No. 16-348

IN THE
# Supreme Court of the United States

MIDLAND FUNDING, LLC,

*Petitioner*,

v.

ALEIDA JOHNSON,

*Respondent*.

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

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

In the decision below, the Eleventh Circuit held that certain bankruptcy creditors are subject to liability under the Fair Debt Collection Practices Act ("FDCPA") for filing proofs of claim on time-barred debts in *full* compliance with the Bankruptcy Code and Rules. That result comes as a rude and expensive surprise to bankruptcy creditors, who have long and correctly understood that the Bankruptcy Code expressly authorizes such claims (as the Court of Appeals conceded). Pet. App. 7a. The Eleventh Circuit's ruling, however, misinterprets both the FDCPA and the Bankruptcy Code, needlessly pitting one statute

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

against the other and causing untold damage to the bankruptcy system.

Critically, the Eleventh Circuit's ruling sweeps far more broadly than the purportedly "narrow range of actors and claims" identified by the decision below. Pet. App. 10a. As a result, the Eleventh Circuit's decision—if left unchecked—will subject a broad range of bankruptcy participants such as major banks and bankruptcy lawyers to liability under conflicting legal standards. It will also harm the very debtors the FDCPA was designed to protect, generate a number of additional conflicts between the FDCPA and the Bankruptcy Code, and spur a rash of litigation that seeks not to remedy any actual harm to debtors but instead to benefit the FDCPA bar.

*Amicus* therefore respectfully urges this Court to overturn the judgment below, and confirm that there can be no FDCPA liability for filing a truthful—if potentially unenforceable—proof of claim in bankruptcy.

## SUMMARY OF ARGUMENT

**I.** The Eleventh Circuit's reading of the FDCPA and the Bankruptcy Code was premised in large part on the erroneous view that its decision would affect only a "narrow subset" of Chapter 13 creditors defined as "debt collectors" under 15 U.S.C. § 1692a(6). Pet. App. 9a. But in fact, the court's extension of the FDCPA threatens a broad range of bankruptcy participants with liability for filing accurate proofs of claim—actions the decision below repeatedly conceded are expressly authorized by the Bankruptcy Code. Pet. App. 7a, 8a, 9a, 12a. Some courts and administrative agencies have broadly interpreted the term "debt collector" to cover far more than prototypical debt-collection companies. For example, "debt collectors" has been construed to encompass (i) major banks that regularly buy defaulted mortgage loans, and (ii) attorneys regularly involved in consumer debt litigation.

The consequences of affirmance in this case thus would sweep far more widely than the Court of Appeals posited. By subjecting mortgage creditors and bankruptcy attorneys—some of Chapter 13's most common and active participants—to the risk of FDCPA liability, the Eleventh Circuit's approach could severely distort a substantial portion of Chapter 13 bankruptcy proceedings.

**II.** The ruling below, if allowed to stand, would also ensure that bankruptcy creditors covered (or arguably covered) by the FDCPA will be forced to make complex legal judgments involving uncertain questions of state law prior to filing a proof of claim. The Eleventh Circuit failed to recognize the complexities involved in determining whether a debt is time-barred. And although the Court of Appeals suggested that creditors could take advantage of the FDCPA's bona fide error provision, 15 U.S.C. § 1692k(c), a patchwork of conflicting decisions by the lower courts means that creditors will often be subject to FDCPA liability for good faith yet ultimately erroneous interpretations of state law.

The obvious, and troubling, result is that many bankruptcy creditors will forfeit their rights to file proofs of claim on even arguably time-barred debts. That outcome will not benefit most debtors. In the vast majority of personal bankruptcy cases, the amount that debtors pay into their bankruptcy plans "is *unaffected* by the number of unsecured claims that are filed." *In re Dubois*, 834 F.3d 522, 531-32 (4th Cir. 2016) (emphasis added). In fact, deterring creditors from filing proofs of claim on potentially time-barred debts will actually undercut the FDCPA's goal of protecting debtors. When proofs of claim on unscheduled debts are not submitted, the debt is not consolidated with other claims and is not discharged, leaving debtors subject to lawful collection activity and—if the debt turns out not to be time-barred—even lawsuits after they emerge from bankruptcy.

The counterproductive effects of applying the FDCPA in bankruptcy confirm what this Court recognized in *Kokoszka v. Belford*: Statutes like the FDCPA are designed to help prevent, not to regulate, bankruptcy. *See* 417 U.S. 642, 650-51 (1974). Once a debtor declares personal bankruptcy, he is protected by the existing structural safeguards under the Bankruptcy Code. Layering FDCPA liability over those protections will result in significant numbers of claims being left out of bankruptcy proceedings—thwarting the bankruptcy system's goal of collective treatment of claims, and depriving debtors of the fresh start offered by the Bankruptcy Code.

**III.** The decision below also creates a number of conflicts between the FDCPA and the Bankruptcy Code. Most obvious is the Eleventh Circuit's imposition of liability under the FDCPA for the exercise of a "right" created by the Bankruptcy Code. Pet. App. 8a. In addition, by defining a proof of claim in bankruptcy as an action to collect a claim against the debtor, the decision places the Bankruptcy Code's automatic stay provision (which prohibits attempts to collect a debt against a debtor in bankruptcy) directly at odds with the Code's express approval of proofs of claim. The FDCPA's detailed notice and dispute provisions are also likely triggered by the Eleventh Circuit's extension of FDCPA liability into bankruptcy, causing additional conflicts with the claims adjudication process and spawning confusion for creditors and debtors alike. These conflicts further demonstrate that the FDCPA has no application in the context of personal bankruptcy.

**IV.** Finally, imposing FDCPA liability for the filing of accurate proofs of claim in bankruptcy would exacerbate the already booming business of FDCPA litigation. Taking advantage of the Act's complexity and its generous remedial provisions, many debtors' attorneys have formed practices that revolve entirely around suing debt collectors, often for good faith, technical violations of the FDCPA. The data regarding this cottage industry is staggering: FDCPA litigation in federal courts has seen a nearly nine-fold increase over the past fifteen years, and just a few attorneys in the entire country are responsible for a significant portion of this litigation explosion. If this Court were to affirm the Eleventh Circuit's extension of the FDCPA, it would magnify the current problem by giving rise to an untold number of new FDCPA suits nationwide predicated on the filing of legitimate proofs of claim in bankruptcy.

