

Living in the 3000s! Advanced Issues in Proof-of-Claim Objections, Including a Primer on the FDCPA Cottage Industry

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**APPLICATION OF THE FAIR DEBT COLLECTION PRACTICES
ACT 15. U.S.C. § 1692, et seq. (“FDCPA”) TO PROOFS OF CLAIM
FILED ON TIME-BARRED DEBT**

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I. OVERVIEW OF THE FDCPA.

The Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §1962, et. seq., was enacted to protect consumers from abusive debt collection practices likely to disrupt a debtor’s life. Mace v. Van Ru Credit Corp., 109 F.3d 338, 343 (7th Cir. 1997). “The FDCPA is designed to protect consumers from the unscrupulous antics of debt collectors irrespective of whether a valid debt actually exists.” Keele v Wexler, 149 F.3d 589, 594 (7th Cir. 1998). The FDCPA “protect[s] consumers from a host of unfair, harassing, and deceptive debt collection practices. . .”. Rhines v. Norlarco Credit Union 847 N.E. 2d 233, 240 (Ind. Ct. App. 2006), trans. denied, 860 N.E.2d 595 (Ind. 2006). The FDCPA only applies to debt collectors. Debt collectors are defined to include:

“any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another.”

15 U.S.C. §1692a(6). The FDCPA only regulates debt collectors pursuing collection of a particular kind of debt. Specifically, the only debt covered the FDCPA is:

“[an] obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”

15 U.S.C. §1692a(5). The FDCPA regulates the nature, timing and content of communications in connection with collection of a FDCPA debt. Communications are

broadly defined to include the “conveying of information regarding a debt directly or indirectly through any medium.” 15 U.S.C. §1692(a)(2). .

The FDCPA provides a road map of non-compliant communications¹. However, the FDCPA fails to define the cornerstone of its application; namely, what constitutes “debt collection”. Strangely, this term is the target of the FDCPA’s stated purpose:

“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”

15 U.S.C. §1692(e). The vast majority of FDCPA cases involve collection activities that involve phone calls, letters or litigation. In these cases, the courts have found, without necessarily discussing, that demands for payment made by letter, phone, or formal

¹ As an example, the FDCPA prohibits:

- (1) early morning or late night phone calls. 15 U.S.C. §1962c(a)(1);
- (2) failing to stop communication (in a way other than litigation) after receiving written notice from the consumer. 15 U.S.C. §1962c(c);
- (3) frequent phone calls intended to annoy, abuse or harass. 15 U.S.C. §1962d(5);
- (4) communication concerning the debt at a consumer’s place of employment after being told the same is not allowed. 15 U.S.C. §1962c(a)(3);
- (5) contacting a consumer known to be represented by counsel. 15 U.S.C. §1962c(a)(2);
- (6) collection communications after a request for validation of the debt has been made. 15 U.S.C. §1962g(b);
- (7) false or misleading misrepresentations concerning the debt. 15 U.S.C. §1962e(1)-(16);
- (8) inclusion of the consumer’s name on a published bad debt list. 15 U.S.C. §1962d(3);
- (9) requesting payment of amounts not allowed by law or contractual terms. 15 U.S.C. §1962f(1);
- (10) threats of unpermitted or unintended legal action or arrest. 15 U.S.C. §1962e(4) and (5);
- (11) use of profane or abusive language in communicating about the debt. 15 U.S.C. §1962d(2);
- (12) unpermitted discussions of debt with third parties (other than attorney or spouse). 15 U.S.C. §§ 1962c(b), and 1962b;
- (13) use of inappropriate instrumentalities of communication, ie, postcards, telegrams or use of false letterheads. 15 U.S.C. §1962f(7) and (8); and
- (14) threatening to report or reporting false information on a credit report. 15 U.S.C. §1962e(8)

In addition to outlining prohibited communications, the FDCPA also outlines required communications. These communications include:

- (1) a warning in every communication that the same is made by a debt collector and in the initial communication that any information obtained will be used to collect the debt. 15 U.S.C. § 1962e(11);
- (2) name and address of original creditor if requested in 30 days after receipt of the initial communication. 15 U.S.C. § 1962g(b);
- (3) notification, within 5 days of the initial communication, that the consumer has 30 days to dispute the debt, in whole or part. 15 U.S.C. § 1962g(b);
- (4) provide written verification of debt upon demand or dispute and cease collection activity. 15 U.S.C. § 1962g(b);
- (5) only sue the consumer in the place he or she lives or the place that the contract was signed. 15 U.S.C. § 1962i(a).

complaint constitute the type of collection activities targeted by the FDCPA. Hahn v. Triumph Partnership, 577 F.3d 790 (7th Cir. 2009)(misleading privacy notice sent in the same envelope as a letter demanding payment of the debt was sent in connection with debt collection); Karr v. Med-1 Solutions, LLC, 2014 U.S. Dist. LEXIS 63424 (S.D. Ind. May 7, 2014)(letter from attorney seeking collection of a debt violated FDCPA). Teng v. Metropolitan Retail Recovery, Inc., 851 F.Supp. 61, 67 (E.D.N.Y. 1994)(a defendant who made phone calls could be held personally liable for an FDCPA violation); Weldon v. Asset Acceptance, LLC, 2011 U.S. Dist. LEXIS 26185 (S.D. Ind. March 14, 2011)(a plaintiff states a FDCPA claim when a complaint on a time barred debt is filed).

II. APPLICATION OF THE FDCPA TO TRADITIONAL FORMS OF COLLECTING A STALE DEBT.

A. Status of Stale Debt Under Indiana Law.

A debt barred by the statute of limitations is not extinguished. “Although the statute of limitations had lapsed on the debt at issue, under ...Indiana law, [the creditor] could still seek to collect on the debts.” Magee v. Portfolio Recovery Associations, LLC, 2012 U.S. Dist. LEXIS 116666 (N.D. Ill. August 15, 2012). A debt collector can still attempt to collect on a debt, outside of a court action, whether or not the statute of limitations has expired. Id. The running of the statute of limitations would bar a creditor from collecting through the courts, but it does not extinguish the debt. Id. In fact, under Indiana law, a time barred debt can be asserted as a counter-claim. IRTP, Rule 13(J). Therefore, a time barred debt is still a debt; it is just a debt that cannot be enforced through the normal channels of litigation.

B. Provisions of the FDCPA Addressing Collection of Stale Debt.

The FDCPA precludes a debt collector from “threat[ing] to take any action that cannot legally be taken or that is not intended to be taken” . 15 U.S.C. §1692e(5).

Relying on this provision of the FDCPA, courts have held that the filing of a complaint to collect a time- barred debt violates the FDCPA. This position was adopted by the Seventh Circuit Court of Appeals in Phillips v. Asset Acceptance, 736 F.3d 1076, 1079 (7th Cir. 2013). The Court in Phillips reiterated the reasoning² for prohibiting the pursuit of litigation on time-barred debts:

“As with any defendant sued on a stale claim, the passage of time not only dulls the consumer’s memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care-sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such law suits”.

Id. The Phillips Court made clear that debt collectors pursuing litigation of time-barred debt did so at the peril of facing FDCPA claims.

After Phillips, it remained unclear what type of collection activity, short of litigation, could be pursued on time-barred debt. For instance, was a collection letter sent on a time-barred debt that did not threaten litigation immune from a FDCPA challenge? That question was answered in the negative by the Seventh Circuit Court of Appeals in McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Circ. 2014) .

In McMahon, the plaintiff received a collection letter on a stale utility bill that

² The Seventh Circuit Court of Appeals quoted the reasoning set forth in Kimber v. Federal Financial, Corp., 668 F. Supp. 1480, (M.D. Ala. 1987).

extended an “offer to settle the account in full”. The letter did not threaten litigation if the utility bill was not paid and it contained the requisite FDCPA warnings and notifications.³ Applying the least sophisticated consumer standard⁴, the McMahon Court held:

“a settlement offer on a time-barred debt implies that the creditor could successfully sue on the debt. If unsophisticated consumers believe either that the settlement offer is their chance to avoid court proceeding where they would be defenseless, or if they believe that the debt is legally enforceable at all, they have been misled. . .”.

McMahon, 744 F.3d. at 1023. While holding that the collection letter at bar violated the FDCPA, the McMahon Court was careful to warn that its ruling should not be construed as a total prohibition on the collection of a time-barred debt.

“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”.

Id. at 1020. The McMahon Court surmised that a collection letter on a time-barred debt that advised of the stale nature of the claim, would likely survive a FDCPA challenge.

³ 15 U.S.C. §1692g(a) provides:

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

⁴When deciding if a representation is misleading under the FDCPA, courts in the Seventh Circuit ask “whether a person of modest education and limited commercial savvy would likely be deceived”. Evory v. RJM Acquisitions Funding, LLC, 505 F.3d 769, 744 (7th Cir. 2007). This is often referred to as the “least sophisticated consumer” standard

“Our decision today does not require debt collectors to conduct additional research. If a debt collector does not know whether the debt submitted for collection is time barred, it would be easy to include general language about that possibility [in the collection letter]”.

Id. at 1021.

III. INITIAL RESPONSE OF LOWER COURTS TO FDCPA CLAIMS PREMISED ON THE FILING OF TIME-BARRED PROOFS OF CLAIM.

In mid 2000, the first cases alleging a FDCPA violation for actions taken in the context of bankruptcy cases emerged. The primary target of the FDCPA complaints was proofs of claim filed on time-barred debts. FDCPA plaintiffs argued that the filing of a proof of claim on a time-barred debt was akin to filing a lawsuit on a time-barred debt. The defendants countered by arguing that compliance with the Bankruptcy Code in filing the proof of claim, shielded the defendants from FDCPA exposure. Specifically, the defendants relied on the Bankruptcy Code’s broad definition of a claim to include any:

“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). The legislative history of 11 U.S.C.§101, confirms that the Bankruptcy Code defined a claim in a way to ensure the most expansive definition of that term.

“[B]y 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.”

H.R. 95-595,95th Cong. 1st Sess. 309 (1977) Senate Report 95-989, 95th Cong.2d Sess. 21 (1978).

If a creditor has a right to payment (ie, under state law the time-barred debt is not extinguished), then the creditor has the right to file a proof of claim under the Bankruptcy

Code. A properly filed proof of claim is afforded prima facie validity as to the existence and amount of the debt. F.R.B.P. 3001(f).

