Claims Litigation in Bankruptcy

Keri L. Wintle, Moderator
Duane Morris LLP; Boston

Hon. Frank J. Bailey
U.S. Bankruptcy Court (D. Mass.); Boston

William S. Gannon
William S. Gannon, PLLC; Manchester, N.H.

Kenneth S. Leonetti
Foley Hoag LLP; Boston

Jessica A. Lewis
Bernstein Shur; Portland, Maine

Fundamentals of Objections to Proofs of Claim

William S. Gannon
William S. Gannon PLLC, Manchester, NH

In chapter 11 cases, debtors and other plan proponents may object to proofs of claim for political and financial reasons. An objection to a proof of claim prevents the creditor from voting on a plan of reorganization subject to the claim being allowed temporarily for voting purposes. 11 U.S.C. § 302(a); Fed. R. Bankr. P. 3018(a). Reducing the allowed amount of claims in a class of creditors to be paid under a plan of reorganization may increase the prospect of confirmation by making such a plan more "feasible" and less expensive. 11 U.S.C. § 1129(a)(11). Although objections to proofs of claim may, and often are, filed after the entry of the order confirming a plan, debtors may want to consider filing meritorious objections to key claims shortly after the approval of the disclosure statement.

A. Proofs of Claim and Undisputed Scheduled Claims Presumptively Valid

Proofs of claim and claims that are not described as contingent, disputed or unliquidated on the debtor's schedules of liabilities are presumptively valid. Fed. R. Bankr. P. 3001(f) and 3003(b)(1) ("The schedule of liabilities filed pursuant to § 521 of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent or unliquidated."). A proof of claim that satisfies the "filing and documentary requirements of [Rule] 3001 and Official Form 10 'constitute[s] prima facie evidence of the validity and amount of the claim.'" *In re King*, 2010 LEXIS 3830, at *5 (Bankr. E.D.N.Y. Oct. 20, 2010). "Once . . . filed under section 501," a proof of claim is deemed allowed, unless a party in interest objects." 11 U.S.C. § 502(a).

B. Objections to Claims

Rule 3007 governs objections to claims. The Rule requires the debtor or a creditor or

party in interest with standing to object to a claim to file a written "objection to the allowance of a claim" with the court. Fed. R. Bankr. P. 3007(a). "A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing." *Id.* The objection may not include a demand for relief of a kind specified in Rule 7001, but a complaint filed against the creditor may include an objection to a claim asserted by the creditor. Fed. R. Bankr. P. 3007(b). Except for "omnibus objections" permitted by Rule 3007(d) and (e), "objections to more than one claim shall not be joined in a single objection," unless authorized by the court. Fed. R. Bankr. P. 3007(c).

In limited circumstances, Rule 3007(e) permits the filing of so-called "omnibus objections," in which "objections to more than one claim may be joined . . . if all the claims were filed by the same" creditor. Fed. R. Bankr. P. 3007(d). Omnibus objections may also be filed to dispute claims because they: (1) "duplicate other claims;" (2) "have been filed in the wrong case;" (3) are "amended by subsequently filed proofs of claim;" (4) "were not timely filed;" (5) "have been satisfied or released during the case in accordance with the Code, applicable rules or court order;" (6) "were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;" (7) "are interests, rather than claims; or" (8) "assert priority in an amount that exceeds the maximum amount under § 507 of the Code." *Id.*

Subsection (e) lays out the special requirements for omnibus objections which, among other things, (1) requires a notice "in a conspicuous place that claimants receiving the objection should look for their names and claim in the objection;" (2) requires that claimants be listed "alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by

category of claims;" and (3) limits the number of objections to "no more than 100 claims." *Id.*

C. Objection Content and Resolution Procedure

The Bankruptcy Rules say nothing about the content of a claim objection. A proof of claim and a schedule of liabilities are executed under oath. An objection to claim need not be verified or supported by a declaration. Local Rule 3007-1 of the Bankruptcy Court for the District of Massachusetts compels an objecting party to "state in the objection, with particularity, the factual and legal grounds for the objection." The District of Puerto Rico has the same rule. Although the Districts of Maine, New Hampshire and Rhode Island Bankruptcy Courts do not have a similar local rule, objecting parties should follow the Massachusetts Rule as a matter of good practice.

The objecting party has the burden "to produce evidence to rebut the claimant's prima facie [claim]." *In re Colonial Bakery, Inc.*, 108 B.R. 13, 15 (Bankr. D.R.I. 1989). "[O]nce the objecting party produces such rebuttal evidence, the burden shifts back to the claimant" and the claimant must "produce additional evidence to 'prove the validity of the claim by a preponderance of the evidence.' The ultimate burden of proof always rests upon the claimant." *Id.* (*citing In re Circle J. Dairy, Inc.,* 92 B.R. 832 (Bankr. W.D. Ark. 1988)).

In the First Circuit, "an objection must have substantial merit to overcome the presumption" that the creditor holds a valid claim in the amount claimed in the proof of claim or the schedule of liabilities. *In re Hemingway Transport, Inc.*, 993 F.2d 915, 925 (1st Cir. 1993) ("The interposition of an objection does not deprive the proof of claim of presumptive validity unless the objection is supported by substantial evidence").[1] The objector "has the burden of going forward with equivalent probative evidence to rebut the presumption of validity and

[1] *Notinger v. Auto Shine Car Wash Systems, Inc. (In re Campano)*, 293 B.R. 281, 285 (D.N.H. 2003) (*quoting United States v. Clifford (In re Clifford)*, 255 B.R. 258, 262 (D. Mass. 2000).

