Consumer Session

Claims/Attorneys' Fees/Impound Escrows/FDCPA Issues/Eleventh Circuit Statute of Limitations

Alane A. Becket, Moderator
Becket & Lee LLP; Malvern, Pa.

Daniel F. Blanks
McGuireWoods LLP; Jacksonville

Matthew M. Holtsinger
Kass Shuler, P.A.; Tampa

Kelly Remick
Standing Chapter 13 Trustee (M.D. Fla.); Tampa

THE TROUBLE WITH CLAIMS

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Kelly Remick
Chapter 13 Standing Trustee
Tampa, FL

Daniel Blanks
McGuireWoods LLP
Jacksonville, FL

Matthew Holtsinger
Kass Shuler, P.A.
Tampa, FL

Alane A. Becket
Becket & Lee LLP
Malvern, PA

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Agenda

- Statute Of Limitations and *In re Crawford*
- Claims After *Crawford*
- Amended and Deficiency Claims
- Escrow an Claims
- Execution of Claims
- Claims From A Trustee's View

Statute of Limitations: A Defense

- When a lawsuit is filed, SOL may be a defense
- Debtor's burden to assert and prove the SOL has run as a defense to a suit
- SOL as a defense is waived if not raised and judgment may be entered against Debtor
- State law is not generally violated when suit is filed on an out of statute debt
- Date the "clock begins to run" can vary from state to state
- The applicable SOL is not clearly defined
  - The state whose laws govern the contract?
  - The state in which the debtor lives?
  - Which SOL applies: contract, open account, account stated?

Has the SOL run?

The application of a statute of limitations is a legal determination, which we review for correctness. *Ottens v. McNeil*, 2010 UT App 237, ¶ 20, 239 P.3d 308. However, "[t]o the extent that the statute of limitations analysis involves 'subsidiary factual determination[s],' we review those factual determinations using 'a clearly erroneous standard.'" Id. (second alteration in original) (quoting *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742).

Filing Suit on an Out of Statute Debt and the FDCPA

- Filing suit on an out of statute debt is not a violation of the precise terms of the FDCPA
- The FDCPA prohibits:
  - The false representation of -- the character, amount, or legal status of any debt. [15 USC 1692e]
  - A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. [15 USC 1692f]
- Filing suit on an out of statute debt has been held to violate both provisions

Case Law

- *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1083 (7th Cir. 2013) (finding an FDCPA violation for suing on a debt on which applicable statute of limitations had run):
  - Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.

Case Law

- *Grant-Hall v. Cavalry Portfolio Servs., LLC*, 856 F. Supp. 2d 929, 944 (N.D. Ill. 2012)
  - The filing of a legally defective debt collection suit can violate § 1692e where the filing falsely implies that the debt collector has legal recourse to collect the debt.

Case Law

- *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987)
  - The court agrees with Kimber that a debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector [sic] having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt.

The Crawford Decision

Crawford v. LVNV, 758 F.3d 1254 (11th Cir. 2014): The FDCPA affords a private right of action against a debt collector for, inter alia, unfair and deceptive practices, as tested by the least sophisticated consumer standard. Because, according to the court, the filing of a proof of claim is a debt collection activity, or at least an indirect means to collect, it falls within the ambit of the FDCPA. The court found that the filing of a proof of claim against an estate in bankruptcy for a debt that is knowingly legally unenforceable pursuant to apposite statute of limitations is unfair, unconscionable, deceiving, or misleading to such a consumer.

- rehearing denied
- stay of the mandate denied
- petition for certerori, amici & response filed

Background

- Debtors filed Chapter 13
- Creditors filed POCs for out of statute debts
- Debtors filed adversary proceedings against creditors for filing stale claims arguing, inter alia, FDCPA violations
- Creditors moved to dismiss arguing, inter alia, that filing a POC is not an FDCPA violation

Background (cont.)

- Debtors' AP dismissed by Bankruptcy Court
- Debtors appealed
- District Court affirmed dismissal of Debtors' AP
- Debtors appealed
- 11th Circuit vacated the District Court's dismissal of the Debtor's AP and remanded FDCPA case
  - (But, determined the FDCPA was violated)

Debtors' Principal Arguments

- Acknowledges that debtor's successful outcome would change the result of virtually every other judicial opinion on the subject
- Recognizes the flaw in earlier position and argues on appeal that a POC is "tantamount" to filing a civil action/complaint in state court
- Argues that despite the uniform nature of the bankruptcy laws, a "debt collector's" rights in bankruptcy are limited by the FDCPA:
  - "… Sims (sic) position on the law will have no effect on Creditors because they will never be subject to the FDCPA. … The FDCPA is the yoke which debt collectors bear for the privilege of being debt collectors. There is no reason to provide debt collectors with a playground full of vulnerable consumers in the Bankruptcy forum for debt collectors to bully with impunity from FDCPA liability."

Creditors' Principal Arguments

- The FDCPA is not "pre-empted" by the Bankruptcy Code, but:
- Overwhelming weight of authority: Filing an out of statute POC is not subject to the FDCPA
- The filing of a POC is not an "attempt" to collect a debt against a consumer
- A POC for an out of statute debt is not false or fraudulent
- A POC is not "tantamount" to a civil action/complaint
- The FDCPA historically applied to acts taken outside of the bankruptcy to collect a debt involved in a bankruptcy

The *Crawford* District Court

- "… Appellants are fighting an uphill battle, and they candidly admit they cannot win their appeals without a change in the law. Indeed, the elephantine body of persuasive authority weighs against Appellants' position. … 'Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action.' …
- While there is no binding authority on point, such consistency is strongly persuasive."

The *Crawford* District Court (cont.)

- "Setting the weight of authority aside, Appellants have not alleged any conduct that amounts to an FDCPA violation. Appellants were never threatened, never tricked, never lied to or deceived; they were never even spoken to. Appellees never asked Appellants for a dime; instead, they merely filed claims in the bankruptcy court. As a matter of law, that conduct does not amount to an effort to collect a debt. Even if it did, it is not the sort of abusive practice the FDCPA was enacted to prohibit."

The *Crawford* 11th Circuit Opinion

- "A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers--armed with hundreds of delinquent accounts purchased from creditors--are filing proofs of claim on debts deemed unenforceable under state statutes of limitations. This appeal considers whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the Fair Debt Collection Practices Act…"

The *Crawford* 11th Circuit Opinion (cont.)

- "…[A]n act or practice is deceptive or unfair if it has the tendency or capacity to deceive." We also explained that "[t]he term 'unconscionable' means 'having no conscience'; 'unscrupulous'; 'showing no regard for conscience'; 'affronting the sense of justice, decency, or reasonableness.'" We have also noted that "[t]he phrase 'unfair or unconscionable' is as vague as they come."

The *Crawford* 11th Circuit Opinion (cont.)

- "The 'least-sophisticated consumer' standard takes into account that consumer-protection laws are 'not made for the protection of experts, but for the public--that vast multitude which includes the ignorant, the unthinking, and the credulous.' … 'However, the test has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness.'" (internal citations omitted).

The *Crawford* 11th Circuit Opinion (cont.)

- "The automatic stay prohibits debt-collection activity outside the bankruptcy proceeding, such as lawsuits in state court. … It does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process. Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an 'indirect' means of collecting a debt."

The *Crawford* 11th Circuit Opinion (cont.)

- A Chapter 13 debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished, making it difficult for a consumer debtor to defend against the time-barred claim.
- Similar to the filing of a stale lawsuit, a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt.
- The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time-barred and unenforceable, and thus fail to object to such a claim.

Statutory Policy

- The Bankruptcy Code: To provide an honest but unfortunate debtor the opportunity to obtain a fresh start and to ensure debtors repay their creditors the maximum they can afford.
- The FDCPA: To stop the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.

The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time-barred and unenforceable and thus fail to object to such a claim.

- The Proof of Claim Form requires (all claims):
  - Documentation supporting the claim
  - Statement of the basis for the claim
  - Last 4 digits of account number
  - Name by which the debtor may know the creditor
  - Itemization of interest charges

- The Proof of Claim Form requires (secured claim):
  - Identification of security
  - Basis for perfection
  - Value of property
  - Interest rate
  - Amount of secured claim vs. amount of unsecured claim

The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time-barred and unenforceable and thus fail to object to such a claim.

- The Bankruptcy Rules require (for claims based on revolving or open accounts):
  - (i) the name of the entity from whom the creditor purchased the account;
  - (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
  - (iii) the date of an account holder's last transaction;
  - (iv) the date of the last payment on the account; and
  - (v) the date on which the account was charged to profit and loss.

The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time-barred and unenforceable and thus fail to object to such a claim.

Penalty for filing a false claim:

- Form B-10: Fine of up to $500,000 or imprisonment for up to 5 years, or both
- Fed. R. Bankr. P. 3001(c)(2)(D): If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:
  - (i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
  - (ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Advisory Committee Note
Fed. Rule Bankr. P. 3001

Subdivision (c) is further amended to add paragraph (3). [P]aragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim.

