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Eleventh Circuit Extends FDCPA to the Filing of Bankruptcy Proofs of Claim

The United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") has become the first circuit court to extend sections 1692e and 1692f of the Fair Debt Collection Practices Act ("FDCPA") to proofs of claim filed in a bankruptcy case, ruling that a debt collector is prohibited from filing a proof of claim on debt that is barred by the applicable state statute of limitation. In *Crawford v. LVNV Funding, LLC, et al. (In re Crawford)*,[1] the Eleventh Circuit rejected lower court decisions dismissing an adversary proceeding brought by a bankruptcy debtor alleging FDCPA violations against a debt collector who filed a proof of claim for stale debt. The Eleventh Circuit applied a "least-sophisticated consumer" standard to hold that the filing of a time-barred claim was deceptive, misleading, unconscionable and unfair under FDCPA §§ 1692e and 1692f. To reach this conclusion, the Eleventh Circuit analogized filing a proof of claim to filing a lawsuit. The Eleventh Circuit's decision in *Crawford* could have significant implications for both debt collectors and actual creditors because it leaves open the possibility that the FDCPA and related state corollary statutes may be applicable to bankruptcy proofs of claim.

Case Background

Appellant Stanley Crawford ("Crawford") owed an unsecured pre-petition debt (the "Debt") that was charged off by the original creditor in 1999 and subsequently sold. On February 2, 2008 (the "Petition Date"), Crawford filed a voluntary petition under Chapter 13 of the Bankruptcy Code. After the Petition Date and well after the applicable state statute of limitations expired, LVNV Funding, LLC ("LVNV"), purchased the Debt and filed an unsecured proof of claim (the "Claim") in Crawford's bankruptcy case. Neither Crawford, who was represented by counsel in his bankruptcy, nor the Chapter 13 Trustee objected to LVNV's Claim during the bankruptcy proceeding, and LVNV ultimately received distributions from the estate in payment of its Claim. In May 2012, Crawford commenced an adversary proceeding against LVNV; its servicer, Resurgent Capital Services, L.P. ("Resurgent"); and several other defendants[2] objecting to the Claim and alleging a violation of the automatic stay and violations of the FDCPA. Crawford subsequently withdrew his claim for stay violations. The Bankruptcy Court granted motions to dismiss filed by LVNV and Resurgent, relying on a Northern District of Alabama case, *In re Simpson*, to conclude that filing of a proof of claim, even one barred by the statute of limitations, does not constitute a violation of the FDCPA.[3]

[1] *See Crawford v. LVNV Funding, LLC, et al. (In re Crawford)*, Case No. 13-12389, *Opinion* (11th Cir. Jul. 10, 2014) ("*Crawford*").

[2] The Defendants are collectively referred to as "LVNV."

[3] *See Crawford v. LVNV Funding, LLC, et al. (In re Crawford)*, Case No. 08-30192-DHW, A.P. No. 12-3033-DHW, Order Dismissing Adversary Proceeding [A.P. D.I. 20] (Bankr. M.D. Ala. Jul. 12, 2012). *See also In re Simpson*, 2008 WL 4216317 (N.D. Ala. Aug. 29, 2008).

The United States District Court for the Middle District of Alabama (the "District Court") affirmed on appeal, noting that "the elephantine body of persuasive authority weighs against Appellants' position."[4] The District Court concluded that Crawford made no allegations of any conduct that would amount to an FDCPA violation, LVNV's filing of the Claim was not an attempt to collect a debt, and even if filing the Claim was determined to be an attempt to collect a debt, LVNV still did not engage in behavior that would violate the FDCPA.[5] Crawford appealed the District Court's decision to the Eleventh Circuit.

