No.

IN THE
Supreme Court of the United States

LVNV FUNDING, LLC; RESURGENT CAPITAL SERVICES, L.P.; AND PRA RECEIVABLES MANAGEMENT, LLC,
Petitioners,

v.

STANLEY CRAWFORD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that liability under the Fair Debt Collection Practices Act may be premised on the filing of a proof of claim in bankruptcy and determined using a least-sophisticated consumer standard.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were the defendants-appellees below, are LVNV Funding, LLC, Resurgent Capital Services, L.P., and PRA Receivables Management, LLC.

LVNV Funding, LLC is owned by Sherman Originator, LLC. Resurgent Capital Services, L.P. is owned by Sherman Financial Group and Alegis Group, LLC. No publicly held company owns 10% or more of the stock of the above companies.

PRA Receivables Management, LLC is owned by PRA Group (formerly known as Portfolio Recovery Associates, Inc.), which is a publicly held company. No other publicly held company owns 10% or more of the stock of the above companies.

Respondent, who was plaintiff-appellant below, is Stanley Crawford.

In addition, Tamara L. Sims was a plaintiff-appellant in the consolidated district court case below against defendants-appellees ANFI, Inc.; Asset Acceptance, LLC; Jefferson Capital Systems; and Resurgent Capital Services, L.P. Ms. Sims's claims were dismissed by the district court and Ms. Sims did not appeal from that ruling.

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PETITION FOR A WRIT OF CERTIORARI

LVNV Funding, LLC, Resurgent Capital Services, L.P., and PRA Receivables Management, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 758 F.3d 1254. The order of the court of appeals denying rehearing and rehearing en banc (App. 23a) is unreported. The order of the district court (App. 15a) is unreported. The order of the bankruptcy court (App. 21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2014. The court of appeals denied a timely petition for rehearing and rehearing en banc on September 18, 2014. On December 3, 2014, Justice Thomas extended the time within which to file a petition for certiorari to and including January 16, 2015. No. 14A564. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Fair Debt Collection Practices Act and the Bankruptcy Code are reproduced in the Appendix (App. 25a).

STATEMENT

The court of appeals created one conflict among the circuits and exacerbated another in holding that the mere filing of a proof of claim, in compliance with the provisions of the Bankruptcy Code, can trigger liability under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"). That holding has already

sparked an onslaught of new litigation in the lower courts and will wreak havoc on the Nation's bankruptcy system if not overturned, as it should be in light of this Court's case-law and the text and purposes of the Act.

The courts of appeals are now starkly divided over the question whether filing a proof of claim in bankruptcy can serve as the basis for FDCPA liability. The circuits are also divided over whether this Court's opinion in *Kokoszka v. Belford*, 417 U.S. 642 (1974), establishes the proper interpretive framework for assessing the scope of the FDCPA in the bankruptcy context. Moreover, the Eleventh Circuit's application of a "least-sophisticated consumer" standard to judge FDCPA liability with respect to communications with a debtor's attorney has further fractured the courts of appeals. Eight federal courts of appeals have addressed the standard for FDCPA liability for communications with a debtor's counsel, resulting in four distinct and inconsistent rules of law.

The Eleventh Circuit's injection of FDCPA liability into the bankruptcy system will also give rise to a number of conflicts between the FDCPA and the Bankruptcy Code, multiplying confusion for debtors and creditors alike and causing untold damage to the efficiency of the bankruptcy claims adjudication process. Already, the court of appeals' decision has resulted in a raft of litigation alleging FDCPA violations based on commonplace actions in bankruptcy proceedings. With more than 1 million personal bankruptcy cases filed annually and over $3 trillion in outstanding consumer debt, the Eleventh Circuit's decision – if left unchecked – threatens to overwhelm the bankruptcy system with time-consuming collat-

eral litigation. Certiorari is warranted to resolve these conflicts in authority among the courts of appeals, and to clarify that mere participation in the bankruptcy claims process is not a basis for FDCPA liability.

A. Statutory Background

1. The Bankruptcy System

When a debtor files a petition for bankruptcy, a bankruptcy estate is created by operation of law, consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "The bankruptcy 'estate' is a separate and distinct legal entity" from the debtor. Charles Jordan Tabb, *The Law of Bankruptcy* § 5.1, at 389 (3d ed. 2014); *see also*, *e.g.*, *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate."); *Katz v. Comm'r*, 335 F.3d 1121, 1127 (10th Cir. 2003) ("[T]he debtor and the bankruptcy estate are distinct entities in an individual's bankruptcy proceeding."). "It is the policy of the Code that debtors' estates should be administered for the benefit of creditors . . . ." Fed. R. Bankr. P. 3004 advisory committee's note (1983).

Once a bankruptcy petition is filed, the Bankruptcy Code's automatic stay provision comes into effect, and operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case]." 11 U.S.C. § 362(a)(6). Any actions to collect such a claim against the debtor, like other violations of the automatic stay, are punishable by contempt or other sanctions by the Bankruptcy Court. *See* 1-1

Collier on Bankruptcy ¶ 1.03[2][b][iii] (rev. 15th ed. 2011) ("Violation of the automatic stay can be punished by contempt or the imposition of sanctions.").

"Bankruptcy, at its core, is about the treatment and disposition of the 'claims' of creditors." Tabb, *supra* § 7.1, at 635. The Bankruptcy Code defines a "claim" as a "right to payment, whether or not such right is . . . fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. § 101(5)(A). "Congress intended by this language to adopt the broadest available definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).

A proof of claim is "a written statement setting forth a creditor's claim," Fed. R. Bankr. P. 3001(a), which 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 (2007). After the petition is filed, each creditor "is entitled to file a proof of claim" against the bankruptcy estate. 549 U.S. at 449; 11 U.S.C. § 501(a). Debtors or trustees may also file proofs of claim, and may have an interest in doing so with respect to nondischargeable or secured claims to ensure that such claims will be eligible for monetary distributions from the estate. *See* 11 U.S.C. § 501(c); Fed. R. Bankr. P. 3004. With limited exceptions, filing a proof of claim is "a prerequisite to its allowance as a claim on the assets of the bankruptcy estate." 4 *Collier on Bankruptcy* ¶ 501.01[2][a] (rev. 15th ed. 2011).

Because the term "claim" is broadly defined to include "contingent" and "disputed" rights to payment, 11 U.S.C. § 101(5)(A), the Bankruptcy Code allows creditors to file proofs of claim with respect to debts that are subject to statute-of-limitations or other defenses. *See In re Keeler*, 440 B.R. 354, 363

(Bankr. E.D. Pa. 2009) ("Based upon the broad definition of a claim . . . and based upon . . . the statutory entitlement to file a proof of claim, numerous courts have upheld the right of an entity to file a proof of claim, even if that claim is clearly barred by the applicable statute of limitations."); *B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("[T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt . . . ."); *In re Knight*, 55 F.3d 231, 234 (7th Cir. 1995) ("[T]he Code expressly recognizes that a disputed claim is nevertheless a claim."); Tabb, *supra* § 3.3, at 249 ("[A] bankruptcy claim exists . . . even if the debtor contests the validity and amount of that claim . . . .").[1]

Proofs of claim are "filed with the clerk" in the district in which the bankruptcy case is pending. Fed. R. Bankr. P. 5005(a)(1). Separate from the bankruptcy court docket, the clerk is required to maintain a claims register listing all claims in cases where it appears unsecured creditors will receive a distribution. Fed. R. Bankr. P. 5003(b). A proof of claim is deemed "allowed" unless an interested party

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[1] In the vast majority of states, the expiration of the statute of limitations applicable to a debt does not extinguish the creditor's right to repayment but merely provides a defense to judicial enforcement, and "the statute of limitations is an affirmative defense that must be asserted or it will be waived." Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, 33 No. 8 Banking & Fin. Services Pol'y Rep. 13, 13 (Aug. 2014). Thus, "if suit is filed on a time-barred debt and the defense is not asserted, the creditor is entitled to judgment on the otherwise valid debt." *Id.* Alabama law, which governs the debt at issue here, follows the majority rule. *See Ex parte Liberty Nat'l Life Ins. Co.*, 825 So. 2d 758, 765 (Ala. 2002) ("[A] statute of limitations generally is procedural and extinguishes the remedy rather than the right . . . .") (internal quotation marks omitted).

