NO. 13-12389-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STANLEY CRAWFORD,

Plaintiff-Appellant,

vs.

LVNV FUNDING, LLC, *et al.*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION
CASE NUMBER 2:12-CV-701-WKW

PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC OR, IN THE ALTERNATIVE, FOR PANEL REHEARING SUBMITTED ON BEHALF OF THE APPELLEES

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AMENDED CERTIFICATE OF INTERESTED PERSONS

Appellees, in accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, hereby certify that the following persons and entities have an interest in the outcome of this appeal:

1. **Honorable Dwight D. Williams**, United States Bankruptcy Judge

2. **Honorable W. Keith Watkins,** United States District Court Judge for the Middle District of Alabama

3. **Stanley L. Crawford,** Appellant

4. **Nicholas H. Wooten,** Attorney for Appellant

5. **Larry B. Childs**, Attorney for Appellees LVNV Funding, LLC, Resurgent Capital, L.P., and PRA Receivables Management, LLC

6. **Gilbert C. Dickey**, Attorney for Appellees LVNV Funding, LLC, Resurgent Capital, L.P., and PRA Receivables Management, LLC

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9. **Nick Wooten, LLC**, Attorney for Appellant

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11. **Waller, Lansden, Dortch & Davis, LLP,** Attorney for Appellees LVNV Funding, LLC, Resurgent Capital, L.P., and PRA Receivables Management, LLC

12. **LVNV Funding, LLC,** Appellee, who is owned by the following parent company: Sherman Originator, LLC

13. **Resurgent Capital Services, LP**, Appellee, who is owned by the following parent companies: Sherman Financial Group, LLC and Alegis Group, LLC

14. **PRA Receivables Management, LLC**, Appellee, who is owned by the following parent company: Portfolio Recovery Associates, Inc.

15. **Curtis C. Redding**, Chapter 13 Trustee for Case No. 08-30192 in the United States Bankruptcy Court for the Middle District of Alabama

STATEMENT OF COUNSEL

We express a belief, based on our reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether a claim under the Fair Debt Collection Practice Act can be premised upon filing a proof of claim in accordance with title 11 of the United States Code.

We express a belief, based on our reasoned and studied professional judgment, that the panel decision is in conflict with the decisions of each of the other Courts of Appeal to address the issue in this appeal. We believe that consideration by the full court is necessary to avoid a split of authority in the federal courts:[1]

1. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010);
2. *Buckley v. Bass & Assocs.*, 249 F.3d 678 (7th Cir. 2001).

Dated: July 31, 2014

s/Larry B. Childs
Larry B. Childs
Gilbert C. Dickey
Attorneys for LVNV Funding, LLC, Resurgent Capital Services, L.P., and PRA Receivables Management, LLC

[1] In fact, based upon our reasoned and studied professional judgment, it appears that the panel decision is contrary to ***every*** reported decision on the issue of whether a claim under the Fair Debt Collection Practices Act can be premised upon filing a proof of claim in accordance with title 11 of the United States Code.

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STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. Whether filing a proof of claim can support a cause of action under the Fair Debt Collection Practices Act (the "***FDCPA***"), 15 U.S.C. § 1692–1692p.

STATEMENT OF CASE AND FACTUAL BACKGROUND

This appeal presented the issue whether filing a proof of claim in a bankruptcy proceeding could violate the FDCPA. A number of federal courts, including two circuit courts, have addressed this issue. None of those courts have concluded that filing a proof of claim could violate the FDCPA. The conclusion of those courts is supported by the text of the FDCPA, which applies only to debts owed by natural persons. Filing a proof of claim is an attempt to participate in the distribution of an estate that is distinct from any natural person. The panel decision in this appeal split with a uniform body of federal law and failed to address the requirement that a debt be owed by a natural person.

Stanley Crawford filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on February 2, 2008. (Bankr. Ct. Dkt. 1). Crawford later filed a schedule of debts. That schedule listed a debt held by LVNV as non-contingent, liquidated, and undisputed. (Bankr. Ct. Dkt. 12 p. 14). The enforcement of the debt held by LVNV may have been time barred. LVNV filed a proof of claim on May 21, 2008. (Bankr. Ct. Dkt. 8).

Almost four years later, on May 3, 2012, Crawford filed an adversary complaint against LVNV and asserted that the proof of claim filed by LVNV

violated the Fair Debt Collection Practices Act because the claim was time barred. (Bankr. Ct. Adv. P. Doc. 1, p. 5, 8–9). The Bankruptcy Court dismissed the adversary complaint for failure to state a claim upon which relief may be granted, (Bankr. Ct. Adv. P. Doc. 20), and the District Court affirmed, (Dist. Ct. Dkt. 19). Both courts reasoned that a proof of claim could not form the basis of an action under the FDCPA. (Bankr. Ct. Adv. P. Doc. 20; Dist. Ct. Dkt. 16, p. 3–6) Crawford appealed.

