

*Consumer Track*

# **You Don't Always Get What You Want, but if You Do It Right, You Might Get What You Deserve**

**Hon. A. Benjamin Goldgar,  
Moderator**

*U.S. Bankruptcy Court (N.D. Ill.); Chicago*

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*Trott Law; Farmington Hills, Mich.*

**Glenn B. Stearns**

*Chapter 13 Trustee; Lisle, Ill.*

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## Bankruptcy Updates 2016 Trott Law, P.C.

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### New Forms 410 and 410A

- When do you use the form?
  - New POC Form 410 replaces the current B10 Form and is required regardless of Chapter. The form is substantially reorganized but not necessarily in a negative way
  - The 410A attachment form is required only in Chapter 13 cases and where the claim is secured by the Debtor's principal residence
  - In the EDM, the B10A may be used when amending a claim originally filed prior to 12/1/15
- What form is used for non-principal residence?
  - 410 and old B10A

T/L



## Part 1: Identify the claim

Creditor: an entity to whom a debtor owes a debt incurred on or before the bankruptcy filing

**Part 1: Identify the Claim**

1. Who is the current creditor?

Name of the current creditor (the person or entity to be paid for this claim) \_\_\_\_\_

Other names the creditor used with the debtor \_\_\_\_\_

2. Has this claim been acquired from someone else?

☐ No

☐ Yes From whom? \_\_\_\_\_

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?

Name \_\_\_\_\_

Number \_\_\_\_\_ Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

Contact phone \_\_\_\_\_

Contact email \_\_\_\_\_

Where should payments to the creditor be sent? (if different)

Name \_\_\_\_\_

Number \_\_\_\_\_ Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

Contact phone \_\_\_\_\_

Contact email \_\_\_\_\_

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

4. Does this claim amend one already filed?

☐ No

☐ Yes. Claim number on court claims registry (if known) \_\_\_\_\_ Filed on MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

☐ No

☐ Yes. Who made the earlier filing? \_\_\_\_\_

General consensus is that this is not applicable for general claim transfers and assignments – again debt buyers

## Part 2: Info on the date of filing

6. Do you have any number you use to identify the debtor?

☐ No

☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: \_\_\_\_\_

7. How much is the claim? \$ \_\_\_\_\_ For leases state only the amount of default.

Does this amount include interest or other charges?

☐ No

☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim?

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

9. Is all or part of the claim secured?

☐ No

☐ Yes. The claim is secured by a lien on property.

Nature of property:

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

☐ Motor vehicle

☐ Other. Describe: \_\_\_\_\_

Basis for perfection: \_\_\_\_\_

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

Value of property: \$ \_\_\_\_\_

Amount of the claim that is secured: \$ \_\_\_\_\_

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

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

Annual Interest Rate (when case was filed) \_\_\_\_\_ %

☐ Fixed

☐ Variable

Should match Part 2 of 410A or be calculated from the B10A

Should match Part 3 of 410A or from part 3 of the B10A



## Form B10A

### Current & may still be used for non-principal residence claims

Why? Under FRBP 3001(c)(2)(A) if a claim, in addition to the principal amount, includes "interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement ... shall be filed with the proof of claim."

**Part 1: Statement of Principal and Interest Due as of the Petition Date**  
Review the principal and interest due on the claims as of the petition date (indicated in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. Principal due: \_\_\_\_\_ (1) \$ \_\_\_\_\_

2. Interest due:

Interest rate	From	To	Amount
____%	____	____	\$ _____
____%	____	____	\$ _____
____%	____	____	\$ _____
Total interest due as of the petition date			\$ _____ (2) + \$ _____

3. Total principal and interest due: \_\_\_\_\_ (3) \$ \_\_\_\_\_

**Part 3: Statement of Amount Necessary to Cure Default as of the Petition Date**

Does the installment payment amount include an escrow deposit?

☐ No

☐ Yes Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

1. Installment payments due: \_\_\_\_\_ Date last payment received by creditor: \_\_\_\_\_

Number of installment payments due: \_\_\_\_\_ (1)

2. Amount of installment payments due:

_____ installments @ _____	\$ _____
_____ installments @ _____	\$ _____
_____ installments @ _____	\$ _____
Total installment payments due as of the petition date: _____ (2) \$ _____	

3. Calculation of cure amount:

Add total prepetition fees, expenses, and charges: \_\_\_\_\_ (Only total from Part 2 here) + \$ \_\_\_\_\_

Subtract total of unapplied funds (funds received but not credited to account): \_\_\_\_\_ = \$ \_\_\_\_\_

Subtract amounts for which debtor is entitled to a refund: \_\_\_\_\_ = \$ \_\_\_\_\_

Total amount necessary to cure default as of the petition date: \_\_\_\_\_ (3) \$ \_\_\_\_\_

Days 1001 into Item 4 of Proof of Claim form

**Part 2: Statement of Prepetition Fees, Expenses, and Charges**  
Review the fees, expenses, and charges due on the claims as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred	Amount
1. Late charges	_____	(1) \$ _____
2. Non-sufficient funds (NSF) fees	_____	(2) \$ _____
3. Attorney's fees	_____	(3) \$ _____
4. Filing fees and court costs	_____	(4) \$ _____
5. Advertisement costs	_____	(5) \$ _____
6. Sheriff/constable fees	_____	(6) \$ _____
7. Title costs	_____	(7) \$ _____
8. Recording fees	_____	(8) \$ _____
9. Appraiser's fee or price opinion fee	_____	(9) \$ _____
10. Property inspection fees	_____	(10) \$ _____
11. Tax delinquency (from owner)	_____	(11) \$ _____
12. Insurance premiums (from owner)	_____	(12) \$ _____
13. Escrow shortage or deficiency (Do not include amounts that are part of any installment payment listed in Part 1.)	_____	(13) \$ _____
14. Property preservation expenses. Specify: _____	_____	(14) \$ _____
15. Other. Specify: _____	_____	(15) \$ _____
16. Other. Specify: _____	_____	(16) \$ _____
17. Other. Specify: _____	_____	(17) \$ _____
Total prepetition fees, expenses, and charges. Add all of the amounts listed above.		(18) \$ _____

## 5 parts to the 410A

Part 1: Mortgage and Case Information				Part 2: Total Debt Calculation				Part 3: Arrearage as of Date of the Petition				Part 4: Monthly Mortgage Payment			
Case number:	_____			Principal balance:	_____			Principal & interest due:	_____			Principal & interest:	_____		
Debtor 1:	_____			Interest due:	_____			Prepetition fees due:	_____			Monthly escrow:	_____		
Debtor 2:	_____			Fees, costs due:	_____			Escrow deficiency for funds advanced:	_____			Private mortgage insurance:	_____		
Last 4 digits to identify:	_____			Escrow deficiency for funds advanced:	_____			Projected escrow shortage:	_____			Total monthly payment:	_____		
Creditor:	_____			Less total funds on hand:	_____			Less funds on hand:	_____						
Servicer:	_____			Total debt:	_____			Total prepetition arrearage:	_____						
Fixed accretion/daily simple interest/other:	_____														

**Part 5: Loan Payment History from First Date of Default**

Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred						
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance



## 410A – Part 1

New: indicates the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, reverse, or other method).  
Note: some servicers include the interest rate as well

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:		Principal balance:		Principal & interest due:		Principal & interest:	
Debtor 1:		Interest due:		Prepetition fees due:		Monthly escrow:	
Debtor 2:		Fees, costs due:		Escrow deficiency for funds advanced:		Private mortgage insurance:	
Last 4 digits to identify:		Escrow deficiency for funds advanced:		Projected escrow shortage:		Total monthly payment:	
Creditor:		Less total funds on hand:		Less funds on hand:			
Servicer:		Total debt:		Total prepetition arrearage:			
Fixed accrual/daily simple interest/other:							

Part 5: Loan Payment History from First Date of Default																
Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin. int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

New: identification of the servicer in addition to the creditor

T/L

## 410A – Part 2

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:		Principal balance:		Principal & interest due:		Principal & interest:	
Debtor 1:		Interest due:		Prepetition fees due:		Monthly escrow:	
Debtor 2:		Fees, costs due:		Escrow deficiency for funds advanced:		Private mortgage insurance:	
Last 4 digits to identify:		Escrow deficiency for funds advanced:		Projected escrow shortage:		Total monthly payment:	
Creditor:		Less total funds on hand:		Less funds on hand:			
Servicer:		Total debt:		Total prepetition arrearage:			
Fixed accrual/daily simple interest/other:							

Part 5: Loan Payment History from First Date of Default																
Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin. int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

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## Total Debt Calculation

### Sum of:

- Principal Balance Interest Due and Owing (if a DSI only will come from Column "N")
- Fees & Costs Due
- Escrow deficiency for funds advanced
  - Defined as "the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed"

### Less:

- **Total** amount of funds on hand (if applicable)
  - Positive escrow balance +
  - Unapplied funds +
  - Amounts in suspense account

#### Part 2: Total Debt Calculation

Principal balance: Column "M"

Interest due: Calculated

Fees, costs due: Column "P"

Escrow deficiency for funds advanced: Column "O"

Less total funds on hand:                     

Total debt:                     

The amount should be the same as the claim amount that you report on line 7 of Official Form 410.

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## 410A - Part 3

Part 1: Mortgage and Case Information				Part 2: Total Debt Calculation				Part 3: Arrearage as of Date of the Petition				Part 4: Monthly Mortgage Payment			
Case number:				Principal balance:				Principal & interest due:				Principal & interest:			
Debtor 1:				Interest due:				Prepetition fees due:				Monthly escrow:			
Debtor 2:				Fees, costs due:				Escrow deficiency for funds advanced:				Private mortgage insurance:			
Last 4 digits to identify:				Escrow deficiency for funds advanced:				Projected escrow shortage:				Total monthly payment:	<span style="border: 1px solid black; padding: 2px;">                    </span>		
Creditor:				Less total funds on hand:	-			Less funds on hand:	-						
Servicer:				Total debt:	<span style="border: 1px solid black; padding: 2px;">                    </span>			Total prepetition arrearage:	<span style="border: 1px solid black; padding: 2px;">                    </span>						
Fixed accrual/daily simple interest/other:															

Part 5: Loan Payment History from First Date of Default																
Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

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## Arrearage Calculation

### Sum of:

- Principal & Interest Portion of all pre-petition monthly installments due
  - *Escrow portion of prepetition payments are NOT be included in this figure*
- Pre-petition fees due
- Escrow deficiency for funds advanced
  - This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Part 3: Arrearage as of Date of the Petition	
Principal & interest due:	_____
Prepetition fees due:	Column "P" _____
Escrow deficiency for funds advanced:	Column "O" _____
Projected escrow shortage:	_____
Less funds on hand:	- _____
Total prepetition arrearage:	_____

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## Arrearage Calculation (cont.)

### Sum of:

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

Part 3: Arrearage as of Date of the Petition	
Principal & interest due:	_____
Prepetition fees due:	Column "P" _____
Escrow deficiency for funds advanced:	Column "O" _____
Projected escrow shortage:	_____
Less funds on hand:	- _____
Total prepetition arrearage:	_____

Per NACTT training webinar, although not spelled out in the instructions, in order to obtain this figure with the escrow deficiency listed as a separate line item, the escrow account will need to be brought to zero prior to running the escrow analysis.

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## Arrearage Calculation (cont.)

**Less:**

- Funds on hand (if applicable)
  - Unapplied funds +
  - Amounts in suspense account

### Part 3: Arrearage as of Date of the Petition

Principal &amp; interest due: \_\_\_\_\_

Prepetition fees due: Column "P"

Escrow deficiency for funds advanced:

Column "O"

Projected escrow shortage:

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: 

This should be the same amount as “Amount necessary to cure any default as of the date of the petition” that your report on line 9 of Official Form 410.

## 410A – Part 4

[illegible]



## Monthly Mortgage Payment

- This is your first post-petition payment
- Insert the monthly escrow portion of the monthly payment.
  - This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage.
  - Therefore, this amount must assume that the escrow deficiency and shortage will be paid through the plan and provide for a credit of a like amount when calculating post-petition escrow installment payments.
- Monthly private mortgage insurance amount is broken out separately.

### Part 4: Monthly Mortgage Payment

Principal & interest:	_____
Monthly escrow:	_____
Private mortgage insurance:	_____
Total monthly payment:	_____
Next Payment Due:	_____

General consensus: it is acceptable to add additional lines here to disclose additional amounts included in the monthly payment such as credit life insurance.  
 \*\*Adding the date of the next payment or the first post-petition payment may also be helpful to the Trustee (e.g. payments are due on a date other than the first of the month)

## Form 410A – Required Loan History to the First Date of Default

- This new loan History requirement shows:
  - When payments were due
  - When payments were made
  - How payments were applied
  - When fees and charges were incurred
  - The balances of various loan components back to the first date of default and at the time of filing
- Challenges –
  - Service transfers
  - Loan modifications –
    - Boarding entries
    - Deferred interest
  - Misapplications, reversals, unexplained entries
- Reverse Mortgages?
  - Generally Part 3 will be used only where there is a collection for pre-petition taxes and insurance and fees/costs/charges associated with the default (not part of regular monthly servicing)
  - May include additional line items that impact arrearage, i.e., “non-escrow advance balance” and/or “line of credit.”



