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NOTES

**PRECLUDING FDCPA CLAIMS IN
BANKRUPTCY**

NATALIE KO[†]

INTRODUCTION

In a recent year, \$72.3 billion in consumer debt, consisting of credit cards, medical, utility, auto, and mortgage debt, was purchased by the expanding debt-buying industry.¹ Debt buyers generally purchase this debt for “pennies on the dollar,” but will then turn around and attempt to collect the full amount from the consumer.² In doing so, debt buyers utilize abusive and illegal tactics, which include harassing consumers and their families.³

To protect consumers from such abusive practices, Congress enacted the far-reaching and all-encompassing Fair Debt Collection Practices Act (“FDCPA”)⁴ to regulate the ever-

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¹ FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 7 (2013), <http://ftc.gov/os/2013/01/debtbuyingreport.pdf> (describing debt-buying statistics for 2008).

² Ann Carrns, *Debt Collectors to Pay \$61 Million in Consumer Refunds and Amend Their Practices*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/your-money/debt-collectors-to-pay-61-million-in-consumer-refunds-and-amend-their-practices.html>.

³ *Id.* (“In July, JPMorgan Chase agreed to pay \$136 million to settle charges that it had used illegal tactics to pursue delinquent credit card borrowers.”); *see also* FED. TRADE COMM’N, *Debt Collection, Consumer Information*, <http://www.consumer.ftc.gov/articles/0149-debt-collection>.

⁴ Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012) (“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.”).

expanding debt collection industry.⁵ Congress sought to deter illegal debt collection activities by providing consumers with a private right of action against offending debt collectors.⁶

Yet, the application of the FDCPA in the context of bankruptcy is in dispute. Particularly, it is debated as to whether debtors in bankruptcy retain their private right of action under the FDCPA against debt collectors who have filed an improper proof of claim.⁷ In these contexts, the Bankruptcy Code arguably overlaps and conflicts with the FDCPA in terms of remedies offered and procedural aspects that debt collectors must abide by.⁸

For years, the majority of courts facing this issue, including the United States Court of Appeals for the Second and Eighth Circuits, have taken the position that consumer FDCPA claims are to be limited or precluded altogether as the supplementation of the FDCPA is unnecessary, even detrimental, to the Bankruptcy Code.⁹ However, the Eleventh Circuit, in departing from this trend and allowing consumer FDCPA claims, was

⁵ See generally 15 U.S.C. § 1692e, 1692f (2012) (declaring open-ended prohibitions on debt collector conduct and mandatory disclosure requirements on their communications).

⁶ See 15 U.S.C. § 1692k (2012) (creating a private right of action for consumers against “debt collector[s] who fail to comply” with the regulations of the FDCPA).

⁷ Both courts and commentators are divided on this issue. See James J. Haller & Tara Twomey, *Debt Collectors Should Not Get a Free Pass in Bankruptcy*, 34 AM. BANKR. INST. J. 11, 30 (2015) (arguing that FDCPA claims should be allowed in bankruptcy). *But see*, Brittany M. Dant, Comment, *Down the Rabbit Hole: Crawford v. LVNV Funding, LLC Upends the Role of the Fair Debt Collection Practices Act in Consumer Bankruptcy*, 66 MERCER L. REV. 1067, 1085 (2015) (arguing that FDCPA claims should not be allowed and that debtors should resort to the remedies under the Bankruptcy Code).

⁸ See Dant, *supra* note 7, at 1080 (discussing how the Bankruptcy Code already provides remedies for situations where a debt collector files an invalid proof of claim).

⁹ *In re Gatewood*, 533 B.R. 905 (B.A.P. 8th Cir. 2015) (limiting the applicability of the FDCPA to deceptive proofs of claim only); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 511 (9th Cir. 2002); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (finding that consumer FDCPA claims are precluded because underlying purpose of FDCPA is not implicated in bankruptcy); *In re Chaussee*, 399 B.R. 225, 227 (B.A.P. 9th Cir. 2008).

motivated by the negative implications of allowing debt collectors to utilize certain provisions of the Bankruptcy Code to the disadvantage of unrepresented debtors.¹⁰

This Note seeks to offer additional justifications and expand upon the Eighth Circuit's intermediate approach in harmonizing both federal statutes by also extending certain exemptions with the FDCPA to apply to proofs of claim in bankruptcy. Part I examines the relevant legislative intent and procedural aspects of both the Bankruptcy Code and the FDCPA. Part II summarizes the various approaches that courts take to the problem and their rationale behind their decision. Part III considers several justifications for limiting consumer enforcement of the FDCPA in the bankruptcy context. Finally, Part IV proposes that, to synchronize both the FDCPA and Bankruptcy Code, courts should extend exemptions within the FDCPA to include proofs of claim and hold that filing a proof of claim for a stale debt, without misrepresentation and similar deceptive practices, does not constitute a violation of the FDCPA.

I. LEGISLATIVE INTENT AND PROCEDURAL ASPECTS OF THE BANKRUPTCY CODE AND FDCPA

A. *Bankruptcy Code*

Although the Bankruptcy Code provides ample protection to debtors, it was not designed to eliminate abusive collection activities. Rather, Congress's intent was to design a "whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and [embarrassed] debtors alike."¹¹ Further, bankruptcy courts are the sole forum for asserting a proof of claim. Accordingly, the Bankruptcy Code provides for the procedural aspects of filing a proof of claim, objecting to it, and obtaining relief for any bad faith conduct.¹²

¹⁰ See *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014) (finding that the automatic allowance provision of the Bankruptcy Code allows creditors to take advantage of unsophisticated debtors).

¹¹ *Chaussee*, 399 B.R. at 231 (quoting *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996)).

¹² See 11 U.S.C. §§ 501–02 (2012); Adina L. Pollan, *Crawford v. LVNV Funding, LLC: The Interplay Between the Bankruptcy Code and the FDCPA*, 89 FLA. B.J. 58 (2015) (stating that past bankruptcy practice and explicit Bankruptcy Code

1. Purpose of the Bankruptcy Code Is To Adjust Rights of Creditors and Debtors Alike

The purpose of the Bankruptcy Code is to provide a neutral plane for both debtors and creditors to come together for a court-regulated resolution. This is accomplished by the automatic stay provision of the Bankruptcy Code, which operates as a freeze on creditor collection activity.¹³ By doing this, the Bankruptcy Code's automatic stay provision protects both debtors and creditors.

The automatic stay provision grants many benefits to the debtor. Its primary protection is that it implements an instant freeze upon any collection activity.¹⁴ Additionally, its scope is broad and encompasses any collection activity against debtors or their estate.¹⁵ Accordingly, it gives a "breathing spell" to debtors by operating as a shield so that the debtor can attempt repayment or a reorganization plan without adverse actions by creditors.¹⁶ Further, as part of the fundamental form of protection for debtors, violation of the automatic stay may subject creditors to "actual damages, including costs and attorneys' fees, and, in appropriate circumstances . . . punitive damages."¹⁷ Some courts have even extended "actual damages" to include emotional injury damages.¹⁸ In addition, this private right of action is not the only form of relief given to the debtor; it is considered a supplement to the debtor's right to also seek civil contempt.¹⁹ As such, debtors are offered many options for which they may seek relief for any violation of the automatic stay.

provisions left remedy for fraudulent and defective claims to be addressed under the Bankruptcy Code).

¹³ 11 U.S.C. § 362 (2012).

¹⁴ *See id.*

¹⁵ *See* § 362(a)(2).

¹⁶ *Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2009) (stating that the stay operates as a shield to the debtor allowing them a breathing spell).

¹⁷ 11 U.S.C. § 362(k)(1).

¹⁸ *See Fleet Mortg. Grp., Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999).

¹⁹ *See In re Kutumian*, No. 13-14675-B-7, 2014 WL 2024789, at *10 (Bankr. E.D. Cal. May 15, 2014) ("[Section] 362(h)'s introduction 'was meant to supplement, not replace, the civil contempt remedy.'").

