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Time Bandits: The Seventh Circuit Gets It Wrong by Allowing Debt Purchasers to Escape FDCPA Liability for Filing Time-Barred Proofs of Claim in Chapter 13 Bankruptcies

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TIME BANDITS: THE SEVENTH CIRCUIT GETS IT WRONG BY ALLOWING DEBT PURCHASERS TO ESCAPE FDCPA LIABILITY FOR FILING TIME-BARRED PROOFS OF CLAIM IN CHAPTER 13 BANKRUPTCIES

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> "You see, to be quite frank, Kevin, the fabric of the universe is far from perfect. It was a bit of botched job, you see. We only had seven days to make it. And that's where this comes in. This is the only map of all the holes. Well, why repair them? Why not use them to get stinking rich?"[1]

INTRODUCTION

Professional debt purchasers in the United States have developed a scheme to profit from unenforceable debt by abusing predictable breakdowns in the chapter 13 bankruptcy process. A debt purchaser can buy debt in bulk and at a sizeable discount when the state statute of limitations on the debt has run. Although the debt is legally unenforceable against the debtor,[2] debt purchasers flood bankruptcy courts with proofs of claim for those debts.[3] The debt is unquestionably time-barred and, if anyone in the bankruptcy case objects, the claims are immediately disallowed and the debt discharged.[4] However, if the claim goes unnoticed and no one objects to it, the debt purchaser is paid out through the debtor's bankruptcy plan. These claims for stale debt impair a debtor's repayment capacity and divert funds that could have otherwise gone to creditors with legitimate, enforce-

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1. TIME BANDITS (HandMade Films 1981) [https://perma.cc/Q3M7-47WP].

2. *See generally* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013), http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf [https://perma.cc/A7FZ-WDG9].

3. David Light & Richard D.R. Hoffman, *11th Circuit Seeks to Stop Flood of Bogus Bankruptcy Claims*, THOMAS REUTERS: LEGAL SOLUTIONS BLOG (July 31, 2014), http://blog.legalsolutions.thomsonreuters.com/top-legal-news/11th-circuit-seeks-stop-flood-bogus-bankruptcy-claims [https://perma.cc/4YGT-VCQT].

4. 11 U.S.C. § 502(b)(1) (2016).

able claims. The scheme's chances of success improve when the debt purchaser floods the courts with these claims: the more claims for debtors, attorneys, trustees, and courts to process means more claims for time-barred debt can slip through the cracks. And business is booming.[5]

To protect debtors from abusive collection practices, Congress passed the Fair Debt Collection Practices Act (FDCPA) in 1977.[6] Under this strict liability statute, a debtor can bring a cause of action against a debt collector who makes "any false, deceptive, or misleading" attempt to collect a debt.[7] Whether the debt purchasers' scheme described above violates the FDCPA has created a circuit split.[8] In the most recent circuit decision on the issue, the Court of Appeals for the Seventh Circuit held in *Owens v. LVNV Funding, LLC* that the FDCPA did not prohibit debt purchasers from filing proofs of claim for time-barred debts.[9] Debt purchasers can therefore continue to exploit predictable failures of the Bankruptcy Code's protections to collect on otherwise unenforceable debt without fear of FDCPA liability.

Part I of this Note describes the relevant processes and law related to chapter 13 bankruptcies, the industry of debt purchasing, and the FDCPA. Part II discusses the Seventh Circuit's decision in *Owens* in light of that legal framework. Finally, Part III considers not only the text of the statutes but also the greater policy implications and argues that *Owens* was wrongly decided because filing a proof of claim for time-barred debt should violate the FDCPA.

I. BANKRUPTCY AND DEBT PURCHASING

Perhaps one of the most important functions of the Bankruptcy Code is the implementation of the automatic stay. The stay "is one of the fundamental debtor protections provided by the bankruptcy laws. . . . It stops all collection efforts, all harassment, and all foreclosure actions."[10] After a debtor initially files for bankruptcy, a stay goes into effect and prohibits creditors from going after property of the debtor or the estate without the

5. *See* discussion *infra* Section I.B.

6. Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 718 (2006).

7. 15 U.S.C. § 1692e(2) (2015).

8. *Compare* Owens v. LVNV Funding, LLC, 832 F.3d 726, 734 (7th Cir. 2016), *with* Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014).

9. *See* 832 F.3d at 737.

10. H.R. REP. NO. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97; S. REP. NO. 95-989, at 54 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840.

bankruptcy court's permission.[11] To seek repayment through the bankruptcy system, creditors may file proofs of claim to establish the existence of debts that the debtor owes to them.[12] A claim is a "right to payment"[13] or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[14] Instead of proceeding with individual collection efforts, creditors generally must file a proof of claim to collect on pre-petition debts through the bankruptcy proceeding.[15] Because the Bankruptcy Code explicitly permits the mere filing of a proof of claim, this filing does not violate the automatic stay even though such action could be interpreted as an effort to collect on a debt. Once the creditor files a proof of claim, the underlying claim or claims are deemed allowed unless a party objects.[16] If a party objects to a claim, the bankruptcy court must determine the amount and enforceability of that claim.[17]

Individual consumers can file for bankruptcy under chapters 7, 13, or 11 of the Bankruptcy Code, subject to the Bankruptcy Abuse and Prevention Act of 2005 (BAPCPA) amendments that tend to favor chapter 13. The chapters offer starkly different procedures: chapter 7 involves an immediate liquidation of the debtor's assets, whereas chapters 11 and 13 promote reorganization by requiring the debtor to draft a plan to repay creditors over a prolonged period of time.[18] Instead of liquidating assets, chapter 13 allows debtors to retain their property because they can repay their debts from their regular income.[19] This ability to retain property is one of the chief reasons a debtor may prefer to file for relief under chapter 13 rather than chapter 7.

A. The Chapter 13 Bankruptcy Process

An individual debtor with regular income and consumer debt not exceeding certain statutory limits is eligible to file for relief under chapter

11. 11 U.S.C. § 362 (2016). The "automatic stay" is precisely that. It is a broad stay of proceedings against the debtor that goes into effect automatically upon filing for bankruptcy relief. *See id.*

12. *Id.* § 501(a).

13. *Id.* § 101(5)(A).

14. *Id.* § 101(5)(B).

15. *Id.* § 501. "Pre-petition debts" refers to claims against the debtor which are blocked by the automatic stay because they arose at the time of or before the automatic stay went into effect. *See id.* § 362(a).

16. *Id.* § 502(a).

17. *Id.* § 502(b).

18. *Differences between Chapters 7, 11, 12, & 13*, GAMBRELL & ASSOCS., http://www.ms-bankruptcy.com/bankruptcy-info/differences [http://perma.cc/A4ZN-MFAV].

19. 11 U.S.C. § 1325.