## 410A – Part 5

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:		Principal balance:		Principal & interest due:		Principal & interest:	
Debtor 1:		Interest due:		Prepetition fees due:		Monthly escrow:	
Debtor 2:		Fees, costs due:		Escrow deficiency for funds advanced:		Private mortgage insurance:	
Last 4 digits to identify:		Escrow deficiency for funds advanced:		Projected escrow shortage:		Total monthly payment:	
Creditor:		Less total funds on hand:		Less funds on hand:			
Service:		Total debt:		Total prepetition arrearage:			
Fixed accrual/daily simple interest/other:							

Part 5 : Loan Payment History from First Date of Default																
Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

### Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter the date of the history will begin in Column A

Part 5 : Loan Payment History from First Date of Default																
Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

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



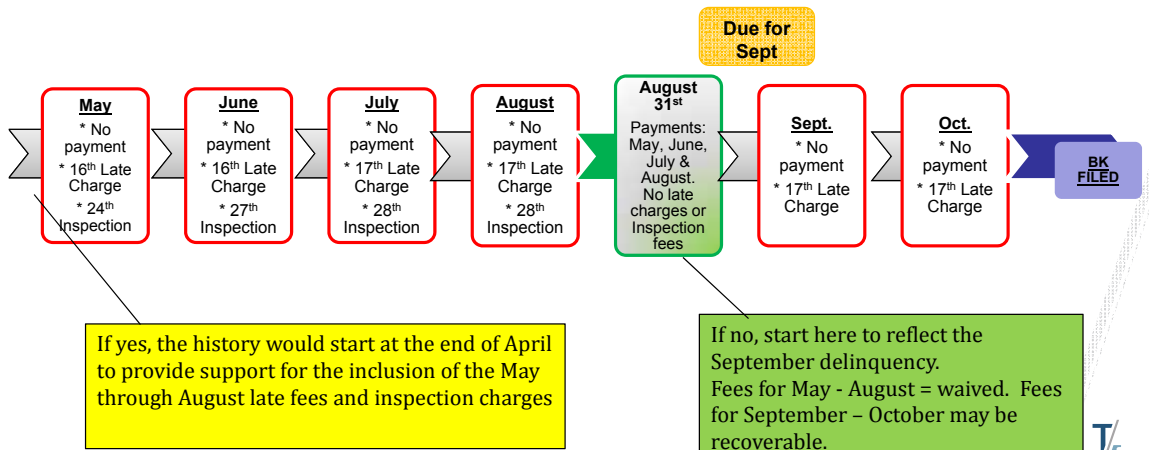
## Determining where to start: Find the First Date of Default

- What does this mean?
- The history should go back to the last date of default that was unpaid as of filing (or where the monthly payments have not been fully reinstated) so as to enable the debtor to better see the basis for the mortgage and arrearage amounts.
- If the intent is to recover a fee or cost assessed, you will need to go back in the history to justify that fee or cost.

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### Example 1

- Loan is delinquent for May, June, July & August. (4) Late charges and (4) inspection fees are incurred. Borrower reinstates payments ONLY on August 31<sup>st</sup> and then makes no further payments and bankruptcy is filed on November 1<sup>st</sup>. Late charges are assessed for September & October.
- Where to start? Does Servicer want to recovery the late charges & inspection fees for May – August?

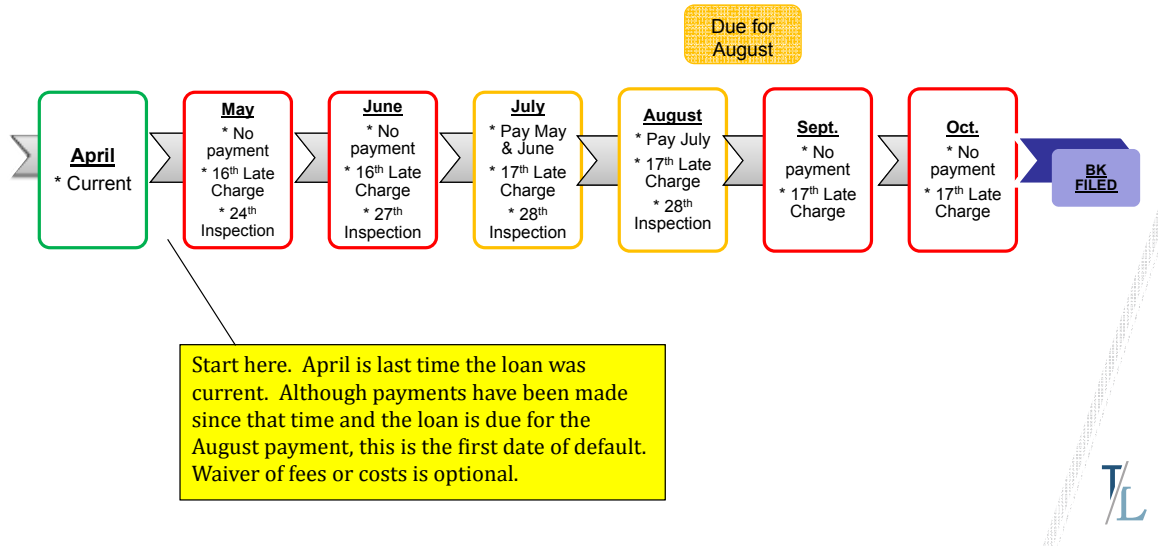


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## Example 2

- Loan is delinquent for May, June, July & August. (4) Late charges and (4) inspection fees are incurred. Borrower makes the May & June payment on July 25<sup>th</sup> and then makes the July payment on August 1<sup>st</sup>. Bankruptcy is filed on November 1<sup>st</sup>. Late charges are assessed for September & October.
- Where to start?



## Entering Line Items Initial Entries

Part 5 : Loan Payment History from First Date of Default

Account Activity					How Funds Were Applied/Amount Incurred							Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

Info from a variety of sources that you will need to supply or gather

- A. Starting date
- F. Contractual due Date
- M. Principal Balance
- O. Escrow Balance
- Q. Unapplied funds balance (possible)



## Entering Line Items General Overview

**Part 5 : Loan Payment History from First Date of Default**

Account Activity						How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin. Int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

Entries should be chronological

3 interactive parts:

Funds coming into or out of the account (Columns A-F);

What was done with that money (Columns H – L);

Impact on the running balances (Columns G, M – Q) and totals

Expectation is that for every entry there should be an entry in each of the parts

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## Entering Line Items Payments Due and Received

A. Date	B. Contractual Payment amount	Account Activity		E. Description	F. Contractual Due Date	G. (G) Prin. Int & Esc Past Due Balance	How funds were applied/Amount Incurred					Balance after amount received or incurred				
		C. Funds received	D. Amount Incurred				H. Amount to Principal	I. Amount to Interest	J. Amount to Escrow	K. Amount to Fees or Charges	L. Unapplied funds	M. (M) Principal Balance	N. Accrued Interest Balance	O. Escrow Balance	P. Fees / Charges Balance	Q. Unapplied Funds Balance
9/29/94	\$0.00		\$5.00	Inspection Fee		\$1,755.30					\$0.00	\$60,200.50		\$401.44	\$100.20	\$0.00
9/9/94	\$505.10		\$0.00	Payment Due	9/9/94	\$2,340.40					\$0.00	\$60,200.50		\$401.44	\$100.20	\$0.00
9/9/94	\$0.00	\$1,170.20	\$0.00	Funds Received		\$2,340.40					\$1,170.20	\$60,200.50		\$401.44	\$100.20	\$1,170.20
9/9/94	\$0.00		\$0.00	Payment Applied	9/9/94	\$1,755.30	\$95.25	\$225.75	\$264.10		-\$595.10	\$60,055.30		\$401.34	\$100.20	\$595.10
9/9/94	\$0.00		\$0.00	Payment Applied	9/9/94	\$1,170.20	\$95.61	\$225.39	\$264.10		-\$595.10	\$60,059.72		\$25.76	\$100.20	\$0.00

Payment Due: Columns A, B, E, F and running balances increasing in G and balances should be static in M and O. If the loan is a DSI, you will likely have an entry in N