Potential Defenses

- Any action belongs to the bankruptcy estate
- Equitable consideration: Retroactive application unfair – law allowed filing OOS POC's
- Bona Fide Error
- Conflict precludes application of the FDCPA to POCs
- In Chapter 13's, confirmation precludes later attack on POCs

Circuit Authority

- Prior to *Crawford*, the 2nd, 3rd, 7th and 9th previously ruled on the alleged conflict between the Bankruptcy Code and the FDCPA

- Florida bankruptcy case law prior to the *Crawford* decision supported a dismissal of such FDCPA claims.

As Judge Paskay said . . .

The FDCPA claims are "a so-called attempt of creative lawyering to make a mountain out of a molehill and to transform a simple claim resolution process into an extensive and expensive proceeding. It is this Court's opinion that such a proceeding is totally needless, specifically, when the litigation involves nothing more than an objection to the claim." *Williams v. Asset Acceptance, LLC* (*In re Williams*), 392 B.R. 882, 888 (Bankr. M.D. Fla. 2008).

Effect of *Crawford* – Wave of FDCPA litigation

- Expanding *Crawford*: Is a proof of claim an "initial communication" under the FDCPA that triggers the act's notice requirements?
  - Ninth Circuit B.A.P. held that a proof of claim is a formal pleading.
  - Overwhelming case law finding that a proof of claim is analogous to a complaint.

Are FDCPA claims property of the estate?

- Chapter 7 v. Chapter 13
  - See 11 U.S.C. §§ 541(a)(1), 1306(a).
- What can the debtor recover?
- Does it matter whether the bankruptcy case is opened or closed?

Where to file – state, district, or bankruptcy court?

Bankruptcy court jurisdiction to enter a final order

- Claims resolution process is inherently a core matter under 28 U.S.C. § 157(b)(2)(B).
- Are these FDCPA claims essentially a counterclaim to the proof of claim? If so, the matter is a statutorily core bankruptcy matter under 28 U.S.C. § 157(b)(2)(C).
  - Is *Stern v. Marshall*, 131 S.Ct. 2594 (2011), implicated? SCOTUS held in *Stern* that the bankruptcy court lacked constitutional authority to enter a final judgment on a state law counterclaim that was not necessarily resolved in ruling on the creditor's proof of claim. Id. at 2620.
- Even if non-core, parties can consent to the bankruptcy court's authority to enter a final order/judgment. See *In re Safety Harbor Resort and Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011).

Statute of Limitations for FDCPA claims

- One-year window from the filing of the proof of claim to bring these claims. *Gurganus v. Recovery Systems Mgmt. Corp.* (*In re Gurganus*), 2015 WL 65089 (Bankr. N.D. Ala. Jan. 5, 2015).
- Continuing violation even if POC withdrawn?

The issue that Crawford avoided: Preemption

Is the FDCPA precluded by the Bankruptcy Code?

- "Some circuits hold that the Bankruptcy Code displaces the FDCPA in the bankruptcy context." Crawford, 758 F.3d at 1262 n.7.
  - ✓ *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)
  - ✓ *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002)
- "Other circuits hold the opposite." *Crawford*, 758 F.3d at 1262 n.7.
  - ✓ *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013)
  - ✓ *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir.2004)
- See also *Davis v. NCO Financial Systems, Inc.*, 2014 WL 4954705 (M.D. Fla. Oct. 2, 2014); *Rios v. Bakalar & Associates, P.A.*, 795 F.Supp.2d 1368 (S.D. Fla. 2011).

Is the FCCPA preempted?

- SCOTUS has shown a greater willingness to hold that federal statutes preempt state-law causes of action. See, e.g., *Grade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).
- In *Williams v. Asset Acceptance, LLC* (*In re Williams*), 392 B.R. 882, 887 (Bankr. M.D. Fla. 2008), Judge Paskay found that if a state law claim arose in a bankruptcy filing, the Bankruptcy Code preempts state law claims.
- But see *In re Johnston*, 2007 WL 1166017 *3-5 (Bankr. N.D. W. Va. 2007) (finding that because neither the automatic stay nor the discharge injunction attempted to regulate how contact to a debtor is made, a violation of the West Virginia equivalent to the FCCPA was not overlapped by the Bankruptcy Code).

Trend of FCCPA / TCPA Claims for Pre-Petition Conduct

Punitive Damages

- *Meininger v. Florida Pediatric Associates, LLC* (*In re Johnson*), 453 B.R. 433 (Bankr. M.D. Fla. 2011).
  - Court granted defendant's motion to strike the chapter 7 trustee's request for punitive damages in the initial complaint.
  - Court found that the chapter 7 trustee was required to demonstrate a reasonable basis for punitive damages. Court noted that the trustee was free to plead entitlement to punitive damages in the initial complaint, but the request is subject to challenge.

Mortgage Claims: Common Concerns

Escrow in Proofs of Claims

- Most residential mortgages include a provision requiring an escrow account for taxes and insurance
- RESPA governs operation of escrow accounts
- There is no bankruptcy exception in RESPA for escrow account statements
- Rule 3002.1 mandates payment change notices on certain types of claims

Escrow - Key Terminology

- See 24 C.F.R. §3500.17
- Escrow Shortage
- Escrow Deficiency
- Surplus
- Target Balance

How to Capture Escrow in a Proof of Claim

- Rule 3001(c)(2)(C) requires Escrow Analysis be attached to the Proof of Claim
- Creditor should analyze the escrow as if it were a new loan as of Petition date
- Escrow shortage must be captured as an arrearage and not in the ongoing payment calculation

Other Considerations

- Creditors should be sure to address escrow when the claim is being modified or paid in full
  - Which party is responsible for payment of escrow
  - Default provision for failure to pay escrow
- Administrative Expense Claim
- Phantom Surpluses

Rule 3002.1

- Applies to a limited class of claims
  - Claims secured by principal residence
  - Claims treated pursuant to 1322(b)(5)
- Attorney's fees recoverable as well
  - 1322(e) – contract governs recoverability
  - 506(b) does not apply
  - Fees must be reasonable
  - Must be filed 180 days from date incurred
  - No prima facie evidentiary value

Pitfalls for Creditors

- Automatic stay violations
  - Attempting to collect prepetition escrow shortage through increase to post-petition payment
- Waiver of escrow advances
- Sanctions under Rule 3002.1(i)
- No Private Cause of Action under RESPA in 11th Circuit

Miscellaneous Claims Issues

- Rule 9011(b) violations imputed to Creditor and/or Attorney
  - Reasonable inquiry under the circumstances
  - Notice required under the Rule
- Attorney can become fact witness by signing a claim on behalf of Creditor
  - Potential Disqualification

Questions?

CONSUMER SESSION: THE TROUBLE WITH CLAIMS

IN RE: *CRAWFORD*
CLAIMS AFTER *CRAWFORD*
AMENDED AND DEFICIENCY CLAIMS
ESCROW IN CLAIMS
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CLAIMS FROM A TRUSTEE'S VIEW

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Alane A. Becket
Becket & Lee LLP
Malvern, PA

IN RE CRAWFORD: PROOF'S OF CLAIM ON TIME BARRED DEBT

Materials prepared by: Daniel Blanks

I. The *Crawford* Decision

a. The Eleventh Circuit's Ruling

i. In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit held that the filing of a proof of claim for a time-barred debt may violate the federal Fair Debt Collections Practices Act ("FDCPA").

b. Pre-*Crawford*

i. Florida bankruptcy case law prior to the *Crawford* decision overwhelmingly supported a dismissal of such FDCPA claims. Judge Paskay ruled that these FDCPA claims were precluded under the Bankruptcy Code. *Williams v. Asset Acceptance, LLC (In re Williams)*, 392 B.R. 882, 886 (Bankr. M.D. Fla. 2008).

1. As noted by Judge Paskay, these claims are "a so-called attempt of creative lawyering to make a mountain out of a molehill and to transform a simple claim resolution process into an extensive and expensive proceeding. It is this Court's opinion that such a proceeding is totally needless, specifically, when the litigation involves nothing more than an objection to the claim." *Id.* at 888. *See also Pariseau v. Asset Acceptance, LLC (In re Pariseau)*, 395 B.R. 492 (Bankr. M.D. Fla. 2008); *Cooper v. Litton Loan Servicing (In re Cooper)*, 253 B.R. 286 (Bankr. N.D. Fla. 2000).

c. Effect of *Crawford* – Wave of FDCPA litigation

i. Expanding *Crawford*: Is a proof of claim an "initial communication" under the FDCPA that triggers the act's notice requirements?

1. Ninth Circuit B.A.P. held that a proof of claim is a formal pleading and, therefore, exempt from the FDCPA's notice provisions. *See In re McCarther-Morgan*, 2009 WL 7810817, at *12 (9th Cir. B.A.P. 2009) (reasoning that a proof of claim is included as a "communication in the form of a formal pleading").