A three judge panel of this Court composed of Judge Hull, Judge Walter of the Western District of Louisiana, and Judge Goldberg of the Court of International Trade reversed the decision of the District Court. (Panel Op. at 1 & 15). The panel decided that filing a proof of claim in compliance with the Bankruptcy Code could form the basis of an action pursuant to the FDCPA, and the panel "h[e]ld that LVNV's conduct violated the FDCPA's plain language." (Panel Op. at 15).

ARGUMENT

This appeal merits en banc review. The panel decision involves a question of exceptional importance because the decision conflicts with the decision of two other circuit courts, and every federal court, to address whether the filing of a proof of claim can violate the FDCPA and the decision relies on a flawed interpretation of the FDCPA. The panel decision also merits review because the panel decided

issues that were not presented by this appeal. This Court should grant rehearing en banc or, in the alternative, the panel should grant rehearing of this appeal.

I. The Appeal Involves a Question of Exceptional Importance Because the Panel Decision Is in Opposition to a Uniform Body of Law, Ignores the Language of the FDCPA, and Will Cause a Flood of Litigation in this Circuit.

This Court may grant en banc review when "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1). An example of a question of exceptional importance is "an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." *Id.* The panel decision conflicts with the two other circuits that have addressed whether a proof of claim can violate the FDCPA and a uniform body of federal decisions that have reached the opposite conclusion of the panel decision. This decision ignores the text of the FDCPA and will open the floodgates of litigation in this Circuit.

A. The Panel Decision Conflicts With a Uniform Body of Law.

The panel decision conflicts with the decision of the United States Court of Appeals for the Second Circuit in *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010). In that decision, the Second Circuit addressed whether a proof of claim that overstated the amount owed could serve as the basis of a claim under the FDCPA. *Id.* at 95. The Court observed that "federal courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid)

cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action." *Id.* The Second Circuit "join[ed] th[ose] courts." *Id.* at 96. The Court explained that the purpose of the FDCPA would not be served by application of the FDCPA to a proof of claim:

> The FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.

Id. at 96. And the Court explained that the text of the FDCPA did not support application in a bankruptcy proceeding:

> Nothing in either the Bankruptcy Code or the FDCPA suggests that a debtor should be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA. And nothing in the FDCPA suggests that it is intended as an overlay to the protections already in place in bankruptcy proceedings.

Id. (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999)). The Court concluded that "the filing [of] a proof of claim in bankruptcy court cannot form the basis for an FDCPA claim." *Id.*

The United States Court of Appeals for the Seventh Circuit has also concluded that filing a proof of claim does not violate the FDCPA. In *Buckley v. Bass & Associates*, 249 F.3d 678, 681 (7th Cir. 2001), the Court addressed whether an inquiry whether a debtor had filed for bankruptcy was a *per se* violation of the

FDCPA. The Court explained that the inquiry could be "a prelude . . . to the filing of a claim in bankruptcy . . . , and such claims are outside the scope of the Fair Debt Collection Practices Act," and concluded that the letter was not a *per se* violation for that reason. *Id.* at 681–82.

The panel decision reaches a result contrary to the conclusion reached by every court in this Circuit that has addressed whether filing a proof of claim can violate the FDCPA. *See, e.g., McMillen v. Syndicated Office Sys., Inc. (In re McMillen)*, 440 B.R. 907, 914 (Bankr. N.D. Ga. 2010) ("[A]n FDCPA action cannot be based on filing a proof of claim during a bankruptcy proceeding."); *Cooper v. Litton Loan Servicing. (In re Cooper)*, 253 B.R. 286, 291 (Bankr. N.D. Fla. 2000) ("[T]he filing of a proof of claim in a bankruptcy proceeding does not trigger the FDCPA . . . .").

And the panel decision conflicts with every reported decision on the issue whether filing a proof of claim can provide the basis for a cause of action under the FDCPA. *See, e.g., Humes v. LVNV Funding, LLC (In re Humes)*, 496 B.R. 557, 581 (Bankr. E.D. Ark. July 17, 2013) ("[A] FDCPA claim cannot be predicated on a creditor's filing of a proof of claim."); *Claudio v. LVNV Funding, LLC (In re Claudio)*, 463 B.R. 190, 194 (Bankr. D. Mass. 2012) ("[A] long line of cases have held that the [FDCPA] is inapplicable to the filing of proofs of claim . . . ."); *Jacques v. U.S. Bank N.A. (In re Jacques)*, 416 B.R. 63, 80 (Bankr. E.D.N.Y.

2009) ("It simply is not wrongful conduct prohibited by the FDCPA to file a proof of claim . . . ."); *Gilliland v. Capital One Bank (In re Gilliland)*, 386 B.R. 622, 623 (Bankr. N.D. Miss. 2008) ("A 'FDCPA claim cannot be premised on proofs of claim filed during the bankruptcy proceeding.'") (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 813 (N.D. Ill. 1999)); *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999) ("[N]othing in the FDCPA suggests that it is intended as an overlay to the protections already in place in the bankruptcy proceedings.").

