

# Crafty Creditor Remedies for Chapter 13

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A BIT OF SHAKESPEARE AND BANKRUPTCY

**I. ATTORNEY-SIGNED CLAIMS. TO SIGN OR NOT TO SIGN? THAT IS THE QUESTION.<sup>1</sup>**

The claims bar date is approaching and you need to file a proof of claim for your client. Should you sign your client's claim as its agent (with your client's approval) to insure it is not time-barred? A decision by the U.S. Bankruptcy Court for the Southern District of Texas should cause an attorney to pause to consider the possible ramifications before making that decision.

In the case before the bankruptcy court, the issue was whether an attorney who signed his client's proofs of claim had waived the attorney-client privilege and work-product doctrine, and could be forced to testify about facts and documents relating to the claims. *In Re Rodriguez*, Bk. No. 10-70606, Adv. No. 11-07012, 2013 WL 2450925 (Bankr. S.D. Tex. June 5, 2013). At his deposition, the attorney for the creditor asserted the privileges, refusing to testify or produce documents. Counsel for the trustee argued that, by signing the claims, the attorney for the petitioning creditors had waived such privileges.

The bankruptcy court found that “[s]igning a proof of claim is an assertion of personal knowledge of the facts alleged in the proof of claim. . . . A properly filed proof of claim is prima facie evidence as to the claim’s validity (thus, as to the facts alleged therein).” 2013 WL 2450925 at \*3. Since the claims themselves “constitute evidence going towards the merits of this litigation,” the attorney “became a fact witness as to the allegations contained in the proof of claim” which resulted in a waiver of the attorney-client privilege. *Id.* at \*4. The bankruptcy court further found the work-product doctrine (or privilege) did not protect against “questions seeking the basis for the factual assertions made by a fact witness.” *Id.* at \*6.

In all, counsel for the petitioning creditors was found to waive the attorney-client privilege and the work-product doctrine as to the debtor's liability for bad faith trespass (and other torts) as asserted in the claims, *Id.* at \*5, the amount of the damages asserted, *Id.* at \* 6, the documents counsel reviewed prior to filing the claim, *Id.*, the identities of the persons with whom the attorney spoke, *Id.*, the documents used in support of the claims, *Id.* at \*7, the facts contained in the documents used in support of the claims, *Id.*, and counsel's knowledge of certain facts or events at relevant time periods that relate to the claims. *Id.* at \*8.

Clearly, Bankruptcy Rule 3001 allows an agent, such as an attorney, to sign a claim if authorized by the creditor, as long as the agent or attorney complies with Bankruptcy Rule 9011, the counterpart to Rule 11 of the Federal Rules of Civil

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<sup>1</sup> Taken from “To be or not to be- that is the question:” Shakespeare, William, Hamlet.

Procedure. And, Part 3 of Official Form 410 (the proof of claim form) specifically provides for a creditor's attorney or authorized agent's signature.

But note further that the claim form requires the signatory to acknowledge that the creditor gave credit for "any payments received toward the debt," to state that he or she "examined the information" in the claim and has "a reasonable belief that the information is true and correct," and, finally, "declare under penalty of perjury that the foregoing is true and correct." Official Form 410, Part 3. While we may quibble over what exactly is the "foregoing" to which is sworn under penalty of perjury, the form makes clear that the signer has a duty to review the information on the claim and such other documents as is necessary to form "a reasonable belief" of its accuracy.

Signing the claim and becoming a fact witness could cause the attorney to be disqualified from representing the client in future proceedings if the attorney could be called as a witness. See e.g. Spencer v BMW of North America, LLC, Case No. 5:14-CV-00869, 2015 WL 3936211 (W.D. Tex. June 26, 2015) (attorney for plaintiff disqualified as material fact witness). In In re Duke Investments, Ltd., 454 B.R. 414 (Bankr. S.D. Tex. 2011), a bankruptcy court was charged with deciding whether the creditor's attorney should be disqualified from representing the creditor in an adversary proceeding regarding a proof of claim prepared and signed by the creditor's attorney. The issue arose in the context of an adversary proceeding in which the debtor disputed the amount shown on Amegy's claim, and alleged the claim wrongfully charged fees, expenses and "an exorbitant default interest rate." 454 B.R. at 419. The debtor argued the creditor's attorney would be a material fact witness at the trial, so should be disqualified. Id. at 420.

Although the court in the Duke case refused to disqualify the attorney because he was not a "necessary witness" with "exclusive knowledge or understanding of the disputed evidence," Id. at 424-25, and his testimony, if required, would not be "substantially adverse" to his client's, Id. at 425, the court cautioned against signing claims, advising "attorneys representing creditors in bankruptcy cases" to "think twice before signing proofs of claim for their clients" citing the risk of becoming a fact witness and "time-consuming and costly effects" of considering the issue. Id. at 427.<sup>2</sup>

Given the importance of maintaining attorney-client privilege and the work-product doctrine, and that an attorney may lose his/her ability to represent the client in

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<sup>2</sup> Rule 3.7(a) of the Illinois Rules of Professional Conduct, like most other states' rules of professional conduct, provides that a "lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- ...
- (2) disqualification of the lawyer would work substantial hardship to the client.

IRPC Rule 3.7(a).

future proceedings if called as a witness, should an attorney ever sign a proof of claim for his/her client? It depends on what is being asserted in the claim.

If, for example, a claim is based upon a judgment rendered in favor of the creditor in a lawsuit filed by counsel for the creditor, the nature of the claim (a judgment), and the amount of the claim are both in the public domain and are not protected by privilege. The facts underlying the judgment and the amount of the claim have been adjudicated by the court/jury, and are no longer privileged. In such a situation, waiver is no longer an issue, and there is little chance the lawyer will be disqualified in another proceeding.

On the other edge of the spectrum is a tort claim against the debtor that a court has yet to adjudicate. The creditor's attorney must retain attorney-client privileged communications, and, to the extent available under state law, information and documents privileged under the work-product doctrine. In such an instance, the creditor should sign the claim.

The real question arises when a signature is needed quickly on claims for which no judgment has been rendered, those for which damages are readily apparent or are based on invoices. An attorney's decision as to whether to sign such proofs of claims should be made only after considering the risks.

## II. 10-YEAR FRAUDULENT TRANSFER STATUTES OF LIMITATION – “HOW FAR THAT LITTLE CANDLE THROWS ITS BEAMS!”<sup>3</sup>

In Illinois, the Uniform Fraudulent Transfer Act's statutes of limitation for the recovery of fraudulent transfers are 4 years after the transfer was made or the obligation incurred, or, if later, 1 year after discovery for transfers made with actual intent to defraud. 740 ILCS 160. Confronted with a fraudulent transfer that diminishes the bankruptcy estate, a bankruptcy trustee may use these state law statutes under 11 U.S.C. § 544(b) to increase the limitations period.

But what if the debtor made a fraudulent transfer 8 years before filing? Could a bankruptcy trustee find some way to recover the fraudulently transferred property? Bankruptcy trustee Barry Mukamal, a Chapter 7 trustee in the U.S. Bankruptcy Court for the Southern District of Florida, did just that. See *In re Kipnis*, Bk. No. 14-11370, Adv. No. 16-01044 & 16-01045, slip op., 2016 WL 4543772 (Bankr. S.D. Fla. Aug. 31, 2016).

The debtor in the *Kipnis* case filed a Chapter 11 bankruptcy petition on January 21, 2014, which was converted to Chapter 7 on February 6, 2014. 2016 WL 4543772 at \*1. The Chapter 7 trustee filed two adversary proceedings against the debtor and Analia Kipnis (“Analia”) to avoid and recover the transfer of a bank account held solely in the debtor's name to the debtor and Analia as tenants by the entireties on August 5, 2005, and to avoid and recover the transfer of a condominium owned solely by the debtor that was

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<sup>3</sup> Shakespeare, William, *The Merchant of Venice*.

transferred on that same date to Analia by quit claim deed pursuant to a Premarital Settlement Agreement. Id.

The sole question before the bankruptcy court was whether the trustee could step into the shoes of the IRS's ten year statute of limitations for recovery of taxes under the "strong-arm" provision, 11 U.S.C. § 544(b), which provides:

Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.  
11 U.S.C. § 544(b)(1).

26 U.S.C. § 6502(a)(1) of the Internal Revenue Code (the "IRC") provides the Service with a 10-year statute of limitation to collect the tax "by levy or by a proceeding in court, but only if the levy is made or the proceeding begun – (1) within 10 years after the assessment of the tax." And 26 U.S.C. § 6901(a)(1)(A) of the IRC provides the service with the authority "to pursue avoidance actions against transferees of the taxpayers' property."

Section 6901(a)(1)(A) of the IRC does not "set[] the standard for establishing transferee liability," and, instead, "the IRS must rely on applicable state law." Id. at \*3. In Kipnis, Florida's fraudulent transfer law was the "applicable state law," to be applied to the transfers, but Florida's statute of limitations would have barred the action.

The bankruptcy court ruled that § 544(b)'s "step in the shoes" provision gave the bankruptcy trustee 10 years to challenge the alleged fraudulent transfers using Florida's substantive fraudulent transfer law (without its statute of limitations), since the IRS held an unsecured claim against the debtor and the 10 year period had not expired.

### **III. WHERE SELFISHNESS IS FOUND, DISCHARGE IS DENIED. "LORD, WHAT FOOLS THESE MORALS BE?"<sup>4</sup>**

The Seventh Circuit recently affirmed the dismissal of a Chapter 7 bankruptcy case "for cause," due to the debtors' "extravagant lifestyle." In In re Schwartz, 799 F.3d 760 (7<sup>th</sup> Cir. 2015), Michael Schwartz, one of the debtors, was hired as an executive by Barclays Capital, Inc., which loaned Schwartz \$400,000. 799 F.3d at 761. The loan was to be forgiven in equal installments over the first seven anniversaries of Schwartz's starting date. Id. However, Schwartz was fired prior to the second anniversary of his starting date, and Schwartz refused to pay the sums due to Barclays. Id.

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<sup>4</sup> Shakespeare, William, A Midsummer Night's Dream.

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The parties arbitrated their issues, and the arbitrator ruled in favor of Barclays, finding Schwartz owed Barclays \$568,568, including attorneys' fees and interest. Id.

After the award was announced and before they filed for bankruptcy, the Schwartzes "spent thousands of dollars on inessential consumer goods and services, including tickets to Disney World (they have two children)." Id. After the Schwartzes filed for bankruptcy, Barclays sought to dismiss their Chapter 7 case "primarily" pursuant to 11 U.S.C. § 707(a) for "cause." Id. at 761-62.

Circuit Judge Posner, writing for the court, agreed with the bankruptcy judge who dismissed the case,

because of their failure to use any of their earnings or assets to pay any part of the debt they owed Barclays. By spending even more than their substantial income for private purposes, they depleted the assets available to pay their creditors. **No one is asking them to live in a tent, dress in rags, drive a 1950 Chevy, or emulate Mme. Loisel in Guy de Maupassant's short story "The Necklace" ("La Parure")** who loses a borrowed necklace that she believes to be very valuable and ruins herself and her husband financially in order to remunerate the owner, only to discover in the end that the necklace was a fake, made of glass and worth almost nothing. What the Schwartzes failed to do was pay as much of their indebtedness as they could without hardship. Their action was deliberate and selfish, and provides good cause for denying the discharge. The dismissal of their petition will place them under greater pressure to pay off, or at least pay down, their debts than if they're permitted to persist in living high on the hog (relative to the average American family, which cannot afford to spend \$11,000 a month on consumption) in the face of a considerable indebtedness. Id. at 763-64 (emphasis added).

The Seventh Circuit clearly believed that the Schwartzes' failure to decrease their standard of living, or "take it down a peg so that there would be some money for their creditors" was "sufficient cause for denying a discharge of their debts." Id. at 764.