## ARGUMENT

### I. THE DECISION BELOW THREATENS A BROAD RANGE OF BANKRUPTCY PARTICIPANTS WITH FDCPA LIABILITY.

The Eleventh Circuit extended FDCPA liability to the filing of accurate (if potentially unenforceable) proofs of claim in bankruptcy, actions the court repeatedly conceded are expressly authorized by the Bankruptcy Code. Pet. App. 7a, 8a, 9a, 12a. In so doing, the court contended that its decision would have a minimal impact on bankruptcy proceedings. The court reasoned that the FDCPA applies only to "debt collectors," and that debt collectors "are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy." Pet. App. 9a; Pet. App. 10a (insisting that its ruling would impact only "a narrow range of actors and claims"). But the Eleventh Circuit greatly understated the scope of the FDCPA's coverage. Courts have interpreted the term "debt collector" to apply, for instance, to major banks and attorneys—both critical and frequent participants in many Chapter 13 bankruptcy proceedings. Thus, the decision below threatens a broad range of bankruptcy participants with liability under the FDCPA for doing *exactly* what the Bankruptcy Code prescribes.

The FDCPA by its own terms imposes liability on only "debt collectors"—those businesses whose "principal purpose" is debt collection, as well as businesses that "regularly" collect debts "owed or due another." 15 U.S.C. § 1692a(6). The prototypical debt collector collects debts on behalf of a creditor and receives a contingency fee in return. *See* Consumer Financial

Protection Bureau, *Fair Debt Collection Practices Act* 9 (Annual Report 2016), *available at* http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf (last visited Nov. 16, 2016) (representing more than half of debt-collection revenues in 2015). On the other hand, "creditors"—those businesses that collect their own debts, such as major banks, utilities, and credit card companies—are generally not subject to the Act's mandates. 15 U.S.C. § 1692a(4).

Some courts and government agencies, however, have expansively interpreted the scope of the term "debt collector" under the FDCPA. In particular, some courts have held that banks—the paradigmatic "creditors" *not* subject to FDCPA liability—qualify as "debt collectors" when they purchase debt already in default, and later attempt to collect that debt. *See*, *e.g.*, *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012) (holding that Deutsche Bank was debt collector with respect to mortgage taken after default); *Frazier v. U.S. Bank Nat'l Ass'n*, No. 11 C 8775, 2013 WL 1337263, at *8 (N.D. Ill. Mar. 29, 2013) (U.S. Bank).[2] The Federal Trade Commission and the Consumer Financial Protection Bureau—the agencies entrusted with enforcement of the FDCPA—agree that the Act covers buyers of debt if the debt was in default at the time of purchase. *See* Brief for FTC as Amicus Curiae Supporting Rehearing En Banc, *Davidson v. Capital One Bank (USA), N.A.*, No. 14-14200, 2015

2 *But see Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 140 (4th Cir. 2016) (holding that purchaser of defaulted debt was not debt collector under FDCPA), *petition for cert. filed*, No. 16-349 (U.S. Sept. 16, 2016); *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1318 (11th Cir. 2015) (same).

WL 5608572, at *9 (11th Cir. Sept. 21, 2015) ("A company that regularly buys debts owed to others and collects them is a 'debt collector' under the FDCPA . . . ."); CFPB, *Fair Debt Collection Practices Act* at 33-34 (describing enforcement action taken against "one of the nation's two largest debt buyers").

That sprawling interpretation of "debt collector" could make major banks frequent targets for FDCPA suits predicated on the filing of proofs of claim in bankruptcy. Many banks regularly buy and sell mortgage and consumer debt portfolios, and portions of those portfolios are often in default at the time of purchase. *See*, *e.g.*, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1311 (11th Cir. 2015) ("Capital One acquired approximately $28 billion of HSBC's United States-based credit card accounts, over $1 billion of which were shown as delinquent or in default at the time of Capital One's acquisition."). Indeed, as of December 2015, just three major banks—Wells Fargo, Bank of America, and JPMorgan Chase—held about $79 billion in residential mortgage and home equity loans that were "acquired with evidence of credit deterioration since their origination."[3]

[3] Wells Fargo & Co., *Annual Report 2015* 64, 176, *available at* https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf (last visited Nov. 16, 2016) ($19 billion); Bank of America Corp., *2015 Annual Report* 71, *available at* http://media.corporate-ir.net/media_files/IROL/71/71595/AR2015.pdf (last visited Nov. 16, 2016) ($17 billion); JPMorgan Chase & Co., *Annual Report 2015* 256, *available at* https://www.jpmorganchase.com/corporate/investor-relations/document/2015-annualreport.pdf (last visited Nov. 16, 2016) ($43 billion). Some portion of this $79 billion in purchased mortgage and home equity loans was acquired via merger with entities that originated the loans. Lower courts are divided on

Under the Eleventh Circuit's approach, any time one of those banks attempts to file a proof of claim on such a mortgage, the bank risks facing an FDCPA lawsuit—not only for proofs of claim on potentially time-barred mortgages, but also for proofs of claim that are arguably "false," "misleading," or "unfair" in any respect. 15 U.S.C. §§ 1692e, f. Thus, far from limiting FDCPA liability to a "narrow subset" of creditors, Pet. App. 9a, the Eleventh Circuit's interpretation of the FDCPA would subject one of bankruptcy's most active classes of creditors to massive liability. *See* Tanta Caraman & Thomas C. Kearns, Executive Office for United States Trustees, *Chapter 13 Disbursement Statistics and the Impact of Case Filing Trends* (2013) (payments to mortgage creditors accounted for over 25 percent of total Chapter 13 disbursements in fiscal year 2013).