In addition, the automatic stay similarly protects creditors' interests, too. Since creditor collection activity has been halted, it essentially prevents any opportunistic attempts by other creditors to gain an unfair advantage with respect to obtaining payment for their claims.²⁰

Accordingly, it can be inferred that the legislative intent behind the Bankruptcy Code is to create a neutral forum for debtors and creditors to come together and adjust their rights equally.

2. Procedural Aspects of Bankruptcy Code: Filing Proof of Claim

Both the Bankruptcy Code and Federal Rules of Bankruptcy Procedure lay the foundation, rules, and procedures for bankruptcy proceedings. To initiate a bankruptcy proceeding, the first step requires a debtor to file a bankruptcy petition.²¹ Although there are various types of bankruptcies, individual debtors may file Chapter 7 or Chapter 13 bankruptcy, depending on their specific circumstances.²² Once the debtor files for bankruptcy, a trustee is appointed to perform various tasks, such as object to improper proofs of claim and distribute the debtor's estate.²³

In response to the bankruptcy petition, creditors file a proof of claim to assert their claims against the debtor.²⁴ For example, a creditor with a judgment or lien against the debtor would assert his or her right by filing a proof of claim in the debtor's bankruptcy proceedings. Bankruptcy Rule 3001 requires the following information to be included in the proof of claim: (1) name of entity from whom the creditor purchased the account; (2) entity that held debt as of the last transaction; (3) date of last transaction; and (4) date of last payment.²⁵ If a creditor files a

²⁰ See *In re Ampal-American Israel Corp.*, 502 B.R. 361, 369 (Bankr. S.D.N.Y. 2013) (stating that the automatic stay also protects creditors against other creditors attempting to "jump the line").

²¹ See FED. R. BANKR. P. 1002.

²² *Bankruptcy*, U.S. CTS., www.uscourts.gov/services-forms/bankruptcy (last visited Feb. 4, 2017).

²³ 11 U.S.C. § 1302(a) (2012); see also 11 U.S.C. § 704(a)(5) (2012).

²⁴ See FED. R. BANKR. P. 3001 ("A proof of claim is a written statement setting forth a creditor's claim.").

²⁵ FED. R. BANKR. P. 3001(c)(3)(A)(i)-(v) (basing claims on open-ended or revolving consumer credit agreements).

proof of claim, it is prima facie evidence of the validity and amount of the claim.²⁶ Accordingly, the burden is placed on the debtor or the bankruptcy trustee to object to a filed proof of claim.²⁷ If they fail to do so, under the automatic allowance provision of the Bankruptcy Code, the claim is allowed.²⁸

However, if the debtor does object to a proof of claim, he must follow the procedure laid out under Rule 3007 of the Federal Rules of Bankruptcy Procedure.²⁹ To object to a creditor's claim, the debtor must file a written objection with notice of a hearing to allow the bankruptcy court to determine whether to exclude the claim.³⁰ The bankruptcy court has authority, pursuant to 11 U.S.C. § 502(b), to modify the amount of the claim or exclude it altogether.³¹

Should there be any misconduct during this process, the bankruptcy courts are also endowed with powers to remedy bad faith conduct and sanction its actors under Bankruptcy Rule 9011 and § 105(a) of the Bankruptcy Code.³² The bankruptcy court's authority to sanction extends to creditors that file improper proofs of claim.³³ Bankruptcy Rule 9011 allows the bankruptcy court to impose sanctions on the parties if they file documents with the court that are either frivolous, in bad faith, or motivated by an improper purpose.³⁴ Essentially, this rule is the functional equivalent of Rule 11 of the Federal Rules of Civil Procedure.³⁵ Accordingly, the bankruptcy court may sanction any party that violates this provision under Rule 9011(c).³⁶

Further, the bankruptcy courts possess an even broader inherent power to sanction legal misconduct under § 105(a) of the Bankruptcy Code.³⁷ The scope of § 105(a) extends beyond the purview of Bankruptcy Rule 9011; it allows the bankruptcy court

²⁶ *In re Chaussee*, 399 B.R. 225, 237 (B.A.P. 9th Cir. 2008) (quoting FED. R. BANKR. P. 3001(f)).

²⁷ See 11 U.S.C. § 502(a) (2012).

²⁸ *Id.*

²⁹ FED. R. BANKR. P. 3007.

³⁰ *Id.*

³¹ 11 U.S.C. § 502(b) (2012).

³² See FED. R. BANKR. P. 9011; 11 U.S.C. § 105(a) (2012).

³³ FED. R. BANKR. P. 9011.

³⁴ FED. R. BANKR. P. 9011; see also *In re Mroz*, 65 F.3d 1567, 1572 (11th Cir. 1995).

³⁵ FED. R. CIV. P. 11.

³⁶ FED. R. BANKR. P. 9011.

³⁷ 11 U.S.C. § 105(a) (2012).

to issue any order that is “necessary or appropriate” to implement the provisions of the Bankruptcy Code and prevent abuse of its process.³⁸ Bankruptcy courts generally exercise their power under § 105 when parties engage in conduct that “intentionally abuse[s] the judicial process in an unreasonable and vexatious manner.”³⁹

Accordingly, bankruptcy courts are vested with broad authority to regulate and sanction the legal misconduct of parties appearing before them.

B. Fair Debt Collection Practices Act

In 1977, Congress enacted the FDCPA as a subsection of the Consumer Credit Protection Act (“CCPA”) in an effort to protect consumers from abusive debt collection practices.⁴⁰ In doing so, many procedural safeguards, such as the debt validation process under § 1692g and the “mini-Miranda” warning requirement, were set in place.

1. Purpose of FDCPA Is Consumer Protection

Congress enacted the FDCPA after it determined that the existing laws and procedures were inadequately protecting consumers from abusive debt collector conduct.⁴¹ Under the FDCPA, debtors are given a private right of action to bring suit against offending debt collectors.⁴² The FDCPA’s primary scheme places open-ended prohibitions upon creditors.⁴³ These open-ended prohibitions may essentially be divided into two categories: (1) “false or misleading representations,”⁴⁴ and (2) “unfair practices.”⁴⁵

³⁸ *Id.*; see also *In re Collins*, 250 B.R. 645, 658 (Bankr. N.D. Ill. 2000).

³⁹ *Collins*, 250 B.R. at 657 (quoting *In re Rimsat, Ltd.*, 212 F.3d 1039, 1047 (7th Cir. 2000)).

⁴⁰ See Dant, *supra* note 7, at 1070.

⁴¹ 15 U.S.C. § 1692a (2012).

⁴² Kara B. Schissler, Note, *Come and Knock on Our Door: The Fair Debt Collection Practices Act’s Intrusion into New York’s Summary Proceedings Law*, 22 CARDOZO L. REV. 315, 348 (2000).

⁴³ 15 U.S.C. §§ 1692e, 1692f (2012).

⁴⁴ 15 U.S.C. § 1692e.

⁴⁵ 15 U.S.C. § 1692f.

In addition to open-ended prohibitions, the FDCPA is a strict-liability statute.⁴⁶ Therefore, a plaintiff does not need to prove knowledge, intent, nor actual damages to have a successful claim.⁴⁷ Creditors who violate the FDCPA may be liable for actual damages, statutory damages up to \$1,000, and reasonable attorney fees and costs.⁴⁸

Traditionally, courts have construed the statute very broadly in an effort to protect all consumers, ranging from the most “shrewd” to the most “gullible.”⁴⁹ To effectuate this goal, courts use the “least sophisticated consumer standard” when determining whether an FDCPA violation exists.⁵⁰ In general, federal circuit and district courts have held that a debt collector bringing a civil action to collect on stale debt per se violates the FDCPA.⁵¹

However, one limitation of the FDCPA is that it does not regulate all creditor conduct; rather, it applies only to “debt collectors” within the meaning as defined by the statute. Pursuant to § 1692a of the FDCPA, “[t]he term ‘debt collector’ means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”⁵² The statute proceeds by listing six groups of creditors exempt from debt collector status.⁵³

⁴⁶ Derek S. Burrell, *The Federal Fair Debt Collection Practices Act: An Overview Rx for Debt Collector Myopia*, 21 S. ILL. U. L.J. 1, 27 (1996) (discussing the strict “mini-Miranda” warning requirement and how its strategic placement or concealment on notices will cause debt collectors to be held strictly liable under the FDCPA).