# Repos & 11 USC Sec.362

BALANCING THE EQUITIES

Thompson v. GMAC, 566 F.3d 699 (7th Cir. 2009)

- ▶ The Bankruptcy Court held that GMAC didn't need to return a lawfully repossessed vehicle, even in the face of the filing of a chapter 13 case. There was a direct appeal to the 7<sup>th</sup> Circuit Court. It held:
- ▶ Because we find that a plain reading of the Bankruptcy Code's provisions, the Supreme Court's decision in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983), and various practical considerations require that a creditor immediately return a seized asset in which a debtor has an equity interest to the debtor's estate upon his filing of Chapter 13 bankruptcy, we reverse.

## Adequate protection & the demand

- ▶ What if the debtor has no insurance?
  - ▶ What if the debtor hasn't filed a plan?
  - ▶ What if the debtor doesn't have a valid driver's license?
  - ▶ What if the debtor is disabled and the "driver" drives?
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- ▶ Must file an immediate motion. Thompson says an emergency motion is required.

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## Emergency motions

- ▶ Takes about 3-4 hours of prep time
  - ▶ Local Rule 9013-2 is new and governs emergency motions. It replaces Rule 5096-1 that has been deleted. The new rule is substantively the same as the procedure set out in Amended General Order No. 12-1 which has governed emergencies since June 1, 2013.
  - ▶ What about a regular motion? Filed for the next opportunity? What's the difference?
  - ▶ How are the courts responding?
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## Motions for relief

- ▶ Include loan history between the creditor and the debtor
  - ▶ Include the lack of adequate protection as presented in the plan
  - ▶ Include information outlining lack of insurance and (if applicable) lack of driver's license
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## Proof of claim & including costs

- ▶ Remember to include costs of repossession in the claim.
  - ▶ Request an order approving the fees incurred for the motion after the lawful repossession.
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## What if the vehicle is impounded?

- ▶ If a City has impounded the vehicle, should you client pull it out of the impound or wait?
- ▶ Answer may be in the value of the vehicle.
- ▶ What if the debtor files and demand the car back from the creditor AFTER the creditor recovered it from the impound?
  - ▶ The recovery from the impound has no good answer

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## Motions/objections

- ▶ Typically the repossessed car issues come up immediately upon filing so
  - ▶ A) bring a motion for relief that also addresses the plan issues
  - ▶ B) watch out for plans that are internally inconsistent
  - ▶ C) seek reimbursement of fees and costs at the time of the hearing on the confirmation of the plan
  - ▶ D) request orders conditioning the stay
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## **Stale Claims: Seventh Circuit Diverges from Eleventh Circuit's Crawford Decision**

There is a question whether filing a proof of claim regarding a debt for which the statute of limitations has expired (referred to as "stale debt") constitutes a violation of the Fair Debt Collection Practices Act (FDCPA).<sup>1</sup> The short answer is that despite the July 2014 holding from the Eleventh Circuit Court of Appeals in *Crawford v. LVNV Funding LLC*, the great weight of authority holds that it is not a violation of the FDCPA to file a proof of claim concerning otherwise-stale debt. The Seventh Circuit recently weighed in on this issue on August 10, 2016 in *Owens v. LVNV Funding, LLC* siding with the majority of courts.

The *Owens* decision is notable not only because of its holding but also by virtue of its lengthy and thoughtful dissent, which seems to be illustrative of the debate on the topic throughout the nation. It seems a foregone conclusion that one of these cases must surely reach the U.S. Supreme Court.

This article will address some of the issues associated with stale debt, the FDCPA, as well as the *Crawford* and *Owens* decisions. In the humble opinion of the author, it is a complex and fact-sensitive inquiry and issue.

### **FDCPA vs. Bankruptcy**

The FDCPA typically governs non-court-supervised communications between an unrepresented debtor and a debt collector. The FDCPA applies only to debt collectors of consumer debt as statutorily defined therein,<sup>2</sup> and it protects consumers from unfair, abusive or deceptive practices of debt collectors.<sup>3</sup> For example, the FDCPA precludes a debt collector from threatening to "take any action that cannot be legally taken or that is not intended to be taken."<sup>4</sup> Courts interpreting the FDCPA have prohibited a debt collector from threatening to file or filing a lawsuit on stale debts because it creates a false and misleading impression regarding the legal status of the debt.<sup>5</sup>

However, the FDCPA is not interpreted to expressly prohibit all collection activities concerning stale debt because the expiration of the statute of limitations

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<sup>1</sup> The Fair Debt Collection Practices Act is codified at 15 U.S.C. §§ 1692-1692p (2006).

<sup>2</sup> 15 U.S.C. § 1692.

<sup>3</sup> 15 U.S.C. § 1692f.

<sup>4</sup> 15 U.S.C. § 1692e(5).

<sup>5</sup> 15 U.S.C. § 1692e(2)(A).

does not normally extinguish the debt,<sup>6</sup> and the creditor may still attempt non-lawsuit collections. In the event of a violation, the FDCPA provides a private cause of action and relief in the form of damages, which include actual and statutory damages and attorneys' fees.<sup>7</sup> Notably, the FDCPA does not apply to creditors collecting their own debts, nor to debt collectors collecting debts outside of the FDCPA's definition. In bankruptcy, all creditor collection activities must cease due to the automatic stay when a petition is filed.<sup>8</sup> All creditors participate in a global proceeding, which includes a court-supervised claim submission and dispute process, as opposed to parties' navigating disparate legal actions in various tribunals and independent-collection activities outside of bankruptcy.

Bankruptcy's proof-of-claim filing, documentation and objection procedures are governed by Fed.Bank. P. 3001-3008. From a conceptual perspective, unlike a collection lawsuit filed against a debtor, a proof of claim is filed against the debtor's bankruptcy estate. Under the Bankruptcy Code, a "claim" is broader than a "debt" and is defined as the following:

- (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; or
- (B) Right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.<sup>9</sup>

A debt is restricted to "*liability* on a claim."<sup>10</sup> Therefore, claim and debt are two distinct concepts in bankruptcy. Pursuant to Fed. R. Civ. P. 8(c), the running of a statute of limitations is *an affirmative defense* against the enforcement of a debt (*i.e.*, liability on a claim), which is waived if not raised. Liability on the debt may not survive the expiration of the statute of limitations, but the claim itself (*e.g.*, the right to payment) is not extinguished when the statute of limitations expires. Because a creditor files a proof of *claim* - not a proof of *debt* - in order to share in the distribution

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<sup>6</sup> *Delgado v. Capital Mgmt. Servs. LP*, No. 4:12-cv-4057-SLD-JAG, 2013 U.S. Dist. LEXIS 40796, at \*10 (C.D. Ill. Mar. 22, 2013).

<sup>7</sup> 15 U.S.C. § 1692k.

<sup>8</sup> 11 U.S.C. § 362.

<sup>9</sup> 11 U.S.C. § 101(5).

<sup>10</sup> 11 U.S.C. § 1014(12) (emphasis added).

from the bankruptcy estate, filing a claim on which the statute of limitations has expired is not an improper act under the Bankruptcy Code.

Extensive informational support is required as part of the proof of claim. Under no circumstance may a proof of claim, which is filed under penalty of perjury, be false or fraudulent. The remedy for presenting a fraudulent proof of claim includes subjecting the filer to criminal and civil penalties of up to \$500,000, imprisonment for up to five years, or both.<sup>11</sup>

### **Crawford: Background**<sup>12</sup>

The debtor, Stanley Crawford, owed \$2,037.99 to a furniture company, which was charged off in 1999. In September 2001, the debt was acquired by LVNV Funding LLC. The last transaction on the account occurred on Oct. 26, 2001; the state law three-year statute of limitations applicable to the debt expired in October 2004.

On Feb. 2, 2008, Crawford filed for chapter 13. LVNV filed a proof of claim, even though the statute of limitations expired almost four years earlier. The chapter 13 trustee paid LVNV on its claim from wages committed by Crawford in his payment plan.

In May 2012, Crawford objected to LVNV's claim, asserting that the debt was unenforceable. He also filed an adversary proceeding against LVNV alleging that its filing of a proof of claim for a debt on which the statute of limitations had run violated the FDCPA.

### **Bankruptcy and District Court Opinions**

The bankruptcy court dismissed Crawford's adversary proceeding, noting that the "filing of a claim in the bankruptcy court, even one barred by the statute of limitations, does not constitute a violation of the Fair Debt Collection Practices Act."<sup>13</sup> On appeal to the district court, the debtor conceded that he could not win his appeal "without a change in the law."<sup>14</sup> Indeed, the district court observed that the

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<sup>11</sup> See, e.g., Official Form 10. See also 18 U.S.C. §§ 152, 3571.

<sup>12</sup> Summary of background facts taken from Crawford v. LVNV Funding LLC, No. 13-12389, 2014 U.S. App. LEXIS 13221, at \*\*2-3 (11th Cir. July 10, 2014). The other defendants in the adversary proceeding included the company that prepared and filed the proof of claim on LVNV's behalf and the company that acquired the debt at a later date from LVNV.

<sup>13</sup> Crawford v. LVNV Funding LLC, NO. 2:12-CV-701-WKW [WO], 2013 U.S. Dist. LEXIS 66169, at \*4 (M.D. Ala. May 9, 2013) (quoting from the bankruptcy court's earlier decisions in "No. 2:12-CV-701-WKW, Doc. #2-7, at 1; No. 2:12-CV-729-WKW, Doc. #2-17, at 1").

<sup>14</sup> Id at \*4 (M.D. Ala. May 9, 2013).

debt- or was fighting an "uphill battle" and that the "elephantine body of persuasive authority" weighed against his position.<sup>15</sup> The district court also remarked that, notably, the debtor had not alleged any conduct that amounted to an FDCPA violation; namely, he had never been threatened, tricked, lied to or deceived - in fact, no communication with the debtor whatsoever had occurred.<sup>16</sup>

The district court held that the filing of a proof of claim is not the equivalent of collecting a debt against a consumer debtor because it is simply "a request to participate in the distribution of the bankruptcy estate under court control."<sup>17</sup> The district court further held that the FDCPA was never intended to preclude all efforts to collect debt - just those that were unfair, abusive or deceptive.<sup>18</sup> The district court also noted a pragmatic distinction; namely, that the "structured environment of the bankruptcy court" protects even the least-sophisticated consumers from the abusive conduct of debt collectors and from the payment of invalid debt.<sup>19</sup> For these reasons, the district court agreed with the bankruptcy court's holding that the filing a proof of claim on stale debt does not violate the FDCPA.<sup>20</sup> In May 2013, Crawford appealed the affirmance of the dismissal of his adversary proceeding to the Eleventh Circuit Court of Appeals.

### Eleventh Circuit Opinion

Hon. Richard W. Goldberg of the U.S. Court of International Trade, sitting by designation, delivered the opinion and quickly noted in its very first paragraph that "a deluge has swept through the U.S. Bankruptcy Courts of late."<sup>21</sup> This deluge consists of "consumer debt buyers - armed with hundreds of delinquent accounts purchased from creditors...filing proofs of claim on debts deemed unenforceable under state statutes of limitations."<sup>22</sup> Noting the "broad" language of the FDCPA, existing precedent and the record, the Eleventh Circuit reversed the bankruptcy and district courts and not only overturned the dismissal of Crawford's adversary proceeding, but also held that a debt collector's filing of a proof of claim on an out-of-statute debt violates the FDCPA.<sup>23</sup>

The Eleventh Circuit noted that Congress passed the FDCPA in 1977 to protect consumers against the use of "abusive, deceptive, and unfair debt-collection

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*5.

<sup>17</sup> *Id.* (quoting from *In re McMillen*, 440 B.R. 907, 912 (Bankr. N.D. Ga. 2010)).

<sup>18</sup> *Id.* at \*6.

<sup>19</sup> *Id.* at \*\*7-8.

<sup>20</sup> *Id.* at \*9.

