"What Is Hot in July Besides the Weather?" Litigation in Consumer Cases, Parts I and II

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THE FDCPA, STATUTE OF LIMITATIONS AND THE CFPB
"What a Long, Strange Trip it's Been"

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THE FDCPA, STATUTE OF LIMITATIONS AND THE CFPB
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I. Historical Background

When enacted in 1977, the Fair Debt Collections Practices Act, ("FDCPA" or the "Act"), 15 U.S.C. 1692 et seq., was a response to

> …abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

Notably absent from the language of the FDCPA was litigation activity, including such activity during the pendency of a bankruptcy. Additionally, the FDPCA made no mention of statute of limitations, time barred debt, or that non-judicial/non-litigation activity to enforce legitimate credit obligations past their limitations period would otherwise violate the Act. Conduct by an original creditor also was specifically excluded from the protections of the FDPCA. Finally, Congress gave no rule making authority to the FTC for the FDCPA, leaving the interpretation of the Act to the Court.

In 1985, the Act was amended, not by pressure from consumer groups but by strong advocacy from the leading trade association of third party collectors, the American Collectors Association ("ACA"), who felt that they were at a competitive disadvantage to lawyers who engaged in debt collection activity. Thus by changing a few simple words, "any person" to the act, lawyers were now under the definition of a third party debtor collector. No other portions of the FDCPA were otherwise amended. The sponsor of the 1985 amended, Rep Frank Annunzio,

(D. Il) made clear the purpose and intend of the amendment in his speech to the House Committee:

> The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorneys' conduct in the courtroom, but because of their conduct in the backroom. . . Only collection activities, not legal activities, are covered by the act. . . Actions which can only be taken by those possessing a license to practice law are outside the scope of the act.

From the mid-1980 to the mid-2000, besides its enforcement authority, the FTC made only annual reports to Congress regarding its administration of its functions under the Act, "including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission include[d] [an] assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission". . During this same time period the FTC has also issued a handful of advisory opinions giving some clarity to the interpretation of the Act. However the only real guidance from the FTC came in 1988 with the issuance of its *Staff Commentary: Statements of General Policy or Interpretation* ("Commentary") regarding the FDCPA. In that report, there was no mention of statute of limitations, time-barred debt or bankruptcy. Interestingly, the Commentary does concur with the intention of Congress that the repeal of the attorney exemption did not apply to "law firms that engaged in traditional debt collection activities" but that legal activity was still exempt from the act.

Despite clear Congressional intent and a consistent policy from the FTC, the FDPCA has been subject to incredible misinterpretation by the Courts as it relates not only to the discharge of an attorney's duty when engaging in debt collection litigation activity, but also when attorneys

as well as non-attorneys must make determinations of the applicable statute of limitations, even in the bankruptcy forum.

II. The First Enforcement Action involving Time-Barred Debt – The FTC Paves the Way for the CFPB

In January of 2012, the FTC brought an enforcement action against a debt buyer, Asset Acceptance LLC, alleging among other things that it failed to disclose that debts were too old to be legally enforceable or that a partial payment would extend the time a debt could be legally enforceable. The case was resolved by Consent Order, with Asset denying any wrong-doing, but agreeing to include certain disclosures in future correspondence with consumers, advising them that the debt was time-barred and that it would not sue to collect the debt. Even if the consumer made a partial payment, Asset was forbidding from seeking further legal action. These disclosure requirement were applicable not only to accounts that Asset serviced but in theory to anyone, including attorneys, who would otherwise collect debt on behalf of Asset. The Asset Consent Order represented a significant turn in policy and in essence forced even non-lawyers to make legal determinations.

At the same time of time of the Asset Consent Order, the FTC issued a publication for consumers, "*Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts*" , setting the stage for a new regulator to push forth this policy of barring collection of time-barred debt.

III. The Birth of the Consumer Financial Protection Bureau

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") which specifically authorized the formation of the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") . The Bureau's mission is several fold: to make current rules in the financial services marketplace more effective, to

consistently and fairly enforce rules, and to empower consumers to take more control over their financial lives. Under Dodd-Frank, the Bureau is authorized to supervise, examine and enforce covered persons which includes banks and non-banks, as well as issue regulations under enumerated consumer protection laws including the FDPCA and the Fair Credit Reporting Act (FCRA) among others. The CFPB also has authority to ensure that covered persons do not otherwise commit unfair and deceptive acts and practice (UDAAPs) which is identical to the authority vested in the FTC. This oversight of UDAAPS extends to persons who might be exempt from traditional consumer protection laws like original creditors from the FDCPA.

It is also important to realize that the CFPB's authority also extends to "service providers" defined as "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service". Thus while you may not be a covered person, if you provide services to a covered person, even only incidentally, you may be subject to CFPB supervision.

The structure of the Bureau is multi-layered and unlike other federal agencies is governed by a single director who reports only to the President. The relative verticals are as follows:

A. *Consumer Education and Engagement* - which is tasked with developing financial literacy and empowerment programs as well as addressing the specific needs of older Americans, service members and students;

B. *Consumer Response Team* - which houses the consumer complaint portal;

C. *Research Markets & Regulation* – which is charged with all research and data in all financial services markets;

D. *Supervision, Enforcement and Fair Lending* - the largest division of the Bureau with over 800 enforcement lawyers; and

E. *Office of General Counsel* – responsible for law and policy including decision as to whether participation in matter through *amici curiae*

The Bureau discharges its express supervision authority in three ways: by issuing civil investigation demands (CIDs), by directing examinations either on-site or by deposition, or by enforcement actions and consent orders. However, the Bureau has utilized its implied authority through bulletins, white papers, research and examination manuals which enables it, in part, to implement policy without formal rulemaking or legislation. It is in this arena where the CFPB has dictated numerous policies, including but not limited to collecting of time-barred debt.

IV. READING THE CFPB'S TEA LEAVES

A. Supervision and Examination Manuals

In October of 2011, the CFPB issued its first *Supervision and Examination Manual* which was meant to be a guide on how the bureau would supervision and examine service providers and covered persons under its jurisdiction for compliance with federal consumer financial protection law. Every consumer protection statute was identified in the Manual, including the FDCPA.

The Manual was then updated to a second version in October of 2012, which articulated exact examination procedures, including specific modules for debt collection. It was in these modules, specifically Module 7, where examiners are tasked with reviewing an entity's policies and procedures for determining time-barred debt:

- Determine whether the entity has policies and procedures related to debt that is older than applicable statute of limitations ("time-barred debt"), including how the entity identifies s debt and how it collects on such debt (if at all);

- Determine whether the entity sues or threatens to sue on time-barred debt; and

- If the entity demands payment on time-barred debt other than through litigation, where permissible, determine what representations, if any, the entity makes in its written and ora

communications with consumers regarding the time-barred nature of the debt and its ability to sue on the debt.

B. Rules and Bulletins

In 2012, the CFPB issued two final rules which granted it authority to supervise certain non-bank covered persons as well as define larger market participants in the debt collection market place. It is within this supervision that the issue of time-barred debt has become a critical focus by the Bureau.

In July of 2013, the CFPB issued *Bulletin 2013-07* which described certain acts and practices relating to the collection of consumer debt which could constitute UDAAPs under Dodd-Frank. While the collection of time-barred debt was not specifically identified, the broad and subjective definitions paved the way for the CFPB to view the collection of time-barred debt as unfair, deceptive or abusive.

C. The Advanced Notice of Proposed Rulemaking for Debt Collection (ANPR)

On November 6, 2013, the CFPB issued its (ANPR) for debt collection practices, seeking responses to 450 questions and sub-questions about the debt collection industry. In Section VI of the ANPR, the CFPB expressed its significant concern about the collection of time-barred debt and requested comment from the industry regarding appropriate disclosures in no less than eleven (11) questions.