(which may include the debtor, the trustee, or other creditors) objects. 11 U.S.C. § 502; *see also* 9-3007 *Collier on Bankruptcy* ¶ 3007.01[2] (rev. 15th ed. 2011) (listing the debtor, the trustee, and creditors as interested parties). Among other defenses, an objection to a claim can be made on grounds that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law." 11 U.S.C. § 502(b)(1).

In addition to a debtor's right to object to a proof of claim, the Bankruptcy Code obligates the bankruptcy trustee to object to improper claims. 11 U.S.C. §§ 1302(b)(1), 704(a)(5). As the representative of the bankruptcy estate, *id.* § 323(a), the trustee can raise any defense that the debtor could raise, "including statutes of limitation . . . and other personal defenses," *id.* § 558.

2. The Fair Debt Collection Practices Act

The FDCPA was enacted in 1977 as new Title VIII of the Consumer Credit Protection Act. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874, 874 (1977). The FDCPA regulates attempts to collect financial obligations from natural persons. 15 U.S.C. § 1692a(3) (defining "consumer" as "any natural person obligated . . . to pay any debt"); *id.* § 1692a(5) (defining "debt" as any "obligation of a consumer to pay money" arising from personal, family, or household purposes). Based on Congress's finding that abusive debt-collection practices "contribute[d] to the number of personal bankruptcies," *id.* § 1692(a), the FDCPA seeks to prevent personal bankruptcies by prohibiting "deceptive" or "misleading" representations and "unfair and uncon-

scionable" actions during the collection of a consumer debt, 15 U.S.C. §§ 1692e & 1692f.

B. Proceedings Before The Bankruptcy Court

Respondent filed a Chapter 13 bankruptcy petition through counsel on February 2, 2008, in the Bankruptcy Court for the Middle District of Alabama. Petition, No. 08-30192 (Bankr. M.D. Ala.), Dkt. 1. Various creditors filed proofs of claim, and respondent's attorney also filed a secured proof of claim in the amount of $3,300 on a creditor's behalf. Claims Register, No. 08-30192 (Bankr. M.D. Ala.), Dkt. 12-1. In May 2008, petitioner LVNV Funding, LLC filed an unsecured proof of claim as the assignee of a $2,037.99 debt originally owed by respondent to the Heilig-Meyers furniture company. App. 3a. The amount due was charged off by Heilig-Meyers in 1999, with a last transaction date of October 26, 2001. App. 3a. In September 2010, LVNV's claim was transferred to PRA Receivables Management, LLC. App. 3a n.2.

In May 2012, four years after the filing of LVNV's proof of claim, respondent filed an adversary proceeding against LVNV Funding, LLC, Resurgent Capital Services, L.P., and PRA Receivables Management, LLC (collectively "LVNV"). App. 3a-4a, 8a. Respondent's adversary complaint objected to LVNV's proof of claim, asserted that the underlying debt was barred by the applicable statute of limitations, and alleged that filing a proof of claim on a time-barred debt violates the FDCPA as well as the Bankruptcy Code's automatic stay provision. App. 21a. LVNV moved to dismiss.

The bankruptcy court dismissed respondent's FDCPA claim, agreeing with LVNV that "the filing of a claim in the bankruptcy court, even one barred by the statute of limitations, does not constitute a violation of the Fair Debt Collection Practices Act." App. 22a. Respondent withdrew its allegation of a violation of the automatic stay. App. 21a-22a. Accordingly, the bankruptcy court dismissed the adversary proceeding. App. 22a.

C. Proceedings Before The District Court

On appeal to the district court, respondent acknowledged that he could not win his appeal "without a change in the law" regarding whether filing a proof of claim can serve as the basis for an FDCPA claim.[2] App. 17a. The district court observed that "the elephantine body of persuasive authority" contradicted respondent's position that the FDCPA prohibits creditors from filing proofs of claim on time-barred debts. App. 17a (citing *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)).

In keeping with the weight of authority, the district court held that "the FDCPA does not apply to the bankruptcy claims process because creditors who file proofs of claim are not engaging in the sort of debt-collection activity that the FDCPA regulates." App. 18a. The court explained that filing a proof of claim is "not the same thing as attempting to collect

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[2] In the district court, respondent's case was consolidated with Tamara L. Sims's action against defendants-appellees ANFI, Inc.; Asset Acceptance, LLC; Jefferson Capital Systems; and Resurgent Capital Services, L.P. Ms. Sims did not appeal from the district court's dismissal of her claims, so the court of appeals did not address them.

a debt," but is instead "merely a request to participate in the distribution of the bankruptcy estate under court control." App. 17a (internal quotation marks omitted). The court also reasoned that treating a proof of claim as a collection activity "would be fundamentally at odds" with the Bankruptcy Code's automatic stay provision, which provides that "the filing of a petition operates as a stay, applicable to all entities, of . . . any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case]." App. 18a (internal quotation marks omitted).

In the alternative, the district court held that LVNV "did not engage in any behavior that would violate the FDCPA" even assuming *arguendo* that its filing of a proof of claim was an attempt to collect a debt. App. 18a. The district court explained that filing a proof of claim on a time-barred debt in the "structured environment of the bankruptcy court" does not raise the same concerns as threats or lawsuits outside the bankruptcy process. App. 19a-20a. The "close supervision attendant to bankruptcy cases, the statutory purpose of the FDCPA, as well as common sense" all supported the district court's view that "there is nothing unfair or unconscionable about filing a proof of claim in a bankruptcy case even if it could be construed as a debt collection activity." App. 18a-19a (internal quotation marks omitted).

D. Proceedings Before The Court Of Appeals

In an opinion by Court of International Trade Judge Goldberg, the court of appeals reversed. App. 1a-14a. The court began its analysis by stating that the "ambiguity" of the FDCPA led the court to adopt "a 'least-sophisticated consumer' standard to evalu-

ate whether a debt collector's conduct is 'deceptive,' 'misleading,' 'unconscionable,' or 'unfair' under the statute." App. 6a (citation omitted). Reasoning that filing a proof of claim on a time-barred debt "creates the misleading impression to the debtor that the debt collector can legally enforce the debt," the court of appeals held that LVNV violated the FDCPA by filing its proof of claim. App. 11a-14a.