<sup>21</sup> *Crawford v. LVNV Funding LLC*, NO. 2:12-CV-701-WKW [WO], 2013 U.S. Dist. LEXIS 66169, at \*1 (11<sup>th</sup> Cir. Ala. July 10, 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*2.

practices by many debt collectors."<sup>24</sup> Congress surmised that the existing law was "inadequate" to protect consumers.<sup>25</sup> As a result of the FDCPA, consumers had a new private right of action rendering debt collectors liable for actual damages, statutory damages and reasonable attorneys' fees where a violation of the FDCPA was demonstrated.<sup>26</sup>

According to the Eleventh Circuit, the filing of proofs of claim for stale debt in bankruptcy is facilitated by § 502 of the Bankruptcy Code and Fed. R. Bank. P. 3001(f) because a proof of claim is automatically allowed, and will be included in any distribution from the estate, unless an objection is filed.<sup>27</sup> The Eleventh Circuit accepted Crawford's argument that a proof of claim filed by a creditor was analogous to the filing of a lawsuit by a debt collector.<sup>28</sup> The court noted that had Crawford not filed for bankruptcy protection and that had LVNV filed a state court lawsuit on the debt instead, the act of filing the lawsuit would have clearly violated the FDCPA (a point that LVNV conceded). The court further observed that the "distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims."<sup>29</sup>

The court rejected LVNV's argument that the filing of a proof of claim was not "a collection activity" aimed at Crawford.<sup>30</sup> The court opined that that the filing of 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."<sup>31</sup> It also noted that stale debt creates problems of proof and misleads the debtor that the debt can be legally enforced.<sup>32</sup>

The court remarked that the U.S. Supreme Court also considered the definition of "to collect a debt" and turned to the dictionary's definition: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings."<sup>33</sup> The court ultimately held that LVNV's filing of a proof of claim on stale debt violated the FDCPA because it sought payment of a debt through a legal proceeding.<sup>34</sup> Consequently, the Eleventh Circuit reversed the bankruptcy and district courts.<sup>35</sup>

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<sup>24</sup> *Id.* at \*6 (quoting 15 U.S.C. § 1692a, *et. seq.*).

<sup>25</sup> *Id.* at \*4 (citing to *Jeter v. Credit Bureau Inc.*, 760 F.2d 1168, 1173 (11<sup>th</sup> Cir. 1985)).

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> *Id.* at \*\*8-9.

<sup>28</sup> *Id.* at \*\*14-17.

<sup>29</sup> *Id.* at \*\*14-15.

<sup>30</sup> *Id.* at \*15.

<sup>31</sup> *Id.* at \*17.

<sup>32</sup> *Id.* at \*14.

<sup>33</sup> *Id.* at \*16 (quoting from *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995)).

<sup>34</sup> *Id.* at \*\*17-18.

<sup>35</sup> *Id.* at \*2.

**The Seventh Circuit Diverges from the Eleventh Circuit’s *Crawford: Owens v. LVNV Funding, LLC***<sup>36</sup>

On August 10, 2016, the Seventh Circuit issued its decision in *Owens v. LVNV Funding, LLC* concerning stale debt and proofs of claim. In *Owens*, three (3) bankruptcy cases were consolidated.<sup>37</sup> In each of the cases, the debt collectors filed proofs of claim for stale debt to which each of the debtors successfully objected by asserting the statute of limitations as an affirmative defense to the claim and then subsequently filed suit in federal court alleging that the act of filing the proofs of claim violated the Fair Debt Collection Practices Act.<sup>38</sup> In all of the cases, the district court granted the debt collectors’ motions to dismiss under 12(b)(6).<sup>39</sup> The Seventh Circuit affirmed the dismissals.<sup>40</sup>

The Seventh Circuit further noted a handful of additional commonalities between the cases: 1) all were chapter 13 cases; 2) the debtors were each represented by counsel; 3) a trustee was assigned to each case; and, 4) the proofs of claim accurately noted the origin of the debt, the date of last payment, and the last transaction.<sup>41</sup> In each of the cases, the district courts rejected the argument that filing a stale debt claim, in and of itself, was deceptive or unfair and posited that it was actually permissible, or at least contemplated, under the Bankruptcy Code.<sup>42</sup> The Court also held that because the claims were accurate – they were neither false nor misleading.<sup>43</sup> The Seventh Circuit observed that in one (1) of the consolidated cases, the district court held that confirmation of the debtor’s bankruptcy plan barred FDCPA claims under the doctrine of *res judicata*.<sup>44</sup>

In their appeal, the consolidated debtors made two (2) basic arguments. First, they argued that the filing of a stale debt proof of claim violated the FDCPA because it was a false, deceptive, misleading, unfair, and unconscionable debt collection practice because a “claim” under the Code must be legally enforceable.<sup>45</sup> Second, the debtors argued that a stale proof of claim was deceptive because debtors and their attorneys often fail to object to the claim permitting the collection of an

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<sup>36</sup> *Owens v. LVNV Funding, LLC*, 2016 U.S. App. LEXIS 14706 (7th Cir. Ind. August 10, 2016).

<sup>37</sup> *Owens at* \*2.

<sup>38</sup> *Id.* at \*3.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*3-4.

<sup>42</sup> *Id.* at \*4.

<sup>43</sup> *Id.* at \*5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*5-6.

unenforceable debt by the collector in a judicial proceeding.<sup>46</sup>

**Definition of “Claim” under the Code**

The Seventh Circuit majority disagreed with the limited definition of “claim” (as limited to legally enforceable obligations) advanced by the debtors.<sup>47</sup> The Court pointed to §101(5)(A) and specifically to two (2) of the examples set forth in the statute, namely, “contingent” and “unmatured” claims.<sup>48</sup> The majority opined that neither of these examples provided the creditor with any collection rights under state law – and yet were not excluded from the Code’s definition of “claim.”<sup>49</sup>

Moreover, the Court stated that the law in both Indiana and Illinois was that the expiration of a statute of limitations does not extinguish the debt.<sup>50</sup> While a creditor cannot file a lawsuit, the time-barred debt is still a debt.<sup>51</sup> The Court further reasoned that while the collector may be precluded from filing a lawsuit, the FDCPA did not preclude all forms of attempted collection of a time-barred debt.<sup>52</sup> The Court also made reference to the moral component of debt repayment – even time-barred debt.<sup>53</sup>

The majority referenced additional sections of the Bankruptcy Code supporting the notion that the filing of time-barred debts was anticipated. Specifically, the majority cited to §502, which provides that in conjunction with the filing of a proof of claim a bankruptcy court must disallow any claim that is “unenforceable against the debtor ... under any agreement or applicable law.”<sup>54</sup> Section 558 of the Bankruptcy Code (“Defenses of the Estate”) specifically provides that the bankruptcy estate has any defenses of the debtor including statutes of limitation.<sup>55</sup>

The majority also remarked that, as a matter of practice, chapter 13 debtors often list stale debt claims so as to assure the receipt of a discharge under §1328(a). Conceptually, they noted that a debt not listed is collectible post-discharge even though the means of collection may be circumscribed.<sup>56</sup> Furthermore, an important nuance to the application of a statute of limitation was mentioned – that a debtor can

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<sup>46</sup> *Id.* at \*6 (relying on *Phillips v. Asset Acceptance, LLC*, 736-F.3d 1076, 1079 (7<sup>th</sup> Cir. 2013)).

<sup>47</sup> *Id.* at \*7.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*8-9.

<sup>51</sup> *Id.* at \*8.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*9.

<sup>54</sup> *Id.* citing to 11 U.S.C. § 502(b)(1).

<sup>55</sup> *Id.* at \*10.

<sup>56</sup> *Id.* at \*13.

“restart the limitations period” by making a payment or promising to pay the debt.<sup>57</sup>

The majority was further unpersuaded by the risk that some debtors would fail to object to a stale debt proof of claim in the bankruptcy context because creditors are required to provide significant detail in the proof of claim form.<sup>58</sup> As such, the majority (while sympathetic to the possibility of abuse) was disinclined to adopt the narrow definition of claim and held that the filing of a stale debt claim was not inherently misleading or deceptive.<sup>59</sup>

### **Does the filing of Stale Debt Proof of Claim Violate the FCPA *per se*?**

The Seventh Circuit also explored whether, irrespective of the Code’s apparent contemplation of stale debt claim filings, such filings, nevertheless, violated the FDCPA. Noting the circuit split (specifically the Eleventh Circuit’s decision in *Crawford* as well as the Second and Eighth Circuits’ contrary views), the Seventh Circuit declined to adopt the reasoning of the Eleventh Circuit in *Crawford*.<sup>60</sup> The Seventh Circuit held that where an accurate and complete stale proof of claim is filed without any additional evidence that the claimant engaged in any deceptive, misleading, unfair or otherwise abusive conduct – a violation of the FDCPA cannot be supported.<sup>61</sup> Stated differently, the majority appears to hold there is no *per se* violation of the FDCPA simply by filing a proof of claim for stale debt.

The Seventh Circuit made several further factual observations specific to the consolidated cases. First, they noted in all three (3) cases the debtors were represented by counsel throughout the bankruptcy proceedings.<sup>62</sup> Second, they noted that trustees were “duty-bound” to review proofs of claim and make appropriate objections.<sup>63</sup> Third, the majority noted that each of the proofs of claim were complete and accurate about the status of the debts.<sup>64</sup> The Court was sympathetic to the debtors’ argument that stale proofs of claim would be missed and inadvertently paid, but in the consolidated cases before the Court – the attorneys had successfully objected to those claims.<sup>65</sup>

The Court limited its decision in as much as it did not expressly preclude

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<sup>57</sup> *Id.* at \*13, f.n. 6.

<sup>58</sup> *Id.* at \*13.

<sup>59</sup> *Id.* at \*16.

<sup>60</sup> *Id.* at \*17-19.

<sup>61</sup> *Id.* at \*22 – 23.

<sup>62</sup> *Id.* at \*22.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at \*23.

<sup>65</sup> *Id.* at \*24.

FDCPA relief where a *pro se* debtor is involved or where there are deceptive, misleading, inaccurate or incomplete stale debt proofs of claim filed.<sup>66</sup> The Court also did not address in any significant detail whether confirmation of the plan and the doctrine of *res judicata* would operate as a *per se* bar to FDCPA enforcement – or, perhaps, taking it a step further - what bankruptcy actions or failures to act by the debtor may restart the statute of limitations rendering the stale debt argument moot.

### The Owens Dissent sides with Crawford and the Eleventh Circuit

Written by the Hon. Chief Judge Diane Pamela Wood of the Seventh Circuit Court of Appeals, the carefully considered dissent focuses on the Seventh Circuit’s prior holding in *Phillips v. Asset Acceptance*, which prohibited a creditor from filing a lawsuit in state court to collect upon a stale debt.<sup>67</sup> The dissent equates the filing and administration of a bankruptcy case to a state court lawsuit; and, therefore, *Phillips* and other similar cases supported the conclusion that a time-barred proof of claim should be impermissible.<sup>68</sup>

The dissent further took issue with the majority’s analysis concerning the scope of the definition of “claim” under 11 U.S.C. § 101(5)(A) and its focus on “contingent” and “unmatured” - arguing that neither of these categories describes a stale debt.<sup>69</sup> The dissent conceded that the statute of limitations may be restarted by certain actions taken by a debtor but opined that a “debtor will not take these steps unless she is snookered into thinking the debt is legally enforceable.”<sup>70</sup> The dissent stated that “contingent” should not include the possibility that a debt collector may “successfully trick[sic] the debtor into paying.”<sup>71</sup> The dissent also stated that a stale debt is not “unmatured” – it is more fairly characterized as “overripe.”<sup>72</sup> While conceding that the list in § 101(5)(A) is illustrative rather than exhaustive, the dissent was not persuaded that the list should contemplate either fraudulent or highly-speculative debt.<sup>73</sup>

The dissent also discussed the application of Bankruptcy Rule 9011 to the filing of a proof of claim.<sup>74</sup> The dissent did not agree that a proof of claim filed clearly on

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<sup>66</sup> *Id.* at \*24-25.

<sup>67</sup> *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013).

<sup>68</sup> *Owens* at \*25-29.

<sup>69</sup> *Id.* at \*29.

<sup>70</sup> *Id.* at \*30 referencing *Cf. Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636,639 (7th Cir. 2014).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 31.