D. Amicus Submissions

The CFPB was busy in 2014 submitting joint amicus briefs with the FTC in three cases all involving time-barred debt. In the consolidated appeals of *Delgado v. Capital Mgmt Servs, LP* and *McMahon v. LVNV Funding et al*, 2014 U.S. App. LEXIS 4592 (7th Cir., 2014), the Court held that a letter from a non-attorney debt collector on a time barred debt was false,

deceptive and misleading because it used the word "settlement." "Settlement," the court reasoned, implied a threat of litigation, even though the letter made did not contain an express threat. The Circuit court adopted CFPB and the FTC's argument that a consumer can be mislead by a settlement letter requesting payment of a time barred debt because they would not understand that "no further legal action to collect on a debt is permitted." The failure to disclose that the debt is subject to an expired limitations period, the regulators said, is therefore misleading in violation of the FDCPA and the Circuit Court agreed. The decision does not prohibit the collection of time barred debt where there is no threat of litigation, but makes actionable under the FDCPA a communication that seeks payment of a time barred debt by misleading "an unsophisticated consumer into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation." The case was remanded back to District Court.

The identical argument was made by the regulators in an amicus in the case of *Buchanan v. Northland Group*, 2015 U.S. App. LEXIS 517 (6th Cir) . Like the the 7th Circuit, the *Buchanan* Court found that statements seeking settlement of a time-barred debt may violate the FDCPA, if it would lead the consumer to believe that the debt may be enforceable in Court. The case was also remanded back to District Court for further proceedings.

E. States Weighing In

Dodd-Frank provides for the coordination between the CFPB and state regulators. Dodd-Frank also empowers state Attorneys General as well as regulators to serve as "force multipliers" and assisting in its enforcement. As proof of this effort the CFPB and the National Associates of Attorneys General signed a joint statement of principle to advance the goals of the CFPB. This partnership was evident in this past January when the New York Attorney General

secured an $18 million dollar settlement with Encore Capital, a debt buyer, for alleging filing lawsuits beyond the applicable statute of limitations. What is important to note about the Encore matter is that prior thereto, all debt collectors in New York, including attorneys, had been following decision of *King v. Asset* in making what they thought was the appropriate determination of the applicable statute of limitations, again which is a legal determination dependent on numerous factors. The Encore matter is further evidence that the decision making regarding statute of limitations is being transferred to regulators on behalf of consumers, with the credit and collection industry having no say in the process.

The influence over state Attorneys General has now carried over into state government and legislatures. Since the birth of the CFPB, nine (9) states have enacted laws which requires disclosures on the collection of time-barred debt, which numerous bills pending in various state houses. What is interesting to note is that no state has otherwise amended the limitations period for any action that may be brought, suggesting that maybe our legislatures understand the complex nature of this process of determination a statute of limitations.

V. OUTCOME

The above summary shows the incredible influence by a federal agency in a very short period of time. All three branches of government, whether at the state or federal level, have been touched by the CFPB in very significant ways.

The decision of *Crawford v. LVNV*, was therefore the result of a perfect storm and puts the CFPB in yet another arena… bankruptcy. The most fundamental aspect of the bankruptcy process, the filing of a proof of claim, now has become the focal point of consumer protection. Coupled that with an ongoing policy of creating barriers to communication when it comes to the

recovery of old but legitimate debts, creates, in this author's opinion, increased consumer harm rather than sound policy protecting consumers. Discouraging the filing of proofs of claim, even on time-barred debt, results in a lack of participation in the bankruptcy process, despite bankruptcy laws and rules which mandate the filing of same. The intent of the bankruptcy code is to provide the consumer with a fresh start, *Crawford* and the federal policy of discouraging the non-judicial payment of time-barred debt does quite the opposite. The long strange trip is far from over.

CREATIVE ATTACKS USING FDCPA CLAIMS IN THE BANKRUPTCY FORUM

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CREATIVE ATTACKS USING FDCPA CLAIMS IN THE BANKRUPTCY FORUM

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1. Sanctions – filing sanction motion either under Rule 11 or Rule 9011 for the filing of an out of stat proof of claim, bypassing the claims objection process.

2. 2004 Examination – Use of the 2004 Examination to investigation potential FDPCA claims, specifically cases against law firm for alleged violation of 1692e(3), lack of meaningful attorney involvement.

3. Failing to report FDCPA class action claims in Chapter 7 cases.

POC tested by "competent lawyer" standard:

Birtchman v. LVNV Funding, LLC, 2015 U.S. Dist. LEXIS 52669 (S.D. Ind. Apr. 22, 2015). In finding that filing a truthful POC for time-barred debt does not violate the FDCPA, the court decided that the POC is reviewed to the competent lawyer standard rather than unsophisticated consumer standard (rejecting *Crawford* standard), particularly given debtor's representation by his bankruptcy attorney and bankruptcy trustee's duty to object to invalid claims.

Donaldson v. LVNV Funding, LLC, 2015 U.S. Dist. LEXIS 45134, (S.D. Ind. Apr. 7, 2015). In finding that filing a POC for time-barred debt does not violate the FDCPA, the court opined that a bankruptcy debtor is not an unsophisticated consumer, such as a plaintiff in an FDCPA action, but is represented by an attorney, and his estate is protected by a trustee, and applied the competent lawyer standard to the POC.

LaGrone v. LVNV Funding LLC (*In re LaGrone*), 525 B.R. 419 (Bankr. N.D. Ill. 2015). In holding that filing a proof of claim in a bankruptcy for an out of statute debt, alone, is no violation of the FDCPA, the court rejected the unsophisticated consumer review standard because "[i]n short, a debtor in bankruptcy is not in the position of a consumer facing a collection lawsuit," later adding, in *LaGrone v. LVNV Funding LLC* (*In re LaGrone*), Adv. No. 14 A 00578, No. 13 B 21423, 2015 Bankr. LEXIS 1662 (Bankr. N.D. Ill. May 14, 2015), that a "debtor's financial interest is . . . protected in any event by the presence of bankruptcy counsel and required disclosure of the information relevant to the statute of limitations."

POC tested by "unsophisticated consumer" standard (alternatively, "least sophisticated consumer"):

Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, No. 14-858, 2015 U.S. LEXIS 2724 (Apr. 20, 2015). The court applied the least sophisticated consumer standard in finding that the filing, by a debt collector, of a proof of claim against an estate in

bankruptcy for a debt that is legally unenforceable pursuant to apposite statute of limitations violates the FDCPA.

Reed v. LVNV Funding, LLC, 2015 U.S. Dist. LEXIS 40457 (N.D. Ill. Mar. 27, 2015). In denying a motion to dismiss a complaint for FDCPA violation for filing a proof of claim in a bankruptcy for an out of statute debt, the court applied the unsophisticated consumer standard.

Grandidier v. Quantum3 Group, LLC, 2014 U.S. Dist. LEXIS 169279 (S.D. Ind. Dec. 8, 2014). The court denied a motion to dismiss and held that filing a proof of claim in a bankruptcy for an out of statute debt is an attempt to collect a debt in violation of the FDCPA because it creates the misleading impression in the least sophisticated consumer that the debt is legally enforceable.

Patrick v. PYOD, LLC, 39 F. Supp. 3d 1032 (S.D. Ind. 2014). The court denied a motion to dismiss and held that filing a proof of claim in a bankruptcy for an out of statute debt is an attempt to collect a debt in violation of the FDCPA because it creates the misleading impression in the least sophisticated consumer that the debt is legally enforceable.

Patrick v. Quantum3 Funding, LLC, 2015 U.S. Dist. LEXIS 17721 (S.D. Ind. Feb. 13, 2015). Magistrate Judge recommended denial of motion to dismiss, applying least sophisticated consumer standard. Adopted by Order, March 12, 2015.

Torres v. Asset Acceptance, 2015 U.S. Dist. LEXIS 45094 (E.D. Pa. Apr. 7, 2015); *Torres v. Cavalry SPV I, LLC*, 2015 U.S. Dist. LEXIS 45087 (E.D. Pa. Apr. 7, 2015). The court, in finding that the filing of a POC for out of statute debt may not be a basis for claim of violation of FDCPA, acknowledged the Third Circuit's least sophisticated consumer standard but found that the bankruptcy court and the trustee adequately protect the debtor.