The Eleventh Circuit Decision

The Eleventh Circuit reversed the lower court decisions, making two significant holdings: (1) that the filing of a proof of a claim constitutes an attempt to collect a debt covered by the FDCPA, and (2) that the filing of a proof of claim to collect a stale debt violates the FDCPA.[6] In so holding, the Eleventh Circuit essentially equates filing a proof of claim with initiating a lawsuit. The Court relied on Section 1692e, which prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt"[7] and Section 1692f, which prohibits a debt collector from using "unfair or unconscionable means to collect or attempt to collect any debt."[8] Even though Crawford was represented by counsel in his bankruptcy case, the Eleventh Circuit applied a "least-sophisticated consumer" standard to conclude that LVNV's filing of a time-barred claim was deceptive, misleading, unconscionable and unfair under the FDCPA.[9]

In so holding, the Eleventh Circuit likened LVNV's filing of the Claim to threatening to sue or suing on a time-barred debt and relied on case law from other circuits holding that threatened or actual litigation to collect on a time-barred debt violates the FDCPA.[10] In particular, the Eleventh Circuit relied on a Seventh Circuit opinion reasoning that

> the FDCPA outlaws 'stale suits to collect consumer debts' as unfair because (1) 'few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts' and would therefore 'unwittingly acquiesce to such lawsuits'; (2) 'the passage of time…dulls the consumer's memory of the circumstances and validity of the debt'; and (3) the delay in suing after the limitations period 'heightens the probability that [the debtor] will no longer have personal records' about the debt.[11]

In a bankruptcy context, the Eleventh Circuit explained, the limitations period indicates "a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt."[12] Like the filing of a stale lawsuit, a debt collector's filing of a time-barred proof of claim constitutes

[4] *See Crawford v. LVNV Funding, LLC, et al. (In re Crawford)*, Case No. 2:12-CV-701-WKW, Memorandum Opinion and Order [D.C. D.I. 18] (M.D. Ala. May 9, 2013).

[5] *See id*. at 5.

[6] *See Crawford*, Case No. 13-12389 at 2.

[7] 15 U.S.C. § 1692e.

[8] 15 U.S.C. § 1692f.

[9] *In re Crawford*, Case No. 13-12389 at 12.

[10] *Id.* at 9.

[11] *Id.* at 10 (quoting *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013)).

[12] *Id.* at 11.

unfair, unconscionable, deceptive and misleading conduct in violation of the FDCPA because it creates the misleading impression that the debt collector may still be able to legally enforce the debt and will be deemed an allowed claim unless the debtor or the trustee takes the time and resources to file an objection.[13]

LVNV argued that its filing of the Claim was not a "collection activity," but the Eleventh Circuit remained unpersuaded by this argument, holding that the filing of a proof of claim fell well within the broad prohibitions of §§ 1692e and 1692f as it was a "means" by which to collect a debt.[14] The Eleventh Circuit also rejected LVNV's argument that to consider the filing of a proof of claim as a "means" used "in connection with the collection of a debt" would contradict the automatic stay of 11 U.S.C. § 362(a)(6). The automatic stay, the Eleventh Circuit explained, prohibits debt collection outside the bankruptcy proceeding, but does not prohibit the filing of a proof of claim, which is the first step in collecting a debt in bankruptcy.[15]

Implications

Notably, the Eleventh Circuit did not decide whether the Bankruptcy Code preempts the FDCPA in the context of a proof of claim filed in a bankruptcy proceeding. While it acknowledged that several circuits, including the Second, Third, Seventh and Ninth Circuits, have held that the Bankruptcy Code preempts the FDCPA in a bankruptcy context, the Eleventh Circuit did not address the issue directly because LVNV did not raise the issue below. The result in *Crawford* may very well have been different if LVNV had raised such a contention.

The Eleventh Circuit also did not address whether a bankruptcy estate can be considered a "consumer" for FDCPA purposes, but its application of the FDCPA in a bankruptcy context tacitly suggests that the estate may well fit into the definition of "consumer."

The Eleventh Circuit's holding in *Crawford* reflects a dramatic shift in law. As recognized by the district court in *Crawford*, many courts have concluded that filing a proof of claim in a bankruptcy case cannot form the basis for an FDCPA claim. Contrary to the Eleventh Circuit's rationale in *Crawford*, other courts have observed that "the FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself."[16] The Eleventh Circuit's ruling in *Crawford* likely will result in increased litigation against debt collectors under the FDCPA and, potentially, actual creditors under corollary state court statutes, as debtors test the scope of the Eleventh Circuit's ruling.

[13] *Id*.

[14] *Id*. at 13.

[15] *Id*. at 14.

[16] *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. Oct. 5, 2010) (holding that the filing of a proof of claim in bankruptcy court could not serve as the basis for an FDCPA action because the filing of the claim could not constitute the sort of abusive debt collection practice proscribed by the FDCPA).

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