FILING PROOF OF CLAIM IS AN ATTEMPT TO COLLECT A DEBT

The Eleventh Circuit has made it clear: it will not back down from its decision in *Crawford v. LVNV Funding*, a decision it issued in 2014 and one which has been the subject of hot debate ever since. In *Crawford*, the Eleventh Circuit ruled that the filing of a proof of claim was an attempt to collect a debt and that the filing of a proof of claim on time barred debt violated the FDCPA. *Crawford v. LVNV Funding, LLC,* 758 F.3d 1254 (11th Cir. 2014). Since *Crawford,* the debate has raged on with several courts weighing in on the subject. Under one rationale or another, the majority have held that the filing of a proof of claim on a time barred debt *does not* give rise to a claim under the FDCPA.

The Eleventh Circuit, however, is sticking to its guns and in a recent decision not only supported its position in *Crawford* but expanded it by addressing the issue left unanswered in *Crawford:* whether the Bankruptcy Code preempts the FDCPA where the debt collector files a proof of claim on a debt it knows to be time barred. *Johnson v. Midland Funding, LLC,* C.A. No. 15-11240, 2016 U.S. App. LEXIS 9478 (11th Cir. May 24, 2016).

In *Johnson,* the Court answered that question in the negative, finding that the Bankruptcy Code does not preempt the FDCPA. Instead, "[t]he FDCPA easily lies over the top of the Code's regime, so as to provide an additional lawyer of protection against a particular kind of creditor." *Johnson* at *15. In its analysis, the Court found that the Bankruptcy Code and FDCPA "differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist." *Johnson* at *13-14. The court concluded that the two statutes could be reconciled because "they provide different protections and reach different actors."*Johnson* at *14. While the Bankruptcy Code allows creditors to file proofs of claim even with respect to time barred debt, it does not require that they do so.While "creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims."Johnson at *10. The court read the statutes together as "providing different tiers of sanctions for creditor misbehavior in bankruptcy." *Johnson* at *15The Court was adamant that regardless of the circumstances if a debt collector, as defined by the FDCPA, "files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a 'misleading' or 'unfair' claim." *Johnson* at *16.

The Court's decision expands the Eleventh Circuit's view that the filing of time barred proofs of claim by debt collectors is a FDCPA violation even if the

Bankruptcy Code allows the debt collectors to do so. If there is good news to be had from the Eleventh Circuit's opinion, it is that the court recognized that the FDCPA's bona fide error defense may protect debt collectors who unintentionally or in good faith file time barred proofs of claim.

Those playing in the debt buyer space should continue to watch for developments on this issue as there is a growing divide in the circuits. *See, e.g., Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010); *Garfield v. Ocwen Loan Servicing*, 811 F.3d 86 (3d Cir. 2016); *Simon v. FIA Card Servs.*, 732 F.3d 259 (3d Cir. 2013); *Covert v. LVNV Funding*, 779 F.3d 248 (4th Cir. 2015); *Gatewood v. CP Medical, LLC*, Case No. 15-6008 (8th Cir. Jul. 10, 2015); *Walls v. Wells Fargo Bank, N.A.*, 276 F. 3d 502 (2002). While the Supreme Court refused to hear *Crawford*, the broader holding in *Johnson* and the split in the circuits make it more likely that the Supreme Court will address this issue at its next opportunity.