

# The Interplay Between The Fair Debt Collection Practices Act & The Bankruptcy Code<sup>1</sup>

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## I. Introduction

The Bankruptcy Code<sup>3</sup> (the “Code”) and the Fair Debt Collection Practices Act<sup>4</sup> (“FDCPA”) are two major forms of federal legislation enacted to protect debtors. However, once a debtor files for bankruptcy, issues arise as to the simultaneous applications of the Code and the FDCPA. One particularly significant example is that a debt collector cannot satisfy the FDCPA’s “Mini-Miranda” requirement (discussed below) without violating the “automatic stay” imposed by the Code. Some courts also disagree as to whether a bankruptcy debtor can bring a claim against a debt collector for violation of the FDCPA. Courts have also issued contradictory opinions as to whether a cause of action exists under the FDCPA when a creditor files a time-barred, i.e., “stale,” proof of claim in a bankruptcy case. These issues are discussed in more detail below.

## II. Bankruptcy Code – A Short Note On Bankruptcy And The “Automatic Stay”

Once the debtor petitions for relief under any chapter, the Code will protect the debtor and the debtor’s assets against collection proceedings (unless otherwise ordered by the bankruptcy court). *See generally* 11 U.S.C. §362; *Maloy v. Phillips*, 197 B.R. 721, 722 (M.D. Ga. 1996) (discussing the effect of the automatic stay). In order to reconcile a creditor’s

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<sup>3</sup> 11 U.S.C. §101 *et seq.*

<sup>4</sup> 15 U.S.C. §1692 *et seq*

competing claims with each other, the Code aims “to determine and implement in a single collective proceeding the entitlements of all concerned.” *In the Matter of American Reserve Corp.*, 840 F.2d 487, 489 (7<sup>th</sup> Cir. 1988). In order for a creditor to be eligible to receive a distribution from the bankruptcy estate, the creditor generally must file a “proof of claim” in accordance with the Code. *Id.*

By way of further explanation, the automatic stay generally bars action against the debtor or the debtor’s assets based upon any prepetition claim, i.e., that arose before the initiation of the bankruptcy proceeding. 11 U.S.C. §362(a). It provides a reprieve from creditor harassment and allows the debtor time to attempt repayment of creditors or to formulate a plan. *Maloy*, 197 B.R. at 722. Any further collection pressure by creditors (without court authorization) will generally constitute a violation of the automatic stay. *Id.* Violations of the automatic stay can be punishable by severe penalties and can include punitive damages and an award of attorney’s fees and costs. *See* 11 U.S.C. §362(k). After the debtor receives a discharge, the “discharge injunction” takes effect under 11 U.S.C. §524 which, generally speaking, prohibits any action against the debtor based upon discharged debts.

### **III. A Short Note On The Fair Debt Collections Practices Act**

The FDCPA was enacted in 1977 to prevent widespread abuse by debt collectors in attempts to collect debt. 15 U.S.C. §1692 (Congressional findings and declaration of purpose). The overarching purpose was to eliminate abusive debt collection practices. *Id.* The FDCPA also aims to ensure 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. *Id.*

The FDCPA provides consumer debtors with numerous protections that they did not previously possess. Particularly important and potentially problematic for debt collectors is FDCPA §1692(g).<sup>5</sup> Under §1692(g), within five days of the initial communication (unless contained in the initial communication), a debt collector must provide a consumer debtor with certain information including the amount of the debt, the name of the creditor, and various statements that (i) the debt collector will assume the debt is valid unless the debtor disputes the debt within 30 days, (ii) if the debtor disputes the debt within that time frame the debt collector will obtain verification of the debt or a copy of the applicable judgment and forward the same to the debtor and (iii) if requested by the debtor, the debt collector will obtain the name and address of the original creditor if different from the current creditor.<sup>6</sup> Until information required by §1692(g) is provided to a debtor, the debt collector cannot proceed with collection efforts. Importantly, the FDCPA applies only to “consumer debt,” i.e., debt arising from personal, family or household expenses. Thus, the FDCPA does not apply to commercial/ business debt. *See generally* 11 U.S.C. §1692 *et seq.* Moreover, the FDCPA applies *only* to third-party debt collectors seeking to recover another creditor’s debt. *Id.*

In *Martel v. LVNV Funding, LLC and Resurgent Capital Services (In re Martel)*, 539 B.R. 192 (D. Me. 2015)(1<sup>st</sup> Cir. appeal filed May 25, 2016), the court described the proof necessary to prevail on an FDCPA claim. For a debtor to recover under the FDCPA, a debtor

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<sup>5</sup> **§1692(g)(a)-Notice of debt; contents:** Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing— (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. 15 U.S.C. §1692(g)(a).