Sanctions:

In re Sekema, 523 B.R. 651 (Bankr. N.D. Ind. 2015). The court found that the claimants did not conduct a reasonable pre-filing inquiry, compliantly with Fed. R. Bankr. P. 9011, prior to filing proofs of claims for out of statute debts and, while specifically eschewing any FDCPA based cause of action, imposed a $1,000 sanction (adopted from the FDCPA fine regime).

Res judicata:

Robinson v. eCAST Settlement Corp., No. 14 CV 8277 (N.D. Ill.) (order entered April 27 2015). The court dismissed an amended complaint, and denied a subsequent motion to reconsider, and found that the filing of a bankruptcy-compliant proof of claim for an out of statute debt is not a violation of the FDCPA because, in part, the action is barred by *res judicata* effect of the confirmed plan.

Covert v. LVNV Funding, LLC, 2015 U.S. App. LEXIS 3278 (4th Cir. Mar. 3, 2015). The court affirmed the court below, finding the confirmation order in the bankruptcy comported with *res judicata* requirements. The court reasoned that to hold otherwise would incentivize Debtors to

eschew pre-confirmation damages claims in favor of post-bankruptcy awards that they would not be required to distribute to creditors, absent an action to revoke the discharge for fraud (difficult to show), and would undermine the finality of the confirmation order.

Statutory conflict:

Johnson v. Midland Funding, LLC, 528 B.R. 462 (S.D. Ala. 2015). The court found irreconciliable conflict between the Bankruptcy Code, which permits the filing of a POC for time-barred debt, insofar as state law permits, and the FDCPA, which does not. In the event, the FDCPA, antedating the Code, must yield to the Code.

A Debt Buyer "Deluge" Meets the 11th Circuit

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A Debt Buyer "Deluge" Meets the 11th Circuit

In 2013, Alabama bankruptcy attorney Nick Wooten had become fed up with debt buyers[1] routinely filing time barred proofs of claim in his consumer bankruptcy cases - thus requiring that he go through the claims objection process repeatedly and in his view unnecessarily.[2] He decided to take a stand and filed an adversary case against one of the country's largest debt buyers, LVNV Funding, LLC ("LVNV"), alleging that the filing of a claim in a debtor's chapter 13 bankruptcy case which was barred by the applicable state statute of limitations constituted a violation of the Fair Debt Collection Practices Act ("FDCPA")[3]. Nick lost his argument in the bankruptcy court and again in the district court, but undeterred, Nick took his case to the Eleventh Circuit Court of Appeals. There he won.

In ***Crawford v LVNV Funding, LLC***, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit concluded that LVNV's "filing of the proof of claim fell well within the ambit of a `representation' or `means' used in `connection with the collection of any debt'" and that such action "violated the FDCPA's plain language". 758 F.3d at 1262--1263. In reaching this result, the court first observed:

> A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers — armed with hundreds of delinquent accounts purchased from creditors — are filing proofs of claim on debts deemed unenforceable under state statutes of limitations.

Id. at 1256. [4]

The motivation for debt buyers filing such claims is not difficult to surmise. Claims filed in chapter 13 bankruptcy cases are automatically allowed and are paid a distribution unless an objection is sustained. Often, these claims are small and go unnoticed and thus are paid, or the motivation of debtor's counsel or a chapter 13 trustee to object is simply not there. Yet, repeated thousands of times in cases filed throughout the country, the practice generates substantial

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[1] For a colorful account of the debt buyer industry, see: *http://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html?_r=0)*

[2] Nick also knew that if he failed to object, the claim would be automatically allowed and paid by the Chapter 13 trustee. Moreover, if the case was subsequently dismissed, the payment could revive or refresh the debt allowing his client to again be sued notwithstanding the stale nature of the debt..

[3] 15 U.S.C. § 1692, *et seq.*

[4] The Eleventh Circuit parts company with the 2nd and 9th Circuits which reach a contrary result. ***Simmons v Roundup Funding, LLC*** 622 F.3d 93 (2nd Cir. 2010); ***Walls v Wells Fargo Bank, NA*** 276 F.3d 502 (9th Cir. 2002).

revenue for what is otherwise an uncollectible debt. In short, its free money and it has become a routine business practice for large debt buyers.

The ***Crawford*** court found that LVNV was a "debt collector"[5] and that its action in filing a proof of claim constituted "debt collection" within the meaning of FDCPA. Employing a "least-sophisticated consumer" standard the Court determined that LVNV's filing of a time barred claim would be unfair, unconscionable, deceiving or misleading. ***Id.*** at 1261. The court analogized the filing of a proof of claim with the filing of a lawsuit and concluded that the later was clearly an FDCPA violation when the claim was filed outside of the applicable statute of limitations in a non-bankruptcy forum. ***Id***. at 1260.
The court writes:

> Similar to the filing of a stale lawsuit, a debt collector's filing of a time--barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt. The "least sophisticated" Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to such a claim.

Id. at 1261.

On April 20, 2015, the United States Supreme Court denied LVNV's petition for *writ of certiorari*. ***Crawford v LVNV Funding, LLC*** , No. 14-858 (U.S. 2015). Significantly, LVNV raised for the first time in its petition the only real argument not dispensed with by the Appellate panel - namely that the Bankruptcy Code preempts the FDCPA and provides the sole process for adjudicating claims in bankruptcy. It is unclear why these arguments were not raised in the courts below and may have been a reason the Supreme Court did not take the case on the undeveloped record below. Now, this is the central argument made by debt buyers in post-Crawford cases. The Courts are now split on the issue, although this author would dare say that the trend favors viability of FDCPA liability for the filing of time-barred claims.

Since Crawford, Courts have been split. Recent attacks have focused on the argument that LVNV failed to raise in the lower courts - federal preemption. This line of cases is exemplified by a federal district court in Alabama which just sidestepped ***Crawford***, finding that the Code and the FDCPA were in conflict on this issue and the Code prevails. ***Johnson v. Midland Funding, LLC***, No. 1:14-cv-00322-WS-C, Doc. #28 (S.D. Ala. March 24, 2015). In ***Johnson***, the plaintiff filed for bankruptcy relief under Chapter 13. The defendant then filed a proof of claim that disclosed on its face that the claim is barred by the statute of limitations. The plaintiff subsequently sued the defendant, alleging that the filing of the proof of claim was

[5] Defined as any person "who regularly collects… debts owed or due or asserted to be owed or due to another." 15 U.S.C. § 1692(a)(6).

deceptive and misleading under 15 U.S.C. § 1692e and unfair and unconscionable under 15 U.S.C. § 1692f.

The defendant filed a motion to dismiss, arguing in part that the plaintiff's FDCPA claim was precluded by the Code. The district court recognized the clear holding of ***Crawford***, but framed the question to be whether "tension" between the Code and the FDCPA precludes the plaintiff's FDCPA claim. Importantly, the ***Johnson*** court noted that this issue was not presented or decided by the Eleventh Circuit in ***Crawford***. The ***Johnson*** court found that there was an irreconcilable conflict between the Code and the FDCPA because a creditor can properly file a proof of claim on a time-barred debt under the Code as long as the underlying debt has not been extinguished under state law, but the same creditor cannot file the proof of claim without violating the FDCPA, as construed by ***Crawford***. In effect, the ***Johnson*** court found that the FDCPA negated the Code, giving rise to an irreconcilable conflict that required that the FDCPA "give way" to the Code.