<sup>74</sup> *Id.*

the basis of stale debt could comply with this provision.<sup>75</sup> Public policy precludes frivolous, bad-faith or unfounded claims.<sup>76</sup>

The dissent also stated that the “statute of limitations itself is full protection against a lawsuit on a stale claim; it does not need to be supplemented by a bankruptcy discharge” in response to the majority’s discussion concerning the scheduling of stale debts by debtors as a matter of § 1328(a).<sup>77</sup> The dissent continued stating that “a time-barred debt cannot be enforced in a legal proceeding, even if in a theoretical or moral sense the debt remains” in response to the majority’s discussion of Indiana and Illinois law on the survival of the debt after the expiration of the statute of limitations.<sup>78</sup>

Generally speaking, the dissent appears clearly troubled by the potential for abuse, particularly for *pro se* litigants, by the holding of the majority.<sup>79</sup>

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<sup>75</sup> *Id.* at 32-33.

<sup>76</sup> *Id.* at 32.

<sup>77</sup> *Id.* at 33.

<sup>78</sup> *Id.* at 33-34.

<sup>79</sup> *Id.* at 36-37.

Wrap-up? Not so much.

This topic seemed particularly interesting for debtor and creditor counsels to consider. So let us, in the spirit of lively discussion, stir it up a bit.

Where you fall on the spectrum in considering the appropriateness of filing a claim for stale debt, at least in my case, may be influenced by the type of client typically represented. I know my clients. I like my clients. Most often, they are a small, family-owned creditor or a regional lender making loans that might not be available from a larger institution to local consumers. My largest institutional clients have taken great pains, some might say even onerous pains, to institute best practices throughout their organizations relative to appropriate collection practices.

In many cases, my creditor clients have offered generous consumer solutions to customers or accept plan treatment based on affordability for the debtor and collection pragmatism. Many of them simply waive collection of post-petition fees as a policy. In my mind and as an advocate for my clients, it is precisely these types of clients who *ought* to be able to file a stale proof of claim in bankruptcy. In my estimation, much of this collection practicality occurs because bankruptcy is a very special forum – and, even the threat thereof, may cause a creditor to consider alternatives.

The bankruptcy process is governed by the unique and wonderful Bankruptcy Code and related rules – where the bankruptcy estate and court-supervised administration thereof is global (not just a bunch of piecemeal, unsupervised lawsuits peppered about here, there and everywhere) – where retention of counsel is typical. The automatic stay and the discharge, perhaps, are what is likely most unique and powerful about the bankruptcy legal proceeding – and a form of relief simply not available to debtors in state court.

I do not condone deceptive, misleading, abusive or fraudulent behavior by anybody (and all the good lawyers, debtor and creditor counsels alike, that I know feel the same way). But, abuse comes in many forms (depending upon your point of view) – including FDCPA lawsuits where the underlying damages to the debtor are negligible at best – but the fees generated in bringing and/or defending the FDCPA action are far from negligible.

I know I will continue to enjoy the intellectual discourse surrounding stale proofs of claim. This will continue to be a “topic to watch.”



ALPHONSE D. OWENS, Plaintiff-Appellant, v. LVNV FUNDING, LLC, Defendant-Appellee. TIAROBINSON, Plaintiff-Appellant, v. ECAST SETTLEMENT CORP., et al., Defendants-Appellees. JOSHUA BIRTCHMAN, Plaintiff-Appellant, v. LVNV FUNDING, LLC, et al., Defendants-Appellees.

Nos. 15-2044, 15-2082, 15-2109

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2016 U.S. App. LEXIS 14706

June 1, 2016, Argued  
August 10, 2016, Decided

**SUBSEQUENT HISTORY:** As Corrected August 12, 2016. Leibowitz, Attorney, Allen Chern Law Llc, Chicago, IL.

**PRIOR HISTORY:** [\*1] Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:14-cv-02083 -- Jane E. Magnus-Stinson, Judge. For Lvnv Funding, Llc, Defendant - Appellee (15-2044): Jeanine Kerridge, Attorney, Barnes & Thornburg Llp, Indianapolis, IN; John P. Boyle, Esq., Attorney, Moss & Barnett, PA, Minneapolis, MN.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:14-cv-08277 -- Manish S. Shah, Judge. For Legal Assistance Foundation (15-2044, 15-2082, 15-2109), Amicus Curiae: David S. Yen, Attorney, Laf, Chicago, IL.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:14-cv-00713 -- Jane E. Magnus-Stinson, Judge. For National Creditors Bar Association (15-2044, 15-2082, 15-2109), Amicus Curiae: Donald S. Maurice Jr., Attorney, Maurice Wutscher, Llp, Flemington, NJ; Daniel Nora, Attorney, Maurice Wutscher Llp, Chicago, IL.

*Robinson v. eCast Settlement Corp.*, 2015 U.S. Dist. LEXIS 176022 (N.D. Ill., Apr. 27, 2015) For TIA ROBINSON, individually and on behalf of all others similarly situated, Plaintiff - Appellant (15-2082): [\*2] David J. Philipps, Attorney, Philipps & Philipps, Palos Hills, IL.

*Owens v. LVNV Funding, LLC*, 2015 U.S. Dist. LEXIS 52680 (S.D. Ind., Apr. 21, 2015) For ECAST SETTLEMENT CORPORATION, a Delaware corporation, Defendant - Appellee (15-2082): Rosa M. Tumialan, Attorney, Dykema Gossett Pllc, Chicago, IL.

*Birtchman v. LVNV Funding, LLC*, 2015 U.S. Dist. LEXIS 52669 (S.D. Ind., Apr. 22, 2015)

**COUNSEL:** For Alphonse D. Owens, Plaintiff - Appellant (15-2044): David P.

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For BECKET & LEE, LLP, a Pennsylvania Limited Liability Partnership, Defendant - Appellee (15-2082): Joel D. Bertocchi, Attorney, David M. Schultz, Attorney, Corinne C. Heggie, Attorney, Hinshaw & Culbertson LLP, Chicago, IL.

For Joshua Birtchman, Plaintiff - Appellant (15-2109): Thomas Bradburn, Attorney, Bradburn Law Firm, Noblesville, IN; Daniel Luke Geysler, Esq., Attorney, Peter K. Stris, Attorney, Stris & Maher LLP, Los Angeles, CA.

For Lvnv Funding, LLC, Resurgent Capital Services, L.P., Defendants - Appellees (15-2109): Joel D. Bertocchi, Attorney, Nabil G. Foster, Attorney, David M. Schultz, Attorney, Hinshaw & Culbertson LLP, Chicago, IL; Jennifer J. Kalas, Attorney, Hinshaw & Culbertson LLP, Schererville, IN.

**JUDGES:** Before WOOD, Chief Judge, and BAUER and FLAUM, Circuit Judges. WOOD, Chief Judge, dissenting.

**OPINION BY:** FLAUM

#### OPINION

FLAUM, *Circuit Judge*. In each of these consolidated cases, a debt collector filed a proof of claim, defined as "a written statement setting forth a creditor's [\*3] claim," *Fed. R. Bankr. P. 3001(a)*, for a time-barred debt in a Chapter 13 bankruptcy proceeding. After successfully objecting to the proof of claim, the debtor sued the debt collector in federal court, alleging that the act of filing a proof of claim on a stale debt violates §§ 1692e and 1692f of the *Fair Debt Collection Practices Act*, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA"). In each case, the district court granted the defendant debt collector's motion to dismiss. For the reasons that follow, we affirm those decisions.

#### I. Background

The three consolidated cases currently before us are similar in mate-

rial respects. In each case, a debtor filed for bankruptcy under Chapter 13 of the Bankruptcy Code.<sup>1</sup> The debtor was represented by counsel throughout the proceedings. In addition, a trustee was assigned to the case.

1 The plaintiff-debtors are Alphonse D. Owens, Tia Robinson, and Joshua Birtchman.

During the bankruptcy proceedings, a debt collector submitted a proof of claim for a "stale" debt, or a debt for which the statute of limitations had expired.<sup>2</sup> The debt collector was not the original creditor, but instead a professional debt buyer who had purchased the stale obligation at a fraction of the debt's face value. As required by *Federal Rule of Bankruptcy Procedure 3001*, the proof of claim filed [\*4] by the debt collector accurately noted the origin of the debt, the date of the last payment on the debt, and the date of the last transaction.

2 The defendant-debt collectors are LVNV Funding, LLC and eCast Settlement Corporation.

Realizing that the debt was time-barred and thus subject to an affirmative defense, the debtor objected to the claim, which was disallowed and eventually discharged. Shortly thereafter, the debtor brought a separate suit in federal court against the debt collector, alleging that the act of filing a proof of claim on a time-barred debt constituted a false, deceptive, misleading, unfair, or unconscionable means of collecting a debt in violation of §§ 1692e and 1692f of the FDCPA.

In each case, the district court granted defendant's motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. Two of the decisions--*Owens* and *Birtchman*--involved the same defendant and were decided on the same day by the same district court judge. In those decisions, the district court rejected the argument that the act of filing a proof of claim was deceptive

or unfair, noting that the defendant was entitled to do so under the Bankruptcy Code. The district court also observed that defendant's proof of claim was complete, accurate, [\*5] and provided the date of the final payment; as such, the court concluded that the proof of claim was not false or misleading.

In *Robinson*, the district court likewise dismissed the plaintiff's complaint under *Rule 12(b)(6)*, holding that filing a proof of claim on a time-barred debt was not a deceptive, false, or misleading debt collection practice. The plaintiff then filed an amended complaint in which she added additional allegations under the FDCPA. The district court dismissed the amended complaint as well, holding that the confirmation of plaintiff's bankruptcy plan barred her FDCPA claims under the doctrine of *res judicata*. The plaintiffs in all three cases appeal.

## II. Discussion

Plaintiffs contend that the district courts erred by granting defendants' motions to dismiss. They maintain that filing a proof of claim on a stale debt misleads the debtor about the legal status of the debt and thus violates the FDCPA's prohibition against false, deceptive, misleading, unfair, and unconscionable debt collection practices.<sup>3</sup> Their argument has two components. First, plaintiffs allege that the act of filing a proof of claim on a time-barred debt is inherently misleading because "claim" is defined to include [\*6] only legally enforceable obligations. In other words, plaintiffs contend that because the claim process in bankruptcy is reserved for enforceable obligations, filing a proof of claim on a stale debt falsely cloaks the underlying obligation with an air of legitimacy. Second, plaintiffs contend that filing a stale proof of claim is deceptive because, in practice, the debtor and his attorney sometimes fail to object to the claim, allowing the debt collector to collect on an unenforceable

obligation. Plaintiffs rely on our case law holding that the FDCPA prohibits creditors from filing lawsuits to collect on stale debts. *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). They allege that the rationale for this holding also applies in the bankruptcy context.

3 The FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." § 1692e. The Act also prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." § 1692f.

We review a dismissal under *Rule 12(b)(6)* de novo, accepting well-pleaded allegations in the complaint as true and drawing all reasonable inferences in the light most favorable to the plaintiffs. *Parish v. City of Elkhart*, 614 F.3d 677, 679 (7th Cir. 2010).

### A. Definition of "Claim"

As an initial matter, we [\*7] disagree with plaintiffs' assertion that the term "claim" includes only legally enforceable obligations, and that filing a proof of claim on a stale debt is therefore per se illegal under the FDCPA. The Bankruptcy Code broadly defines a "claim" as 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[.]" 11 U.S.C. § 101(5)(A). It would be strange to interpret "claim" as excluding legally unenforceable obligations when two of the enumerated examples--"contingent" and "unmatured" claims--afford the creditor no collection right under state law when the claim is filed with the bankruptcy court.<sup>4</sup> See, e.g., *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1192 (7th Cir. 1993) (noting that contingent claims exist even before a cause of action has accrued).

4 The dissent disagrees with our reliance on this statutory language. Although the dissent is correct that the statutory definition of claim does not explicitly include time-barred debts, the list is not exhaustive, and instead sets forth examples of the types of debts that could constitute a claim. Our point is not that time-barred debts fit neatly into any of these categories (although [\*8] they are in fact contingent, as certain actions by the debtor can restart the statute of limitations period even after it has run, see note 6 *infra*). Instead, we observe that by including these examples, the broad statutory definition of claim undermines plaintiffs' argument that a claim includes only legally enforceable obligations.