⁴⁷ *In re Broadrick*, 532 B.R. 60, 65 (M.D. Tenn. 2015).

⁴⁸ 15 U.S.C. § 1692k (2012).

⁴⁹ *Broadrick*, 532 B.R. at 65 (quoting *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007)).

⁵⁰ *See United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 135–36 (4th Cir. 1996) (discussing that most courts apply the “least sophisticated consumer” standard to evaluate violations of the FDCPA).

⁵¹ *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (stating that filing a suit after the statute of limitations on a claim had run violates the FDCPA); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32–33 (3d Cir. 2011) (recognizing that a majority of courts have held that threatened or actual litigation to collect on a stale debt violates the FDCPA); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783, 787 (5th Cir. 2011) (same).

⁵² 15 U.S.C. § 1692a(6) (2012).

⁵³ *See* 15 U.S.C. § 1692a(6)(A)–(F).

Accordingly, the purpose of the FDCPA is to protect consumers against the abusive actions of debt collectors. This is accomplished by holding debt collectors strictly liable for violating any of its broadly interpreted open-ended prohibitions. However, inasmuch as it seeks to protect all consumers, the reach of the FDCPA does not regulate all creditor conduct.

2. Procedural Aspects of the FDCPA

In addition to imposing open-ended prohibitions on debt collectors, the FDCPA requires debt collectors to comply with two important procedural aspects. First, 15 U.S.C. § 1692g outlines the debt validation procedure for circumstances where a consumer wants to dispute the validity of a debt. Second, § 1692e(11) mandates a “mini-Miranda” warning to be placed upon specific communications sent by the debt collector.

Debt validation, under § 1692g, requires the debt collector to send the consumer a written communication notifying him of his right to obtain a verification of the debt.⁵⁴ One of the underlying purposes of this requirement is to target the debt-buying industry—debt collectors who purchased the debt from the original creditor, but collect on the debt under a different name.⁵⁵ Through verification, the debt collector must disclose the name and address of the original creditor and provide supporting documentation of the debt.⁵⁶ Debt collectors must comply with this process after making any “initial communication[s]” with the consumer.⁵⁷ However, under the statute, “formal pleading[s]” are exempt and do not constitute an initial communication under the FDCPA.⁵⁸

In addition, a second procedural requirement of the FDCPA is the “mini-Miranda” warning.⁵⁹ Debt collectors are mandated to disclose their intent to collect a debt and warn the consumer

⁵⁴ 15 U.S.C. § 1692g (2012).

⁵⁵ Elizabeth Lea Black, *Construction and Application of Provision of Fair Debt Collection Practices Act Relating to Validation of Debts (15 U.S.C.A. § 1692g)*, 150 A.L.R. Fed. 101, 2a (1998).

⁵⁶ § 1692g(b).

⁵⁷ § 1692g(a).

⁵⁸ § 1692g(d). “Initial communications” and “formal pleadings” are not defined within the statute.

⁵⁹ 15 U.S.C. § 1692e(11) (2012).

that any information obtained will be utilized for that purpose.⁶⁰ Similar to the debt validation procedure, this provision also exempts “formal pleading” from compliance.⁶¹

Accordingly, both the debt validation and mini-Miranda warning provisions serve to protect consumers through mandatory disclosure. However, both provide the same exception to formal pleadings.

II. VARIOUS APPROACHES COURTS HAVE UTILIZED

Courts addressing the issue of whether the Bankruptcy Code necessarily precludes FDCPA claims based on improper proofs of claim have taken various positions. On one end of the spectrum, the United States Court of Appeals for the Eleventh Circuit has concluded that FDCPA claims are not precluded. On the other end, the Second and Ninth Circuits have disagreed and held that FDCPA claims are precluded. The Eighth Circuit, however, has taken an intermediate approach in an effort to harmonize both federal statutes and held that the FDCPA is only implicated in specific circumstances.

A. *Eleventh Circuit and the State Court Analogy of “Unfairness”*

The Eleventh Circuit found that the Bankruptcy Code did not preclude FDCPA claims. In *Crawford v. LVNV Funding, LLC*,⁶² the Eleventh Circuit held that filing a proof of claim in a Chapter 13 bankruptcy proceeding to collect on a stale debt violated the FDCPA for the same reasons it would violate the FDCPA in an ordinary state court action.⁶³ Using this state court analogy, the court reasoned that the automatic allowance provision in the Bankruptcy Code allows creditors to take unfair advantage of unsophisticated debtors and collect payments on stale debt.⁶⁴

In *Crawford*, plaintiff owed a debt to a furniture company.⁶⁵ The debt collector purchased this debt from the furniture company in 2001; the statute of limitations subsequently expired

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

⁶³ *Id.* at 1262; *see also* 11 U.S.C. § 362(a)(6) (2012).

⁶⁴ *Crawford*, 758 F.3d at 1262.

⁶⁵ *Id.* at 1256.

in 2004.⁶⁶ In 2008, plaintiff filed for Chapter 13 bankruptcy and the debt collector filed a proof of claim to collect on the debt despite the fact that the statute of limitations had expired four years earlier.⁶⁷ Neither plaintiff nor the bankruptcy trustee objected to the proof of claim.⁶⁸ After four years of making payments towards the claim, plaintiff objected to the claim and initiated a lawsuit alleging that the debt collector violated the FDCPA by filing a proof of claim for stale debt.⁶⁹ The case eventually made its way to the Eleventh Circuit after the district court affirmed dismissal of her claim.⁷⁰

To start its analysis, the Eleventh Circuit examined both the underlying purpose and open-ended prohibitions of the FDCPA.⁷¹ Specifically, it emphasized the “unfair practices” prohibition under the FDCPA.⁷² The court stated that threatening to sue or filing a lawsuit to collect a stale debt would constitute a per se violation of the FDCPA in state court.⁷³ In state court, stale suits are considered unfair under the FDCPA for several reasons: (1) unsophisticated debtors may unsuspectingly acquiesce to the lawsuit as they are unaware that they may assert a statute of limitations defense; (2) the plaintiff’s recollection of the validity of the debt is dulled with the passage of time; and (3) given the amount of time that has passed, the plaintiff may no longer have personal records regarding the allegedly owed debt.⁷⁴ Through this line of reasoning, the Eleventh Circuit emphasized the importance of the statute of limitations in guarding against these unfair outcomes in civil litigation.⁷⁵

This same principle is equally applicable in the bankruptcy context.⁷⁶ Particularly, the Eleventh Circuit focused on the automatic allowance provision, under 11 U.S.C. § 502(a)–(b) and Bankruptcy Rule 3001(f), which automatically allows a claim

⁶⁶ *Id.* (stating that Alabama statute of limitations of three years governed this debt).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1259.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1257.

⁷¹ *Id.*

⁷² *Id.* at 1258.

⁷³ *Id.* at 1259.

⁷⁴ *Id.* at 1260 (quoting *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013)).

⁷⁵ *Id.*

⁷⁶ *Id.*

against a Chapter 13 debtor unless there is an objection from either the debtor or the trustee.⁷⁷ As is what happened in this case, under the bankruptcy rules, a debt collector may file a proof of claim asserting a stale debt and still be able to collect on a debt that would otherwise be unenforceable in court if both the debtor and trustee fail to object to it.⁷⁸ Accordingly, filing a proof of claim for a stale debt produces the same unfair consequences as in state court. Given the Bankruptcy Code's automatic allowance provision, the debt collector was able to collect payment from the plaintiff's future wages as part of the Chapter 13 repayment plan when the debt collector would not otherwise be able to enforce such a right through litigation.⁷⁹ Further, even if a debtor were to object, objecting to a proof of claim would cause him or her to expend resources and energy similar to filing a limitations defense in state court.⁸⁰

The debt collector argued that allowing an FDCPA claim in this circumstance would contradict the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(6);⁸¹ essentially, the court's holding would imply that a proof of claim is a form of debt collection activity prohibited by the stay.⁸² The Eleventh Circuit rejected this argument by distinguishing between direct and indirect methods of debt collection. As an indirect means of debt collection, filing a proof of claim in a bankruptcy proceeding does not come into conflict with the automatic stay.⁸³

In conclusion, the Eleventh Circuit concluded by analogy that since the debt collector would be liable under the FDCPA claim in state court, he is similarly liable under the FDCPA in bankruptcy court.⁸⁴

⁷⁷ *Id.* at 1261.