Cases such as ***Johnson*** and ***Walls*** (cited herein) are not the golden fleece to debt-buyers that they may first appear. The cases that find preemption/preclusion (many courts seem to use the terms interchangeably) give short shrift to basic statutory construction. This question was squarely addressed in the 7th Circuit in ***Randolph v. IMBS, Inc***., 368 F. 3d 726 (7th Cir. 2004) wherein the court ruled that the lower court erred in finding that the Code "preempts" the FDCPA when the act that transgresses the FDCPA also violates the Code. In addressing the issue the court wrote,

> The district court wrote that § 362(h) "preempts" § 1692e(2)(A), but this cannot be right. One federal statute does not preempt another. See *Baker v. IBP, Inc.,* 357 F.3d 685, 688 (7th Cir.2004). When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other — and repeal by implication is a rare bird indeed. See, e.g., *Branch v. Smith,* 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.,* 534 U.S. 124, 141-44, 122 S.Ct. 593, 151 L.Ed.2d 508 (2001)(collecting authority). It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other.

Here is a compilation of the cases (all cases are hyperlinked to Google Scholar) on both sides of the issue:

Pro-Crawford Cases

Reed v. LVNV Funding, LLC, No. 14 C 8371 (N.D. Ill. 2015)

McMahon v. LVNV Funding, LLC, 744 F.3d 1010, 1020 (7th Cir. 2014)

Brimmage v Quantum3 Group, LLC, No. 14-00674 (Bankr. N.D. Ill. Jan. 9, 2015)

Reed v LVNV Funding, LLC, No. 14 C 8371 (N.D. Ill. March 27, 2015)

Feggins v LVNV Funding, LLC, No. 14-1049 (Bankr. M.D. Ala. 2014)

Grandidier v Quantum3 Group, LLC, No. 1:14 -cv- 00138-RLY-TAB (S.D. Ind. 2014)

In re Sekema, 523 B.R. 651 (Bankr. N.D. Ind. 2015)

Patrick v. PYOD, LLC, 39 F. Supp. 3d 1032, 1036 (S.D. Ind. 2014)

Patrick v. Worldwide Asset Purchasing II, LLC, No. 1:14-cv-00544-TWP-TAB, 2015 WL 627376, at *2 (S.D. Ind. Feb. 13, 2015)

Elliot v. Cavalry Inv. LLC, No.1:14 C 01066, 2015 WL 133745 (S.D. Ind. Jan. 9, 2015)

Anti-Crawford Cases

Simmons v Roundup Funding, LLC, 622 F.3d 93 (2nd Cir. 2010)

Walls v Wells Fargo Bank, NA 276 F.3d 502 (9th Cir. 2002)

In Re Chaussee*, 399 B.R. 225 (B.A.P. 9th Cir. 2008)*

Torres v. Asset Acceptance, LLC, 2015 U.S. Dist. LEXIS 45094 (E.D. Pa. Apr. 7, 2015)

In re LaGrone, ---B.R.----, 2015 WL 273373, at *6-7 (Bkrtcy. N.D. Ill. Jan. 21, 2015)

Robinson v. eCast Settlement Corp., No. 14 C 8277, 2015 WL 494626, at *3-4 (N.D. Ill. Feb. 3, 2015)

Johnson v. Midland Funding, LLC, No. 1:14-cv-00322-WS-C, Doc. #28 (S.D. Ala. March 24, 2015)

Donaldson v LVNV Funding, LLC, No. 1:14-cv-01979-LJM-TAB (S.D. Ind. April 7, 2015)

In re Gurganus, No. 13-70114-BGC-13, A.P. No. 14-70054 (Bankr. N.D. Ala. Jan 5, 2015)

Hijacked Bankruptcies:
New Terroristic Tactics Confounding Lenders and Borrowers Alike

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Hijacked Bankruptcies:
New Terroristic Tactics Confounding Lenders and Borrowers Alike

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I. Introduction[1]

Certain *pro se* borrowers, in an ever-expanding effort to delay foreclosure of their homes at any cost, have started employing a new strategy which has become particularly prevalent on the west coast. Dubbed "Bankruptcy Hijackings," this new ploy -- which takes a number of different forms -- typically involves *pro se* borrowers who are not in bankruptcy deeding a small percentage interest of their home to a debtor in bankruptcy. The hijacker simply identifies a recently filed bankruptcy case and prepares a deed transferring a small percentage interest in his or her property to the debtor in bankruptcy. The hijacker may go so far as to back date the transfer deed with a prepetition date making it appear as if the transfer occurred before the commencement of the unsuspecting debtor's bankruptcy case. In some instances, the hijacker may record the transfer deed in the real estate records but often does not.[2] The hijacker then sends notice to the current servicer of the hijacker's loan, usually on the eve of a foreclosure sale, advising the servicer that the property in question is an asset of a bankruptcy estate protected by the automatic stay provisions of the Bankruptcy Code.

Hijackers employ these terroristic tactics in the hopes of getting the benefit of delay from the bankruptcy automatic stay without the burden of having to file and prosecute a bankruptcy case of their own. They often employ this strategy using multiple bankruptcy cases, deeding small percentage interests in their property to numerous unsuspecting debtors in a staggered fashion so as to continually frustrate the loan servicer's efforts to foreclose on the underlying collateral.

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[1] The author would like to thank the able assistance of attorney Ben Carlsen who provided research, cite-checking and editing assistance in connection with this paper.

[2] Some hijackers go so far as to take copies of recorded deeds of conveyance pulled from the real estate records with recording information from the applicable clerk's office appearing on the face of the document. They then white out and replace the property specific information with information specific to their property and submit a copy of that "doctored" deed to their servicer as evidence of the transfer, making it appear as though the conveyance has been recorded in the appropriate real estate records.

These tactics present a number of issues both for lenders and unsuspecting and innocent bankruptcy debtors directly affected by the fraudulent and often times criminal conduct[3] these hijackers employ. This article seeks to identify some of these issues both from a lender's and debtors's perspective, offer strategies for how to deal with these issues, and provide a summary of the very limited case law that has developed on this topic to date.

II. How a Hijacked Bankruptcy Arises

The typical Bankruptcy Hijacking first comes to light when a bank or loan servicer receives some kind of correspondence, usually on the eve of a foreclosure sale, notifying the servicer that the property subject to a pending foreclosure sale is part of a bankruptcy case protected by the automatic stay. The notice will not be the typical Notice of Commencement sent by the Bankruptcy Court, but often times the notice will attach a document printed from the applicable bankruptcy case to make the notice look as "official" as possible. The servicer, with little if any time to investigate the matter in advance of the foreclosure sale, will follow its internal policies and procedures and have the foreclosure sale stopped so as not to violate the automatic stay. At this point the hijacker has achieved – at least in part – his or her goal: delay of the pending foreclosure sale. The servicer then will typically refer the matter to bankruptcy counsel to seek stay relief in the bankruptcy case.

Bankruptcy counsel, based on a simple review of matters of record in the bankruptcy case, will almost immediately notice something strange is afoot. A review of the debtor's Schedules and Statement of Financial Affairs will reveal nothing with respect to the property. The bankruptcy debtor, who is not the same person as the borrower on the underlying loan,

[3] At least one bankruptcy blogger noted that this type of conduct has garnered much attention in the California bankruptcy courts, with at least one judge indicating "that the problem was serious enough to warrant a major push by the U.S. Attorney's Office." Nicholas Gebelt, *Chapter 13 Bankruptcy And A New Foreclosure Scam*, S. CAL. BANKR. BLOG (Oct. 5, 2011), http://www.southerncaliforniabankruptcylawblog.com.

makes no disclosure of any ownership interest in the property on Schedule B and does not list the servicer or the lender that owns the underlying loan as a creditor in the bankruptcy case. If the 341 Meeting of Creditors has not already occurred, and the lawyer has an opportunity to ask questions of the debtor relating to the purported transfer, the debtor will honestly profess to know nothing about the purported transfer or the hijacker. Because hijackers often choose cases that have been pending for a while, the 341 Meeting may have already occurred, and reaching out to what is frequently a *pro se* debtor will be difficult given the debtor's likely limited understanding of real estate law and the confusing facts the lawyer is trying to unravel.[4] If, by happenstance, the debtor is represented by counsel, questions directed to debtor's counsel may likewise prove unfruitful as the lawyer likely knows nothing about the purported transfer and can obtain no information from his client about the transfer. The lawyer is left to look at what is publicly available in the real estate records in hopes of unraveling the mystery. A review of the real estate records, however, often turns up nothing because the purported transfer deed may not be recorded in the real estate records. At this point, the servicer's lawyer is left scratching his or her head trying to figure out exactly what to do next.