The decision below also subjects bankruptcy attorneys to potential FDCPA liability, given this Court's holding that the "FDCPA's definition of 'debt collector' includes attorneys who regularly, through litigation, attempt to collect consumer debts." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 593 (2010) (citing *Heintz v. Jenkins*, 514 U.S. 291 (1995)). To be sure, bankruptcy attorneys would have

whether debt acquired via merger can form the basis of an FDCPA claim. *Compare Brown v. Morris*, 243 F. App'x 31, 35 (5th Cir. 2007) (per curiam) (holding that debt acquired via merger cannot form the basis of FDCPA claim), *with McAdams v. Citifinancial Mortg. Co. of NY*, No. CIV.A.06 27 A, 2007 WL 141128, at *7 (M.D. La. Jan. 16, 2007) (holding that debt acquired via merger may give rise to FDCPA liability). But by any account, billions of dollars in purchased debt are implicated by the broadly interpreted definition of "debt collector" under the FDCPA.

to "regularly" file or defend proofs of claim to trigger FDCPA coverage. *Id.* But "regularity" is often a low bar. *See*, *e.g.*, *Silva v. Mid Atl. Mgmt. Corp.*, 277 F. Supp. 2d 460, 466 (E.D. Pa. 2003) (holding that firm "regularly" collected debt by taking on at least ten debt-collection cases per year, amounting to less than one percent of firm's total caseload). And once a bankruptcy attorney falls within the ambit of the FDCPA, a wide range of litigation-related activity can subject the attorney to FDCPA liability. *Cf. Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808, 810 (7th Cir. 2016) (holding that FDCPA applies to all "pleadings or filings in court" during debt-collection proceeding).

The threat of such expansive FDCPA liability would significantly undermine the ability of bankruptcy attorneys zealously to represent creditors, and would thereby upset the careful balance between creditors' and debtors' rights that Congress struck in the Bankruptcy Code. *See* S. Rep. No. 95-989, at 12 (1978) (explaining that the "basic purpose" of Chapter 13 is "to permit an individual to pay his debts" while "fairly distributing the funds deposited [in bankruptcy] to creditors until all debts have been paid").

The consequences of affirmance in this case thus would sweep far more widely than the Court of Appeals posited. Rather than affecting just a small group of creditors, the Eleventh Circuit's rule could severely distort a substantial portion of Chapter 13 bankruptcy proceedings.

## II. THE DECISION BELOW HARMS THE BANKRUPTCY SYSTEM BY PENALIZING PARTICIPATION IN THE CLAIMS ADJUDICATION PROCESS.

The Eleventh Circuit's rule will force a broad range of bankruptcy participants to make complex legal judgments about whether a debt is time-barred *prior* to exercising their right to file a proof of claim in bankruptcy, instead of allowing those questions to be decided in the claims adjudication process as envisioned by the Bankruptcy Code. And under the decision below, bankruptcy creditors and their attorneys will be threatened with potential liability even for good faith interpretations of state law. The obvious result is that certain creditors, fearing FDCPA liability, will forgo their rights under the Bankruptcy Code, filing fewer proofs of claim on arguably time-barred debts. That development would be troubling for the entire bankruptcy system. The decision below plainly harms creditors, but it also fails to provide any countervailing protections to debtors, who are already covered by a network of protections in bankruptcy. Furthermore, the incentives created by the decision will actually harm debtors by causing liabilities to be unaddressed in bankruptcy—depriving debtors of the fresh start promised by the Bankruptcy Code and thwarting the bankruptcy system's goal of collective treatment of claims.

### A. The Eleventh Circuit's Rule Subjects Bankruptcy Participants Covered By The FDCPA To Liability For Good Faith Interpretations Of State Law.

The Eleventh Circuit acknowledged, as it must, that its extension of FDCPA liability will leave bankruptcy creditors that are covered (or arguably covered) by the definitional provisions of the FDCPA "vulnerable to a claim" under that statute any time they file a knowingly time-barred proof of claim. Pet. App. 7a. Contrary to the Eleventh Circuit's assurances, there is good reason to believe that the purported limitation of FDCPA liability to "'knowingly' time-barred" claims will *not* "limit application of the FDCPA to a narrow range of . . . claims." Pet. App. 10a. Importantly, the decision below failed to recognize that determining whether a debt is time-barred is not always easy. Thus, the Eleventh Circuit's rule would expose creditors to conflicting standards of liability in the lower courts for good faith—but ultimately erroneous—interpretations of state law.

A creditor attempting to determine whether a debt is time-barred would often have to analyze (i) which state's law applies, (ii) which limitations period applies, and (iii) whether the limitations period has been tolled.

**Choice of law:** Creditors attempting to avoid the liability threatened by the decision below would first have to determine which state's law provides the applicable statute of limitations. Unfortunately for them, "[c]ontracts is one of the most complex and most confused areas of choice of law." Restatement (Second) of Conflict of Laws ch. 8, intro. note (1971). Even when a contract contains a choice-of-law provision, some courts hold that "'contractual choice-of-law clauses incorporate only substantive law, not procedural provisions such as statutes of limitations.'" *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 834-35 (N.D. Ohio 2010) (citation omitted) (applying Ohio statute of limitations notwithstanding contractual provision stating New Hampshire law governed). *But see McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1275 (M.D. Fla. 2008) (holding in FDCPA action that contractual choice-of-law provision incorporated Delaware statute of limitations).

Uncertainty also persists in the absence of a binding contractual choice-of-law clause. The law of the forum state provides one possible source for the applicable statute of limitations. Restatement (Second) of Conflict of Laws § 142(2) (1971) ("An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143."). Under state law borrowing statutes, however, courts must in certain circumstances look to the law of the state where the cause of action accrued. *See id.* § 143; *Hamid v. Stock & Grimes, LLP*, No. CIV.A. 11-2349, 2012 WL 2135502, at *2 (E.D. Pa. June 12, 2012) (holding that state where claim accrued provided statute of limitations under Pennsylvania choice-of-law statute); *cf. Cope v. Anderson*, 331 U.S. 461, 464-68 (1947) (discussing operation of state law "borrowing statutes" in determining which state's law governs).

**<u>Applicable limitations period</u>:** In addition to facing choice-of-law uncertainties, creditors must determine precisely which limitations period applies under governing state law. This analysis may involve unsettled questions of state law, leaving potential filers to make educated guesses on how a future federal court will interpret state law.

