equitable tolling. *Wolin*, 83 F.3d at 852; see also *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 340-341 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (deciding case on discovery-rule grounds and therefore not reaching issues of fraudlent concealment); Wright & Miller § 1056, at 46-48 n.1.2 (Supp. 2001). *Wolin* relies, in turn, on the discussion of the different doctrines in *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-453 (7th Cir. 1990) (Posner, J.), cert. denied, 501 U.S. 1261 (1991). This Court too has noted the distinction. See *Klehr*, 521 U.S. at 192 (citing *Cada* for its "descri[ption of the] differences among various discovery rules and doctrines of 'equitable tolling' and 'equitable estoppel'"); cf. *Rotella* v. *Wood*, 528 U.S. 549, 554 n.2 (2000) (reserving applicability of discovery rule in private suits under Racketeer Influenced and Corrupt Organizations Act); *id.* at 561 (citing *Klehr* as noting "distinctions between different equitable devices" that might also apply).

Wolin explains that under the discovery rule, "the statute of limitations does not even *begin* to run until the prospective plaintiff learns or should learn that he has been injured." 83 F.3d at 852. Equitable tolling and estoppel, by contrast, normally operate "[a]fter the statute of limitations starts running," and define certain circumstances under which running of the period may be "arrested." *Ibid.* *Cada* elaborates that where something about the original wrongful conduct (such as a fraud) "prevent[s] the plaintiff from discovering that he is a victim" of the wrong (*i.e.*, that he has been injured), the effect of that conduct is "within the domain of the discovery rule"; if that rule applies, the circumstances will "postpone the date of accrual" of a claim and the beginning of the limitation period. 920 F.2d at 451. In the case of equitable tolling or estoppel, by contrast, "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Ibid.*

Thus, these doctrines differ from the discovery rule in the following respects. First, because the discovery rule governs the time when the limitation period begins to run, a plaintiff is, by definition, entitled to the benefit of the entire limitation period after the time she learns (or should learn) that the defendant's conduct has injured her. Under equitable estoppel as a judicial doctrine, the plaintiff would be entitled to the full statutory limitation period, *plus* any time during which the defendant succeeded in actively concealing some fact material to the plaintiff's right or decision to sue. *Cada*, 920 F.2d at 452. Under equitable tolling, however, where the plaintiff lacks critical information but the defendant has not actively concealed that information, the plaintiff is, under *Cada*, entitled only to whatever extension of the statutory period (if any) is reasonably necessary to allow her time to sue. *Id.* at 453. The plaintiff must, in other words, "bring suit within a reasonable time after [s]he has obtained, or by due diligence could have obtained, the necessary information." *Ibid.*; see also *Wolin*, 83 F.3d at 852-853.

Second, equitable tolling is often claimed on the basis of some sort of special disability—such as minority, illness, or absence of the plaintiff or defendant from the jurisdiction—that prevented the potential plaintiff from suing in the time ordinarily allowed. See, *e.g.*, *Brockamp*, 519 U.S. at 348 (senility and alcoholism claimed as extenuating disabilities); 2 Corman, *supra*, chs. 9-10. The analysis therefore focuses on the actual circumstances of a particular plaintiff. Equitable estoppel focuses on whether, and for how long, special conduct by a particular defendant wrongfully prevented the plaintiff from suing that defendant to seek redress for a known injury. See *Wolin*, 83 F.3d at 850, 852. In contrast to each of those doctrines, the discovery rule asks when a potential plaintiff knew, or when a reasonable person in her position should have known, that she had been injured by the defendant's conduct. See 2 Corman, *supra*, § 11.4 & n.2; see also *id.* §§ 11.5.6 & n.51, 11.5.8. It is therefore most appropriately employed where the very fact of injury may not ordinarily be apparent to the person injured. See *Connors*, 935 F.2d at 342-343.

The discovery rule and the doctrines of tolling and estoppel are, of course, closely related, and *Cada* points out that they are "frequently confused." 920 F.2d at 451; see also, *e.g.*, *Wolin*, 83 F.3d at 852; cf. *Klehr*, 521 U.S. at 192 (reserving judgment on related issues and noting that "[t]he legal questions involved may be subtle and difficult."). Our point here does not depend on any comprehensive exploration of their subtleties, or reconciliation of their potentially overlapping domains. Cf., *e.g.*, *Beggerly*, 524 U.S. at 48 (indicating that by including its own express discovery rule, a statutory limitation provision had "already effectively allowed for equitable tolling"); *Holmberg*, 327 U.S. at 397 (discussing equitable doctrines and giving as an example the discovery rule traditionally applied in cases of fraud). What we have said in broad outline concerning the relevant background legal principles suffices to show that the express anti-concealment provision in Section 1681p covers only circumstances that would otherwise be addressed primarily by the "fraudulent concealment" strain of the equitable estoppel doctrine. Because that doctrine is distinct from the discovery rule, and because use of the discovery rule is otherwise appropriate in the special circumstances the FCRA (see pp. 24-30, *infra*), the fact that Congress chose to address directly circumstances that would otherwise raise issues of estoppel does not justify an inference that it thereby intended to *exclude* operation of the discovery rule in determining when the basic limitation period begins to run. Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983) (*expressio unius* maxim "cannot properly be applied to a situation where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity").