amount." *In re Patchell*, 344 B.R. 8, 12 (Bankr. D. Mass. 2006). "Probative" means "testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason cooperating as coordinating factors." *Johnson v. Inter-Southern Life Ins. Co.*, 50 S.W.2d 16 (Ky. 1932). In the Second and Third Circuits, an objecting party must "produce evidence equal in force to the *prima facie* case which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." *In re Oneida, Ltd.*, 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009) (internal citations omitted); *accord In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992). If the objecting party does not provide "probative evidence of equal force," the objection must be overruled because it cannot overcome the Rule 3001(f) presumption. *In re Cluff*, 313 B.R. 323, 343 (Bankr. D. Utah 2004). Unless the "objector, introduces evidence as to the invalidity of the claim or the excessiveness of its amount, the claimant need offer no further proof of the merits of the claim." Collier on Bankruptcy P 502.02[f] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

The filing of a claim objection commences a contested matter governed by Rule 9014 and requires that the claimant be given "reasonable notice and [an] opportunity for hearing." Fed. R. Bankr. P. 9014(a). Courts have "the discretion to decide an issue without holding an evidentiary hearing." *Rockstone Capital LLC v. Metal*, 508 B.R. 552, 558 (E.D.N.Y. 2014) (citations omitted); *see also Munce's Superior Petroleum Prods., Inc. v. N.H. Dep't of Envtl. Servs.*, 490 B.R. 5, 7 (D.N.H. 2013). "A bankruptcy judge 'does not abuse her discretion in reaching a decision without holding an evidentiary hearing where the record provided ample evidence on which the court could make such a decision.'" *In re Garcia*, 532 B.R. 173, 182 (B.A.P. 1st Cir. 2015) (*quoting Rockstone Capital*, 508 B.R. at 559).

The fact that the contested matter begins with a motion has led to the practice of using

affidavits and declarations to put "evidence" into the record, which permits the creation of a broad record without discovery or a formal evidentiary hearing. *See* Fed. R. Civ. P. 43(c). Although a claimant need not file a response to a claim objection, the claimant may want to file a response to identify a core issue of fact that requires an evidentiary hearing. *See In re Caviata Attached Homes, LLC*, 481 B.R. 34, 44-46 (9th Cir. BAP 2012) ("Where the . . . core facts are not disputed, the bankruptcy court is authorized to determine contested matters . . . on the pleadings and arguments of the parties, drawing necessary inferences from the record").

Rule 9014 automatically incorporates many of the Rules applicable to adversary proceedings.[2] Fed. R. Bankr. P. 9014(c). Rule 7012 is not available to a claimant and neither party to the contested matter must make the mandatory disclosures required by Rule 7026(a)(1), (2) and (3), unless so ordered by the court. The procedures for discovery set forth in Rules 7028 through 7037, however, are available to the parties. As a result, the objecting party and the claimant may obtain the necessary evidence from the other party.

D. Conclusion

The claims objection process is governed by the Code and the Rules. It is straightforward. Although mediation and arbitration proceedings have been employed in large cases for efficiency, the use of alternative dispute resolution procedures seems to be unusual at this time.

[2] Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). Fed. R. Bankr. P. 9014(c).

Fair Debt Collection Practices Act and the Claims Adjudication Process

Jessica Lewis
Bernstein Shur, Portland, ME

For years, courts have been split on the issue of whether, and under what circumstances, the Bankruptcy Code precludes actions under the Fair Debt Collection Practices Act (the "FDCPA"). Currently, the question of whether the filing of a time-barred, inaccurate or misleading proof of claim may give rise to liability under the FDCPA is unsettled in the First Circuit; but that may soon change. As discussed in greater detail below, an order by the United States Bankruptcy Court for the District of Maine dismissing an FDCPA claim premised on the filing of time-barred proofs of claim is currently on appeal. *See Martel v. LVNV Funding, LLC (In re Martel)*, 539 B.R. 192 (Bankr. D. Me. 2015).

A. The Current State of the Law with Respect to the Intersection of the Bankruptcy Code and the FDCPA

Several key decisions have issued from various jurisdictions analyzing when, if ever, an FDCPA claim may arise in the bankruptcy context. Although many of these cases relate to alleged violations of the automatic stay or the discharge injunction, a brief review of the rationales adopted by these courts is instructive and reveals nuanced arguments which inform the discussion concerning time-barred, inaccurate and misleading proofs of claim.

1. The Ninth Circuit

The United States Court of Appeals for the Ninth Circuit was the first Circuit Court of Appeals to weigh in on the issue of the Bankruptcy Code, the FDCPA and repeal by implication. The debtor in *Walls* brought a class action on behalf of chapter 7 debtors against Wells Fargo seeking enforcement of the discharge injunction under 11 U.S.C. § 542 and asserting a claim under the FDCPA. The claims were premised upon Wells Fargo's alleged attempts to collect on

discharged debts. The Court initially determined that no private right of action exists under 11 U.S.C. § 542; rather, civil contempt is the appropriate remedy for a discharge injunction violation. The Court then turned to the question of whether the debtor could assert a claim under the FDCPA and held that she could not:

> The Bankruptcy Code provides its own remedy for violating § 524, civil contempt under § 105. To permit a simultaneous claim under the FDCPA would allow through the back door what Walls cannot accomplish through the front door -- a private right of action. This would circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating the discharge injunction to contempt. "[A] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code . . . demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." Nothing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nonetheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code.

Walls, 276 F.3d at 510 (*quoting MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996) (finding state law malicious prosecution claims based on bankruptcy filings preempted)). Most subsequent decisions, including many of the decisions discussed below, interpret the *Walls* decision to mean that the Bankruptcy Code generally precludes a simultaneous claim under the FDCPA.