The notion that a properly filed, Bankruptcy Code sanctioned, proof of claim could be the basis of a FDCPA claim was unpalatable to the majority of lower courts that first addressed the issue. The lower courts routinely dismissed the FDCPA claims finding either (1) that the filing a proof of claim did not constitute collection activity under the FDCPA; or (2) that the FDCPA was implicitly repealed by the Bankruptcy Code in the context of bankruptcy proceedings. See, Jenkins v. Genesis Fin. Solutions, (In re Jenkins), 456 B.R. 236 (Bankr.E.D.N.C. 2011) (if filing a proof of claim constituted a ‘collection’ activity, then filing of proofs of claims would be at odds with the Bankruptcy Code’s automatic stay); Middlebrooks v. Interstate Credit Control, Inc., 391 B.R. 434, 437 (D. Minn. 2008)(FDCPA claim[s] cannot be premised upon proofs of claim); In re Surprise, 342 B.R. 119, 122 (Bankr.N.D.N.Y. 2006); Rodgers v. B-Real, LLC, 391 B.R. 317, 324 (Bankr.M.D.La. 2008)(A FDCPA claim does not exist for the filing proofs of claim on time barred debts in bankruptcy); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510-511 (9th Cir. 2002)(negligent attempts to collect from debtors during bankruptcy cannot yield liability under the FDCPA); Humes v. LVNV Funding, 496 B.R. 557, 580 (Bankr.E.D.Ark. 2013)(filing a proof of claim is not debt collection under the FDCPA); McMillen v. Syndicated Office Sys., Inc., 440 B.R. 907, 912 (Bankr.N.D.Ga. 2010)(“the filing of a proof of claim is a request to participate in the distribution of the bankruptcy estate under court control. It is not an effort to collect a debt from the debtor, who enjoys the protections of the automatic stay”).

IV. THE SEVENTH CIRCUIT COURT OF APPEALS ANSWERS THE QUESTION WHETHER THE FDCPA IS IMPLICITY REPEALED BY THE BANKRUPTCY CODE.

The Seventh Circuit Court of Appeals in Randolph v. IMSB, Inc., 368 F.3d 726 (7th Cir. 2004) addressed whether the Bankruptcy Code implicitly repeals the FDCPA. Randolph involved a demand for immediate payment of a debt that was subject to a confirmed Chapter 13 plan (which did not require immediate payment of the debt). The creditor argued that FDCPA's strict liability provisions for collection infractions were at odds with the Bankruptcy Code's requirement that collection infractions be willful. Id. at 728-729.

The Randolph Court held that an implicit repeal of a federal statute requires either a finding of expressed legislative intent to repeal, or a finding of irreconcilable conflict between the statutes. Id. at 730. "Overlapping statutes do not repeal one another by implication, as long as people can comply with both, then courts can enforce both". Id. at 731. The Court concluded that permitting remedies for negligent falsehoods does not contradict any portion of the Bankruptcy Code. Id. at 731.

"We have been able to address [the FDCPA claims and the Bankruptcy Code claims] independently, without saying that it would undercut the scienter requirement of § 1692c(a) to permit no-fault liability under § 1692e(2)(A). They are simply different rules, with different requirements of proof and different remedies. Just so with § 1692e(2)(A) and § 362(h) of the Bankruptcy Code."

Id. at 732.

V. THE ELEVENTH CIRCUIT BREAKS FROM THE MAJORITY OF LOWER COURTS AND FINDS THAT THE FILING OF A TIME-BARRED PROOF OF CLAIM VIOLATES THE FDCPA.

The Eleventh Circuit Court of Appeals in Crawford v. LVNV Funding, Inc., 758 F.3d 1254 (11th Cir. 2014), responding to what it coined as a deluge of proof of claim filings on time-barred debt, held that the filing of the same violates the FDCPA. Applying the least sophisticated consumer standard (which the Court defined as that of the “ignorant, the unthinking, the credulous”), the Eleventh Circuit Court of Appeals held that the filing of a time-barred proof of claim “creates the misleading impression...that the debt collector can legally enforce the debt.” Id. at 1260. This false impression violates the FDCPA. Id.

The Crawford decision was the subject of a Petition for Writ of Certiorari. The Petition was denied on Monday, April 20, 2015.

VI. FDCPA PROOF OF CLAIM LITIGATION IN THE SEVENTH CIRCUIT.

In the period of a few short months, lower courts in the Seventh Circuit Court of Appeals have reached different conclusions on whether the filing of a time-barred proof of claim violates the FDCPA.

A. District Court, Southern District of Indiana, Indianapolis Division.

The Honorable William T. Lawrence, United States District Court Judge, Southern District of Indiana, Indianapolis Division, was one of the first to weigh in on the issue in Smith v. Asset Acceptance, LLC, Cause No. 1:13-cv-255 WTL-DML (S.D. Ind. 2013)⁵. In Smith, the plaintiff brought a FDCPA claim against the defendant

⁵ The decisions cited in this part of the brief are attached. Cite references will be to the Orders issued in those cases, copies of which

premised upon the defendant's filing of a time-barred proof of claim in the plaintiff's Chapter 13 bankruptcy case. The defendant filed a motion to dismiss the FDCPA complaint. Id. at 2. The defendant's motion to dismiss was premised solely on the argument that actions taken in a bankruptcy proceeding are exclusively within the realm of the bankruptcy court. Therefore, FDCPA claims arising from bankruptcy filings are not permitted.

Relying on Randolph, 368 F.3d 726, Judge Lawrence, in an Order dated August 9, 2013, rejected the defendant's argument that the FDCPA is implicitly repealed by the Bankruptcy Code. Judge Lawrence reasoned that the filing of a proof of claim is permissive. Consequently, a creditor could comply with both the FDCPA and the Bankruptcy Code by simply electing not to file a proof of claim on a time-barred debt. Id. at 2-3.

Closing a door, but opening a window, Judge Lawrence cautions, in fn1 of his opinion, that the Court expresses no opinion on whether the filing of a proof of claim constitutes debt collection under the FDCPA. Judge Lawrence also ponders, without deciding, whether the filing of a time-barred proof of claim violates Bankruptcy Rule 9011. Id. at 3. This is an issue discussed in Section D, infra.

The next Judge to tackle the issue is the Honorable Richard Young, United States District Court Judge, Southern District of Indiana, Indianapolis Division, in Patrick v. PYOD, LLC et. al., 1:14-cv-00539-RLY-MJD (S.D. Ind. 2014). In an Order dated

are attached. Cites do not reference published decisions, if any.

August 20, 2014, denying the defendants’ motion to dismiss, Judge Young, closes the loophole created by Judge Lawrence’s fn1, by finding that the filing of a proof of claim constitutes debt collection under the FDCPA. Id. at 5-6.

Recognizing that the FDCPA fails to define the term debt collection, Judge Young looks to three factors: (1) the presence or absence of a demand for payment; (2) the nature of the parties relationship; and (3) the purpose and context of the communication. Without analyzing any of these factors, Judge Young, relying on Crawford, 758 F.3d 1254, concludes that the “filing of a proof of claim is the first step in collecting a debt in bankruptcy. . .”. Id. at 6.

Having found that the FDCPA is implicated by the filing of a proof of claim, Judge Young (relying on Crawford, which in turn relied in part, on Phillips, 736 F.3d 1076) rules that the filing of a proof of claim on a time-barred debt creates the misleading impression that the debt collector can legally enforce the debt. In closing, Judge Young asserts that the filing of a time-barred proof of claim is “unfair, unconscionable, deceptive and misleading” within the scope of the FDCPA. Id. at 7.

Judge Young’s decision was taken up on interlocutory appeal by the defendants; but the Seventh Circuit Court of Appeals did not take the case. Judge Young’s decision in Patrick was relied on to deny motions to dismiss in the cases of Grandidier v. Quantum3 Group, LLC, No. 1:14-cv-00138 (S.D. Ind. 2014); Patrick v. Worldwide Asset Purchasing, II, LLC., et al., 1:14-cv-00544-TWP-TAB (S.D. Ind. 2014), and Patrick v. Quantum3 Funding, LLC., et al., 1:14-cv-00545-TWP-TAB (S.D. Ind. 2014)⁶.

Five months after Patrick, in a case involving the same fact pattern, the Honorable

⁶ These are cases that the speaker is defending on behalf of the named defendants.

Jane Magnus-Stinson, United States District Court Judge, Southern District of Indiana, Indianapolis Division, in Elliott v. Calvary Investments, LLC, 1:14-cv-01066-JMS-TAB, addressed the issue. While Judge Magnus-Stinson denied the defendants' motion to dismiss, she was careful to point out that her ruling should not be construed as a finding that the filing of a proof of claim on a time-barred debt violates the FDCPA.

In her opinion, Judge Magnus-Stinson struggles with her colleague Judge Young's reliance on Phillips, 736 F.3d 1076, in a fact pattern that does not involve the filing of a civil complaint on a time-barred debt.

“When consumers receive a summons regarding a state court suit over a time-barred debt, the creditors are initiating legal action against the consumer. But, consumers, such as Elliott, themselves file for Chapter 13 bankruptcy. Thus in *Phillips* the creditor initiates the legal proceedings, while in this case the Elliotts did so.”

Id. at 8. Drawing distinctions between civil litigation and bankruptcy, Judge Magnus-Stinson reasons that unlike civil litigation, in bankruptcy, trustees are appointed and charged with the duty to review proofs of claim. Moreover, in bankruptcy, debtors are typically represented by counsel who also are duty bound to review proofs of claim. Judge Magnus-Stinson concludes that “[t]hese differences cast doubt on the applicability of *Phillips* to the filing of a proof of claim in a Chapter 13 proceeding under the facts presented here”. Id. at 9.

A short time later, Judge Magnus-Stinson in the cases of Birtchman v. LVNV Funding, 2015 WL 1825970 (S.D. Ind. April 22, 2015) and Owens v. LVNV Funding, LLC, 2015 WL 1826005(S.D. Ind. April 21, 2015) held that the mere filing of a proof of claim on a time-barred debt does not violate the FDCPA. The Court held that the filing of an accurate proof of claim on a time-barred debt “is not unlawful, false, deceptive, or

misleading”. The Birtchman and Owens cases are currently before the Seventh Circuit Court of Appeals.

B. Bankruptcy Court, Northern District of Illinois, Eastern Division.

On January 9, 2015, the Honorable Jacqueline Cox, United States Bankruptcy Court Judge, Northern District of Illinois, Eastern Division, issued an Order denying a motion to dismiss a FDCPA complaint premised on a time-barred proof of claim in the adversary proceeding of Samuel L. Brimmage v. Quantum3 Group, LLC, et. al., Adversary No. 14-00674⁷. From the onset, Judge Cox rejects the defendants’ contention that the filing of a proof of claim is not debt collection. “[T]he filing of a proof of claim is the bankruptcy analog of filing a complaint or sending a demand letter to recover on a debt outside of bankruptcy”. Id. at 5. Therefore, the filing of a proof of claim is subject to the FDCPA.