The unanimous conclusion of these Courts is consistent with the decision of the Supreme Court in *Kokoszka v. Belford*, 417 U.S. 642, 94 S. Ct. 2431 (1974). The Supreme Court explained in *Kokoszka* that Congress did not intend the Consumer Credit Protection Act, which the FDCPA amended, to alter the administration of an estate under the predecessor to the Bankruptcy Code, the Bankruptcy Act. *Id.* at 650, 94 S. Ct. at 2436. Instead, "Congress' concern was not the administration of a bankrupt's estate but the prevention of bankruptcy in the first place . . . ." *Id.* This decision suggests that the FDCPA should not be read to bar acts contemplated by the Bankruptcy Code.

The only acknowledgment of any of these decisions in the panel opinion is a dismissal of the decision of the Second Circuit in *Simmons* as "hold[ing] that the Bankruptcy Code displaces the FDCPA in a bankruptcy context," in a footnote that declines to weigh in on a preclusion issue on which the Circuits are split that is not

presented in this appeal, (Panel Op. at 14 n.7), but the decision in *Simmons* will not bear this reading. *Simmons* held that the filing of a proof a claim "cannot serve as the basis for an FDCPA action," because "filing a proof of claim in bankruptcy court . . . cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA." *Simmons*, 622 F.3d at 95. *Simmons* relied on a construction of the FDCPA. The Court explained explicitly that it was not taking the position ascribed to it by the panel decision: "Some courts have ruled more broadly that no FDCPA action can be based on an act that violates any provision of the Bankruptcy Code, because such violations are dealt with exclusively *by* the Bankruptcy Code," but "we are not compelled to consider [that rule] in this case." *Id.* at 96 n.2. *Simmons* is in conflict with the panel decision.

The other decisions cited by the panel decision as examples of the split among the circuits on the issue whether the Bankruptcy Code precludes the FDCPA illustrate that, although courts may disagree about the reasoning, no Court has held that an act permitted by the Bankruptcy Code can form the basis of an action under the FDCPA. The Ninth Circuit has concluded that because the "remedy for violation of [a provision of the Bankruptcy Code] . . . lies in the Bankruptcy Code, [a] simultaneous FDCPA claim is precluded." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 511 (9th Cir. 2002). The Seventh and Third Circuits have reached conclusions contrary to the conclusion of the Ninth Circuit,

but neither Circuit concluded that an FDCPA claim could be based on an action contemplated by the Bankruptcy Code.

The Seventh Circuit held that the Bankruptcy Code did not preclude an action under the FDCPA when a debt collector sent a letter demanding payment outside of the bankruptcy process after a plan had been approved in *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 & 732 (7th Cir. 2004). The Seventh Circuit explained that in that situation the differences between the Bankruptcy Code and the FDCPA "do not . . . add up to irreconcilable conflict; instead the two statutes overlap . . . ." *Id.* at 730. This decision allowed an action under the FDCPA to proceed based on a letter sent "about two years after [the bankruptcy] plan was confirmed." *Id.* at 728. In other words, the Seventh Circuit concluded that an FDCPA action could proceed when that action "was based upon the [debt collector's] actions taken after [the] conclusion of the bankruptcy case." *B-Real, LLC v. Chausee*, 399 B.R. 225, 237 (B.A.P. 9th Cir. 2008).

The Third Circuit reached a similar conclusion in *Simon v. FIA Card Services, N.A.*, 732 F.3d 259 (3d Cir. 2013). In that decision, the Third Circuit explained that an action under the FDCPA premised on a letter sent to a debtor that threatened an adversary proceeding in bankruptcy and an attached subpoena that failed to comply with the procedure for a subpoena in a bankruptcy proceeding was not precluded by the Bankruptcy Code. *Id.* at 278–80. But the Third Circuit

affirmed the dismissal of two claims under the FDCPA that were premised on an alleged violation of the Bankruptcy Rules because the Court concluded that "there was no failure to comply with the rules" and that "there was no underlying rule violation." *Simon*, 732 F.3d at 268. The Court concluded too that the Code precluded an argument that a letter and subpoenas "failed to disclose that they were sent by a debt collector attempting to collect a debt" because the debt collector "would violate the automatic stay provision of the Bankruptcy Code by including the notice . . . ." *Id.* at 280. The only claim that the *Simon* Court allowed to proceed was a claim based on a violation of the bankruptcy rules. *Id.* at 279. The *Simon* Court explained that the existence of other means of enforcement of the rules in bankruptcy "does not conflict with finding liability or awarding damages under the FDCPA . . . ." *Id.* The *Simon* decision suggests that an action under the FDCPA cannot be premised on an action permitted by the Bankruptcy Code.