The Bankruptcy Appellate Panel for the Ninth Circuit later held that a proof of claim can never give rise to a claim under the FDCPA. *See B-Real, LLC v. Chaussee (In re Chaussee)*, 399 B.R. 225 (B.A.P. 9th Cir. 2008). The debtor in *B-Real* filed an adversary proceeding alleging that collector creditor had violated the Washington Consumer Protection Act (the "CPA") and the FDCPA by filing two proofs of claims with respect to debts barred by the statute of limitations. After the complaint had been filed, the debtor objected to the proofs of claim and the objections were sustained. In its decision reversing the bankruptcy court's order denying the

creditor's motion to dismiss, the Ninth Circuit BAP pointed to *Walls* and *MSR Exploration* and held that the reasoning set forth in those decisions—*i.e.* that the Bankruptcy Code is "a 'whole system' designed to comprehensively define all rights and remedies of debtors and creditors"—was equally applicable to a determination as to preclusion of an FDCPA claim under the facts then before the BAP. *B-Real*, 399 B.R. at 236.

The BAP then went on to analyze the debt validation process established in 15 U.S.C. § 1692g and determined that those procedures were in direct conflict with the bankruptcy claims adjudication process:

> Attempting to reconcile the debt validation procedure contemplated by FDCPA with the claims objection process under the Code results in the sort of confusion and conflicts that persuades us that Congress intended that FDCPA be precluded in the context of bankruptcy cases. We fail to understand how B-Real could comply with FDCPA § 1692g and its various notice and information requirements because those provisions conflict with the Code and Rules. Yet, if Debtor is correct, presumably debt collectors must comply with all provisions of FDCPA when attempting to collect debts in bankruptcy cases. We think avoiding this sort of disorder provides a solid basis for application of the Ninth Circuit's reasoning in *MSR Exploration* and *Walls*. Whatever shortcomings the Seventh Circuit in *Randolph* perceived in the Ninth Circuit's analysis, they are unpersuasive when viewed under our facts.

Id. at 239. Finding that the Bankruptcy Code and Bankruptcy Rules provide sufficient remedies in the face of abusive proofs of claim, the BAP held that the debtor's FDCPA claim was precluded.

2. The Seventh Circuit

While the Ninth Circuit appears to have ruled that the Bankruptcy Code generally precludes claims under the FDCPA, the Seventh Circuit has held that 11 U.S.C. § 362 does not preclude a claim under FDCPA relating to a debt collector's attempts to collect a debt while the automatic stay is in effect. *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). In *Randolph*,

the Seventh Circuit began by distinguishing preemption from repeal by implication and noting that "repeal by implication is a rare bird indeed." *Id.* at 730.

> It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replaces the other. Preemption is more readily inferred, so decisions such as *Cox v. Zale* -- which held that bankruptcy principles come from federal rather than state law -- are not informative about which federal laws apply to what transactions. The district court did not find any clearly expressed decision that the Bankruptcy Code displaces the FDCPA, and the debt collectors do not contend that Congress made such a decision. The argument, rather, is one based on the operational differences between the statutes. These do not, however, add up to irreconcilable conflict; instead the two statutes overlap, and if the plaintiff shows a more serious transgression -- the willful violation to which § 362(h) refers -- then more substantial sanctions (such as punitive damages) are available. It is easy to enforce both statutes, and any debt collector can comply with both simultaneously.

Id. The Seventh Circuit provided a table comparing the various elements of a claim under 11 U.S.C. § 362 and a claim under the FDCPA. Finding none of those elements to be in conflict, the Court held that FDCPA claim is not precluded.

3. The Second Circuit

In 2005, the United States Court of Appeals for the Second Circuit heard an appeal by a pro se debtor of an order issued by the United States District Court for the Eastern District of New York dismissing the debtor's action for damages under the Bankruptcy Code and the FDCPA arising from a creditor's attempt to collect on a discharged debt. *See Yaghobi v. Robinson*, 145 Fed.Appx. 697 (2d Cir. 2005). The Second Circuit affirmed the District Court order, holding that where a debtor believes a creditor is acting in violation of 11 U.S.C. § 524, the debtor should seek relief in the first instance in the bankruptcy court. *Id.* at 699. However, the Court reserved for another day whether debtors in bankruptcy can ever maintain FDCPA and state law unfair debt collection claims based on violation of the Bankruptcy Code. *Id.*

Five years later, the Second Circuit revisited the FDCPA issue when debtors appealed an order dismissing their putative class action asserting a claim under the FDCPA relating to an

allegedly inflated proof of claim. *Simmons v. Roundup, LLC*, 622 F.3d 93 (2d Cir. 2010). The Court affirmed the order dismissing the case, agreeing with federal courts that had "consistently" ruled that filing a proof of claim—even an invalid proof of claim—cannot form the basis for an FDCPA action. *Id.* at 95. The Court found that the FDCPA is designed to protect defenseless debtors but "[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by a bankruptcy itself." *Id.* at 96. The Bankruptcy Code provides adequate remedies to combat fraudulent proofs of claim and debtors should not be permitted to circumvent those procedural safeguards for the purpose of "asserting potentially more lucrative claims under the FDCPA." *Id.*

Notwithstanding its decision in *Simmons*, the Second Circuit has not followed suit with the Ninth Circuit's apparent holding that the Bankruptcy Code generally precludes *all* FDCPA claims. In a relatively recent decision, the Court reversed an order dismissing FDCPA claims premised upon a debt collector's attempts to collect a discharged debt. *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86 (2d Cir. 2016). Relying, in part, on *Randolph*, the Court explicitly held that "the Bankruptcy Code does not broadly repeal the FDCPA for purposes of FDCPA claims based on conduct that would constitute alleged violations of the discharge injunction." *Id.* at 91. Contrary to the Seventh Circuit, however, pre-discharge conduct does not give rise to an FDCPA claim in the Second Circuit.

