No. 14-858

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 Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF LVNV FUNDING, LLC, ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

DRI—The Voice of the Defense Bar ("DRI"), is the international membership organization of all lawyers involved in the defense of civil litigation. DRI exists to enhance the skills of defense lawyers, anticipate and address interests germane to defense lawyers and the civil justice system, promote appreciation of the role of the defense lawyer, and improve the civil justice system. DRI believes that the issue in this case is of special significance to the defense bar, the defense practice, and the civil justice system in general.

[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This brief demonstrates that the Eleventh Circuit Court of Appeals wrongly decided to impose liability under the Fair Debt Collection Practices Act ("FDCPA") on debt collectors who file proofs of claim in a Chapter 13 bankruptcy proceeding for debts that are potentially subject to a statute of limitations defense. In support of the Appellant's Petition for Writ of Certiorari, DRI submits this brief as amicus curiae to expand on two issues raised in that petition.

First, expanding liability under the FDCPA to include filing a proof of claim on an "out-of-statute debt" will yield negative unintended consequences for the bankruptcy process and for lawyers and the creditors for whom they work. The Bankruptcy Code and FDCPA inherently conflict, and these conflicts mean that the FDCPA cannot apply to the conduct of filing a proof of claim. Further, adversary proceedings asserting FDCPA violations based on the filing of an out-of-statute proof of claim would unnecessarily burden the bankruptcy courts and diminish the effectiveness of the bankruptcy process. In addition, imposing FDCPA liability for filing a proof of claim on an "out-of-statute debt" could unfairly exact a penalty for conduct by one type of entity but not for the exact same conduct by another entity. Finally, the obligation to assert the statute of limitations defense will be shifted improperly from the debtor to the claimant, turning an affirmative defense into a liability risk for debt collectors.

Second, the least sophisticated consumer standard should not apply to FDCPA claims that are based on a claimant's participation in a consumer's

bankruptcy proceeding, especially when the consumer typically is represented by counsel. The bankruptcy process is designed to protect debtors and differs substantially from the environment the FDCPA was intended to regulate. Unlike the debt collection environment of the FDCPA, the bankruptcy process makes available the services of a trustee who is duty-bound to protect the interest of the bankruptcy estate and is obligated by law to protect it from unenforceable claims. Furthermore, the bankruptcy debtor has his own counsel to advise him regarding the enforceability of out-of-statute debts. Finally, filing a proof of claim in a bankruptcy case does not raise the same potential concerns as filing a debt collection lawsuit in court against a consumer on an out-of-statute debt.

ARGUMENT

I. EXPANDING FDCPA LIABILITY TO INCLUDE FILING A PROOF OF CLAIM ON AN OUT-OF-STATUTE DEBT WILL HAVE NEGATIVE UNINTENDED CONSEQUENCES ON THE BANKRUPTCY PROCESS AND ON THE LAWYERS AND CREDITORS FOR WHOM THEY WORK.

A. Inherent conflicts exist between the Bankruptcy Code and the FDCPA.

"[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Bankruptcy Code and the FDCPA, 15 U.S.C. § 1601, *et seq.*, compete for dominance when a debt collector files a proof of claim in a bankruptcy proceeding related to an out-of-statute debt. By permitting an FDCPA claim in that context, the Eleventh Circuit decided that the FDCPA prevails over the Bankruptcy Code. However, because the Bankruptcy Code expressly allows the filing of a proof of claim for an out-of-statute debt, application of the FDCPA would outlaw what the Bankruptcy Code allows. This inherent conflict between the Bankruptcy Code and the FDCPA requires recognition that the FDCPA cannot apply in the context of filing a proof of claim related to an out-of-statute debt.

The Framers of the Constitution granted Congress the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, Cl. 4. To ensure uniformity of

the bankruptcy process, Congress designed the Bankruptcy Code, 11 U.S.C. §§ 101, et seq., "to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike," as shown by its "complex, detailed, and comprehensive provisions." *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996). As part of the Bankruptcy Code's comprehensive framework, bankruptcy courts have "great authority over the allowance and disallowance of claims, for a myriad of reasons." *Id.* at 910 n.2 (citing 11 U.S.C. § 502).