B. The Panel Decision Conflicts with the Language of the FDCPA.

An erroneous interpretation of the FDCPA caused the panel to part from this uniform body of law. The FDCPA does not bar filing a proof of claim for at least two reasons. First, filing a proof of claim is not a debt collection activity within the meaning of the FDCPA. Second, filing a proof of claim is neither false, misleading, or deceptive nor unfair or unconscionable.

The FDCPA 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, and that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f, but filing a proof of claim is not debt collection activity governed by the FDCPA. The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money . . . ." 15 U.S.C. § 1692a(5). The FDCPA defines a "consumer" as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). Under these definitions, only the use of a false, deceptive, or misleading representation or unfair or unconscionable means to collect *an obligation of a natural person* is a prohibited debt collection activity.

Filing a proof of claim is not debt collection activity within the meaning of the FDCPA because filing a proof of claim is not an attempt to collect an obligation of a natural person. Instead, "[t]he filing of a proof of claim is a request to participate in the distribution of the bankruptcy estate under court control. It is not an effort to collect a debt from the debtor . . . ." *In re McMillen*, 440 B.R. at 912. The Supreme Court has explained that a proof of claim asserts a right to payment "against the debtor's estate." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449, 127 S. Ct. 1199, 1204 (2007). The conclusion that filing a proof of claim constitutes a violation of the FDCPA ignores the

distinction between the debtor and the estate under the Bankruptcy Code. The commencement of a bankruptcy proceeding "creates an estate." 11 U.S.C. § 541(a). "[T]he debtor and the bankruptcy estate are distinct entities in an individual's bankruptcy proceeding." *Katz v. C.I.R.*, 335 F.3d 1121, 1127 (10th Cir. 2003). A proof of claim cannot be a debt collection activity governed by the FDCPA because a proof of claim is an attempt to participate in the distribution of an estate that is legally distinct from any natural person.

This understanding of the FDCPA would be consistent with the Bankruptcy Code. The automatic stay provision of the Code forbids "any act to collect, assess, or recover a claim against the debtor . . . ." 11 U.S.C. § 362(a)(6). To conclude that filing a proof of claim is a debt collection activity under the FDCPA, a court would have to give the almost identical language of the automatic stay provision a different meaning or conclude that all proofs of claim violate the automatic stay.

The panel decision ignores the statutory requirement that a collection activity be against a natural person. The panel decision explains that the Supreme Court has defined "to collect a debt" as "to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." (Panel Op. at 13 (quoting *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S. Ct. 1489, 1491 (1995))). The panel decision explains that filing a proof of claim is an effort to obtain payment, but the

panel decision fails to address whether participation in the distribution of an estate is an attempt to collect an obligation of a natural person.

Even if this appeal involved activity governed by the FDCPA, the FDCPA bars only activity that "use[s] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, or that "uses unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. § 1692(f), and a proof of claim does not violate those prohibitions. "A proof of claim is a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001(a). "[E]ach . . . creditor[] is entitled to file a proof of claim." *Travelers Cas. & Sur. Co.*, 549 U.S. at 449, 127 S. Ct. at 1204. The proof of claim does not attest whether an obligation is enforceable. Instead, a proof of claim asserts a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(a).

In the light of these provisions, filing a proof of claim cannot be construed as "false, deceptive, or misleading." 15 U.S.C. § 1692e. A proof of claim asserts a "right to payment," 11 U.S.C. § 101(5)(a), and this Court has explained that "a statute of limitations [] is procedural and extinguishes the remedy rather than the right." *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1991 (11th Cir. 2004). LVNV had a right to payment and asserted that right.

The panel decision suggested that filing a proof of claim could be misleading because "it creates the misleading impression to the debtor that the debt collector can legally enforce the debt," (Panel Opinion at 11), but the panel fails to explain how this impression by an action that the Code says may be taken on a debt that is "contingent . . . [or] disputed," 11 U.S.C. § 101(5)(a). Both a contingent and a disputed debt may be unenforceable. The Code contemplates a proof of claim that asserts a right to payment of unenforceable debts, and filing a proof of claim on an unenforceable debt is not false, deceptive, or misleading.

Nor can filing a proof of claim be construed as "unfair or unconscionable" in the light of the protections available in bankruptcy. 15 U.S.C. § 1692f. "Debtors in bankruptcy proceedings do not need protection from abusive collection methods . . . because the claims process is highly regulated and court controlled." *Simmons*, 622 F.3d at 96. A trustee or any party in interest may object to a proof of claim, 11 U.S.C. § 502, and "[b]ankruptcy provides remedies for wrongfully filed proofs of claim," *Simmons*, 622 F.3d at 96.