The court of appeals expressly rejected LVNV's argument that filing a proof of claim is "not the sort of debt-collection activity that the FDCPA regulates." App. 12a. Instead, the court held that LVNV's proof of claim was an effort "to obtain payment" of respondent's debt "by legal proceeding." App. 12a-13a (internal quotation marks omitted). The court asserted that its interpretation was not inconsistent with the automatic stay provision of the Bankruptcy Code, based on its view that the "automatic stay prohibits debt-collection activity outside the bankruptcy proceeding," but "does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process," which it considered to be an "indirect" means of collecting a debt under the FDCPA. App. 13a. LVNV sought rehearing and rehearing en banc, which was denied. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to resolve multiple conflicts among the circuits regarding the scope and standard for FDCPA liability in bankruptcy proceedings. Until recently, federal courts had consistently held that filing a proof of claim in bankruptcy cannot serve as the basis for liability under the FDCPA. This uniform authority recognized that the FDCPA's purposes – namely, to prevent consumer bankruptcies by protecting defenseless debtors and

providing remedies against abuse by creditors – are not implicated in the "highly regulated and court controlled" process of bankruptcy claims adjudication. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010).

The Eleventh Circuit adopted the opposite rule of law, holding that LVNV violated the FDCPA merely by filing a proof of claim that was subject to an affirmative defense, even though such conduct is permissible under the Bankruptcy Code. That holding conflicts with the decisions of three other courts of appeals – the Second, Seventh, and Ninth Circuits – all of which have repudiated the notion that FDCPA liability can be premised on filing a proof of claim in bankruptcy.

In reaching its erroneous conclusion that LVNV's proof of claim was "misleading" in violation of the FDCPA, the Eleventh Circuit also applied a "least-sophisticated consumer" standard, even though respondent was represented by counsel and the Chapter 13 trustee was authorized to object to invalid proofs of claim. Application of the least-sophisticated consumer standard in this context further exacerbates an existing circuit conflict regarding the proper standard for assessing FDCPA liability for communications with counsel. Eight circuit courts of appeals have now addressed this issue, resulting in four distinct and inconsistent rules of law.

In addition, the Eleventh Circuit's holding that the mere filing of proofs of claim in bankruptcy can give rise to FDCPA liability has placed the FDCPA on a collision course with the Bankruptcy Code. The resulting confusion will harm debtors and creditors alike, and threatens to disrupt the efficient operation of the Bankruptcy Code's claims adjudication process

by clogging the system with time-consuming and expensive collateral litigation.

The lower federal courts will continue to apply divergent standards to identical and recurring conduct in vast numbers of bankruptcy cases unless and until this Court intervenes. Certiorari is necessary so that this Court can resolve these conflicts and clarify that mere participation in the bankruptcy claims adjudication process is not a basis for FDCPA liability.

I. THE DECISION BELOW CREATES A CIRCUIT CONFLICT OVER WHETHER FILING A PROOF OF CLAIM IN BANKRUPTCY CAN VIOLATE THE FDCPA

The decision below is flatly inconsistent with the uniform prior case-law addressing whether a proof of claim in bankruptcy can serve as the basis for an FDCPA claim. This holding creates a circuit conflict, and exacerbates an existing divide in the circuits over whether this Court's opinion in *Kokoszka v. Belford*, 417 U.S. 642 (1974), governs the scope of the FDCPA in the bankruptcy context.

A. The Decision Below Conflicts With Decisions Of The Second, Seventh, And Ninth Circuits

The court of appeals held that the filing of a proof of claim (which asserts a potential right to participate in distributions from the bankruptcy estate) constitutes "an effort 'to obtain payment' of [the debtor's] debt 'by legal proceeding'" and is therefore subject to the FDCPA. App. 12a-13a. The Second, Seventh, and Ninth Circuits have adopted contrary constructions of the FDCPA that would have led to precisely the opposite result in this case.

In *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), the Second Circuit held that the filing of an invalid proof of claim "cannot form the basis for a claim under the FDCPA." *Id*. at 94. In rejecting FDCPA liability for the filing of an allegedly inflated proof of claim, the Second Circuit 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.* at 95 (collecting cases).

Simmons explained that while the FDCPA was designed "to protect defenseless debtors and to give them remedies against abuse by creditors," neither of these purposes supports extending FDCPA liability to the bankruptcy context. 622 F.3d at 96. FDCPA protections are not needed to safeguard debtors in bankruptcy, the Second Circuit observed, because the bankruptcy "claims process is highly regulated and court controlled." *Id.* (internal quotation marks omitted). Thus, the FDCPA's purpose to protect "unsophisticated consumers from unscrupulous debt collectors" is simply "not implicated when a debtor is instead protected by the court system and its officers." *Id.* (internal quotation marks omitted).

The *Simmons* court also explained that the FDCPA's goal of providing debtors with remedies against abusive creditor tactics has no application in the bankruptcy claims context, because the Bankruptcy Code already "provides remedies for wrongfully filed proofs of claim," which include disallowance of fraudulent proofs of claim and the bankruptcy court's contempt power. 622 F.3d at 96. The Second

Circuit concluded its analysis by noting that "[n]othing 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 the bankruptcy proceedings." *Id.* (internal quotation marks omitted).

Like the Second Circuit in *Simmons*, the Seventh Circuit in *Buckley v. Bass & Associates*, 249 F.3d 678 (7th Cir. 2001), held that the filing of a claim in bankruptcy is "outside the scope of the Fair Debt Collection Practices Act." *Id*. at 681. The Seventh Circuit considered whether a letter sent to a debtor, which inquired whether the debtor had filed for bankruptcy, constituted a *per se* violation of the FDCPA. *Id.* at 682. In rejecting the plaintiff's *per se* claim, the court held that when a company in the business of handling creditors' claims in bankruptcy proceedings sends such a letter to a debtor, its action "would 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*." *Id.* at 681 (emphasis added). The court further explained that, in that situation, the company preparing to file a proof of claim "wouldn't be a debt collector after all." *Id.*

Announcing a broader rule, the Ninth Circuit in *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), held that the Bankruptcy Code "precluded" FDCPA claims based on actions taken in bankruptcy. *Id*. at 510-11. The Ninth Circuit reasoned that allowing an FDCPA claim for actions taken in bankruptcy would "circumvent the remedial scheme

of the Code." *Id.* at 510. Looking to the text of the FDCPA and the Bankruptcy Code, as well as this Court's decision in *Kokoszka*, the Ninth Circuit explained that "[n]othing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." *Walls*, 276 F.3d at 510 (citing 417 U.S. at 651).

The foregoing decisions are irreconcilable with the Eleventh Circuit's decision below. While the Second Circuit in *Simmons* explained that filing proofs of claim in bankruptcy does not implicate the FDCPA's debtor protection or remedial considerations, 622 F.3d at 96, the court below reached precisely the opposite conclusion. App. 11a-12a. And while the Seventh Circuit in *Buckley* held that a company taking steps to file a proof of claim in bankruptcy "wouldn't be a debt collector" within the meaning of the FDCPA, 249 F.3d at 681, the Eleventh Circuit concluded that the FDCPA's definition of "debt-collector" supported its holding that the FDCPA applies to parties filing proofs of claim in bankruptcy. App. 13a. Finally, the Ninth Circuit's decision in *Walls* precludes FDCPA liability for actions taken in bankruptcy proceedings even as to purported violations of the Bankruptcy Code, whereas the decision below imposed FDCPA liability for actions specifically contemplated by the Bankruptcy Code. *See supra* pp. 4-6.

Review is therefore warranted to clarify that participation in the bankruptcy process is not a basis for FDCPA liability.