Moreover, a "claim" is defined as a right to payment. § 101(5)(A). In most jurisdictions, including Illinois and Indiana, the expiration of the statute of limitations period does not extinguish the underlying debt. See *Mascot Oil Co. v. United States*, 42 F.2d 309, 311, 70 Ct. Cl. 246 (Ct. Cl. 1930), *aff'd*, 282 U.S. 434, 51 S. Ct. 196, 75 L. Ed. 444, 71 Ct. Cl. 783, 1931-1 C.B. 190 (1931) ("[T]he statute of limitations or other bar against a remedy for the collection of a debt does not extinguish the liability therefor."); *Donaldson v. LVNV Funding, LLC*, 97 F. Supp. 3d 1033, 1039 (S.D. Ind. 2015) ("It is true that [the creditor] cannot file a lawsuit, but it is the law in Indiana that the debt is still owed. The statute of limitations does not extinguish the debt, it merely limits avenues of collection."); *Fleming v. Yeazel*, 379 Ill. 343, 40 N.E.2d 507, 508 (Ill. 1942) ("[T]he statute of limitations controls the remedy for recovery of the debt, but the debt remains the same as before, excepting that the remedy for enforcement is gone." (citation omitted)). In other words, a time-barred debt is still a debt, even if the creditor cannot file a collection suit. See *Pearl--Phil GMT (Far*

*E.) Ltd. v. Caldor Corp.*, 266 B.R. 575, 581 (S.D.N.Y. 2001) [\*9] ("Thus, under the Code, a right to payment need not be currently enforceable in order to constitute a claim."). We have also held that the fact that the statute of limitations has run does not mean that all avenues of collection are prohibited. See *McMahon v. LVNV Funding*, 744 F.3d 1010, 1020 (7th Cir. 2014) (holding that it is not "automatically improper for a debt collector to seek re-payment of time-barred debts" so long as the debt collector does not use deceptive practices). Implicit in this holding is the understanding that a creditor with a stale debt retains some right to payment, even if recourse is only grounded in the debtor's moral obligation to pay. *Id.* (observing that "some people might consider full debt re-payment a moral obligation, even though the legal remedy for the debt has been extinguished").

Therefore, a "claim" in bankruptcy is "more extensive than the existence of a cause of action that entitles an entity to bring suit." *In re Keeler*, 440 B.R. 354, 362 (Bankr. E.D. Pa. 2009) (citing *In re Remington Rand Corp.*, 836 F.2d 825, 831-32 (3d Cir. 1988)); *In re Grossman's*, 607 F.3d 114, 121 (3d Cir. 2010) (holding that a "claim" can exist in bankruptcy notwithstanding an inability to commence an action under state law at the time of filing). Further support for this interpretation comes from the claim allowance process set forth in the Bankruptcy Code, which has been described as a "sifting [\*10] process." *Gardner v. New Jersey*, 329 U.S. 565, 573, 67 S. Ct. 467, 91 L. Ed. 504 (1947); see also *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449, 127 S. Ct. 1199, 167 L. Ed. 2d 178 (2007) (describing the claim allowance process). Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor ... ." 11 U.S.C. §§ 541(a)(1); 1306(b). A creditor who wishes to collect on a debt may file a proof of claim, or "a written state-

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ment setting forth a creditor's claim." *Fed. R. Bankr. P. 3001(a); Travelers*, 549 U.S. at 449 ("When a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim ..."). A proof of claim "constitute[s] prima facie evidence of the validity and the amount of the claim,"<sup>5</sup> but not all claims are entitled to payment. *Fed. R. Bankr. P. 3001(f)*. Importantly, the bankruptcy court must, upon an objection by a party in interest, disallow any claim that "is unenforceable against the debtor ... under any agreement or applicable law[.]" 11 U.S.C. § 502(b)(1). Furthermore, the Code specifically enumerates statutes of limitation as one means of proving the unenforceability of a claim. § 558; see also *In re Keeler*, 440 B.R. at 360 ("Therefore, if as of the date of the debtor's bankruptcy filing a creditor's claim was barred by the applicable statute of limitations, then the claim must be disallowed upon objection by a party in interest.").

5 In addition, a creditor who files a proof of claim certifies that the claim [\*11] is "not being presented for any improper purpose" and is "warranted by existing law ... ." *Fed. R. Bankr. P. 9011(b)(1), (2)*. Sanctions are available for violations of this rule. See *In re Volpert*, 110 F.3d 494, 501 n.11 (7th Cir. 1997); see also 11 U.S.C. § 105(a) (providing that a bankruptcy court has inherent power to impose sanctions). During oral argument, plaintiffs contended for the first time that defendants' conduct was eligible for sanctions and that the FDCPA applies to sanctionable conduct. Although at least one bankruptcy court has imposed sanctions on a debtor who filed a proof of claim on a time-barred debt, others have refused to do so, and this Court has not yet ruled on the propriety of sanctioning a debt collector who engages in the type of conduct at issue in these cases. Compare *In*

*re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015) (imposing a \$1,000 sanction against a debt collector that filed time-barred proofs of claim), with *In re Keeler*, 440 B.R. at 366-67 ("Given that section 501(a) authorizes every creditor holding a claim to file a proof of claim, even if that claim is later disallowed under section 502(b), section 105(a) does not state a cause of action to sanction such a filing."); *In re Simpson*, No. 08-00137, 2008 Bankr. LEXIS 2457, 2008 WL 4216317, at \*3 (Bankr. N.D. Ala. Aug. 29, 2008) (holding that the creditor's act of filing a proof claim on a time-barred debt was not sanctionable under § 105(a)); and *In re Varona*, 388 B.R. 705, 723-24 (Bankr. E.D. Va. 2008) (same); cf. *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993) ("[W]hen a specific Code section addresses an issue, a court may not employ [\*12] its equitable powers to achieve a result not contemplated by the Code.").

Thus, the Bankruptcy Code contemplates that creditors will file proofs of claim for unenforceable debts--including stale debts--and that the bankruptcy court will disallow those claims upon the debtor's objection. Indeed, filing a proof of claim allows the debt to be processed in the bankruptcy proceeding, which is intended to be all-encompassing. *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988) ("The principal function of bankruptcy law is to determine and implement in a single collective proceeding the entitlements of all concerned."); *In re Glenn*, 542 B.R. 833, 841 (Bankr. N.D. Ill. 2016) ("Above all, bankruptcy is a collective process, designed to gather together the assets and debts of the debtor and to effect an equitable distribution of those assets on account of the debts. The more participation there is; the better this process works." (citing *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1194 (7th Cir. 1989));

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1 NORTON BANKR. L. & PRAC. 3d § 3:9 (2016) ("A fundamental principle of the bankruptcy process is the collective treatment of all of a debtor's creditors at one time."). In fact, sometimes even Chapter 13 debtors--such as plaintiff Owens--list stale debts in the schedule of unsecured debts that they file with the bankruptcy court. This is because debts that are not brought [\*13] to the bankruptcy court's attention (either by the debtor or by the creditor who files a proof of claim) will not be discharged, see 11 U.S.C. § 1328(a), and a debt that is not discharged remains collectible, although the avenues for collection are limited. See *McMahon*, 744 F.3d at 1020.<sup>6</sup>

6 In fact, the statute of limitations period can be restarted by the debtor's conduct, such as by making a payment on or promising to pay the debt. See, e.g., 735 Ill. Comp. Stat. 5/13-206. Of course, a debtor who alerts the bankruptcy court to the existence of the time-barred debt or who objects to a proof of claim on a stale debt would secure a full discharge of the debt, without any fear of it returning on some future occasion.

It is true that debtors may fail to object to a proof of claim for a stale debt. When that occurs, the debt becomes part of the confirmed bankruptcy plan and the debtor is required to pay a portion of it. To reduce the risk of this outcome, creditors are required to include details about the status and origin of the debt on the proof of claim form. *Fed. R. Bankr. P. 3001(c)(3)*. The most recent revision to the Federal Rules of Bankruptcy Procedure explains:

Because a claim [based on consumer credit debts] may have been sold one or more times prior to the debtor's bankruptcy, the [\*14] debtor may not recognize the name of the person filing the proof of claim. Disclo-

sure of the information required [under *Rule 3001(c)(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.*

*Fed. R. Bankr. P. 3001*, Advisory Committee Notes (emphasis added).

These established procedures--the filing of the proof of claim, the opportunity to object, and the required disclosure on the proof of claim form--confirm that the Bankruptcy Code anticipates that creditors will file proofs of claim on stale debts. Nonetheless, plaintiffs maintain that we should rely on their limited interpretation of "claim." The only support for their argument comes from a statement made in dicta by the U.S. Supreme Court in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990). In that case, the Court explained that a claim is a "right to payment," and "a 'right to payment' is nothing more nor less than an enforceable obligation ... ." *Id.* at 559.

Plaintiffs take this statement out of context. *Davenport* considered whether restitution obligations imposed in state criminal proceedings were "debts" as defined by 11 U.S.C. § 101(12). *Id.* at 558. Because "debt" is defined as "liability on a claim," the Court looked to the definition of "claim," which is defined [\*15] as a "right to payment." *Id.* (quoting § 101(5)(A)). The petitioners argued that a restitution order could not represent a "right to payment" because the obligation could only be enforced by threatening to revoke probation, and not in civil proceedings. *Id.* at 558-59. The Supreme Court rejected petitioners' argument that the reason for an obligation or the way that it was enforced could take it outside of the statutory definition of "claim." *Id.* at 560. In so doing, the Court noted that a right to payment is

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"nothing more nor less than an enforceable obligation[.]" *Id.* at 559.

Taken in context, it is apparent that this statement was not intended to address the issue of whether a "claim" includes only enforceable obligations. See *Johnson v. Midland Funding, LLC*, 528 B.R. 462, 466-67 (S.D. Ala. 2015), *rev'd on other grounds*, 823 F.3d 1334, 2016 WL 2996372 (11th Cir. 2016) (noting that *Davenport* "cannot plausibly be read for the proposition that a 'right to payment' ... ceases to exist the moment the statute of limitations expires"). Moreover, the Supreme Court's treatment of this subject in other cases conflicts with plaintiffs' interpretation.

The Supreme Court has repeatedly recognized that Congress intended for the term "claim" to have "the broadest possible definition." *Davenport*, 495 U.S. at 563-64 (internal quotation marks omitted); see also *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302, 123 S. Ct. 832, 154 L. Ed. 2d 863 (2003); *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991); *Ohio v. Kovacs*, 469 U.S. 274, 279, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985). In *Home State Bank* [\*16], the Supreme Court explored the legislative background and history of the Code in evaluating whether a mortgage interest could be characterized as a "claim." *Id.* at 85-87. The Court observed that unlike the modern Bankruptcy Code, the pre-1978 Code did not contain a single definition for claim, but defined a claim for purposes of corporate reorganizations as "includ[ing] all claims of whatever character against a debtor ... ." *Id.* at 85 (alteration in original) (quoting 11 U.S.C. § 506(1) (1976)). The Court noted that in drafting a single definition of "claim" for the 1978 Code, Congress intended to "adop[t] an even broader definition of claim than [was] found in the [pre-1978 Act's] debtor rehabilitation chapters." *Id.* at 86 (alterations in original) (quoting H.R. Rep. No. 95-595, at 309 (1977), re-

printed in 1978 U.S.C.C.A.N. 5963, 6266). Congress also explained: "By this broadest possible definition ... the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (emphasis added). Indeed, since *Davenport*, the Supreme Court has clarified that a "claim" merely includes a right to payment, which is nothing more nor less than an enforceable obligation. See *NextWave*, 537 U.S. 302-03.

We therefore decline to adopt plaintiffs' limited interpretation of "claim" and hold that a proof of claim on a time-barred debt does not purport to be anything other than a claim subject to dispute in the bankruptcy case. Filing such a proof of claim is not inherently misleading or deceptive.

#### B. The FDCPA

The fact that the Bankruptcy Code permits creditors to file proofs of claim on stale debts does not conclusively answer the question presented in this case--whether defendants' conduct violated the FDCPA. See *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) (holding that the Bankruptcy Code did not implicitly repeal the FDCPA). Thus, we must determine whether defendants' attempts to collect on plaintiffs' time-barred debts in bankruptcy were false, deceptive, or misleading under the FDCPA.

