By Susan E. Trent

Stale Claim Circuit Discord at the Supreme Court

In 2014, the Eleventh Circuit issued a provocative stale claims opinion in *Crawford v. LVNV Funding LLC*.[1] That court perceived a serious problem; namely, the "deluge" of consumer debt buyers "armed with hundreds of delinquent accounts from creditors" filing claims for "unenforceable" debt.[2] In light of more recent rulings, *Crawford* currently reflects the circuits' minority view of the Fair Debt Collection Practices Act (FDCPA) and stale claims. Nevertheless, *Crawford* has informed similarly inclined courts and vigorous dissents.

The FDCPA/stale claims issue was unsettled when both the Seventh and Fourth Circuits issued opinions that were contrary to *Crawford*. The circuit split is now squarely before the U.S. Supreme Court in the case of *Midland Funding LLC v. Johnson*.[3]

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Seventh Circuit Parts Company with *Crawford*

In *Owens v. LVNV Funding LLC*, three bankruptcy cases were consolidated.[4] In each case, debt collectors filed stale claims, and the debtors filed successful stale-claim objections in bankruptcy court, then filed suit in district court for FDCPA violations.[5] However, the district courts granted the debt collectors' motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[6] Notably, the district courts rejected the argument that filing a stale claim, in and of itself, was deceptive or unfair. Rather, it held that the collector was entitled to do so under the Bankruptcy Code; hence, filing the stale claim was neither false nor misleading.[7] The Seventh Circuit affirmed.[8]

The Seventh Circuit noted certain important commonalities among the cases: (1) All were chapter 13 cases; (2) the debtors retained counsel; and (3) the claims were accurate.[9] On appeal to the Seventh Circuit, the debtors advanced the following arguments. First, a stale-claim filing violated the FDCPA because it was an inherently false, misleading, unfair and unconscionable debt-collection practice, since a "claim" under the Bankruptcy Code must be legally enforceable.[10] Second, they asserted that debtors often fail to object permitting, via deception, the collection of an unenforceable consumer debt in a judicial proceeding, which is an FDCPA *no-no*.[11] These arguments did not persuade the Seventh Circuit to depart from *Crawford*.

The *Owens* Majority Addresses the Definition of "Claim"

The majority disagreed with the circumscribed "claim" definition as being limited to legally enforceable obligations advanced by the debtors.[12] The majority pointed to § 101(5)(A) and two claim examples, "contingent" and "unmatured," neither of which provided any state collection rights nor were excluded from the definition.[13] Moreover, the majority noted that the law in most jurisdictions was that the expiration of a statute of limitations does not extinguish the debt.[14] The majority further reasoned that the FDCPA did not preclude all forms of attempted collection of a time-barred debt.[15] The majority also made brief reference to the equitable or moral component of debt repayment.[16]

The majority reasoned that additional Code sections anticipated the filing of time-barred debts including § 502, which provides that a bankruptcy court must disallow any claim that is "unenforceable against the debtor ... under any agreement or applicable law."[17] In addition, § 558 addresses the bankruptcy estate's retention of debtor defenses, including statutes of limitations.[18] The majority observed that chapter 13 debtors often schedule stale claims to assure a discharge therefrom under § 1328(a) because an unscheduled debt remains collectible post-discharge, although the means of collection can be tightly constrained.[19] Furthermore, debtors can "restart" the limitations period by making a payment or merely promising to pay.[20] The majority was further unpersuaded by the risk of

1 *Crawford v. LVNV Funding LLC*, 758 F.3d 1254, 1259-60 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844, 191 L. Ed. 2d 724 (2015).
2 *Id.* at 1256.
3 *Johnson v. Midland Funding LLC*, 829 F.3d 1334 (11th Cir. 2016), *cert. granted*, 2016 U.S. LEXIS 6274 (Oct. 11, 2016).
4 *Owens v. LVNV Funding LLC*, 832 F.3d 726, 729 (7th Cir. 2016).
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at 729-30.
10 *Id.*
11 *Id.* at 730 (relying on *Phillips v. Asset Acceptance LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013)).
12 *Id.*
13 *Id.* at 730-31.
14 *Id.* at 731.
15 *Id.*
16 *Id.*
17 *Id.* at 732.
18 *Id.*
19 *Id.*
20 *Id.* at 732, fn.6.

debtors failing to object given the significant detail required on the claim form.[21] While sympathetic to the possibility of abuse, the majority found that the filing of an accurate-but-stale claim was not inherently misleading or deceptive.[22]

Irrespective of the Bankruptcy Code's contemplation of stale claims, the Seventh Circuit examined whether such filings violated the FDCPA. Noting the circuit split, the majority declined to adopt *Crawford*'s reasoning.[23] The majority held that where an accurate, complete stale claim is filed without any additional evidence that the claimant engaged in any deceptive, misleading, unfair or otherwise abusive conduct, no FDCPA violation occurs.[24] The majority avoided precluding the possibility of FDCPA relief where a *pro se* debtor is involved or where there are deceptive, misleading, inaccurate or incomplete stale claims filed or such other behavior.[25] The majority also was silent as to the potentially preclusive effect of confirmation of a chapter 13 plan and the *res judicata* doctrine.