13.[20] In many cases, though, a debtor might file for chapter 13 simply because he or she is ineligible for chapter 7. When Congress amended the Bankruptcy Code with BAPCPA, it added a "means test" to determine the appropriate chapter under which a debtor could file.[21] Congress implemented this means test to combat the perceived threat of debtors seeking liquidation relief in bad faith without first considering a creditor repayment plan.[22] Under BAPCPA, a debtor who appears to have sufficient debt-repaying potential cannot seek a chapter 7 liquidation in good faith.[23] As a result, BAPCPA requires debtors to file for chapter 13 when the statute deems that creditors could receive more from a debtor reorganization.[24]

To receive relief under chapter 13, the debtor must develop a bankruptcy plan to repay his or her debts.[25] Creditors prove the existence of these debts by filing claims with the bankruptcy court.[26] The standard claim form includes enough information for the debtor to determine what debt the claim arises from, the amount of that debt, and whether that debt is enforceable.[27] The debtor's plan then must address each allowed, enforceable claim in the order that the Bankruptcy Code requires.[28] If the bankruptcy court approves the plan, the plan binds "the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."[29] Thus, the Bankruptcy Code creates an incentive for all creditors with claims to participate in the process.

The Bankruptcy Code allows debtors, trustees, and creditors to object to proofs of claim for debt that is unenforceable under nonbankruptcy law, such as debt that has expired under a state statute of limitations.[30] The objection provisions thus implicitly recognize that a creditor might file a proof of claim for an unenforceable debt. The bankruptcy process does

20. *Id.* § 109(e).

21. Kathleen Murphy & Justin H. Dion, Esq., *"Means Test" or "Just a Mean Test": An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(b)*, 16 AM. BANKR. INST. L. REV. 413, 413 (2008).

22. *Id.*

23. 11 U.S.C. § 707(b) (requiring courts to presume a debtor's bad faith where certain conditions are met).

24. *Id.*

25. *Id.* § 1321.

26. *Id.* § 501.

27. *See* Admin. Office of the U.S. Courts, Bankruptcy Official Form 410, http://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0 [https://perma.cc/6H6U-SKUJ].

28. *See* 11 U.S.C. § 1325.

29. *Id.* § 1327(a).

30. *See id.* § 502(b)(1) (stating that a debtor can object to a claim if "such claim is unenforceable against the debtor . . . under . . . applicable law").

not, however, confer on creditors new substantive rights that would otherwise be unenforceable outside of bankruptcy.[31] Put differently, the debtor's filing cannot transform an unenforceable debt into an enforceable one.[32] For example, if a debt is unenforceable under a state statute of limitations, a statute of limitations defense remains in effect even when the debtor is in bankruptcy. Debtors rely on the objection provisions of the Bankruptcy Code to protect themselves from paying improper claims. Ultimately, a debtor should pay only those claims that are allowed, enforceable, and accounted for in the bankruptcy plan.

B. The Economy of Debt Purchasing

The holders of claims in a bankruptcy need not be the original creditors who contracted with the debtor. Pursuant to this principle, the market for consumer debt purchasing is massive and affects millions of people. In a 2013 study, the Federal Trade Commission (FTC) observed nine leading debt purchasers in the United States over a three-year period.[33] During that period, these debt purchasers bought more than 5000 portfolios, representing over 90 million consumer accounts and over $143 billion in consumer debt.[34] The debt purchasers had acquired this debt for just under $6.5 billion, which exceeded more than three quarters of the debt sold in the United States during that time period.[35] The FTC also noted an increase in consumer complaints as the debt purchasing industry increased. In 2009 alone, consumers filed over 27,000 complaints alleging that a debt purchaser had falsely represented the character, amount, or status of a debt.[36]

Debt purchasers can buy debt at a significant discount if the debtor appears unlikely to pay or the underlying debt is unenforceable. Generally, when the statute of limitations runs on a debt, the debt does not cease to exist under state law and can still be sold to third parties.[37] The statute of limitations removes enforceability options, but does not extinguish the debt

31. *See generally* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946).

32. *Id.*

33. FED. TRADE COMM'N, *supra* note 2.

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 1 n.5.

37. *See, e.g.*, Owens v. LVNV Funding, LLC, 832 F.3d 726, 734 (7th Cir. 2016). Interestingly, this is not the law throughout the Seventh Circuit. In Wisconsin, unlike in most states, some kinds of debts are extinguished when the statute of limitations runs. Bridgit Bowden, *Controversial Debt Buyers Get a Break Under New Wisconsin Law*, WISCONSINWATCH.ORG (Apr. 3, 2016), http://wisconsinwatch.org/2016/04/controversial-debt-buyers-get-a-break-under-new-wisconsin-law [https://perma.cc/8MRL-4JRV].

itself.[38] Although the debtholder cannot pursue a cause of action to recover, the debt still exists. Thus, even time-barred debt can be sold albeit at a fraction of its face value. On average, debt is sold for "4.0 cents per dollar of debt face value."[39] The older the debt, and thus the higher the risk of nonpayment, the cheaper the debt purchaser can buy it.[40] By providing a backup option for creditors to receive payment, debt purchasing increases the value of debt and encourages creditors to continue extending credit.[41] Both creditors and debt purchasers realize value from these transactions. The creditor receives some payment, which is better than complete nonpayment, and the debt purchaser receives debt for much lower than its face value. The challenge for debt purchasers becomes finding a way to get repaid for these high-risk debts, often within the confines of the bankruptcy system.

With chances of repayment in mind, debt purchasers tend to focus on chapter 13 debtors. Debtors in chapter 7 bankruptcies are unlikely to be of any interest to these buyers because anyone getting into chapter 7 often has zero non-exempt assets and will come out with a full discharge.[42] That is, purchasers of chapter 7 debt would often receive nothing through the bankruptcy process.[43] Debt purchasing works only in a chapter 13 case because the debtor is required to pay more toward debt claims over a longer period of time than they would in a chapter 7 case. As a result, debt purchasers must be able to navigate the chapter 13 process effectively to collect their debts.

C. The Fair Debt Collection Practices Act

As the market for debt purchasing has grown, so has the need to police unfair or abusive debt collection practices. In their efforts to collect on debts, debt purchasers must abide by the Fair Debt Collection Practices Act (the "FDCPA").[44] Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collec-

38. *See, e.g.*, 735 ILL. COMP. STAT. 5/13-206 (2007) (indicating that no cause of action to recover on a debt can be brought in Illinois after a specified time period, but not that the underlying debt has been extinguished).

39. FED. TRADE COMM'N, *supra* note 2, at ii.

40. *Id.*

41. *Id.* at i ("Debt buying can reduce the losses that creditors incur in providing credit, thereby allowing creditors to provide more credit at lower prices.").

42. Chapter 7 is unlikely to involve debtors with significant repayment potential or assets to retain, due to the "means test" and liquidation function of chapter 7 proceedings.

43. The only caveat is that the creditors might resist discharge on grounds in sections 523 or 727—but that is a huge cost that debt purchases likely will not want. *See* 11 U.S.C. §§ 523, 727 (2016).