Judge Cox next moves to the issue of whether a creditor can comply simultaneously with the FDCPA and the Bankruptcy Code. Judge Cox concludes “the holder of a time-barred debt may decide not to file a proof of claim [on a time-barred debt] and thereby comply with the Bankruptcy Code and the FDCPA. Thus, compliance is possible with both statutes and the Court can enforce both”. Id. at 8.

While the ink on the Brimmage decision was still drying, Judge Cox’s colleague, the Honorable Eugene Wedoff, United States Bankruptcy Court Judge, Northern District of Illinois, Eastern Division, penned, on January 21, 2015, a twelve page opinion contrary to that of Brimmage. Judge Wedoff’s opinion was issued in the adversary case

⁷ The primary case is styled In re Samuel L. Brimmage, United States Bankruptcy Court, Northern District of Illinois, Eastern Division, Case No. 13-29753.

captioned Booker Largrone v. LVNV Funding, LLC, et. al, Adversary No. 14 A 00578⁸. Like Judge Cox, Judge Wedoff finds that the filing of a proof of claim is debt collection under the FDCPA and further finds that payment of the proof of claim by the bankruptcy estate, rather than the debtor, does not stave off a FDCPA claim. Id. at 9

However, Judge Wedoff finds the holding and reasoning of Phillips, 736 F.3d 1076, is inapplicable to the filing of a time-barred proof of claim. Judge Wedoff reasons that Phillips involved the filing of a time-barred lawsuit; filing a proof of claim is not like filing a lawsuit. Id. at 10. Judge Wedoff explains that in a lawsuit, a defendant must raise affirmative defenses. Conversely, in a bankruptcy case, a debtor has a court appointed trustee, with a fiduciary duty, to review proofs of claim. A debtor has much less at stake when a proof of claim is allowed, then when a lawsuit proceeds to judgment. A proof of claim will only be paid out of the bankruptcy estate. A judgment will be collected against the debtor personally. Additionally, in a lawsuit, a debtor would have to retain and pay for counsel. In most bankruptcy cases, debtors have already retained counsel of their choosing to represent them and have themselves initiated the legal proceedings. Id. at 10-11. Judge Wedoff holds that the reasoning of Phillips is inapplicable to the filing of a proof of claim in bankruptcy

Finally, Judge Wedoff closes by noting that the information required, by Federal Rule of Bankruptcy Procedure 3001(c)(3)(A), in a proof of claim (ie., the last transaction date, the last payment date, and the date the account was charged off), easily allows a debtor to ascertain if the statute of limitations on the debt represented by the proof of

⁸ The primary case is styled In re Booker Lagrone, United States Bankruptcy Court, Northern District of Illinois, Eastern Division, Case No. 13 B 21423.

claim has expired. *Id.* at 11. “[U]nlike the consumer who has only the information required in a state court complaint, a debtor in bankruptcy should always have the information needed to determine whether the statute of limitations for a claim has expired.” *Id.* Based on the foregoing, Judge Wedoff, dismisses the FDCPA complaint premised on the filing of a time-barred proof of claim.

C. District Court, Northern District of Illinois, Eastern Division.

Two weeks after Judge Wedoff’s decision in Booker Largrone, the Honorable Manish Shah, United States District Court Judge, Northern District of Illinois, Eastern Division, confronts the issue in Tia Robinson v. Ecast Settlement Corporation, et. al., Case No. 14-cv-8277. Judge Shah, in an Order dated February 3, 2015, granted defendants’ motion to dismiss a FDCPA complaint premised on the filing of a time-barred proof of claim. In Robinson, Judge Shah rejects the notion that time-barred proofs of clam are, by their nature, deceptive, false, or misleading, and holds:

“a time-barred proof of claim that complies with the Bankruptcy Rules does not purport to be anything other than a claim subject to dispute in the bankruptcy case-it is not deceptive, false or misleading.”

Id. at 4. Relying on the broad definition of a claim under the Bankruptcy Code, Judge Shah finds that a proof of claim is a neutral statement that a debt existed at a certain time and is now owed by the claimant. The Bankruptcy Code allows proofs of claim to be filed on disputed debts. Therefore, the filing of a proof of claim on a time-barred debt does not misrepresent the enforceability of the debt. *Id.* at 5.

The case of Tia Robinson is before the Seventh Circuit Court of Appeals in a consolidated appeal with Birtchman and Owens.

D. Rule 9011 Resurfaces in the United States District Court, Northern District of Indiana, Hammond Division at Lafayette.

The question of whether filing a time-barred proof of claim violates Rule 9011 was raised, but not decided, by Judge Lawrence in Smith v. Asset Acceptance, LLC, Case No. 1:13-cv-255 WTL-DML (S.D. Ind. 2013).

“[A]ssuming that a time-barred claim is a “claim” that may be filed in the claims allowance process within the meaning of the Bankruptcy Code [citations omitted], it is not clear that doing so would not violate Federal Rule of Bankruptcy Procedure 9011, the bankruptcy equivalent of Federal Rule of Civil Procedure 11.”

Id. at 3. The Honorable Robert Grant, United States Bankruptcy Court Judge, Northern District of Indiana, Hammond Division at Lafayette, in an opinion dated January 7, 2015, answered Judge Lawrence’s inquiry in the affirmative. The opinion, issued in a case styled In re Sekema, Case No. 14-40145, involved two proofs of claim. The first filed by Jefferson Capital, LLC (“JC”). The other filed by Resurgent Capital Services, on behalf of LVNV Funding, LLC (“RCS”). The JC proofs of claim did not contain the last payment date as required by Federal Rule of Bankruptcy Procedure 3001(c)(3)(A)(iv). The RCS proof of claim did not contain the last transaction date or the last payment date as required by Federal Rule of Bankruptcy Procedure 3001(c)(3)(A)(iii, v). However, the proofs of claim did contain charge off dates that were well beyond Indiana’s 6 year statute of limitations. Objections to the proofs of claim were filed. Neither JC or RCS responded. Orders were entered denying the proofs of claim of JC and RCS. Id. at 1. Thereafter, Orders to Show Cause were issued. And, again, neither JC or RCS filed a response. Id. at 2.

In his opinion, Judge Grant, found that the filing of the time-barred proofs of

claim violated Rule 9011. In reaching his decision, Judge Grant focused on a creditors' duty, under Rule 9011, to conduct a pre-filing investigation prior to filing pleadings. Id. at 3. Judge Grant noted, that the investigation required by Rule 9011 "does not have to be exhaustive, simply 'reasonable under the circumstance'". Id.

Judge Grant concluded that the proofs of claim, on their face, allowed any third grader to do the math and figure out that the debts were likely barred by the statute of limitations. Id. at 4. Armed with this obvious information, JC and RCS were obligated to engage in further inquiry into the viability of the statute of limitations defense. Id. The failure of JC and RCS to respond to the Orders to Show Cause left the Court to conclude that neither creditor conducted any investigation of the viability of a statute of limitations defense prior to filing the proofs of claim. Therefore, the filing of the proofs of claim violated Rule 9011. Id.

AMERICAN BANKRUPTCY INSTITUTE

ABI Consumer Bankruptcy Conference
Chicago — October 12, 2015

Living in the 3000s!
Chief Judge Mary P. Gorman
U.S. Bankruptcy Court — Central District of Illinois

I. Rule 3002 - The timely filing of proofs of claim

In cases filed under chapters 7, 12, and 13, a proof of claim “is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under §341(a) of the Code[.]” Fed. R. Bankr. P. 3002(c). With a few limited exceptions, proofs of claim filed by governmental units are timely if filed “not later than 180 days after the date of the order for relief.” Fed. R. Bankr. P. 3002(c)(1). Unsecured creditors and equity security holders “must file a proof of claim or interest for the claim or interest to be allowed[.]” Fed. R. Bankr. P. 3002(a). Because the Rules do not specifically require secured creditors to file a proof of claim in order to have an allowed claim, a number of courts have held that the deadlines set for the timely filing of proofs of claim do not apply to secured creditors. *See, e.g., In re Weise*, 455 B.R. 702, 704-05 (Bankr. E.D. Wis. 2011); *In re Brooks*, 370 B.R. 194, 196-97 (Bankr. C.D. Ill. 2007); *In re Burrell*, 85 B.R. 799, 800 (Bankr. N.D. Ill. 1988).

In May 2015, the 7th Circuit Court of Appeals considered the issue of whether Rule 3002(c) deadlines apply to secured creditors and held that notwithstanding the provisions of Rule 3002(a), secured creditors must file their proofs of claim by the Rule 3002(c) deadlines in order for such claims to be allowed. *In re Pajian*, 785 F.3d 1161, 1162 (7th Cir. 2015). Relying on Rule 3021, the court found that secured creditors must actually file a proof of claim in order to have an allowed claim. *Id.* at 1163; Fed. R. Bankr. P. 3021. The court went on to hold that Rule 3002(c) applies on its face to all claims and makes no distinction between secured and unsecured claims. *Pajian*, 785 F.3d at 1164. In finding that Rule 3002(a) does not control the question, the court found that Rule 3002(a) is properly applied only to unsecured creditors who would receive nothing if they failed to file a claim. The court reasoned that secured creditors’ liens pass through bankruptcy and, accordingly, secured creditors who fail to file claims are not left without a remedy.¹ *Id.*

Pajian is a chapter 13 case and its holding will impact the claims process in chapter 12 and 13 cases. Although the holding would apply in chapter 7 cases, its impact in those cases is less clear.

¹ Unfortunately, when explaining the differences between secured and unsecured claims in its discussion of the applicability of Rule 3002(a), the court says that unsecured debts for which claims are not filed will be “discharged” but secured debts are “non-dischargeable[.]” *Pajian*, 785 F.3d at 1164. Obviously, this is an incorrect statement of the law. The provisions of the Code which address the dischargeability of particular debts apply to both secured and unsecured debts. *See* 11 U.S.C. §§523(a), 1228(a), 1328(a). Elsewhere, the court more accurately says that because liens may pass through bankruptcy, secured creditors’ rights are largely unaffected by the bankruptcy discharge. *Pajian*, 785 F.3d at 1163.

Secured creditors generally do not share in chapter 7 distributions and a secured creditor who failed to file a timely claim could still enforce its lien rights in property sold or otherwise administered by a chapter 7 trustee.