The *Owens* Dissent Aligns with *Crawford*

Chief Judge Diane Wood wrote a thoughtful dissent focused on the Seventh Circuit's prior holding in *Phillips v. Asset Acceptance LLC* that prohibited a creditor from filing a state court action to collect on a stale debt.[26] The dissent equated the filing and administration of a bankruptcy case to a state action; therefore, *Phillips* reinforced the argument that stale claims should be impermissible.[27]

The dissent also challenged the majority's analysis of the definition of "claim" under § 101(5)(A) and its focus on "contingent" and "unmatured," arguing that neither category describes a stale claim.[28] Noting that a limitations period could be restarted by certain debtor actions, the dissent opined that a "debtor will not take these steps unless she is 'snookered' into thinking [that] the debt is legally enforceable."[29] The dissent maintained that "contingent" should not include the possibility of a collector "successfully tricking the debtor into paying."[30]

The dissent also argued that stale debt is appropriately characterized as "overripe," not "unmatured."[31] While conceding that the list in § 101(5)(A) is illustrative but not exhaustive, the dissent was unpersuaded that a "claim" should contemplate either fraudulent or highly speculative, revived debt.[32] The dissent also concluded that a stale claim could not comply with Civil Rule 11.[33] The dissent pointed out that public policy precludes frivolous, bad-faith or unfounded claims.[34]

With regard to the majority's observations concerning the scheduling of stale debt by debtors and § 1328(a), the dissent declared that the "statute of limitations itself is full protection against a lawsuit on a stale claim; it does not need to be supplemented by a bankruptcy discharge."[35] The dissent vocalized significant concern about the potential for abuse, particularly for *pro se* litigants.[36]

The Divide Widens: The Fourth Circuit Also Rejects *Crawford*

In considering facts similar to that of *Owens* in its Aug. 25, 2016, decision in *Dubois v. Atlas Acquisitions LLC*, the Fourth Circuit held that no FDCPA violation occurs simply by filing a stale claim.[37] The debt collector advanced the argument (adopted by the bankruptcy court) that filing a stale claim does not constitute a debt-collection activity regulated by the FDCPA; rather, it was just a "request to participate in the bankruptcy process."[38] However, the Fourth Circuit noted that "Congress enacted the FDCPA to eliminate abusive debt-collection practices and to ensure that debt collectors who refrain from such practices are not competitively disadvantaged."[39] It also stated that the federal courts have "consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect time-barred debt." Unlike the bankruptcy court, the Fourth Circuit declined to find that the filing of a claim was not a debt-collection activity regulated by the FDCPA.[40]

The Fourth Circuit analyzed whether the FDCPA should prohibit collectors from filing stale claims altogether on the basis that a time-barred debt is not a "claim."[41] The Fourth Circuit was persuaded that

> while the Bankruptcy Code provides that time-barred debts are to be disallowed, *see, e.g.*, 11 U.S.C. § 558, the Code nowhere suggests that debts are not to be filed in the first place. Indeed, the Bankruptcy Rules were recently amended to facilitate the assessment of a claim's timeliness by requiring that claims such as the ones at issue in this appeal be filed with a statement setting forth the last transaction date, last payment date, and charge-off date on the account.[42]

The Fourth Circuit concluded that "the statute of limitations does not extinguish debts, and a time-barred debt falls within the Code's broad definition of claim."[43] The court also said that "the debt collector may lawfully pursue collection activity apart from filing a lawsuit" in such a circumstance.[44] Ultimately, it concluded that the "optimal scenario is for a claim to be filed and for the Bankruptcy Code to operate as written."[45]

The Fourth Circuit also made several pragmatic observations about bankruptcy. First, the court discussed that the amount paid by most chapter 13 debtors into a plan is not impacted by the number of unsecured claims.[46] The court

21 *Id.* at 733.
22 *Id.*
23 *Id.* at 734-35.
24 *Id.* at 735-36.
25 *Id.*
26 *Id.* at 737 (citing *Phillips v. Asset Acceptance LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013)).
27 *Id.* at 737-38.
28 *Id.* at 738-39.
29 *Id.* (referring to *cf. Suesz v. Med-1 Solutions LLC*, 757 F.3d 636, 639 (7th Cir. 2014)).
30 *Id.* at 739.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.* at 740.
36 *Id.* at 740-41.
37 *Dubois v. Atlas Acquisitions LLC*, 834 F.3d 522 (4th Cir. Md. 2016).
38 *Id.* at 526-27 (citing App'ee Br. 20).
39 *Id.*
40 *Id.* at 527-28.
41 *Id.* at 528.
42 *Id.* at 530.
43 *Id.*
44 *Id.* at 531.
45 *Id.*
46 *Id.* at 531-32.