A particularly thorny problem involves whether an action to collect on credit card debt should be considered an action based on a written agreement. *See*, *e.g.*, *Uche v. N. Star Capital Acquisition, LLC*, No. 4:09CV3106, 2010 WL 5256350, at *7 (D. Neb. Dec. 15, 2010) (noting in FDCPA action that "Nebraska law is unsettled regarding whether 'collections of third-party (bank) credit card debt' actions are actions based on written agreements or actions based on 'open accounts,'" which would trigger different limitations periods). As just one example, a federal district court denied a group of defendants' motion for summary judgment on an FDCPA claim notwithstanding the defendants' reliance on a prior decision of the Iowa Court of Appeals construing a substantially identical credit card agreement as a "written agreement" for purposes of the Iowa statute of limitations. *New v. Gemini Capital Grp.*, 859 F. Supp. 2d 990, 998 (S.D. Iowa 2012). The district court recognized that the defendants "understandably" may have relied on the prior state court opinion "when they considered whether to file suit." *Id.* Nevertheless, because that opinion was unpublished, the district court held that the defendants were not shielded from FDCPA liability when a subsequent state court determined that the defendants' agreement was subject to another, shorter statute of limitations. *Id.*

**Tolling of the limitations period:** Further complicating matters, actions that would otherwise seem to be plainly barred by the applicable statute of limitations may actually be timely due to tolling of the limitations period. Several state statutes, for example, "toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state." *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 18 (Del. 2005); *accord*, *e.g.*, Mich. Comp. Laws § 600.5853.

Relatedly, many states provide that a statute of limitations may be tolled or restarted (e.g., where a debt is revived) by a debtor's acknowledgement of a debt or a promise to pay. *See*, *e.g.*, *Owens v. LVNV Funding, LLC*, 832 F.3d 726, 732 n.6 (7th Cir. 2016) (noting that under Illinois law "the statute of limitations period can be restarted by the debtor's conduct, such as by making a payment on or promising to pay the debt"), *petition for cert. filed*, No. 16-315 (U.S. Aug. 26, 2016).

This is just a brief sketch of the problems faced by creditors subject to the FDCPA under the Eleventh Circuit's approach. Tellingly, even judges who agree with aspects of the Eleventh Circuit's decision concede the complications faced by creditors in this context. *See id.* at 740 (Wood, J., dissenting) (recognizing that there will be cases where the statute of limitations "is the subject of a fair dispute").

In addition to ignoring the complications in determining whether a debt is time-barred, the Eleventh Circuit also underestimated the risks faced by bankruptcy participants in claiming that FDCPA liability under its rule will extend only to proofs of claim on "knowingly" time-barred debts. Pet. App. 10a. But the Courts of Appeals (including the Eleventh Circuit) uniformly describe the FDCPA as "a 'strict liability' statute." *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1259 n.4 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015); *accord Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 n.7 (3d Cir. 2011) ("The characterization of the FDCPA as a strict liability statute is generally accepted.") (collecting cases). Thus, to make out a prima facie case of an FDCPA violation under the decision below, the debtor need not prove that the creditor *knew* the claim was time-barred. Instead, to avoid the "severe remedy of civil liability for damages," Pet. App. 13a, a creditor would have an affirmative obligation to show "by a preponderance of evidence" that the proof of claim on a time-barred debt was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c); Pet. App. 10a.

The Eleventh Circuit's gesture to the purported "safe harbor" of Section 1692k(c), Pet. App. 10a, will also prove illusory for many creditors. As this Court recognized in *Jerman*, the Courts of Appeals are divided "about whether 15 U.S.C. § 1692k(c) applies to violations of the FDCPA resulting from a misinterpretation of the requirements of state law." 559 U.S. at 580 n.4 (identifying conflicting decisions from Eighth and Tenth Circuits). The Sixth and Eighth Circuits, as well as a number of district courts, have affirmatively held that "mistakes of state law can give rise to liability" under the FDCPA. *Wise v. Zwicker & As-*

*socs., P.C.*, 780 F.3d 710, 713 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 793 (2016); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451-52 (8th Cir. 2001) (rejecting application of Section 1692k(c) to mistaken legal interpretation of a Minnesota garnishment statute).[4] These problems are especially acute where, as is often the case, the relevant state courts have not issued an authoritative interpretation of the legal question at issue. *See Sayyed v. Wolpoff & Abramson, LLP*, 733 F. Supp. 2d 635, 645 n.6 (D. Md. 2010) (explaining that "the unseen hazards to the collecting attorney would seem to be considerable" when errors involve misinterpretations of state law).

The Fifth and Eleventh Circuits, meanwhile, have issued opinions reserving judgment on this crucial question—leaving creditors in limbo as to whether their good faith legal analysis may nevertheless subject them to FDCPA liability in those jurisdictions. *See Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1273 n.13 (11th Cir. 2011) (noting that "[w]e also need not address this issue"); *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 614 F. App'x 146, 156 (5th Cir. 2015) (per curiam) (declining to address the issue "on which the Supreme Court expressly reserved judgment" because any mistake ultimately turned on the requirements of the FDCPA), *cert. denied*, 136 S. Ct. 1160 (2016).

Finally, other courts, including the Seventh and Tenth Circuits, have held that a debt collector could attempt to establish a bona fide error under Section

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[4] *See also*, *e.g.*, *Ballou v. Law Offices Howard Lee Schiff, P.C.*, 713 F. Supp. 2d 79, 82 (D. Conn. 2010); *Hamid*, 2012 WL 2135502, at *2.

1692k(c) for mistakes of state law. *E.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1121 (10th Cir. 2002) (concluding that Section 1692k(c) applied to misinterpretation of a Utah dishonored check statute); *Jenkins v. Heintz*, 124 F.3d 824, 833 (7th Cir. 1997) (rejecting interpretation of FDCPA that would foreclose bona fide error defense for claim "not legally authorized by the contract with the debtor"); *see also Gray v. Suttell & Assocs.*, 123 F. Supp. 3d 1283, 1288-89 (E.D. Wash. 2015) (reserving judgment but recognizing pre-*Jerman* Ninth Circuit case law generally excluding mistakes of law from Section 1692k(c)). Assuming that bankruptcy creditors would be permitted to attempt a showing of bona fide error under Section 1692k(c), creditors would still be faced with time-consuming and uncertain litigation revolving around the intent behind their misapprehension of state law principles.

The conflicts in the lower courts over the scope of Section 1692k(c)'s safe harbor—and the difficult questions of intent and legal judgment remaining even if a bona fide error defense were available nationwide, which it is not—further support reversal.