Payment Applied: Columns A, C, E, F, H, I, J, K, L and running balances (reduction) in G, M, O, P, and Q

T/L



## Entering Line Items Escrow Entries

PART V Loan Payment History from First Date of Default																
A. Date	B. Contractual Payment amount	Account Activity		E. Description	(F) Contractual Due Date	(G) Prin. Int. & Esc Part Due Balance	How funds were applied/Amount Incurred					Balance after amount received or incurred				
		C. Funds received	D. Amount Incurred				(H) Amount to Principal	(I) Amount to Interest	(J) Amount to Escrow	(K) Amount to Fees or Charges	(L) Unapplied funds	(M) Principal Balance	(N) Accrued interest balance	(O) Escrow Balance	(P) Fees / Charges Balance	(Q) Unapplied Funds Balance
9/9/14	\$0.00		\$0.00	Payment Applied	9/9/14	\$1,755.30	\$95.25	\$225.75	\$354.10		-\$595.10	\$60,009.72		-\$100.20	\$100.20	\$95.10
9/9/14	\$0.00		\$0.00	Payment Applied	9/9/14	\$1,170.20	\$95.61	\$225.39	\$354.10		-\$595.10	\$60,009.72		-\$100.20	\$100.20	\$0.00
9/9/14	\$0.00		-\$57.64	PMI		\$1,170.20					\$0.00	\$60,009.72		\$100.20	\$100.20	\$0.00
9/10/14	\$0.00		\$23.40	Late Charge		\$1,170.20					\$0.00	\$60,009.72		\$123.60	\$123.60	\$0.00
9/19/14	\$0.00		\$15.00	Inspection Fee		\$1,170.20					\$0.00	\$60,009.72		\$138.60	\$138.60	\$0.00

Escrow entry: Columns A, D, E and running balances in O

Note: you may also see the amount listed in column D repeated in column K. This is not a “double” charge but an interpretation based on the heading “How funds were applied/*Amount incurred*”



## Entering Line Items Fee/Cost Entries

PART V Loan Payment History from First Date of Default																
A. Date	B. Contractual Payment amount	Account Activity		E Description	(F) Contractual Due Date	(G) Prin, Int & Esc Part Due Balance	How funds were applied/Amount Incurred					Balance after amount received or incurred				
		C. Funds received	D. Amount Incurred				(H) Amount to Principal	(I) Amount to Interest	(J) Amount to Escrow	(K) Amount to Fees or Charges	(L) Unapplied funds	(M) Principal Balance	(N) Accrued interest balance	(O) Escrow Balance	(P) Fees / Charges Balance	(Q) Unapplied Funds Balance
9/9/14	\$0.00		\$0.00	Payment Applied	9/9/14	\$1,755.30	\$95.25	\$225.75	\$354.10		-\$595.10	\$60,009.72		\$100.20	\$595.10	
9/9/14	\$0.00		\$0.00	Payment Applied	9/9/14	\$1,170.20	\$95.61	\$225.39	\$354.10		-\$595.10	\$60,009.72		\$100.20	\$0.00	
9/9/14	\$0.00		-\$57.64	PMI		\$1,170.20					\$0.00	\$60,009.72		\$100.20	\$0.00	
9/10/14	\$0.00		\$23.40	Late Charge		\$1,170.20					\$0.00	\$60,009.72		\$123.60	\$0.00	
9/19/14	\$0.00		\$15.00	Inspection Fee		\$1,170.20					\$0.00	\$60,009.72		\$138.60	\$0.00	

Escrow entry: Columns A, D, E and running balances in P

Note: you may also see the amount listed in column D repeated in column K. This is not a “double” charge but an interpretation based on the heading “How funds were applied/*Amount incurred*”





- Foreclosure was initiated in April; however, was cancelled upon filing in June. Billing and entries on the system of record do not appear until July.
  - Are they post-petition?
  - Are the pre-petition?
  - Entries are chronological?
  - Does the entry date become the date of filing with descriptions in columns E and F?

 $\tau_L$ 

PART 2 Total Debt Calculation		PART 3 Arrearage as of Date of the Petition	
Principal Balance	\$164,222.72	Principal & Interest Due:	\$6,663.20
Interest Due	\$5,937.83	Petition Fees Due:	\$863.74
Fees, Costs Due	\$863.74	Escrow deficiency for funds advanced:	-\$296.29
Escrow deficiency for funds advanced:	-\$296.29	Projected escrow shortage:	\$1,294.32
Less total funds on hand	\$33.31	Less funds on hand	\$33.31
Total Debt	\$170,094.69	Total Petition Arrearage	\$6,491.66

Total of column Q plus any positive escrow

[illegible] $\tau_L$







**Thank you!**

Trott Law P.C.





## TREATMENT OF TIME-BARRED CLAIMS IN BANKRUPTCY PROCEEDINGS

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### I. Introduction

A pattern has emerged, primarily in Chapter 13 cases, of adversary proceedings under the FDCPA against creditors for filing so-called “stale” claims—claims against a debtor that, as of the petition date, are time-barred by the applicable statute of limitations.<sup>1</sup> The process begins with a bankruptcy case in which assets are to be distributed (usually a Chapter 13 case), and a notice is mailed to creditors of the date by which claims must be filed. A creditor holding a “stale” claim responds by filing a proof of claim, including the statement Rule 3001(c)(3) requires for claims based on certain consumer credit agreements. From the Rule 3001(c)(3) statement, the debtor’s counsel learns that the claim is time-barred and objects under section 502(b)(1). The objection is sustained, and the claim is disallowed (or the claim is withdrawn before the objection is heard).

After the claim is disallowed or withdrawn, or sometimes in conjunction with the claim objection, the debtor files an adversary proceeding against the creditor for alleging that the creditor’s act of filing the “stale” claim violated provisions of the Fair Debt Collection Practices Act (FDCPA). The FDCPA provisions in question prohibit debt collectors from using “any false, deceptive, or misleading representations or means” to collect a debt, including misleading representations about the “legal status” of a debt, 15 U.S.C. § 1692e(2), and threatening or taking “any action that cannot legally be taken or that is not intended to be taken,” or using “any false

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<sup>1</sup> As one judge noted: “It isn’t clear how the practice of bringing FDCPA claims in this context began, but there is no question that has caught on. On April 16, 2015, for example, the Chicago Bar Association held a seminar for the express purpose of training attorneys on how to bring FDCPA claims in bankruptcy entitled “Statute of Limitations on Debt Collection & More.” Calendar of Events, Chicago Bar Assoc. This judge alone heard five other complaints and motions to dismiss predicated on the same arguments [in a single day]. *In re Glenn*, 542 B.R. 833, 834, FN.2 (Bankr. N.D. Ill. 2016) (internal citation omitted).



representation or deceptive means to collect or attempt” to collect a debt, 15 U.S.C. §§ 1692e(5), (10). Debt collectors who violate the FDCPA are liable for actual damages, “such additional damages as the court may allow, but not exceeding \$1,000,” and costs, including reasonable attorneys’ fees. 15 U.S.C. § 1692k(a).