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also stated that it might be "preferable for a time-barred claim to be filed even if it is not objected to, as the debt will likely pay the same total amount to creditors and the debt can be discharged."[47] In addition, the court described the qualitative difference between a debtor who is unwillingly made a party to a lawsuit versus a debtor's voluntary initiation of bankruptcy, which the court concluded "diminishe[d] concerns about the embarrassment [that] the debtor may feel in objecting to a stale claim."[48]

Lastly, the Fourth Circuit noted that the debtors "concede[d] that a debt collector would not violate the FDCPA by filing a proof of claim on a time-barred debt that the debtor had scheduled and did not designate as 'disputed'" and that "scheduling a debt as undisputed is an 'invitation to participate.'"[49] However, the Fourth Circuit remarked that a notice of the bankruptcy (the invitation) is sent to all creditors irrespective of whether or not they are scheduled as disputed or undisputed.[50] Therefore, the court had no reason to attach FDCPA liability to a claim that has been scheduled or even unscheduled because of the "interest in discharge and collective treatment of claims" in bankruptcy.[51] The Fourth Circuit did not reach the final issue raised on appeal by the debt collector as to the preclusion of the FDCPA by the Code in the bankruptcy context.

Dissent Reaches the Preclusion Issue

Consistent with the dissent in *Owens*, Hon. Judge Albert Diaz was also concerned with abuse and "conduct [that] games the bankruptcy process" rather than "ensur[es] its integrity."[52] Accordingly, the dissent would have held that a debt collector's conduct violated the FDCPA. Furthermore, the dissent noted that "debt collectors can avoid FDCPA liability by putting in place a reasonable procedure to screen unscheduled, time-barred claims."[53]

The dissent also grappled with whether the Bankruptcy Code precluded the application of the FDCPA in the bankruptcy context.[54] The dissent stated that the Second and Ninth Circuits held that the Code precluded certain actions under the FDCPA, and that these decisions relied on the "comprehensive provisions and protections of the Bankruptcy Code to hold that it leaves no room for FDCPA claims."[55] The dissent further pointed out that the Third, Seventh and Eleventh Circuits rejected the idea that FDCPA violations cannot be brought in the bankruptcy context on the basis that the statutes do not directly contradict one another and collectors can comply with both.[56] The dissent commented that it would join with the Third, Seventh and Eleventh Circuits because a creditor is "not obligated to file a proof of claim" and can comply with both statutes "by not filing unscheduled, time-barred proofs of claim."[57]

Contemplation Short of Conclusion

If a debt is not extinguished under a state's statute of limitations, concluding that it does not fit the broad definition of "claim" under the Bankruptcy Code seems flawed. Plus, there might be good legal and practical reasons for debtors to address all claims, including stale claims, in bankruptcy. In addition (although admittedly the author's own circuit does not agree), one could be inclined to accept the notion that the FDCPA is impliedly repealed by the Code in the bankruptcy context. Bankruptcy is intentionally designed to be exceedingly different from other judicial forums, especially with regard to claims treatment and the creation of the "bankruptcy estate."

Therefore, to a collector, the Fourth Circuit's sentiment concerning the "optimal scenario" should prevail: to file claims and operate under the Code as written. There are also reservations about whether additional damages under the FDCPA (beyond those already provided in the Code) serve good purpose. FDCPA lawsuits (including requests for attorneys' fees) where no actual damages to debtors exist and the stale claims at issue are accurate, *de minimus* and anticipated to be paid *pro rata*, cast doubt on whether the legitimate aims of the FDCPA are really being met. In any event, based on the intellectually spirited discourse on the topic, it is best to wait for future discussion and decisions on these issues from the Supreme Court in 2017. abi

47 *Id.*
48 *Id.* at 532.
49 *Id.*
50 *Id.* at 532-33.
51 *Id.* at 533.
52 *Id.* at 535.
53 *Id.*
54 *Id.* at 535-36.
55 *Id.* at 536 (citing *Walls v. Wells Fargo Bank NA*, 276 F.3d 502, 510-11 (9th Cir. 2002), and *Simmons v. Roundup Funding LLC*, 622 F.3d 93 (2d Cir. 2010)).
56 *Id.* (citing *Johnson v. Midland Funding LLC*, 823 F.3d 1334 (11th Cir. 2016); *Simon v. FIA Card Servs. NA*, 732 F.3d 259 (3d Cir. 2013); and *Randolph v. IMBS Inc.*, 368 F.3d 726 (7th Cir. 2004)).
57 *Id.*