**B. The Chilling Effect Of The Eleventh Circuit's Rule Will Also Harm Debtors.**

Faced with the threat of FDCPA liability for good faith interpretations of state law, bankruptcy creditors covered by the FDCPA may rightfully conclude that any attempt to file a proof of claim on an arguably time-barred debt will simply buy them a lawsuit and choose to forgo filing such proofs of claim altogether. That result provides no benefit to, and affirmatively disadvantages the very debtors the FDCPA was designed to protect. This buttresses the conclusion that the FDCPA was never intended to regulate the bankruptcy claims adjudication process.

The point of the bankruptcy system is to resolve, once and for all, the debts of the estate. The chilling effect of the Eleventh Circuit's rule "'undermines the bankruptcy system's interest in 'the collective treatment of all of a debtor's creditors at one time.'" *In re Dubois*, 834 F.3d 522, 531 (4th Cir. 2016) (quoting 1 Norton Bankr. L. & Prac. 3d § 3:9 (2016)).

Keeping proofs of claim out of bankruptcy will provide no financial benefit to the vast majority of debtors. That is because "Chapter 13 debtors typically do not enter into 100 percent repayment plans." 834 F.3d at 532. In that circumstance, the filing of additional claims against a Chapter 13 estate may result in unsecured creditors receiving "a smaller share of available funds but *the total amount paid by the debtor remains unchanged*." *Id.* (emphasis added); *accord*, *e.g.*, *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749, 752 (8th Cir. 2016).[5]

What is more, deterring the filing of proofs of claim on arguably time-barred debts will actually harm debtors. If a "debt is unscheduled and no proof of claim is filed, the debt continues to exist" after bankruptcy. *In re Dubois*, 834 F.3d at 531. Time-barred debts are particularly prone to being accidentally left out of the debtor's bankruptcy petition due to the passage of time. *See Crawford*, 758 F.3d at 1261 (noting that the "debtor's memory of a stale debt

[5] The same holds true in Chapter 7 proceedings. Most Chapter 7 debtors have no financial interest in the bankruptcy estate. *See* 4 Norton Bankr. L. & Prac. 3d § 86:29 (2016).

may have faded and personal records documenting the debt may have vanished"). After bankruptcy, even if the debt turns out to be time-barred, the creditor "may lawfully pursue collection activity apart from filing a lawsuit." *In re Dubois*, 834 F.3d at 531. But if it turns out that the debt is *not* time-barred, the debtor has bigger problems. In that case, a creditor could proceed to file a lawsuit against a debtor who just emerged from bankruptcy. Either result denies the "'honest but unfortunate debtor'" the "'fresh start'" that is "[t]he principal purpose of the Bankruptcy Code." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)).

The counterproductive effects of extending FDCPA liability to the filing of accurate proofs of claim point to a larger structural reason why the FDCPA has no place in personal bankruptcy proceedings: The FDCPA was designed to prevent—not to regulate—personal bankruptcy. As this Court explained in *Kokoszka v. Belford*, the Consumer Credit Protection Act ("CCPA")—the predecessor statute to the FDCPA—performs an entirely different function than the bankruptcy laws: "[T]he Consumer Credit Protection Act sought to prevent consumers from entering bankruptcy in the first place," but "if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act." 417 U.S. 642, 651 (1974).

The FDCPA, like the CCPA, was designed to *prevent* the onset of personal bankruptcy. *See* 15 U.S.C. § 1692(a) ("Abusive debt collection practices contribute to the number of personal bankruptcies . . . ."). Tracking the reasoning in *Kokoszka*, multiple Courts of Appeals have thus recognized that the FDCPA's purpose to protect "unsophisticated consumers from unscrupulous debt collectors" is simply "not implicated when a debtor is instead protected by the [bankruptcy] court system and its officers." *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (internal quotation marks omitted); *accord Nelson*, 828 F.3d at 752 (citing *Simmons* and holding that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA").

There is at bottom no reason to adopt the Eleventh Circuit's skewed interpretation of the FDCPA, which would subject a broad range of bankruptcy participants to expansive liability for actions expressly permitted by the Bankruptcy Code, undermine the basic purposes of the Code, and harm the very debtors the FDCPA was designed to protect.

## III. IMPOSING LIABILITY FOR FILING ACCURATE PROOFS OF CLAIM WILL GENERATE CONFUSION AND CONFLICTS BETWEEN THE FDCPA AND THE BANKRUPTCY CODE.

The Eleventh Circuit's ruling threatens to impose sweeping FDCPA liability for the filing of accurate claims in bankruptcy notwithstanding its "recogni[tion] that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." Pet. App. 7a. And while the decision below insisted that "the FDCPA and the Code can coexist," Pet. App. 13a, it acknowledged that by taking actions specifically permitted by the Bankruptcy Code, a bankruptcy creditor "is simply opening himself up to a potential lawsuit for an FDCPA violation." Pet. App. 14a. The statutory conflict created by the Eleventh Circuit's rule is patent. Importing the FDCPA into bankruptcy proceedings will create other serious conflicts between the Bankruptcy Code and the FDCPA that will spawn additional confusion. These added complications provide further reason to resist the Eleventh Circuit's extension of FDCPA liability to actions in bankruptcy.

There is nothing "simpl[e]," Pet. App. 14a, about reading one federal statute to outlaw as "unfair" conduct that another federal statute explicitly prescribes. That jarring result is *itself* unfair. And it violates "the most rudimentary rule of statutory construction": "[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion).

Beyond the obvious conflict of imposing liability under the FDCPA for an action "'explicitly contemplate[d]'" by the Bankruptcy Code, Pet. App. 8a (citation omitted), the rule applied below creates a threshold conflict by equating the filing of a proof of claim in bankruptcy with debt-collection activity under the FDCPA. This approach, if followed consistently, would turn every proof of claim into a violation of the Bankruptcy Code's automatic stay provision.

The Eleventh Circuit's prior decision in *Crawford v. LVNV Funding, LLC*, held that filing a proof of claim "is, at the very least, an 'indirect' means of collecting a debt" against a consumer. 758 F.3d at 1262. But Section 362(a)(6) of the Bankruptcy Code bars any action to "collect, assess, or recover a claim *against the debtor* that arose before the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a)(6) (emphasis added). Thus, if filing a proof of claim is an attempt to collect a debt from a consumer debtor, as the decision below implicitly held, then it would logically *also* be an attempt to recover a claim "against the debtor" in violation of the automatic stay. This absurd result places the Bankruptcy Code (which expressly permits the filing of proofs of claim, including for disputed debts, Pet. App. 8a) at war with itself.