The defendant-creditor typically files a motion (under Fed. R. Bankr. P. 7012, incorporating Rule 12(b)(6) of the Federal Rules of Civil Procedure) to dismiss the adversary proceeding for failure to state a claim on the ground that the mere filing of a “stale” proof of claim in the debtor’s bankruptcy does not violate the FDCPA. Most of the jurisprudence on this issue arises out of resolution of these motions.

## **II. Bankruptcy Code Provisions and Rules Related to Filing Claims**

For its claim to be allowed, a creditor must file a proof of claim. Fed. R. Bankr. P. 3002(a). Section 501 permits a creditor to file its claim, and a filed claim is automatically allowed under section 502(a) unless there is an objection. Under section 502(b) a claim will be disallowed to the extent that “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b)(1).

Rule 3001 prescribes the form and content of a proof of claim. In addition to the requirement that claims be filed on the official form, Rule 3001(c) requires the filer of a claim to include certain information with the claim. If the claim is based on an open-end or revolving consumer credit agreement, an statement must be filed with the form that includes the following information:

- (i) the name of the entity from whom the creditor purchased the account;
- (ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;



- (iii) the date of an account holder's last transaction;
- (iv) the date of the last payment on the account; and
- (v) the date on which the account was charged to profit and loss.

Fed. R. Bankr. P. 3001(c)(3). The advisory committee note indicates that, among other things, the required additional information will “provide a basis for assessing the timeliness of the claim.” Fed. R. Bankr.P. 3001(c) advisory committee’s note (2012).

### III. FDCPA and Stale Claims in Bankruptcy.

It is well-settled that threatening to file or filing a lawsuit to collect on a time-barred claim violates the FDCPA. What is not clear is whether it is a violation of the FDCPA to file a proof of claim for a time-barred debt in a bankruptcy case.

Federal courts have uniformly held that a debt collector’s threatening to file or filing a time-barred suit in state court to recover a debt violates §§ 1692e and 1692f of the FDCPA. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259 (11th Cir. 2014) (collecting cases). The Seventh Circuit has concluded that the filing of a lawsuit on a time-barred debt is a violation of the FDCPA. *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1083 (7th Cir. 2013) (“[T]he debt collection suits against the class members were time-barred and hence violated the Fair Debt Collection Practices Act.”). As the Third Circuit explained, “the majority of courts have held that when the expiration of the statute of limitations does not invalidate a debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt *so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts.*” *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32–33 (3d Cir.2011) (emphasis added.); see also *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (“[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred



debt that is otherwise valid” (emphasis added)). Thus, while a creditor may attempt to collect a time-barred debt, it becomes a FDCPA violation to initiate or threaten legal action to recover the debt. *But see McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (a debtor states a claim for a FDCPA violation when it misleads an unsophisticated consumer to believe a time-barred debt is legally enforceable, regardless of whether litigation is threatened).

#### **A. Is Filing a Stale Proof of Claim is Like Commencing a Collection Action?**

Equating a proof of claim with a civil complaint is not a new concept. “The analogy between a proof of claim and a complaint finds further support in the application of Rule 7(a), Fed.R.Civ.P., to the former: the creditor need not reply to objections, and indeed is not permitted to do so, unless a counterclaim denominated as such is set forth, or the Court orders the creditor to make such reply to the objections. Application of Rule 7(a) would be contraindicated unless a proof of claim had the force of a complaint.” *In re Am. Anthracite & Bituminous Coal Corp.*, 22 F.R.D. 504, 507 (S.D.N.Y. 1958) (internal citations omitted). As another court reasoned: “[t]he filing by [the creditor] of its proof of claim is analogous to the commencement of an action within the bankruptcy proceeding. The trustee’s [objection] is in the nature of an answer incorporating an affirmative request for relief ... The claimant is deemed to consent to the jurisdiction of the court upon filing its proof of claim.” *Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 164 (2d Cir. 1962).

One circuit court recently held that “[s]imilar 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.” *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844, 191 L. Ed. 2d 724 (2015). As the



*Crawford* court explains, the fundamental policy which underpins statutes of limitations in civil actions should also apply to bankruptcy claims:

Statutes of limitations protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

The same is true in the bankruptcy context. In bankruptcy, the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt. A Chapter 13 debtor's memory of a stale debt may have faded and personal records documenting the debt may have vanished, making it difficult for a consumer debtor to defend against the time-barred claim.

*Crawford*, 758 F.3d at 1261.

Several district and bankruptcy courts have followed *Crawford*, and denied a creditor's motion to dismiss an FDCPA claim against the creditor for filing time-barred proof of claim. See, e.g., *Reed v. LVNV Funding, LLC*, No. 14 C 8371, 2015 WL 1510375 (N.D. Ill. Mar. 27, 2015); *Patrick v. Quantum3 Group, LLC*, No. 1:14-cv-00545-TWP-TAB, 2015 WL 627216 (S.D. Ind. Feb. 13) adopted, 2015 WL 1166055 (S.D. Ind. Mar. 12, 2015); *In re Seak*, No. 3:13-bk-5446-PMG, Adv. No. 3:14-ap-330-PMG, 2015 WL 631578 (Bankr. M.D. Fla. Jan. 22, 2015); see also, *Taylor v. Galaxy Asset Purchasing, LLC*, 108 F.Supp.3d. 628 (N.D. Ill. 2015); *Grandidier v. Quantum3 Group, LLC*, No. 1:14-CV-00138-RLY-TAB, 2014 WL 6908482 (S.D. Ind. Dec. 8, 2014); *In re Feggins*, 535 B.R. 862 (Bankr. M.D. Ala. 2015) (collecting case); *In re Holloway*, 538 B.R. 137 (Bankr. M.D. Ala. 2015); *In re Avalos*, 531 B.R. 748 (Bankr. N.D. Ill. 2015); *In re Brimmage*, 523 B.R. 134 (Bankr. N.D. Ill. 2015).

But most courts to address the issue have held that filing a proof of claim for a time-barred debt is not a violation of the FDCPA. *In re Glenn*, 542 B.R. 833 (Bankr. N.D. Ill. 2016) (no FDCPA liability for stale proof of claim); *LaGrone v. LVNV Funding LLC and Resurgent*