As a practical matter, the *Pajian* holding is generally good news for chapter 13 debtors and standing trustees. The sooner secured creditors file claims, the sooner confirmable plans can be filed. Fewer plan modifications will be required to address late claims. The *Pajian* holding, however, does place a new burden on secured creditors to act quickly to file claims. Combined with new proof of claim form requirements taking effect December 1, 2015, secured creditors will now have significantly increased responsibilities in the claims process, particularly in chapter 13 cases.

Secured creditors who fail to file timely claims will generally not be entitled to obtain an extension of time to file. The time periods set forth in Rule 3002(c) may only be enlarged to the extent expressly set forth in that Rule. Fed. R. Bankr. P. 9006(b)(3). Although Rule 3002(c) contains some provisions for enlargement of the proof of claim filing period, the circumstances for allowing enlargement are limited, and enlargement for a secured creditor who received notice and simply failed to act timely is not allowed. Fed. R. Bankr. P. 3002(c).

Debtors may file proofs of claim for creditors who fail to file their own claim. Fed. R. Bankr. P. 3004. Claims filed by debtors must be filed within 30 days after the expiration of the Rule 3002(c) deadline. *Id.* Debtors may request enlargement of the time for the filing of proofs of claim for creditors. Fed. R. Bankr. P. 9006(b)(1). If requested before the original 30-day period or any previously granted extension has expired, the enlargement may be granted in a court's discretion "with or without motion or notice[.]" *Id.* If requested after the expiration of the previously allowed period, an enlargement may be granted on motion and upon a showing that "the failure to act was the result of excusable neglect." *Id.*

Debtors and their attorneys will have to be vigilant in chapter 12 and 13 cases and will now have to closely track whether secured creditors have timely filed their claims. If a case has been filed to save a home or a vehicle, a debtor may have to file claims for secured creditors who fail to timely file their own claims. Once a secured creditor misses the deadline, under *Pajian* and the Rule 9006(b)(3) limits on enlargement of time, the secured creditor may have no options left to file a timely claim. Debtors must be prepared to act under their Rule 3004 30-day window of time or to obtain such enlargements of time as needed to prepare and file claims for their secured creditors.

II. Fair Debt Collection Practices Act Basics

The Fair Debt Collection Practices Act ("FDCPA") was enacted because Congress found "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. §1692. Congress determined that existing laws were inadequate to protect consumers and additional remedies were necessary to eliminate abusive debt collection practices. *Id.*

The FDCPA broadly defines the term "debt collector" and includes all persons using

interstate commerce or the mails in any business which has a principal purpose of debt collection. 15 U.S.C. §1692a(6). Communications by debt collectors with consumers are limited as are communications with persons other than consumers from whom information is sought about a consumer. 15 U.S.C. §§1692b, 1692c. Harassment and abuse of consumers is prohibited. 15 U.S.C. §1692d. Debt collectors may not use threats of violence, obscene or profane language, or repeated phone calls while attempting to collect a debt. *Id.*

Debt collectors are prohibited by the FDCPA from using false, deceptive, or misleading representations in attempting to collect a debt. 15 U.S.C. §1692e. Specifically, debt collectors may not falsely imply that they are affiliated with the United States or any state and may not use any documents which falsely represent that they were issued by a court or other government agency or official. *Id.* Debt collectors may not threaten actions which may not be legally taken or which are not intended to be taken and may not falsely claim that a consumer has committed a crime. *Id.*

Unfair practices by debt collectors are also prohibited by the FDCPA. 15 U.S.C. §1692f. Debt collectors may not collect any amounts in excess of the amount expressly authorized by the agreement which created the debt or as permitted by law. *Id.* Debt collectors may not demand post-dated checks with a threat of criminal prosecution and may not deposit or threaten to deposit post-dated checks prior to the date on the check. *Id.* Debt collectors may not communicate by the use of a post card or the use of language or symbols on an envelope which indicate the communication is for the purpose of debt collection. *Id.*

Debt collectors who violate the FDCPA are subject to civil liability and may be ordered to pay the amount of any actual damage sustained by the injured consumer. 15 U.S.C. §1692k. Additionally, individual plaintiffs may be awarded up to \$1000 in additional damages and, in class actions, all class members may collectively be awarded additional damages of the lesser of \$500,000 or 1% of the net worth of the debt collector. *Id.* Successful plaintiffs may be awarded their costs and reasonable attorney fees. *Id.* But if a court finds that an action was brought in bad faith and for the purpose of harassment of the debt collector, the defendant may be awarded costs and reasonable attorney fees. *Id.* Debt collectors will not be held liable under the FDCPA if they are able to prove by a preponderance of the evidence that the violation was not intentional and resulted from a “bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Id.*

Individual consumers have been successful in enforcing the provisions of the FDCPA. A recent decision in an FDCPA case opens with the following: “What do you do when your bank repeatedly tries to collect a debt that is not due, you repeatedly try to tell them that they are making a mistake but they just won’t listen, and then they file a foreclosure action on your home?” *Goodin v. Bank of America, N.A.*, __ F.Supp.3d __, 2015 WL 3866872, at*1 (M.D. Fla. June 23, 2015). After considering the evidence, the court in *Goodin* awarded \$100,000 in actual damages, \$100,000 in punitive damages, and attorneys fees and costs to the consumer plaintiffs.

Other courts have not looked so favorably on individual FDCPA actions. In *Majerowitz v. Stephen Einstein & Associates, P.C.*, 2013 WL 4432240 (E.D.N.Y. 2013), for example, the court granted summary judgment and awarded fees to the debt-collector defendant. The court stated that

a determination of whether an FDCPA violation has occurred is made by objectively testing the alleged offensive communication from the perspective of the least sophisticated consumer. *Id.* at *3. The court found that even under that standard, the communications in question in the action before it did not violate the FDCPA and that the plaintiff who had four other FDCPA actions pending at the same time had filed the case in bad faith. Relying on one of its prior decisions, the court complained about the emergence of a cottage industry of professional plaintiffs bringing frivolous FDCPA suits. *Id.* at *5; *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F.Supp.2d 133, 138-39 (E.D.N.Y. 2006), *aff'd in part, rev'd in part*, 516 F.3d 85 (2d Cir. 2008).

Administrative enforcement of the FDCPA is conducted by the Federal Trade Commission and other governmental bodies and agencies. 15 U.S.C. §1692l. A violation of the FDCPA is deemed by statute to also be an unfair or deceptive act or practice in violation of the Federal Trade Commission Act. *Id.* Currently the most active enforcement of the FDCPA is being undertaken by the Consumer Financial Protection Bureau. *See* www.consumerfinance.gov/newsroom.

**REMEDIES FOR VIOLATION OF BANKRUPTCY RULES 3001 AND 3002.1
DURING A CHAPTER 13 BANKRUPTCY**

Submitted by:

James J. Haller

INTRODUCTION

Since December 1, 2011, the effective date of these rules, creditors filing a proof of claim must include more information and documentation to support their claims. If the claim is not filed correctly or doesn't have the appropriate documentation, the issue of enforcement arises. This document will explore the options available to enforce these rules and practice tips for practitioners.

ENFORCEMENT PROVISIONS IN THE BANKRUPTCY RULES

Bankruptcy Rule 3001(c)(2)(D) states:

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Bankruptcy Rule 3001(f) states:

Evidentiary effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Bankruptcy Rule 3002.1(i) states:

(i) Failure to notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

ANALYSIS

CAN A CLAIM BE STRICKEN (WITHOUT FAILURE TO FILE AN AMENDED CLAIM) FOR FAILURE TO FOLLOW THE REQUIREMENTS OF BANKRUPTCY RULES 3001 AND 3002.1?

There is a split in authority over how to enforce the provisions of these bankruptcy rules. The rules themselves indicate two possible enforcement mechanisms. First, a court may impose evidentiary

restrictions on a creditor attempting to prove the debt. Second, a court may award "other appropriate relief." It is this second mechanism that is at issue. Some bankruptcy courts have disallowed claims in their entirety for failure to follow the bankruptcy rules. However, the majority of cases hold that 11 U.S.C. § 502(b) contains the exclusive bases for disallowing a proof of claim and that Bankruptcy Rules 3001 and 3002.1 do not supplement that list.

Two lines of cases have emerged in determining the allowance of claims that don't comply with Bankruptcy Rule 3001. The minority view is that failure to attach the documentation required by Rule 3001(c) is grounds for disallowance of the claim. See, e.g., *In re Henry*, 311 B.R. 813, 817-18 (Bankr. W.D. Wash. 2004) (failure to supply a sufficient amount of account statements and copy of the agreement authorizing the charges and fees included in the claim by at least the return date on a claim objection is grounds for disallowance.); *In re Blue*, 2004 U.S. Dist. LEXIS 14771, 2004 WL 1745786 (N.D. Ill.) (lack of documentation is basis for disallowance, but creditor should be given opportunity to amend the claim); *In re Armstrong*, 320 B.R. 97, 106-09 (Bankr. N.D. Tex. 2005) (lack of documentation requires claimant to establish the claim by a preponderance of the evidence, or objection is sustained). While there are some policy arguments favoring the minority view, such as prevention of creditor abuse of the claims process and easing the burden of confirming the propriety of claims on trustees and debtors, the majority view rests on stronger principles of statutory construction and requiring debtors to take responsibility for accurate schedules and knowledge of their own debts. In *In re Cluff*, 313 B.R. 323, 331-332 (Bankr. D. Utah 2004), the court examined the interplay between Bankruptcy Code § 502 and Bankruptcy Rule 3001, and concluded that failure to comply with Bankruptcy Rule 3001, on its own, is not sufficient for disallowance of the claim. Accord, *In re Guidry*, 321 B.R. 712 (Bankr. N.D. Ill. 2005). Cluff explains that the purpose of Rule 3001 is to provide certain minimum evidentiary standards for proofs of claim. *Cluff*, 313 B.R. at 332. Under Bankruptcy Rule 3001(f), a proof of claim "executed and filed in accordance with these rules" constitutes prima facie evidence of both the validity and amount of the claim.

In re Habiballa, 337 B.R. 911, 914-915 (Bankr. E.D. Wis. 2006)(J. Kelley).

Judge Wedoff holds

The resolution of the debtors' claim objections is dictated by the plain language of the relevant provisions of the Bankruptcy Code and Rules. Section 501(a) of the Code provides that a creditor having a claim may file a proof of claim in a debtor's case. A proof of claim, according to Rule 3001(a) of the Federal Rules of Bankruptcy Procedure, is simply "a written statement setting forth a creditor's claim," conforming substantially to the appropriate Official Form, currently Form 10. Under § 502(a) of the Code, a proof of claim filed pursuant to § 501 is deemed allowed unless a party in interest objects. And under § 502(b), if a party objects, the court, after notice and a hearing, must allow the claim except to the extent that it is subject to one or more of nine grounds for disallowance enumerated in § 502(b). (Additional grounds for disallowance, set out in § 502(d) and (e), do not apply to claims of the sort involved here.) None of the grounds for disallowance set out in § 502(b) involves failure to attach documents to a proof of claim.