⁷⁸ *Id.* at 1259.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1261.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1261-62.

⁸⁴ *Id.* at 1262.

B. Second and Ninth Circuits Found That the Bankruptcy Code Precludes FDCPA Claims

The Second and Ninth Circuits found that the Bankruptcy Code precluded FDCPA claims. The Second Circuit, in *Simmons v. Roundup Funding, LLC*,⁸⁵ reasoned that the underlying purpose of the FDCPA is not implicated in the bankruptcy context.⁸⁶ The bankruptcy court offers sufficient protection to a debtor when it presides over a debtor's bankruptcy case. Therefore, it is unnecessary and contrary to any expressed intent by Congress to have the FDCPA serve as a supplement to the remedies already provided for in bankruptcy.⁸⁷ In fact, in *In re Chaussee*,⁸⁸ the Ninth Circuit found that the allowance of FDCPA might even run to the detriment of the Bankruptcy Code.⁸⁹

1. Second Circuit: *Simmons v. Roundup Funding, LLC*⁹⁰

In *Simmons v. Roundup Funding, LLC*, the Second Circuit held that a proof of claim stating the incorrect amount owed could not form the basis of an FDCPA claim.⁹¹ The plaintiff in *Simmons* filed for bankruptcy in 2007.⁹² The debt collector filed a proof of claim for a debt in the amount of \$2,039.21.⁹³ The plaintiffs objected to the proof of claim and the Bankruptcy Court ultimately modified the amount to \$1,100, an amount the plaintiffs admitted that they owed.⁹⁴ The plaintiffs subsequently brought a class-action lawsuit in district court against the debt collector, alleging an FDCPA violation for misrepresenting the amount of debt owed.⁹⁵ In response, the debt collector moved to dismiss the complaint arguing that an FDCPA claim could not be based on an inflated proof of claim.⁹⁶ The district court agreed with the debt collector and dismissed the complaint.

⁸⁵ 622 F.3d 93 (2d Cir. 2010).

⁸⁶ *Id.* at 95–96.

⁸⁷ *Id.* at 96.

⁸⁸ 399 B.R. 225 (B.A.P. 9th Cir. 2008).

⁸⁹ *Id.* at 236–37 (quoting *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002)).

⁹⁰ See generally *Simmons*, 622 F.3d 93.

⁹¹ *Id.* at 96.

⁹² *Id.* at 94.

⁹³ *Id.* at 95.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Upon appeal, the Second Circuit reviewed the legislative history of the FDCPA.⁹⁷ Citing several decisions from other district courts, the Second Circuit concluded that filing a proof of claim in bankruptcy court was not the type of abusive conduct contemplated by the FDCPA and, therefore, could not be the basis for an FDCPA action.⁹⁸ In arriving at this conclusion, the Second Circuit reasoned that the Bankruptcy Code already provided sufficient protection to the debtors against abuses that the FDCPA sought to protect.⁹⁹ Due to the supervision of the court, discharge of the debt, and the protections afforded by bankruptcy to debtors, the underlying purpose of the FDCPA was no longer implicated.¹⁰⁰

Further, the Second Circuit justified its approach by stating that the Bankruptcy Code provided adequate remedies to an aggrieved debtor, which could include revoking an improper proof of claim or utilizing the court's contempt power.¹⁰¹ However, instead of seeking a remedy under the Bankruptcy Code, the plaintiffs immediately commenced an action under the FDCPA.¹⁰² The Second Circuit reasoned that filing an FDCPA claim was potentially more lucrative for the plaintiff than seeking remedy from the bankruptcy courts.¹⁰³ "[N]othing in the FDCPA suggest[ed] that it is intended as an overlay to the protections already in place in the bankruptcy proceedings."¹⁰⁴ Accordingly, the Second Circuit held that the only recourse that debtors who fall victim to fraudulent proofs of claim have is through the Bankruptcy Code itself.¹⁰⁵ Recourse through the FDCPA is foreclosed.

⁹⁷ *Id.* ("Congress acted with the aim of eliminating abusive practices in the debt collection industry, and also sought to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.").

⁹⁸ *Id.* at 96.

⁹⁹ *Id.* ("[T]here is no need to supplement the remedies afforded by bankruptcy itself.").

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999)).

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* ("While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." (quoting *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002))).

2. Ninth Circuit: *In re Chaussee* and Its Reliance on *Walls v. Wells Fargo Bank, N.A.*¹⁰⁶

In *Chaussee*, the Court held that the Bankruptcy Code precluded the plaintiff's FDCPA claims.¹⁰⁷ The plaintiff, who filed for Chapter 13 bankruptcy, had commenced an action against the debt collector alleging various violations including an FDCPA claim.¹⁰⁸ The two credit card debts in dispute were assigned to the debt collector from a collection agency.¹⁰⁹ The debt collector subsequently filed two proofs of claim in the plaintiff's bankruptcy case with inadequate supporting documentation.¹¹⁰

The plaintiff commenced an action against the debt collector alleging that: (1) they violated both the state Consumer Protection Act ("the CPA") and FDCPA because the debts were barred by the statute of limitations, and (2) they were attempting to collect on a debt that she did not owe, as a different name was listed as the account holder.¹¹¹ The debt collector subsequently moved to dismiss the complaint, arguing neither the CPA nor FDCPA were applicable to proofs of claim in bankruptcy proceedings.¹¹² Further, the debt collector argued that plaintiff's exclusive remedy for challenging a proof of claim was to object to it pursuant to the relevant Bankruptcy Rules.¹¹³ Their motion also contended that plaintiff had already obtained adequate relief pursuant to § 502(b)(1) of the Bankruptcy Code when the bankruptcy court excluded the debt collector's proofs of claim.¹¹⁴

The Bankruptcy Court, relying on *Walls v. Wells Fargo Bank, N.A.*,¹¹⁵ held that the Bankruptcy Code precluded the plaintiff's FDCPA claims. The facts in *Walls* are rather straightforward. A Chapter 7 debtor, who was able to keep her home, continued to make payments on her mortgage despite

¹⁰⁶ See generally *In re Chaussee*, 399 B.R. 225 (B.A.P. 9th Cir. 2008).

¹⁰⁷ *Id.* at 227.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 228.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 228–29 (“[A]n order was entered by the bankruptcy court on December 18, 2007, sustaining the objection and disallowing [the debt collector's] claims.”).

¹¹⁵ 276 F.3d 502, 504 (9th Cir. 2002).

having it discharged in bankruptcy.¹¹⁶ When the debtor later stopped making payments on the mortgage, the debt collector foreclosed.¹¹⁷ In response, the debtor brought a class action in federal court alleging FDCPA violations that the debt collector attempted to collect on a discharged debt.¹¹⁸ The *Walls* court dismissed the action, stating that the Bankruptcy Code precluded the FDCPA claim.¹¹⁹

Identifying that the source of the FDCPA claim was a violation of § 524 of the Bankruptcy Code, the *Walls* court reasoned that allowing an FDCPA claim would be unnecessary for three reasons: (1) the bankruptcy court's power under § 105 of the Bankruptcy Code remedies § 524 violations;¹²⁰ (2) allowing FDCPA claims in these circumstances would subject the district court to "bankruptcy-laden" determinations, which would be irrelevant to the FDCPA;¹²¹ and (3) allowing an FDCPA claim would essentially create a back door for debtors to circumvent the bankruptcy's remedial scheme.¹²² The *Walls* court found that the legislature intended to design the Bankruptcy system as a forum to "adjust all the rights and duties of creditors and . . . debtors alike" and not to allow debtors to circumvent this remedial scheme through the FDCPA.¹²³ Accordingly, the *Walls* court concluded that, although federal statutes should be read jointly when possible, the Chapter 7 debtor's remedies were limited to those provided under the Bankruptcy Code because to hold otherwise would circumvent the nature of the Bankruptcy Code.¹²⁴ Adopting the *Walls* approach, finding that the Bankruptcy Code "represents a 'whole system' designed to

¹¹⁶ *Chaussee*, 399 B.R. at 235 (citing *Walls*, 276 F.3d at 505 (internal citations omitted)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 235–36.