2. Nor would use of the discovery rule render the anti-concealment provision "superfluous." See Pet. Br. 23-25. As the foregoing discussion explains, the two apply in different circumstances, and address different potential problems. The discovery rule applies when a potential plaintiff does not even know that she has been injured, and prevents the limitation period from beginning to run until she is (or should be) on notice of the injury—at which point she may fairly be held to a requirement of due diligence. The concealment provision applies, whether or not the plaintiff is aware of the injury, if the defendant attempts through wrongful misrepresentations to prevent or dissuade the plaintiff from filing suit, and seeks to ensure that the defendant will not profit from that conduct.

These differences lead to the use of different criteria for when the limitation period begins to run: When the potential plaintiff learned or should have learned of her injury, or when she actually learned of the potential defendant's wrongful misrepresentations. As the District of Columbia Circuit explained in a Privacy Act case, rejecting essentially the same argument petitioner makes here, the difference between the date when the plaintiff should, with due diligence, have learned of her injury and the date that she actually learned, with or without diligence, of a defendant's related misrepresentation is enough to give each rule independent scope. See *Tijerina*, 821 F.2d at 798; cf. *Wolin*, 83 F.3d at 852 (distinguishing tolling from estoppel based on diligence requirement).

A simple example clarifies the point. If a credit reporting agency included false derogatory information in a consumer's file and released it to a requester, in violation of the Act, but the consumer had no reason to learn of the wrong (for instance, because the requester granted her credit in any event—although perhaps on less favorable terms than it otherwise would have offered), under the discovery rule the limitation period in Section 1681p would not begin to run. If another requester, receiving the same information, later denied the consumer credit, the consumer would presumably be put on inquiry notice of the violation, and the discovery rule *would* start the running of the normal limitation period—whether or not the consumer took any further action. If, however, the consumer then asked the reporting agency whether it had provided a report to the second requester, and the agency denied doing so, then the basic period would become irrelevant as to that defendant. The anti-concealment rule would start a new period running whenever the consumer later actually discovered that the defendant had lied to her—even if the consumer had other means of learning the truth at the time of the first denial, and even if she did not diligently pursue the matter thereafter.

The discovery rule would not, therefore, "operate in exactly the same manner" as the anti-concealment provision, even "[a]s a practical matter." See Pet. Br. 24. First, it is not true that a potential plaintiff who is able to invoke the concealment provision is necessarily "also blamelessly ignorant of her claims and therefore protected by a general discovery rule." *Ibid.* Such a plaintiff might well be on at least inquiry notice of her claims, and thus outside the protection of the discovery rule, at the time a misrepresentation is made. Or a plaintiff who is on notice may never *make* the inquiry that might trigger either a misrepresentation or an honest response. Indeed, that would be the classic situation for the operation of any statute of limitations —when the plaintiff is on notice that she has (or may have been) been injured, and has enough information to pursue her right to legal redress, but does not do so with due diligence. See, *e.g.*, *Kubrick*, 444 U.S. at 122-125.

Second, it is not true that "the limitations period under a general discovery rule would commence at the same time as the period under the" concealment provision. See Pet. Br. 24. In cases where there is a misrepresentation, the general period may or may not have begun to run before that time, depending on whether other circumstances have given the potential plaintiff reason to know that she has been injured by conduct within the purview of the Act. For the same reason, the basic limitation period in such a case might or might not, in theory, "run for the same two-year period" as the period established by the concealment provision. Whether it would or not is of little moment, however, because if there *is* a misrepresentation, the concealment provision wholly supplants the basic limitation period with respect to the misrepresenting defendant—whether or not the discovery rule is, or otherwise would have been, used to determine when that period began to run. The basic period operates in cases—presumably the vast majority—in which there is *not* a misrepresentation; and in those cases, a variety of other attendant circumstances will determine when a potential plaintiff first had enough information to trigger a duty of diligence in deciding whether or not to pursue a legal remedy under the FCRA.