The basis for the debtors' claim objections is instead Fed. R. Bankr. P. Rule 3001(c). It provides: "When a claim ...is based on a writing, the original or a duplicate shall be filed

with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim." Rule 3001(c), however, does not say that a failure to comply with its terms should result in disallowance of the claim for which the noncompliant proof was filed. Nor could it. The legislation allowing the Supreme Court to prescribe bankruptcy rules states that the rules shall not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. Thus, a bankruptcy rule cannot create a ground for disallowance of claims not set out in the Code.

Courts have accordingly held that a claim cannot be disallowed solely on the basis that its proof was not accompanied by a Rule 3001(c) attachment. See *In re Cluff*, 313 B.R. 323, 331 (Bankr. D. Utah 2004) ("Bankruptcy Rule 3001 does not provide substantive grounds for disallowanceCourts have no discretion to disallow claims for reasons beyond those stated in the statute."); *In re Shank*, 315 B.R. 799, 812 (Bankr. N.D. Ga. 2004) ("An objection to a proof of claim based solely on the lack of attached documents provides no basis for disallowance of a claim."); *In re Mazzoni*, 318 B.R. 576, 578-79 (Bankr. D. Kan. 2004); cf. *In re Taylor*, 289 B.R. 379, 384 (Bankr. N.D. Ind. 2003) (holding in a different context that "a claim may not be denied for just any reason, but only for one of the reasons Congress has included in § 502(b)").

In re Guidry, 321 B.R. 712, 714 (Bankr. N.D. Ill. 2005)(J. Wedoff).

The amendments to the rules effective December 1, 2011 do not overrule these opinions and instead strengthen them by including language that specifically states the consequences for failure to follow the rules. See Eugene R. Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures--Open for Comment*, 83 Am. Bankr. L.J. 579, 584 (2009) (stating "[t]hese sanctions are modeled after those for failure to make ordered discovery under Fed. R. Civ. P. 27") and see 9-3002.1 Collier on Bankruptcy P 3002.1.05 (2012) (stating "If the creditor fails to provide the information required to implement payment changes, supplement fees, expenses or charges, or to determine the final cure payment (if any), the court may, after notice and hearing, take action against the creditor. The court may preclude the creditor from presenting any omitted information as evidence in any contested matter or adversary proceeding in the case. The only defense a creditor has to this action by the court is to prove that the failure to provide the information was substantially justified or harmless. Without use of the omitted information, the creditor will be unable to prove the validity of the creditor's claim for additional amounts, or that the debtor has not cured a default, in many instances. The court may also award other relief including reasonable expenses and attorney's fees for damage caused by the creditor's failure to respond.") See also *In re Reynolds*, 2012 Bankr. LEXIS 3517, 8-9 (Bankr. D. Colo. July 31, 2012)("Not only is it inconsistent with the revisions to Rule 3001 to continue to treat failure to comply with Rule 3001(c)(1) as an independent ground for claim disallowance, the commentary that the Court discussed in its Claims Order flatly states that such failure is not an independent ground for claim disallowance.")

SO WHAT ARE MY OPTIONS FOR FAILURE OF A CREDITOR TO FOLLOW THE RULES?

A. ENSURE YOU HAVE AN INDEPENDENT BASIS TO CHALLENGE THE CLAIM.

Objections to claims should be based on a dispute with the debt independent of the creditor's failure to follow the bankruptcy rules. For example, a debtor might object to the amount of an arrearage

claim, the fact that they owe an unknown debt buyer, or charges or costs on a claim that are unknown and disputed by the debtor. Judge Wedoff states:

The debtors' claim objections raised no factual dispute requiring a hearing. If eCAST's proofs of claim are analogized to complaints--as is commonly done --then the debtors' objections are like motions to dismiss for failure to state a claim on which relief can be granted. The debtors do not deny any of the factual allegations of the proofs of claim; rather, their objections assert that an evidentiary hearing is unnecessary because of eCAST's noncompliance with Rule 3001(c). Thus, the question is not the evidentiary impact of noncompliance with the rule, but whether noncompliance itself renders a claim subject to disallowance. As already noted, it does not. Of course, if the debtors had raised a valid ground for disallowance in their claim objections--such as a denial that they actually owed the debts asserted--an evidentiary hearing would have been required. In that situation, eCAST's noncompliance with Rule 3001(c) would have resulted in eCAST having the burden of going forward with evidence at the trial; it could not have relied on its proofs of claim as prima facie evidence that the debtors were liable for the claims asserted. See *In re Cluff*, supra, 313 B.R. at 337 ("If a claim's prima facie validity is lost, then the creditor has the initial burden of proving that the claim exists and the amount of that claim.") Indeed, if there were facts in dispute as to which the writings required by Rule 3001(c) would have been relevant, the debtors might properly have enforced the Rule's requirement through discovery. All of this, however, is merely speculative here, since the debtor's claim objections set forth no basis for disallowance of the claims that required any evidentiary hearing.

In re Guidry, 321 B.R. 712, 715 (Bankr. N.D. Ill. 2005).

Debtor's counsel should particularly take note that they may be sanctioned for bringing objections to claim based solely on a creditor's failure to follow the bankruptcy rules, particularly when the debt is listed and admitted on the debtor's schedules. Failure to investigate and bring a legitimate challenge to the claim may subject the attorney to sanctions.

The court has entered orders to show-cause in this case and others with a singular aim — to address what has become a pervasive problem within this district stemming from wholesale unjustified claim objections, and to stop that practice. Fed. R. Bankr. P. 9011 places an affirmative duty upon attorneys to make a reasonable investigation of the facts and the law before signing and submitting any petition, pleading, motion, or other paper. *B-Line, LLC v. Wingerter (In re Wingerter)*, 594 F.3d 931, 939 (6th Cir. 2010); *Briggs v. Labarge (In re Phillips)*, 433 F.3d 1068 (8th Cir. 2006). Attorneys are required to "think first and file later." *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986); [**21] see also *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986) (telling attorneys to "look before leaping"). The filing of claim objections with little investigation into the facts or law has become commonplace in this district. In an attempt to stop this practice, the court is entering this and other similar sanctions orders. Attorneys who have filed claim objections in violation of Fed. R. Bankr. P. 9011(b) are being sanctioned in accordance with Rule 9011: A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Fed. R. Bankr. P. 9011(c)(2). While a certain sanction may be sufficient to deter repetition by an attorney who got caught, that very same sanction may not be sufficient to deter comparable conduct by

others similarly situated. The sanctions imposed by this order must be tailored to deter those who may choose to take a calculated risk when deciding whether to object to a creditor's claim.

Albert H. Hernandez filed and prosecuted five claim objections in this case without reasonable investigation into the facts or the law. He sought to strike and disallow the claims in their entirety when his clients had already admitted under penalty of perjury to owing the money. "The gig is up . . . on debtors taking advantage of the cost of responding to claims objections and obtaining orders striking claims which the debtor has acknowledged owing in whole or substantial part." *Moreno*, 341 B.R. at 819-820. Mr. Hernandez violated Fed. R. Bankr. P. 9011(b), and sanctions under Rule 9011(b)(2) must be tailored to deter repeat behavior and to deter similar conduct by others similarly situated.

It is accordingly ORDERED that: (1) Alberto H. Hernandez, Esq. is hereby suspended from practice in the United States Bankruptcy Court, Southern District of Florida for 31 days. The suspension period shall begin on a date to be set by separate order of court after the time for reconsideration and appeal of this order has run;

(2) the Debtors' objections to claims 2, 3, 5, 7, & 8, which Mr. Hernandez filed at ECF No. 44 in violation of [*922] Fed. R. Bankr. P. 9011(b), are hereby OVERRULED and claims 2, 3, 5, 7, & 8 are hereby ALLOWED as filed;

(3) a status conference is hereby scheduled for March 5, 2012 at 1:00 p.m. in Courtroom 301, 299 East Broward [**23] Blvd., Fort Lauderdale, FL 33301 to address the issue of when Mr. Hernandez' suspension should begin.

In re Velez, 465 B.R. 912, 921-922 (Bankr. S.D. Fla. 2012).

B. FILE A MOTION IN LIMINE PRIOR TO THE HEARING ON THE OBJECTION TO CLAIM TO EXCLUDE ANY EVIDENCE NOT PRODUCED IN THE ORIGINAL PROOF OF CLAIM.

Pursuant to the rules, the punishment for failure to abide by the rules is preclusion of evidence. Bankruptcy Rule 3001(c)(2)(D) states:

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Bankruptcy Rule 3002.1(i) states:

(i) Failure to notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

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(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

C. FILE A MOTION IN LIMINE ARGUING THAT THE CREDITOR HAS THE BURDEN OF PROOF

Once it is established that the claim does not conform to Bankruptcy Rule 3001, the claim no longer has prima facie effect. Bankruptcy Rule 3001(f) states:

Evidentiary effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

As such the creditor should have to present their evidence first. Hold them to the Federal Rules of Evidence.

D. CONSIDER FILING MOTIONS FOR CONTEMPT FOR FAILURE TO FOLLOW THE BANKRUPTCY RULES

In jurisdictions that allow disallowance of claims based on failure to follow Bankruptcy Rules 3001 or 3002.1, it may become necessary to file an answer to the objection to claim (usually by the trustee) and then file a motion for contempt or to show cause against the creditor for failure to follow the bankruptcy rules. These motions are not seeking a private right of action on behalf of the debtor, but instead are attempting to enforce the bankruptcy rules.

Debtors who sue based on violations of court orders are not asking the court to create new rights of action, but simply to use the power granted by § 105 to enforce its own orders. Id. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It is unclear why Congress would give the bankruptcy courts the power to "carry out the provisions of this title," but forbid exercise of that power merely because the request for enforcement was initiated by a debtor.

In re Pompa, 2012 Bankr. LEXIS 3051, 13-14 (Bankr. S.D. Tex. June 29, 2012)

The motions for contempt or sanctions are effective when coupled with a request for a creditor's CEO or CFO to appear to explain why a claim is filed improperly and holding up the administration of the bankruptcy.