¹²⁰ *Id.*

¹²¹ *Id.* at 235 (quoting *Walls*, 276 F.3d at 510).

¹²² *Id.* at 235–36 ("This would circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtor's remedies for violating the discharge injunction to contempt.").

¹²³ *Id.* at 236 (quoting *Walls*, 276 F.3d at 510 (citation omitted)).

¹²⁴ *Id.* (citing *Walls*, 276 F.3d at 510).

comprehensively define all rights and remedies of debtors and creditors,” the Ninth Circuit in *Chaussee* held that the FDCPA is precluded.¹²⁵

The plaintiff, relying on *Randolph v. IMBS, Inc.*,¹²⁶ urged the Court to rule similarly and allow her FDCPA claim.¹²⁷ The Court rejected *Randolph* and held that it was bound by precedent to apply the *Walls* reasoning instead.¹²⁸ However, in dicta, the Ninth Circuit stated that it would nevertheless reject *Randolph*’s reasoning as inconsistent with the Bankruptcy Code.¹²⁹ The Ninth Circuit proceeds with comparing the differing procedural aspects between the Bankruptcy Code and the FDCPA, specifically the automatic allowance provision of the Bankruptcy Code and the FDCPA validation requirements, respectively.¹³⁰ For example, the automatic allowance provision of the Bankruptcy Code provides that a debt, when asserted in a proof of claim, is valid unless the debtor affirmatively objects to it.¹³¹ In contrast, under the FDCPA’s scheme, the debtor’s failure to contest the validity of the debt does not constitute an admission of liability.¹³² Accordingly, in light of such a direct contradiction, the Court concluded that it could not reconcile both the statutory schemes of the Bankruptcy Code and the FDCPA.¹³³

In addition, the Ninth Circuit found that attempts to comply with both statutory schemes would result in confusion. For example, under the debt validation provision of the FDCPA, the debt collector is mandated to send a notice informing the debtor of his or her right to dispute the debt.¹³⁴ Upon receiving the notice, a debtor would be uncertain whether to dispute the debt under the procedures laid out under the FDCPA or object to the claim through the bankruptcy process.¹³⁵ The Ninth Circuit was

¹²⁵ *Id.* at 241.

¹²⁶ 368 F.3d 726, 732 (7th Cir. 2004) (finding no direct conflict between the Bankruptcy Code and FDCPA and allowing plaintiff’s FDCPA claim to proceed).

¹²⁷ *Chaussee*, 399 B.R. at 237.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 237–38.

¹³¹ 11 U.S.C. § 502(a) (2012).

¹³² *Chaussee*, 399 B.R. at 238; *see also* 15 U.S.C. § 1692g(c) (2012).

¹³³ *Chaussee*, 399 B.R. at 239.

¹³⁴ *Id.* at 238; *see also* § 1692g. The Court even points out the ambiguity as to whether proofs of claim would be required to comply with § 1692g. *Chaussee*, 399 B.R. at 238.

¹³⁵ *Chaussee*, 399 B.R. at 239.

unable to reconcile the validation process under the FDCPA and the claims objection process under the Bankruptcy Code. Consequently, it concluded that Congress did not intend for the FDCPA to apply to proof of claims filed in bankruptcy court.¹³⁶

In arguing for the allowance of her FDCPA claim, the debtor contended that the Bankruptcy Code did not rectify the debt collector's misconduct in filing an improper proof of claim—something that the FDCPA strict-liability approach targets.¹³⁷ Specifically, she argued that the Bankruptcy Code provided inadequate protection by allowing debt collectors to assert unenforceable claims and then subsequently placing an unreasonable burden, in terms of fees and costs, on the debtor to object to them.¹³⁸ The Ninth Circuit rejected the notion that objecting to improper proofs of claim is overly burdensome because a debtor may object to a claim by merely filing a single-page document after conducting a claims analysis, which is, in any event, presumably completed under the ordinary course of bankruptcy proceedings regardless.¹³⁹

Further, the debtor asserted that recovery, under Bankruptcy Rule 9011, posed a greater difficulty than the strict-liability standard as established under the FDCPA.¹⁴⁰ The Ninth Circuit rejected this contention because—although the remedies provided by Bankruptcy Rule 9011 should be sufficient—under § 105(a) of the Bankruptcy Code, bankruptcy courts are inherently vested with power to remedy patterns of bad faith conduct that extend beyond the reach of Bankruptcy Rule 9011.¹⁴¹ With this, the Ninth Circuit concluded that the Bankruptcy Code adequately deterred abuse of the bankruptcy process and provided relief to aggrieved debtors.¹⁴² As a result, the court held that FDCPA claims are precluded under the Bankruptcy Code.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 239–40.

¹⁴⁰ *Id.* at 240.

¹⁴¹ *Id.* at 240–41.

¹⁴² *Id.* at 241.

¹⁴³ *Id.*

C. *Eighth Circuit's Intermediate Approach*

The Eighth Circuit in *In re Gatewood*¹⁴⁴ explicitly rejected the holdings of both *Crawford* and *Simmons*.¹⁴⁵ Instead, the Eighth Circuit adopted the rationale of a lower court by holding that filing an accurate proof of claim containing all relevant information, including the timing of the debt, is not a violation of the FDCPA.¹⁴⁶

The facts in *Gatewood* are very similar to those in *Crawford*. The plaintiffs filed for Chapter 13 bankruptcy in 2013 and, in response, the debt collector filed a proof of claim for a stale medical debt.¹⁴⁷ The plaintiffs failed to object to the proof of claim and entered into a repayment plan where the debt collector participated in collecting monthly payments.¹⁴⁸ During that time, the plaintiffs commenced an action against the debt collector, asserting violation of the FDCPA.¹⁴⁹

In rejecting *Crawford* and *Simmons*, the Eighth Circuit reasoned that both cases did not adopt the “cardinal principle of construction,” which is to give effect to both federal statutes.¹⁵⁰ Findings of an automatic violation or complete preclusion of the FDCPA, as held in *Crawford* and *Simmons*, respectively, run contrary to the goal of harmonizing both the FDCPA and Bankruptcy Code.¹⁵¹ Accordingly, the Eighth Circuit adopted an intermediate approach by limiting the FDCPA’s applicability to only specific circumstances.¹⁵² Since the FDCPA prohibits false and misleading practices, filing an accurate proof of claim and disclosing all relevant information does not implicate the FDCPA.¹⁵³

¹⁴⁴ 533 B.R. 905 (B.A.P. 8th Cir. 2015).

¹⁴⁵ *Id.* at 909–10 (quoting *Broadrick v. LVNV Funding LLC (In re Broadrick)*, 532 B.R. 60, 75 (Bankr. M.D. Tenn. 2015)).

¹⁴⁶ *Id.* at 910.

¹⁴⁷ *Id.* at 906. The two-year statute of limitations had already expired. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 910 (quoting *Broadrick*, 532 B.R. at 74).

¹⁵¹ *Id.*

¹⁵² *Id.* (specifying that the FDCPA “simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection”).