II. USE OF A DISCOVERY RULE BEST COMPORTS WITH THE HISTORY, STRUCTURE, AND PURPOSES OF THE FAIR CREDIT REPORTING ACT

Because the text of Section 1681p neither requires nor precludes the use of a discovery rule for purposes of the basic limitation period, the real question in this case is which of two possible statutory constructions—a discovery rule, or a strict time-of-violation rule—is the more appropriate one. This Court has repeatedly cautioned that such an inquiry is purposive, not "technical" or "mechanical." *Crown Coat Front*, 386 U.S. at 517; *Urie*, 337 U.S. at 169; *Reading Co.*, 271 U.S. at 61-62 ("We do not think it is possible to assign to the word 'accrued' any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other."); cf. *Klehr*, 521 U.S. at 192-193 (deferring consideration of possible accrual rules). In *Kubrick*, for example, the Court accepted the basic discovery rule (awareness of injury and cause) as appropriate for malpractice cases under the FTCA, but rejected a more generous rule because it "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims." 444 U.S. at 123; see *id.* at 122-125. As *Kubrick* demonstrates, such distinctions are to be made by interpreting any given limitation provision "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served" by the limitation period. *Reading Co.*, 271 U.S. at 62; cf. *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 426-436 (1965) (purposive analysis of tolling question). In the case of the FCRA, those considerations favor use of a discovery rule.

The "obvious purpose" of a limitation provision "is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. Limitation of actions protects potential defendants and the courts from the need to litigate stale claims—after "affording plaintiffs what the legislature deems a reasonable time to present th[ose] claims." *Ibid.* In the ordinary case, in which conduct by a known defendant has arguably led to a known or alleged injury to the plaintiff, those dual purposes are well served by starting the running of the limitation period from the time when the plaintiff's claim is first ripe for legal resolution. See note 3, *supra*; *Connors*, 935 F.2d at 342.

In certain types of cases, however, the plaintiff often will not learn of an injury, in the ordinary course, until some time after it has been inflicted. In such cases it may be meaningless to require "diligence" by the plaintiff from the time of the unsuspected injury, and inconsistent with legislative intent to allow a period of limitation to begin to run (and perhaps to run completely) before the plaintiff is even aware of the basic factual predicates for her potential cause of action. It is in such situations that this Court has applied the discovery rule. See *Kubrick*, 444 U.S. at 122 (medical malpractice) ("That [the plaintiff] has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Urie*, 337 U.S. at 170 (compensation for latent occupational injury) (Remedial legislation would not have "intended such consequences to attach to blameless ignorance"; rather, "statutes of limitations * * * conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."); see also *Holmberg*, 327 U.S. at 397 (fraud).

The FCRA fits this model. As the D.C. Circuit observed about the Privacy Act, the FCRA "seeks to provide a remedy for [wrongful] conduct that by its very nature is frequently difficult to discover." *Tijerina*, 821 F.2d at 797. As with Privacy Act violations, "unauthorized, unconsented-to disclosure[s]" of credit information, or careless inclusions of inaccurate information in a credit report, are "unlikely to come to the subject's attention until [they] affect[] him adversely, if then," and "possible violations of the Act are often not immediately apparent to the aggrieved individual." *Id.* at 797-798. Thus, in construing the FCRA, as in construing the Privacy Act, "Congress's desire to provide a civil remedy would be poorly served if the cause of action could arise before the plaintiff even had reason to know of the violation." *Id.* at 798; see also *Connors*, 935 F.2d at 343 (holding discovery rule applicable under different statute because conduct was "likely to [cause] a hidden injury, similar to the type of injury that has long triggered the discovery rule," and because use of rule would be consistent with Congress's remedial intent). It is similarly appropriate to construe Section 1681p to include the discovery rule.

That conclusion is consistent with the length of the FCRA limitation period. Where a statute permits an unusually long time to bring suit, Congress may already have taken into account the difficulties a plaintiff may face in learning the facts necessary to perfect his cause of action. Cf. *Beggerly*, 524 U.S. at 48-49 (taking "unusually generous nature" of 12-year period into account in rejecting equitable tolling under the Quiet Title Act). The FCRA's two-year period is, however, not lengthy, and suggests that Congress would not have expected the period to begin to run until the potential plaintiff is on at least inquiry notice of a possible claim.