The Bankruptcy Code defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). The Code states explicitly that "[a] creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). Reading these two subsections together, the Code establishes that a creditor may file a proof of claim concerning a disputed right to payment. The debtor then may raise that dispute in his objection to the claim pursuant to 11 U.S.C. § 502(a). Likewise, the bankruptcy trustee, who represents the bankruptcy estate (§ 323(a)), must, "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. § 704(a)(5); *see also* 11 U.S.C. § 1302(b)(1).

If the debtor or trustee objects, a hearing is held and the bankruptcy court either allows the claim or disallows it based on several enumerated grounds. *See id.* § 502(b). Those grounds include if the "claim is unenforceable against the debtor and property of the debtor, under any agreement *or applicable law* for a reason other than because such claim is

contingent or unmatured." *Id.* § 502(b)(1) (emphasis added). Further, 11 U.S.C. § 558 "provides that 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* . . . ." 11 U.S.C. § 558 (emphasis added). The direct reference to statutes of limitation as a defense and the framework for objections to proofs of claim demonstrate that filing a proof of claim on an out-of-statute debt is within the explicit framework of the Bankruptcy Code. *B-Real, LLC v. Rogers*, 405 B.R. 428, 431-32 (M.D. La. 2009) ("[T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt and the Bankruptcy Court disallowing such claim after objection from the debtor."). Indeed, debtors regularly and successfully object to proofs of claims based on the debt being barred by a statute of limitations. *See, e.g.*, *In re Hess*, 404 B.R. 747, 750 (Bankr. S.D.N.Y. May 6, 2009), *In re McGregor*, 398 B.R. 561 (Bankr. N.D. Miss. 2008); *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008); *Wilferth v. Faulkner*, CA No. No. 3:06-CV-510-K, 2006 WL 2913456, at *3 (N.D. Tex. 2006).

The claims objection process set forth in the Bankruptcy Code does not subject the debtor to the types of abuses that the FDCPA is intended to proscribe and thus logically does not violate the FDCPA. "The whole purpose of regulating debt collection was to 'supervise' a range of unsupervised contacts, such as demand letters and late-night telephone calls." *Argentieri v. Fisher Landscapes, Inc.*, 15 F. Supp. 2d 55, 61-62 (D. Mass. 1998). Thus, the substantive provisions of the FDCPA plainly do not reach the filing of a proof of claim for an out-of-

statute debt filed in the carefully regulated environment of the bankruptcy claims process. For example, section 1692d of the FDCPA prohibits a debt collector from "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt." 15 U.S.C. § 1692d. However, because the Bankruptcy Code allows the out-of-statute proof of claim to be filed, "such action's 'natural consequence' could not possibly be harassing, oppressive, or abusive." *B-Real v. Rogers*, 405 B.R. at 432. Similarly, section 1692e(2)(A) forbids the "false representation of . . . the legal status of any debt." 15 U.S.C. § 1692e(2)(A). A proof of claim does not, however, require the debt collector to assert the legal status of the debt. Instead, the debt collector must provide certain facts concerning the debt which will enable the debtor to challenge the debt through objections in the form of, for example, a statute of limitations defense. (*See infra* pp. 11-12.)

That the FDCPA is not intended to apply to a proof of claim on a time-barred debt is demonstrated by provisions of the FDCPA which, on their face, could appear to have been violated by filing the proof of claim. Section 1692e(10) prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt . . . ." 15 U.S.C. § 1692e(10). Other sections of the FDCPA prohibit "threatening to take or actually taking 'any action that cannot legally be taken,'" (15 U.S.C. § 1692e(5)), and "seeking to collect on any amount 'unless . . . permitted by law.'" 15 U.S.C. § 1692f(1). However, following the proof of claim procedure prescribed by Congress cannot be false or deceptive, illegal, or prohibited by law.

Similarly, a proof of claim may on its face appear to be a debt collection or an attempt to collect a debt under the FDCPA. However, the proof of claim would then violate the automatic stay imposed upon the filing of the bankruptcy petition.[2] Filing a proof of claim, then, cannot be "any act to collect" "against the debtor" subject to the provisions of the FDCPA.