Plaintiffs argue that defendants' conduct was deceptive or unfair because their business model depends on the reality that the debtor, the trustee, [\*17] and the debtor's attorney will sometimes fail to object to the stale claims. In other words, plaintiffs contend that creditors take advantage of the fact that the bankruptcy process will sometimes "break down and fail." Plaintiffs rely on *Phillips v. Asset Acceptance, LLC*, in which we held that filing a state court lawsuit

to collect on a time-barred debt violates the FDCPA. 736 F.3d at 1078. In *Phillips*, we explained that suing to collect on an old debt was misleading or deceptive because the consumer might not recall the debt or have evidence to mount a statute of limitations defense; in fact, an unsophisticated consumer might not even be aware of the statute of limitations defense. 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 ...." *Id.* at 1079 (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987)). Plaintiffs contend that these concerns are likewise present in the bankruptcy context.

There is a circuit split on the issue of whether filing a proof of claim on a stale debt in bankruptcy is a misleading or deceptive act prohibited by the FDCPA. In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 (11th Cir. 2014), cert. denied [\*18], 135 S. Ct. 1844, 191 L. Ed. 2d 724 (2015), the Eleventh Circuit relied on *Phillips* to hold that it is. The Court reasoned that the act of filing the proof of claim "create[d] the misleading impression to the debtor that the debt collector can legally enforce the debt." *Id.* at 1261. In so holding, the Eleventh Circuit relied on the "least sophisticated" consumer standard, which asks whether an unsophisticated consumer would be misled by the debt collector's conduct. *Id.*

The Second Circuit reached a different conclusion in *Simmons v. Round-up Funding, LLC*, 622 F.3d 93, 94 (2d Cir. 2010). In that case, the debtor objected to an inflated proof of claim and the bankruptcy court ultimately reduced the claim by more than half. *Id.* at 95. The debtor then sued the creditor in federal court, alleging that the creditor violated the FDCPA by misrepresenting the amount of the debt. *Id.* The district court dismissed

the suit and the Second Circuit affirmed. *Id.* The Second Circuit noted that federal district courts across the country have held that the act of filing a proof of claim in bankruptcy court is not an abusive debt collection practice proscribed by the FDCPA, even if the claim is invalid or unenforceable. *Id.* at 95-96. The Second Circuit reasoned that debtors who are under protection of the bankruptcy court do not need additional [\*19] protection from debt collectors because the bankruptcy process affords sufficient remedies for abuse. See *id.* at 96.<sup>7</sup> Recently, the Eighth Circuit relied on *Simmons* when rejecting a plaintiff-debtor's request to extend the FDCPA to time-barred proofs of claim in a case with nearly identical facts to the cases currently before us. See *Nelson v. Midland Credit Mgmt.*, No. 15-2984, 2016 U.S. App. LEXIS 12683, 2016 WL 3672073 (8th Cir. July 11, 2016).

7 At oral argument, plaintiffs contended that the Second Circuit cast doubt on the continuing validity of *Simmons* in *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86 (2d Cir. 2016). We disagree. The plaintiff in *Garfield* filed a suit in district court against a creditor who attempted to collect on a debt by threatening foreclosure and sending a delinquency notice, even though the debt had been discharged in the debtor's Chapter 13 bankruptcy. *Id.* at 88. In holding that the plaintiff-debtor had stated a claim for a FDCPA violation, the Second Circuit clarified that the Bankruptcy Code did not implicitly repeal the FDCPA. *Id.* at 91-92 (citing *Randolph*, 368 F.3d at 730). The Second Circuit did not abandon the rationale underlying *Simmons*--that there is less of a need to protect debtors who are protected by the bankruptcy court.

Like the Eighth Circuit, we decline to follow the Eleventh Circuit's approach. See 2016 U.S. App. LEXIS

12683, [WL] at \*2. As an initial matter, we note that the concerns identified in *Phillips* regarding [\*20] the misleading or deceptive nature of the conduct are less acute when a proof of claim is filed in bankruptcy, especially in a counseled case, as opposed to when a lawsuit is filed in state or federal court.<sup>8</sup> First, because the proof of claim is required to inform the debtor about the age and origin of the debt, the consumer need not have a memory of it or records documenting it to file an objection--the affirmative defense is evident on the face of the claim. See *In re La Grone*, 525 B.R. 419, 427 (Bankr. N.D. Ill. 2015) ("Under *Bankruptcy Rule 3001(c)(3)*, a claim for credit card debt ... must list the creditor who held the debt at the time of the account holder's last transaction, the date of the last transaction, the date of the last payment, and the date the account was charged to profit or loss... . [Therefore,] a debtor in bankruptcy should always have the information needed to determine whether the statute of limitations for a claim has expired."). Second, as in the cases before us, debtors filing for bankruptcy are usually represented by attorneys who are familiar with the statutes of limitations for different types of debt. Even in other cases, when the debtor proceeds pro se, a bankruptcy trustee who is duty-bound to object to improper claims is appointed [\*21] to oversee the proceedings. In addition, a debtor who has initiated bankruptcy proceedings and thus demonstrated a willingness to participate in them is unlikely to give in rather than fight the claim.<sup>9</sup>

8 The dissent reads *Phillips* and *McMahon* as precluding "any use of legal process" to collect on a stale debt. We do not read those cases as announcing a broad rule of this kind. *Phillips* outlawed lawsuits to collect stale debts, and for the reasons discussed above, we conclude that the rationale for that holding does not apply to the act of fil-

ing a proof of claim. The proper inquiry, set forth in *McMahon* and *Evory v. RJM Acquisitions Funding LLC*, for evaluating other types of collection activities employed by debt collectors is whether the collection effort would mislead the recipient of the communication (in the cases before us, the debtor's lawyer or bankruptcy trustee) into believing that the debt is legally enforceable. See *McMahon*, 744 F.3d at 1020; *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 774 (7th Cir. 2007).

9 Plaintiffs contend that filing objections to time-barred claims burdens the debtor and the bankruptcy court tasked with processing the objections. But the costs associated with objecting to a proof of claim are not substantial, as the objection process is simple. [\*22] As the National Association of Consumer Bankruptcy Attorneys pointedly acknowledged in their amicus brief supporting plaintiffs' position, "this sort of motion practice is among the simplest ... that [a consumer bankruptcy attorney] encounters."

Significantly, the Eleventh Circuit's decision in *Crawford* is inapposite in light of our precedent. In *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769 (7th Cir. 2007), we held that the "unsophisticated consumer" standard is not appropriate when evaluating whether communications made to a debtor's lawyer violated the FDCPA. *Id.* at 774. Rather, a court should evaluate whether the communications would be likely to mislead a competent lawyer. *Id.* at 775; see also *Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 603 (7th Cir. 2016) (reaffirming the "competent attorney" standard).

It is undisputed that plaintiffs were represented by counsel at all stages of their bankruptcy proceedings. Further, as discussed, the bankruptcy process afforded additional protections, including the appointment

of trustees who were duty-bound to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. §§ 704(a)(5); 1302(b)(1). Therefore, we must evaluate defendants' actions under a "competent attorney" standard. *Bravo*, 812 F.3d at 603.

We conclude that, under this standard, defendants' conduct was not deceptive or misleading. [\*23] Plaintiffs do not allege that the information contained in the proof of claim was misleading; instead, they admit that the proofs of claim set forth accurate and complete information about the status of the debts. See *Donaldson*, 97 F. Supp. 3d at 1038 ("A factual, true statement about the existence of a debt and the amount ... is neither false nor deceptive."); cf. *Sheriff v. Gillie*, 136 S. Ct. 1594, 1601, 194 L. Ed. 2d 625 (2016) (noting that accurate statements are not false or misleading for purposes of the FDCPA). Therefore, to determine whether the statute of limitations had run, plaintiffs' attorneys had to look no further than the proof of claim form, which included the date of the most recent payment. With that information, a reasonably competent lawyer would have had no trouble evaluating whether the debt was timely. See *Birtchman v. LVNV Funding, LLC*, No. 1:14-cv-00713, 2015 U.S. Dist. LEXIS 52669, 2015 WL 1825970, at \*8 (S.D. Ind. Apr. 22, 2015) ("A competent lawyer would undoubtedly be aware of the statute of limitations defense that is common in most areas of law and permitted by the Bankruptcy Code."). In sum, plaintiffs have failed to present any evidence that defendants engaged in deceptive, misleading, unfair, or otherwise abusive conduct prohibited by the FDCPA.

We are not unsympathetic to plaintiffs' concern that in certain cases, debtors [\*24] and their representatives fail to object to claims for unenforceable debts, which then become part of the bankruptcy plan. This outcome harms not only the debtor, who is forced to pay a portion of the stale debt out of limited means, but also

creditors with legally enforceable debts whose share of the pie is reduced because an additional creditor is claiming a piece. See *Crawford*, 758 F.3d at 1261. But the risk of this outcome in such cases is not sufficient to support a FDCPA claim in the cases currently before us, where plaintiffs' attorneys successfully objected to proofs of claim that were neither false nor misleading.

The dissent faults us for supposedly ignoring the realities of the bankruptcy process. To be sure, in certain cases, the debtor proceeds pro se and lacks the sophistication to understand that a claim for a stale debt is subject to disallowance, and the trustee does not abide by his statutory duty to review all claims filed in the debtor's case. Respectfully, the dissent attacks a straw man: this opinion does not foreclose relief under the FDCPA in cases involving such facts. We reiterate that any debt collection practice that "misleads an unsophisticated consumer to believe a time-barred debt [\*25] is legally enforceable" violates the FDCPA. *McMahon*, 744 F.3d at 1020. The dissent decries a problem that is not present here--in these cases, the debtors were represented by attorneys and were able to secure complete discharge of the time-barred debts in their Chapter 13 bankruptcy proceedings without undue cost or burden.

Of course, if defendants had filed proofs of claim with inaccurate information, or had otherwise engaged in deceptive or misleading debt collection practices, plaintiffs would have a cause of action under the FDCPA. See *McMahon*, 744 F.3d at 1020; *Phillips*, 736 F.3d at 1079. But in these cases, the district courts did not err in concluding that plaintiffs had not stated claims for relief under the FDCPA.<sup>10</sup>

10 Because we affirm the district courts' conclusion that defendants' conduct did not violate the FDCPA, we do not address the district court's holding in *Rob-*

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inson that a confirmed Chapter 13 plan bars FDCPA claims that could have been filed in the bankruptcy proceeding under the doctrine of res judicata.

### III. Conclusion

For the foregoing reasons, the judgments are AFFIRMED.

**DISSENT BY:** WOOD

### DISSENT

Wood, *Chief Judge*, dissenting. This court held, in *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013), that the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq., prohibits a creditor from filing a lawsuit in state court to collect [\*26] a debt for which the statute of limitations has expired. See also *McMahon v. LVNV Funding*, 744 F.3d 1010, 1020 (7th Cir. 2014). Today, the majority holds that the creditor may take comparable action within a bankruptcy proceeding, by filing a proof of claim on a debt that it knows to be stale--an action the creditor will take knowing that it will result in payment only if the staleness of the debt slips past the debtor, her lawyer (if she has one), and the trustee, and thus become collectible through the bankruptcy court (at the expense of other creditors). They rely on the broad scope of the types of claims that may or must be filed in bankruptcy, on the extra protections they believe bankruptcy affords, and the fact that the type of limitations bar we are considering here cuts off only the right to sue, not the cause of action itself. None of those rationales holds up under close inspection, in my view, and so I dissent.

It is helpful to begin with a brief review of the holdings of *Phillips* and *McMahon*. In *Phillips*, the plaintiff sought to bring a class action against a debt collector that had sued her after the statute of limitations on the underlying creditor's claim had run.