Use of a discovery rule is also consistent with the history and structure of the FCRA. As petitioner recognizes (Br. 36), Congress when it adopted the Act was well aware of the difficulties then facing consumers in discovering how or whether they might have been harmed by credit reporting practices. Although the Act addressed those difficulties in part by adopting new disclosure rules and record-correction mechanisms, see 15 U.S.C. 1681g-1681i (1994 & Supp. V 1999), it also required reporting agencies to follow "reasonable procedures" to ensure the accuracy of their reports, 15 U.S.C. 1681e(b), and to ensure compliance with the Act's specific restrictions on the release of information to third parties, 15 U.S.C. 1681b (1994 & Supp. V 1999); 15 U.S.C. 1681e(a). Those procedural requirements were to be enforced in large part through private lawsuits. 15 U.S.C. 1681n-1681*o* (1994 & Supp. V 1999). In enacting those provisions, Congress was surely aware that the nature of the credit reporting business would not fundamentally change, and that many records would still be compiled and released to third parties without any direct notice to the affected consumer. Although it no doubt expected potential plaintiffs to be diligent in pursuing *suspected* claims—in part by using the Act's new tools for forcing disclosures by the reporting agencies—there is no reason to think it intended to impose a limitation period that would run even as to claims a consumer had no reason to suspect.[5]

That conclusion serves the public interest, as well as the interests of private litigants such as respondent. As petitioner points out (Br. 30), major credit reporting agencies in the United States maintain computerized files on nearly 200 million individuals—virtually the entire adult population of the United States—and issue hundreds of millions of consumer reports every year. Although the FCRA gives the Federal Trade Commission and other federal officials authority to enforce the Act, 15 U.S.C. 1681s (1994 & Supp. V 1999), their resources are not sufficient by themselves to ensure adequate monitoring of compliance. Enforcement of the Act therefore depends to an important degree on private damage actions, in which plaintiffs act not only on their own behalf, but as "private attorneys general." *Rotella*, 528 U.S. at 557; cf., *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (private suits are "an essential tool for enforcement" of securities laws).

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[5] Petitioner notes (Br. 36-37) that Congress did not adopt *in haec verba* a proposal, offered in testimony by Professor Arthur Miller, that the limitation period "should be measured 'from the date of the occurrence of the violation or the date on which the violation is discovered.'" On the other hand, as petitioner explains (Br. 37), the "occurrence" language of various precursor bills was ultimately changed, without explanation, to the final "liability arises" language of Section 1681p. Neither observation answers the question, presented here, whether the language Congress actually adopted should or should not be read to incorporate the discovery rule. Since the language *permits* such a reading, that question is best answered by examining whether use of the rule is consistent with the remainder of the Act and serves its purposes.

Such actions have become even more important in recent years as the phenomenon of identity theft, illustrated by the facts of this case, has expanded the possibilities for (and potential damage from) violations of the Act. Identity theft cases underscore the importance of the "reasonable procedures" provisions (15 U.S.C. 1681e(a) and (b)) that lie at the heart of respondent's claim on the merits in this case. Yet the Federal Trade Commission's analysis of consumer complaints indicates that in cases of identity theft it takes more than 25% of victims a year or more to discover that they have been victimized. In the absence of a discovery rule, those victims would have a year or less to investigate whether they had been harmed by related violations of the FCRA, and if so to bring suit.

The important public purposes served by private litigation can under some circumstances counsel against undue extension of a limitation period. See *Rotella*, 528 U.S. at 558 (enforcement of statutes through such litigation is "an object pursued the sooner the better"). It supports, however, the use of a rule under which the limitation period begins to run only once a potential plaintiff knows that she has been injured. Only then may the running of the period effectively encourage a private litigant to be diligent in pursuing her potential statutory remedies, thereby also serving the public interest. Compare *id.* at 558-559 ("Rotella does not deny that he knew of his injury * * * when it occurred[.]").

Compared to a rule under which "liability arises" at the time of an FCRA violation, even if the affected consumer has no reason to know the violation has occurred, a discovery rule will somewhat lengthen the time during which a defendant may find itself subject to suit. By definition, however, it does so only when the plaintiff has exercised due diligence. In such situations, in which neither party is to blame for the delay in notice of injury to the plaintiff, and in which the defendant may or may not be operating in complete good faith, the discovery rule reconciles the affected interests by allowing litigation on the merits of the plaintiff's statutory claims. That outcome serves the ends of justice and law enforcement, and imposes on defendants only the ordinary costs of establishing that their business practices comply with applicable federal law. Accordingly, in the view of the United States and the Federal Trade Commission—the agency charged by Congress with principal responsibility for enforcement of the FCRA—use of the discovery rule under the FCRA strikes the proper balance between potential defendants' legitimate interest in repose and the private and public interests in ensuring that potential plaintiffs receive the full measure of "what the legislature [has] deem[ed] a reasonable time to present their claims." *Kubrick*, 444 U.S. at 117.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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