¹⁵³ *Id.*

III. JUSTIFICATIONS FOR LIMITING THE APPLICABILITY OF THE FDCPA

Several reasons justify limiting the FDCPA's applicability in the context of proofs of claim. Some reasons include: (1) debt collectors' inability to simultaneously comply with requirements of the Bankruptcy Code and FDCPA; (2) allowing FDCPA claims may have a detrimental effect on the Bankruptcy Code; (3) debt collectors are denied an opportunity for the Bankruptcy Court to adjudicate their claims; and (4) lastly, the misplaced concerns against the preclusion of FDCPA claims.

A. *Simultaneous Compliance with the FDCPA and Bankruptcy Code Is Not Feasible*

The FDCPA should be inapplicable to improper proofs of claim because simultaneous compliance with both federal statutes is not feasible. The strongest example being that the FDCPA's mini-Miranda notice requirement directly conflicts with the Bankruptcy Code. Under the FDCPA, debt collectors must place a mini-Miranda warning that discloses their intent to collect a debt.¹⁵⁴ Generally, failure to include the mini-Miranda warning constitutes an FDCPA violation.¹⁵⁵ However, the plain language of the mini-Miranda warning violates the automatic stay of the Bankruptcy Code because debt collectors are purporting to collect on a debt.¹⁵⁶ As a result, debt collectors would be faced with an impermissible choice: leave the mini-Miranda warning off and violate the FDCPA, or include the mini-Miranda warning and violate the Bankruptcy Code.¹⁵⁷

Further, even in a scenario where debt collectors are somehow able to comply with both the Bankruptcy Code and FDCPA when filing their proof of claim, debtors would be left with a confusing choice when disputing the validity of a claim: should they object to the claim under § 502 of the Bankruptcy

¹⁵⁴ 15 U.S.C. § 1692e(11) (2012). The mini-Miranda warning requires debt collectors to disclose that they are "attempting to collect a debt and that any information obtained will be used for that purpose." *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See 11 U.S.C. § 362(a)(6) (2012).

¹⁵⁷ See *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 279–80 (3d Cir. 2013) (stating that debt collectors would be faced with a conflict between Bankruptcy Code and the FDCPA); see also *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268, 273 (Bankr. E.D. Pa. 2015) (discussing *Simon's* rationale for direct conflict between Bankruptcy Code and FDCPA).

Code or bring a claim under the FDCPA?¹⁵⁸ Accordingly, the direct conflict between both the federal statutes necessitates the preclusion of the FDCPA in the context of filing proofs of claim in a bankruptcy proceeding.

Other circuit courts addressing this same issue have found that the direct conflict between the FDCPA and Bankruptcy Code necessitates an inference of an implied statutory repeal of the FDCPA. Specifically, the Third Circuit, in *Simon v. FIA Card Services, N.A.*,¹⁵⁹ held a strong position that courts must read federal statutes together unless there is a “positive repugnancy.”¹⁶⁰ Even holding that there is a strong inference against implied statutory repeal, the *Simon* court, when considering the same contradiction between the mini-Miranda requirement of the FDCPA and the automatic stay provision of the Bankruptcy Code, could not reconcile both federal statutes.¹⁶¹ Accordingly, it held that such a direct conflict was sufficient enough to produce a finding that an FDCPA claim for failure to include a mini-Miranda notice was precluded.¹⁶²

B. *Detrimental Effect on the Bankruptcy Code*

The bankruptcy courts are endowed with broad powers to remedy any potential creditor misconduct,¹⁶³ allowing debtors to bring FDCPA claims would potentially render some of its powers obsolete. As explained earlier in this Note, Bankruptcy Rule 9011 is essentially identical to Rule 11 of the Federal Rules of Civil Procedure; it allows the bankruptcy courts to sanction abuse of the process.¹⁶⁴ Further, if needed, the bankruptcy courts

¹⁵⁸ *In re Chaussee*, 399 B.R. 225, 238–39 (B.A.P. 9th Cir. 2008) (discussing the confusion that would ensue because debtors would not know whether to use the Bankruptcy Code or FDCPA to remedy wrongful proofs of claim).

¹⁵⁹ 732 F.3d 259 (3d Cir. 2013).

¹⁶⁰ *Id.* at 274 (“[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” (alteration in original) (quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 143–44 (2001))).

¹⁶¹ *Id.* at 280.

¹⁶² *Id.*

¹⁶³ See FED. R. BANKR. P. 9011(c) (“[T]he court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.”); 11 U.S.C. § 105(a) (2012) (“The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”); see also *supra* Section I.A.2.

¹⁶⁴ See FED. R. BANKR. P. 9011(c).

also have an even broader inherent authority under 11 U.S.C. § 105(a) to sanction parties for conduct that is beyond the reach of Bankruptcy Rule 9011 and similar statutes.¹⁶⁵ Two examples illustrate how FDCPA claims can render the bankruptcy court's powers useless.

First, the allowance of FDCPA claims to supplement the relief offered by bankruptcy courts raises the concern of the bankruptcy court's power under 11 U.S.C. § 502 being obsolete. For example, it is likely that debtors will no longer resort to the bankruptcy court to exclude an objectionable proof of claim when they are able to bring their own private right of action to hold the debt collector strictly liable for damages.¹⁶⁶ In another instance, debtors who fail to properly review and object to improper proofs of claim under the bankruptcy process may bring an FDCPA claim to recover on their own negligence. As a result, the bankruptcy court's power under 11 U.S.C. § 502 may be rendered useless. The allowance of FDCPA claims against improper proofs of claim incentivizes debtors to forego the standard bankruptcy process and resort to the FDCPA's strict-liability scheme.

Second, the *Walls* court followed this same line of reasoning and determined that the exclusive remedy should rest with the Bankruptcy Code.¹⁶⁷ In *Walls*, the debtor commenced an FDCPA action for a creditor's violation of discharge injunction on her mortgage.¹⁶⁸ Although the Bankruptcy Code already provides civil contempt under § 105(a) as an enforcement mechanism for violations of the discharge injunction, the debtor resorted only to the FDCPA.¹⁶⁹ Finding that her FDCPA claim was precluded, the *Walls* court held that allowing FDCPA would circumvent the remedial scheme of the Bankruptcy Code.¹⁷⁰

Accordingly, the application of FDCPA claims in the context of improper proofs of claim may negatively impact the existing scheme of the Bankruptcy Code rather than supplement it.

¹⁶⁵ 11 U.S.C. § 105(a).

¹⁶⁶ See Dant, *supra* note 7, at 1084.

¹⁶⁷ *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002).

¹⁶⁸ *Id.* at 504.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 510. ("To permit a simultaneous claim under the FDCPA would allow through the back door what *Walls* cannot accomplish through the front door—a private right of action.")

C. *Debt Collectors Would Receive Differential Treatment and Rights*

By allowing FDCPA actions to be brought for filing proofs of claim asserting stale debt, debt collectors would be given differential treatment and rights depending on their status under the FDCPA. First, because the FDCPA does not apply uniformly to all creditors, some creditors risk FDCPA liability while others will not. Second, the expiration of the statute of limitations does not extinguish a creditor's rights to a debt, only his or her remedy.¹⁷¹ Therefore, by allowing FDCPA actions, certain creditors are effectively prevented from asserting their valid right to payment in the form of a proof of claim.

Creditors in bankruptcy courts would be faced with unequal treatment; some will be sanctioned under the Bankruptcy Code while others will face FDCPA liability for essentially the same types of violations. As stated before, not all creditors fall within the meaning of "debt collector," as defined by the statute.¹⁷² For example, a private individual who does not qualify as a debt collector may still file a proof of claim asserting a stale debt against the debtor's bankruptcy estate. As a result, nondebt-collector creditors would still be able to assert stale claims without fear of liability under the FDCPA. This inconsistent treatment of creditors for the same violations will cause additional confusion for courts in determining the proper course of action and assessing damages.

Further, if FDCPA claims are allowed, debt collectors are prevented from asserting their valid right to payment. The expiration of the statute of limitations does not extinguish the creditor's rights to the debt, only his or her remedy.¹⁷³ This is unlike statutes of repose, which are substantive, and extinguish both the right and the remedy. Statutes of limitation, in contrast, are considered to be procedural only and function to extinguish only the remedy.¹⁷⁴ As such, a debt collector's right to payment still exists even after the statute of limitations has

¹⁷¹ *In re Broadrick*, 532 B.R. 60, 74 (M.D. Tenn. 2015).