*Capital Services (In re LaGrone )*, 525 B.R. 419 (Bankr. N.D. Ill. 2015) (same); *Owens v. LVNV Funding, LLC*, No. 1:14-cv-02083-JMS-TAB, 2015 WL 1826005 (S.D. Ind. Apr. 21, 2015) (same), *appeal docketed*, No. 15-2044 (7th Cir. May 13, 2015); *Torres v. Asset Acceptance, LLC*, 96 F.Supp.3d 541 (E.D. Pa. 2015) (same), *appeal docketed*, No. 15-2132 (3rd Cir. May 13, 2015); *Robinson v. eCast Settlement Corp.*, No. 14 CV 8277, 2015 WL 494626 (N.D. Ill. Feb. 3, 2015) (same); *Covert v. LVNV Funding, LLC*, No. DKC 13-0698, 2013 WL 6490318 (D. Md. Dec. 3, 2013) (filing proof of claim is not an attempt to collect debt under FDCPA), *aff'd on other grounds*, 779 F.3d 242; *Crawford v. LVNV Funding, LLC*, 2013 WL 1947616 (M.D. Ala. May 9, 2013) (no FDCPA liability for stale proof of claim), *rev'd*, 758 F.3d 1254 (11th Cir.2014); *Gatewood v. CP Medical, LLC (In re Gatewood)*, 533 B.R. 905 (8th Cir. BAP 2015) (same); *Perkins v. LVNV Funding, LLC (In re Perkins)*, 533 B.R. 242 (Bankr. W.D. Mich. 2015) (same); *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, 532 B.R. 60 (Bankr. M.D. Tenn. 2015) (no FDCPA liability for stale proof of claim if information is accurate and applicable statute of limitations extinguishes only the remedy and not the right to collect debt); *Murff v. LVNV Funding, LLC (In re Murff)*, No. 13 B 44431, No. 14 A 790, 2015 WL 3690994 (Bankr. N.D. Ill. Jun. 15, 2015) (no FDCPA violation for stale proof of claim); *Marcinowski v. Ecast Settlement Corp. (In re Marcinowski)*, Case No. 13 B 33571, Adv. No. 14 A 00678, 2015 WL 3524977 (Bankr. N.D. Ill. Jun. 3, 2015) (same) (adopting *LaGrone*); *Dunaway v. LVNV Funding, LLC (In re Dunaway)*, 531 B.R. 267 (Bankr. W.D. Mo. 2015) (same), *appeal docketed*, No. 15-8007 (8th Cir. Jun. 29, 2015); *LaGrone v. LVNV Funding, LLC (In re LaGrone)*, 525 B.R. 419 (Bankr. N.D. Ill. 2015) (same); *Claudio v. LVNV Funding, LLC (In re Claudio)*, 463 B.R. 190 (Bankr. D. Mass. 2012) (same); *Carter v. B-Line, LLC (In re Carter)*, No. 10-10459-8-RDD, Adv. No. 11-00069-8-RDD, 2012 WL 627769 (Bankr. E.D. N.C. Feb. 24, 2012) (filing proof of



claim is not an attempt to collect a debt under the FDCPA); *Jenkins v. Genesis Fin. Solutions (In re Jenkins)*, 456 B.R. 236 (Bankr. E.D. N.C. 2011) (no FDCPA liability for stale proof of claim); *Keeler v. PRA Receivables Mgmt., LLC (In re Keeler)*, 440 B.R. 354 (Bankr. E.D. Pa. 2009) (same); *Jacques v. U.S. Bank, N.A. (In re Jacques)*, 416 B.R. 63 (Bankr. E.D. N.Y. 2009) (same); *Simpson v. PRA Receivables Mgmt., LLC (In re Simpson)*, No. 08–00344–TOM–13, Adv. No. 08–00137, 2008 WL 4216317 (Bankr. S.D. Ala. Aug. 29, 2008) (same).

Among the majority of courts dismissing FDCPA actions against creditors for filing stale claims, several have found that filing a stale claim is not sufficiently similar to commencement of a time-barred suit to be actionable under the FDCPA, highlighting the differences between filing a claim in a debtor-initiated bankruptcy and summoning a debtor into court. One court explained these differences this way:

First, in collection lawsuits, the debtors themselves must assert the statute of limitations in an answer. Debtors in bankruptcy cases, on the other hand, have the benefit of a trustee with a fiduciary duty to all parties to examine proofs of claims and object to the allowance of any claim that is improper....

Second, a debtor in bankruptcy has much less at stake in the allowance of a proof of claim than a defendant facing the prospect of an adverse judgment in a collection lawsuit. A proof of claim does not result in collection from the debtor personally but seeks only a share in the total payments available to all of the debtor's creditors....[Thus, often] the debtor will pay the same total amount to creditors, regardless of whether particular proofs of claim are disallowed....

Third, in a collection lawsuit a consumer debtor would have to retain and likely pay for the services of a lawyer. Debtors in bankruptcy, by contrast, are likely from the outset of the case to be represented by an attorney who can both advise them about the existence of a statute of limitations defense and file an objection if the trustee does not....

Finally, even if the trustee fails to file a claim objection based on the statute of limitations, even if filing a claim objection would have a significant benefit for the debtor, and even if the debtor did not have legal assistance, it would be easier—and less embarrassing—for the individual debtor to file a claim objection pro se than to deal with an untimely collection lawsuit.

*In re LaGrone*, 525 B.R. 419, 426-27 (Bankr. N.D. Ill. 2015).



Discussing the differences between commencement of a suit and filing a claim in bankruptcy, another court explains:

[T]his is not the case of the debtor being dragged into a process by the creditor. The debtor was not forced from the comfort of his home to respond to egregious tactics by the creditor. Nor was the debtor hounded into bankruptcy, only to be met with a claim by the very party who forced the case to be filed. No evidence of any such actions exists here. In fact there is no allegation other than those set forth above, and those make clear that when the Debtor commenced a bankruptcy case, [the creditor] did nothing other than respond...

Further, unlike in Phillips, the debtor picked this particular fight. Even if the debtor is pro se, to grant the debtor the breadth of protection that drove the Phillips decision would be manifestly unfair. The debtor must certainly be charged with greater responsibility in prosecuting the bankruptcy case which it commenced, and the creditor should be afforded its day in court in response to the debtor's actions. While it would be unfair to allow the creditor to do whatever it pleases as a result of the debtor's actions, it would be more unfair to say that the creditor may do nothing at all in response.

*In re Glenn*, 542 B.R. 833, 841-42 (Bankr. N.D. Ill. 2016)

The reasoning of *LaGrone*, *Glenn*, and similar decisions does not create a per se bar on FDCPA actions based on the filing of claims in bankruptcy cases. But these decisions make clear that FDCPA relief is not always appropriate. As a Tennessee bankruptcy court explained:

The FDCPA should not be implicated with regard to stale debts when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations.

*In re Broadrick*, 532 B.R. 60, 75 (Bankr. M.D. Tenn. 2015).

## **B. Statutes of Limitations and The Status of Claims**

At the heart of the debtor's FDCPA actions concerning stale claims are the applicable state statutes of limitations. But not all statutes of limitations are created equally. Most state statutes of limitations do not extinguish a debt altogether; they merely bar use of the court system



to seek collection of the time-barred debt. The attached chart summarizes the statutes of limitations for the states in the Sixth and Seventh Circuits, as well as the State of Minnesota. The statutes of limitations in all of these states except Wisconsin bar only the remedy, not the right<sup>2</sup>. Unique among the states surveyed, Wisconsin's statute codifies prior case law holding that its statute of limitations not only bars a remedy at law but extinguishes any underlying right as well. Thus, a time-barred claim in Wisconsin would likely fail to meet even the bankruptcy code's expansive definition of a "claim."

