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## Feature

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



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

But Appellants are fighting an uphill battle, and they candidly admit [that] they cannot win their appeals without a change in the law. Indeed, the elephantine body of persuasive authority weighs against Appellants' position.... ("Federal courts have consistently ruled that filing a proof of claim in bankrupt-

cy 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.")<sup>4</sup>

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

#### Statute of Limitations: A Definition

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

It is often unclear which statute of limitations applies to a particular claim. For example, contractual choice-of-law terms may discord with

1 758 F.3d 1254 (11th Cir. 2014).

2 *Id.* at 1256; see also Susan E. Trent, "Crawford Surprises: Stale Debt, FDCPA and Proofs of Claim," XXXIII *ABI Journal* 10, 14, 82-83, October 2014.

3 A debt collector is defined as:

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

15 U.S.C. § 1692a(6) (2014). The Act defines a debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services [that] are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (2014).

4 *Crawford v. LVNV Funding LLC*, No. 2:12-CV-701-WKW [WJ], 2013 U.S. Dist. LEXIS 66169, at \*4 (M.D. Ala. May 9, 2013).

5 *Crawford*, 758 F.3d at 1259 n.4; 15 U.S.C. § 1692k(a)(3).

6 *Black's Law Dictionary* 1422 (7th ed. 1999).

7 Fed. R. Civ. P. 8(c)(1).

8 For example, in Virginia, the statute of limitations for personal-injury claims is two years, Va. Code Ann. § 8.01-243A (2014). However, in Tennessee, it is one year, Tenn. Code Ann. § 28-3-104(a)(1) (2014).

local conflict of laws statutes or precedent. There may be a dispute over which cause of action, and its applicable statute of limitations, applies to a claim. Are revolving credit accounts written contracts, accounts stated or, in the absence of a signed credit agreement, an unwritten account? The statute of limitations in many states differs as to actions on similar claims.

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

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

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

## Effect of the Running of the Statute of Limitations

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

## The FDCPA and the Statute of Limitations

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

FDCPA is purposed "to eliminate abusive debt-collection practices by debt collectors, to [e]nsure that those debt collectors who refrain from using abusive debt-collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt-collection abuses."<sup>15</sup>

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

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

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

## Statute of Limitations and Bankruptcy Claims

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

The fact that a claim might be subject to disallowance due to the running of an applicable statute of limitations "does not defeat the existence of the claim in bankruptcy."<sup>23</sup> "Quite the contrary: the existence of the claim must be determined independent of limitations questions else the process

15 15 U.S.C. § 1692(e) (2014).

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

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

18 15 U.S.C. § 1692e (2014).

19 15 U.S.C. § 1692f (2014).

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

21 11 U.S.C. § 101(5).

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

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

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

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

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

12 15 U.S.C. § 1692(a) (2014).

13 *Id.*

14 15 U.S.C. § 1692(b) (2014).

of allowance under § 502 becomes redundant, if not circular.<sup>24</sup> By ruling that a proof of claim for an out-of-statute debt is a violation of the FDCPA, the Eleventh Circuit has effectively prohibited certain claimants from filing legitimate bankruptcy claims, eschewing the claim-determination process for adjudicating the allowance of claims.

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

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

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

## The Crawford Effect

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

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

The potential for FDCPA liability imposes additional procedural obligations on a discreet subset of bankruptcy claimants: those defined by the FDCPA as “debt collectors.” Such claimants would be required to attempt to reconcile not only the Bankruptcy Code and the FDCPA, but also conflicting limitation periods among jurisdictions. A ban would also

entrap those, such as attorneys, who assist non-debt-collector creditors in the administration of their bankrupt accounts, particularly by filing their proofs of claims. It is unlikely that such outside parties would agree to file claims that subject them to FDCPA liability.

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

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<sup>24</sup> *Id.*

<sup>25</sup> Fed. R. Bankr. P. 3001(c)(3)(A).

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

<sup>27</sup> See, e.g., *Patrick v. PYOD LLC*, 1:14-cv-539-RLY-TAB, 2014 U.S. Dist. LEXIS 116092 (S.D. Ind. Aug. 20, 2014) (denying motion to dismiss and holding that filing proof of claim in bankruptcy for out-of-statute debt is attempt to collect debt in violation of FDCPA because it creates misleading impression in least-sophisticated consumer that debt is legally enforceable); *accord, Granddier v. Quantum3 Grp. LLC*, No. 1:14-cv-00138-RLY-TAB, 2014 U.S. Dist. LEXIS 169279 (S.D. Ind. Dec. 8, 2014) (same).

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

<sup>29</sup> *Id.* at \*4-5.

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

<sup>31</sup> April Kuehnhoff and Margot Saunders, “Zombie Debt: What the CFPB Should Do About Attempts to Collect Old Debt,” National Consumer Law Center, January 2015, available at [www.nclc.org/images/pdf/debt\\_collection/report-zombie-debt-2015.pdf](http://www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf) (last visited March 3, 2015).

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