44. 15 U.S.C. §§ 1692–1692p (2015).

tors 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."[45] Debt collectors can violate the FDCPA by using "any false, deceptive, or misleading representations or means" to collect a debt. The FDCPA sets forth non-exhaustive examples of conduct that violates this prohibition, including misrepresenting the legal status of any debt[46] and using false representations or deceptive means to attempt to collect a debt.[47] Further, the FDCPA forbids a debt collector from using unfair or unconscionable means to attempt to collect any debt.[48]

The FDCPA provides debtors with a cause of action against debt collectors who violate its provisions. To state a plausible FDCPA claim, a plaintiff must sufficiently allege that the defendant is a debt collector who sought to collect a consumer debt in a manner prohibited by the statute.[49] If the plaintiff wins on his or her FDCPA claim, the court can award actual damages, plus additional damages up to $1000.[50] The FDCPA imposes strict liability so plaintiffs can pursue an FDCPA claim even if they suffer no actual injury as a result of the alleged statutory violation.[51]

The standard by which courts determine whether a debt collector's actions violated the FDCPA in a given case is largely fact-dependent. Generally, circuit courts have applied a "least sophisticated consumer" or an "unsophisticated consumer" standard.[52] The Seventh Circuit held in *Phillips v. Asset Acceptance, LLC* that the filing of a civil action against a consumer to recover a time-barred debt violates the FDCPA.[53] In finding so, the court established that the FDCPA prohibits actions of debt collectors that would have deceived the "unsophisticated consumer."[54] The "unsophisticated consumer" standard evaluates alleged violations of the FDCPA under the assumption that a communication or practice is deceptive if "a person of modest education and limited commercial savvy would be likely to be deceived" by it.[55]

45. *Id.* § 1692(e).
46. *Id.* § 1692e(2)(A).
47. *Id.* § 1692e(10).
48. *Id.* § 1692f.
49. Kang v. Eisenstein, 962 F. Supp. 112, 114 (N.D. Ill. 1997).
50. 15 U.S.C. § 1692k(a)(1)–(2).
51. *Id.* § 1692k(a)(2)(A); *see also* Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1083 (7th Cir. 2013) ("Proof of injury is not required when the only damages sought are statutory.").
52. *See* Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1258–61 (11th Cir. 2014).
53. 736 F.3d at 1079.
54. *Id.*
55. Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 774 (7th Cir. 2007) (citing Olson v. Risk Management Alternatives, Inc., 366 F.3d 509, 512–13 (7th Cir. 2004)).

Alternatively, some courts evaluate representations made to a debtor's attorney on a "competent lawyer" standard.[56] Under this standard, if a communication would deceive or mislead a competent attorney, then the communication is deceptive or misleading in violation of the FDCPA. In *Evory v. RJM Acquisitions Funding L.L.C.*, the Seventh Circuit determined that communications to a debtor's attorney were significantly different from communications to a debtor for purposes of establishing FDCPA claims.[57] Specifically, "communications to a consumer's lawyer are judged by a different standard: a communication 'that would be unlikely to deceive a competent lawyer . . . [is] not . . . actionable.'"[58] This standard therefore provides a higher bar of scrutiny against FDCPA claims. Determining whether to apply the "least sophisticated consumer" standard from *Phillips* or the "competent lawyer" standard from *Evory* to proofs of claim in bankruptcy has been crucial to FDCPA jurisprudence.

D. The Splintered Jurisprudence of the FDCPA and Debtors in Bankruptcy

Before courts can determine which FDCPA standard applies to proofs of claim, they must first decide whether the FDCPA provides remedies to debtors in bankruptcy at all. Debt collection practices are inevitably relevant in bankruptcy cases, but circuit courts are split over whether the FDCPA applies to debt collectors' actions within the bankruptcy process.[59] The Second,[60] Eighth,[61] and Ninth[62] Circuits have determined that remedies under the FDCPA are unavailable to debtors in bankruptcy whereas the Third,[63] Seventh,[64] and Eleventh[65] Circuits have not precluded applying FDCPA relief in such cases.

56. *Id.* at 775.

57. *Id.*

58. Owens v. LVNV Funding, LLC, No. 1:14-cv-02083-JMS-TAB, 2015 U.S. Dist. LEXIS 52680, at *10 (S.D. Ind. Apr. 21, 2015), *aff'd*, 832 F.3d 726 (7th Cir. 2016) (quoting *Evory*, 505 F.3d at 775).

59. *Compare* Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002), *and* Simmons v. Roundup Funding, LLC, 622 F.3d 93 (2d Cir. 2010), *with* Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004), *and* Simon v. FIA Card Servs., N.A., 732 F.3d 259 (3d Cir. 2013), *and* Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014).

60. *Simmons*, 622 F.3d at 96.

61. Nelson v. Midland Credit Mgmt., Inc., 828 F.3d 749, 752 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).

62. *Walls*, 276 F.3d at 510.

63. *Simon*, 732 F.3d at 274.

64. *Randolph*, 368 F.3d at 732.

65. Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1262 (11th Cir. 2014).

In *Walls v. Wells Fargo Bank, N.A.*, the United States Court of Appeals for the Ninth Circuit determined that the availability of remedies in the Bankruptcy Code precluded debtors in bankruptcy from seeking remedies through the FDCPA.[66] The debtor in *Walls* pursued an FDCPA action, alleging that her creditor had collected on debt that had been discharged through bankruptcy.[67] The court pointed out that the Bankruptcy Code already offered remedies for violations of bankruptcy's discharge provisions.[68] Using its equitable powers, a bankruptcy court could find a creditor in contempt and order sanctions or damages accordingly.[69] Although the FDCPA is meant to help debtors avoid bankruptcy, "if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."[70] Thus, allowing a separate private cause of action under the FDCPA would be unnecessary and improper.[71]

The Second Circuit adopted a similar approach in *Simmons v. Roundup Funding, LLC*.[72] In *Simmons*, the debt collector misrepresented through its proof of claim the amount that the debtor owed.[73] In the Second Circuit's view, filing an inflated proof of claim did not form the basis of an FDCPA claim because the Bankruptcy Code already provided a remedial scheme for fraudulent or defective proofs of claim.[74] If a creditor filed such a proof of claim, then the bankruptcy court could find that creditor in contempt of court or revoke a fraudulently obtained order.[75] Thus, the court concluded that as a matter of law "the filing a proof of claim in bankruptcy court cannot form the basis for an FDCPA claim."[76] The Eighth Circuit also adopted this logic.[77]

The Seventh Circuit, on the other hand, adopted a dual compliance view of the Bankruptcy Code and the FDCPA. That is, "as long as people can comply with both, then courts can enforce both."[78] In *Randolph v. IMBS, Inc.*, the Seventh Circuit acknowledged that these two statutes can

66. *Walls*, 276 F.3d at 511.
67. *Id.* at 505.
68. *Id.* at 510.
69. *Id*. at 506–07 (citing 11 U.S.C. § 105(a)).
70. *Id.* at 510 (citing Kokoszka v. Belford, 417 U.S. 642, 651 (1974)).
71. *Id.* at 510–11.
72. *See* 622 F.3d 93 (2d Cir. 2010).
73. *Id.* at 95.
74. *Id.* at 96.
75. *Id.* (citing 11 U.S.C. §§ 105(a), 1330).
76. *Id.*
77. *See* Nelson v. Midland Credit Mgmt., Inc., 828 F.3d 749, 752 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).
78. Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004).