Filing a proof of claim on an out-of-statute debt "is intimately tied to the bankruptcy proceedings and because of this intimate connection, there is clearly a risk of undermining the Code's provisions [through application of the FDCPA]." *B-Real v. Rogers*, 405 B.R. at 434. "[W]hile the 'FDCPA and Bankruptcy Code overlap but generally coexist peaceably,' in this specific factual situation application of the FDCPA is precluded by the Bankruptcy Code." *Id.* at 434; *see B-Real, LLC v. Chaussee (In re Chaussee)*, 399 B.R. 225 (B.A.P. 9th Cir. 2008) ("[A]ttempting to reconcile the debt validation procedure contemplated by the FDCPA with the claims objection process under the Code results in the sort of confusion and conflicts that persuades us that Congress intended that FDCPA be precluded in the context of bankruptcy cases.").

A further conflict exists in the remedies available under the Bankruptcy Code and the FDCPA. The Bankruptcy Code allows a debtor to choose among several sufficient and appropriate remedies for an improper proof of claim, remedies that are designed

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[2] Pursuant to 11 U.S.C. § 362(a)(3) and (6), filing a bankruptcy petition stays "any act to obtain possession or property of the estate or of property from the estate or to exercise control over the property of the estate," and stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."

to preserve the efficiency of the bankruptcy process. *See Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010).

For example, "[i]t is beyond cavil that past bankruptcy practice, as well as Bankruptcy Code Provisions, have left the remedy for fraudulent and otherwise defective proofs of claim to the Bankruptcy Code." *Baldwin v. McCalla*, No. 98-C-4280, 1999 WL 284788, at *3-4 (N.D. Ill. Apr. 19, 1999), *cited in Simmons*, 622 F.3d at 96. A claim can be disallowed or even revoked. *See Baldwin*, No. 98-C-4280, 1999 WL 284788, at *4. The creditor may be subject to contempt of court, because the Bankruptcy Courts have the power to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a); *see also Baldwin*, at *4. In some cases, sanctions may be warranted under Bankruptcy Rule 9011 for violating the required certification that papers submitted for filing are "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" or that "the claims, defenses, and other legal contentions therein are warranted by existing law . . . ." Fed. R. Bankr. P. 9011(b); *see also id.* at 9011(c) (allowing sanctions for violations of 9011(b)).

None of these remedies, however, provides a private cause of action for the debtor against the creditor as would be allowed by the Eleventh Circuit's grafting of the FDCPA onto the bankruptcy process.

"To permit a simultaneous claim under the FDCPA would allow through the back door what [Crawford] cannot accomplish through the front door—a private right of action." .*Walls v. Wells*

Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002). "Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating" the proof of claim process. *Id.*

Although Congress has not explicitly addressed whether the FDCPA applies to proofs of claim for out-of-statute debts,[3] "[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.

B. Adversary proceedings asserting FDCPA violations based on out-of-statute proofs of claim will unnecessarily burden the bankruptcy court and thwart the efficient reorganization of debtors' obligations.

To allow the FDCPA to create "an alternative method to challenge a proof of claim in bankruptcy, would open the floodgate for unnecessary and expensive litigation, replacing the simple procedure for dealing with an objection to the allowance of a claim." *Middlebrooks v. Interstate Credit Control, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008). FDCPA

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[3] "[I]n the absence of congressional definition this is a matter to be determined by decisions of this Court after due consideration of the structure and purpose of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question." *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (analyzing scope of summary proceedings regarding creditor preferences).

liability for conduct in a bankruptcy "action would be totally contrary to the entire scheme established by Congress to deal with creditor and debtor relationships." *Id.* The process of objecting to proofs of claim is more economical and efficient than initiating litigation over the same issue through an adversary proceeding asserting an FDCPA violation.