C. The Panel Decision Will Cause a Flood of Litigation in This Circuit.

The panel decision will open the floodgates of litigation in this Circuit. The Bankruptcy Court for the Middle District of Florida has explained the effect of a rule that allows an FDCPA action to be based on the filing of a proof of claim:

> Although this Court would not expect a non-bankruptcy practitioner to understand the overwhelming significance of how the "floodgates

> of litigation" would be opened by allowing this type of suit to proceed, it does expect those who practice before this Court regularly to appreciate the significance . . . [The proof of claim process] is an efficient process that gives all sides an opportunity to assert their position. Typically, the majority of objections to claims are either worked out amongst the parties themselves, or if a hearing is necessary, the objection can usually be resolved within 5–10 minutes of the Court's time. Therefore, given the thousands of cases filed annually, coupled with the high volume of claims filed in each case, it is essential that practitioners appearing before this Court respect the claims process so that significant judicial resources are not squandered on matters that can be so very easily resolved.

Pariseu v. Asset Acceptance, LLC (*In re Pariseau*), 395 B.R. at 495–96 (footnote omitted). The Court then explained that allowing a proof of claim to form the basis of an FDCPA action would "would open up the floodgate for unnecessary and expensive litigation . . . ." *Id.* at 496 (quoting *Williams v. Asset Acceptance (In re Williams)*, 392 B.R. 882, 888 (Bankr. M.D. Fla. 2008)). The panel decision creates exactly the rule that concerned the Court in *In re Pariseau*.[2]

II. The Panel Decision Reaches a Holding That Goes Beyond the Correct Scope of Review.

The panel decision "hold[s] that LVNV's conduct violated the FDCPA's plain language," (Panel Op. at 15), but the question whether LVNV violated the FDCPA was not before the Court in this appeal. The appeal arose from a dismissal

[2] LVNV requests that the Court take judicial notice of seven putative class action complaints since July 11, 2014, in just the Southern District of Alabama, alleging proofs of claim violated the FDCPA including *e.g. Johnson v. Midland Funding LLC*, No. 1:14-cv-00322. Others are Nos. 1:14-cv-00323-CG-M; 1:14-cv-00324-WS-M; 1:14-cv-00325-WS-M; 1:14-cv-00326-CG-N; No. 1:14-cv-00331-CG-B; No. 1:14-cv-00336-C.

under Federal Rule of Bankruptcy Procedure 7012(b). This rule provides that Federal Rule of Civil Procedure 12(b)(6) "applies [to a motion to dismiss] in adversary proceedings." Fed R. Bankr. P. 7012(b). The bankruptcy court dismissed and the district court affirmed because "the filing of a claim in bankruptcy court . . . does not constitute a violation of the Fair Debt Collection Practices Act." *Crawford v. LVNV Funding, LLC (In re Crawford)*, No. 2:12-cv-701, 2013 WL 1947616, *3 (M.D. Ala. May 9, 2013). The parties briefed the issue whether filing a proof of claim could constitute a violation of the FDCPA before this Court. This appeal did not present the issue whether the proof of claim filed in this matter violated the FDCPA. The conclusion that LVNV violated the FDCPA required conclusions on issues not presented in this appeal. For example, the panel decision assumes that a "least sophisticated consumer" analysis applies, but some courts have concluded that a "competent attorney" analysis applies when a debt collector communicates with a lawyer. *See Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 774–75 (7th Cir. 2007) ("[T]he 'unsophisticated consumer' standpoint is inappropriate for judging communications with lawyers . . . ."). Filing a proof of claim is a communication with the bankruptcy trustee, a lawyer.

CONCLUSION

For the foregoing reasons, LVNV requests that the Court rehear this appeal en banc or, in the alternative, that the panel rehear this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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ADDENDUM

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12389

D.C. Docket No. 2:12-cv-00701-WKW,
Bkcy No. 08-bk-30192-DHW

STANLEY CRAWFORD,

Plaintiff - Appellant,

versus

LVNV FUNDING, LLC, et al.,

Defendants – Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(July 10, 2014)

Before HULL, Circuit Judge, and WALTER,[*] District Judge, and GOLDBERG,[**] Judge

GOLDBERG, Judge:

A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations. This appeal considers whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the Fair Debt Collection Practices Act ("FDCPA" or "Act"). 15 U.S.C. §§ 1692−1692p (2006).

We answer this question affirmatively. The FDCPA's broad language, our precedent, and the record compel the conclusion that defendants' conduct violated a number of the Act's protective provisions. See id. §§ 1692(e), 1692d−1692f. We hence reverse the orders of the bankruptcy and district courts.

I. FACTS[1]

[*]Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.

[**]Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

Stanley Crawford, the plaintiff in this case, owed $2,037.99 to the Heilig-Meyers furniture company. Heilig-Meyers charged off this debt in 1999, and in September 2001, a company affiliated with defendant LVNV Funding, LLC, acquired the debt from Heilig-Meyers.[2] The last transaction on the account occurred one month later on October 26, 2001. Accordingly, under the three-year Alabama statute of limitations that governed the account, Crawford's debt became unenforceable in both state and federal court in October 2004. See Ala. Code § 6-2-37(1).