This conflict derives from the Eleventh Circuit's misunderstanding of bedrock principles of bankruptcy. It is an elementary proposition of bankruptcy law that "[t]he bankruptcy 'estate' is a separate and distinct legal entity" from the debtor. Charles Jordan Tabb, *The Law of Bankruptcy* § 5.1, at 389 (3d ed. 2014); *accord*, *e.g.*, *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate."). Because a proof of claim asserts a right to payment "against the debtor's estate," *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449 (2007), neither the FDCPA nor the automatic stay applies to the filing of proofs of claim. The FDCPA does not apply because it regulates attempts to collect financial obligations only from natural persons. 15 U.S.C. § 1692a(3) (defining "consumer" as "any natural person obligated . . . to pay any debt"); *id.* § 1692a(5) (defining "debt" as any "obligation of a consumer to pay money" arising from personal, family, or household purposes). And the automatic stay is inapt because a proof of claim is not a claim "against the debtor," 11 U.S.C. § 362(a)(6), but rather "against the debtor's estate," *Travelers*, 549 U.S. at 449.

The Eleventh Circuit's rule also clashes with the notice and other technical requirements of the FDCPA. As the Ninth Circuit's Bankruptcy Appellate Panel explained, "the debt validation provisions required by [the] FDCPA clearly conflict with the claims processing procedures contemplated by the [Bankruptcy] Code and Rules," such that "the provisions of both statutes cannot compatibly operate." *In re Chaussee*, 399 B.R. 225, 238 (B.A.P. 9th Cir. 2008).

Specifically, Section 1692e(11) of the FDCPA requires that in an "initial communication" with the debtor, a debt collector must include certain disclosures. 15 U.S.C. § 1692e(11). In addition, Section 1692g of the FDCPA requires debt collectors to send debtors a notice that includes information concerning the method for disputing the debt "[w]ithin five days" after an initial debt-collection communication. *Id.* § 1692g(a). The problem with applying these provisions to actions in bankruptcy, as several courts have recognized, is that sending such notices to debtors has been held to violate the automatic stay. *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 280 (3d Cir. 2013) ("Several courts have held that sending a § 1692e(11) notice violates the automatic stay."); *In re Chaussee*, 399 B.R. at 238 ("[S]ending [a § 1692g(a)] notice to a debtor in a pending bankruptcy case has been held to violate the automatic stay."). It is "puzzl[ing]" how creditors "can comply with both statutory schemes when the Code dictates they *cease* all collection actions, whereas [the] FDCPA *requires* them to communicate with the debtor in connection with the collection of a debt." *In re Chaussee*, 399 B.R. at 238 (emphases added).[6]

These notices, moreover, "would undoubtedly cause confusion" for consumers due to the differing methods for disputing a debt under the FDCPA and the Bankruptcy Code. *Id.* at 239. For example, the bankruptcy rules permit any party in interest to object to a claim at any time up until thirty days prior to a hearing on that claim. Fed. R. Bankr. P. 3007(a); 11 U.S.C. § 502(a). The FDCPA, by contrast, requires debt collectors to inform debtors that they must dis-

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[6] Some may attempt to avoid this conflict by arguing that proofs of claim are "formal pleading[s]" and are therefore exempt from the FDCPA communication requirements. 15 U.S.C. § 1692e(11) (exempting "formal pleading made in connection with a legal action" from initial written communication requirement); *see also id.* § 1692g(d) (exempting a "communication in the form of a formal pleading in a civil action" from notice requirements in Section 1692g(a)). It is an open question whether a proof of claim is a "formal pleading" for purposes of these exemptions. *See* Fed. R. Civ. P. 7(a) (identifying the only "pleadings [that] are allowed" as complaints, answers, and replies to answers); *In re Beaulieu*, No. EP 99-004, 2001 WL 36384162, at *3 (B.A.P. 1st Cir. Sept. 7, 2001) (holding that the definition of "Pleading" in Rule 7 "does not include a proof of claim"); *In re Lijoi*, 288 B.R. 511, 515 (Bankr. E.D. Tenn. 2002) (holding that "Proof of Claim" "is not a pleading" within the meaning of Rule 7). *But see*, *e.g.*, *Reed v. LVNV Funding, LLC*, No. 14 C 8371, 2015 WL 1510375, at *5 (N.D. Ill. Mar. 27, 2015) (rejecting statutory conflict and holding that proof of claim is a formal pleading in a civil action). In any event, creditors confronting the FDCPA's notice requirements under the Eleventh Circuit's approach will be forced to run the substantial risk of violating either the Bankruptcy Code's automatic stay provision or the FDCPA's notice requirements.

pute the validity of a debt within thirty days of receiving the notice, and that any dispute will trigger an informal debt validation procedure. *See* 15 U.S.C. § 1692g(a)(3)-(4).

On top of that, "a proof of claim filed in a bankruptcy case constitutes prima facie evidence of its validity and is deemed allowed unless and until the debtor [or another interested party] objects to it," whereas the "FDCPA provides that, if the consumer fails to dispute the validity of a debt, that failure may not be construed by any court as an admission of liability by the consumer." *In re Chaussee*, 399 B.R. at 238. Debtors faced with these dueling standards would have to determine whether they need to comply with both the FDCPA and bankruptcy requirements for disputing debts, or whether it is sufficient to follow only one or the other of these conflicting procedures.

There is no justification for injecting this level of uncertainty and confusion into the bankruptcy claims adjudication process. The conflicts created by the Eleventh Circuit's rule are more proof that the FDCPA was never intended to regulate bankruptcy. *See Jerman*, 559 U.S. at 599-600 (explaining that the FDCPA's conduct-regulating provisions "should not be assumed to compel absurd results when applied to debt collecting attorneys").

## IV. THE DECISION BELOW WILL EXACERBATE THE COTTAGE INDUSTRY OF FDCPA LITIGATION.

The FDCPA's plaintiff-friendly features—such as statutory damages and mandatory attorney's fees—have given rise to a cottage industry in which the primary beneficiaries of the Act's protections are not debtors, but debtors' attorneys. Imposing FDCPA liability for filing accurate proofs of claim in bankruptcy would serve only to exacerbate the booming business of FDCPA litigation at the expense of debtors, creditors, and the bankruptcy system as a whole.