The broad definition of "claim" found in the Bankruptcy Code would seem to encompass time-barred claims in the majority of states where only the remedy, not the right, is extinguished. A "claim" is defined as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured..." 11 U.S.C. § 101(5). As the *Glenn* court observed, that

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<sup>2</sup> It is debatable whether "rights" and "remedies" may be distinguished this way. One theory is that a right without a remedy is merely a "weaker" form of right:

The weakest right is the one for which no legal remedy is available in case of its breach. Section 32(a) of the Israeli Contracts (General Part) Law 1973 offers an example of this type of legal right. It provides that "A gambling, lottery or betting contract ... does not provide ground for enforcement or damages." The Contracts Law thus envisages a type of contract that is valid and binding and confers legal rights and yet no legal remedy is available to protect it. In this respect it is a very weak right. Yet, there is no denying that at least in the eyes of the legislator it is a valid and legally binding right. In this respect it is similar to a legal right that cannot be enforced by virtue of a statute of limitation. Enforceable rights are in this respect "stronger" than non-enforceable rights.

Another theory is that, without a remedy, there can be no right:

The right derives from the remedy and as a matter of sequence the remedy precedes the right. Consequently the absence of a remedy points to the non-existence of a legal right. This model is in line with the traditional approach of the common law under which "where there is a remedy there is a right" (*ubi remedium ibi ius*), and the granting of a remedy via an action in court remains to date a major vehicle for the development of new legal entitlements and the expansion of established legal rights... This model, in its extreme form, was adopted by Holmes in whose view "[t]he primary rights and duties with which jurisprudence busies itself ... are nothing but prophecies." A legal right (and a legal duty) "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."

Daniel Friedmann, *Rights and Remedies in COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* (Oxford, Hart Publishing, 2004): 3-17.



definition is broad enough to include a right to payment held by a creditor, even if that right is unenforceable in court: “What further is necessary to establish a creditor’s right to payment, than, well, a right to payment? The law [in Illinois] is clear that, even on a time-barred debt, the creditor has a right to keep a payment made after the bar.” *Glenn*, 542 B.R. at 844. Another Illinois bankruptcy court disagreed: “By definition, stale debt is debt that is no longer owed. Debt collectors may get paid by a Chapter 13 debtor despite having no right to payment.” *In re Avalos*, 531 B.R. 748, 756 (Bankr. N.D. Ill. 2015).<sup>3</sup> At least insofar as the Illinois statute of limitations is concerned, this appears to be an incorrect statement of the law, but as noted above, this reasoning could apply in Wisconsin, where the expiration of the statute of limitations extinguishes both the remedy and the right.

But even if the debt is not literally extinguished under many state statutes of limitations, the protection of the FDCPA is not limited to literal misstatements or outright falsehoods. The FDCPA also prohibits statements that are deceptive or misleading, and “even a true statement may be banned if it creates a misleading impression.” *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 396 (6th Cir. 2015). To the extent a proof of claim is a “statement” about the validity of the claim, while technically true, it could be misleading, and thus potentially actionable under the FDCPA.

#### IV. Sanctions for Filing Stale Claims

As an alternative to attacking stale claims under the FDCPA, some debtors have elected to challenge a creditor’s proof of claim as a frivolous pleading under Bankruptcy Rule 9011. Rule 9011 is the bankruptcy equivalent of Rule 11 of the Federal Rules of Civil Procedure, and mandates that anyone who presents (“whether by signing, filing, submitting or later advocating”)

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<sup>3</sup> The *Avalos* court derides as “nonsense” the “claimant’s argument that it has a right to payment but is shut out of ... its state court remedies,” *Avalos*, 531 B.R. at 757 n.1, although many (perhaps a majority of) courts reach this precise conclusion regarding the status of time-barred claims.



a particular position to the court (“a petition, pleading, written motion, or other paper”) has an affirmative obligation to conduct a reasonable investigation into both the law and the facts before doing so, and that inquiry must lead to the conclusion that the presenter’s position is warranted by existing law or a non-frivolous argument. *In re Sekema*, 523 B.R. 651, 653 (Bankr. N.D. Ind. 2015), (citing Fed. R. Bankr.P. Rule 9011(b)(2)).

In *Sekema*, the debtor objected successfully to a stale proof of claim, and the court then *sua sponte* scheduled a show-cause hearing to consider sanctions against the creditor under Rule 9011(b)(2). When the creditor failed to respond or appear at the hearing, the court imposed sanctions of \$1,000 against the creditor, noting:

Debtors’ statute of limitations defense to both claims was blindingly obvious. It does not take a rocket scientist to figure out that [the creditor’s claims are time barred]. A third grader could do the math. Moreover, coming to the conclusion that the claims might be time-barred did not require either claimant to look beyond the information it already possessed.

*Sekema*, 523 B.R. at 654. Another court reached a similar conclusion:

A facially time-barred proof of claim is not well-founded. It follows that a creditor’s only possible purpose in filing a facially time-barred proof of claim is to take advantage of the automatic claims allowance process of § 502(a) and hope that the debtor and the bankruptcy court do not notice the defect. Such conduct is an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court...

The Bankruptcy Code and Rules provide remedy for such conduct... Bankruptcy Rule 9011 authorizes the bankruptcy court to impose sanctions on creditors who file proofs of claim for any improper purpose or who make claims or legal contentions that are not warranted by existing law.

*In re Feggins*, 535 B.R. 862, 868–69 (Bankr. M.D. Ala. 2015).

Another court, however, declined to follow *Sekema* and *Feggins*, and refused to sanction a creditor for similar conduct:

Indeed, given the split in the case law, it is difficult to see how sanctions under Rule 9011(b)(2) can be imposed on claimants filing stale proofs of claim, even if, in the future, a substantial number of courts (including, perhaps, several courts of appeal) adopt the



Sekema/Feggins position that it is improper to file proofs of claim without investigating and developing plausible responses to obvious affirmative defenses to a proof of claim. Unless and until the Supreme Court resolves the issue, a rational argument exists for the practice of filing stale proofs claims and compelling debtors and trustees to object to their allowance.

*In re Freeman*, 540 B.R. 129, 144 (Bankr. E.D. Pa. 2015)

At least one other court considered but denied a debtor's request for sanctions under section 105 against a creditor that filed a state claim:

As discussed above, however, the claim at issue does not appear to be false or fraudulent. Although the debtor stated that she does not recall this debt, no evidence was offered to characterize this claim as representative of an invalid debt. Instead, the debtor's primary position is that the debt is time-barred. The claim represents a valid debt that the statute of limitations does not extinguish; rather, it bars enforcement of the debt. Thus, based on the unavailability of § 105 sanctions for the filing of a stale claim, the portions of the complaint that seek § 105 sanctions must be dismissed as the plaintiff has not stated a claim upon which relief can be granted.

*In re White*, No. 14-03109-5-SWH, 2016 WL 1125640 (Bankr. E.D. N.C. Mar. 21, 2016).

## V. Conclusion

In the coming year, several circuit courts will have an opportunity to weigh in on these issues. This question is currently before the Seventh Circuit Court of Appeals in three consolidated appeals: *Robinson v. eCast Settlement Corp.*, No. 15-2082, *Owens v. LVNV Fund, LLC*, No. 15-2044, and *Birchman v. LVNV Funding, LLC*, No. 15-2109. Similar cases have reached other circuits, including *Martel v. LVNV Funding, LLC*, No. 15-2489 (1st Cir.); *Dubois v. Atlas Acquisitions LLC (In re Dubois)*, No. 15-1945 (4th Cir.); *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, No. 16-5042 (6th Cir.); *Nelson v. Midland Credit Mgmt., Inc.*, No. 15-2984 (8th Cir.); and *Johnson v. Midland Funding, LLC*, No. 15-11240 (11th Cir.). Given the splits across lower courts, it seems likely that a split will also emerge in the circuits, especially since the Eleventh Circuit already adopted the minority view in *Crawford*. It will likely be up to the Supreme Court to ultimately decide this issue.