III. Strategies for Dealing with Hijacked Bankruptcies

A. Can You Simply Ignore It?

One option that should at least be considered is whether the lawyer can or should recommend to his client to simply ignore the purported transfer as being fraudulent. Such an option becomes more appealing if the lawyer is able to confirm with the debtor and/or the debtor's lawyer that the debtor has no knowledge of the purported transfer and does not know the person who purportedly transferred the property. Likewise, while no evidence of the transfer in

[4] Frequently, the hijacker will deed the property to a *pro se* debtor, but on occasion hijackers deed properties to debtors represented by counsel.

the real estate records is not definitive proof that no transfer in fact occurred, the absence of a recorded deed at least supports the lawyer's suspicion that his client has been victimized by a fraudulent bankruptcy hijacking. Moreover, if his client moves forward with a foreclosure sale in the face of what appears to be a hijacked bankruptcy, who is going to bring a claim against the lender for violating the automatic stay? Certainly not the debtor who confirmed having no interest in the loan or property. Similarly, in what forum and on what basis is the hijacker going to have standing to raise a claim for violation of the automatic stay? Unfortunately, the lawyer is often unable to confirm with enough certainty that a fraud has indeed occurred to be able to advise his client to move forward without seeking some protective relief from the bankruptcy court.

B. Seeking Stay Relief under 11 U.S.C. § 362(d)(4)

Many lawyers faced with these issues proceed to seek relief from the automatic stay in the hijacked bankruptcy case out of an abundance of caution. However, because hijackers often employ these tactics in stages, purportedly deeding small percentage interests in the property to multiple debtors at different times, if not careful the lawyer will be caught up in endless motions practice in multiple bankruptcy cases. To avoid this conundrum, the better strategy is to seek *in rem* stay relief under 11 U.S.C. § 362(d)(4) on notice to the debtor, the hijacker and any other party with a potential interest in the property.[5] When a court grants stay relief pursuant to § 362(d)(4), creditors are granted *in rem* relief with respect to that specific property and the order is binding in any bankruptcy case purporting to affect the property filed within the next two years

[5] Providing notice to any potential party with an interest in the property should address any due process concerns in connection with the court granting the requested relief. *In re Dana Dorsey*, 476 B.R. 261, 270 (Bankr. C.D. Cal. 2012).

if the order is properly recorded in the appropriate real estate records. The statute specifically provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> . . . .
>
> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either –
>
> (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
>
> (B) multiple bankruptcy filings affecting such real property.
>
> If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

11 U.S.C. § 362(d)(4).

To obtain relief under § 362(d)(4), the bankruptcy court must find that three elements are present: (1) the debtor's bankruptcy filing was part of the scheme; (2) the object of the scheme was to delay, hinder or defraud creditors; and (3) "the scheme must involve either (a) the transfer of some interest in the real property without the secured creditor's consent or court approval, or (b) multiple bankruptcy filings affecting the property." *First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First Yorkshire Holdings, Inc.)*, 470 B.R. 864, 870-71 (B.A.P. 9th Cir. 2012).

1. **The Debtor's Bankruptcy Filing was Part of a Scheme**

Of the three elements, the most potentially problematic is proving that the debtor's bankruptcy filing was part of the scheme. After all, the unsuspecting debtor had no knowledge of the transfer and did not participate in the transfer in any way. One way of reading the statute is to require a finding that the petitioning debtor was part of the fraudulent scheme. Such an interpretation would render *in rem* relief unavailable in this context absent a showing of complicity of the debtor in the scheme. Alternatively, the statute could be interpreted to mean that the debtor's bankruptcy filing need only be used as part of a scheme without any showing of the debtor's involvement. Importantly, the courts that have addressed the issue to date in the context of hijacked bankruptcies have held that it not necessary to prove that the debtor knew or participated in the scheme to be entitled to relief under § 362(d)(4). *In re Dana Dorsey*, 476 B.R. 261 (Bankr. C.D. Cal. 2012); *In re 4th Street E. Investors, Inc*., 474 B.R. 709 (Bankr. C.D. Cal. 2012).

In the *Dorsey* case, for instance, the bankruptcy court was faced with a hijacking scenario where a deed transferring an interest in property to a Chapter 13 debtor was recorded in the real estate records three weeks after a debtor filed her Chapter 13 bankruptcy petition. After the lender was successful in obtaining stay relief in the Chapter 13 case, an additional grant deed was recorded transferring an interest in the property to another debtor. One day after the recording, the second debtor filed a Chapter 7 bankruptcy petition and did not list the subject property in her schedules. The lender in the second bankruptcy again moved for relief from the automatic stay but this time requested *in rem* relief pursuant to § 362(d)(4). In response, the debtor through her counsel filed a declaration with the bankruptcy court attesting to no knowledge of the purported transfer and no familiarity with the transferor. The borrower

specifically attested: "I can only presume that the transfer was orchestrated to take advantage of the bankruptcy stay that was effected upon the filing of my case and perhaps documents were doctored to make it seem like an interest was transferred to me prior to the commencement of the bankruptcy case." The debtor did not oppose the lender's stay relief motion but did object to any findings of bad faith on her part.

Faced with such facts, the bankruptcy court focused its analysis on whether the debtor herself must be part of the underlying scheme to entitle the lender to *in rem* relief under § 362(d)(4). In reading the requirement that the movant must establish that the debtor's bankruptcy filing was part of the scheme, the court pointed out that the language was written in passive voice. The court also noted that the statutory language does not require any involvement of the debtor and is likewise devoid of any requirement of a finding of bad faith by the debtor. *Dorsey*, 476 B.R. at 267. Finding no support for the proposition that the debtor must be a participant in the underlying scheme, the *Dorsey* court found that the requirements of § 362(d)(4) were met because a nondebtor party had sought to use the debtor's bankruptcy petition as part of a plan to delay or hinder creditors by extending the automatic stay to property that served as collateral for a loan to a nondebtor party. *Id*. at 268.

Similarly, the *4th Street East Investors* court found *in rem* relief to be appropriate notwithstanding the fact that there was insufficient evidence to support a finding of an intent by the debtor -- in filing the petition -- to hinder, delay or defraud creditors. The court in that case found facts to be "consistent with the pattern in so-called 'hijacked' or 'dumping' cases – i.e., cases in which a transferor of property, acting *without* the debtor's participation or acquiescence, seeks to implicate the automatic stay for the transferor's *own* benefit by purporting to transfer property into a random bankruptcy estate, or by back-dating or falsifying a grant deed to make it

appear that such a transfer has occurred." *4th St.E. Investors*, 474 B.R. at 711. Notwithstanding the fact that the Court could not find evidence that the debtor participated in the scheme, the bankruptcy court nonetheless found it appropriate to grant *in rem* relief under § 362(d)(4). As both courts concluded, proving a debtor's participation in the underlying scheme is unnecessary so long as the lender can establish the other requirements for *in rem* relief.