B. The Courts Of Appeals Are Divided Over Whether This Court's Interpretive Approach In *Kokoszka* Governs The Intersection Of The FDCPA And The Bankruptcy Code

The courts of appeals are also divided over whether the interpretive approach followed by this Court in *Kokoszka* governs interpretive questions arising from the intersection of the FDCPA and the bankruptcy process. In *Kokoszka*, the Court addressed the question whether limitations on garnishment of wages set forth in the Consumer Credit Protection Act ("CCPA") were applicable to proceedings in bankruptcy. 417 U.S. at 643. Based on its examination of the history and purpose of the CCPA, and in light of Congress's recognition that the CCPA and bankruptcy law would have to "coexist," the Court held that the CCPA's provisions regarding garnishment do not extend to proceedings in bankruptcy. *Id.* at 650. As the Court explained, Congress's concern in enacting the CCPA "was not the *administration* of a bankrupt's estate but the *prevention* of bankruptcy in the first place." *Id.* Thus, "the Consumer Credit Protection Act sought to prevent consumers from entering bankruptcy in the first place," but "if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act." *Id.* at 651. In enacting the CCPA, the Court concluded, there was "no indication" that "Congress intended drastically to alter the delicate balance of a debtor's protections and obligations during the bankruptcy procedure." *Id*.

In recognition of the fact that the FDCPA was adopted as an amendment to the CCPA not long after *Kokoszka* was decided, and shares the CCPA's

focus on avoiding bankruptcy rather than purporting to regulate proceedings in bankruptcy, some courts of appeals have applied *Kokoszka*'s interpretive approach in holding that FDCPA liability cannot be premised on actions in bankruptcy. *See Walls*, 276 F.3d at 510 ("While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." (citing *Kokoszka*)); *Simmons*, 622 F.3d at 96 (same) (quoting *Walls*).

Other courts, however, have rejected *Kokoszka*'s application to the FDCPA. *See Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 278 (3d Cir. 2013) (holding that *Kokoszka*'s conclusions "do not apply to the relationship between the Code and the FDCPA"); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) (stating that passage from *Kokoszka* "was not expressed as a holding" and in any event "would not affect the FDCPA").

Consistent with the view of the Ninth and Second Circuits, a review of the FDCPA shows that it was designed to prevent – not regulate – bankruptcy. The FDCPA was enacted as an amendment to the CCPA, and is Title VIII of the CCPA. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874, 874 (1977). Congress's express findings set forth in the FDCPA, like those in the CCPA generally, reiterate Congress's goal of preventing, rather than regulating, bankruptcy. *See* 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to the number of personal bankruptcies . . . ."). As the Second Circuit recognized in *Simmons*, the FDCPA's purpose to protect "unsophisticated consumers from unscrupulous debt collectors" is simply "not implicated when a debtor is instead protected by the [bank-

ruptcy] court system and its officers." 622 F.3d at 96 (internal quotation marks omitted).

Moreover, filing a proof of claim in bankruptcy is not a debt-collection activity under the FDCPA at all. The FDCPA applies only to attempts to collect an obligation of a natural person. 15 U.S.C. § 1692a(3), (5). A proof of claim, by contrast, asserts a right to payment "against the debtor's estate" rather than the debtor. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449 (2007). The law is clear that the bankruptcy estate is a distinct legal entity from the debtor. *E.g.*, *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate."); *Katz v. Comm'r*, 335 F.3d 1121, 1127 (10th Cir. 2003). The Eleventh Circuit's holding that filing a proof of claim is a debt-collection activity aimed at the debtor improperly ignores the fundamental distinction in bankruptcy between the debtor and the bankruptcy estate. *See* Tabb, *supra* § 5.1, at 389 ("The bankruptcy 'estate' is a separate and distinct legal entity.").

* * *

The Eleventh Circuit's extension of the FDCPA into the bankruptcy context is inconsistent with the text and purposes of the FDCPA, disregards fundamental principles of bankruptcy law, violates the interpretive framework adopted by this Court in *Kokoszka*, and conflicts with decisions of the Second, Seventh, and Ninth Circuits. Review is warranted to resolve these conflicts and to ensure that the express congressional purposes undergirding the FDCPA are honored without disruption of the bankruptcy claims adjudication process.

II. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED OVER THE PROPER STANDARD FOR EVALUATING COMMUNICATIONS TO ATTORNEYS UNDER THE FDCPA

The decision below also merits review because the Eleventh Circuit's holding that a least-sophisticated-consumer standard governs FDCPA claims arising from the filing of a proof of claim in bankruptcy exacerbates still further an existing circuit conflict over the standard for determining whether the FDCPA has been violated by communications with attorneys. At least eight circuits have considered whether and under what circumstances the FDCPA is violated by communications with counsel for a debtor, and by virtue of the decision below the various courts of appeals have now adopted no fewer than four different and inconsistent rules of law in an attempt to answer this question.

The first approach, employed by the Second and Ninth Circuits, excludes FDCPA liability for communications with counsel. Thus, the Ninth Circuit has held that communications "directed only to a debtor's attorney, and unaccompanied by any threat to contact the debtor, are not actionable under the Act." *Guerrero v. RJM Acquisitions LLC*, 499 F.2d 926, 936 (9th Cir. 2007) (per curiam). The *Guerrero* court explained that the purpose of the FDCPA "is to protect unsophisticated debtors from abusive debt collectors, and once a consumer obtains this protection by procuring legal counsel, the Act's protections become superfluous and therefore its provisions no longer apply." *Id.* at 929. In support of this point, the court relied on several provisions of the FDCPA that distinguish between consumers and attorneys;

the court reasoned that these provisions establish that "Congress treated attorneys as intermediaries between debtors and debt collectors, and that a debtor's attorney does not require the same protections as a debtor himself." *Id.* at 935, 938.

Likewise, the Second Circuit has stated in dictum that "alleged misrepresentations to *attorneys* for putative debtors cannot constitute violations of the FDCPA." *Kropelnicki v. Siegel*, 290 F.3d 118, 127 (2d Cir. 2002). The purported misrepresentation in *Kropelnicki* involved advancing a state court action without contacting the debtor's attorney first, as previously promised. *Id.* In discussing the merits of the FDCPA claim, the Second Circuit stated that "we find serious flaws in [the debtor's] argument that a violation of the FDCPA occurs where a party alleges that his attorney has been misled to the party's detriment." *Id.* "Where an attorney is interposed as an intermediary between a debt collector and a consumer," the Second Circuit reasoned, "we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior." *Id.* at 128. Although the Second Circuit ultimately dismissed the debtor's appeal in that case for lack of jurisdiction, its reasoning has been relied upon by subsequent decisions applying Second Circuit law.[3]

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[3] *See*, *e.g.*, *Gabriele v. Am. Home Mortg. Servicing Inc.*, 503 F. App'x 89, 95-96 (2d Cir. 2012); *Tromba v. M.R.S. Assocs., Inc.*, 323 F. Supp. 2d 424, 428 (E.D.N.Y. 2004); *DiMatteo v. Sweeney, Gallo, Reich & Bolz, LLP*, No. 13 CIV. 8451 PAC, 2014 WL 4449797, at *4 (S.D.N.Y. Sept. 9, 2014); *Nicholson v. Forster & Garbus LLP*, No. 11-CV-524 SJF WDW, 2013 WL 2237554, at *3 n.5 (E.D.N.Y. May 17, 2013), *aff'd*, 570 F. App'x 40 (2d Cir.