4. The Third Circuit

The United States Court of Appeals for the Third Circuit adopted the rationale in *Randolph* when that Court affirmed in part, and reversed in part, an order dismissing a debtor's district court FDCPA action premised upon correspondence and subpoenas served on the debtor during the pendency of the debtor's bankruptcy case. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013). Noting the split in authority, the Court held that no categorical

preclusion exists and, therefore, that "The proper inquiry is whether the FDCPA claim raises a direct conflict between the Code or Rules and the FDCPA, or whether both can be enforced." *Id.* at 274.

Having found that the Bankruptcy Code does not categorically preclude FDCPA claims, the Court turned to the debtor's allegations that the debt collector's failure to comply with subpoena rules violated the FDCPA which prohibits a debt collector from making a threat to take action that cannot legally be taken. The Court rejected the debt collector's argument that the Bankruptcy Rules and the Federal Rules of Civil Procedure provide sufficient remedies to protect the debtor. *Id.* at 279.

> No conflict exists between these Bankruptcy Code or Rule obligations and the obligations the Simons seek to impose under the FDCPA. A creditor may comply with the obligations of Bankruptcy Rule 9016 and Civil Rule 45 on the one hand and with the FDCPA on the other. Nor is there a conflict between the remedies for noncompliance available in a bankruptcy court and the remedies available under the FDCPA. The fact that the bankruptcy court has other means to enforce compliance with the subpoena rules does not conflict with finding liability or awarding damages under the FDCPA for violations based on a debt collector's failure to comply with the subpoena rules. As a result, we reverse the dismissal of the Simons' remaining FDCPA claims under § 1692e(5) and (13).

Id.

The Court did, however, affirm the dismissal of the debtor's claim under 15 U.S.C. § 1692e(11), which requires a communication by a debt collector to disclose that the communication is being sent by a debt collector attempting to collect a debt. *Id.* at 279-280. The Court held that 11 U.S.C. § 362(a)(6) is in direct conflict with 15 U.S.C. § 1692e(11) and, therefore, the Bankruptcy Code precludes an action under the FDCPA with respect to that particular requirement. *Id.* at 280.

5. The Eleventh Circuit

In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the United States Circuit Court of Appeals for the Eleventh Circuit further muddied the FDCPA waters when it held that the filing of a time-barred proof of claim constitutes an effort to obtain payment by a legal proceeding, within the meaning of the FDCPA and, further, that the filing of an expired claim is misleading and unfair. *Crawford*, 758 at 1261-62. At first blush, the *Crawford* case seems to be the first Circuit Court-level decision explicitly holding that an FDCPA claim premised on the filing of a proof of claim is not precluded by the Bankruptcy Code. However, footnote seven provides an important disclaimer to the entire decision:

> The Court also declines to weigh in on a topic the district court artfully dodged: Whether the Code "preempts" the FDCPA when creditors misbehave in bankruptcy. Some circuits hold that the Bankruptcy Code displaces the FDCPA in the bankruptcy context. In any event, we need not address this issue because LVNV argues only that its conduct does not fall under the FDCPA or, alternatively, did not offend the FDCPA's prohibitions. LVNV does not contend that the Bankruptcy Code displaces or "preempts" §§ 1692e and 1692f of the FDCPA.

Id. at n.7 (internal citations omitted). Accordingly, *Crawford* does not actually address the issue of whether the Bankruptcy Code precludes an FDCPA claim arising from the filing of a proof of claim.

6. The Eighth Circuit

In a post-*Crawford* decision, the United States Bankruptcy Appellate Panel for the Eighth Circuit affirmed summary judgment on an FDCPA claim arising out of the filing of a time-barred claim. *Gatewood v. CP Medical, LLC (In re Gatewood)*, 533 B.R. 905 (B.A.P. 8th Cir. 2015). The Court's decision was premised upon its finding that the debtors had listed in their schedules the very debt which was the subject of the proof of claim and that the creditor had filed a facially accurate proof of claim. The Court further held that "[t]here is nothing improper about

attempting to collect on a time-barred debt since the debt remains." *Id.* at 910. The Court did, however, state that it found "compelling" an analysis extracted from *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, 532 B.R. 60, 75 (Bankr. M.D. Tenn. 2015):

> Using an unnecessarily sweeping interpretation of the FDCPA to find even an accurate proof of claim, albeit on a stale debt, to be a violation of the FDCPA runs counter to the Supreme Court's 'cardinal principle of construction' to give effect to both laws. However, finding that the bankruptcy claims process is so contradictory to the FDCPA protections that the FDCPA must be essentially ignored in every bankruptcy situation likewise violates that important principle.
>
> Thus, this Court rejects the holding in *Crawford* and finds that not every filing of a proof of claim on a stale claim is automatically a violation of the FDCPA. However, going to the other extreme and finding, as *Simmons* did, that the laws are so inconsistent that the FDCPA can never be applied in the bankruptcy claims setting would be just as contrary to the goal of making the two laws work together to the extent possible.

In re Gatewood, 533 B.R. at 909-10 (*quoting In re Broadrick*, 532 B.R. at 75). The reference to the *Broadrick* decision is *dicta* but seems to leave open the possibility that the Court would consider an FDCPA claim if a proof of claim fraudulently misrepresented a debt.

B. The Current State of the Law in the First Circuit

In a case out of Rhode Island, former debtors brought suit against a creditor for alleged violations of the Bankruptcy Code and the FDCPA stemming from post-discharge redemption agreements offered by the creditor, which held a security interest in certain household goods. *Arruda v. Sears, Roebuck & Company*, 273 B.R. 332 (D.R.I. 2002). The Court first held that the post-discharge reaffirmation did not constitute an act to collect a debt but, rather, constituted an *in rem* action, such that the Bankruptcy Code was not implicated. *Id.* at 344-345. The Court then went on to address the FDCPA claims. In its analysis of those claims, the Court rejected the defendant's argument that the debtors were precluded from bringing FDCPA claims because they were bound by the remedies afforded them by the Bankruptcy Code. *Id.* at 349.