2. Proof of claim is analogous to a complaint. *See In re Franchi*, 451 B.R. 604, 607 (Bankr. S.D. Fla. 2011) (citing *In re Cagle*, 2008 WL 7874772 (Bankr. N.D. Ga. June 2, 2008)). Under Rule 7(a)(1) of the FED. R. CIV. P., a complaint is a type of pleading.

d. Are FDCPA claims based on the filing of a proof of claim property of the estate?

i. Chapter 7 v. Chapter 13

1. *See* 11 U.S.C. §§ 541(a)(1), 1306(a).

ii. What can the debtor recover?

iii. Does it matter whether the bankruptcy case is opened or closed?

e. Where to file the action – state, district, or bankruptcy court

i. Bankruptcy court jurisdiction to enter a final order on FDCPA claims

1. Claims resolution process is inherently a core matter under 28 U.S.C. § 157(b)(2)(B).

2. Are these FDCPA claims essentially a counterclaim to the proof of claim?

a. If so, the matter is a statutorily core bankruptcy matter under 28 U.S.C. § 157(b)(2)(C).

i. Is *Stern v. Marshall*, 131 S.Ct. 2594 (2011) implicated?

1. SCOTUS held in *Stern* that the bankruptcy court lacked constitutional authority to enter a final judgment on a state law counterclaim that was not necessarily resolved in ruling on the creditor's proof of claim. *Id.* at 2620.

3. Even if non-core, parties can consent to the bankruptcy court's authority to enter a final order/judgment. *See In re Safety Harbor Resort and Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011).

f. Statute of Limitations

i. One-year window from the filing of the proof of claim to bring these claims. *Gurganus v. Recovery Systems Mgmt. Corp. (In re Gurganus)*, 2015 WL 65089 (Bankr. N.D. Ala. Jan. 5, 2015).

g. The issue that *Crawford* avoided: Preemption

i. Is the FDCPA precluded by the Bankruptcy Code?

1. "Some circuits hold that the Bankruptcy Code displaces the FDCPA in the bankruptcy context." *Crawford*, 758 F.3d at 1262 n.7.

a. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (holding that "Bankruptcy provides remedies for

wrongfully filed proofs of claim . . . . 'Nothing in either the Bankruptcy Code or the FDCPA suggests that a debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA'").

b. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002) (holding that the debtor's remedy for a discharge violation, "no matter how cast lies in the Bankruptcy Code, [debtor's] simultaneous FDCPA claim is precluded").

2. "Other circuits hold the opposite." *Crawford*, 758 F.3d at 1262 n.7.

a. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013)(holding that FDCPA claims based on actual notices sent to a debtor during the bankruptcy case are not precluded by the Bankruptcy Code after finding no broad categorical preclusion).

b. *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir.2004) (holding that because a court can enforce both simultaneously and a debt collector can comply with both statutes simultaneously, the Bankruptcy Code did not preclude the FDCPA).

c. *See also Davis v. NCO Financial Systems, Inc.*, 2014 WL 4954705 (M.D. Fla. Oct. 2, 2014); *Rios v. Bakalar & Associates, P.A.*, 795 F.Supp.2d 1368 (S.D. Fla. 2011).

ii. Is the FCCPA preempted?

1. The Supreme Court has shown a greater willingness to hold that federal statutes preempt state-law causes of action. *See, e.g. Grade v. Nat'l Solid Wasts Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).
2. In *Williams*, Judge Paskay found that if a state law claim arose in a bankruptcy filing, the Bankruptcy Code preempts state law claims. *In re Williams*, 392 B.R. at 887. *But see In re Johnston*, 2007 WL 1166017 *3-5 (Bankr. N.D. W. Va. 2007) (finding that because neither the automatic stay nor the discharge injunction attempted to regulate *how* contact to a debtor is made, a violation of the West Virginia equivalent to the FCCPA was not overlapped by the Bankruptcy Code).

II. Trend of FCCPA / TCPA Claims for Pre-Petition Conduct

a. Punitive Damages

i. *Meininger v. Florida Pediatric Associates, LLC (In re Johnson)*, 453 B.R. 433 (Bankr. M.D. Fla. 2011). Court granted defendant's motion to strike the chapter 7 trustee's request for punitive damages in the initial complaint. The court found that the chapter 7 trustee was required to demonstrate a reasonable basis for punitive damages. Court noted that the trustee was free to plead entitlement to punitive damages in the initial complaint, but the request is subject to challenge.

MORTGAGE CLAIMS: COMMON CONCERNS

Materials prepared by: Matthew Holtsinger

I. ESCROW IN PROOFS OF CLAIM AND NOTICES OF PAYMENT CHANGE

1. Governing Statutes and Terminology

RESPA governs the origination and servicing of mortgage loans and at its core is a consumer protection statute. 12 U.S.C. §2609 specifically addresses escrow accounts related to a mortgage that falls under the purview of RESPA. This statute requires mortgage servicers to provide an annual escrow account statement, commonly referred to as an escrow analysis, among other things. The Statute also provides guidance on how much a servicer is permitted to require in an escrow account and how an escrow payment for the coming year can be calculated.

a. 24 C.F.R. §3500.17 sets forth various definitions that will assist in understanding an escrow account statement and understanding how escrow is captured in a mortgage proof of claim. The relevant terms defined in this Regulation include:

b. **Escrow Shortage** – "an amount by which a current escrow account balance falls short of the target balance at the time of escrow analysis."

c. **Escrow Deficiency** – "the amount of a negative balance in an escrow account."

d. **Surplus** – "an amount by which the current escrow account balance exceeds the target balance for the account"

e. **Target balance** – "the estimated month end balance in an escrow account that is just sufficient to cover the remaining disbursements from the escrow account in the escrow account computation year, taking into account the remaining scheduled periodic payments, and a cushion, if any."

RESPA does not provide any exemption for accounts in bankruptcy, so mortgage servicers should continue to comply with RESPA regulations during the pendency of a bankruptcy case, especially when a debtor is seeking to cure a mortgage through a chapter 13 plan. Specifically, creditors should continue to create an escrow account statement each year and provide notice to the debtor and trustee.

In addition to RESPA requirements, Bankruptcy Rule 3001(c)(2) provides in pertinent part that "if a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim."

2. How to account for escrow advances and escrow shortages in a Proof of Claim

In many ways, escrowed accounts and the corresponding RESPA requirements do not mesh well with bankruptcy concepts. An escrow cycle is forward looking and is based on a twelve month calendar. When an escrowed account is treated in a bankruptcy case, the creditor must separate the prepetition obligations from the ongoing post-petition obligations and this can prove tricky when it comes to escrow shortages and deficiencies that may exist on the account.

When preparing a mortgage proof of claim where the loan is contractually escrowed, a creditor should run an escrow analysis as of the date of filing or as close to that date as possible. Rule 3001 requires that the servicer attach an account statement as of the date of the petition. The

escrow analysis is also is useful in calculating the appropriate escrow shortage amount to include in a proof of claim.

It is important to differentiate between an escrow shortage and an escrow advance and how those figures are reflected in the claim itself. The escrow advance is the amount the creditor has actually advanced prepetition for payment of taxes and insurance. This figure will be included in the calculation of the total claim amount. The escrow shortage represents the shortfall that will exist in the current escrow cycle after disbursements are made for escrow items in that cycle. The escrow shortage amount may or may not have been advanced by the Creditor. The escrow shortage figure will be included in the arrearage calculation.

3. Pitfalls for Creditors with Respect to Escrow Accounts

a. An Escrow Shortage must be captured as an arrearage

An Escrow Shortage must be captured in the claim as part of the arrearage figure and it **cannot** be recovered through an increase to the post-petition mortgage payment, as would be permitted under RESPA outside of bankruptcy.

To do otherwise has been held to be a violation of the automatic stay. For example, in the case of In re Rodriguez, 629 F.3d 136 (3d Cir. 2010), the creditor did not include the unpaid prepetition escrow shortage in the claim because the creditor had not advanced these amounts. Instead, the creditor recovered these amounts by increasing the escrow payment when calculating the ongoing post-petition mortgage payment. The creditor argued that because it had not actually advanced the funds on behalf of the debtor, these amounts did not fall within the definition of a "claim." The court construed the meaning of the term "claim" broadly and ruled that the unpaid escrow shortage constituted a claim regardless of whether the creditor had actually

advanced those amounts because a contingent claim is a claim nonetheless. The Court went on to conclude that attempting to recover the prepetition escrow shortage through an increase in the post-petition mortgage payment constituted a violation of the automatic stay as it was an attempt to collect a prepetition debt. The Rodriguez Court relied on a prior decision from the Fifth Circuit Court of Appeals in Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348 (5th Cir. 2008), which offers similar facts and a similar holding.

b. How to deal with "phantom" surpluses

In creating an escrow account statement to include as an attachment to the proof of claim as well as creating ongoing post-petition yearly escrow account statements, the creditor must assume that the account is current and that any prepetition shortage will be cured over the life of the plan. Otherwise, the escrow payment will not be correct and the creditor runs the risk of "double dipping" or committing a stay violation as described above.