E) FILING MOTION FOR SANCTIONS UNDER BANKRUPTCY RULE 9011

In limited circumstances it may be appropriate to file a motion for sanctions under Bankruptcy Rule 9011 against a creditor who has filed a proof of claim so full of errors that an argument of improper preparation could legitimately be raised. While this alternative is not a direct result of failure to comply with Bankruptcy Rules 3001 and 3002.1, that failure may be a factor in a 9011 sanction motion.

Admittedly, as the bankruptcy court stressed, B-Line's proof of claim was submitted on an incomplete Form 10. This deficiency violated Rule 3001(c) of the Federal Rules of

Bankruptcy Procedure, which requires that a proof of claim based on a writing include a copy of that writing. The ramifications for this type of violation are well-established, however, and do not result in sanctions. See *Heath v. Am. Express Travel Related Servs. Co., Inc. (In re Heath)*, 331 B.R. 424, 433 (B.A.P. 9th Cir. 2005) (explaining that a failure to comply with Rule 3001 results in the creditor's proof of claim not being prima facie evidence of the claim's validity and amount). Not complying with Rule 3001 might be a factor in determining whether a Rule 9011(b) violation has occurred under different circumstances, but it is not a relevant factor in this case

In re Wingerter, 594 F.3d 931, 941 (6th Cir. 2010).

Debtors have limited tools to use in obtaining omitted information in a deficient claim, and the cost of employing such tools is extraordinary and often prohibitively expensive. Depending on the jurisdiction and the inclination of the bankruptcy judge, the debtor may:

F) Move the Court to order a 2004 exam of the debt collector who filed the deficient proof of claim.

G) File an Adversary Complaint under Bankruptcy Rule 7001 to obtain an injunction or other equitable relief against the debt collector filing the proof of claim¹ or seek a declaratory judgment that the claim was filed beyond the statute of limitations.² These options permit a Debtor to send out discovery requests for information.

¹ See Fed. R. Bankr. P. 7001(7).

² Fed. R. Bankr. P. 7001(9).

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PRACTICAL ENFORCEMENT OF BANKRUPTCY RULES 9037, 3001 AND 3002.1

1. Reviewing claims as part of the claims review process
 - a. When filed
 - b. At CBD (Claims Bar Date)
 - i. Double check claims
 - ii. Any claims should be filed for creditor?
 1. Ie. Tax claims or student loan claims in 13's with dividend
 - c. When amended claims are filed
 - i. For change in mortgage payments
 - ii. To correct amounts in original mortgage
 - iii. To transfer claims
2. Split claims into different categories for objection:
 - a. Claims that are factually different than client info or plan
 - i. Ie. Mortgage arrears
 - b. Claims that violate 9037
 - c. Claims that violate 3001 and 3002.1
3. Process for claims that violate 3001 and 3002.1 and 9037.
 - a. 9037
 - i. Send standard letter demanding creditor redact information within 24 hours.
 - ii. When not redacted, file motion to redact.
 - iii. Keep a list of creditors who have violated this rule.
 - iv. If a creditor violates it more than once, redo letter to creditor. If not fixed immediately, file a motion to compel creditor to comply with Bankruptcy Rule 9037.
 - v. No attorney's fee provision.
 - b. 3001 and 3002.1
 - i. Identify errors and omissions on claim.
 - ii. Make copy and send letter/email to person who filed POC or their attorney requesting information that is missing.
 - iii. Check with client regarding missing information
 1. Any information/statements from creditor?
 - a. Foreclosure, statements, bills, letters etc with payment or financial information?
 - iv. When creditor fails to respond, file a motion to compel compliance or and adversary to determine the correct amounts to be paid.
 - v. Attorney's fees provision.

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Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1 Identify the Claim

1. Who is the current creditor? _____
Name of the current creditor (the person or entity to be paid for this claim)
Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?
 No
 Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

<p>Where should notices to the creditor be sent?</p> <p>Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Contact phone _____</p> <p>Contact email _____</p>	<p>Where should payments to the creditor be sent? (if different)</p> <p>Name _____</p> <p>Number _____ Street _____</p> <p>City _____ State _____ ZIP Code _____</p> <p>Contact phone _____</p> <p>Contact email _____</p>
---	---

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. Does this claim amend one already filed?
 No
 Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?
 No
 Yes. Who made the earlier filing? _____

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Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? No
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____

7. How much is the claim? \$ _____ Does this amount include interest or other charges?
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
 Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
 Limit disclosing information that is entitled to privacy, such as healthcare information.

9. Is all or part of the claim secured? No
 Yes. The claim is secured by a lien on property.

Nature of property:

Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

Motor vehicle

Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: \$ _____

Amount of the claim that is secured: \$ _____

Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: \$ _____

Annual Interest Rate (when case was filed) _____%

Fixed

Variable

10. Is this claim based on a lease? No
 Yes. Amount necessary to cure any default as of the date of the petition. \$ _____

11. Is this claim subject to a right of setoff? No
 Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? No
 Yes. Check all that apply:

Amount entitled to priority
255

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<p>A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.</p>	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). \$ _____
	<input type="checkbox"/> Up to \$2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). \$ _____
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). \$ _____
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). \$ _____
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). \$ _____
	<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. \$ _____
<small>* Amounts are subject to adjustment on 4/1/16 and every 3 years after that for cases begun on or after the date of adjustment.</small>	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.

Check the appropriate box:

I am the creditor.
 I am the creditor's attorney or authorized agent.
 I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
 I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

City State ZIP Code

Contact phone _____ Email _____

Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court

12/15

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- Fill in all of the information about the claim as of the date the case was filed.
- Fill in the caption at the top of the form.
- If the claim has been acquired from someone else, then state the identity of the last party who owned the claim or was the holder of the claim and who transferred it to you before the initial claim was filed.
- **Attach any supporting documents to this form.**
Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)

Also attach redacted copies of any documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called "Bankruptcy Rule") 3001(c) and (d).
- **Do not attach original documents because attachments may be destroyed after scanning.**
- If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.

- A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual's tax identification number, or financial account number, and only the year of any person's date of birth. See Bankruptcy Rule 9037.
- For a minor child, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write *A.B., a minor child (John Doe, parent, 123 Main St., City, State)*. See Bankruptcy Rule 9037.

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court's PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate.
11 U.S.C. § 503.

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). A claim may be secured or unsecured.

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Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor's name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include documents showing that a security interest has been filed or recorded, such as a mortgage, lien, certificate of title, or financing statement.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed in the district where the case is pending.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to *privacy* on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that some creditors use to facilitate electronic payment.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part to the extent that the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

Official Form 410A

Instructions for Mortgage Proof of Claim Attachment

United States Bankruptcy Court

12/15

Introduction

This form is used only in individual debtor cases. When required to be filed, it must be attached to *Proof of Claim* (Official Form B410) with other documentation required under the Federal Rules of Bankruptcy Procedure.

Applicable Law and Rules

Rule 3001(c)(2)(A) of the Federal Rules of Bankruptcy Procedure requires for the bankruptcy case of an individual that any proof of claim be accompanied by a statement itemizing any interest, fees, expenses, and charges that are included in the claim.

Rule 3001(c)(2)(B) requires that a statement of the amount necessary to cure any default be filed with the claim if a security interest is claimed in the debtor's property.

If a security interest is claimed in property that is the debtor's principal residence, Rule 3001(c)(2)(C) requires this form to be filed with the proof of claim. The form implements the requirements of Rule 3001(c)(2)(A) and (B).

If an escrow account has been established in connection with the claim, Rule 3001(c)(2)(C) also requires an escrow statement to be filed with the proof of claim. The statement must be prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law.

Directions

Definition

This form must list all transactions on the claim from the *first date of default* to the petition date. The *first date of default* is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Information required in Part 1: Mortgage and Case Information

Insert on the appropriate lines:

- the case number;
- the names of Debtor 1 and Debtor 2;
- the last 4 digits of the loan account number or any other number used to identify the account;
- the creditor's name;
- the servicer's name, if applicable; and
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method).

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt;
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

Also disclose the *Total amount of funds on hand*. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under *Total debt*. The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

Information required in the Part 3: Arrearage as of the Date of Petition

Insert the amount of the principal and interest portion of all prepetition monthly installments that remain outstanding as of the petition date. The escrow portion of prepetition monthly installment payments should not be included in this figure.

Insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P.

Insert any *escrow deficiency for funds advanced*. This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Insert the *Projected escrow shortage* as of the date the bankruptcy petition was filed. The *projected escrow shortage* is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O.

This calculation should result in the amount necessary to cure any prepetition default on the note or mortgage that arises from the failure of the borrower to satisfy the amounts required under the Real Estate Settlement Practices Act (RESPA). The amount necessary to cure should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the *Proof of Claim*, as required by Rule 3001(c)(2)(C).

Insert the amount of funds on hand that are unapplied or held in a suspense account as of the petition date.

Total the amounts due listed in Part 3, subtracting the funds on hand, and insert the calculated amount in *Total prepetition arrearage*. This should be the same amount as “Amount necessary to cure any default as of the date of the petition” that your report on line 9 of Official Form 410.

Information required in Part 4: Monthly Mortgage Payment

Insert the principal and interest amount of the first postpetition payment.

Insert the monthly escrow portion of the monthly payment. This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a claimant should assume that the escrow deficiency and shortage will be paid through a plan of reorganization and provide for a credit of a like amount when calculating postpetition escrow installment payments.

Claimants should also add any monthly private mortgage insurance amount.

Insert the sum of these amounts in *Total monthly payment*.

Information required in Part 5: Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter:

- ☐ the date of the default in Column A;
- ☐ amount incurred in Column D;
- ☐ description of the charge in Column E;
- ☐ principal balance, escrow balance, and unapplied or suspense funds balance as of that date in Columns M, O, and Q, respectively.

For (1) all subsequently accruing installment payments; (2) any subsequent payment received; (3) any fee, charge, or amount incurred; and (4) any escrow charge satisfied since the date of first default, enter the information in date order, showing:

- ☐ the amount paid, accrued, or incurred;
- ☐ a description of the transaction;
- ☐ the contractual due date, if applicable;
- ☐ how the amount was applied or assessed; and
- ☐ the resulting principal balance, accrued interest balance, escrow balance, outstanding fees or charges balance, and the total unapplied funds held or in suspense.

If more space is needed, fill out and attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary.

B 410 (Official Form 410) (Committee Note) (12/15)

COMMITTEE NOTE

Official Form 410, *Proof of Claim*, applies in all cases. Form 410 replaces Official Form 10, Proof of Claim. It is renumbered to distinguish it from the forms used by debtors for case opening, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 410 has been substantially reorganized. A new question has been added at line 10 that solicits information about claims based on leases.