¹⁷² *See* 15 U.S.C. § 1692a(6).

¹⁷³ *Jones v. Methodist Healthcare*, 83 S.W.3d 739, 743 (Tenn. Ct. App. 2001).

¹⁷⁴ *Id.*

expired.¹⁷⁵ Accordingly, by ruling that a proof of claim asserting a stale debt is a violation of the FDCPA, courts have effectively prevented creditors from filing legitimate claims to the detriment of the claim-determination process.¹⁷⁶

D. Concerns Raised Against the Preclusion of FDCPA Claims Are Misplaced

Various arguments that have been advanced in support for allowing FDCPA actions be brought against creditors who file a proof of claim asserting a stale debt are misguided. Specifically, the unfairness analogy that the *Crawford* court employed did not account for fundamental differences between state and bankruptcy proceedings. Also, the presumption against repeal by implication is rebuttable when two federal statutes directly conflict with one another.

1. Unfairness Analogy from State Court Proceedings

The concern raised in *Crawford*, allowing debt collectors to file a proof of claim asserting stale debt is “unfair,” is unfounded.¹⁷⁷ The crux of the concern is that the proof of claim would mislead an unsophisticated consumer into believing that it was an enforceable debt—given the passage of time and the consumer’s likely unawareness of the limitations defense—using the same rationale employed by state courts.¹⁷⁸ In addition, the concern of misleading unsophisticated consumers is further strengthened by the exponential increase in pro se bankruptcy filings in recent years.¹⁷⁹

¹⁷⁵ *Roach v. Edge (In re Edge)*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (“That a claim is not *allowable* because a statute of limitation has expired does not defeat the *existence* of the claim in bankruptcy.”).

¹⁷⁶ *See id.* A debtor may even have an interest in having a stale debt paid in bankruptcy; for example, a co-signor may be rendered responsible for payment. *See In re Gatewood*, 533 B.R. 905, 910 n.4 (B.A.P. 8th Cir. 2015).

¹⁷⁷ *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014).

¹⁷⁸ *Id.*

¹⁷⁹ Joseph Callanan, *Pro Se Bankruptcy Filings Growing Faster than Other Debtor Relief*, A.B.A. SEC. LITIG. NEWS (Dec. 29, 2011), https://apps.americanbar.org/litigation/litigationnews/top_stories/010312-pro-se-bankruptcy-growing.html; *see also* *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268, 275 (E.D. Pa. 2015) (discussing the concern raised in *Crawford* that debtors may be forced to settle lawsuit to avoid litigation costs); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (stating that even if a debtor knows to use the limitations defense, they will be more inclined to settle the debt in order to avoid costs and embarrassment).

However, many key distinctions between the nature of the bankruptcy courts and state courts illustrate the flaw in merely analogizing the unfairness aspect of filing a lawsuit in state court to filing a proof of claim in bankruptcy.¹⁸⁰ Some distinctions include: (1) special protections in bankruptcy court not found in state court; (2) debtor initiates bankruptcy proceeding and invites the participation of creditors; and (3) the involvement of a trustee.¹⁸¹

First, bankruptcy court provides special protections to debtors that are not afforded to them in state court, such as the automatic stay, bankruptcy discharge of debt, and required disclosures for proofs of claim.¹⁸² As stated above, the automatic stay prevents the creditor from liquidating the debtor's assets.¹⁸³ Further, a bankruptcy discharge provides an even broader protection than that contemplated by the FDCA.¹⁸⁴ If a debt is discharged, a creditor is prevented from even asking for payment on a stale debt.¹⁸⁵ Lastly, when a creditor files a proof of claim, they are required to disclose information such as the date of last payment, the date of last transaction, and the name of the entity that the debt was owed to at the time of last transaction.¹⁸⁶ Therefore, this leaves the debtor in a superior position to identify stale debts at the outset of the bankruptcy.¹⁸⁷ As such, bankruptcy courts vastly differ in protections offered to the debtor than in state courts.

Second, the bankruptcy process is not similar to a state court lawsuit as the debtor initiates the proceeding and invites the participation of creditors. In contrast, state court proceedings are generally commenced against the debtor, and they must affirmatively assert the statute of limitations defense.

¹⁸⁰ See *Broadrick v. LVNV Funding LLC (In re Broadrick)*, 532 B.R. 60, 69 (Bankr. M.D. Tenn. 2015) (summarizing the state analogy raised by the *Crawford* court).

¹⁸¹ See *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010); FED. R. BANKR. P. 1002(a) (stating that the debtor files a proof of claim to initiate the process); 11 U.S.C. § 1302 (2012).

¹⁸² See *Simmons*, 622 F.3d at 96 (2d Cir. 2010) (stating that the supervision of the court and its officers provides adequate protection and does not require the FDCA to supplement it).

¹⁸³ 11 U.S.C. § 362 (2012).

¹⁸⁴ *In re Broadrick*, 532 B.R. 60, 71 (M.D. Tenn. 2015).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 72.

¹⁸⁷ *Id.*

Oftentimes, a pro se debtor may not know of the limitations defense and run the risk of inadvertently waiving it. In bankruptcy, the debtor is not required to take affirmative action as the bankruptcy trustee generally reviews and objects to proofs of claim.¹⁸⁸ This is another key distinction between bankruptcy and state court proceedings that upends any analogy between the two.

Lastly, in addition to the special protections mentioned above, a trustee is appointed to safeguard the interests of the debtor.¹⁸⁹ As discussed before, a trustee is charged with specific duties such as administering the estate, objecting to claims, and furnishing information concerning the estate.¹⁹⁰ No trustee is automatically appointed for debtors to perform similar tasks in state court. The presence of a trustee further contributes to the difference in the nature of bankruptcy proceedings.

Accordingly, given the vastly different natures of the two proceedings, the unfairness aspect cannot be merely analogized to a bankruptcy context.

2. Presumption Against Federal Repeal by Implication

It is well established that finding an implicit repeal or preemption of a federal statute is generally disfavored.¹⁹¹ This same principle is especially applicable in the context of bankruptcy. In *Butner v. United States*, the United States Supreme Court grappled with an issue concerning whether a federal rule in equity or state law governed the right to use rents collected during bankruptcy.¹⁹² In reaching a conclusion, the court held in the absence of a specific bankruptcy interest or provision, bankruptcy courts will take non-bankruptcy rights as they are found.¹⁹³ Accordingly, given the presumption against

¹⁸⁸ 11 U.S.C. § 704(a)(5) (2012); see also *Broadrick*, 532 B.R. at 73.

¹⁸⁹ See generally 11 U.S.C. § 1302(a) (2012); 11 U.S.C. § 704(a)(5).

¹⁹⁰ 11 U.S.C. § 704(a).

¹⁹¹ See *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs.*, 619 F.3d 1289, 1299 (11th Cir. 2010) (stating that there is a presumption against finding an implicit federal repeal because it requires a court to speculate as to legislative intent).

¹⁹² *Butner v. United States*, 440 U.S. 48 (1979). Although the Bankruptcy Act has been superseded by the Bankruptcy Code, the proposition articulated in *Butner* still stands.

¹⁹³ *Id.* at 55 (“Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”).

finding a repeal by implication and *Butner's* philosophy, courts are generally reluctant to find that the FDCA has no applicability in the bankruptcy context.¹⁹⁴

However, both these doctrines recognize that in light of a direct contradiction, the presumption against repeal by implication is rebutted.¹⁹⁵ As explained above, certain aspects of the FDCA and Bankruptcy Code directly contradict with one another and cannot be reconciled.¹⁹⁶ As a result, even courts that have taken a position against implying preemption have recognized that there is an irreconcilable conflict between both federal statutes. However, this Note argues that a solution exists without requiring courts to resort to repeal by implication of the FDCA.

