

## **Banking and Finance Law Daily Wrap Up, TOP STORY—7th Cir.: Filing a time-barred claim in bankruptcy not an FDCPA violation, (Aug. 11, 2016)**

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By Richard A. Roth, J.D.

Debt collectors that filed accurate proofs of claim on time-barred debts in consumers' bankruptcy cases did not engage in false, deceptive, misleading, unfair, or unconscionable debt collection practices, the U.S. Court of Appeals for the Seventh Circuit has decided. As a result, the debt collectors did not violate the Fair Debt Collection Practices Act by filing their claims, the court said, even though the Seventh Circuit had previously determined that suing on a stale claim is a violation (*Owens v. LVNV Funding, LLC*, Aug. 10, 2016, Flaum, J.).

As outlined by the court, the significant facts in the three consolidated cases were the same: debt buyers filed proofs of claim in consumers' bankruptcy cases. All of the filings outlined the claims in a factually accurate manner, all of the consumers were represented by attorneys, all of them objected to the claims under the statutes of limitations, and all of the claims were rejected by the bankruptcy courts. All of the consumers then sued the debt collectors, alleging that filing a time-barred proof of claim violated the FDCPA.

**What's a "claim" in bankruptcy?** The court first rejected the consumers' attempt to narrow the bankruptcy definition of "claim" to only legally enforceable obligations. If that definition were correct, then filing a proof of claim on a stale debt would automatically be an FDCPA violation, the court conceded. However, the bankruptcy definition actually is much broader, encompassing claims that were characterized as unmatured or contingent. This implies that stale claims are permissible.

The Bankruptcy Code expects that claims will be filed for unenforceable debts and that the bankruptcy court will disallow such claims, the court said. It is true that this could result in some unenforceable debts slipping through, the court conceded, but the requirement that a proof of claim include details about the debt would help prevent this, including by demonstrating the timeliness or untimeliness of the claim.

**No FDCPA violation.** Of course, a creditor's ability to file a proof of claim on a time-barred debt under the Bankruptcy Code did not mean that doing so would not violate the FDCPA, the court continued. However, in this case, the claims were not false, deceptive, or misleading.

The consumers conceded that the proofs of claim gave complete and accurate information about the debts, the court pointed out. The consumers all had attorneys and, given the information in the filings, "a reasonably competent lawyer would have had no trouble evaluating whether the debt was timely."

**Precedent disregarded.** The court was unpersuaded that its opinion in *Phillips v. Asset Acceptance, LLC*, compelled a decision that the FDCPA had been violated. In *Phillips*, a different three-judge panel of the Seventh Circuit decided that filing a collection suit on a time-barred debt would violate the FDCPA. However, the factors that led to the *Phillips* ruling were not present in the context of bankruptcy court proceedings, the court said.

A consumer being sued might not know about the statute of limitations or might not recall the debt at all, the court explained. Alternatively, a consumer might choose to surrender rather than litigate a collection suit. These concerns were not present in bankruptcy proceedings.

**Dissenting opinion.** Chief Judge Woods disagreed with the other two members of the panel. According to the dissenter, Seventh Circuit precedent makes clear that misleading a consumer about the collectability of a debt is a violation, and a bankruptcy court proof of claim is just as misleading as the collection suit found to be a violation in *Phillips*.

Contrary to the majority's belief, an effort to collect a time-barred debt is not a claim permitted by the bankruptcy rules, she continued. Such a debt is neither contingent nor unmatured.

When a creditor knows that a debt is time-barred, it should not be attempting to collect it in bankruptcy, according to the dissenting opinion. Nearly 10 percent of recent bankruptcy cases filed in the Chicago district were filed by consumers without attorneys, she pointed out, and these consumers need to be protected.

**Differing interpretations.** U.S. appellate courts have reached contrary conclusions on whether filing bankruptcy court proofs of claim on stale debts violates the FDCPA. For example, the Eleventh Circuit recently decided in *Johnson v. Midland Funding, LLC* that such a filing is a violation (see *Banking and Finance Law Daily*, May 25, 2016). The bankruptcy code does not displace the FDCPA, in the Eleventh Circuit's opinion. Creditors can file claims on stale debts, but they are liable for the consequences if they do so.

However, the Seventh Circuit agreed with the Second and Eighth Circuits that filing a claim is not necessarily an FDCPA violation. Most recently, the Eighth Circuit decision in *Nelson v. Midland Credit Management, Inc.*, found there is no violation because bankruptcy court procedures adequately protect consumers, making the application of the FDCPA unnecessary (see *Banking and Finance Law Daily*, July 12, 2016).

The cases are No. 15-2044, No. 15-2082, and No. 2109.

Attorneys: David P. Leibowitz (Allen Chern Law LLC) for Alphonse D. Owens. David J. Philipps (Philipps & Philipps) for Tia Robinson. Jeanine Kerridge (Barnes & Thornburg LLP) for LVNV Funding, LLC. Rosa M. Tumialan (Dykema Gossett PLLC) for eCast Settlement Corp.

Companies: eCast Settlement Corp.; LVNV Funding, LLC

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