Official Form 410A, *Mortgage Proof of Claim Attachment*, is revised in its content and format. Rather than requiring a home mortgage claimant to fill in blanks with itemized information about the principal, interest, and fees due as of the petition date and the amount necessary to cure a prepetition default, the form now requires the claimant to provide a loan history that reveals when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. Because completion of the revised form can be automated, it will permit claimants to comply with

B 410 (Official Form 410) (Committee Note) (12/15)

Rule 3001(c)(2)(C) with efficiency and accuracy. Attachment of a loan history with a home mortgage proof of claim will also provide transparency about the basis for the claimant's calculation of the claim and arrearage amount.

The loan history should begin with the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Official Forms 410S1 and 410S2, *Notice of Mortgage Payment Change* and *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, are revised as part of the Forms Modernization Project. There are formatting changes throughout the forms.

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? YES

Bankruptcy Caption: Deborah Y. Edwards

Bankruptcy No.: 14 B 13263

Adversary Caption: Edwards v. LVNV Funding, LLC et al

Adversary No.: 15 A 00384

Date of Issuance: October 6, 2015

Judge: Carol A. Doyle

Appearance of Counsel:

Attorney for Plaintiff: Rusty Payton/PaytonDann

Attorney for Defendant: William J. Connelly/Hinshaw & Culbertson LLP

Trustee or Other Attorneys:

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	Chapter 13
)	
Deborah Y. Edwards,)	
)	Case No. 14 B 13263
Debtor.)	
<hr/>		
)	Judge Carol A. Doyle
Deborah Y. Edwards,)	
)	
Plaintiff,)	
v.)	Adversary No. 15 A 00384
)	
LVNV Funding, LLC and)	
Resurgent Capital Services, LP)	
)	
Defendants.)	

MEMORANDUM OPINION

Deborah Edwards, a chapter 13 debtor, filed an adversary complaint against LVNV Funding, LLC and Resurgent Capital Services, LP. She alleges that they violated provisions of the Fair Debt Collections Practices Act (“FDCPA”) by filing proofs of claim to collect debts that are barred by the statute of limitations. Both defendants moved to dismiss the remaining two counts of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing primarily that filing a time-barred proof of claim in a bankruptcy case does not violate the FDCPA as a matter of law. The court disagrees and will deny the motion to dismiss the claim in Count I for violation of the FDCPA. Count II, however, which alleges a claim for “Fraud on the Court,” will be dismissed.

1. Jurisdiction

The court has subject matter jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b), which confers jurisdiction over matters arising under title 11, arising in a case under title 11, and related to a case under title 11. This proceeding does not arise in or under title 11 but it is related to Edwards' bankruptcy case because resolution of the claims could affect the amount of property available for distribution to creditors. *See In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); *Murff v. LVNV Funding, LLC (In re Murff)*, 2015 WL 3690994 at *1 (Bankr. N.D. Ill. June 15, 2015); *Avalos v. LVNV Funding, LLC (In re Avalos)*, 531 B.R. 748, 750 (Bankr. N.D. Ill. 2015); *LaGrone v. LVNV Funding, LLC (In re LaGrone)*, 525 B.R. 419, 425 (Bankr. N.D. Ill. 2015). Under 28 U.S.C. § 157(c), a bankruptcy court hearing a related proceeding proposes findings of fact and conclusions of law to the district court, which must enter any final judgment. Ruling on this motion to dismiss will not result in entry of a final judgment, however, so the court may decide it without making proposed findings to the district court.

2. Facts and Background

The complaint alleges that LVNV and Resurgent filed proofs of claim in Edwards' chapter 13 case to collect on debts that are barred by the applicable statute of limitations under Illinois law. In Count I, Edwards alleges that filing the unenforceable proofs of claim violated §§ 1692e and 1692f of the FDCPA, 15 U.S.C. § 1692e, f. Section 1692e prohibits debt collectors from using false, deceptive, or misleading representations to collect a debt, including false representations about the amount or legal status of a debt. Section 1692f prohibits the use

of unfair or unconscionable means to collect or attempt to collect a debt. Edwards alleges that the defendants violated both provisions of the FDCPA because they misrepresented the legal status of the unenforceable debts and they used deceptive, unfair, unconscionable, and misleading means to collect the debts.

In Count II, Edwards alleges a claim entitled “Fraud on the Court.” She states that, by filing stale proofs of claim, the defendants violated two criminal statutes that prohibit a person from knowingly and fraudulently making false statements in a bankruptcy case. 18 U.S.C. §§ 152, 3571. Edwards also alleges that the court has authority under section 105(a) of the Bankruptcy Code and Rule 9011 of the Federal Rules of Bankruptcy Procedure to impose sanctions for filing the stale claims. Count III alleges an objection to the proofs of claim, but Edwards withdrew this count.

The defendants move to dismiss Counts I and II for failure to state a claim. Although their arguments are not clearly delineated, they make three principal arguments: (1) the FDCPA does not apply in bankruptcy cases; (2) filing a proof of claim is not an action to collect a debt so it does not fall under the prohibitions of the FDCPA; and (3) filing a proof of claim that is barred by the statute of limitations does not violate the FDCPA as a matter of law. None of these arguments has merit.

3. Standard on Motion to Dismiss

On a motion to dismiss under Rule 12(b)(6), all well-pleaded allegations in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *Geinosky v. City of Chicago*, 675 F.3d 743, 746 (7th Cir. 2012). A court reviews the allegations to determine

whether the complaint states a “plausible” claim for relief. *Maddox v. Love*, 655 F.3d 709, 718 (7th Cir. 2011).

The facts alleged in the complaint are straightforward. The defendants are debt collectors as that term is defined in the FDCPA. LVNV purchases distressed debt portfolios from banks, consumer finance companies, and other consumer creditors. Resurgent services the debt purchased by LVNV, including by filing proofs of claim in bankruptcy cases. The defendants filed three proofs of claim in Edwards’ bankruptcy case. Each proof of claim is based on a consumer credit card debt that was charged off more than five years before Edwards filed her bankruptcy petition and is therefore unenforceable under Illinois’ five-year statute of limitations for credit card accounts. Edwards does not dispute the accuracy of the content of the proofs of claim, and the defendants do not dispute that the Illinois statute of limitations bars their claims.

4. The Bankruptcy Code and the FDCPA: Repeal by Implication

First, the defendants argue that the FDCPA and the Bankruptcy Code are in “inextricable conflict” and that the Bankruptcy Code precludes application of the FDCPA in bankruptcy cases. They cite *In re Chaussee*, 399 B.R. 225 (B.A.P. 9th Cir. 2008), which relies on *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002). The defendants fail to acknowledge, however, that the Seventh Circuit Court of Appeals has rejected this argument and concluded that the provisions of the FDCPA and the Bankruptcy Code are not in irreconcilable conflict but instead can be enforced simultaneously. *Randolph v. IMBS, Inc.*, 368 F.3d 726, 733 (7th Cir. 2004) (“To the extent that *Walls* holds otherwise, we do not follow it”). There is no irreconcilable conflict that prevents courts from enforcing both the FDCPA and the Bankruptcy

Code with regard to stale claims. *See LaGrone*, 525 B.R. at 424.

5. Filing a Proof of Claim is Debt Collection

Second, the defendants argue that filing a proof of claim is not an action to collect a debt and, therefore, is not prohibited by the FDCPA. They contend that filing a proof of claim is merely a response to Congress' "invitation" in § 501(a) of the Bankruptcy Code, 11 U.S.C. § 501(a), to file a claim that "informs the court" of the right to payment. These euphemisms cannot disguise the undeniable reality that a creditor files a proof of claim to get paid on the debt. As many courts have held, filing a proof of claim is an action to collect a debt for purposes of the FDCPA. *See, e.g., Crawford v. LVNV Funding LLC*, 758 F.3d 1254 (11th Cir. 2014); *Murff*, 2015 WL 3690994 at *4; *Avalos*, 531 B.R. at 753; *LaGrone*, 525 B.R. at 425; *Dunaway v. LVNV Capital Funding, et al.*, 531 B.R. 267, 270-71 (Bankr. W.D. Mo. 2015).

6. Stale Proofs of Claim and the FDCPA: Is Bankruptcy Different?

Finally, the defendants argue that filing a proof of claim for a time-barred debt does not violate the FDCPA as a matter of law. They contend that their proofs of claim show the timing of payment and collection activities and, therefore, are not misleading and do not otherwise violate the FDCPA.

Federal courts across the country are divided on whether filing a proof of claim to collect on a debt that is unenforceable under the applicable statute of limitations violates §§ 1692e and 1692f of the FDCPA. The Seventh Circuit has held that a creditor who sues a debtor outside of bankruptcy on a stale claim violates the FDCPA. In *Phillips v. Asset Acceptance, LLC*, 736 F.3d

1076 (7th Cir. 2013), the court held that a debt collector that filed a collection lawsuit after the statute of limitations expired violated the FDCPA. The court cited three reasons for its holding: (1) “the passage of time not only dulls the consumer’s memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt;” (2) unsophisticated consumers would not be aware that a statute of limitations could be used as a defense; and (3) even if the consumer knows about the statute of limitations, she might acquiesce to avoid spending resources and subjecting herself to the embarrassment of court proceedings. *Id.* at 1079 (quoting *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1487 (M.D. Ala. 1987)). The Seventh Circuit reiterated this conclusion in *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir. 2014), in which it extended the *Phillips* holding to dunning letters that might mislead an unsophisticated consumer.

The Seventh Circuit has not yet addressed the issue in this case: whether filing a proof of claim in bankruptcy to collect on an unenforceable debt violates the FDCPA. Trial courts in this circuit are split on the issue. Some courts have held that asserting a time-barred claim in a bankruptcy case does not violate the FDCPA as a matter of law. *See, e.g., Murff*, 2015 WL 3690994; *Birtchman v. LVNV Funding, LLC*, 2015 WL 1825970 (S.D. Ind. April 22, 2015); *Owens v. LVNV Funding, LLC*, 2015 WL 1826005 (S.D. Ind. April 21, 2015); *Donaldson v. LVNV Funding, LLC*, 2015 WL 1539607 (S.D. Ind. April 7, 2015); *Tia Robinson v. eCast Settlement Corp.*, 2015 WL 494626 (N.D. Ill. February 3, 2015); *LaGrone*, 525 B.R. 419. Other courts have concluded that filing a stale proof of claim can violate the FDCPA. *See, e.g., Avalos*, 531 B.R. 748; *Taylor v. Galaxy Asset Purchasing, LLC*, 2015 WL 3645668 (N.D. Ill. June 11, 2015); *Taylor v. Midland Funding, LLC*, 2015 WL 1456442 (N.D. Ill. March 20, 2015);

Patrick v. Worldwide Asset Purchasing II, LLC, 2015 WL 627376 (S.D. Ind. February 13, 2015); *Grandidier v. Quantum3 Group, LLC*, 2014 WL 6908482 (S.D. Ind. December 8, 2014); *Patrick v. Pyod, LLC*, 39 F.Supp. 3d 1032 (S.D. Ind. 2014).¹

The question boils down to whether filing a proof of claim in a bankruptcy case is different enough from filing a collection lawsuit to make the holding in *Phillips* inapplicable. This court's answer is no.