<sup>6</sup> This is a summary of the statutory language. Please see note 5.

must prove that: (1) the debtor was the target of an attempt to collect a consumer debt; (2) the alleged violator is a debt collector; and (3) the alleged violator engaged in an act prohibited by a provision of the FDCPA. *Id.* at 195; *see generally* 15 U.S.C. §1692 *et seq.*

Intentional conduct by a debt collector is not necessary to sustain an action under the FDCPA. To the contrary, the FDCPA is a strict liability statute. *Hess v. Cohen & Slamowitz LLP*, 637 F.3d 117, 125 (2d Cir. 2011). The FDCPA prohibits debt collectors from using “unfair or unconscionable means” to collect a debt. 15 U.S.C. §1692(f). The FDCPA also protects consumers against “any false, deceptive, or misleading representation or means” by a debt collector. 15 U.S.C. §1692(e). Indeed, any misrepresentation of the debt will violate the FDCPA, even if such representation was inadvertent. *Patzka v. Viterbo College*, 917 F.Supp. 654, 658 (W.D. Wis. 1996). The majority of federal courts have adopted the “least sophisticated consumer” standard in analyzing claims brought under the FDCPA.<sup>7</sup> *Waters v. Kream*, 770 F. Supp. 2d 434, 437 (D. Mass. 2011) (quoting *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006)). The “least sophisticated consumer” is an objective standard and establishes a much lower threshold than the “reasonable person standard” because the intention of the FDCPA is to protect “all consumers, the gullible as well as the shrewd” from abusive debt collection practices. *Brown*, 464 F.3d at 454. The standard at its foundation attempts to establish reasonableness to determine if the least sophisticated consumer would be deceived by a collection practice or endeavor. However, the statute also provides limited protection for debt collectors from “*bona fide* errors” that are reasonably unforeseen or unavoidable. 15 U.S.C. §1692(c). All of these factors must be considered together to determine if the FDCPA has been violated.

The FDCPA also sets forth other specific requirements for contacting a debtor (now known as the “Mini-Miranda” notice). *See* 15 U.S.C. §1692(e). Under §1692(e)(11), the

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<sup>7</sup> Some courts have used the term “unsophisticated consumer.” *See Waters v. Kream*, 770 F. Supp. 2d 434 at note 1.

FDCPA requires debt collectors to disclose in the initial communication with the debtor that they are attempting to collect a debt and that any information obtained will be used for that purpose.

*Id.* Any subsequent communication must also contain an abbreviated form of that warning notifying the debtor that the subsequent communication is from a debt collector. *See* 15 U.S.C. §1692(e)(11).

#### **IV. The Question of Conflicts Between The FDCPA And The Bankruptcy Code**

##### **a. FDCPA's Mini-Miranda Warning and The Automatic Stay**

Both the automatic stay under the Code and the FDCPA were enacted for the purpose of debtor protection. However, a debt collector seeking to collect a debt from a bankruptcy debtor cannot issue the required “Mini-Miranda” warning without violating the broad scope of the automatic stay. In short, in such a circumstance a debt collector is left with a Hobbesian choice of violating one or the other of the applicable federal statutory schemes.