If that was true, we said, citing *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011) (per curiam); *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 332-33 (6th Cir. 2006); and *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009), the debt [\*27] collector's suit violated the FDCPA. We followed up on that statement in *McMahon*. Nothing in *McMahon* suggested that a lawsuit based on a time-barred debt, or even a demand for payment under color of legal right, is permissible, in the absence of an honest disclosure about the creditor's loss of the right to take legal action. Here is what we said:

We do not hold that it is automatically improper for a debt collector to seek repayment of time-barred debts; some people might consider full debt repayment a moral obligation, even though the legal remedy for the debt has been extinguished. But, as we held in *Phillips, supra*, if the debt collector uses language in its dunning letter that would mislead an unsophisticated consumer into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation ..., the collector has violated the FDCPA. Because it is plausible that an unsophisticated consumer would believe a letter that offers to "settle" a debt implies that the debt is legally enforceable, it was correct in *Delgado* to decline to dismiss the action at this stage, and incorrect to dismiss the class allegations in *McMahon*.

The proposition that a debt collector [\*28] violates the FDCPA when it misleads an unsophisticated consumer to believe a time-

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barred debt is legally enforceable, regardless of whether litigation is threatened, is straightforward under the statute [citing 15 U.S.C. § 1692e(2)(A), (5)].

744 F.3d at 1020. "Seeking" repayment is one thing: it could be accomplished by a polite, non-threatening letter advising the debtor of the debt's existence, and the fact that a lawsuit is time-barred. At most, the letter would represent an effort to persuade the debtor to pay, based on whatever advantage payment might confer (perhaps a moral advantage, perhaps a boost to one's credit rating). This is in stark contrast with the use of any type of legal process, whether a suit in state court, a suit in federal court, or the filing of a claim in bankruptcy. Those are all an entirely different matter, and nothing in *McMahon* condoned any use of any type of court to collect a concededly stale debt. I take it that my colleagues agree with me that proceedings in bankruptcy court "count" as a form of judicial proceeding, given the fact that the bankruptcy court (a unit of the federal district court, see 28 U.S.C. § 151) presides over the legal process of collecting all good-faith claims against the estate, amassing [\*29] the assets of the estate, setting priorities, identifying what can and cannot be discharged, and then resolving who can be paid and how much. Unless there is something in the Bankruptcy Code to distinguish the proceedings in bankruptcy court from proceedings in the courts involved in *McMahon* and *Phillips*, that is enough for me to hold that the rule of those cases applies here as well.

The majority finds such a distinction in the definition of the word "claim" in the Bankruptcy Code, which provides that a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisput-

ed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). My colleagues focus particularly on two of the items in this list-- "contingent" and "unmatured" claims-- as support for their view that a clearly time-barred claim may be submitted by a debt collector consistently with this statute.

Neither of those categories, however, covers a concededly stale debt. A claim based on such a debt is not contingent, because the expiration of the statute of limitations means that a lawsuit to collect it is no longer available. There is no event that [\*30] could come to pass that could create an enforceable legal obligation for the debtor to pay up--at least no contingency that does not fall within the group of sharp or fraudulent practices that *Phillips* and *McMahon* hold are barred by the FDCPA. It is true that certain actions by the debtor can re-start the statute of limitations after it has run, but the debtor will not take those steps unless she is snookered into thinking that the debt is still legally enforceable. Cf. *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 639 (7th Cir. 2014) (en banc) (condemning collection tactic of suing in a court that is inconvenient to the debtor, hoping to obtain a default judgment "for a debt that the defendant doesn't actually owe"). We should not distort the meaning of the word "contingent" to include the possibility of the debt collector's successfully tricking the debtor into paying.

A stale debt is certainly not "unmatured." If anything, it is overripe. Nor does the stale debt fit any other category in section 101(5)(A). I do not disagree with the notion, ante at n.4, that the list in section 101(5)(A) is illustrative. But it has not persuaded me that an effort to use legal process, hoping that the debtor (and others) will fail to spot a clear limitations defense, falls within either the enumerated [\*31] possibilities or anything remotely related to them. Some things are simply too spec-

ulative, or too much against public policy, to include. A debtor could be induced to pay a fraudulent debt, too, but that does not mean that the Bankruptcy Code should be distorted into facilitating such a payment.

It is important in this connection not to view the Code in isolation from the Rules of Bankruptcy Procedure. The filing of a proof of claim, like any other "petition, pleading, written motion, and other paper," is subject to *Bankruptcy Rule 9011*, the counterpart to *Federal Rule of Civil Procedure 11*. By filing the proof of claim, the filer "is certifying that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... the claims ... are warranted by existing law[,] ... [and] the allegations and other factual contentions have evidentiary support ... ." *Fed. R. Bkr. P. 9011(b)*. No one--not a debt collector, not any other kind of creditor--should be filing a proof of claim that fails to comply with this rule. Public policy, expressed in the Bankruptcy Rules, demands that we do not protect frivolous, bad-faith, or unfounded claims. And a proof of claim is no mere request on moral grounds [\*32] to turn money over from the bankruptcy estate to the claimant: it is a legal mechanism through which the payment of that claim can be compelled, if the claim is not disallowed by the bankruptcy court. Put differently, the bankruptcy process is one of the avenues of collection that the expiration of the statute of limitations closes off for the creditor.

The concepts in *Rule 9011* also supply a limitation on the rule that I would apply here. Where an old debt is subject to an ironclad statute of limitations defense, such that any suit on that debt would amount to a violation of *Federal Rule of Civil Procedure 11* (and its counterparts in state court and under *Bankruptcy Rule 9011*), the debt should not be eligible to be submitted in a proof of claim. If, on the other hand, there is a good-faith doubt about the applicability of a

statute of limitations, then scheduling is compatible with both *Civil Rule 11* and *Bankruptcy Rule 9011*, because it is possible to imagine a state of affairs in which a *legally* enforceable obligation exists. That leaves ample room for the operation of *section 502(b)(1) of the Bankruptcy Code*, which requires the bankruptcy court, upon objection from a party in interest, to disallow any claim that "is unenforceable against the debtor ... under any ... applicable law[.]" The statute of limitations [\*33] is one such law, *11 U.S.C. § 558*, and there will be cases in which its applicability is the subject of a fair dispute.

My colleagues imply that debtors may actually be better off if the stale claims are submitted to the bankruptcy court, because if the debtor, her lawyer, and the trustee (or one of them) is vigilant, the filing of the proof of the stale claim will be a meaningless act: the time-barred debt will be disallowed, and the debtor will have the protection of the discharge judgment. See *ante* at 9-10 & n.6. That is cold comfort to the debtor who knows that the debt collectors are banking on those cases where no one spots the stale claim--a claim on which an independent lawsuit is already barred by *McMahon* and *Phillips*--and it instead winds up as a recoverable item. Sometimes people like the "belt-and-suspenders" approach, giving them redundant protection of one kind or another, but there is no justification for forcing this on them. The statute of limitations itself is full protection against a lawsuit on a stale claim; it does not need to be supplemented by a bankruptcy discharge. That is why the majority's comment that "a debt that is not discharged remains collectible, although the avenues [\*34] for collection are limited," *ante* at 10, misses the boat. A time-barred debt *cannot be enforced in a legal proceeding*, even if in a theoretical or moral sense the debt remains.

The majority also tries to shoehorn these stale debts into the "remote or

contingent" language used by Congress in H.R. Rep. No. 95-595. Ante at 13. But the stale debt is not "remote." A debt owed by a third party to an entity owned by the debtor might be remote, or a debt Person A owes to Debtor, who then owes Creditor, might be remote. But the case before us now involves just a straightforward debt that could have been enforced until the statute of limitations expired. And I have already explained why these are not contingent debts--there are no contingencies, either anticipatory or after-the-fact, on which its legal collectability depends.

The reason this case is important is because the protections the majority believes exist in the bankruptcy courts are only as good as the human actors working in those courts. The majority notes, ante at 16, that "debtors filing for bankruptcy are usually represented by attorneys ... ." But "usually" does not mean always. In the Bankruptcy Court for the Northern District of [\*35] Illinois, in the first five months of 2016 there were 19,291 bankruptcy filings; of that number, 1,748 (about 9%) were *pro se*. Over the course of a year, it is reasonable to conclude that thousands of *pro se* litigants seek the services of that one court. They tend to be unsophisticated (that is often why they fell into financial trouble in the first place), and they easily could be buffaloed into thinking that every proof of claim represented a legal obligation, when the proof makes no mention of the limitations bar. It is unrealistic to think that the *pro se* litigant or the busy trustee will catch every scheduled stale claim--claims presented in filings that do not, in the only respect pertinent here, provide "accurate and complete information" about the matter, because they are mum about the unenforceabil-

ity of the debt. (Indeed, I would be surprised if very many non-lawyers understand what a statute of limitations is, much less what the difference is between a bar on recovery and extinguishment of a claim.)

My colleagues, ante at 19, accuse me of attacking a straw man when I highlight the possibility of abuse, particularly for *pro se* litigants. I beg to differ. They concede that the [\*36] bankruptcy court will disallow the stale debt as soon as it learns about the limitations defense. Thus, as I indicated at the outset, the scheduling of this debt represents only the hope that it will slip through the cracks and be reborn as an allowed claim in bankruptcy. To the extent they are leaving the door open for an FDCPA claim when a bankruptcy petitioner (*pro se* or otherwise) is misled by the scheduling of the stale claim, I welcome that limitation, though its scope is unclear given the rationale the majority has adopted.

The majority stresses that there is an existing circuit split on this issue, and so we need only to line up on one side or the other. In keeping with our decisions in *Phillips* and *McMahon*, I would align this court with the Eleventh Circuit, see *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259-60 (11th Cir. 2014), rather than the Second and Eighth, see *Simmons v. Round-up Funding, LLC*, 622 F.3d 93 (2d Cir. 2010); *Nelson v. Midland Credit Mgmt., Inc.*, No. 15-2984, 2016 U.S. App. LEXIS 12683, 2016 WL 3672073 (8th Cir. July 11, 2016). I would hold that the scheduling of a proof of claim on a debt that undisputedly is no longer collectible through judicial proceedings because the statute of limitations has expired violates the FDCPA.

I respectfully dissent.

**Crafty Creditors' Remedies for Chapter 13**  
**The Chapter 13 Discharge and Dischargeability Issues**

**Gary A. Norton**

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**ABI Hon. Eugene R. Wedoff Seventh Circuit**

**Consumer Bankruptcy Conference**

**October 10, 2016, Jenner & Block Conference Center in Chicago.**

## **Chapter 13's Full-Compliance Discharge Under § 1328(a) - Generally**

Under Section 1328(a) a Chapter 13 debtor is to be granted a discharge as soon as practicable after the completion of all payments under the chapter 13 plan, unless discharge has been duly waived. The discharge is without application and the phrase "completion by the debtor of all payments" in section 1328(a) means payments made by the debtor to the trustee, so it is not necessary to await the completion of the trustee's distributions to creditors. As such, it is the chapter 13 trustee who is best situated to determine when payments under the plan have been completed, so it is the trustee who will initiate the process for the granting of a discharge for full compliance, after which the scheduling of the discharge hearing will occur, if one is to be held, under section 524(d).

There are a few general conditions to which the discharge is subject.

- Section 1328(g), in most cases will require a debtor to complete a personal financial management instructional course and file evidence thereof with the court.
- If the debtor was required to pay a domestic support obligations during the case, the debtor must certify that all amounts payable on such obligation that were due on or before the date of the certification have been paid, except for any prepetition arrears not provided for by the plan.
- Finally, the court must give notice of the intent to enter a discharge to all parties in interest, and an opportunity for a hearing on whether the discharge should be delayed pursuant to section 1328(h) due to the possibility of an exemption objection under section 522(q).

## Chapter 13 Discharge Is Broader Than Chapter 7 Discharge

The discharge under chapter 13 of the Bankruptcy Code is broader than the chapter 7 discharge.

Section 1328(a) states:

(a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

(4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

Certain debts not dischargeable in chapter 7 are dischargeable in chapter 13. Section 523(a) has nineteen (19) subsections, yet only a few of those are referenced for exception from discharge in 1328(a)(2) and specific exceptions under Chapter 13 are listed in 1328(3) and (4). See the chart below for comparison as to whether a type of debt is or is not dischargeable under Chapter 7 and 11 vs. Chapter 13.