2. The Scheme Included Transfers Without Consent or Multiple Bankruptcy Filings

In addition to establishing that the transfer in question was part of a scheme to hinder, delay or defraud creditors in connection with the filing of a petition in bankruptcy, the lender must also establish that the transfer was made without the lender's consent or was part of multiple bankruptcy filings. Because bankruptcy hijackings often involve multiple bankruptcy filings, this latter requirement may be very easy to prove. If multiple cases have not occurred, however, the lender may need to establish that the transfer was made without the lender's consent or court approval (if applicable). If the underlying loan documents contain a typical "due on sale" clause which prohibits a transfer of the property without the lender's consent, establishing the lack of consent likewise may be easy. Where, however, the loan documents do not contain any provisions prohibiting such a transfer, establishing this element may be more problematic. At least one court, however, has indicated that a contractual prohibition on transfer is not necessary to establish a lack of consent. In *Dorsey*, the bankruptcy court concluded that "the express statutory language of § 362(d)(4) is clear and unambiguous that if a scheme to delay, hinder or defraud is shown, and if that scheme involves the transfer of an ownership interest in real property without the secured creditor's consent, then the secured creditor may obtain relief under § 362(d)(4). Under the express terms of § 362(d)(4), the secured creditor

need not show that it had some additional right to oppose the transfer." *Dorsey*, 476 B.R. at 269 (citing *In re First Yorkshire Holdings*, 470 B.R. at 870-71).

C. Protecting Innocent Debtors victimized by the Hijacking

In considering whether *in rem* relief is appropriate in connection with a hijacked bankruptcy, an important point that has not gone unnoticed by the courts is making sure that the innocent debtor is not further victimized by the hijacking. Typically, an *in rem* relief order implicates a debtor as having participated in a scheme to hinder, delay or defraud creditors. In the hijacking scenario, however, the debtor is merely an innocent third party. As the court in *Dorsey* noted: "An innocent debtor would certainly want to avoid any inference that he or she has exhibited bad faith or engaged in some abuse of the bankruptcy system, which may negatively impact the present or future bankruptcy case." *Dorsey*, 476 B.R. at 267 n.1. (*citing* 11 U.S.C. § 109(g)(2) and its imposition of a 180 day bar against refiling by an individual debtor who requests voluntary dismissal of a bankruptcy case following the filing of a request for stay relief). In *Dorsey*, the debtor was represented by counsel who filed a response to the stay relief motion indicating no opposition to the relief but objecting to any finding of bad faith on the part of the debtor. Quite often, *pro se* debtors are the hijacking victims. Such debtors are much less likely to file any kind of response, let alone a response that makes clear that they are in no way connected to the underlying scheme. Cognizant of this problem, a number of bankruptcy courts in the absence of any evidence implicating the *pro se* debtor have made specific findings in granting *in rem* relief that the debtor was in no way implicated in the scheme to hinder, delay or defraud creditors. Creditors moving for *in rem* relief in this context, would be well served to highlight this issue for the bankruptcy court in their pleadings and include such language in proposed orders submitted to the Court.

IV. Conclusion

Bankruptcy Hijackings have become a growing trend, particularly on the west coast. While hijackers are frequently able to gain some form of delay from their fraudulent and sometimes criminal conduct, a vigilant lender armed with *in rem* relief under § 362(d)(4) of the Bankruptcy Code should be able to put a stop to such terroristic tactics without negatively affecting innocent debtors victimized by these hijacking schemes.

The Statue of Limitations and Proofs of Claim

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The Statute of Limitations: A Definition[1]

A statute of limitations is a legislatively proscribed period of time within which a lawsuit must be brought on a claim. In most cases, the running of the statute of limitations is an affirmative defense to suit that must be raised by a defendant.[2] The limitations period for a specific type of action under state law, *e.g.*, a personal injury claim, may vary from state to state.[3]

It is often unclear which statute of limitations applies to a particular claim. For example, contractual choice of law terms may discord with local conflict of laws, statutes or precedent. There may be a dispute over which cause of action, and its applicable statute of limitations, applies to a claim. (Are revolving credit accounts written contracts, accounts stated, or, in the absence of a signed credit agreement, an unwritten account?) The statute of limitations in many states differs as to actions on similar claims. Additionally, the beginning of the limitations period for an open or revolving consumer account is, generally, the date of the last transaction on the account. However, that date is also subject to interpretation. (Is it the date of the last payment, the date of the creditor's last non-suit collection attempt, or the date of any creditor transaction on the account, such as final delinquency or interest charges?) Finally, determining if the statute of limitations applies also involves facts that are uniquely within the defendant's knowledge, such as where the debtor lived during the life of the account and after delinquency. All of these factors make determining which statute of limitations applies and whether it has run more complicated and the answer can mean the difference between a suit surviving a motion to dismiss or not.

> **As is generally true elsewhere, in Alabama the statute of limitations is an affirmative defense, not an element of the plaintiff's claim.** *E.g., Special Assets, L.L.C. v. Chase Home Finance, L.L.C., 991 So. 2d 668, 675 (Ala. 2007)*.

The Effect of the Running of the Statute of Limitations

[1] Portions of this paper are excerpted with permission from Alane A. Becket & William A. McNeal, *A Claimant's Dilemma: The Statute of Limitations and Proofs of Claim*, Am. Bankr. Inst. J., April 2015.
[2] Fed. R. Civ. P. 8(c)(1).
[3] For example, in Virginia, the statute of limitations for personal injury claims is two years, Va. Code Ann. § 8.01-243A (2014); however, in Tennessee, it is one year, Tenn. Code Ann. § 28-3-104(a)(1) (2014).

It is nearly uniformly held that the running of the statute of limitations does not extinguish the debt, but rather, only the remedy if raised properly and proven.[4] "The expiration of a statute of limitation does not extinguish the substantive right itself, just the right to enforce a remedy. . . . A statute of repose or duration, on the other hand, provides a date upon which the substantive right itself no longer exists."[5]

The Statute of Limitations and the FDCPA

Enacted in 1978, the FDCPA arose as a result of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[6]

The FDCPA proscribes specific acts, for example, communicating with third parties about a debt or contacting debtors early in the morning or late at night. It also more generally prohibits debt collectors from engaging in harassing or abusive behavior, employing unfair practices in the collection of debts, and making false representations to collect debts. However, nothing in the FDCPA prohibits the lawful collection of debts for which the statute of limitations for a suit has run.[7]

Likewise, filing suit on an out of statute debt is not a violation of the precise terms of the FDCPA. However, "Federal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f."[8] Section 1692e of Title 15 prohibits the false representation of -- the character, amount, or legal status of any debt.[9] Section 1692f prohibits using unfair or unconscionable means to collect or attempt to collect any debt.[10] Filing suit when the plaintiff knows the statute of limitations provides the defendant with a complete defense has been held to violate both provisions.

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[4] *Gatewood v. CP Med. LLC*, Adv. No. 5:14-ap-7068, No. 5:13-bk-73363, at 2-3 n.2 (Bankr. W.D. Ark. Feb. 6, 2015) (order granting summary judgment to defendant and dismissing complaint) (citation omitted); *but see* Miss. Code Ann. § 15-1-3(1) (2014) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); *Heritage Mut. Ins. Co. v. Picha*, 397 N.W.2d 156 (Wis. Ct. App. 1986) ("Wisconsin may be unique in holding that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself.").

[5] *Gatewood v. CP Med. LLC*, Adv. No. 5:14-ap-7068, No. 5:13-bk-73363, at 2-3 n.2.

[6] 15 U.S.C. § 1692(a) (2014).

[7] *Johns v. Northland Group, Inc.*, No. 14-2947, 2015 U.S. Dist. LEXIS 93, at *10 (E.D. Pa. Jan. 5, 2015) (holding that, "[p]ursuant to the FDCPA, a debt collector may seek voluntary repayment of the time-barred debt, so long as the debt collector does not initiate or threaten legal action in connection with the collection efforts").

[8] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014).

[9] 15 U.S.C. § 1692e (2014).

[10] 15 U.S.C. § 1692f (2014).

The Statute of Limitations and Bankruptcy Claims

A "claim" in bankruptcy is not the same as a claim eligible for suit. The Bankruptcy Code defines "claim" broadly as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ".[11] The definition is intentionally expansive so that any party who may make a claim against the debtor is notified of the bankruptcy,[12] after which any disputes over the claim can be adjudicated.