To ensure the process operates efficiently and effectively, the proof of claim procedure has been adapted to provide the information necessary for the debtor or trustee to make sufficient objections to the claims, including asserting a statute of limitations defense. The 2012 revisions to Bankruptcy Rule 3001 regarding proofs of claim require certain information for open-end or revolving consumer credit, including the date of an account holder's last transaction, the date of the last payment on the account, and the date on which the account was charged to profit and loss. Fed. R. Bankr. P. 3001(c)(3).[4] According to the Rules Advisory Committee, disclosure of this information will "provide a basis for assessing the timeliness of the claim." *Id.* (2012 Advisory Committee Notes). Rule 3001 also provides that a party in interest may

[4] The proof of claim at issue in the Stanley Crawford case was filed on May 21, 2008, by LVNV Funding LLC, by and through its account servicer, Resurgent, on a line of credit account originally created by Crawford with Heilig-Meyers. *In re Crawford*, Case No. 08-30192 (Bankr. M.D. Ala) (Claims Register Claim No. 8). The proof of claim listed the dates on which the account was "[c]harged off by original creditor" and "[l]ast transaction date." The 2008 proof of claim was missing only the last payment date, but the debtor or trustee was nonetheless able to object to the claim based on the statute of limitations. However, the debtor did not assert that defense until choosing to file the adversary proceeding on May 3, 2012.

request a copy of the writing on which the claim is based, and that the holder of the claim must provide the documentation within 30 days after the request. *Id.* 3001(a)(3)(B). In short, under the current procedure, the drafters of the Bankruptcy Rules have incorporated into the proof of claim procedure the contingency that a debt may be subject to a statute of limitations and provided a straightforward way for a debtor to obtain the information necessary to object based on the statute of limitations.

The drafters of the Bankruptcy Code did not envision that the information a claimant must provide under Rule 3001(c)(3) concerning the timeliness of a claim would then be used by the debtor as pre-suit discovery to pursue a strict liability cause of action under the FDCPA. Instead, the information is available for the debtor to participate in the summary process of objecting to the claim, a process created to "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen*, 382 U.S. at 328 (quoting *Ex parte Christy*, 3 How. 292, 312, 11 L.Ed. 603); *see id.* at 329 ("[T]he expressly granted power to 'allow,' 'disallow' and 'reconsider' claims, which is of basic importance in the administration of a bankruptcy estate, is to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit." (internal citations and quotations omitted)); 9 Collier on Bankruptcy ¶ 1001 (15th ed. rev. 2009) ("The objective of 'expeditious and economical administration of cases under the Code has frequently been recognized by courts to be 'a chief purpose of the bankruptcy laws.'"); *see also* Fed. R. Bankr. P. 1001 (stating that the bankruptcy rules

"shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding").

Aside from the Bankruptcy Code's preference for the summary adjudication of claim objections to further the goals of efficient resolution of the debtor's obligations, pursuing an FDCPA claim instead of objecting to a proof of claim creates a windfall for debtors and their attorneys. If an objection to a proof of claim is sustained and the claim disallowed, the claim simply is not paid from the bankrupt estate. The other creditors receive a greater pro rata share, and the debtor pays no more than if the claim had been allowed. If, however, the debtor is allowed to pursue an FDCPA claim against the creditor who files the proof of claim on a debt subject to a statute of limitations defense, the debtor could recover damages under the FDCPA, which include actual and statutory damages (up to $1,000) and attorneys' fees and costs, 15 U.S.C. § 1692k(a)(2).[5] By filing the adversary action asserting an FDCPA claim instead of simply objecting to the claim, the debtor and his lawyer would position themselves for a prize that is inconsistent with the purposes of the Bankruptcy Code. "Nothing in either the Bankruptcy Code or the

[5] As this Court has recognized, some "violations of the FDCPA are deemed to be unfair or deceptive acts or practices under the Federal Trade Commission Act . . .; As a result, a debt collector who acts with 'actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]' is subject to civil penalties of up to $16,000 per day." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 576 (2010) (internal citations omitted). This extension of liability would provide a further windfall if FDCPA liability can be premised upon filing a proof of claim for an out of statute debt.

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 proceeding." *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999).

The incentive of actual and statutory damages and attorneys' fees under the FDCPA will encourage debtors and their counsel to choose the adversarial route of an FDCPA claim instead of the efficiently-designed proof of claim procedure. Since the Eleventh Circuit's opinion in this case, this trend is evident. In November 2014 alone, only the month after the Eleventh Circuit's October 17, 2014 decision to deny Petitioners' motion to stay the court's mandate, 10 adversary proceedings were filed in the Alabama bankruptcy district courts asserting FDCPA claims based on a creditor filing a proof of claim on an out-of-statute debt.