A. Similarities

The similarities between filing a collection lawsuit outside of bankruptcy and filing a proof of claim in a bankruptcy case are strong enough that *Phillips* is controlling. In both forums, the creditor invokes the process of a court to seek payment on an unenforceable debt. While the processes are somewhat different, the fundamentals are the same. The creditor files a document with the court that asserts a right to payment and seeks to employ the process of the court to get paid. In a collection lawsuit, the process includes filing a complaint asserting a right to payment, serving process, seeking a default judgment if there is no answer (as is typical) or otherwise getting a judgment entered, and collecting on the debt through post-judgment collection proceedings. In bankruptcy court, the creditor files a proof of claim asserting a right to payment. That proof of claim is allowed unless and until a debtor, a trustee, or another creditor objects to the claim. 11 U.S.C. § 502. If no one objects, the claim will be paid from any

¹The Circuit Courts of Appeal that have ruled on this issue are also divided. See *Crawford*, 758 F.3d at 1261 (filing a proof of claim on a time-barred debt violates §§ 1692e and 1692f); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2nd Cir. 2010) (filing a proof of claim cannot form the basis for a FDCPA claim).

assets available in the bankruptcy estate.

The goal of the creditor in both situations is to invoke the process of the court to be paid on a claim when it is not entitled to payment. The essential allegations made in both forums are the same - that the debtor owes the creditor money that he has not paid. The statute of limitations is a complete defense to liability in both forums, but it must be raised as an affirmative matter - as an affirmative defense in a collection lawsuit, and by filing an objection to claim specifically raising the defense as a basis for disallowance in bankruptcy. If the defense is not affirmatively raised in either forum, the creditor will be able to use court processes to be paid on the unenforceable debt. Thus, the essential elements of the collection process are the same in both forums and, as discussed below, there is no difference between the processes that justifies rejecting *Phillips* in the bankruptcy context.

B. Potential Differences

Courts in this circuit reaching the opposite conclusion have relied on perceived differences between the bankruptcy system and the non-bankruptcy court systems to justify rejecting the *Phillips* holding. These courts have offered four justifications for deviating from *Phillips* in the bankruptcy context. None is persuasive.

First, some courts have observed that trustees in bankruptcy police the system and should object to stale claims, obviating the need for the protections of the FDCPA. *See, e.g., LaGrone*, 525 B.R. 419, 421; *Murff*, 2015 WL 3690994. Trustees are indeed charged with the duty to object to improper claims in chapter 13 cases under §§ 1302(b)(1) and 704(b)(5). In districts

like this with a large number of chapter 13 cases,² however, trustees typically object to claims only if they are filed after the claims bar date or improperly seek priority treatment, i.e., the easiest-to-detect bases for disallowance. Chapter 13 trustees in this district do not object to proofs of claim based on statute of limitations defenses. This is not surprising because objecting to claims based on affirmative defenses would require trustees to examine the details of virtually every unsecured proof of claim, which is simply impracticable. If trustees were in fact objecting to every stale claim in this district and across the country, the business of buying stale claims and filing proofs of claim in bankruptcy to collect on them would not be profitable and the practice would likely have ended shortly after it began. Instead, it appears to be a big and prosperous business. See Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine and Extremely Lucrative World of Consumer Debt Collection*, N.Y. Times, August 17, 2014, Magazine. The most likely explanation is that the unenforceable claims are in fact getting paid despite the statutory duties of chapter 13 trustees.

Second, courts holding that *Phillips* does not apply to proofs of claim filed in bankruptcy cases have concluded that debtors in bankruptcy have “much less at stake” than a defendant facing a judgment in state court. See, e.g., *LaGrone*, 525 B.R. at 426-27. They reason that a proof of claim does not result in collection from the debtor personally, but instead seeks a share in total payments available to all of the debtor’s creditors. This is correct in a typical chapter 7 case, in which creditors are paid from the assets in the bankruptcy estate, which is generally limited to assets owned by the debtor on the petition date and does not include the debtor’s post-petition earnings. In chapter 13, however, claims are almost always paid from the debtor’s post-

²In 2014, 19,170 chapter 13 cases were filed in this district.

petition earnings. Thus, real money from the debtor's post-petition income for a period of three to five years is used to pay creditors who file proofs of claim, including creditors like the defendants who routinely file claims that are unenforceable.

While it is true, as the *LaGrone* court noted, that some chapter 13 plans simply pay unsecured creditors a certain amount of the debtor's income, most plans in this district provide for payment of a specified minimum percentage of unsecured claims. Thus, the total amount of allowed unsecured claims directly affects the minimum amount that a debtor must pay to complete his plan. And in many chapter 13 cases, the best interests of creditors test in § 1325(a)(4) and other provisions require debtors to pay a significant percentage, up to 100%, of all unsecured debt. Thus, each allowed unsecured proof of claim can and often does have a real impact on the amount that a debtor must pay under his plan from his post-petition income.

Third, courts distinguishing *Phillips* reason that a debtor would likely have to hire a lawyer to defend himself in a lawsuit, whereas many debtors in bankruptcy are represented by counsel who can advise them about the statute of limitations defense and file an objection to a stale proof of claim. While many chapter 13 debtors have counsel, some counsel are less diligent than others, and a significant number of debtors represent themselves in chapter 13 (10% according to the statistics cited in *LaGrone*). These *pro se* debtors are not likely to understand how to examine the claims register, evaluate a statute of limitations defense, and properly file and serve a claim objection.

Finally, the *LaGrone* court stated that it would be easier and less embarrassing for a *pro se* debtor to file a claim objection in bankruptcy than to raise this defense in a lawsuit outside of bankruptcy. *LaGrone*, 525 B.R. at 427. This court disagrees. For *pro se* debtors who are not

familiar with the legal system or the peculiarities of bankruptcy law and procedure, filing a viable objection to a claim could be very daunting. The undersigned cannot recall a single *pro se* debtor who has managed this feat in 16 years on the bench.

And in at least one respect, the bankruptcy process is more onerous for a debtor than collection litigation because a proof of claim has a presumption of validity that is not afforded to a complaint outside of bankruptcy. In bankruptcy, if a debtor takes no action to object to a claim, it is allowed and will be paid automatically, without further action by the creditor, if estate assets are available to pay claims. 11 U.S.C. § 502(a). Outside of bankruptcy, even if a defendant fails to answer a complaint, the creditor must file a motion for a default judgment, prove up damages to obtain a judgment, and then undertake collection activities to get paid on the judgment. Thus, the process in bankruptcy is easier than collection litigation for *creditors*, not for debtors, which probably explains why some debt buyers affirmatively seek to purchase claims of debtors in bankruptcy. There is no basis for concluding that it is easier or less embarrassing for a *pro se* debtor to challenge a proof of claim in bankruptcy than it is to defend a collection lawsuit outside of bankruptcy. Instead, all the concerns raised in *Phillips* - including the effects of the passage of time and the likelihood that the unsophisticated consumer would not know to assert a statute of limitations defense - are present in bankruptcy cases. *See Crawford*, 758 F.3d at 1259-60 (concluding that the *Phillips* rationale applies in bankruptcy).

None of the four principal rationales relied on in *LaGrone* and other decisions, alone or together, provides sufficient grounds for distinguishing *Phillips* and concluding that filing an unenforceable claim in bankruptcy does not violate the FDCPA. There is no significant difference between filing a collection action in state court and filing a proof of claim in

bankruptcy court that matters for purposes of §§ 1692e and 1692f of the FDCPA. The holding in *Phillips* therefore controls, and the motion to dismiss Count I must be denied.

7. Claim for “Fraud on the Court”

Count II of the complaint is entitled “Fraud on the Court” and contains an odd assortment of allegations that do not state a claim upon which relief can be granted. The complaint first refers to two criminal statutes: 18 U.S.C. §§ 152 and 3571. There is no private right of action available under either provision. See *In re Martin*, 387 B.R. 307, 313 (Bankr. S.D. Ga. 2007); *Heavrin v. Boeing Capital Corp.*, 246 F. Supp. 2d 728, 731 (W.D. Ky. 2003) *aff’d sub nom. Heavrin v. Nelson*, 384 F.3d 199 (6th Cir. 2004). These statutes provide no basis for imposing sanctions on the defendants.

The complaint also seeks relief under Rule 9011 of the Federal Rules of Bankruptcy Procedure. Edwards alleges that the defendants should be sanctioned for filing claims that lacked a basis in law and fact. These allegations also fail to state a claim. Rule 9011(c) permits a court to impose sanctions against a party who violates Rule 9011(b) by filing a document containing factual or legal contentions that are not well grounded in fact or law. Fed. R. Bankr. P 9011(b), (c). Rule 9011(c) specifically provides that a party seeking sanctions must file a motion that “shall be made separately from other motions and requests.” Fed. R. Bankr. P 9011(c)(1)(A). Before filing such a motion, the party seeking sanctions must comply with the safe harbor provision in Rule 9011(c)(1)(A), which requires 21 days notice to the party who filed the challenged document, who can then withdraw or correct the document. Thus, the proper procedure for pursuing sanctions for violation of Rule 9011 is to comply with the safe harbor

provision and then file a separate motion, not an adversary proceeding. The court also notes that, given the split of authority in this circuit and elsewhere discussed above, there is no basis for sanctioning the defendants for filing their proofs of claim in this case in any event.

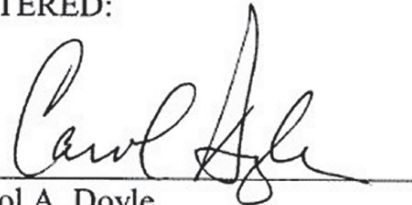
For all of these reasons, Count II fails to state a claim upon which relief can be granted so it will be dismissed.

8. Conclusion

The motion to dismiss the claims in Count I under the FDCPA will be denied. The motion to dismiss the claim in Count II for “Fraud on the Court” will be granted.

Dated: October 6, 2015

ENTERED:

A handwritten signature in black ink, appearing to read "Carol A. Doyle", written over a horizontal line.

Carol A. Doyle
United States Bankruptcy Judge