The Seventh and Tenth Circuits have adopted a second, and inconsistent, approach to resolution of this same issue. Those courts hold that the FDCPA does apply to communications with counsel, but imposes a heightened standard for imposition of liability in those circumstances.

In *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007), the Seventh Circuit held that a heightened standard applies to FDCPA liability when a debt collector communicates with a debtor's counsel. *Id.* at 775. The *Evory* court began its analysis by holding that a communication to a consumer's lawyer was an indirect communication with a consumer under the FDCPA. *Id.* at 773. *Evory* recognized, however, that "the standard for determining whether particular conduct violates the statute is different when the conduct is aimed at a lawyer than when it is aimed at a consumer." *Id.* at 774. The Seventh Circuit explained that "the 'unsophisticated consumer' standpoint is inappropriate for judging communications with lawyers." *Id.* The court opted instead for a "competent lawyer" standard, and concluded that "a representation by a debt collector that would be unlikely to deceive a competent lawyer . . . should not be actionable" under the FDCPA. *Id.* at 775.

In *Dikeman v. National Educators, Inc.*, 81 F.3d 949 (10th Cir. 1996), the Tenth Circuit rejected an FDCPA claim based on a purported failure to provide a verbal clarification to a debtor's attorney, because the communication would have been clear to the at-

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2014); *Izmirligil v. Bank of New York Mellon*, No. CV 11-5591 LDW AKT, 2013 WL 1345370, at *4-5 (E.D.N.Y. Apr. 2, 2013).

torney from the context. *Id*. at 953. Like the Seventh Circuit in *Evory*, the court in *Dikeman* relied "heavily on the *professional status and representative role of the lawyer,* as contrasted with that of a consumer, the kind of person the statute is designed to protect." *Id.* at 954 n.14. Noting that the statement of purposes in 15 U.S.C. § 1692(e) focuses on the protection of "*consumers* against debt collection abuses," the Tenth Circuit reasoned that further disclosure to the debtor's attorney in this context "would be a pointless formality." *Id.* at 953-54.

The Eighth Circuit has adopted a third approach, attempting to stake out a middle ground. *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 818 (8th Cir. 2012). Explaining that "the circuit courts have struggled to define the extent to which a debt collection lawyer's representations to the consumer's attorney or in court filings . . . can violate" the FDCPA, *Hemmingsen* adopted a "case-by-case approach." *Id.* at 818-19. On the facts before it, which involved allegedly false statements in court filings that did not mislead either the court or the debtor's counsel, the court held that there was no FDCPA liability. *Id*. at 819-20. The court emphasized that imposition of FDCPA liability in such circumstances "would be contrary to the FDCPA's 'apparent objective of preserving creditors' judicial remedies.'" *Id*. at 819 (quoting *Heintz v. Jenkins*, 514 U.S. 291, 296 (1995)).[4]

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[4] Finally, the Third and Fourth Circuits have held (in conflict with the approach followed by the Second and Ninth Circuits) that the FDCPA applies to communications directed at a debtor's attorney, but have not specified which standard applies in judging whether such communications violate the FDCPA. In *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007),

The approach adopted by the Eleventh Circuit in the decision below conflicts with all three of the approaches discussed in the text above, by holding that communications with counsel (namely, the Chapter 13 trustee and the debtor's personal counsel) violate the FDCPA whenever the least-sophisticated consumer would be misled by such filings. According to the Eleventh Circuit, filing a proof of claim on a time-barred debt "creates the misleading impression to the debtor that the debt collector can legally enforce the debt." App. 11a. On this basis, the Eleventh Circuit held that filing a proof of claim was an indirect communication to the debtor, and further ruled that this method of debt collection was subject to the FDCPA. App. 11a-13a. But filing a proof of claim is not a communication with the debtor; rather, it is a communication with the bankruptcy court and with the Chapter 13 trustee, who serves as the representative of the bankruptcy estate and had a "statutory duty to object to improper claims." App. 8a n.5; 11 U.S.C. § 323(a). Moreover, the debtor in this case was represented by counsel, so any court filings were not communications with the debtor himself. The Eleventh Circuit's holding that such communications can give rise to FDCPA liability is thus flatly inconsistent with the rule of law applied by the Second

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the Fourth Circuit held that "the FDCPA covers communications to a debtor's attorney," which it considered "an indirect communication to the debtor." *Id*. at 232-33. Noting that "the courts of appeals are divided on this issue," the Third Circuit in *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011), also held that FDCPA liability can attach to a communication to a debtor's attorney, which it viewed as "an indirect communication to the consumer." *Id*. at 366, 368.

and Ninth Circuits, which hold that the FDCPA's provisions "no longer apply" to communications and debt-collection efforts directed at a debtor's attorney. *Guerrero*, 499 F.2d at 929; *see Kropelnicki*, 290 F.3d at 127-28.

The least-sophisticated consumer standard adopted by the court below is also irreconcilable with the approach followed by the Seventh and Tenth Circuits, which hold that a heightened standard applies to FDCPA claims based on communications with counsel. Indeed, the Seventh Circuit explicitly rejected application of a least-sophisticated consumer standard for determining FDCPA liability with respect to communications with a debtor's counsel. *Evory*, 505 F.3d at 775; *accord Dikeman*, 81 F.3d at 954 ("[I]t is not likely that Congress imagined that . . . implications obvious to an attorney would ordinarily be required in communications made to a debtor's attorney.").

Finally, the Eleventh Circuit's categorical holding that filing a proof of claim on a time-barred debt violates the FDCPA is also irreconcilable with the Eighth Circuit's case-by-case approach. *Hemmingsen*, 674 F.3d at 818-19. Under the reasoning employed in *Hemmingsen*, FDCPA liability could not be imposed in this case, because there is no indication that the bankruptcy court, the Chapter 13 trustee, or respondent's bankruptcy counsel would have been misled by the mere filing of LVNV's proof of claim. *Id*. at 819-20.

The courts of appeals are thus hopelessly divided over the standard for FDCPA liability applicable to communications with counsel. Eight circuits have considered this question, resulting in at least four distinct and incompatible rules of law. Members of

this Court have previously acknowledged that the courts of appeals are divided over this question. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 621 (2010) (Kennedy, J., dissenting) (citing amicus brief identifying this circuit conflict as evidence of a "split" of authority). The conflict has only broadened and deepened in the intervening years. The case-law is developed. Confusion is rampant. This Court's review is warranted.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND REVIEW IS NECESSARY TO PREVENT DISRUPTION OF THE BANKRUPTCY SYSTEM

The Eleventh Circuit's ruling threatens to impose FDCPA liability on a vast number of hitherto common actions in bankruptcy proceedings, where creditors and their representatives routinely file proofs of claim to preserve their rights with respect to disputed debts without any expectation that such conduct may give rise to liability. The rule of law adopted below, if not overturned, will interfere with the efficient operation of the bankruptcy claims adjudication process by imposing liability on conduct authorized by the Bankruptcy Code, and will create other serious conflicts between the Bankruptcy Code and the FDCPA.