Then, on February 2, 2008, Crawford filed for Chapter 13 bankruptcy in the Middle District of Alabama. During the proceeding, LVNV filed a proof of claim to collect the Heilig-Meyers debt, notwithstanding that the limitations period had expired four years earlier. In response, Crawford filed a counterclaim against LVNV via an adversary proceeding pursuant to Bankruptcy Rule 3007(b). Crawford alleged that LVNV filed stale claims as a routine business practice and that attempting to claim Crawford's time-barred debt violated the FDCPA.

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[1] LVNV's motion to dismiss Crawford's adversary proceeding is governed by Federal Rule of Civil Procedure 12(b)(6). See Fed. R. Bankr. P. 7012(b) (providing that Federal Rule Civil Procedure 12(b) "applies in adversary proceedings"). Accordingly, we accept the allegations in Crawford's complaint "as true and construe them in the light most favorable to [Crawford]." Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2012) (quotation marks omitted).

[2] The other defendants in this case are Resurgent Capital Services, L.P., and PRA Receivables Management, LLC. According to the complaint, LVNV filed the time-barred proof of claim "by and through" Resurgent in May 2008, and LVNV transferred the claim to PRA Receivables in September 2010. We refer to defendants collectively as "LVNV."

Bankruptcy Judge Dwight H. Williams, Jr., dismissed Crawford's adversary proceeding in its entirety. Crawford then appealed to the district court, but Chief Judge W. Keith Watkins affirmed. Crawford v. LVNV Funding, LLC, Nos. 2:12–CV–701–WKW, 2:12–CV–729–WKW, 2013 WL 1947616 (M.D. Ala. May 9, 2013). Crawford appealed to us on May 24, 2013.

II. THE FDCPA

To decide this case, we must first examine the statute that governs Crawford's claim: the FDCPA. The FDCPA is a consumer protection statute that "imposes open-ended prohibitions on, inter alia, false, deceptive, or unfair" debt-collection practices. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 587, 130 S. Ct. 1605, 1615 (2010) (quotation marks and citations omitted). Finding "abundant evidence" of such practices, Congress passed the FDCPA in 1977 to stop "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress determined that "[e]xisting laws and procedures" were "inadequate" to protect consumer debtors. Id. at § 1692(b); see Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1173 (11th Cir. 1985) (noting "that despite prior [Federal Trade Commission] enforcement in the area," Congress found "[e]xisting laws and procedures" inadequate).

In short, the FDCPA regulates the conduct of debt-collectors, which the statute defines as any person who, inter alia, "regularly collects . . . debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Undisputedly, LVNV and its surrogates are debt collectors and thus subject to the FDCPA.[3]

To enforce the FDCPA's prohibitions, Congress equipped consumer debtors with a private right of action, rendering "debt collectors who violate the Act liable for actual damages, statutory damages up to $1,000, and reasonable attorney's fees and costs." Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1270 (11th Cir. 2011) (citing 15 U.S.C. § 1692k(a)); Jeter, 760 F.2d at 1174 n.5 ("Most importantly, consumers were given a private right of action to enforce the provisions of the FDCPA against debt collectors . . . ."). To determine whether LVNV's conduct, as alleged in Crawford's complaint, is prohibited by the FDCPA, we begin "where all such inquiries must begin: with the language of the statute itself." Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1216 (11th Cir. 2012) (quotation marks omitted).

Section 1692e of the FDCPA 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. Section 1692f states that "[a] debt

[3] It is worth noting that the FDCPA does not apply to all creditors; it applies only to professional debt-collectors like LVNV.

collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Id. § 1692f.

Because Congress did not provide a definition for the terms "unfair" or "unconscionable," this Court has looked to the dictionary for help. "The plain meaning of 'unfair' is 'marked by injustice, partiality, or deception.'" LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1200 (11th Cir. 2010) (quoting Merriam–Webster Online Dictionary (2010)). Further, "an act or practice is deceptive or unfair if it has the tendency or capacity to deceive." Id. (quotation marks omitted and alterations adopted). We also explained that "[t]he term 'unconscionable' means 'having no conscience'; 'unscrupulous'; 'showing no regard for conscience'; 'affronting the sense of justice, decency, or reasonableness.'" Id. (quoting Black's Law Dictionary 1526 (7th ed. 1999)). We have also noted that "[t]he phrase 'unfair or unconscionable' is as vague as they come." Id. (quoting Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 480 F.3d 470, 474 (7th Cir. 2007)).