**1.** Several features of the FDCPA combine to create a recipe for vexatious litigation. First, the Act imposes numerous technical procedural requirements on debt collectors, while at the same time subjecting debt collectors to vague standards of conduct. *See* 15 U.S.C. § 1692g(a) (setting out detailed notice requirements); *see also id.* § 1692e (prohibiting any "false, deceptive, or misleading" collection methods); *id.* § 1692f (prohibiting any "unfair or unconscionable" collection methods). That combination of detailed and open-ended prescriptions makes minor violations of the Act all but unavoidable. *See Jerman*, 559 U.S. at 618 (Kennedy, J., dissenting).

In addition, the FDCPA imposes harsh civil sanctions for violations of "*any* provision" of the Act. 15 U.S.C. § 1692k(a) (emphasis added). The Act permits a plaintiff to recover actual and statutory damages, including statutory damages in class actions up to the lesser of $500,000 or one percent of the debt collector's net worth. *Id.* § 1692k(a)(2)(B). Moreover, the FDCPA mandates that successful plaintiffs' attorneys recover costs and reasonable attorney's fees. *Id.* § 1692k(a)(3). Costs and attorney's fees in FDCPA cases can be significant; they frequently make up the bulk of the total recovery in a given case. *See*, *e.g.*, *Norton v. Wilshire Credit Corp.*, 36 F. Supp. 2d 216, 221 (D.N.J. 1999) (awarding $58,000 in fees and costs and only $5,800 in actual and statutory damages); *Nguyen v. HOVG, LLC*, No. 14CV837 BTM (RBB), 2015 WL 5476254, at *6 (S.D. Cal. Sept. 15, 2015) (awarding $41,000 in fees and costs and $3,000 in damages).

The upshot is that the FDCPA creates strong incentives to file lawsuits even in cases where debt collectors commit good faith, technical violations of the law that cause no actual harm to debtors. As Justice Kennedy has explained:

> This happens when the plaintiff can recover statutory damages for the violation and his or her attorney will receive fees if the suit is successful, no matter how slight the injury. A favorable verdict after trial is not necessarily the goal; often the plaintiff will be just as happy with a settlement, as will his or her attorney (who will receive fees regardless). The defendant, meanwhile, may conclude a quick settlement is preferable to the costs of discovery and a protracted trial.

*Jerman*, 559 U.S. at 616 (Kennedy, J., dissenting).

**2.** The interaction of the FDCPA's liability and remedial provisions has produced a rash of FDCPA litigation. In fact, the growth in FDCPA litigation over the past decade and a half is so staggering that calling this litigation a mere "cottage" industry is now a genteel understatement.

Since 2001, the number of plaintiffs bringing individual FDCPA claims in federal court has grown by nearly *900 percent*—from around 1,300 plaintiffs in 2001 to over 11,800 plaintiffs in 2015. App. 1a. This litigation bonanza, rather than vindicating debtors who are actually harmed by abusive debt-collection practices, appears to be driven primarily by a small number of attorneys whose practices revolve around suing debt collectors. Statistics compiled by FDCPA Case Listing Service, LLC, a service that tracks federal consumer lawsuits, illustrate the point: Through September 2016, just *ten* law firms represented an astounding 23 percent of the more than 9,500 plaintiffs who brought individual claims under the FDCPA and the Telephone Consumer Protection Act in federal court this year. App 2a. One of the most active consumer litigation attorneys boasts that he has personally "litigated over 5,000 individual Plaintiff's cases," mainly using the FDCPA and an analogous state law. *See* Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Nov. 16, 2016).

This boom in attorney-driven FDCPA litigation has not escaped the notice of courts and commentators. For instance, Justice Kennedy's dissent in *Jerman*, 559 U.S. at 617, discussed at length the "troubling dynamic of allowing certain actors in the system to spin even good faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." And Justice Kennedy was not the first (or last) federal judge or commentator to take heed of the troubling rise in FDCPA litigation. *See, e.g.*, *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (quoting *Jacobson v. Healthcare Fin. Servs.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006)) (recognizing the "cottage industry" that has formed around FDCPA litigation); *see also* Terry Carter, *Payback: Lawyers on Both Sides of Collection Are Feeling Debt's Sting*, 96 A.B.A. J., Dec. 2010, at 41, 43 ("There is a fast-growing cottage industry of lawyers suing debt collectors" under the FDCPA.).

The FDCPA litigation industry imposes costs on creditors and debtors alike. Creditors are harmed because FDCPA suits—particularly class-action suits—can be "used to force settlement even absent fault or injury." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting). That is because "the settlement amounts sought are small enough that debt collectors view settlement as economically advantageous—even where they may possess a meritorious defense." Matthew R. Bremner, Note, *The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553, 1580-81 (2011). But debtors can be victimized by excessive FDCPA litigation as well. Overzealous enforcement of technical violations drives up debtors' borrowing costs and can "divert[] private enforcement efforts away from prosecuting the truly harmful consumer abuses that Congress initially sought to eliminate" in enacting the FDCPA. *Id.* at 1556, 1579 (explaining that suits based on technical FDCPA violations, as opposed to more substantive violations, more "often present facts that are readily certifiable as a class action").

**3.** The current state of FDCPA litigation is problematic enough. Extending FDCPA liability to the filing of accurate proofs of claim in bankruptcy would just exacerbate the problem. If the decision below is allowed to stand, there can be no doubt that a nationwide explosion of FDCPA litigation would quickly ensue.