C. Under the Eleventh Circuit's decision, FDCPA liability would not arise equally for the same conduct.

If the Eleventh Circuit's holding is correct, Petitioner could be considered a "debt collector" under the FDCPA and thus subject to civil liability. *See* 15 U.S.C. § 1692k. The same would not be true for a company that collects its own debts, which is considered a creditor under the FDCPA. *See* 15 U.S.C. § 1692a(4) (defining "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed," but excluding from that definition any person receiving an "assignment or transfer of a debt in default solely for the purpose of

facilitating collection of the debt for another"), 15 U.S.C. § 1692a(6)(A) (excluding from the definition of debt collector "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor."). This distinction between a creditor and a debt collector means that for the same conduct—filing a proof of claim form concerning an out of statute debt—a debt collector could be subject to FDCPA liability while the creditor would be protected from liability. This unequal treatment under the law is an absurd result that is contrary, at the very least, to basic principles of statutory construction. *See United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing absurd construction of statute that punished drug dealers less than others).

D. The Eleventh Circuit's decision would make a claimant responsible for resolving whether a statute of limitation bars enforcement of the debt, effectively shifting the obligation of asserting a statute of limitations defense from the debtor to the claimant.

The Eleventh Circuit's decision transforms an affirmative defense into a liability risk for debt collectors filing proofs of claim in bankruptcy. The decision requires a claimant to consider whether a statute of limitation defense could apply, and if so, the claimant must decide whether to refrain from filing the proof of claim or proceed and risk potential FDCPA liability. The statute of limitations, however, is an affirmative defense, *see* Fed. R. Civ. P 8(c)(1); *Jones v. Bock*, 549 U.S. 199, 215 (2007), which if not raised at the pleading stage by the party asserting it, is waived, *see John R. Sand & Gravel*

Co. v. United States, 552 U.S. 130, 133 (2008). As a result, the party ***opposing*** claims in litigation, not the party ***asserting those claims***, is responsible for determining whether to raise the bar of the statute of limitations.

The bankruptcy process is designed in the same way: a claimant submits its claim, and the debtor can object to the claim and assert a statute of limitations defense. If the debt collector is subject to FDCPA liability for filing a proof of claim when the debtor may potentially assert a statute of limitation affirmative defense, the debt collector, the party asserting the claim, is subjected to the burden of considering the defense and weighing the risk of suit. The statute of l imitations as we know it ceases to exist in the context of a consumer's bankruptcy. Moreover, if FDCPA liability can be based upon conduct within a bankruptcy, any affirmative defense that may be asserted to the enforceability of a debt arguably could support a debtor's FDCPA claim. These possible extensions of the Eleventh Circuit's ruling demonstrate the negative unintended consequences of imposing FDCPA liability on a debt collector who files a proof of claim on an out-of-statute debt.

II. THE LEAST SOPHISTICATED CONSUMER STANDARD SHOULD NOT APPLY TO FDCPA CLAIMS THAT ARE BASED ON A CLAIMANT'S PARTICIPATION IN A CONSUMER'S BANKRUPTCY PROCEEDING, ESPECIALLY WHEN THE CONSUMER IS REPRESENTED BY COUNSEL.

A. The bankruptcy process is designed to protect debtors and is different from

the environment the FDCPA was intended to regulate.

Congress enacted the FDCPA "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. § 1692(e); *see also Scheuer v. Jefferson Capital Sys., LLC*, CA No. 14-cv-11218, 2014 WL 4435874, at *5 (E.D. Mich. Sept. 9, 2014). Thus, the FDCPA is designed to "protect *defenseless* debtors." *See Simmons*, 622 F.3d at 96 (emphasis added). To achieve the FDCPA's purpose of protecting "defenseless" debtors, courts fashioned the least sophisticated consumer standard to ensure that "all consumers, the *gullible* as well as the shrewd," are protected. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)) (emphasis added).