coexist.[79] The court noted that "[i]t takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other."[80] The differences between the statutes does not add up to an irreconcilable conflict because debt collectors can easily comply with both.[81] Thus, the overlapping statutes do not repeal one another by implication and a debtor in bankruptcy is not precluded from seeking FDCPA relief.[82]

The Third Circuit followed the Seventh Circuit's view in *Simon v. FIA Card Services, N.A.*[83] In *Simon*, the joint debtors received letters and a subpoena from a debt collector shortly after they filed for bankruptcy protection.[84] The communications indicated that the debt collector was considering disputing a discharge of the debtors' credit card debt and was offering to settle.[85] The debtors then sued the creditor, alleging that the communications violated the FDCPA.[86] First, the court had to consider whether the Bankruptcy Code or rules precluded FDCPA remedies:

> When . . . FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims. When . . . the FDCPA claim arises from communications sent in a pending bankruptcy proceeding and there is no allegation that the communications violate the Code or Rules, there is even less reason for categorical preclusion. The proper inquiry for both circumstances is whether the FDCPA claim raises a direct conflict between the Code or Rules and the FDCPA, or whether both can be enforced.[87]

The court went on to indicate that debt collectors can comply with both the Bankruptcy Code and the FDCPA.[88] As a result, the remedies available in bankruptcy court do "not conflict with finding liability or awarding damages under the FDCPA for violations based on a debt collector's failure to comply" with that court's rules.[89]

The *Randolph* and *Simon* decisions thus set the stage for the United States Court of Appeals for the Eleventh Circuit's highly controversial

79. *Id.* at 730–31.
80. *Id.* at 730.
81. *Id.*
82. *Id.*
83. 732 F.3d 259, 274 (3d Cir. 2013).
84. *Id.* at 262.
85. *Id.*
86. *Id.* at 263.
87. *Id.* at 274.
88. *Id.* at 279.
89. *Id.*

decision in *Crawford v. LVNV Funding, LLC*.[90] The court in *Crawford* found not only that Bankruptcy Code remedies could co-exist with FDCPA damages, but also that the mere filing of a proof of claim in bankruptcy could trigger FDCPA liability.[91] Specifically, *filing a proof of claim for time-barred debt* can violate sections 1692e and 1692f of the FDCPA.[92] The court in *Crawford* suggested that there was essentially no difference between a debt collector filing a stale lawsuit in state court and one filing a stale proof of claim in bankruptcy.[93] As a result, a time-barred debt collector has violated the FDCPA if its actions in bankruptcy would give the "least-sophisticated consumer" the false impression that the debt is enforceable.[94]

E. Post-Crawford *Chaos in the Seventh Circuit*

Where the circuits had already been split on whether the FDCPA could apply to debt collection practices in bankruptcy at all, *Crawford* quickly splintered FDCPA jurisprudence even further. Although the Seventh Circuit was aligned with the Eleventh Circuit that the FDCPA could apply to debt collectors in bankruptcy, actual application of the FDCPA proved an additional challenge. Bankruptcy courts and district courts in the Seventh Circuit struggled to apply the FDCPA consistently. Specifically, whether a creditor merely filing a claim for time-barred debt could constitute an FDCPA violation became another major point of disagreement. Some courts held that asserting a time-barred claim in a bankruptcy case cannot violate the FDCPA as a matter of law.[95] Other courts concluded that filing a stale proof of claim can violate the FDCPA.[96]

90. *See* 758 F.3d 1254 (11th Cir. 2014).

91. *Id.* at 1262.

92. *Id.*

93. *Id.* at 1260–61.

94. *Id.* (citing Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013)).

95. *See, e.g.*, Birtchman v. LVNV Funding, LLC, No. 1:14-cv-713-JMS-TAB, 2015 WL 1825970 (S.D. Ind. Apr. 22, 2015); Donaldson v. LVNV Funding, LLC, 97 F. Supp. 3d 1033 (S.D. Ind. 2015); Robinson v. eCast Settlement Corp., No. 14 CV 8277, 2015 WL 494626 (N.D. Ill. Feb. 3, 2015); Murff v. LVNV Funding, LLC (*In re* Murff), Ch. 13 Case No. 13 B 44431, Adv. No. 14 A 790, 2015 WL 3690994 (Bankr. N.D. Ill. June 15, 2015); Lagrone v. LVNV Funding, LLC (*In re* Lagrone), 525 B.R. 419 (Bankr. N.D. Ill. 2015).

96. *See, e.g.*, Taylor v. Galaxy Asset Purchasing, LLC, 108 F. Supp. 3d 628 (N.D. Ill. June 11, 2015); Taylor v. Midland Funding, LLC, 94 F. Supp. 3d 941 (N.D. Ill. Mar. 20, 2015); Patrick v. Worldwide Asset Purchasing II, LLC, No. 1:14–cv–00544–TWP–TAB, 2015 WL 627376 (S.D. Ind. Feb. 13, 2015); Grandidier v. Quantum3 Group, LLC, No. 1:14-CV-00138-RLY, 2014 WL 6908482 (S.D. Ind. Dec. 8, 2014); Patrick v. Pyod, LLC, 39 F. Supp. 3d 1032 (S.D. Ind. 2014); Edwards v. LVNV Funding, LLC (*In re* Edwards), 539 B.R. 360 (Bankr. N.D. Ill. 2015); Avalos v. LVNV Funding, LLC (*In re* Avalos), 531 B.R. 748 (Bankr. N.D. Ill. 2015); Brimmage v. Quantum3 Group, LLC (*In re* Brimmage), 523 B.R. 134 (Bankr. N.D. Ill. 2015).

In *Patrick v. Pyod, LLC*, the first post-*Crawford* decision within the Seventh Circuit regarding this issue, the United States District Court for the Southern District of Indiana followed *Crawford* and held that filing a proof of claim for a time-barred debt could give rise to an FDCPA claim.[97] The overlap in coverage between the Bankruptcy Code and the FDCPA did not preclude the application of both statutes because as "long as 'people can comply with both, then courts can enforce both.'"[98] Because the FDCPA could apply, the court found *Crawford* particularly persuasive.[99] A proof of claim for time-barred debt would confuse the "least sophisticated consumer," so the proof of claim was "unfair," "unconscionable," "deceptive," and "misleading" under FDCPA sections 1692e and 1692f.[100]

In *Brimmage v. Quantum3 Group, LLC (In re Brimmage)*, Judge Jacqueline P. Cox, writing for the United States Bankruptcy Court for the Northern District of Illinois, followed the dual compliance test set forth in *Randolph* and *Pyod*.[101] Because a debt collector could comply with both the Bankruptcy Code and the FDCPA, the FDCPA could apply to proofs of claim despite "a series of cases from other jurisdictions which have held [otherwise]."[102] As such, although the Bankruptcy Code "may allow [debt collectors] to file a proof of claim on a time-barred [debt], it does not relieve them of their obligation to comply with the FDCPA."[103] Judge Cox also noted that "the filing of a proof of claim is merely the bankruptcy analog of filing a complaint or sending a demand letter to recover on a debt outside of bankruptcy."[104]

Less than two weeks later, Judge Eugene R. Wedoff, also writing for the United States Bankruptcy Court for the Northern District of Illinois, disagreed with Judge Cox's decision.[105] Judge Wedoff held that "filing a proof of claim on a debt subject to a limitation defense" could not violate the FDCPA.[106] In *Lagrone v. LVNV Funding, LLC (In re Lagrone)*, Judge Wedoff agreed that the FDCPA could be applied to proofs of claim in bankruptcy cases but disagreed with the *Crawford* analysis, finding that

97. 39 F. Supp. 3d 1032, 1036 (S.D. Ind. 2014).