> As discussed above, the redemption agreements do not violate the Bankruptcy Code, therefore a possible FDCPA action cannot be limited by a non-existent Bankruptcy Code remedy. Additionally, as this Court held in *McGlynn*, an FDCPA claim regarding post-discharge conduct that does not impact in any way the bankruptcy estate does not fall under Title 11's jurisdiction umbrella. *See McGlynn v. Credit Store, Inc.*, 234 B.R. 576, 584 (D.R.I. 1999). Because any remedies gained under the FDCPA inure to the plaintiff and not to the bankruptcy estate, they are separate actions. *See id.*

Arruda, 273 B.R. at 349-50. The Court ultimately held that the FDCPA claims failed because that statute is limited to actions to recover a debt that is an obligation for money and the creditor in this case had issued a demand for goods. Nonetheless, the claims were not found to be precluded by the Bankruptcy Code. On appeal, the First Circuit affirmed the District Court's finding that the creditor's actions did not constitute a demand to pay a "debt" within the meaning of the FDCPA but the issue of preclusion apparently was not raised. *See Arruda v. Sears, Roebuck & Company*, 310 F.3d 13 (1st Cir. 2002).

In another case in this Circuit, a debtor asserted numerous claims against law firms representing a mortgagee, including claims under the Real Estate Settlement Procedures Act ("RESPA") and the FDCPA. *Holland v. EMC Mortgage (In re Holland)*, 374 B.R. 409 (Bankr. D. Mass. 2007). The United States Bankruptcy Court for the District of Massachusetts dismissed the FDCPA claims for failure to satisfy the *Bell Atlantic* plausibility standard and without addressing whether the FDCPA claim would have been precluded. The Court, did, however, consider whether the Bankruptcy Code implicitly repeals RESPA. In that discussion the Court appeared to adopt the *Randolph* approach in ultimately determining that the RESPA claims are not precluded by the Bankruptcy Code. *Id.* at 443-444.

The first court within the First Circuit to consider whether time-barred claims give rise to FDCPA liability was the United States Bankruptcy Court for the District of Massachusetts. *Claudio v. LVNV Funding, LLC (In re Claudio)*, 463 B.R. 190 (Bankr. D. Mass. 2012). Without

filing a claim objection, the debtor in *Claudio* brought suit alleging that the creditor violated the FDCPA by filing proofs of claim on a time-barred debt. The Court cited a long line of cases holding that the mere filing of a proof of claim does not give rise to an FDCPA claim and distinguished *Randolph* because it arose out of violations of the discharge injunction. *Id.* at 193-94. The Court went on to hold that, even if the FDCPA did apply, the claim would fail because a stale claim—although unenforceable—continues to be a valid claim. *Id.* at 196.

In still another case out of this Circuit, a debtor filed suit alleging violations of the automatic stay and the FDCPA arising from a debt collector's inadvertent filing of a document in a Puerto Rican court post-petition and without relief from stay. *Gonzalez-Arroyo v. Operating Partners Co. LLC*, 527 B.R. 844 (Bankr. D.P.R. 2015). The Court granted summary judgment in favor of the defendant on the FDCPA claim.

> In the instant case, the court finds that remedies under the FDCPA are available in bankruptcy when Debtors have no other remedies for damages under the Bankruptcy Code for the same actions. The court follows the reasoning in *Simmons v. Roundup Funding, LLC*: "[t]he FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors . . . [t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." 622 F.3d at 96. Therefore, the court concludes that the remedies afforded by the Bankruptcy Code to recover damages under 11 U.S.C. § 362(k)(1) precludes further damages under the FDCPA. In reaching such conclusion, the court weighs that the Plaintiffs' allegations under the FDCPA were the same as the ones averred for the violation of the automatic stay. Simply put, without the violation of the automatic stay, the Plaintiffs would not have an FDCPA claim. Hence, allowing such FDCPA remedies in addition to those in 11 U.S.C. § 362(k) would allow Plaintiffs to obtain damages from two different sources for the same violation.

Id. at 864-865.

More recently, the United States Bankruptcy Court for the District of Maine held in *Martel* that the filing of a time-barred proof of claim does not give rise to a claim under the FDCPA. In its decision, the Court rejected the argument that the Bankruptcy Code implicitly

repeals the FDCPA, holding instead that the "Code and the FDCPA are not irreconcilable and creditors are under the obligation to follow both." *Id.* at 198. Nonetheless, the Court dismissed the FDCPA claim on the grounds that the filing of a time-barred claim does not, in itself, violate the FDCPA because "[s]tatutes of limitation do not extinguish debts, but bar actions to collect once raised." *Id.* at 197. Following the *Martel* decision, the question of whether a proof of claim could ever give rise to an FDCPA claim is still an open one in Maine.

The debtor and creditor in *Martel* have jointly petitioned for a direct appeal to the United States Court of Appeal for the First Circuit. *See Martel v. LVNV Funding, LLC*, Court of Appeals Docket No. 15-2489. The debtor is presenting the narrower question of whether the filing of a proof of claim based on a time-barred debt violates the FDCPA, Maine's FDCPA and/or the Bankruptcy Code. The creditor, however, is appealing the Bankruptcy Court's broader holding that FDCPA is not implicitly repealed by, and Maine's FDCPA is not preempted by, the Bankruptcy Code. The petition for direct appeal had not been decided as of the date on which these materials were completed.