In contrast, the principal purpose of the Bankruptcy Code is to grant a "fresh start" to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). Thus, the bankruptcy process is inherently designed to *protect debtors*. There is no need to further "protect debtors who are already under the protection of the bankruptcy court" or to "supplement the remedies afforded by bankruptcy itself." *Simmons*, 622 F.3d at 96. Bankruptcy consumers choose to subject themselves to the bankruptcy process, which includes multiple statutory protections, to organize and resolve their debts. A least sophisticated consumer standard is not necessary within bankruptcy proceedings because the bankruptcy process accounts for and protects the consumer.

B. The bankruptcy trustee serves to protect the interest of the bankruptcy estate and is obligated by law to protect it from unenforceable claims.

In addition to the protection provided to the debtor by the Bankruptcy Code, the trustee's obligations toward the bankruptcy estate insulates the debtor from the type of conduct prohibited in the FDCPA. In Chapter 7 and Chapter 13 bankruptcy cases, a trustee is appointed immediately upon the commencement of the case. *See* 11 U.S.C. §§ 701(a) & 1302(a). The trustee then is obligated by law to "examine proofs of claim and object to the allowance of any claim that is improper." *See* 11 U.S.C. § 704(a)(5) & 11 U.S.C. § 1302(b)(1). One such objection is that the "claim is unenforceable against the debtor" under 11 U.S.C. § 502(b)(1), "which includes an objection that the debt is time-barred under governing state law." *Elliot v. Calvary Investments*, Case No. 1:14-CV-01066-JMS, 2015 WL 133745, at *5 (S.D. Ind. Jan. 9, 2015). Therefore, "if a creditor files a proof of claim on a time-barred debt, the trustee has a statutory duty to object to the proof of claim as unenforceable pursuant to Section 502(b)(1)." *Id.*; *see also* App. 8a n.5.[6] Debtors, armed with the protection of the trustee, are not "gullible" and "defenseless."

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[6] The Eleventh Circuit also noted that the trustee failed to fulfill its statutory duty to object to improper claims. (App. 8a n.5.) Accordingly, the issue in *Crawford* could have been avoided if the trustee had simply complied with its statutory duty.

C. The bankruptcy debtor has his own counsel to advise him regarding the enforceability of out-of-statute debts.

In addition to having the protection of the trustee, a bankruptcy consumer is represented by an attorney in 90% of Chapter 13 cases and in 92% of Chapter 7 cases. *See* Admin. Office, U.S. Courts, "By the Numbers—Pro Se Filers in the Bankruptcy Courts," *The Third Branch* (Oct. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-10-01/By_the_Numbers--Pro_Se_Filers_in_the_Bankruptcy_Courts.aspx (last visited Feb. 18, 2015). The vast majority of debtors, therefore, are not "defenseless" and "gullible" as most have the benefit of trained attorneys to review filed claims and advise them as to when a claim may be unenforceable. As a result, representations by debt collectors that likely would not deceive a competent lawyer should not be actionable under the FDCPA. *See Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774-75 (7th Cir. 2007). This includes the filing of a claim based on an out-of-statute debt, as the ability to determine the applicable statute of limitations is a basic legal skill. In sum, the filing of a proof of claim does not implicate the FDCPA or the least sophisticated consumer standard.

Furthermore, filed proofs of claim are more accurately characterized as communications to a debtor's attorney instead of communications to the debtor himself, because as described above, the debtor's attorney is available to review filed claims and advise as to possible defenses. This distinction is critical, as the statutory scheme and language of the FDCPA suggests that communications directed at attorneys are treated differently from those directed

at consumers. *See Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 935 (9th Cir. 2007) (explaining that Congress viewed "attorneys as intermediaries able to bear the brunt of overreaching debt collection practices from which debtors and their loved ones should be protected"); *see id.* ("[u]nsophisticated consumers are easily bullied and misled" while "trained attorneys are not")).[7] Congress simply did not view attorneys as susceptible to the abuses that spurred the need for the FDCPA. *See Zaborac v. Phillips & Cohen Assocs., Ltd.*, 330 F. Supp. 2d 962, 967 (N.D. Ill. 2004).