Indeed the fact that a claim may be subject to disallowance due to the running of an applicable statute of limitations, "does not defeat the *existence* of the claim in bankruptcy." *Roach vs. Edge* (*In re Edge*), 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986). "Quite the contrary: the existence of the claim must be determined independent of limitations questions else the process of *allowance* under § 502 becomes redundant if not circular." *Id.* By ruling that a proof of claim for an out of statute debt is a violation of the FDCPA, the Eleventh Circuit in *Crawford v. LVNV Funding LLC*[13], has effectively prohibited certain claimants from filing legitimate bankruptcy claims, eschewing the claim determination process for adjudicating the allowance of claims.

[11] 11 U.S.C. § 101(5).
[12] *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("We have previously explained that Congress intended by this language to adopt the broadest available definition of 'claim.'").
[13] 758 F.3d 1254 (11th Cir. 2014).

Feature

By Alane A. Becket and William A. McNeal

A Claimant's Dilemma: The Statute of Limitations and Proofs of Claim

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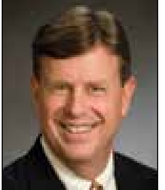

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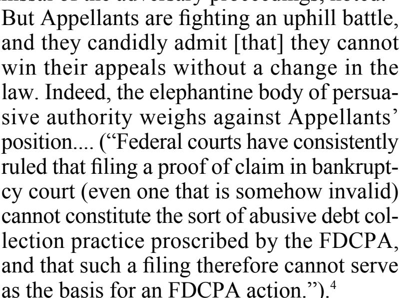
In recent months, especially after the Eleventh Circuit's opinion in *Crawford v. LVNV Funding LLC*,[1] the issue of a proof of claim based on a debt for which the statute of limitations had passed has generated significant interest. In *Crawford*, the court overruled the decisions of both the bankruptcy and district courts, as well as a previously uniform body of federal law, and held that the filing of a proof of claim for a debt for which the statute of limitations had expired was a violation of the Fair Debt Collection Practices Act (FDCPA).[2] *Crawford* is especially troubling because the FDCPA only applies to certain entities and certain types of debt, specifically "debt collectors" collecting on "consumer debt," both as defined by the FDCPA.[3] Thus, the practical effect of *Crawford* is the imposition of liability under the FDCPA upon only certain claimants filing certain types of claims in a bankruptcy case, such claims as are filed without penalty by any other claimant. The court below, in affirming the dismissal of the adversary proceedings, noted:



> But Appellants are fighting an uphill battle, and they candidly admit [that] they cannot win their appeals without a change in the law. Indeed, the elephantine body of persuasive authority weighs against Appellants' position.... ("Federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action.").[4]

Despite this, the *Crawford* panel found an FDCPA violation and created a split among the circuits by being the only one to rule that merely filing a proof of claim for a time-barred debt was an FDCPA violation. Predictably, since the decision, bankruptcy creditors-claimants, who may coincidentally be debt collectors under the FDCPA, have been faced with an onslaught of litigation seeking damages and attorneys' fees pursuant to the FDCPA's strict liability and fee-shifting provisions.[5] Even more punitive is the retroactive application of *Crawford* to claims filed before the *Crawford* decision was issued.

Statute of Limitations: A Definition

A statute of limitations is a legislatively proscribed period of time "establishing a time limit for suing in a civil case, based on the date when the claim accrued."[6] In most cases, the running of the statute of limitations is an affirmative defense to a suit that must be raised by a defendant.[7] The limitations period for a specific type of action under state law (*e.g.*, a personal-injury claim) may vary from state to state.[8]

It is often unclear which statute of limitations applies to a particular claim. For example, contractual choice-of-law terms may discord with local conflict of laws statutes or precedent. There may be a dispute over which cause of action, and its applicable statute of limitations, applies to a claim. Are revolving credit accounts written contracts, accounts stated or, in the absence of a signed credit agreement, an unwritten account? The statute of limitations in many states differs as to actions on similar claims.

In addition, the beginning of the limitations period for an open or revolving consumer account is generally the date of the last transaction on the account. However, that date is also subject to interpretation. Is it the date of the last payment, the date of the creditor's last non-suit collection attempt, or the date of any creditor transaction on the account, such as final delinquency or interest charges?

Finally, determining whether the statute of limitations applies also involves facts that are uniquely within the defendant's knowledge, such as where the debtor lived during the life of the account and after delinquency. All of these factors make determining which statute of limitations applies and whether it has run more complicated, and the answer can mean the difference between a suit's surviving a motion to dismiss or not.

1 758 F.3d 1254 (11th Cir. 2014).
2 *Id.* at 1256; *see also* Susan E. Trent, "*Crawford* Surprises: Stale Debt, FDCPA and Proofs of Claim," XXXIII *ABI Journal* 10, 14, 82-83, October 2014.
3 A debt collector is defined as:

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

15 U.S.C. § 1692a(6) (2014). The Act defines a debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services [that] 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) (2014).
4 *Crawford v. LVNV Funding LLC*, No. 2:12-CV-701-WKW [WO], 2013 U.S. Dist. LEXIS 66169, at *4 (M.D. Ala. May 9, 2013).
5 *Crawford*, 758 F.3d at 1259 n.4; 15 U.S.C. § 1692k(a)(3).
6 *Black's Law Dictionary* 1422 (7th ed. 1999).
7 Fed. R. Civ. P. 8(c)(1).
8 For example, in Virginia, the statute of limitations for personal-injury claims is two years, Va. Code Ann. § 8.01-243A (2014). However, in Tennessee, it is one year, Tenn. Code Ann. § 28-3-104(a)(1) (2014).

In sum, the statute of limitations is an affirmative defense that must be raised and proven by a defendant. It is axiomatic that if the burden of determining the applicable statute of limitations falls on a plaintiff, a defendant's case may be compromised. When disputed, the ultimate determination of whether a statute of limitations has passed on a claim is the province of the court.[9]

Effect of the Running of the Statute of Limitations

The running of the statute of limitations does not extinguish the debt, but rather only the remedy if a defense of statute of limitations is properly raised and proven.[10] "The expiration of a statute of limitation[s] does not extinguish the substantive right itself, just the right to enforce a remedy.... A statute of repose or duration, on the other hand, provides a date upon which the substantive right itself no longer exists."[11]

The FDCPA and the Statute of Limitations

Enacted in 1978, the FDCPA arose as a result of "abundant evidence of the use of abusive, deceptive, and unfair debt-collection practices by many debt collectors."[12] Premised on the concept that "[a]busive debt-collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy,"[13] its drafters shared a concern that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers."[14] To that end, the FDCPA is purposed "to eliminate abusive debt-collection practices by debt collectors, to [e]nsure 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]

The FDCPA proscribes specific acts (*e.g.*, communicating with third parties about a debt or contacting debtors early in the morning or late at night). It also more generally prohibits debt collectors from engaging in harassing or abusive behavior, employing unfair practices in the collection of debts and making false representations to collect debts. However, nothing in the FDCPA prohibits the lawful collection of debts for which the statute of limitations for a suit has run.[16]

Likewise, filing suit on an out-of-statute debt is not a violation of the precise terms of the FDCPA. However, "[f]ederal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f."[17] Section 1692e of title 15 prohibits the false representation of the character, amount or legal status of any debt.[18] Section 1692f prohibits using unfair or unconscionable means to collect or attempt to collect any debt.[19] As stated by the *Phillips v. Asset Acceptance LLC* court:

> Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care — that sufficient to protect the least sophisticated consumer. *Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.*[20]

Statute of Limitations and Bankruptcy Claims

A "claim" in bankruptcy is not the same as a claim eligible for suit. The Bankruptcy Code broadly defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[21] The definition is intentionally expansive so that any party who may make a claim against a debtor is notified of the bankruptcy,[22] after which any disputes over the claim can be adjudicated.

The fact that a claim might be subject to disallowance due to the running of an applicable statute of limitations "does not defeat the existence of the claim in bankruptcy."[23] "Quite the contrary: the existence of the claim must be determined independent of limitations questions else the process of *allowance* under § 502 becomes redundant, if not circular."[24] By ruling that a proof of claim for an out-of-statute debt is a violation of the FDCPA, the Eleventh Circuit has effectively prohibited certain claimants from filing legitimate bankruptcy claims, eschewing the claim-determination process for adjudicating the allowance of claims.