In the first place, treating a proof of claim as a debt-collection activity would turn every proof of claim into a violation of the Bankruptcy Code's automatic stay provision. The decision below held that filing a proof of claim "is, at the very least, an 'indirect' means of collecting a debt." App. 13a. But Section 362(a)(6) of the Bankruptcy Code bars any action to "collect, assess, or recover a claim *against the debtor* that arose before the commencement of the

[bankruptcy] case." 11 U.S.C. § 362(a)(6) (emphasis added). Thus, if filing a proof of claim is an attempt at "collecting a debt" from a consumer debtor, as the court below held, then it is necessarily a violation of the automatic stay as well, placing the Bankruptcy Code (which expressly allows the filing of proofs of claim, including for disputed debts) at war with itself.

The court below attempted to avoid this glaring difficulty by blithely characterizing the automatic stay as extending only to "debt-collection activity *outside* the bankruptcy proceeding," but it offered no textual justification for that interpretation. App. 13a (emphasis added). The fact that the court of appeals found it necessary to twist the meaning of the automatic stay in order to facilitate its expansive reading of the FDCPA is further confirmation of the invalidity of that result and of the need for this Court's review.

Nor can the logical implications of the Eleventh Circuit's holding be limited to the filing of proofs of claim. Extending the detailed notice and debt-validation procedures of the FDCPA into the bankruptcy process with its very different set of procedures will inevitably produce confusion and conflict. As one court has explained, "the debt validation provisions required by FDCPA clearly conflict with the claims processing procedures contemplated by the [Bankruptcy] Code and Rules," such that "the provisions of both statutes cannot compatibly operate." *In re Chaussee*, 399 B.R. 225, 238 (B.A.P. 9th Cir. 2008).

Section 1692e(11) of the FDCPA, for example, requires that in an "initial communication" with the debtor, a debt collector must include a disclosure that "the debt collector is attempting to collect a debt

and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Section 1692e(11) also requires that all subsequent communications with the debtor must disclose "that the communication is from a debt collector." But as the Third Circuit recognized in *Simon*, "[s]everal courts have held that sending a § 1692e(11) notice violates the automatic stay." 732 F.3d at 280. *Simon* held that this "conflict precludes allowing a[n FDCPA] claim under § 1692e(11)." *Id.*[5]

Furthermore, Section 1692g of the FDCPA requires debt collectors to send debtors a notice "[w]ithin five days" after an initial debt collection communication that includes information on the method for disputing the debt, and a notification that "unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692g(a). But "sending such a notice to a debtor in a pending

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[5] It may be argued that a proof of claim is not subject to the initial communication requirement because "formal pleading[s]" are exempt from that requirement. 15 U.S.C. § 1692e(11) (exempting "formal pleading made in connection with a legal action" from initial written communication requirement); *see also id.* § 1692g(d) (exempting a "communication in the form of a formal pleading in a civil action" from notice requirements in Section 1692g(a)). But it is unlikely that a proof of claim qualifies as a "formal pleading" for purposes of this exemption. *See* Fed. R. Civ. P. 7(a) (identifying the only "pleadings [that] are allowed" as complaints, answers, and replies to answers). In any event, debt collectors confronting the FDCPA's notice requirements under the Eleventh Circuit's holding will have no choice but to run the substantial risk of violating either the Bankruptcy Code's automatic stay or the FDCPA's notice requirements.

bankruptcy case has been held to violate the automatic stay." *In re Chaussee*, 399 B.R. at 238. Thus, the Eleventh Circuit's approach potentially places debt collectors in the impossible position of having to choose between violating the FDCPA or flouting the automatic stay.

While the provisions of 15 U.S.C. § 1692g do not apply if the FDCPA-required "information is contained in the initial [debt collection] communication," any attempt to include this required information in a proof of claim would likely violate the automatic stay, as explained above. Moreover, it "would undoubtedly cause confusion," *In re Chaussee*, 399 B.R. at 239, thereby creating the very uncertainties the FDCPA was designed to prevent, because of the inconsistent procedures for objecting to claims in bankruptcy, on the one hand, and for disputing debts under the FDCPA, on the other. For example, while the bankruptcy rules permit notice of an objection to a claim to be filed at any time up until 30 days prior to a hearing on that claim (Fed. R. Bankr. P. 3007(a)), the FDCPA requires debt collectors to inform debtors that they have 30 days to dispute a debt, and that such disputes will trigger an informal debt validation procedure, *see* 15 U.S.C. § 1692g.

Moreover, "a proof of claim filed in a bankruptcy case constitutes prima facie evidence of its validity and is deemed allowed unless and until the debtor objects to it," whereas the "FDCPA provides that, if the consumer fails to dispute the validity of a debt, that failure may not be construed by any court as an admission of liability by the consumer." *In re Chaussee*, 399 B.R. at 238. Debtors faced with these divergent standards would have to determine whether they need to comply with both the FDCPA and

bankruptcy requirements for disputing debts, or if it would be sufficient instead to follow only one or the other of these conflicting procedures.

The conflicts and confusion that are the inevitable result of the decision below provide sound reason to conclude that the FDCPA does not and was never intended to regulate the bankruptcy claims adjudication process. *See Jerman*, 559 U.S. at 599-600 (explaining that the FDCPA's conduct-regulating provisions "should not be assumed to compel absurd results when applied to debt collecting attorneys"). There is no justification for injecting this level of uncertainty and confusion into the bankruptcy claims adjudication process. Proofs of claim are a routine and essential part of the bankruptcy system. In enacting the Bankruptcy Code, Congress provided an intentionally broad definition of "claim" so that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977); S. Rep. No. 95-989, at 21-22 (1978) (same); *accord* Tabb, *supra* § 3.3, at 248. For this reason, the Bankruptcy Code defines "claim" as any "right to payment," including "unliquidated," "contingent," "unmatured," and "disputed" obligations. 11 U.S.C. § 101(5)(A).

Under the Bankruptcy Code, creditors have a right to file a proof of claim, which is presumed valid until an objection is filed. 11 U.S.C. §§ 501(a), 502. Consistent with Congress's intent to deal with all of the debtor's legal obligations in the bankruptcy case, the debtor or trustee is also permitted to file proofs of claim – as respondent did through counsel in this case. *See id.* § 501(c); Fed. R. Bankr. P. 3004. Once all claims are entered in the bankruptcy proceeding,

Section 502 and the Federal Rules of Bankruptcy Procedure provide a streamlined procedure for objecting to claims on a variety of grounds that can be efficiently determined by the bankruptcy judge. *See* 11 U.S.C. § 502; Fed. R. Bankr. P. 3007.

The Bankruptcy Code also expressly anticipates that some of these proofs of claim may be disallowed on the basis of affirmative defenses. For example, Section 558 states that the bankruptcy estate may raise any defense that the debtor could have raised, "including *statutes of limitation* . . . and other personal defenses." 11 U.S.C. § 558 (emphasis added). And Section 502 provides for objections to a claim on the grounds that "such claim is unenforceable against the debtor and property of the debtor, *under any agreement or applicable law*." *Id.* § 502(b)(1) (emphasis added). Thus, the decision below premised FDCPA liability on actions expressly contemplated by the Bankruptcy Code. *See*, *e.g.*, *In re Keeler*, 440 B.R. 354, 363 (Bankr. E.D. Pa. 2009) ("Based upon the broad definition of a claim . . . and based upon . . . the statutory entitlement to file a proof of claim, numerous courts have upheld the right of an entity to file a proof of claim, even if that claim is clearly barred by the applicable statute of limitations."); *B-Real, LLC v. Rogers*, 405 B.R. 428, 431 (M.D. La. 2009) ("[T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt . . . .").