Thus, the Second and Ninth Circuits have held that communications to a consumer's attorney are not subject to the FDCPA. *Kropelnicki v. Siegel*, 290 F.3d 118, 127-28 (2d Cir. 2002); *Guerrero*, 499 F.3d at 936. The Seventh and Tenth Circuits have held that the FDCPA does apply to consumers represented by counsel, but imposes a higher standard of liability than the least sophisticated consumer standard. *See Evory*, 505 F.3d at 774; *Dikeman v. National Educators, Inc.*, 81 F.3d 949, 954 (10th Cir. 1996). Finally, the Eighth Circuit applies a "case by case" approach to determine whether communications to a consumer's attorney

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[7] Pursuant to 15 U.S.C. § 1692c(a)(2), a debt collector who knows that a consumer has retained counsel regarding the debt may contact counsel but may not contact the consumer directly unless that attorney gives consent. Additionally, under 15 U.S.C. § 1692b(6), a debt collector who knows a consumer has counsel may not contact anyone other than that attorney to determine information about the consumer's whereabouts. Finally, "consumer" is defined broadly under the FDCPA to include others with a fiduciary relationship to the consumer. *See* 15 U.S.C. § 1692c(d).

are actionable under the FDCPA. *See Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814, 819 (8th Cir. 2012). In applying the least sophisticated consumer standard to communications with consumers' attorneys, the Eleventh Circuit's decision conflicts with all of these approaches and fails to recognize that (1) proofs of claim filed in bankruptcy almost always are communications directed at debtors' attorneys, not the debtors themselves; and (2) the least sophisticated consumer standard applied under the FDCPA should not apply to communications with attorneys in bankruptcy proceedings.

D. Filing a debt collection lawsuit against a consumer is significantly different from filing a proof of claim in a bankruptcy case.

Under the FDCPA, filing a lawsuit seeking to collect an out-of-statute debt, as opposed to merely pursuing debt collection, has been found to be both deceptive and unfair to the consumer. *See, e.g.*, *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987). The court in *Kimber* explained its concerns:

> [T]he passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer. Because few

> unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense.

The filing of a proof of claim in bankruptcy does not implicate these concerns. In bankruptcy, whether the consumer has the memory or records to dispute the debt is irrelevant, because Rule 3001 requires that sufficient information to assess the timeliness of the claim must be included in the proof of claim, and the consumer's attorney and the bankruptcy trustee are accountable for reviewing the claim. A debtor is also less likely to "acquiesce" to an out-of-statute claim since the trustee and the debtor's attorney would know to assert the statute of limitations as a defense. Finally, a debtor is not required to spend additional time or resources in order to dispute the claim (due to the presence of the trustee in all cases and the presence of an attorney in most cases) or subject himself to the "embarrassment" of going to court (as the debtor has already voluntarily subjected himself to the bankruptcy process).

The Eleventh Circuit failed to distinguish between the filing of a proof of claim and filing a debt collection lawsuit. *See In re Lagrone*, Adv. P. No. 14-

A-00578, 2015 WL 273373, at *6 (Bankr. N.D. Ill. Jan. 21, 2015). First, in collection lawsuits, the "debtors themselves must assert the statute of limitations in an answer." *Id.* In contrast, bankruptcy consumers not only have the benefit of the information the claimant is required to provide concerning the timeliness of the claim (*see supra*, pp. 11-12), but they also "have the benefit of a trustee with a fiduciary duty to all parties" to examine and object to proofs of claim as appropriate. *Id.* Second, the stakes for a consumer in bankruptcy are lower than the stakes for a consumer in a collection action. *See id.* at *7. The result of a successful collection action is a personal judgment against the consumer, while the result of a successful proof of claim "does not result in collection from the debtor personally." *Id.*

Finally, in a collection lawsuit, the debtor is in a defensive posture and must seek and retain counsel if representation is desired. *Id.* However, as explained above (*see supra*, p. 23), a debtor in bankruptcy likely already has counsel when the proof of claim is filed, and the attorney can advise the debtor "about the existence of the statute of limitations defense and file an objection if the trustee does not." *In re Lagrone*, Adv. P. No. 14-A-00578, 2015 WL 273373, at *7.

CONCLUSION

Amicus curiae DRI respectfully requests that the Court grant the petition for writ of certiorari.

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