However, the most recent revision to Fed. R. Bankr. P. 3001 ("Proof of Claim") requires an open-end or revolving consumer credit claim to include the following information: The date of an account holder's last transaction, the date of the last payment on the account, and the date on which the account was charged to profit and loss.[25] The Advisory Committee Notes to the Rule state:

> Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. *It will also provide a basis for assessing the timeliness of the claim.*[26]

Clearly, the drafters of the Federal Bankruptcy Rules were aware that out-of-statute claims are routinely filed, and crafted provisions to add transparency to those claims.

9 *Ottens v. McNeil*, 239 P.3d 308, 316 (Utah Ct. App. 2010) ("The application of a statute of limitations is a legal determination, which we review for correctness.").

10 *Gatewood v. CP Med. LLC*, Adv. No. 5:14-ap-7068, No. 5:13-bk-73363, at 2-3 n.2 (Bankr. W.D. Ark. Feb. 6, 2015) (order granting summary judgment to defendant and dismissing complaint) (citation omitted); *but see* Miss. Code Ann. § 15-1-3(1) (2014) ("The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy."); *Heritage Mut. Ins. Co. v. Picha*, 397 N.W.2d 156 (Wis. Ct. App. 1986) ("Wisconsin may be unique in holding that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself.").

11 *Gatewood v. CP Med. LLC*, Adv. No. 5:14-ap-7068, No. 5:13-bk-73363, at 2-3 n.2.

12 15 U.S.C. § 1692(a) (2014).

13 *Id.*

14 15 U.S.C. § 1692(b) (2014).

15 15 U.S.C. § 1692(e) (2014).

16 *Johns v. Northland Grp. Inc.*, No. 14-2947, 2015 U.S. Dist. LEXIS 93, at *10 (E.D. Pa. Jan. 5, 2015) (holding that "[p]ursuant to the FDCPA, a debt collector may seek voluntary repayment of the time-barred debt, so long as the debt collector does not initiate or threaten legal action in connection with the collection efforts").

17 *Crawford v. LVNV Funding LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014).

18 15 U.S.C. § 1692e (2014).

19 15 U.S.C. § 1692f (2014).

20 *Phillips v. Asset Acceptance LLC*, 736 F.3d 1076, 1083 (7th Cir. 2013) (emphasis added) (finding FDCPA violation for suing on debt on which applicable statute of limitations had run).

21 11 U.S.C. § 101(5).

22 *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) ("We have previously explained that Congress intended by this language to adopt the broadest available definition of 'claim.'").

23 *Roach v. Edge (In re Edge)*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986).

24 *Id.*

25 Fed. R. Bankr. P. 3001(c)(3)(A).

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

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The *Crawford* Effect

In the months since *Crawford*, several courts outside of the Eleventh Circuit have adopted its reasoning, allowing FDCPA suits premised on the filing of out-of-statute claims to proceed.[27] One court resorted, *sua sponte*, to sanctions pursuant to Fed. R. Bankr. P. 9011.[28] Disconcertingly shifting the burden of affirmative defense away from a defendant to a claimant, the court castigated the claimant for apparently failing to investigate whether its claim was susceptible to a statute-of-limitations defense.[29]

In contrast, other courts faced with this issue have understood that a proof of claim filed in a bankruptcy case differs from a lawsuit based on an out-of-statute debt and have further held that even if a debt collector filing a proof of claim in a bankruptcy is subject to the FDCPA, there is nothing inherently false or fraudulent about filing a proof of claim.[30]

The potential for FDCPA liability imposes additional procedural obligations on a discreet subset of bankruptcy claimants: those defined by the FDCPA as "debt collectors." Such claimants would be required to attempt to reconcile not only the Bankruptcy Code and the FDCPA, but also conflicting limitation periods among jurisdictions. A ban would also entrap those, such as attorneys, who assist non-debt-collector creditors in the administration of their bankrupt accounts, particularly by filing their proofs of claims. It is unlikely that such outside parties would agree to file claims that subject them to FDCPA liability.

In recent years, collection of out-of-statute consumer debts has garnered significant interest at both the state and federal level. The National Consumer Law Center recently issued a report calling for the Consumer Financial Protection Bureau (CFPB) to ban all collection of out-of-statute debt.[31] Such a move would inevitably raise many questions. For example, does the CFPB retain the authority to make such a regulation? Even if the CFPB could regulate debt collection in this manner, do its powers extend to actions in bankruptcy that are permitted by its Code and Rules?[32] Perhaps legislative action must precede regulation banning all collection of out-of-statute debt. If so, what are its prospects? In any event, it seems certain that if the U.S. Supreme Court grants the writ of *certiorari* and reviews *Crawford*, it will dictate how bankruptcy treats claims on out-of-statute debt and possibly substantially affect the collection of such debt, outside of bankruptcy. abi

27 *See, e.g., Patrick v. PYOD LLC*, 1:14-cv539-RLY-TAB, 2014 U.S. Dist. LEXIS 116092 (S.D. Ind. Aug. 20, 2014) (denying motion to dismiss and holding that filing proof of claim in bankruptcy for out-of-statute debt is attempt to collect debt in violation of FDCPA because it creates misleading impression in least-sophisticated consumer that debt is legally enforceable); *accord, Grandidier v. Quantum3 Grp. LLC*, No. 1:14-cv-00138-RLY-TAB, 2014 U.S. Dist. LEXIS 169279 (S.D. Ind. Dec. 8, 2014) (same).

28 *In re Sekema*, No. 14-40145, 2015 Bankr. LEXIS 239, at *7-*8 (Bankr. N.D. Ind. Jan. 7, 2015).

29 *Id.* at *4-*5.

30 *LaGrone v. LVNV Funding LLC (In re LaGrone)*, Adv. No. 14 A 00578, No. 13 B 21423, 2015 Bankr. LEXIS 212 (Bankr. N.D. Ill. Jan. 21, 2015) (holding that filing proof of claim in bankruptcy for out-of-statute debt, alone, is no violation of FDCPA because it is not improper collection activity proscribed by FDCPA such as false representations, threats of illegal action, deceptive means of collection, or unfair or unconscionable collection methods); *Marcinowski v. eCAST Settlement Corp. (In re Marcinowski)*, Adv. No. 14 A 00678, No. 13 B 33571 (Bankr. N.D. Ill. Jan. 30, 2015) (order dismissing adversary proceeding for reasons set forth in *LaGrone v. LVNV Funding LLC (In re LaGrone)*, Adv. No. 14 A 00578, No. 13 B 21423, 2015 Bankr. LEXIS 212 (Bankr. N.D. Ill. Jan. 21, 2015)); *Gatewood v. CP Med. LLC*, Adv. No. 5:14-ap-7068, No. 5:13-bk-73363 (Bankr. W.D. Ark. Feb. 6, 2015) (order granting summary judgment to defendant and dismissing complaint; opining that while FDCPA and Bankruptcy Code can be read together, and while filing proof of claim may be attempt to collect debt, and while creditor and agent were debt collectors under FDCPA, nevertheless, time-barred proof of claim was not false, deceptive or misleading, and debtor's remedy to such claim lay in Code and Rules because FDCPA and Code, while overlapping, serve different purposes and FDCPA is not controlling after debtor files voluntary petition).

31 April Kuehnhoff and Margot Saunders, "Zombie Debt: What the CFPB Should Do About Attempts to Collect Old Debt," National Consumer Law Center, January 2015, *available at* www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf (last visited March 3, 2015).

32 *LaGrone*, Adv. No. 14 A 00578, No. 13 B 21423, 2015 Bankr. LEXIS 212, at *14. For its part, the Bankruptcy Code merely makes a proof of claim disallowed if it falls to a statute of limitations affirmative defense. 11 U.S.C. § 502(b).

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