The Eleventh Circuit's ruling threatens to disrupt the claims adjudication process established in the Bankruptcy Code and overlay it with time-consuming and expensive collateral litigation over purported FDCPA violations. As the lower courts have recognized, allowing the FDCPA to operate as

in effect "'an alternative method to challenge a proof of claim in bankruptcy would open up the floodgate for unnecessary and expensive litigation, replacing the simple procedure for dealing with an objection to the allowance of a claim.'" *In re Pariseau*, 395 B.R. 492, 496 (Bankr. M.D. Fla. 2008) (quoting *In re Williams*, 392 B.R. 882, 888 (Bankr. M.D. Fla. 2008)).

These concerns are not mere speculation. At least six putative class action complaints have been filed since the Eleventh Circuit's decision in the Southern District of Alabama alone, alleging that the filing of proofs of claim in bankruptcy proceedings violated the FDCPA.[6]

The scope and standards for determining FDCPA liability are critical issues impacting the bankruptcy process, consumers, creditors, debt collectors, and financial institutions that sell debt, as well as the broader financial system. Consumer debt in the third quarter of 2014 exceeded $3.2 trillion. *See* Federal Reserve Statistical Release, G.19 Consumer Credit, Nov. 2014, *available at* http://www.federalreserve.gov/releases/g19/current/g19.pdf. Additionally, over 1 million personal bankruptcy cases were filed in 2013. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2013, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf. "An ex-

[6] *Johnson v. Midland Funding LLC*, No. 1:14:-cv-00322; *Russell v. Palisades Collection, L.L.C.*, No. 1:14-cv-00323-CG-M; *Brock v. Resurgent Capital Servs., LP*, No. 1:14-cv-00324-WS-M; *Davis v. AIS Recovery Solutions, LLC*, No. 1:14-cv-00325-WS-M; *Spain v. RJM Acquisitions LLC*, No. 1:14-cv-00326-CG-N; *Russell v. Jefferson Capital Sys., LLC*, No. 1:14-cv-00331-CG-B.

pected flood of FDCPA disputes with millions of proofs of claims filed annually threatens to swallow the dockets of bankruptcy and district courts." Alane A. Becket et al., *Filer Beware! It's Not Just the Rules Committee Changing the Rules*, Norton Bankr. L. Adviser, Sept. 2014, at 1, 8.

The "cottage industry" of FDCPA litigation in the bankruptcy context does not seek to remedy the "widespread and serious national problem" that the FDCPA was designed to curtail. *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (internal quotation marks omitted); *see also Jerman*, 559 U.S. at 617 (Kennedy, J., dissenting) (applying *Lamar* to interpretation of bona fide error defense). The FDCPA's intent to protect "unsophisticated consumers from unscrupulous debt collectors" is "not implicated when a debtor is instead protected by the [bankruptcy] court system and its officers." *Simmons*, 622 F.3d at 96 (internal quotation marks omitted). Indeed, injecting FDCPA liability into the bankruptcy context creates a perverse incentive for debtors "to ignore the procedural safeguards within the Bankruptcy Code, such as the right to object to proofs of claim and to seek sanctions against creditors who violate provisions within the Bankruptcy Code, in favor of the FDCPA." *Middlebrooks v. Interstate Credit Control, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008) (internal quotation marks omitted).

The question presented by the petition is recurring, and the courts of appeals will continue to apply divergent standards to identical conduct unless this Court intervenes. It is essential for this Court to speak with clarity to these important questions that now divide the courts of appeals, so that the bankruptcy claims adjudication process can once again

proceed unhampered by the Eleventh Circuit's overbroad extension of the FDCPA into a setting in which it was never intended to operate and serves no legitimate purpose in light of the substantial protections and procedures already in place in the bankruptcy system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 2015

APPENDIX

APPENDIX A

[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,

versus

Plaintiff-Appellant,

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.

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* 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.

I. FACTS[1]

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 busi-

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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."

ness practice and that attempting to claim Crawford's time-barred debt violated the FDCPA.

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 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

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

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]

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

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[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.

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.

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.

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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.

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]

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

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 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

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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).

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

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**.

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[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.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STANLEY L. CRAWFORD, Appellant, v. LVNV FUNDING, LLC, *et al.*, Appellees.	)	CASE NO. 2:12-CV-701-WKW [WO]
TAMARA L. SIMS, Appellant, v. AFNI, INC., *et al.*, Appellees.	)	CASE NO. 2:12-CV-729-WKW

MEMORANDUM OPINION AND ORDER

Appellant Tamara L. Sims is the debtor in a Chapter 13 bankruptcy case pending in this district. So is Appellant Stanley Crawford. In both cases, Appellants initiated adversary proceedings accusing creditors of violating the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. The bankruptcy judge dismissed both those adversary proceedings. This matter comes before the court on the consolidated appeals from those orders.

I. JURISDICTION

This is a core proceeding over which appellate jurisdiction is exercised. *See* 28 U.S.C. § 158(a). Ven-

ue is proper because an appeal "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." *Id.*

II. STANDARD OF REVIEW

"Factual findings by the bankruptcy court are reviewed under the limited and deferential clearly erroneous standard." *In re Club Assocs.*, 951 F.2d 1223, 1228 (11th Cir. 1992). In contrast to the deference given to factual findings, the district court examines the bankruptcy court's legal conclusions *de novo*. *In re Celotex Corp.*, 613 F.3d 1318, 1322 (11th Cir. 2010); *see also* Fed. R. Bankr. P. 8013.

III. FACTUAL AND PROCEDURAL BACKGROUND

Appellants are the debtors in two Chapter 13 bankruptcy cases pending in this district. In both cases, Appellants initiated adversary proceedings against creditors who purportedly violated the FDCPA by filing claims on time-barred debts. In both cases, Judge Williams (the bankruptcy judge handling Appellants' cases) dismissed the adversary proceedings because "the filing of a claim in the bankruptcy court, even one barred by the statute of limitations, does not constitute a violation of the Fair Debt Collection Practices Act." (No. 12-cv-701, Doc. # 2-7, at 1; No. 12-cv-729, Doc. # 2-17, at 1.)

IV. DISCUSSION

Although Appellants identify eight "issues" they think the court must resolve, resolution of these appeals turns on the answer to a single question: Does the FDCPA prohibit creditors from filing bankruptcy

notices of claims on time-barred debts? Appellants urge an affirmative answer.

But Appellants are fighting an uphill battle, and they candidly admit they cannot win their appeals without a change in the law. Indeed, the elephantine body of persuasive authority weighs against Appellants' position. *See, e.g., Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) ("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."). While there is no binding authority on point, such consistency is strongly persuasive.

And setting the weight of authority aside, Appellants have not alleged any conduct that amounts to an FDCPA violation. Appellants were never threatened; they were never tricked; they were never lied to or deceived – they were never even spoken to. Appellees never asked Appellants for a dime; instead, they merely filed claims in the bankruptcy court. As a matter of law, that conduct does not amount to an effort to collect a debt. And even if it did, it is not the sort of abusive practice the FDCPA was enacted to prohibit.

A. Appellees did not attempt to collect a debt from Appellants.

Filing a proof of claim is not the same thing as attempting to collect a debt; it is merely "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, who enjoys the protections of the automatic stay." *In re McMillen*, 440 B.R. 907, 912 (Bkrtcy. N.D. Ga. 2010). Indeed, another court has noted the inconsistency that would arise if that were not so:

> If filing a proof of claim constituted a "collection" activity, then filing proofs of claim . . . would be fundamentally at odds with language in § 362(a)(6) providing that the filing of a petition "operates as a stay, applicable to all entities, of . . . any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case]."