98. *Id.* at 1034 (quoting Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004)).

99. *Id.* at 1035–36.

100. *Id.* at 1036 (citing Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1260–61 (11th Cir. 2014)).

101. Brimmage v. Quantum3 Group, LLC (*In re* Brimmage), 523 B.R. 134, 138–39 (Bankr. N.D. Ill. 2015).

102. *Id.* at 138.

103. *Id.* at 141.

104. *Id.* at 138.

105. Lagrone v. LVNV Funding, LLC (*In re* Lagrone), 525 B.R. 419, 426 (Bankr. N.D. Ill. 2015).

106. *Id.*

lawsuits filed against individuals are sufficiently different from proofs of claim filed in bankruptcy cases.[107] Four key differences between lawsuits and proofs of claim indicated that the inherent deception of untimely lawsuits is not present in bankruptcy cases.[108]

First, debtors in collection lawsuits must assert statute of limitations defenses themselves, whereas debtors in chapter 13 bankruptcy cases have trustees looking out for debtor and creditor interests.[109] Second, a debtor in bankruptcy has less at stake in allowing a proof of claim for a time-barred debt than a debtor in a collection lawsuit.[110] Under a chapter 13 plan, debtors often elect to pay less than the full sum of the claims against them, meaning that the debtor will pay the same amount regardless of whether particular proofs of claim are disallowed.[111] Third, an FDCPA-protected debtor brought into a collection lawsuit would have to hire legal counsel; debtors engaged in the bankruptcy process are often represented by an attorney and are therefore much less likely to be uninformed regarding unenforceable debt.[112]

Finally, proofs of claim for time-barred debt necessarily provide the debtor with all of the information required to form an objection, whereas a state court complaint might not.[113] As a result, "it would be easier—and less embarrassing—for the individual debtor to file a claim objection pro se than to deal with an untimely collection lawsuit."[114] Judge Wedoff concluded that because the issues a consumer faces in defending an untimely "collection lawsuit . . . are not raised by untimely proofs of claims, there is no reason to interpret the FDCPA as having the same effect on bankruptcy claims that it has on civil actions."[115]

II. THE SEVENTH CIRCUIT DECIDES *OWENS VS. LVNV FUNDING*

Facing an ample amount of irreconcilable case law, the Court of Appeals for the Seventh Circuit resolved the intra-circuit chaos in *Owens v.*

107. *Id.*

108. *Id.*

109. *Id.* (citing 11 U.S.C. § 704(a)(5) (applicable in chapter 13 under § 1302(b)(1))); *see also In re* Andreas, 373 B.R. 864, 876 (Bankr. N.D. Ill. 2007) ("[T]he Trustee is a fiduciary owing duties to all parties in interest in a Chapter 13 case."); *In re* Mid–States Express, Inc., 433 B.R. 688, 697 (Bankr. N.D. Ill. 2010) ("The trustee has a duty to object to improper claims.").

110. *In re Lagrone*, 525 B.R. at 426.

111. *Id.* at 427.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

LVNV Funding, LLC. Alphonse Owens filed his chapter 13 bankruptcy petition in the Bankruptcy Court for the Southern District of Indiana.[116] In his petition, he listed as a creditor LVNV Funding, LLC, a debt purchaser who had purchased Owens' consumer debt from an original creditor.[117] LVNV filed a proof of claim with the bankruptcy court and provided information sufficient to establish that the underlying debt was unenforceable under Indiana's statute of limitations for collecting debt.[118]

Owens, represented by counsel throughout his bankruptcy case, objected to LVNV's proof of claim on the ground that Indiana's statute of limitations precluded enforcement of that debt obligation.[119] The bankruptcy court sustained Owens's objection and dismissed the claim.[120] Owens then filed a complaint in the United States District Court for the Southern District of Indiana, seeking statutory damages against LVNV.[121] The complaint alleged that LVNV violated provisions of the FDCPA that prohibit "any false, deceptive, or misleading representation or means in connection with the collection of any debt"[122] and the use of "unfair or unconscionable means to collect or attempt to collect any debt."[123]

The district court dismissed the complaint on LVNV's motion.[124] Owens then appealed to the Seventh Circuit, which consolidated his appeal with two appeals from cases with similar facts.[125]

The Seventh Circuit had to resolve two separate issues. First, the consolidated plaintiffs argued that "the act of filing a proof of claim on a time-barred debt is inherently misleading because 'claim' is defined to include only legally enforceable obligations."[126] Second, the plaintiffs contended that filing a stale proof of claim is practically deceptive because it would

116. Owens v. LVNV Funding, LLC, No. 1:14-cv-02083-JMS-TAB, 2015 U.S. Dist. LEXIS 52680, at *3 (S.D. Ind. Apr. 21, 2015), *aff'd*, 832 F.3d 726 (7th Cir. 2016).

117. *Id.* LVNV often litigated this issue and was regularly a defendant in FDCPA lawsuits regarding proofs of claim for stale debts. *See Simon*, 732 F.3d 259 at 263, 274.

118. *Owens*, 2015 U.S. Dist. LEXIS 52680, at *3.

119. *Id.* at *4.

120. *Id.*

121. *Id.* at *1.

122. 15 U.S.C. § 1692e.

123. *Id.* § 1692f.

124. *Owens*, 2015 U.S. Dist. LEXIS 52680, at *1.

125. Owens v. LVNV Funding, LLC, 832 F.3d 726, 729 (7th Cir. 2016); *see also* Robinson v. eCast Settlement Corp., No. 14 CV 8277, 2015 U.S. Dist. LEXIS 176022 (N.D. Ill. Apr. 27, 2015); Birtchman v. LVNV Funding, No. 1:14-cv-713-JMS-TAB, 32015 U.S. Dist. LEXIS 52669 (S.D. Ind., Apr. 22, 2015).