C. Conclusion

The case law on implicit repeal of the FDCPA varies widely from jurisdiction to jurisdiction but the appeal in *Martel* may provide greater clarity within the First Circuit. Pending a decision in that appeal, the question of whether an FDCPA claim can ever arise in a bankruptcy case depends both on the jurisdiction and the nature of the claim (*i.e.*, proof of claim, automatic stay violation or discharge injunction violation).

Claims Estimation: A Comparison of Estimation Under Section 502(c) and Temporary Allowance Under Rule 3018(a)

Kenneth Leonetti
Foley Hoag LLP, Boston, MA

Keri L. Wintle
Duane Morris LLP, Boston, MA

The Bankruptcy Code and Rules contemplate two instances in which a creditor's filed claim may have an impact on the estate without being fully "allowed" or "disallowed"—temporary allowance of a claim under Federal Rule of Bankruptcy Procedure 3018(a) and estimation of a claim under Section 502(c) of the Code. While similar in concept, there are material differences between temporary allowance and estimation.

One key difference is the purpose of the proceeding. Temporary allowance of a claim is precisely as its name implies, a creditor's claim is "temporarily" allowed for the limited purpose of voting on a plan of reorganization. In contrast, estimation under section 502 can be used to determine plan feasibility or the amount of distribution to creditors, among other purposes. Another key difference is the consequence of the proceeding. The parties are not bound by the court's determination of the amount of a temporarily allowed claim beyond the plan election. In contrast, the outcome of estimation can have a less ephemeral impact.

A. Temporary Allowance

Rule 3018 is the operative provision governing temporary allowance. It provides that the bankruptcy court "may temporarily allow" a claim "in an amount which the court deems proper for the purpose of accepting or rejecting a plan[,]" under the voting provisions of section 1126.

A creditor whose claim is subject to a pending objection will not have its vote counted unless such claim is temporarily allowed under Rule 3018(a). *See, e.g., In Jacksonville Airport*,

434 F.3d 729, 732 (4th Cir. 2006) ("As long as a party in interest objects to a claim -- regardless of the objection's validity or merit -- the claim cannot be deemed allowed.").

At least one court has held that the mere filing of an objection will not necessarily disenfranchise a creditor. *See, In re Goldstein*, 114 B.R. 430, 432 (Bankr. S.D.N.Y. 1990) ("[I]t seems unfair to allow a debtor to disenfranchise . . . a creditor from voting . . . by its unilateral act of filing an objection to the creditor's proof of claim."). The court in *Goldstein*, however, appeared influenced by the fact that the debtor had objected to the claim of his largest creditor on the eve of the confirmation hearing (also "[n]oting that [the creditor]'s potential valid, negative vote is the only impediment to confirmation"), and that the claim objection would not be heard until after confirmation. *Id.* at 434. The court refused to disallow the claim for voting purposes and reached a Solomonic solution: move the confirmation hearing to after the hearing on objection. Given the unique facts of *Goldstein*, prudence would dictate that a creditor whose claim is subject to an objection file a motion for temporary allowance.

Bankruptcy courts have broad discretion over the process used for temporary allowance. *See In re Armstrong*, 294 B.R. 344, 354 (B.A.P. 10th Cir. 2003) ("There is no guidance in the Bankruptcy Code to courts as to how to determine whether to permit the temporary allowance of a claim; it is left to a court's discretion"); *In re Harmony Holdings, LLC*, 395 B.R. 350, 354 (Bankr. D.S.C. 2008). At the same time, bankruptcy courts have identified a list of three nonexclusive circumstances under which temporary allowance is generally appropriate: (1) when an objection to claim is filed too late to be heard prior to the confirmation hearing; (2) when fully hearing the objection would delay administration of the case, or (3) when the objection is frivolous or of questionable merit. *In re Armstrong*, 294 B.R. at 354 (internal citations omitted); *In re Zolner*, 173 B.R. 629 (Bankr. N.D. Ill. 1994), *aff'd*, 249 B.R. 287 (N.D. Ill. 2000).

Both the first and second scenarios are typically present in the mania that precedes confirmation of a chapter 11 plan. Debtor's counsel and other estate professionals are often occupied with the various issues attendant to confirmation, including negotiating with plan sponsors, undertaking feasibility analyses, addressing potential plan objections, assembling the post-confirmation structure of the debtor (such as selection of new officers and directors, attending to the capitalization structure and drafting of new corporate documents) and preparing the confirmation order. In addition to relieving the debtor from the burdens of litigating a claim objection, temporary allowance removes some of the incentives that might otherwise engender unnecessary objections. *See In re Armstrong,* 294 B.R. at 354 ("The policy behind temporarily allowing claims is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors."). Thus, temporary allowance prevents the unfair disenfranchisement of creditors while conserving estate resources that would otherwise be spent on claims litigation that may ultimately become moot.

B. Estimation Under Section 502(c)

Unlike temporary allowance, claims estimation under section 502(c) is utilized for a variety of purposes, including, but not limited to: (1) determining voting rights on a plan;[1] (2) gauging plan feasibility;[2] (3) determining the aggregate amount of a related series of claims;[3] or (4) setting claim distribution reserves.[4] Estimation "provides a means for a bankruptcy court to achieve reorganization, and/or distributions on claims, without awaiting the results of legal proceedings that could take a very long time to determine." *In re Chemtura*, 448 B.R. at 648.

---

[1] *In re Ralph Lauren Womenswear, Inc.,* 197 B.R. 771 (Bankr. S.D.N.Y. 1996).

[2] *In re Adelphia Business Solutions*, 341 B.R. 415, 424 (Bankr. S.D.N.Y. 2003).

[3] *See In re General Motors Corp.*, Ch. 11 Case No. 09-50026, ECF No. 7782 (Bankr. S.D.N.Y. Nov. 15, 2010).