Because a creditor must account for prepetition escrow shortages and deficiencies as part of its arrearage claim, the escrow analysis must be generated in such a way as to ensure that the escrow shortage is removed from the calculation for purposes of determining the ongoing escrow payment. This sometimes results in a "phantom" surplus being reflected in the escrow analysis. Escrow surpluses are typically refunded to the Debtor. If an escrow analysis reflects a surplus that doesn't actually exist, it is good practice to include a disclaimer in the proof of claim advising that there is no actual shortage due to the default on the account.

c. When to file a Rule 3002.1 Notice of Payment Change Notice and Consequences of Failure to File

Bankruptcy Rule 3002.1 requires that creditors provide timely notice of a change in payment for certain claims, including changes in the escrow payment. The Rule provides: "This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under § 1322(b)(5) of the Code in the debtor's plan." Fed. R. Bankr. P. 3002.1(a). Clearly if a chapter 13 plan proposes to cure a default and maintain ongoing payments and the claim is secured by the debtor's principal residence, then a Rule 3002.1 payment change notice would be required. However, a question remains as to whether a 3002.1 notice is required when the Debtor is paying the Creditor directly and not through the auspices of a chapter 13 trustee. It is also unclear whether a whether a Rule 3002.1 notice is required if the account is not in default. It is a good idea to file a Rule 3002.1 Notice in a direct pay case unless prohibited by local rules, because the consequences of failing to file a Rule 3002.1 notice can be severe. The Rule requires that the Notice of Payment Change must be filed at least 21 days prior to the effective date of the payment change.

What are the consequences of filing a Rule 3002.1 notice? The Rule is silent, but the case of In re Dominique, 368 B.R. 913, (Bankr. S.D. Fla. 2007) should be a warning to creditors. Judge Isicoff from the Southern District of Florida ruled that a creditor waives its right to recover post-petition escrow shortages if not properly disclosed. The Court found that although RESPA does not address the remedies

available to a debtor for a violation of the escrow shortage noticing provisions, the Court applied the doctrine of waiver under applicable Florida law and ruled that the creditor was not permitted to recover the escrow shortage amounts because they were not properly disclosed. The Dominique case pre-dated Rule 3002.1 and addresses a creditor's failure to provide notice of an escrow shortage under RESPA regulations and the ruling is not specifically based on a failure to provide a notice of payment change under Rule 3002.1. However, the holding of the case would likely also apply to a creditor's failure to file Rule 3002.1 notices.

Practitioners should be aware that the Southern District of Florida has issued Administrative Order 2012-02, which sets forth the circumstances under which a Rule 3002.1 notice should be filed. The Southern District of Florida Bankruptcy Court has explicitly excluded cases where the plan proposes to pay the claim directly. Under the Administrative Order, a creditor can be sanctioned if a Rule 3002.1 notice is filed when the claim is being paid direct.

d. Creditors need to ensure that escrow is accounted for in the valuation context

With respect to claims not secured by a debtor's principal residence, it is commonplace for a debtor to seek a cram down pursuant to Section 506(a) and propose a modification of the creditor's contractual rights. In the event a loan subject to a cram down motion is an escrowed loan, the creditor should be cognizant to ensure that any cram down order specifies whether the loan is to remain escrowed or whether the debtor will be responsible for paying the escrow items on a going forward basis.

4. CONSEQUENCES OF AN ATTORNEY SIGNING A PROOF OF CLAIM

When a creditor hires an attorney for representation in a bankruptcy proceeding, the representation often includes the preparation or filing of a proof of claim. Creditors' attorneys routinely sign proofs of claim on behalf of the creditor client as an agent of the creditor. In fact, the Official Form for a proof of claim contemplates that the creditor's agent may execute the claim on behalf of the creditor. There are practical reasons such as expediency and cost-effectiveness that may prompt an attorney to agree to sign a proof of claim on behalf of a creditor. However, practitioners need to be aware of the potential consequences to the attorney and the creditor client when an attorney elects to sign the claim on behalf of the creditor.

a. Rule 9011 Sanctions

Federal Bankruptcy Rule 9011(b) governs representations made through pleadings or papers filed with the Court. It provides that by filing papers with the court, the attorney signing the paper is certifying that the attorney has performed a reasonable inquiry into the underlying facts, allegations, and legal theories contained in the paper. By making this certification, the attorney is subject to sanctions if the attorney fails to comply with Rule 9011.

The case of In re Obasi, No. 10-10494 SHL, 2011 WL 6336153 (Bankr. S.D.N.Y. Dec. 19, 2011) involved a motion for sanctions under Rule 9011 and an order to show cause directed at a managing attorney signing a claim on behalf of a creditor. The claim was signed by the managing attorney using the managing attorney's electronic signature. Deposition testimony revealed that the managing attorney, whose signature appeared on the claim, did not actually review the contents of claim prior to filing. Instead, an associate attorney reviewed the claim for accuracy and used the managing attorney's ECF

login information for the purposes of filing the claim. The attorney defended the motion for sanctions on the basis that the firm had procedures in place for ensuring the accuracy of the information set forth in the claim, including checklists for claim preparation and client review and approval.

The Court found that the reasonable inquiry requirement in Rule 9011 was non-delegable and therefore regardless of how acceptable the Firm's procedures in preparing claims and ensuring accuracy may have been, if the attorney signing the claim does not personally review the claim for accuracy, then Rule 9011 is violated because no reasonable inquiry could have been made by the attorney signing the claim.

The Court also found it irrelevant whether the information in the Claim was or was not accurate. The Court noted that accuracy of the document is not a defense to a Rule 9011 violation. The attorney in In re Obasi was ultimately not sanctioned or held in contempt because remedial action was taken.

It is always important to remember that the Official Form for a proof of claim includes the following declaration: "I declare under penalty of perjury that the information provided in this claim is true and correct and to the best of my knowledge, information, and reasonable belief."

b. Waiver of Attorney-Client Privilege

The case of In re Rodriguez, No. 10-70606, 2013 WL 2450925 (Bankr. S.D. Tex. June 5, 2013) presents another potential consequence of an attorney signed proof of claim. Rodriguez arose in the context of an objection to several proofs of claim. Discovery disputes ensued and the issue that arose was whether attorney-client privilege

prevented the Debtor from deposing the attorney who signed the claim. The Court found that attorney-client privilege was not applicable under the circumstances. The attorney who signed the claim became a fact witness in the adversary proceeding by virtue of signing the claim. The Court stated that, "Signing a proof of claim is an assertion of personal knowledge of the facts alleged in the proof of claim." *Id* at 3.

There was some discussion in this opinion concerning whether a proof of claim is more akin to a complaint or an affidavit. The Court indicated that a proof of claim is more akin to an affidavit than to a complaint. The Court noted that a proof of claim is similar to an affidavit in that both involve a declaration under penalty of perjury. Also, a proof of claim has inherent prima facie evidentiary value pursuant to Bankruptcy Rule 3001(f).

Although not specifically addressed in the Rodriguez case, it follows that if an attorney is found to be a fact witness in a contested matter or adversary proceeding by virtue of signing a proof of claim on behalf of a creditor, then under the Rules of Professional Responsibility, that attorney could potentially be required to withdraw from representation of that creditor due to a potential conflict of interest. See Florida Rule of Professional Conduct 4-3.7.

5. LATE/AMENDED POC'S ON SECURED CLAIMS/DEFICIENCIES:

It is common practice for a secured creditor to first file a wholly secured claim and then later seek to amend the claim in order to assert an unsecured deficiency claim at a later date in the event the collateral is liquidated post-petition. Creditors are faced with a number of pitfalls

and issues associated with the practice of amending a timely filed claim or filing a new claim for an unsecured deficiency as will be discussed further below.