# AMERICAN BANKRUPTCY INSTITUTE

State	Statute(s)	Extinguishes Remedy Only or Extinguishes Right & Remedy
Michigan	<b>6 Years – § 600.5807(8):</b> “No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section... (8) The period of limitations is six years for all other actions to recover damages or sums due for breach of contract.”	<b>Remedy Only:</b> “Under Michigan law, as under the law of most states, a debt remains a debt even after the statute of limitations has run on enforcing it in court. As a result, when the six-year limitations period ran on Buchanan's debt, that meant only that the creditor—LVNV today—could not enforce the debt in court without facing a complete legal defense to it.” <u>Buchanan v. Northland Group, Inc.</u> , 776 F.3d 393, 396-97, 2015 WL 149528 (6th Cir. 2015).
Ohio	<p><b>4 Years = Sale of Goods – § 1302.98(A):</b> “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.”</p> <p><b>6 Years = Promissory Notes – § 1303.16(A):</b> “[A]n action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.”</p> <p><b>6 Years = Oral Contracts, Accounts – § 2305.07:</b> “[A]n action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.”</p> <p><b>8 Years = Written Contracts – § 2305.06:</b> “[A]n action upon a specialty or an agreement, contract, or promise in writing shall be brought within eight years after the cause of action accrued.”</p>	<b>Remedy Only:</b> “The statutes of Ohio do not so provide but it has long been the law of Ohio that the debtor may defeat recovery by asserting the running of the statute of limitations. This right of the debtor to defeat recovery by pleading the statute of limitations must be kept in mind when the courts assert, as is said in <i>Taylor v. Thorn</i> , Admr., 29 Ohio St. 569, 573: ‘They do not extinguish the debt nor affect its validity. They merely withhold from the owner thereof the right to employ remedial process for its collection.’” <u>Summers v. Connolly</u> , 159 Ohio St. 396, 402, 112 N.E.2d 391, 394, 39 A.L.R.2d 661, 50 O.O. 352 (1953).
Kentucky	<p><b>4 Years – § 355.2-725(1):</b> “An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.”</p> <p><b>5 Years – § 413.120:</b> “The following actions shall be commenced within five years after the cause of action accrued...(1) an action upon a contract not in writing, express or implied; (7) an action upon a bill of exchange, check, draft or order, or any endorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange; (9) an action upon a merchant’s account for goods sold and delivered, or any article charged in such store account.”</p>	<b>Remedy Only:</b> “In Kentucky, ‘a statute of limitations does not extinguish a legal right but merely affects the remedy.’ <i>Wethington v. Griggs</i> , 392 S.W.2d 56, 57 (Ky.1964). Therefore, the statute of limitations affects the debt collector's remedy, but it does not eliminate the debt.” <u>Brewer v. Portfolio Recovery Associates</u> , CIV.A. 1:07CV-113-M, 2007 WL 3025077, at *2 (W.D. Ky. Oct. 15, 2007)
Tennessee	<b>6 Years – § 28-3-109(a)(3):</b> “The following actions shall be commenced within six years after the cause of action accrued...Actions on contracts not otherwise expressly provided for.”	<b>Remedy Only:</b> “The Tennessee statute of limitations on collection of a debt does not extinguish a creditor's rights in the debt, only the remedy.” <u>In re Broadrick</u> , 532 B.R. 60, *74, 2015 WL 3855251 (Bankr. M.D. Tenn. 2015).
Wisconsin	<b>6 Years – § 893.43(1):</b> “[A]n action upon any	<b>Right &amp; Remedy: § 893.05: Relation of Statute of</b>



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	contract, obligation, or liability, express or implied . . . shall be commenced within six years after the cause of action accrues or be barred.”	<p><u>Limitations to Right and Remedy</u> – When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.</p> <p>Wisconsin's statute of limitations effectively extinguishes a debt and renders it nil. <u>Klewer v. Cavalry Investments, LLC</u>, No. 01-CV-541-S, 2002 WL 2018830, at *3 (W.D. Wis. Jan. 30, 2002)</p> <p>In Wisconsin the expiration of the statute of limitations does more than merely close the door of the courthouse. "The expiration of the limitations period extinguishes the cause of action of the potential plaintiff and it also creates a right enjoyed by the would-be defendant to insist on that statutory bar." <u>Wojtas v. Capital Guardian Trust Co.</u>, 477 F. 3d 924 (7th Cir. 2007), citing <u>Colby v. Columbia County</u>, 202 Wis.2d 342, 350, 550 N.W.2d 124, 128 (1996).</p>
<b>Illinois</b>	<p><b>10 Years – 735 ILCS 5/13-206:</b> “[A]ctions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing and actions brought under the Illinois Wage Payment and Collection Act shall be commenced within ten years next after the cause of action accrued[.]”</p> <p>*Case law says that the statute of limitations on a credit card debt without a written contract is 5 years since state law doesn’t specify limits on open accounts.</p>	<p><b>Remedy Only:</b> The running of the statute of limitations would bar defendant from collecting through the courts, but it does not extinguish plaintiff's debt. <i>See Walker v. Cash Flow Consultants, Inc.</i>, 200 F.R.D. 613, 616 (N.D.Ill.2001). That defendant cannot sue to recover the debt does not prevent it from seeking to recover the debt via an alternate route. Merely attempting to collect a time-barred debt does not violate the FDCPA. <u>Murray v. CCB Credit Services, Inc.</u>, 04 C 7456, 2004 WL 2943656, at *2 (N.D. Ill. Dec. 15, 2004).</p>
<b>Indiana</b>	<p><b>6 Years – § 34-11-2-9:</b> “An action upon promissory notes, bills of exchange, or other written contracts for the payment of money executed after August 31, 1982, must be commenced within six years after the cause of action accrues.”</p>	<p><b>Remedy Only:</b> “‘We do not hold that it is automatically improper for a debt collector to seek repayment of time-barred debts; some people might consider full debt repayment a moral obligation, even though the legal remedy for the debt has been extinguished.’ Thus, sending a dunning letter in an attempt to collect a stale debt does not, in and of itself, violate the FDCPA. However, <i>suing</i> to collect a time-barred debt is unquestionably an FDCPA violation.” <u>Holt v. LVNV Funding, LLC</u>, 115CV00851RLYDKL, 2015 WL 7721222, at *3 (S.D. Ind. Nov. 30, 2015).</p>
<b>Minnesota</b>	<p><b>6 Years – § 541.05(1)(1):</b> “[T]he following actions shall be commenced within six years . . . upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed[.]”</p>	<p><b>Remedy Only:</b> “[T]he running of a statute of limitations on a debt does not extinguish the debt but merely bars the remedy for the recovery of the debt.” <u>Marriage of Chaignot v. Chapin</u>, A05-1966, 2006 WL 2348119, at *13 (Minn. App. Aug. 15, 2006).</p>