IV. EXPANSION OF THE EIGHTH CIRCUIT'S APPROACH

To resolve the present issue, this Note proposes that courts should take various actions to limit the applicability of the FDCA in the context of filing proofs of claim without having to resort to repeal by implication. First, courts should extend the "formal pleading" exemption, under 15 U.S.C. §§ 1692e(11) and 1692g(d), to encompass proofs of claim. Second, courts should hold that absent additional factors such as fraud or misrepresentation, a proof of claim asserting a stale debt does not implicate the FDCA.

A. *Extend the "Formal Pleading" Exemption To Include Proofs of Claim*

Courts should extend the "formal pleadings" exemption, under 15 U.S.C. §§ 1692e(11) and 1692g(d) of the FDCA, to include proofs of claim. By extending this exemption, debt collectors filing a proof of claim will not have to comply with the mini-Miranda and debt validation requirements of the FDCA. Therefore, the direct contradictions and confusion associated

¹⁹⁴ See *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 273 (3d Cir. 2013) (discussing the inference against finding a federal repeal by implication).

¹⁹⁵ *Id.*

¹⁹⁶ For discussion on how courts have been unable to reconcile the contradiction between the FDCA mini-Miranda warning requirement and the Bankruptcy's automatic stay, see *supra* text accompany note 150.

with complying with both the FDCPA and Bankruptcy Code will be eliminated without resorting to repeal by implication of the FDCPA.

Both §§ 1692e(11) and 1692g(d) set forth requirements that conflict with the Bankruptcy Code's scheme. As discussed earlier, § 1692e(11) requires debt collectors to place a mini-Miranda warning on certain communications and § 1692g sets forth a debt validation process.¹⁹⁷ However, both provisions conflict with aspects of the Bankruptcy Code.¹⁹⁸ By utilizing the form pleadings exemption found in both provisions of the FDCPA, the obligations will not be triggered and creditors will not be held liable under the FDCPA for failure to include them when filing a proof of claim. As a result, the direct conflict between the Bankruptcy Code and FDCPA will be eliminated.

Several lower federal courts have held that proofs of claim constitute a "formal pleading" for purposes of the FDCPA.¹⁹⁹ The weight of authority has held that filing a proof of claim is seemingly analogous to filing a complaint.²⁰⁰ Just as litigants file a complaint in civil actions, creditors file a proof of claim in bankruptcy actions. Accordingly, to resolve any direct conflicts that the FDCPA notice requirements impose upon debt collectors attempting to file a proof of claim, courts should hold that a proof of claim is considered a "formal pleading" within the purview of the FDCPA.

¹⁹⁷ See 11 U.S.C. § 1692e(11) (2012); 11 U.S.C. § 1692g.

¹⁹⁸ See *supra* Section III.A. (discussing how the mini-Miranda warning conflicts with the automatic stay and how the debt validation process confuses debtors in challenging the validity of a claim).

¹⁹⁹ See *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 273 (3d Cir. 2013) (stating that "[a] debt collector could not satisfy the FDCPA by including the notice of rights in a proof of claim, because 'a communication in the form of a formal pleading' is not an 'initial communication' under the FDCPA"); *In re McCarther-Morgan*, No. 07-90654, 2009 WL 7810817, at *12 (B.A.P. 9th Cir. Jan. 27, 2009) (holding that the "formal pleading" exception included proofs of claim); *In re F.C.M. Corp.*, No. 87-0946-CIV-DAVIS, 1987 WL 364456, at *2 (S.D. Fla. Sept. 22, 1987) (stating that filing a proof of claim is the equivalent of filing a complaint); *Nortex Trading Corp. v. Newfield*, 311 F.2d 163, 164 (2d Cir. 1962) (same); *In re Brosio*, 505 B.R. 903, 912 (B.A.P. 9th Cir. 2014) (same).

²⁰⁰ See *In re Franchi*, 451 B.R. 604, 607 (Bankr. S.D. Fla. 2011) ("Courts routinely recognize that the filing of a proof of claim is analogous to the filing of a complaint."); *In re Cont'l Airlines*, 928 F.2d 127, 129 (5th Cir. 1991) (holding that filing a proof of claim is analogous to filing a complaint in a civil action).

This alternative solution is significant because it allows for compliance with both federal statutes without inferring repeal of the FDCPA. It achieves this result and also avoids the direct conflict between the FDCPA notice requirements and the automatic stay completely. By holding that the “formal pleadings” exception applies to proofs of claim, the judicial inclination against repeal by implication can be avoided altogether.²⁰¹

In conclusion, courts should hold that the formal pleadings exemption, under 15 U.S.C. §§ 1692e(11) and 1692g(d), apply to proofs of claim. As such, this will resolve certain contradictions without implying that the FDCPA be implicitly repealed in the bankruptcy context.

B. Proofs of Claim Asserting a Stale Debt Should Not Constitute a Per Se Violation of the FDCPA

In addition, courts should hold that filing a proof of claim, even when asserting a debt, should not constitute a per se violation of the FDCPA absent any additional factors. By using this approach, courts may be able to maximize the effect of both federal statutes while eliminating the issue of debtors resorting to the FDCPA over the Bankruptcy Code.

Courts should hold that a proof of claim asserting a stale debt, without additional factors, does not constitute an automatic violation of the FDCPA. If the only impediment to the proof of claim is the expiration of the statute of limitations, the FDCPA should not be implicated and the debtor’s only remedy is through the Bankruptcy Code. Absent additional factors such as misrepresentation of information or other deceptive conduct, the FDCPA should not be implicated. The underlying rationale being that, in rejecting the unfair analogy from state court,²⁰² filing a proof of claim and giving full disclosure of the timing of the debt does not constitute false or misleading behavior that the FDCPA seeks to remedy.²⁰³

²⁰¹ See *supra* Section III.C.2. (discussing repeal by implication as not favorable as a concern against preclusion of the FDCPA).

²⁰² Section 1692f of the FDCPA provides that “[a] debt collector may not use *unfair or unconscionable* means to collect or attempt to collect any debt.” 15 U.S.C. § 1692f (2012) (emphasis added).

²⁰³ Section 1692e provides that “[a] debt collector may not use any *false, deceptive, or misleading representation* or means in connection with the collection of any debt.” 15 U.S.C. § 1692e (emphasis added).

The United States Court of Appeals for the Eighth Circuit adopted this same approach in *In re Gatewood*.²⁰⁴ Although the Eighth Circuit held that an accurate proof of claim, disclosing all relevant information, does not automatically violate the FDCPA, it did not clearly articulate what situations would implicate FDCPA liability.²⁰⁵ Accordingly, courts should expand upon the *Gatewood* court's reasoning and hold that situations involving misrepresentation, deception, and omission of relevant facts may constitute a violation of the FDCPA.

The importance of this approach allows both the federal statutes to function as intended without significant interference with one another. Further, this prevents a court from implying that the FDCPA is partially or completely repealed in the bankruptcy context. Debt collectors can still incur FDCPA liability if they resort to deceptive tactics such as misinformation or omission of relevant information. However, if they candidly disclose the timing of their debt, given the supervision of the court, and the presence of a trustee, this cannot be regarded as unfair under the meaning of the FDCPA.

CONCLUSION

In conclusion, this Note argues that the FDCPA should be inapplicable in the context of filing proofs of claim. However, recognizing that implied repeal of federal statutes is generally disfavored, this Note offers some alternative solutions to addressing this issue. First, courts should hold that proofs of claim fall within the "formal pleading" exceptions to avoid requirements under §§ 1692e(11) and 1692g(d) of the FDCPA. Second, courts should find that filing a proof of claim for a stale debt, by itself, does not constitute "unfair or unconscionable" or "false or deceptive" conduct as contemplated by the FDCPA. Accordingly, this avoids the implied repeal of the FDCPA while achieving the same, and arguably more efficient, result.

²⁰⁴ *In re Gatewood*, 533 B.R. 905 (B.A.P. 8th Cir. 2015).

²⁰⁵ *Id.* at 910.