A body of case law at the Bankruptcy Court level, the District Court level, and the Circuit Court level has developed within the 11th Circuit concerning the various issues that arise in the context of late filed claims or claims amended post-bar date. Below is a summary of the various 11th Circuit cases on the issue.

a. Relevant Statutory Authority

i. Section 502(a) provides that "a claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest…objects" 11 U.S.C. 502(a) (*parts omitted*).

ii. Section 502(b) in turn provides the exclusive grounds for which a party in interest may object to a proof of claim. Section 502(b)(9) provides a basis to object to any claim that is not timely filed.

iii. Bankruptcy Rule 3002, provides that "a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code…" with certain enumerated and limited exceptions. Fed. R. Bankr. P. 3002 (*parts omitted*).

b. Case law

i. In re Int'l Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985) involved a creditor who sought to amend its timely filed proof of claim post-bar date to assert additional amounts for tax liability. The 11th Circuit Court of Appeals upheld the Bankruptcy Court's decision to disallow the amended claim. In doing so, the Court found that

the amendment was for the purpose of asserting new tax liability that did not arise from the same transactions on which the original claim was based. The Court held that, "amendment is permitted only where the original claim provided notice to the court of the existence, nature, and amount of the claim and that it was the creditors' intent to hold the estate liable. *Id* at 1217.

ii. In In re Winters, 380 B.R. 855, (Bankr. M.D. Fla. 2007) the Court was tasked with determining whether a Creditor could amend its previously filed secured claim to assert an unsecured deficiency claim post-bar date when the original claim contained language reserving the right to later amend if the Collateral was liquidated. The Court found the amended claim to be allowable. Unlike the holding in In re Int'l Horizons, Inc., the Court in Winters did not consider the amended claim to be simply a newly asserted claim under the guise of an amendment. The Court focused on the fact that both the original claim and the amended claim both arose from the same contract and the same Collateral. Additionally, the original claim had provided notice that the creditor may later seek to hold the estate liable for any deficiency. Compare with In re Matthews, 313 B.R. 489, (Bankr. M.D. Fla. 2004), which presented similar facts, with the difference being that the original claim in Matthews did not have any language reserving the right to later amend and assert a deficiency claim. The Court in Matthews disallowed the amended proof of claim as a result.

iii. In re: Rodriguez, No. 2:10-CV-57-FTM-29, 2010 WL 1838286 (M.D. Fla. May 3, 2010) also involved a post-bar date amendment to a timely filed proof of claim for the purposes of asserting an unsecured deficiency. The Bankruptcy Court entered

an order disallowing the amended claim as untimely and the creditor appealed. The District Court noted that whether to allow an amendment to a timely filed claim was within the discretion of the Bankruptcy Court and was subject to equitable considerations. The District Court found that the Bankruptcy Court did not abuse its discretion and determined that, "no defect was cured by the amendment," the creditor, "did not plead with greater particularity by increasing the unsecured claim, and the Bankruptcy Court did not err in finding that the untimely claim would be highly prejudicial." *Id* at 4.

iv. In re Porco, No. 9:10-BK-14251-FMD, 2013 WL 1283378 (Bankr. M.D. Fla. Mar. 28, 2013) stands for the proposition that a creditor cannot file a post-bar date amended claim asserting an unsecured deficiency, when the original claim was filed as wholly secured and when the Creditor knew of the Debtor's intention to surrender and knew or should have known that its claim was wholly unsecured. The Court relied on the In re Rodriguez case as persuasive and found that the balance of equities weighed against the Creditor. Specifically, the Court concluded that it would be highly prejudicial to the other unsecured creditors to allow the amended claim under the circumstances of the case.

v. In re Stone, 473 B.R. 465 (Bankr. M.D. Fla. 2012) concerned a late filed claim rather than an amended claim seeking to assert a deficiency. The creditor advanced two arguments for why its late filed claims should be nonetheless allowed. Creditor sought to invoke the Court's equitable powers under Section 105 to allow the claims. Creditor also argued that Bankruptcy Rule 9006(b)(1) applied to late filed claims and the Creditor could rely on the excusable neglect

standard set forth in that Rule. The Court considered the interplay of the various statutes that were implicated, including Bankruptcy Rule 9006, Section 502(b)(9) and Bankruptcy Rule 3002(c). The Court's statutory analysis led to the conclusion that the excusable neglect standard expressly provided for in Rule 9006(b)(1) was not imported into Chapter 13 cases. Essentially, the Court found that the bar date in Chapter 13, "operates as a strict statute of limitations." *Id* at 468.

A TRUSTEE'S PRACTICE POINTERS FOR PROOFS OF CLAIMS

Materials prepared by: Kelly Remick, Chapter 13 Trustee

1. When filing a claim for secured creditors please be sure to include the monthly payment amount, the arrears amount and a description of the collateral (property address for real estate). Please also review all exhibits and attachments to make sure that the monthly payment amounts and start dates are consistent on all documents. We often find conflicting information regarding monthly payment amounts and effective start dates. Specifically the proof of claim will have one payment amount listed, and will say to start in a certain month, but 25 pages in to the attachments, it will have a different amount with a completely different start date.

2. When a creditor sells/transfers/assigns a claim to another entity, the creditor should immediately file a transfer or assignment of claim. Failure to do so results in the delay of Trustee disbursements to the new entity.

3. When a creditor returns a Trustee payment because a loan has been sold/transferred/assigned/service released it would be helpful if that creditor includes the name and address of the new servicer. Again, failure to do so results in the delay of Trustee disbursements to the new entity.

4. When a creditor returns/refunds a Trustee payment please include the Debtor's name and case number and an explanation as to why the funds are being returned, i.e. paid in full, etc. The Trustee receives creditor checks with no information regarding the case to which it relates and why it is being returned. Without this information the Trustee is often unable to process the check and apply these funds, and the creditor check is returned requesting more information.

5. Please do not seek legal advice from the Trustee, the Trustee staff attorneys or Trustee staff. The Trustee's office is not in a position to provide legal advice. Those seeking legal advice, including attorneys, will be asked to seek their own counsel.

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Managing Editor: Hon. Keith M. Lundin, United States Bankruptcy Judge, Nashville, TN

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FILER BEWARE! IT'S NOT JUST THE RULES COMMITTEE CHANGING THE RULES

Alane A. Becket

Gilbert B. Weisman

William A. McNeal

Becket & Lee LLP
Malvern, PA

Statutes seldom operate in isolation from other statutes and occasionally, the provisions of one federal statute are incompatible with those of another federal or state statute. Federal preemption resolves many conflicts arising with state laws. However, when one federal statute conflicts with another, few clear guidelines exist to determine which prevails. Under these circumstances, courts must look to statutory construction and interpretation principles, as well as the underlying statutory policies and congressional intentions because, fundamentally, each federal statute is born with equal effect under the law.[1]

One such potential conflict was recently addressed in *Crawford v. LVNV Funding, LLC*,[2] wherein the United States Court of Appeals for the Eleventh Circuit overruled the decisions of both the bankruptcy court and the district court, as well as a uniform body of federal law, and held that the filing of a proof of claim for a debt for which the statute of limitations had expired was a violation of the Fair Debt Collection Practices Act ("FDCPA" or "Act").[3] The decision sent shockwaves throughout the creditor community because, for the first time, some bankruptcy claimants could be penalized

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under the FDCPA for lawfully participating in a bankruptcy case, whereas other claimants filing similar claims would not. This article reviews the decision and examines its far reaching and troubling effects.

FDCPA vs. Bankruptcy Code: The Statutory Scheme

Enacted in 1978, the FDCPA arose as a result of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[4] Premised on the concept that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy,"[5] its drafters shared a concern that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[6] To that end, the FDCPA is purposed "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[7]

The FDCPA does not apply to all types of debt nor does it apply to everyone who collects debts. Its prohibitions are limited to "debt collectors" collecting consumer "debts." The Act defines a debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[8] A "debt collector" is defined as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include—(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.[9]

The FDCPA proscribes specific acts, for example, communicating with third parties about a debt or contacting debtors early in the morning or late at night. It also more generally prohibits debt collectors from engaging in harassing or abusive behavior, employing unfair practices in the collection of debts, and making false representations to collect debts.

Violations of the FDCPA incur strict liability and are punishable by actual damages, statutory damages of up to $1000, and attorney fees.[10] Class actions are not uncommon and can result in damages of up to $1000 for each named plaintiff and "such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per

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centum of the net worth of the debt collector," plus attorney fees.[11]

Bankruptcy, on the other hand, "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[12] The Bankruptcy Code places in the bankruptcy court the power of policing violations of bankruptcy statutes and rules.[13]

In most cases, the filing of a petition for bankruptcy relief invokes the automatic stay which, among other things, prohibits the commencement or continuation of any collection efforts.[14] Thereafter, all creditors are invited to participate in the bankruptcy by filing a proof of claim. A "claim" in bankruptcy is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[15] The definition is intentionally broad so that any party who may make a claim against the debtor is notified of the bankruptcy,[16] wherein any disputes over the claim can be adjudicated.

FDCPA vs. Bankruptcy Code: The Conflict

When a debtor files for bankruptcy protection, at least two troublesome conflicts between the Bankruptcy Code and the FDCPA may arise. First, a debt collector may, according to some, be held liable for damages, pursuant to the FDCPA, for actions taken during the pendency of the bankruptcy. Second, a debt collector who complies with the FDCPA may, again according to some, inescapably violate the Bankruptcy Code.