The Eleventh Circuit's experience provides an excellent case study: Within one week of the Eleventh

Circuit's ruling in *Crawford v. LVNV Funding, LLC*—the precursor to the ruling under review—*six* putative class-action complaints were filed in the Southern District of Alabama alone. All six suits, including this case, were filed by the same lawyer, and all six suits contained nearly identical five- to six-page complaints alleging that the filing of proofs of claim in bankruptcy proceedings violated the FDCPA.[7] Moreover, in the two years since *Crawford* was decided, debtors in Eleventh Circuit bankruptcy proceedings have initiated eighty-one adversary proceedings against LVNV Funding, LLC—the defendant in *Crawford*. Seventy-two of those eighty-one adversary proceedings involved FDCPA claims predicated on the filing of proofs of claim in bankruptcy.[8]

A key practical reason for this astounding number of FDCPA suits—against just *one* defendant in *one* circuit—is that plaintiffs' attorneys can quickly and cheaply produce FDCPA complaints predicated on the filing of proofs of claim. Indeed, on September 15,

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[7] *See* J.A. 23-28; *Russell v. Palisades Collection, L.L.C.*, No. 1:14-cv-00323-CG-B; *Brock v. Resurgent Capital Servs., LP*, No. 1:14-cv-00324-WS-M; *Davis v. AIS Recovery Solutions, LLC*, No. 1:14-cv-00325-WS-M; *Spain v. RJM Acquisitions LLC*, No. 1:14-cv-00326-CG-N; *Russell v. Jefferson Capital Sys., LLC*, No. 1:14-cv-00331-CG-B.

[8] To review this data, go to www.bloomberglaw.com, then to "Litigation & Dockets," and finally to "Search Dockets." Limit the search to Alabama, Georgia, and Florida bankruptcy courts. Use the party name "LVNV Funding," the keyword "adversary case," and a date range of the last five years. As of November 16, 2016, that search yielded 86 adversary proceedings, 81 of which were filed after July 10, 2014—the date of the *Crawford* decision. Seventy-two of those 81 adversary proceedings involve FDCPA claims predicated on the filing of proofs of claim in bankruptcy.

2014, just one lawyer initiated twelve of the seventy-two adversary proceedings that have been brought against LVNV Funding, LLC, by filing twelve virtually identical, six-page complaints. *See*, *e.g.*, *Thompson v. LVNV Funding, LLC et al.*, No. 14-80122-CRJ (Bankr. N.D. Ala.); *Williams v. LVNV Funding, LLC et al.*, Docket No. 14-70043-JHH (Bankr. N.D. Ala.). The filing of such complaints, moreover, is often costless, as debtors' attorneys typically need not pay a filing fee in order to initiate adversary proceedings in bankruptcy. *See* 28 U.S.C. § 1930(f) (granting bankruptcy courts discretion to waive debtor fees); Bankruptcy Court Miscellaneous Fee Schedule, http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Nov. 16, 2016) (stating that fee for filing adversary complaint "must not be charged if . . . the debtor is the plaintiff"). And while it is true that *successful* debtors' attorneys in district court will recover any filing fees from the defendant, *see supra* p. 27, in bankruptcy court debtors' attorneys can avoid the up-front cost of a filing fee, further catalyzing the initiation of FDCPA suits.

Examining nationwide bankruptcy statistics further underlines the problems posed by the Eleventh Circuit's ruling. In 2015 alone there were over 800,000 personal bankruptcy filings, undoubtedly involving millions of proofs of claim. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2015, *available at* http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2015/12/31 (last visited Nov. 16, 2016). It is therefore no exaggeration to say that the Eleventh Circuit's extension of the FDCPA would lead to a "flood of FDCPA disputes" that would "threaten[] to swallow the dockets of bankruptcy and district courts." Alane A. Becket et al., *Filer Beware! It's Not Just the Rules Committee Changing the Rules*, Norton Bankr. L. Adviser, Sept. 2014, at 1, 8.

* * *

The Eleventh Circuit's decision—if left unchecked—will subject a broad range of bankruptcy participants to liability under conflicting legal standards for doing precisely what the Bankruptcy Code tells them to do with time-barred debts, and even when they carefully adhere to every single legal requirement for filing proofs of claim for such debts under the Bankruptcy Code and Rules. It will also harm the very debtors the FDCPA was designed to protect, create a number of additional conflicts between the FDCPA and the Bankruptcy Code, and fan the bonfire of FDCPA litigation. This Court should reverse the Eleventh Circuit's judgment, and confirm that there can be no FDCPA liability for filing an accurate proof of claim in compliance with the Bankruptcy Code.

## CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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November 21, 2016

# APPENDIX

| Number of Individual Plaintiffs Bringing FDCPA Claims in Federal District Court by Year* | |
|---|---|
| **Year** | **FDCPA Plaintiffs** |
| 2001 | 1,323 |
| 2002 | 1,711 |
| 2003 | 2,120 |
| 2004 | 2,783 |
| 2005 | 3,207 |
| 2006 | 3,680 |
| 2007 | 4,316 |
| 2008 | 6,140 |
| 2009 | 9,410 |
| 2010 | 11,154 |
| 2011 | 12,226 |
| 2012 | 11,373 |
| 2013 | 10,616 |
| 2014 | 10,240 |
| 2015 | 11,813 |
| 2016 (through 9/30/16) | 8,029 |

* Data provided by WebRecon, LLC. The database consists of all plaintiffs who brought FDCPA claims in U.S. District Courts between January 1, 2001 and September 30, 2016.

**Ten of the Most Active Law Firms in Terms of FDCPA and TCPA Plaintiffs Represented in Federal Court from January 1, 2016 to September 30, 2016***

| Law Firm | Number of Individual FDCPA and TCPA Plaintiffs Represented | Percent of Total FDCPA and TCPA Plaintiffs (9,592 Total) |
|---|---|---|
| Lemberg Law | 362 | 3.77% |
| Law Offices of Todd M. Friedman, P.C. | 282 | 2.94% |
| Kimmel & Silverman, P.C. | 257 | 2.68% |
| Morgan & Morgan | 245 | 2.55% |
| Baker Sanders, LLC | 203 | 2.12% |
| Community Lawyers Group | 195 | 2.03% |
| Consumer Law Partners, LLC | 192 | 2.00% |
| Sulaimon Law Group, LTD | 187 | 1.95% |
| Edelman, Combs, Latturner & Goodwin, LLC | 166 | 1.73% |
| Berry & Associates | 152 | 1.58% |
| **Totals** | **2,241** | **23.36%** |

* The figures in this table were derived from a database provided by FDCPA Case Listing Service, LLC. The database consists primarily of all plaintiffs who brought FDCPA claims in U.S. District Courts between January 1, 2016 and September 30, 2016. The database also includes some plaintiffs who brought TCPA claims in U.S. District Courts during that time period.