Given this ambiguity, we have adopted a "least-sophisticated consumer" standard to evaluate whether a debt collector's conduct is "deceptive," "misleading," "unconscionable," or "unfair" under the statute. LeBlanc, 601 F.3d at 1193-94, 1200-01 (holding that the "least-sophisticated consumer" standard applies to evaluate claims under both § 1692e and § 1692f); see also Jeter, 760

F.2d at 1172-78 (reversing the district court's use of the "reasonable consumer" standard in a §1692e case). The inquiry is not whether the particular plaintiff-consumer was deceived or misled; instead, the question is "whether the 'least sophisticated consumer' would have been deceived" by the debt collector's conduct. Jeter, 760 F.2d at 1177 n.11. The "least-sophisticated consumer" standard takes into account that consumer-protection laws are "not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous." Id. at 1172-73 (quotation marks omitted). "However, the test has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." LeBlanc, 601 F.3d at 1194 (quotation marks omitted and alterations adopted).

Given our precedent, we must examine whether LVNV's conduct—filing and trying to enforce in court a claim known to be time-barred—would be unfair, unconscionable, deceiving, or misleading towards the least-sophisticated consumer. See id. at 1193-94; see also Jeter, 760 F.2d at 1172-78.[4]

[4] The FDCPA is generally described as a "strict liability" statute. LeBlanc, 601 F.3d at 1190. Nevertheless, a debt collector's knowledge and intent can be relevant—for example, a debt collector can avoid liability if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C § 1692k(c). At this juncture in the case and for purposes of this appeal, LVNV does not dispute that it knew that the debt was time-barred.

III. DISCUSSION

The reason behind LVNV's practice of filing time-barred proofs of claim in bankruptcy court is simple. Absent an objection from either the Chapter 13 debtor or the trustee, the time-barred claim is automatically allowed against the debtor pursuant to 11 U.S.C. § 502(a)-(b) and Bankruptcy Rule 3001(f). As a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court.

That is what happened in this case. LVNV filed the time-barred proof of claim in May of 2008, shortly after debtor Crawford petitioned for Chapter 13 protection. But neither the bankruptcy trustee nor Crawford objected to the claim during the bankruptcy proceeding; instead, the trustee actually paid monies from the Chapter 13 estate to LVNV (or its surrogates) for the time-barred debt.[5] It wasn't until four years later, in May 2012, that debtor Crawford—with the assistance of counsel—objected to LVNV's claim as unenforceable.

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[5] The Bankruptcy Code provides a trustee in every Chapter 13 proceeding. 11 U.S.C. § 1302(a). Statute requires the trustee (among other duties) to appear at hearings, to advise the debtor in nonlegal matters, to ensure the debtor makes timely payments, and, "if a purpose would be served, [to] examine proofs of claims and object to the allowance of any claim that is improper." Id. §§ 1302(b)(1)−(2), (4)−(5), 704(a)(5). Here, however, it appears the trustee failed to fulfill its statutory duty to object to improper claims, specifically LVNV's stale claim.

LVNV acknowledges, as it must, that its conduct would likely subject it to FDCPA liability had it filed a lawsuit to collect this time-barred debt in state court. Federal circuit and district courts have uniformly held that a debt collector's threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f. See Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013) (explaining that a debt collector's filing of a time-barred lawsuit to recover a debt violates the FDCPA); see also Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32-33 (3d Cir. 2011) (indicating that threatened or actual litigation to collect on a time-barred debt violates the FDCPA, but finding no FDCPA violation because the debt-collector never pursued or threatened litigation); Castro v. Collecto, Inc., 634 F.3d 779, 783, 787 (5th Cir. 2011) (collecting cases and indicating that threatened or actual litigation to collect a time-barred debt "may well constitute a violation of [§1692e]," but ultimately concluding that no FDCPA violation occurred because the debt was not time-barred under the applicable statute of limitation); Freyermuth v. Credit Bureau Servs., 248 F.3d 767, 771 (8th Cir. 2001) (same as Huertas, supra); cf. McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 947-49 (9th Cir. 2011) (affirming summary judgment in favor of the consumer after the debt collector filed a time-barred lawsuit to recover a debt).[6]

[6]See also Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 875 (N.D. Ill. 2009)

As an example, the Seventh Circuit has reasoned that the FDCPA outlaws "stale suits to collect consumer debts" as unfair because (1) "few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts" and would therefore "unwittingly acquiesce to such lawsuits"; (2) "the passage of time . . . dulls the consumer's memory of the circumstances and validity of the debt"; and (3) the delay in suing after the limitations period "heightens the probability that [the debtor] will no longer have personal records" about the debt. Phillips, 736 F.3d at 1079 (quoting Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (quotation marks omitted)).