[4] *In re Chemtura Corp.*, 448 B.R. 635 (S.D.N.Y. 2011).

There is no guidance in either the Code or Rules as to the procedure to be used for estimation. Bankruptcy courts have broad discretion over the process. *See In re Ralph Lauren Womenswear*, 197 B.R. 771 (The "method for estimating a claim . . . is therefore committed to the reasonable discretion of the court, which should employ whatever method is best suited to the circumstances of the case."). Courts have employed a wide variety of proceedings on estimation, including summary trials and full evidentiary hearings. *See In re Chemtura*, 448 B.R. at 648.

The analytical methods employed by bankruptcy courts are equally diverse. Some courts have proceeded on an "all or nothing" basis, awarding the full value of the claim if the claimant proves its claim by a preponderance of the evidence, and awarding zero if the claimant fails to meet this burden. S*ee Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 135 (3d Cir. 1982). The majority of courts reject this approach, choosing instead to estimate the value of a claim based on the probability of the success of various potential outcomes if decided on the merits. *See In re Chemtura*, 448 B.R. at 650-51 (collecting cases). Under this approach, the court assesses the range of outcomes, assigns a weight to each outcome and determines the estimated value by "multiplying a number of possible recovery values by the probability of their occurrence and taking the sum of these products." *In re Windsor Plumbing Supply Co.*, 170 B.R. 503, 521 (E.D.N.Y. 1994). Whatever the chosen method, the court is "bound by the legal rules which govern the ultimate value of the claim." *Bittner v. Borne Chem.*, 691 F.2d at 135 ("For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law.").

The following chart is a practical guide that summarizes the key distinctions between temporary allowance and estimation, with specific examples of how courts have applied both Section 502(c) and Rule 3018(a).

	TEMPORARY ALLOWANCE	CLAIMS ESTIMATION
Authority	• Fed. R. Bankr. P. 3018(a), which provides that "the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." • 28 U.S.C. § 157(b)(2)(B) provides that "estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13" is a core proceeding.	• 11 U.S.C. § 502(c) provides that the following "shall be estimated for purpose of allowance under this section— (1) any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance." • 28 U.S.C. § 157(b)(2)(B) provides that "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution" is not a core proceeding.
Purpose	• *Temporary* allowance of a claim for the sole purpose of determining a creditor's voting rights with respect to a plan of reorganization. • Section 1126(a) provides that only a claimant whose claim "is allowed under section 502 of this title may accept or reject a plan," and section 502(a) provides that "a claim . . . proof of which is filed under section 501 of this title, is deemed allowed unless a party in interest . . . objects," thus, a creditor whose proof of claim has been objected to is disenfranchised from voting on a plan.	• Procedure for fixing the amount of contingent or unliquidated claims for distribution. *In re Kivler*, 2009 Bankr. LEXIS 1461, *3 (June 3, 2009) ("[P]ractical purpose . . . is to enable courts to reduce claims to dollar amounts without holding up distribution to all creditors until lawsuits can be completed."). • May be used to establish total amount to be held in reserve for claims distribution. *In re Chemtura Corp.*, 448 B.R. at 648. • May be used as alternative to granting relief from automatic stay to allow litigation on unliquidated claim to continue, if litigation would unnecessarily delay case administration. *In re Choice ATM Enters., Inc.*, 2015 Bankr. LEXIS 689 (Bankr. N.D. Tex. Mar. 4, 2015). • May be used to gauge feasibility of chapter 11 plan. *In re Adelphia Bus. Solutions*, 341 B.R. at 424.

	TEMPORARY ALLOWANCE	CLAIMS ESTIMATION
How Initiated	• By motion pursuant to Rule 9013.	• By motion pursuant to Rule 9013.
Who May Initiate	• Typically utilized by creditors to avoid being disenfranchised from voting on a plan by a pending objection to their claim. • Rule 3018(a) is "a tool which the court or any party can invoke to expedite confirmation when numerous objection to claims cloud the issue of a creditors' right to vote." *In re Goldstein*, 114 B.R. at 434. • Debtor may initiate to facilitate settlement with creditor of claim prior to confirmation process. *In re FRG, Inc.*, 121 B.R. 451 (Bankr. E.D. Pa. 1990).	• By debtor or other party in interest. • Some courts have found they have an affirmative obligation to estimate a claim if resolution would unduly delay closing of estate. *In re Lane*, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) ("This duty of the bankruptcy court is mandatory, since the language if the . . . section states 'shall.'").
Timing	• Neither the Bankruptcy Code, nor the Rules, provide time limit for filing a motion for temporary allowance. • Temporary allowance should be sought soon after an objection has been made to a creditor's proof of claim if creditor intends to vote on plan of reorganization. *In re Jacksonville Airport*, 434 F.3d at 729. If claimant delays, court may perceive that there was sufficient time to resolve the objection and decline to temporarily allow the claim. *See* Collier on Bankruptcy P 3018.01[5].	• Courts have wide discretion over the time and manner for estimation of a claim. • The process of estimation could benefit the creditor because it will likely be quicker and, therefore, cheaper than litigation.
Burdens of Proof	• Allocation of burdens of proofs in estimation process is the "same as in deciding objection to proofs of claim." *In re FRG*, 121 B.R. at 456.	• Left to the broad discretion of the bankruptcy court.