126. *Owens*, 832 F.3d at 730.

succeed only when the debtor and his attorney fail to object.[127] Ultimately, both of these arguments failed.[128]

The court first rejected the plaintiffs' assertion that LVNV violated the FDCPA by filing a proof of claim for stale debt because "the term 'claim' [in the Bankruptcy Code] includes only legally enforceable obligations."[129] Because bankruptcy is intended to be all-encompassing, courts interpret "claim" very broadly to ensure that all relevant claims against the debtor are processed within a collective proceeding.[130] After all, only debts brought to the court's attention can be discharged.[131] The Bankruptcy Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]"[132] This definition includes several rights to payment that are not yet enforceable, including unmatured and contingent rights.[133] The Bankruptcy Code therefore anticipates that creditors may file a claim for unenforceable debt and provides procedures for processing such claims.[134] According to the court, a claim for unenforceable debt does not falsely cloak that debt with an air of legitimacy, it simply purports to be a claim subject to dispute in the bankruptcy.[135] If the definition of a "claim" includes claims for unenforceable debts, then filing such a claim could not be inherently misleading.[136]

The plaintiffs next contended that, in practice, LVNV's behavior was deceptive because its success depends on a break-down of the bankruptcy process.[137] Essentially, LVNV could get paid on its claim only when the trustee, the debtor, and the debtor's attorney all fail to object where objecting would be appropriate.[138] LVNV's business model thus relies on flooding courts with claims for time-barred debt to overwhelm the systems in place, which the plaintiffs argued was unacceptably deceptive under the FDCPA.[139] If the "system functions as intended," these claims would be

127. *Id.*
128. *Id.* at 737.
129. *Id.* at 730.
130. *Id.* at 732.
131. *Id.*
132. 11 U.S.C. § 101(5)(A) (2016).
133. *Owens*, 832 F.3d at 730.
134. *Id.* at 732 (citing 11 U.S.C. § 558).
135. *Id.* at 734.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

immediately dismissed because the statute of limitations provides "an iron-clad affirmative defense" to them.[140] The court took issue with this argument partly because the statute of limitations running on a debt does not terminate the debt nor does it prohibit all avenues of collection.[141] The court held that the claim was not deceptive because LVNV was accurate and thorough with the information it provided, Owens had legal counsel, and the claim would not have deceived a competent attorney.[142]

The court ultimately ruled against the plaintiff but left open the possibility that LVNV's practices could run afoul of the FDCPA in a future case where the debtor was not represented by an attorney.[143] In *Owens*, the plaintiffs were each represented by an attorney who objected to LVNV's claim and the claims were dismissed without being paid.[144] Relying on its decision in *Evory*, the court used its "competent lawyer" standard to determine that LVNV's claim was not facially deceptive.[145] That is, a competent attorney would, and in fact did, know that the claim was barred by the statute of limitations. This holding thus does not foreclose all FDCPA liability in bankruptcy cases involving time-barred debt. For example, *Owens* would not prohibit a future *pro se* debtor from bringing an FDCPA action for filing a time-barred proof of claim. If the debtor was not represented by an attorney, the "least sophisticated consumer" standard from *Phillips* would apply and the court's analysis would have to change.[146]

Unconvinced that the FDCPA should permit LVNV's behavior, Chief Judge Diane Wood vigorously dissented from the court's decision.[147] First, Judge Wood clarified that "[s]ome things are too speculative, or too much against public policy, to include" in section 101(5)(A)'s definition of a

140. Oral Argument at 0:32, *Owens*, LLC, 832 F.3d 726 (No. 15-2044), http://media.ca7.uscourts.gov/sound/2016/sp.15-2044.15-2044_06_01_2016.mp3 [https://perma.cc/9T8X-6E6R]. At oral arguments, counsel for the debtor further argued that being subject to an iron-clad affirmative defense meant that claims for stale debts were additionally sanctionable under Bankruptcy Rule 9011. *Id.* at 1:40 (citing Fed. R. Bankr. P. 9011).

141. *Owens*, 832 F.3d at 731; *see also* McMahon v. LVNV Funding, 744 F.3d 1010, 1020 (7th Cir. 2014) (holding that it is not "automatically improper for a debt collector to seek re-payment of time-barred debts.").

142. *Owens*, 832 F.3d at 736–37.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 735–37. It is hard to imagine when this scenario could realistically play out. Assuming that the Bankruptcy Code's protections have broken down, these claims sneak their way into the debtor's plan, which the court unknowingly confirms. How often would an unsophisticated consumer debtor realize, without legal representation, that they are paying an unenforceable claim as part of their court-confirmed bankruptcy plan?

147. *See id.* at 737 (Wood, J., dissenting).

claim.[148] For example, a claim for fraudulent debt would not be acceptable in a bankruptcy case so it is reasonable that a claim for stale debt should not be either.[149] Judge Wood next highlighted that LVNV likely violates Federal Bankruptcy Rule of Procedure 9011 every time it files one of its proofs of claim for time-barred debt.[150] Under Rule 9011, the act of filing a proof of claim "[certifies] that to the best of [the filer's] knowledge, information, and belief . . . the claims . . . are warranted by existing law."[151] Therefore, filing is sanctionable when the claim is for debt that is not enforceable under applicable law and subject to an ironclad affirmative defense.[152] Because a court should never condone or "protect frivolous, bad-faith, or unfounded claims," sanctionable claims should not be welcome in bankruptcy.[153] Accordingly, filing a sanctionable proof of claim should be punishable under the FDCPA.[154]

Judge Wood also criticized LVNV's argument that a debtor still has a moral obligation to repay a debt even where the debt is unenforceable.[155] Although such a moral obligation might actually exist, "a proof of claim is no mere request on moral grounds . . . it is a legal mechanism through which the payment of that claim can be compelled."[156] Because the statute of limitations provides an absolute bar against stale claims, then time-barred debt is not collectible and does not need to be discharged.[157] Statutes of limitations sever legal avenues to collect the debt such that a time-barred debt cannot be enforced in a legal proceeding, even if the debt still technically exists under state law.[158] The disagreement between Judge Wood and the *Owens* majority highlights most of the relevant points that the Supreme Court of the United States would need to address upon review of this issue.

148. *Id.* at 739.
149. *Id.*
150. *Id.*
151. Fed. R. Bankr. P. 9011(b).
152. *See id.*
153. *Owens*, 832 F.3d at 739 (Wood, J., dissenting).
154. *See id.* at 739–41.
155. *Id.* at 740.
156. *Id.*
157. *Id.*
158. *Id.*

III. FILING TIME-BARRED PROOFS OF CLAIM VIOLATES THE FDCPA

The *Owens* decision contributes to a circuit split on this issue; the Seventh Circuit put itself squarely at odds with the Eleventh Circuit.[159] This split means that the issue of whether a chapter 13 proof of claim for a time-barred debt violates the FDCPA is ripe for review by the Supreme Court. Despite the split and need for resolution, however, the Supreme Court denied certiorari in the *Owens* case.[160] For now, the *Owens* decision will stand, but circuits undecided on this issue should decline to follow it.

First, the Seventh Circuit found that the definition of a "claim" in section 101(5)(A) of the Bankruptcy Code included claims for time-barred debts because it also included other types of unenforceable rights to payment. Although the definition of "claim" in the Bankruptcy Code is unquestionably broad, the majority's view ignores the fact that none of the rights to payment enumerated in the statute are unenforceable in the same way that time-barred debt is unenforceable. If a debt is "contingent," the debt is unenforceable but can become enforceable upon the occurrence of some triggering event determined before the debtor petitioned for bankruptcy. If a debt is "unmatured," again the debt is currently unenforceable but can mature and become enforceable in the future based on pre-petition arrangements. If unmatured or contingent rights to payment were not included in the bankruptcy process, then those debts would inevitably become enforceable against the debtor outside of bankruptcy. Keeping them out of the proceeding would defeat the whole point of bankruptcy.