The *Crawford* Case

In February 2008, Mr. Crawford filed a Chapter 13 case. LVNV Funding, LLC ("LVNV"), a purchaser of the debtor's delinquent Heilig-Meyers department store account, was listed as a creditor in the debtor's schedule of unsecured debts, and filed a proof of claim. In 2012, the debtor filed an adversary proceeding alleging that the filing of LVNV's claim was a violation of the FDCPA because the state statute of limitations on the debt had run.[17] According to the debtor, filing an out-of-statute claim is a violation of the FDCPA in the same way that suing or threatening to file suit on a time-barred debt is a FDCPA violation.[18]

In its motion to dismiss the adversary proceeding, LVNV argued that well-settled law from throughout the country holds that the filing of a proof of claim cannot be the basis for a FDCPA action. Importantly, it also explained that, even outside of bankruptcy, attempting to collect a debt that is out-of-statute, absent a suit or threat thereof, has uniformly been held not to be a violation of the FDCPA. Finally, the creditor maintained that filing a proof of claim in bankruptcy court cannot violate the FDCPA, which regulates actions against consumers. Rather, it is a request to participate in the bankruptcy case and receive distributions from the bankruptcy estate.

The bankruptcy court dismissed the debtor's adversary proceeding, agreeing with LVNV that filing a proof of claim in bankruptcy court, even if barred by the statute of limitations, cannot premise a violation of the FDCPA.

The District Court

The debtor appealed the dismissal of the adversary proceeding. In district court, the debtor acknowledged that the position he was advocating would require a change in the law:

> But Appellants are fighting an uphill battle, and they candidly admit they cannot win their appeals without a change in the law. Indeed, the elephantine body of persuasive authority weighs against Appellants' position. *See, e.g.*, *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir.2010)("Federal courts have consistently ruled that filing a proof of claim in

> bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action.").[19]

In response to LVNV's argument that the change in the law suggested by the debtor would unfairly prejudice a subset of creditors collecting only certain accounts in bankruptcy cases, the debtor dismissively remarked that such is the "yoke which debt collectors bear for the privilege of being debt collectors."[20] He added, "[t]here is no reason to provide debt collectors with a playground full of vulnerable consumers in the Bankruptcy forum for debt collectors to bully with impunity from FDCPA liability."[21] The debtor urged that "[t]his practice [of debt collectors' filing claims for out-of-statute debt] and this mistake of law must be stopped."[22]

The district court affirmed dismissal of the debtor's adversary proceeding, and expanded upon the rationale of the bankruptcy court, by considering the purpose of the FDCPA—to protect consumers from abusive, deceptive and unfair treatment. The court reasoned that even if filing a proof of claim could somehow be considered an attempt to collect a debt under the FDCPA, doing so did not run afoul of the FDCPA. Observing that the creditor never communicated with the debtor, the district court said:

> Appellants were never threatened; they were never tricked; they were never lied to or deceived—they were never even spoken to. Appellees never asked Appellants for a dime; instead, they merely filed claims in the bankruptcy court. As a matter of law, that conduct does not amount to an effort to collect a debt. And even if it did, it is not the sort of abusive practice the FDCPA was enacted to prohibit.[23]

Notably, the court also addressed a misstatement of the law in which the debtor persisted, *viz*., that any attempt to collect a debt on which the statute of limitations had run was a FDCPA violation. It noted that the case relied upon by the debtor, *Kimber v. Federal Financial Corp.*,[24] did not so hold. The *Kimber* court found a FDCPA violation when a creditor threatened to file suit on an out-of-statute debt, and explained why this was an unfair practice:

> Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.[25]

In addition to factual distinctions between *Kimber* and *Crawford*, the district court found unpersuasive the more general concerns expressed in *Kimber*. It noted that in the bankruptcy context, the parties operate under court supervision and there is little likelihood even the most unsophisticated consumer would be threatened or deceived in this environment.

The Eleventh Circuit

The debtor appealed to the United States Court of Appeals for the Eleventh Circuit. This time, recognizing his earlier error, the debtor did not argue that merely attempting to collect an out-of-statute debt violated the FDCPA. Conceding that it is only a suit or threat of suit that is actionable, the debtor changed his approach and analogized the filing of a proof of claim against a bankruptcy estate to the filing of a state court lawsuit against the debtor:

> Crawford's position is simple. . . . [T]he filing of a proof of claim is tantamount to the filing of a complaint in a civil action. . . . Since at least 1987 debt collectors have been on notice that filing suit on time-barred debt was a violation of the FDCPA. Therefore, a ***debt collector*** who files a claim in the bankruptcy court to collect on a time-barred debt has filed a civil action to collect time-barred debt in violation of the FDCPA.[26]

In support of his position, the debtor argued that a proof of claim functions "similarly" to a complaint in that it sets forth the facts on which the creditor bases its claim, and equated an objection to a proof of claim to an "answer."[27]

The debtor urged application of the FDCPA's "least sophisticated consumer" standard for adjudging whether the filing of a proof of claim for an out-of-statute debt is an abusive attempt to collect a debt.[28] In doing so, he suggested that a debtor may be unaware that a time-barred claim may be objectionable, and that payment of the claim would reduce distributions to "legitimate creditors." Finally, the debtor lamented the "energy and resources" required to object to the claim.[29]

To prevail, the debtor needed to convince the Eleventh Circuit of the validity of two novel arguments. First, as noted above, the court would have to find the filing of a proof of claim to be analogous to the filing of a state court suit on an unpaid debt by a debt collector, a violation of the FDCPA. Second, the court would have to agree that the remedy for filing a proof of claim on an out-of-statute debt could be found in the remedial provisions of the FDCPA, in addition to the Bankruptcy Code.

The debtor correctly noted a split of circuit court authority on whether the FDCPA may be applied to redress putatively violative conduct occurring in the context of a bankruptcy case, citing *Randolph v. IMBS, Inc.*[30] for the proposition that the FDCPA can be invoked even when a debtor is in bankruptcy. In *Randolph*, the debt collectors sent dunning letters to debtors in active bankruptcy cases. Rather than alleging a violation of the automatic stay, the debtors sued the debt collectors for violations of the FDCPA. The United States Court of Appeals for the Seventh Circuit ruled that the debtors' FDCPA suits based on the collection letters, were viable, even though the Bankruptcy Code contained separate remedies for violations of the automatic stay. The court specifically rejected the argument that the remedial provisions of the Bankruptcy Code impliedly repealed the FDCPA. Instead, the court found that when statutes can be interpreted in harmony, they should be, and that there was nothing improper about bringing an FDCPA action when debtors are dunned during bankruptcy. As to the basic differences between the FDCPA and the Bankruptcy Code, the Seventh Circuit found no inherent conflict justifying a restriction on the application of the FDCPA.[31]

LVNV conceded that the Bankruptcy Code and the FDCPA coexist. However, it argued that even if the FDCPA could be applied to the filing of a proof of claim, debtor's adversary proceeding was properly dismissed "because he has not been the victim of false, fraudulent, harassing or oppressive collection efforts. In fact, he has not been subjected to any collection efforts at all."[32] It noted that the proof of claim was filed against the bankruptcy estate, neither a consumer nor a natural person and certainly not the debtor himself, while the FDCPA is designed to protect debtors from abusive or unfair tactics.

LVNV pressed additional points. First, assuming that the FDCPA is applicable to proofs of claim, LVNV reiterated that the FDCPA is violated only by the filing or threatening of a lawsuit for an out-of-statute debt. The Act does not bar other lawful collection attempts, such as dunning letters, and most relevantly, the filing of a proof of claim in a bankruptcy case. No court had ever found otherwise.

Next, LVNV observed that if the filing of a proof of claim were subject to the FDCPA, by definition, doing so is an "attempt to collect a debt." Under the Bankruptcy Code, attempting to collect a prepetition debt is prohibited. As a result, under the debtor's reasoning, every proof of claim would (nonsensically) violate the automatic stay.

LVNV further argued that even if a proof of claim were subject to the protections of the FDCPA, filing a claim for a debt on which the statute has run is not abusive, unfair, deceptive, false or improper in any manner the FDCPA is designed to curtail. In fact, the proof of claim process is specifically how the Bankruptcy Code instructs creditors to apprise the court of their claims.

Finally, LVNV contended that while filing a proof of claim may superficially *appear* similar to a suit on a debt, it is in fact fundamentally different, because it is part of a process administered by a bankruptcy court pursuant to the Bankruptcy Code. The process includes an instruction to all creditors to file any "claim" against the bankruptcy estate—a claim being defined under the Code as any right to payment, including even disputed debts. If the debtor disputes the allowance of any claim, the Bankruptcy Code and Bankruptcy Rules include provisions for a debtor to challenge the claim.[33]

The United States Court of Appeals for the Eleventh Circuit, in an opinion authored by Judge Richard W. Goldberg, from the United States Court of International Trade, sitting by designation, began by tipping its hand, "[a] deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations."[34] In reversing the bankruptcy and district courts, the circuit measured LVNV's conduct in filing a proof of claim for an out-of-statute debt against the "least sophisticated" consumer standard.[35] While noting that the least sophisticated consumer criterion "takes into account that consumer-protection laws are 'not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous[,]' "[36] the court also acknowledged that the test has an objective component designed to "preserv[e] a quotient of reasonableness" into the determination.[37]

There was no dispute that had the creditor filed a lawsuit against the debtor in state court, it would have been a violation of the FDCPA. The court, carrying over that concern to the bankruptcy case, worried, "[a] Chapter 13 debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished, making it difficult for a consumer debtor to defend against the time-barred claim."[38] The court indicated that allowance of the claim would result in the payment of an "otherwise unenforceable time-barred debt" at the expense of "legitimate creditors with enforceable claims."[39]

In dismissing the creditor's argument that a proof of claim is not a "debt collection activity" regulated by FDCPA, the court persisted that filing of an out-of-statute proof of claim was a false and fraudulent means to collect a debt and, therefore, a violation of the FDCPA.[40] In response to the creditor's contention that it was not collecting a debt against a natural person, but rather against the bankruptcy estate, the court reasoned that the source of any payment, *i.e.*, the debtor, was sufficient to satisfy this prerequisite.