	TEMPORARY ALLOWANCE	CLAIMS ESTIMATION
	• Objecting party required to present evidence supporting its objection and then burden shifts to claimant; claimant has burden to prove all elements of claim by a preponderance of the evidence. *In re Stone Hedge Properties*, 191 B.R. 59, 64 (Bankr. M.D. Pa. 1995). • In "summary proceeding," creditor only required to demonstrate that it has a "colorable claim." *In re Armstrong*, 294 B.R. at 354.	• Some courts have estimated claims "according to their ultimate merits" and assigned a value of zero if not proven by a preponderance of the evidence. *Bittner v. Borne Chem. Co.*, 691 F.2d at 136.
Specific Circumstances	• When litigation on the objection to claim would unduly delay the chapter 11 case • When objection to claim is frivolous, or without or of questionable merit • Bankruptcy courts may temporarily allow a claim based on a state court judgment, the merits of which may be barred from examination by bankruptcy court under the *Rooker-Feldman* doctrine. *In re Clements*, 2013 Bankr. LEXIS 798, at *4 (Bankr. E.D. N.C. Mar. 4, 2013). • Claimants that have allegedly received preferential transfers may have their claims temporarily allowed for voting purposes.	• Environmental contamination claims. *In re Kaiser Group Int'l, Inc.*, 289 B.R. 597 (Bankr. D. Del. 2003). • Mass Tort/Asbestos cases. *In re G-I Holdings, Inc.*, 323 B.R. 583 (Bankr. D.N.J. 2005). • Labor claims. *In re Patrick Cudahy, Inc.*, 97 B.R. 489 (Bankr. E.D. Wis. 1989). • Malpractice claim against debtor-attorney by creditor-client for unenforceable prenuptial contract. *In re Kivler*, 2009 Bankr. LEXIS 1461 (Bankr. D.N.J. June 3, 2009). • Compensatory and punitive damages claim of creditor-tenant against debtor-landlord for forcible eviction. *In re Chavez*, 381 B.R. 582 (Bankr. E.D.N.Y. 2008). • Courts have held that § 502(c) should not be used to estimate post-petition tax claims. *In re Indian Motocycle., Co.*, 261 B.R. 800 (B.A.P. 1st Cir. 2001).
Hearing and Evidence	• Left to the reasonable discretion of the bankruptcy court • No uniform process or procedure	• Left to the reasonable discretion of the bankruptcy court • No uniform process or procedure

	TEMPORARY ALLOWANCE	CLAIMS ESTIMATION
	• Some courts have held summary proceedings (*In re Zolner*, 173 B.R. at 633), while others have conducted full evidentiary hearings (*In re FRG*, 121 B.R. at 456). • *In re Hydrox Chemical Company*: Parties entered into an Agreed Order Regarding Estimation of Certain Claims for Voting Purposes, which set forth schedule and procedure for filing detailed objections, pleadings, depositions, affidavits and briefing. 194 B.R. 617, 622 (Bankr. N.D. Ill. 1996).	• "The court should use whatever method is best suited to the circumstances of the case." *In re Chicago Investments, LLC*, 470 B.R. 32 (Bankr. D. Mass. 2012). • "The court is bound by the legal rules that may govern the ultimate value of the claim." *In re Chemtura Corp.*, 448 B.R. at 648-49. "For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law." *Bittner v. Borne Chem. Co.*, 691 F.2d at 135. • Some courts have held summary trials. *In re Baldwin-United Corp.*, 55 B.R. 885, 899 (Bankr. S.D. Ohio 1985) (full day hearing with evidence and argument "sufficient to provide a reasonable basis for estimat[ion]"). • Some courts have held full evidentiary hearings on estimation. *In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (Bankr. E.D. Va. 1982) (eight days of testimony on a claim that was the subject of pending litigation). • Bankruptcy courts may require mediation on discrete issues. *In re Mona Lisa at Celebration, LLC*, 410 B.R. 710 (Bankr. M.D. Fla. 2009). • Bankruptcy courts may use the arbitration process for estimating claim. *In re Seaman Furniture Co. of Union Square, Inc.*, 160 B.R. 40, 42 (S.D.N.Y. 1993). • Bankruptcy courts may also decline to use arbitration process. *In re Interco Inc.*, 137 B.R. 993 (Bankr. E.D. Mo. 1992) (granting motion to estimate rather than require debtor to submit to arbitration to determine ERISA withdrawal liability).

	TEMPORARY ALLOWANCE	CLAIMS ESTIMATION
		• Bankruptcy courts may conduct a "trial on the papers," as agreed to by the parties. *In re Kool, Mann, Coffee & Co.*, 233 B.R. 291, 294 (Bankr. D.N.J. 1999).
Partial Relief	• *In re Hydrox Chemical Co.*: Bankruptcy court temporarily allowed creditor's RICO claim in two-thirds of the amount sought, based upon strength of evidence and likelihood of outcome. 194 B.R. at 617. • *In re Loucheschi LLC*: Court limited secured creditor's claim to original principal amount of loan because interest rate was usurious. 471 B.R. 777 (Bankr. D. Mass. 2012).	• *In re Lane*: Bankruptcy court estimated creditor-buyers' state court claim for breach of contract and misrepresentation against debtor-seller in amount of the buyers' down payment, but not in any amount for other compensatory/punitive damages sought. 68 B.R. at 612.
Effect of Order	• Order temporarily allowing claim only authorizes claimant to vote, does not have an effect on the amount or distribution on claim.	• Estimation order will have binding effect on remaining aspects of bankruptcy case, unless reconsidered. • Any claim estimated under § 502(c) may be reconsidered for cause under § 502(j) and is subject to adjustment as long as the case is not closed. 11 U.S.C. § 502(j); *see also In re Lane*, 68 B.R. at 612; *In re Stone & Webster, Inc.*, 279 B.R. 748 (Bankr. D. Del. 2002) (estimation order provided for adjustment for actual costs).
Standard of Review on Appeal	• Bankruptcy court's decision to temporarily allow a claim for voting purposes under Rule 3018(a) is reviewable for abuse of discretion.	• Findings of fact will be set aside if clearly erroneous. • Bankruptcy court's determination as to method used for estimation may only be reversed for abuse of discretion.