Type of Debt	Ch. 7 or 11	Ch. 13
	Child Support and Alimony Obligations	No
Civil Fines & Penalties	No	Yes
Criminal Fines & Restitution	No	No
Divorce Decree Debts	No	Yes
Drunk Drivers Causing Death or Injury	No	No
Embezzlement, Theft or Breach of Fiduciary Duty	No*	No*
Fraud and False Financial Statements	No*	No*
Student Loans	No	No
Tax Debts		
• Less than 3 Years Old	No	No
• Required Return Was Never Filed	No	No
• Tax Fraud and Willful Evasion	No	No
• Employment / Trust Fund Taxes	No	No
Debts Incurred to Pay Non-Dischargeable Federal Taxes	No	Yes
Debts Incurred to Pay Non-Dischargeable State or Local Tax	No	Yes
Unlisted Debts	No	No
Waiver or Denial of Discharge in Prior Case	No	Yes
Welfare Repayment Obligations	No	Yes
Willful & Malicious Injury – to		
• Persons	No*	No
• Property	No*	Yes

The debts marked with an \* above require the creditor to file a lawsuit in bankruptcy court to establish that the debt exists and that it is non-dischargeable. All other debts are automatically non-

dischargeable. Section 523(c) requires creditors to bring proceedings raising exceptions under section 523(a)(2), (4) and (6) only in the bankruptcy court and FRBP 4007 sets a deadline for bringing a proceeding in chapter 13 cases.

Also, section 523(d) will also apply to proceedings brought under section 523(a)(2) in chapter 13 cases. Debtors who prevail in such proceedings have a right to be awarded costs and reasonable attorney's fees against the creditor if the position of the creditor was not substantially justified, unless special circumstances would make such an award unjust. This provision alone can affect the practicality of litigating such a complaint entering a stipulation as to dischargeability.

### **Discharge of Debts "Provided for by the Plan"**

The chapter 13 discharge extends to all debts "provided for" by the plan, with but a few limited exceptions. To "provide for" a claim a plan need only "make a provision for it, i.e., deal with it or refer to it." *See, Rake v. Wade*, 508 U.S. 464, 473 (1993). Even if the plan proposes to pay nothing to unsecured claimants, if those claimants had proper notice and an opportunity to object to confirmation the claims may be discharged under section 1328(a).

### **Discharge Exception for Long-Term Debts -1322(b)(5)**

Section 1322(b)(5) permits the debtor to make special provision for curing any default and maintaining payments under the plan on any secured or unsecured claim on which the last contract payment becomes due after the final payment required under the plan and Section 1328(a)(1) excepts from a full-compliance discharge long-term debts provided for in accordance with section 1322(b)(5). However, a debt is nondischargeable only if cure is, in fact, provided for by the plan.

### **Discharge Exception for Certain Taxes**

Among the debts nondischargeable under section 1328(a) are tax debts specified in section 507(a)(8)(C) and in section 523(a)(1)(B) and (C).

- "Trust fund" taxes that the debtor is required to withhold for the benefit of taxing authorities, such as income taxes, Social Security and Medicare taxes withheld from employees' wages, and sales taxes, i.e., usually small business related taxes.
- Liability of a debtor as a "responsible person" in a business owned by another, such as a corporation, under section 6672 of the Internal Revenue Code.
- Excluded is the employer's share of employment taxes, covered by section 507(a)(8)(D). While a debtor is normally required by section 1322(a)(2) to pay in full a priority claim described in section 507(a)(8)(C), full payment of the claim without postpetition interest does not necessarily discharge the obligation to pay postpetition interest.
- Taxes with respect to which a return, or equivalent report or notice was not filed or was filed late and within two years before the bankruptcy petition.
- Taxes with respect to which a fraudulent return was filed or the debtor willfully attempted to evade the tax.

#### **Discharge Exception for Debts Incurred Through Fraud**

Debts described in section 523(a)(2), for money, property or services obtained by false pretenses, fraud, or a false financial statement are non-dischargeable.

#### **Discharge Exception for Debts Not Listed or Scheduled by the Debtor**

Section 523(a)(3) excepts from discharge debts not listed or scheduled in time to permit the creditor to timely file a proof of claim or, if the debt is nondischargeable under section 523(a)(2), (4), or (6), in time to file a proceeding to determine dischargeability. The exception does not apply if the creditor had actual knowledge of the case in time to act, and would not apply in chapter 13 with respect to debts nondischargeable under section 523(a)(6) because there is no exception to the section 1328(a) discharge for such debts. *See below.*

#### **Discharge Exception for Debts Incurred Through Fraud as a Fiduciary; Embezzlement or Larceny**

Section 1328(a)(2) also includes debts described in section 523(a)(4). These debts are those incurred through fraud or defalcation while acting in a fiduciary capacity, embezzlement, or

larceny. Again, to be nondischargeable in a bankruptcy case a proceeding must be brought in the bankruptcy court by the FRBP 4007 deadline.

### **Discharge Exception for Debts for Domestic Support Obligations**

Debts for domestic support obligations coming within the provisions of section 523(a)(5) provided for under the chapter 13 plan are excepted from a full-compliance discharge under section 1328(a). This exception does not include debts in the nature of marital property.

### **Discharge Exception for Debts for Educational Loans**

Section 1328(a)(2) incorporates paragraph (8) of section 523(a). Based on this the full-compliance discharge of Chapter 13 excludes debts for educational loans that are nondischargeable under section 523(a)(8). (See the presentation below regarding “ripeness”, particularly related to student loans.)

### **Discharge Exception for Debts for Death or Personal Injury Caused by Debtor's Operation of Motor Vehicle While Intoxicated**

Section 1328(a)(2) also incorporates section 523(a)(9), so section 1328(a) does not discharge debts that are nondischargeable under section 523(a)(9) for "death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.”

### **Discharge Exception for Debts for Restitution or Fine Included in Sentence on Debtor's Conviction of Crime**

The discharge under Section 1328(a)(3) excludes debts for "restitution included in a sentence on the debtor's conviction of a crime." This amendment had the effect of limiting the U.S. Supreme Court's decision *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990). When the debt is for restitution included in a sentence on the debtor's conviction of a crime, the provisions of paragraph (3) apply.

The amendment does not apply when the restitution order does not result from conviction of a crime, such as a pretrial diversion program or an agreement that charges will be dropped on condition of restitution, so those obligations would be dischargeable.

### **Debts for Restitution or Damages Awarded for Willful or Malicious Injury or Death**

Section 1328(a)(4) makes nondischargeable in Chapter 13 certain types of debts for personal injury to an individual or the death of an individual meeting special conditions.

- The debt must be for damages or restitution awarded in a civil action (not within a criminal action).<sup>1</sup>
- In addition, the debt must be a result of willful or malicious injury. This is a lower standard than section 523(a)(6), which requires the debt to be the result of a willful and malicious injury.
- Unlike section 523(a)(6), injuries to property are not included. The injury must be a personal injury to an individual or the death of an individual.

Also unlike section 523(a)(6), section 1328(a)(4) probably need not be asserted during the bankruptcy case. A creditor holding a claim that is nondischargeable under section 1328(a)(4) may litigate the dischargeability of any unpaid portion of that claim after the chapter 13 discharge in a nonbankruptcy court.

### **Discharge Exception for Postpetition Debts Not Provided for by Plan**

While it may seem apparent, section 1328(a) does not discharge debts incurred by the chapter 13 debtor after the commencement of the case and not provided for by the plan. However, postpetition debts allowed under sections 502(a) and (b) and 1305(a), (b) and (c) actually provided for under the plan as permitted by section 1322(b)(6) are discharged under section 1328(a). The exception to such a discharge would be if the debt is based on a consumer debt claim under section

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<sup>1</sup> Whether a debt would be nondischargeable if no award had yet been made in a civil action when the bankruptcy petition was filed is unclear. If Congress had intended for a debt to be nondischargeable even if not yet awarded, the words "awarded in" would be surplusage.

1305(a)(2) incurred by the debtor without the prior approval of the chapter 13 trustee, where the obtaining of approval was practicable.<sup>2</sup>

### **Chapter 13's Hardship Discharge**

A chapter 13 debtor who has not completed payments under a plan may obtain a “hardship discharge” under section 1328(b) at any time after confirmation of the plan, after notice and a hearing. A hardship discharge is still subject to the debtor completing a personal financial management instructional course. The other criteria are as follows.

- Debtor Not Justly Accountable for Failure to Complete Payments - § 1328(b)(1). Under subsection 1328(b)(1), the court must find that the failure to complete payments under the plan was due to circumstances for which the debtor should not justly be held accountable, e.g., death, loss of income due to involuntary unemployment.

- Satisfying the Best Interests Test; § 1328(b)(2), i.e., the court must find that the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim at least equals the amount that would have been paid on each allowed unsecured claim had the estate of the debtor been liquidated under chapter 7 on the effective date of the plan.

- Modification of Plan Not Practicable; § 1328(b)(3).

Note that the hardship discharge would provide no discharge for section 1322(b)(5) debts and all the exceptions under section 523(a) then become applicable.

### **Revocation of Chapter 13 Discharge**

Section 1328(e) provides that a party in interest may request revocation of a discharge granted in a chapter 13 case, upon application made within one year following the granting of the chapter 13 discharge. Revocation may occur if discharge was obtained by the debtor through fraud

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<sup>2</sup> Section 1305(a)(2) permits the filing of a proof of claim based on a consumer debt, arising during the chapter 13 case, which is for property or services necessary for the debtor's performance under the plan. However, section 1305(c) disallows such a postpetition consumer debt claim if the holder of the claim knew or should have known that obtaining the approval of the chapter 13 trustee was practicable but was not done before the incurring of the debt. Section 1322(b)(6) permits a chapter 13 plan to propose payment of such a section 1305(a)(2) claim. So, as a practical matter, no postpetition claim may be discharged unless the holder of the claim and the debtor agree, since the claim may be allowed only if (1) the holder files a claim and (2) the plan will provide for the claim only if the debtor files a plan that does so.

committed by the debtor (not by some third party) and the requesting party did not know of the fraud until after the discharge was granted.

### **Prior Discharge as Bar to Chapter 13 Discharge;**

Section 1328(f), enacted in 2005, prohibits a chapter 13 discharge in certain circumstances when a prior bankruptcy discharge has been entered.

- Discharge after Prior Discharge in Chapter 7, 11 or 12 Case - debtor received a discharge in a chapter 7, 11 or 12 case that was filed during the four years prior to the date of the order for relief in a subsequent chapter 13 case.<sup>3</sup>
- Discharge after Prior Discharge in Chapter 13 Case; § 1328(f)(2) - chapter 13 case filed within two years of the filing of a prior chapter 13 case in which a discharge was granted.<sup>4</sup>

### **Timely filing of Complaint to Determine Dischargeability**

Federal Rule of Bankruptcy Procedure 4007, provides:

**(b) Time for Commencing Proceeding Other Than Under §523(c) of the Code. A complaint other than under §523(c) may be filed at any time.** A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

**(c) Time for Filing Complaint Under §523(c) in a Chapter 7 Liquidation, Chapter 11 Reorganization, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.** Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

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<sup>3</sup> Section 1328(f) does not prevent a debtor from filing a chapter 13 case after a chapter 7 case; it only prevents such a debtor from receiving a discharge in that chapter 13 case if it is filed within four years of the earlier petition. It may be advantageous for a debtor to file a chapter 13 case anyway in order to, for example, cure a default through a plan, or simply to seek protection of the bankruptcy court and the automatic stay while paying debts in an orderly fashion through a plan. There may also be other advantages.

<sup>4</sup> This provision should rarely be applicable, because most chapter 13 cases in which discharges are granted last for three to five years, except for possible hardship discharge.

**(d) Time for Filing Complaint Under §523(a)(6) in a Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.** On motion by a debtor for a discharge under §1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under §523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

### **Ripeness for Dischargeability Complaint – Student Loan Debt**

*Soler v. United States*, 250 B.R. 694 (Bankr. D. Minn. 2000) held that a dischargeability determination is only necessary if there is a discharge and found that determination of the dischargeability of the debtor's student loan debt five years in advance of her anticipated discharge was premature, and therefore seeks relief which cannot presently be granted. Accordingly, the debtor's complaint to determine a hardship discharge of her student loan debt was dismissed.