Finally, the court also addressed the conflict, cited by LVNV, arising from application of the FDPCA to acts taken in a bankruptcy case, *viz.,* if filing a claim is an "act to collect" a debt, then every proof of claim would violate the automatic stay, a basic bankruptcy protection. The court found this concern unwarranted, employing somewhat circular reasoning.

> The automatic stay prohibits debt-collection activity outside the bankruptcy proceeding, such as lawsuits in state court. It does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process. Filing a proof of claim is the first step in collecting a

debt in bankruptcy and is, at the very least, an 'indirect' means of collecting a debt.[41]

The court's rationale was simple: "Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court."[42] It not only overturned the dismissal of the debtor's adversary proceeding, it arguably went beyond the issue before it and ruled on the merits of the underlying action by holding LVNV's claim violated the FDCPA. The case was remanded for further proceedings.

FDCPA vs. Bankruptcy Code: A Comparison

While the parties in *Crawford* agreed that the Bankruptcy Code did not impliedly repeal the FDCPA, a comparison of some key features and protections of each illuminates the disparate purposes and effects of the two regimes.

Bankruptcy Code	FDCPA
Applies to all entities uniformly.	Applies only to specified entities and debts, i.e., debt collectors and consumer debts.
Prohibits attempts to collect debts.	Regulates attempts to collect debts.
Proof of claim filed against the bankruptcy estate.	Collection activity against a consumer-debtor.
Court-supervised and statutory process almost always voluntarily entered into by debtor.	Protects consumers from mostly unregulated and unfair collection tactics.
Debtor usually represented by counsel.	Debtor usually not represented by counsel.
Out-of-statute debts are included in the definition of a "claim" for which proof may be filed.	Out-of-statute debts are collectible with the exception of filing or threatening to file suit.
Proof of claim must state the name of the original creditor.	Debtor must request, in writing, the name of the original creditor within approximately 30 days of the creditor's first communication with the debtor.
Proof of claim must identify date of last payment and date of last transaction.	Does not require identification of date of last payment and/or date of last transaction in communications with consumers.
Debtor can request additional documentation at any time, which must be provided within 30 days.	Debtor can request additional documentation, within approximately 30 days of creditor's first communication.[43]
Filing a proof of claim for an out-of-statute debt is not a violation of the Bankruptcy Code.	Filing or threatening suit on an out-of-statute debt is a false and misleading representation, in violation of the FDCPA.
Bankruptcy Code has a regime for disputing "allowance" of claims. Knowingly "false" claims can be penalized by civil and criminal penalties.	Strict liability for violations plus attorney fees.

While both the FDCPA and the Bankruptcy Code regulate interactions between consumer debtors and creditors, the chart above shows that the statutes are not congruous in purpose, procedure or remedy. As argued by the creditor and noted by many courts, layering one statute over the other creates unavoidable conflicts for creditors if they must comply with both.

What *Crawford* Means

For the first time, a circuit court of appeals has found that a debt collector faces liability under the FDCPA for filing a proof of claim in a bankruptcy case. The decision has implica-

tions far beyond the windfall debtors and their attorneys will receive by litigating a strict liability statute that includes attorney fees in its damages provisions. Debt collectors will avoid filing claims for out-of-statute debt, which in turn devalues accounts or pools of accounts containing out-of-statute debt, a commodity commonly traded by banks and other financial institutions seeking to liquidate nonperforming assets.

The fallout will not end there. Claims are filed electronically (and economically) in every bankruptcy court in the country, every day of the year. These claims are filed by a wide variety of claimants, such as medical care providers, student loan lenders (both government and private), and credit issuers such as banks, retailers, and credit unions. While non-debt collector claimants in bankruptcy are exempt from the reach of the FDCPA, the panel's reasoning and holding will ensnare non-debt collector creditors who engage the services of outside entities to assist them in the administration of their bankrupt accounts, including filing claims. It is of course unlikely that such outside parties would agree to file claims that subject them to FDCPA liability. Creditors will be forced either to abandon out-of-statute claims filed by outside entities, including attorneys,[44] such claims as would not violate the FDCPA if filed directly by the creditor, or reengineer their processes and file the claims themselves.

As noted above, the filing of a proof of claim is authorized by the Bankruptcy Code and not limited to "in statute" debts. It harms the elaborate scheme enacted by Congress in the Bankruptcy Code to force a claimant to make a determination whether its claim is beyond the state's statute of limitations in order to avoid violating the FDCPA.[45] Indeed, § 502 of the Bankruptcy Code correctly aligns the burden in accordance with state law. A claim is deemed allowed unless and until a debtor engages the claim objection process in which he may raise the affirmative defense of statute of limitations.

Many other federal and state statutes, laws and regulations have consumer protection provisions that do not distinguish between creditors and debt collectors. If the filing of a proof of claim in a bankruptcy case is a collection activity regulated by the FDCPA, other consumer protection statutes may likewise apply. The panel's analysis potentially exposes *any* creditor to a host of statutory and regulatory regimes and liabilities for lawfully participating in a bankruptcy case.

The ruling also raises the specter of incalculably expensive litigation, including class actions, and awards against more than just FDCPA-defined "debt collectors."[46] It also puts bankruptcy professionals, including attorneys, at risk for penalties under the FDCPA's strict liability provisions for representing creditors in bankruptcy cases. Creditors, their agents and attorneys, as well as debt purchasers, all lose the right to file legitimate bankruptcy claims, or risk litigation for doing so. This clearly defeats the fair and economical administration of estates in bankruptcy, unjustly "pricing" the process out of reach of many claimants.

An expected flood of FDCPA disputes with millions of proofs of claims filed annually threatens to swallow the dockets of bankruptcy and district courts.[47] The wave of litigation will not abate there. Rather, if the act of participating in a bankruptcy case is violative, almost any contested matter initiated by a claimant or even wherein a claimant responded, could give rise to an FDCPA-based challenge by a debtor, despite the absence of any collection activity, proper or otherwise.

The Bankruptcy Code very adequately polices the conduct of claimants, containing severe criminal and monetary penalties for false or fraudulent proofs of claim. The United

States Trustee is tasked with overseeing the bankruptcy system and ensuring that parties conform their activities to the law. There is simply no legal or policy reason to single out "debt collectors," for disadvantaged treatment in bankruptcy cases, by ruling that another federal statute, whose purpose is very different from that of the Bankruptcy Code, makes it unlawful for debt collectors to file claims.

Finally, the most recent revision to Bankruptcy Rule 3001 ("Proof of Claim") requires an open-end or revolving consumer credit claim to include the following information: The name of the entity from whom the creditor purchased the account; the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account; the date of an account holder's last transaction; the date of the last payment on the account; and the date on which the account was charged to profit and loss.[48] It also allows a debtor to request additional documentation from the creditor, which must be provided within thirty days.[49] The Advisory Committee Notes to the Rule state:

> Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. **It will also provide a basis for assessing the timeliness of the claim**.[50]

Clearly, the drafters of the Federal Bankruptcy Rules were aware that out-of-statute claims are routinely filed, and crafted provisions to add transparency to those claims. In addition, as demonstrated by the chart above, the Bankruptcy Rules require significantly more information of a claimant than does the FDCPA. A debtor is thus more fully protected in bankruptcy and need only exercise his right to object to claims, a far more economical process than suit under the FDCPA.

In recent years, the collection out-of-statute debts has garnered significant interest at both the state and federal level. Debt collectors and debt purchasers face substantial scrutiny and regulation as a result of what are perceived to be unfair practices by some. However, unless the Bankruptcy Code is amended, it is still lawful to file a proof of claim for an out-of-statute debt and, everywhere except the Eleventh Circuit, doing so does not constitute a violation of the FDCPA.[51]

ENDNOTES:

[1]Baldwin v. McCalla, Raymer, Padrick, Cobb Nichols & Clark. L.L.C., No. 98 C 4280, 1999 WL 284788, at *3 (N.D. Ill. Apr. 26, 1999) (quoting United States v. Palumbo Bros. Inc., 145 F.3d 850, 862 (7th Cir. 1998)). Indeed, in Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004) (internal citation omitted), Judge Easterbrook notes, "[w]hen two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed. It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other."