These observations reflect the purpose behind statutes of limitations. Such limitations periods "represent a pervasive legislative judgment that it is unjust to

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("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009) ("Courts have held that the filing of a time-barred lawsuit violates the FDCPA."); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008) ("[I]t may be inferred from Freyermuth that a violation of the FDCPA has occurred when a debt collector attempts, through threatened or actual litigation, to collect on a time-barred debt that is otherwise valid."); Larsen v. JBC Legal Grp., P.C., 533 F. Supp. 2d 290, 303 (E.D.N.Y. 2008) ("Although it is permissible [under the FDCPA] for a debt collector to seek to collect on a time-barred debt voluntarily, it is prohibited from threatening litigation with respect to such a debt."); Goins v. JBC & Assoc., P.C., 352 F. Supp. 2d 262, 272 (D. Conn. 2005) ("As the statute of limitations would be a complete defense to any suit . . . the threat to bring suit under such circumstances can at best be described as a 'misleading' representation, in violation of § 1692e [of the FDCPA]."); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991) ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (holding that a debt collector's filing of a time-barred lawsuit violated § 1692f).

fail to put the adversary on notice to defend within a specified period of time." United States v. Kubrick, 444 U.S. 111, 117, 100 S. Ct. 352, 356-57 (1979). That is so because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." Id. at 117, 100 S. Ct. at 357 (quoting R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349, 64 S. Ct. 582, 586 (1944)) (quotation marks omitted). 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." Id.

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.

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

object to such a claim. Given the Bankruptcy Code's automatic allowance provision, the otherwise unenforceable time-barred debt will be paid from the debtor's future wages as part of his Chapter 13 repayment plan. Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims. Furthermore, filing objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court. For all of these reasons, under the "least-sophisticated consumer standard" in our binding precedent, LVNV's filing of a time-barred proof of claim against Crawford in bankruptcy was "unfair," "unconscionable," "deceptive," and "misleading" within the broad scope of §1692e and §1692f.

Any contrary arguments mentioned in the briefs do not alter this conclusion. For example, we disagree with the contention that LVNV's proof of claim was not a "collection activity" aimed at Crawford and, therefore, not "the sort of debt-collection activity that the FDCPA regulates." As noted earlier, the broad prohibitions of § 1692e apply to a debt collector's "false, deceptive, or misleading representation or means" used "in connection with the collection of any debt." 15 U.S.C. § 1692e (emphases added). The broad prohibitions of §1692f apply to a debt collector's use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f (emphasis added). The FDCPA does not

define the terms "collection of debt" or "to collect a debt" in §§ 1692e or 1692f. However, in interpreting "to collect a debt" as used in § 1692(a)(6), the Supreme Court has turned to the dictionary's definition: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." Heintz v. Jenkins, 514 U.S. 291, 294, 115 S. Ct. 1489, 1491 (1995) (quoting Black's Law Dictionary 263 (6th ed. 1990)).

Applying these definitions here, we conclude that LVNV's filing of the proof of claim fell well within the ambit of a "representation" or "means" used in "connection with the collection of any debt." It was an effort "to obtain payment" of Crawford's debt "by legal proceeding." In fact, payments to LVNV were made from Crawford's wages as a result of LVNV's claim. And, it was Crawford—not the trustee—who ultimately objected to defendants' claim as time-barred. Our conclusion that §§ 1692e and 1692f apply to LVNV's proof of claim is consistent with the FDCPA's definition of a debt-collector as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (emphasis added).

LVNV also argues that considering the filing of a proof of claim as a "means" used "in connection with the collection of debt" for purposes §§ 1692e and 1692f of the FDCPA would be at odds with the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(6). We disagree. The automatic stay

prohibits debt-collection activity outside the bankruptcy proceeding, such as lawsuits in state court. See Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348, 354 (5th Cir. 2008) (explaining that the automatic stay "does not determine a creditor's claim but merely suspends an action to collect the claim outside the procedural mechanisms of the Bankruptcy Code"). It does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process. Filing a proof of claim is the first step in collecting a debt in bankruptcy and is, at the very least, an "indirect" means of collecting a debt. See 15 U.S.C. §§ 1692a(6), 1692e, and 1692f.

Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.[7]

III. CONCLUSION

[7]The Court also declines to weigh in on a topic the district court artfully dodged: Whether the Code "preempts" the FDCPA when creditors misbehave in bankruptcy. Crawford, 2013 WL 1947616, at *2 n.1. Some circuits hold that the Bankruptcy Code displaces the FDCPA in the bankruptcy context. See Simmons v. Roundup Funding, LLC, 622 F.3d 93, 96 (2d Cir. 2010); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002). Other circuits hold the opposite. See Simon v. FIA Card Ser., N.A., 732 F.3d 259, 271−74 (3d Cir. 2013); Randolph v. IMBS, Inc., 368 F.3d 726, 730−33 (7th Cir. 2004). In any event, we need not address this issue because LVNV argues only that its conduct does not fall under the FDCPA or, alternatively, did not offend the FDCPA's prohibitions. LVNV does not contend that the Bankruptcy Code displaces or "preempts" §§ 1692e and 1692f of the FDCPA.

Because we hold that LVNV's conduct violated the FDCPA's plain language, we vacate the district court's dismissal of Crawford's complaint and remand for further proceedings.

VACATED and **REMANDED**.