Time-barred debt, on the other hand, is unenforceable and will not become enforceable again without some intentional action by the debtor to revive the debt.[161] Although stale debt can be revived under state law, the revival mechanism distinguishes time-barred debt from unmatured or contingent debt. Time-barred debt can become enforceable only by a post-petition agreement to revive the debt rather than upon terms established pre-petition. In other words, at the time of the bankruptcy petition, expired debt would remain unenforceable whether the bankruptcy process sorts it out or not. If time-barred debt is left outside the bankruptcy process, nothing would change—the debtor would still not be legally obligated to pay. If unmatured or contingent debt were left outside of bankruptcy, then those

159. *Id.* at 735.

160. Owens v. LVNV Funding, LLC, 137 S. Ct. 2157 (2017) (mem.).

161. There are very specific circumstances where expired debt can be revived under Illinois and Indiana law, but this revival typically requires an agreement in writing. *See* 735 ILL. COMP. STAT. 5/13-206 (2007) (indicating that expired debt obligations can be revived in Illinois) and IND. CODE § 34-11-9-1 (2016) (indicating that expired debt obligations can be revived in Indiana).

debts could become enforceable against the debtor based on pre-petition agreements *without* further debtor action to intentionally revive them. Thus, the definition of a "claim" within the Bankruptcy Code should not include all kinds of unenforceable debt merely because it includes some kinds. Because an expired right to payment is significantly distinguishable from unmatured and contingent rights to payment, a claim for debt that cannot become enforceable again is outside the scope of section 101(5)(A)'s definition.

Thus, courts should not foreclose FDCPA liability when a creditor files a claim for a debt that falls outside of 101(5)(A)'s definition. Not every time a creditor files a claim for stale debt should merit FDCPA liability, though. In cases where there is a good faith argument regarding the enforceability of the debt, the filing would not be sanctionable under Bankruptcy Rule 9001 because "it is possible to imagine a state of affairs in which a legally enforceable obligation exists."[162] Therefore, a bankruptcy court could disallow the claim, as anticipated by the Bankruptcy Code, without rendering the filer liable for damages under the FDCPA.[163] In the debt purchaser scheme described in this Note, there is no question that the debt is unenforceable and stale. By filing a proof of claim anyway, the debt purchaser has engaged in deceptive and misleading practices that should violate the FDCPA. If the debt purchaser is unaware of the staleness of the debt or can pose some argument why the debt is not stale, it would be a different situation.

Although section 101(5)(A) defines a "claim" exceptionally broadly, interpreting this definition to exclude time-barred debt is appropriate in light of the reason for that broadness. Courts read the meaning of "claim" exceptionally broadly to further 'the overriding goal of the Bankruptcy Code to provide a "fresh start" for the debtor.'"[164] Debtors receive a fresh start *only* when they schedule all of their debts and discharge them through the bankruptcy process.[165] By attaching FDCPA liability to creditors who file their claims for stale debt, the courts would be keeping these creditors out of the collective proceeding, arguably contrary to the purpose of bankruptcy. The debt exists and would exist in perpetuity because it could never be discharged.

162. *Owens*, 832 F.3d at 739–40 (Wood, J., dissenting).

163. *See id.*

164. *In re* Morgan, 197 B.R. 892, 896 (N.D. Cal. 1996), *aff'd sub nom.* Corman v. Morgan, 131 F.3d 147 (9th Cir. 1997).

165. Consolidated Brief and Appendix of Defendant-Appellees at 10-11, *Owens*, 832 F.3d 726 (No. 15-02044).

In a general sense, filing a proof of claim aids the debtor's fresh start—that is, if a creditor does not file its proof of claim then the debtor could never be free from the underlying debt.[166] But this argument strains credulity when it comes to stale debts. A debtor does not have to worry about a discharge for a debt they no longer legally owe, which is exactly what the statute of limitations running out means. "Time-barred debts do not impose financial stress, and there is no need for legal relief from 'moral obligations.' The true 'irony' [in these cases is the debt purchasers'] attempt to add a financial burden in a process designed to reduce consumer debt."[167] Obviously, this debt purchasing scheme is not actually about helping debtors with their fresh starts. If the creditor's true purpose was aiding the debtor's fresh start, the creditor could better achieve that end by refraining from pursuing the claim at all rather than filing a proof of claim for an unenforceable debt and hoping that no one notices. Then, there would be no non-bankruptcy collection efforts or illegitimate proofs of claim to object to.

Furthermore, even if a debtor has some moral obligation to repay a debt, this is not sufficient justification to include a time-barred right to payment in the definition of a claim. Moral obligations simply cannot be read into a statute addressing legal rights to payment, particularly when payment on that obligation would harm creditors with actual legal rights to payment. The more money that the plan designates for time-barred creditors, the less money there would available to the plan's remaining creditors. Thus, even if a debtor wanted to repay a debt pursuant to a moral obligation, a trustee would be perfectly within its duty to object to such repayment on behalf of the legal creditors.

In addition to its strained reading of the word "claim," the Seventh Circuit also erred in its promotion of a "competent attorney" standard in these cases. Essentially, the court determined that filing a proof of claim for expired debt is not misleading because the information on the claim is accurate and sufficient for a competent attorney to know to object. Although the *Owens* court left open the possibility that LVNV's practice could violate the FDCPA in cases involving *pro se* debtors,[168] the scheme merits FDCPA liability regardless of whether the debtor is represented. The "competent attorney" standard ignores the reality that the whole scheme relies on flooding the system with claims. Each proof of claim does not

166. *See id.*

167. Consolidated Reply Brief for Plaintiff-Appellants at 25 n.9, *Owens*, 832 F.3d 726 (No. 15-02044).

168. *See Owens*, 832 F.3d at 737.

exist in a vacuum; the scheme works only when there are lots of claims in lots of cases. Thus, FDCPA liability should attach to any claims for stale debt subject to ironclad affirmative defenses, not just the ones filed in cases with unrepresented debtors. This expansion of liability is particularly important considering that debtors go unrepresented by an attorney in up to 10% of chapter 13 cases.[169] In those cases, debtors are significantly less protected against these claims. If a time-barred claim slips through the cracks, a *pro se* debtor is much less likely to ever catch it and pursue an FDCPA claim. Plus, even if debtors do have legal representation in their cases, the scope of that representation may not always include reviewing and objecting to individual proofs of claim.[170] By allowing debt purchasers to flood the system without liability, unrepresented debtors are inevitably harmed if the scheme is permitted to continue.

The *Owens* holding also inappropriately flips the burden of weeding out these unenforceable claims onto the debtors' lawyers, the trustee, and the bankruptcy courts, whereas the debt purchasers are in the best position to keep the system unclogged. Trustees and bankruptcy courts are already overwhelmed with the massive volume of claims in chapter 13 cases.[171] Weeding out unenforceable claims adds an unnecessary drain on judicial and party energy, increases administrative costs, and wastes hundreds of hours litigating. The filing creditors could prevent these issues because they are professionals who know that their debt is expired. Their incentive does not lie in prevention, though; the scheme relies on flooding the system and hoping some claims fall through the cracks. It is therefore in the debt purchasers' best interest to waste the trustee's and the court's time because the more flooded the system is, the more likely that these claims will get paid. As their practice benefits only the debt purchasers at the expense of everyone else in the process, they have no interest in alleviating anyone else's burdens. Because they have no interest in doing so, one way to encourage debt purchasers to stop obfuscating the system would be FDCPA liability.