[2]Crawford v. LVNV Funding, LLC, No. 13-12389, 2014 WL 3361226 (11th Cir. July 10, 2014).

[3]Crawford, 2014 WL 3361226, at *1-*2.

[4]15 U.S.C.A. § 1692(a).

[5]15 U.S.C.A. § 1692(a).

[6]15 U.S.C.A. § 1692(b).

[7]15 U.S.C.A. § 1692(e).

[8]15 U.S.C.A. § 1692a(5).

[9]15 U.S.C.A. § 1692a(6).

[10]15 U.S.C.A. § 1692k(a).

[11]15 U.S.C.A. § 1692k(a).

[12]Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

[13]11 U.S.C.A. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

[14]Whether or not a creditor participates in

the case, any discharge the debtor receives will relieve the debtor of personal liability for the obligation in most cases.

[15]11 U.S.C.A. § 101(5).

[16]Johnson v. Home State Bank, 501 U.S. 78, 83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991) ("We have previously explained that Congress intended by this language to adopt the broadest available definition of 'claim.' ").

[17]LVNV conceded that the debt was beyond the applicable statute of limitations. Interestingly, the debtor's adversary proceeding was filed after the one year limitations period in the FDCPA. 15 U.S.C.A. § 1692(k).

[18]Threatening to file or filing suit on an out-of-statute debt has been held to violate 15 U.S.C.A. § 1692(e), which prohibits making any false, deceptive, or misleading representation or means in connection with the collection of any debt, including specifically, misrepresenting the legal status of a debt.

[19]Crawford v. LVNV Funding, LLC, No. 2:12-CV-701-WKW, 2013 WL 1947616, at *1 (M.D. Ala. May 9, 2013).

[20]Appellant's Rebuttal Brief to Brief of Asset Acceptance at 11, Crawford v. LVNV Funding, LLC, Case no. 2:12-cv-00701-WKW (Nov. 27, 2012), ECF No. 17.

[21]Appellant's Rebuttal Brief to Brief of Asset Acceptance at 11, Crawford v. LVNV Funding, LLC, Case no. 2:12-cv-00701-WKW (Nov. 27, 2012), ECF No. 17.

[22]Appellant's Rebuttal Brief to Brief of Asset Acceptance at 11, Crawford v. LVNV Funding, LLC, Case no. 2:12-cv-00701-WKW (Nov. 27, 2012), ECF No. 17.

[23]Crawford, No. 2:12-CV-701-WKW, 2013 WL 1947616, at *1.

[24]Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

[25]Kimber v. Federal Fin. Corp., 668 F. Supp. at 1487.

[26]Brief of Plaintiff-Appellant at 4 (internal citations and citations omitted), Crawford v. LVNV Funding, LLC, No. 13-12389 (11th Cir. July 15, 2013).

[27]The debtor correctly noted that the FDCPA does not prohibit a debt collector from seeking voluntary payments on a time barred debt. Brief of Plaintiff-Appellant at 11-12, Crawford v. LVNV Funding, LLC, No. 13-12389 (11th Cir. July 15, 2013). It should be noted that, in a small minority of states, the expiration of the statute limitations extinguishes the underlying obligation. Thus, even non-legal collections on such debt would be considered violative of the FDCPA.

[28]"Because we believe that Congress intended the standard under the FDCPA to be the same as that enunciated in the relevant FTC cases, . . . , and because we believe that '[t]he FDCPA's purpose of protecting [consumers] . . . is best served by a definition of 'deceive' that looks to the tendency of language to mislead the least sophisticated recipients of a debt collector's letters and telephone calls,' we adopt the *Exposition Press* standard of 'least sophisticated consumer' as previously followed by the federal courts in *Baker*, . . . and *Bingham*[.]" Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. Ga. 1985) (internal citations omitted).

[29]Brief of Plaintiff-Appellant at 15, Crawford v. LVNV Funding, LLC, No. 13-12389 (11th Cir. July 15, 2013). In support of his complaint that it is unfair for a debtor to be required to object to claims that are out-of-statute, the debtor in *Crawford* cites *In re Andrews*, 394 B.R. 384 (Bankr. N.D.N.C. 2004), in which the court noted in dicta that it was both burdensome and expensive for debtors to object to stale claims. However, even the court in *Andrews* understood that to be the debtor's burden under the Bankruptcy Code, and that the court was not empowered to change that burden. In re Andrews, 394 B.R. at 389 ("Perhaps that result cannot be changed without changing the Bankruptcy Code, but it may be possible for the Advisory Committee on Bankruptcy Rules to craft a rule to relieve the debtor from this burden."). Notably, the *Andrews* court then asked the Advisory Committee on Bankruptcy Rules to review the issue and consider implementing changes to the Official Bankruptcy Forms "to alleviate the significant burden on individual debtors and on the bankruptcy system caused by the large number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts." In re Andrews, 394 B.R. at 389. "Thereafter, the Advisory Committee made changes to the proof of claim form and required attachments specifically designed to make it easier for the Debtor to determine if the statute of limitations may have passed on a claim." Advisory Committee Notes to Rule 3001 (2012).

[30]Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004).

[31]Randolph, 368 F.3d at 732 ("They are simply different rules, with different requirements of proof and different remedies.").

[32]Brief of Appellees at 2, Crawford v. LVNV Funding, LLC, No. 13-12389 (11th Cir. Aug. 1, 2013).

[33]However, the debtor is not required to object to claims that are out-of-statute and such claims are entitled to distributions from the bankruptcy estate. ("A claim or interest, proof of which is filed under section 501 of this, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C.A. § 502(a)). For instance, in a bankruptcy in which creditors are paid less than the full amounts of their claims, a debtor may be indifferent to the distributions made by the trustee, and will avoid the expense of litigating claims (unless the disallowance of a claim will provide a return to the debtor after all allowed claims are paid). In this situation, creditors would be incentivized to police each other, rather than the debtor.

[34]Crawford, 2014 WL 3361226, at *1.

[35]Not all agree where, as in this case, any communication was with debtor's attorney only. Champion v. Target Nat'l Bank, N.A., No. 1:12-CV-4196-RLV, 2013 WL 8699367, at *8 (N.D. Ga. Apr. 15, 2013) (internal citations omitted) ("The Ninth Circuit has concluded that a communication to a debtor's counsel is outside the scope of FDCPA. Dicta from two other Circuits supports the same conclusion. Finally, numerous district courts hold that the FDCPA does not apply to a communication to a debtor's attorney. . . . This Court agrees with the above-cited decisions and holds that the FDCPA does not apply to a communication to a debtor's attorney.").

[36]Crawford, 2014 WL 3361226, at *2.

[37]Crawford, 2014 WL 3361226, at *2 (citation omitted).

[38]Crawford, 2014 WL 3361226, at *4.

[39]Crawford, 2014 WL 3361226, at *4.

[40]Crawford, 2014 WL 3361226, at *4.

[41]Crawford, 2014 WL 3361226, at *5 (internal citation omitted).

[42]Crawford, 2014 WL 3361226, at *5. Likewise, the Chapter 13 trustee was not immune from criticism by the panel. "Here, however, it appears the trustee failed to fulfill its statutory duty to object to improper claims, specifically LVNV's stale claim." Crawford, 2014 WL 3361226, at *5 n.5.

[43]This does not mean that a debtor cannot request documentation after this time limit, merely that the FDCPA provides a right to request verification of the debt after a debtor's collector's initial communication. 15 U.S.C.A. § 1692(g).

[44]See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 622, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (Kennedy, J., dissenting) ("After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk.")

[45]Indeed, such a requirement would arguably oblige a non-attorney claimant who executes a proof of claim into the unauthorized practice of law, by forcing him to determine if the statute of limitations has passed, traditionally a legal determination.

[46]In the few weeks since the ruling, the creditor in *Crawford* has been named as a defendant in numerous adversary proceedings, all alleging an FDCPA violation as a result of proofs of claim filed prior to the ruling.

[47]Consider, for example, the impact of reduced funding due to recent sequestration: "nearly 15 percent fewer staff on-board in clerks' offices, probation and pretrial services offices, and court of appeals units than there were two-and-a-half years ago; the number of on-board staff is now equivalent to on-board staffing levels in the courts in 1997." http://news.uscourts.gov/judicial-conference-reports-show-sequestration-impact-detail-court-space-savings (last visited August 5, 2014). "This directly impacts individuals, small businesses, and corporations seeking to resolve disputes in the federal courts," according to Hon. Julia Gibbons, Chair of the Budget Committee of the Judicial Conference of the United States. http://news.uscourts.gov/judicial-conference-reports-show-sequestration-impact-detail-court-space-savings (last visited August 5, 2014).

[48]Fed. R. Bankr. P. 3001(c)(3)(A).

[49]Fed. R. Bankr. P. 3001(c)(3)(B).

[50]Fed. R. Bankr. P. 3001, Advisory Committee Notes, 2012 Amendments (emphasis added).

[51]At the time of this writing, a petition for