In re Jenkins, 456 B.R. 236, 240 (Bkrtcy. E.D.N.C. 2011). In other words, the FDCPA does not apply to the bankruptcy claims process because creditors who file proofs of claim are not engaging in the sort of debt-collection activity that the FDCPA regulates.

B. Appellants did not engage in abusive practices.

Even if Appellees *were* trying to collect a debt when they filed proofs of claims in Appellants' bankruptcies, they still did not engage in any behavior that would violate the FDCPA. That Act was never intended to prohibit *all* efforts to collect debts; instead, it outlaws only those practices that are "abusive, deceptive, and, unfair," 15 U.S.C. § 1692(a) – things like false representations, *id.* at § 1692e, and threats of violence, *id.* at § 1692d(1). Given the close supervision attendant to bankruptcy cases, "the statutory purpose of the FDCPA, as well as common sense," suggests "there is nothing unfair or uncon-

scionable about filing a proof of claim in a bankruptcy case even if it could be construed as a debt collection activity." *In re Chaussee*, 399 B.R. 225, 245 (B.A.P. 9th Cir. 2008) (Jury, J., concurring).

And the only case Appellants cite in their favor does not hold otherwise. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987). In *Kimber*, the court held that a debt collector violated the FDCPA when it threatened to sue on a time-barred debt, *id.*, and then followed through on that threat, *id.* at 1488. In reaching that conclusion, Judge Thompson reasoned that consumers, who are usually ignorant of statute-of-limitations defenses, might "unwittingly acquiesce to such lawsuits," or simply pay the debt rather than "expend energy and resources and subject [themselves] to the embarrassment of going into court." *Id.* at 1487.

But those concerns are not present here. First, this case merely involves a claim filed in a bankruptcy, not a collection-letter threat followed by an actual lawsuit. Second, an unsophisticated consumer faced with a lawsuit (or the threat of one) may well unwittingly pay an invalid debt. There is little risk, however, that even the most unsophisticated consumer will unwittingly pay a bankruptcy claim without court approval. The FDCPA was meant to protect the least sophisticated consumers in our society – "that vast multitude which includes the ignorant, the unthinking, and the credulous." *Jeter v. Credit Bureau, Inc.,* 760 F.2d 1168, 1172-73 (11th Cir. 1985) (quotations omitted). But in the structured environment of the bankruptcy court, even the least sophisticated among us are protected from abusive practices. So even if Appellants were attempting to

collect a debt when they asked to participate in Appellees' bankruptcy cases, they did not engage in the sort of abusive tactics the FDCPA prohibits.[1]

V. CONCLUSION

For the reasons discussed above, the court agrees with Judge Williams and holds that the filing of a claim in the bankruptcy court, even one barred by the statute of limitations, does not constitute a violation of the Fair Debt Collection Practices Act.

The orders of the bankruptcy court are AFFIRMED.

DONE this 9th day of May, 2013.

s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

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[1] This opinion intentionally omits mention of a topic that received quite a bit of attention in the briefs: preemption. Appellants vigorously contend that the Bankruptcy Code does not preempt the FDCPA. But that is a question the court need not answer; this opinion assumes, without deciding, that the Bankruptcy Code does not preempt (or more accurately, implicitly repeal) the FDCPA. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) ("One federal statute does not preempt another. When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed." (quotations omitted)). Appellants' FDCPA claims do not fail because of a conflict between two federal statutes; they fail because, as discussed above, Appellants never alleged any conduct violative of the FDCPA in the first place.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re STANLEY L. CRAWFORD, Debtor. STANLEY L. CRAWFORD, Plaintiff, v. LVNV FUNDING, LLC, RESURGENT CAPITAL SERVICES, L.P., and PRA RECEIVABLES MANAGEMENT, LLC, Defendants.	Case No. 08-30192-DHW Chapter 13 Adv. Pro. No. 12-3033-DHW

ORDER DISMISSING ADVERSARY PROCEEDING

Defendants LVNV Funding, LLC and Resurgent Capital Services, L.P. filed motions to dismiss this adversary proceeding. The motions came on for hearing on July 9, 2012.

The complaint alleges that the defendants filed time-barred claims in the bankruptcy court whose substance violate the Fair Debt Collection Practices Act and the automatic stay. At the hearing, the

plaintiff withdrew the count alleging a stay violation. The complaint also objects to the defendants' claims.

The defendants contend that the filing of a claim in the bankruptcy court, even one barred by the statute of limitations, does not constitute a violation of the Fair Debt Collection Practices Act. *See In re Simpson*, 2008 WL 4216317 (N.D. Ala. Aug. 29, 2008). The court agrees. Accordingly, it is

ORDERED that the motions are GRANTED, and this adversary proceeding is DISMISSED. However, this order does not bar the plaintiff from objecting, in the underlying bankruptcy case, to the claim of any defendant and seeking any appropriate remedy if the defendant lacked the requisite authority to file the claim, either as agent of the creditor or assignee of the claim.

Done this 12 day of July, 2012.

s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Nicholas H. Wooten, Attorney for Plaintiff
Neal D. Moore, Attorney for LVNV Funding and Resurgent Capital Servs.
PRA Receivables Management, LLC

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-12389-EE

In re: STANLEY L. CRAWFORD,	Debtor.
2:12-CV-00701-WKW	
STANLEY L. CRAWFORD, versus	Plaintiff-Appellant,
LVNV FUNDING, LLC, RESURGENT CAPITAL SERVICES, L.P., PRA RECEIVABLES MANAGEMENT, LLC,	Defendants-Appellees.
2:12-CV-729-WKW	
TAMARA L. SIMS, versus	Plaintiff,
AFNI, INC., ASSET ACCEPTANCE, LLC, JEFFERSON CAPITAL SYSTEMS, LLC, RESURGENT CAPITAL SERVICES, L.P.,	Defendants.

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

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BEFORE HULL, Circuit Judge, and WALTER,* District Judge, and GOLDBERG,** Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

[Sept. 18, 2014]

* 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.

APPENDIX E

11 U.S.C. § 101:

* * *

(5) The term "claim" means—

(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. § 323:

(a) The trustee in a case under this title is the representative of the estate.

* * *

11 U.S.C. § 362:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title

* * *

11 U.S.C. § 501:
(a) A creditor or an indenture trustee may file a proof of claim . . . .

* * *

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

* * *

11 U.S.C. § 502:
(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

(b) . . . [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . .

* * *

11 U.S.C. § 541:
(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) . . . [A]ll legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

11 U.S.C. § 558:
The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. § 704:
(a) The trustee shall—

* * *

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper

* * *

11 U.S.C. § 1302:

* * *

(b) The trustee shall—

(1) perform the duties specified in section[] . . . 704(a)(5) . . . of this title

* * *

15 U.S.C. § 1692:
(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to

marital instability, to the loss of jobs, and to invasions of individual privacy.

* * *

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure 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.

15 U.S.C. § 1692a:
As used in this subchapter—

* * *

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

* * *

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which 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. § 1692e:
A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

* * *

15 U.S.C. § 1692f:
A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

* * *

15 U.S.C. § 1692g:
(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

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(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.

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