Had the Supreme Court overturned *Owens*, it would have come with some notable consequences. For example, courts holding that filing time-barred claims violates the FDCPA would significantly impair the market for stale debt. Debt already loses value over time, as older debt sells for

169. Consolidated Reply Brief for Plaintiff-Appellants, *supra* note 167, at 5.

170. *Id.*

171. *See* Feggins v. LVNV Funding LLC, No. 13-11319-WRS, 2015 WL 7424339, at *3 n.5 (Bankr. M.D. Ala. Nov. 20, 2015) (trustee "testified that his office processes between 6,000 and 7,000 claims each month, and that there are between 18,000 and 19,000 pending Chapter 13 cases in [his] district").

much less than newer debt.[172] Increased risk of non-repayment lowers the debt's value.[173] Adding more FDCPA hurdles in bankruptcy would make time-barred debt even more difficult to collect on and entirely reliant on the debtor's choice to repay. This increased difficulty would decrease both the value of this debt and the incentive to buy it, and the downstream benefits of debt purchasing diminish. When potential buyers know that they stand little chance to collect, creditors would probably be less likely to sell these debts. The increased possibility of original creditors being stuck with worthless debt would, in turn, likely raise the price of credit for future borrowers.[174]

FDCPA remedies for merely filing a proof of claim might also create the opportunity for debtors to take advantage of debt collectors in the bankruptcy process. For example, when the debtor lists the time-barred debt owed to the debt collector in his schedules, he invites the debt collector to file a proof of claim. The debt collector mistakenly believes that the debtor will pay, files its proof of claim, and then is met with an FDCPA claim for damages. Such a situation might result from either mistake by the parties or, even worse, invidious attempts by the debtor and the debtor's attorney to try to secure an additional windfall for his client. In a world where FDCPA claims are allowed against time-barred proofs of claim, a debtor might be incentivized "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."[175] Realistically, though, such risks do not exist. First, a professional debt purchaser would know that filing for an expired debt would open them up to FDCPA liability even if it seemed like the debtor encouraged them. Second, FDCPA proceeds would not actually result in a windfall for the debtor; instead, they would likely be vested in the debtor's estate or the basis for increased plan payments.[176] Since a filer of a proof of claim for time-barred debt attempted to divert money from legitimate creditors, it is a perfectly reasonable punishment to require that filer to pay back into the estate.

When debt purchasers do not face repercussions for abusing the bankruptcy system to revive their stale debts, it creates an incentive to drive

172. FED. TRADE COMM'N, *supra* note 2, at ii.

173. *Id.*

174. *See id.*

175. Middlebrooks v. Interstate Credit Control, Inc., 391 B.R. 434, 437 (D. Minn. 2008) (internal quotations omitted).

176. *See* Avalos v. LVNV Funding, LLC (*In re* Avalos), 531 B.R. 748, 750–51 (Bankr. N.D. Ill. 2015).

debtors into bankruptcy. Treating "creditors differently depending on which enforcement mechanism they use invites troublesome forum shopping."[177] As a result, bankruptcy law generally respects parties' pre-bankruptcy positions to avoid such incentives.[178] Attempts to collect time-barred debt outside of bankruptcy are unquestionably subject to the FDCPA. Once the debtor files for bankruptcy, that previously unenforceable debt now has a chance to be paid off if the claim avoids objection.[179] Thus, a debt collector would have a better-than-nothing chance to collect through the bankruptcy process on debt that would be unenforceable outside of bankruptcy. If the FDCPA does not deter filing stale proofs of claim, this chance arises without any downside or repercussion. Immunizing filers of time-barred proofs of claim from FDCPA liability therefore puts debt collectors in a better position to collect when the debtor is in bankruptcy than when the debtor is not. As a result, not punishing filers of stale proofs of claim would create the unacceptable incentive to drive debtors into bankruptcy.

Additionally, the faith that some judges have placed in the Bankruptcy Code's protections is misplaced. Debt purchasers, like LVNV, have designed a business model that relies on the predictable failure of these protections. Thus, any success in collecting on stale debts demonstrates that these protections are practically inefficient because trustees' offices face thousands of claims with limited time and resources,[180] and debtors' attorney representation often stops short of objecting to claims.[181] The scheme works only when the trustee and the debtor's counsel fail to object when they should have. The FDCPA provides a necessary backstop to curb abusive debt collector behavior where these processes break down. By concluding that the FDCPA should not provide a remedy to debtors in bankruptcy, courts remove this backstop and open the bankruptcy system up for abuse.

Ultimately, because the Supreme Court has refused to reverse *Owens*, the confusion over whether FDCPA prohibits filing proofs of claim for stale debts could be resolved by Congress or by state legislatures. Congress could simply add knowingly filing a proof of claim for stale debt or

177. Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987).

178. Butner v. United States, 440 U.S. 48, 56 (1979) (indicating that courts "should take whatever steps are necessary to ensure that [a creditor is] afforded in federal bankruptcy court the same protection [he] would have under state law if no bankruptcy had ensued").

179. *See* 11 U.S.C. § 502(a) (allowing claims unless they are objected to).

180. *See* Owens v. LVNV Funding, LLC, 832 F.3d 726, 737 (7th Cir. 2016).

181. *See* Consolidated Reply Brief for Plaintiff-Appellants, *supra* note 167.

committing an act that is sanctionable under Rule 9011 as a specifically disallowed practice under the FDCPA. Congress could also amend the Bankruptcy Code to clarify that time-barred rights to payment fall outside section 101(5)(A)'s definition of a "claim." Finally, state legislatures could follow Wisconsin's lead and legislate that when the statute of limitations runs on a debt claim, the underlying debt is terminated.[182] If the debt itself expired, a former debtholder could not file a proof of claim in a bankruptcy case without directly lying about that debt's existence. Thus, debt collectors would have no incentive to file proofs of claim for time-barred debt if they faced FDCPA liability every time they did so.

CONCLUSION

When debt purchasers flood courts with proofs of claim for stale debts, they purposely manipulate predictable failures of the Bankruptcy Code. These claims are unenforceable in legal proceedings and are unquestionably subject to iron-clad affirmative defenses. Despite this, debt purchasers have developed a scheme to trick debtors and bankruptcy courts into enforcing these claims. This scheme is deceptive, misleading, and unconscionable. Filing knowingly unenforceable claims (and hoping that no one catches them) burdens the debtor, the estate, other creditors, the trustee, and the bankruptcy court. As a result, debt purchasers who flood bankruptcy courts with proofs of claim for time-barred debts must be held accountable. Where the Bankruptcy Code's protections fail, the FDCPA should provide a remedy.

182. *See* Bowden, *supra* note 37.