In *Maloy v. Phillips*, for example, the United States District Court for the Middle District of Georgia (an Eleventh Circuit court) addressed whether the automatic stay prohibits the notice otherwise required by §1696(g)(a) of the FDCPA. 197 B.R. at 723. The court recognized that the language of the ‘automatic stay’ is very broad, and that it thus encompasses the notice required by 15 U.S.C. §1696(g). *Id.* at 721. In *Maloy*, the debt collector/defendant, an experienced attorney, understood that the filing of a bankruptcy petition triggered the automatic stay under §362 of the Code, and accordingly, ceased all communication with the debtor/plaintiff once he learned that the debtor had sought bankruptcy relief. *Id.* at 721. In a later suit to determine liability of the debt collector under the FDCPA for not sending the information to the debtor as required under 15 U.S.C. §1692(g)(a), the *Maloy* court found that the defendant faced a “catch-22”—honor the FDCPA mandate under §1692(g) and violate the automatic stay under the

Code or honor the Code and violate the FDCPA. The Court found that, erring on the side of caution, the debt collector made the best *and right* decision, i.e., to honor the automatic stay and cease all communication with the debtor. *Id.* at 723.

However, the court in *Randolph v. IMBS Inc.*, 368 F.3d 726, 731 (7<sup>th</sup> Cir. 2004) came to a different conclusion. In that case, the *Randolph* court (a Seventh Circuit Court) considered whether a debt collector's demand for immediate payment from a bankruptcy debtor constituted a violation of the FDCPA or whether the Code repealed or preempted the FDCPA in those circumstances. *Id.* The *Randolph* court overturned certain lower court decisions and held that the Code does not preempt or repeal the FDCPA. *See generally id.* The court explained that “it would be better to recognize that...[the FDCPA and the Code]...overlap, each with coverage that the other lacks – the Code covers all persons, not just debt collectors, and all activities in bankruptcy; the FDCPA covers all activities by debt collectors, not just those affecting debtors in bankruptcy.” *Id.* at 731. The court further explained that “[o]verlapping statutes do not repeal one another by implication *so long as people can comply with both, then courts can enforce both.*” *Id.* (Italics added). As shown in *Maloy*, however, the issue is that, in reality, debt collectors cannot always “comply with both” as suggested by the court in *Randolph*.

Understanding the above described obvious conflict between the FDCPA and the Code is crucial to debt collection efforts that involve consumer debt. When two statutes co-exist, courts have a duty, absent congressional intention to the contrary, to regard each as fully operative. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 605 (2001). However, the open question of how to treat each statutory scheme as “operative” – particularly with regard to the conflict described above – presents a true conundrum for debt collection attorneys. The *Maloy* court found that at least one *irreconcilable* difference does, indeed, exist that requires that

attorneys pursuing consumer debt exercise informed judgment on how best to proceed and to, at least sometimes, ignore the mandate of the FDCPA where collection of consumer debt is pursued against a bankruptcy debtor. The *Randolph* court took the opposite view (albeit under different facts). The problem is that there is no clear road map to the way forward in all circumstances, nor any assurances that any given path will avoid liability over these issues or the costs associated with litigating the matter.

**b. Bringing FDCPA Claims During Bankruptcy Proceeding**

Controversy also surrounds the assertion of FDCPA claims by bankruptcy debtors. *See generally Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86, 89-93 (2<sup>nd</sup> Cir. 2016) (discussing the different approaches taken by the Second, Third, Seventh, and Ninth circuits). In *Garfield*, the court questioned whether there was irreconcilable conflict between the Code and the FDCPA and whether such conflict resulted in implied repeal of the FDCPA where debtors are in bankruptcy. In the end, the answer turned on whether the FDCPA claims were asserted pre-discharge or post-discharge. *See generally id.*

In *Garfield*, the Second Circuit, referencing its decision in *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), concluded that, although the FDCPA does not authorize suit during a pending bankruptcy proceeding, such a suit is permitted post-discharge. *Garfield*, 811 F.3d at 89-93. The court reasoned that the “FDCPA is designed to protect defenseless debtors and there is no need to protect debtors who are already *under the protection of the bankruptcy court.*” *Id.* at 90 (internal quotations omitted; italics in original). The *Garfield* court distinguished the pre-discharge from post-discharge context and explained that a bankruptcy debtor may bring FDCPA claims post-discharge because the debtor no longer has the protection of the bankruptcy court. *Id.* at 92. In support of its reasoning, the *Garfield* court explained that

the 11 U.S.C. §524(a)(2) contains no express cause of action for violation of the discharge injunction while the automatic stay provision, §362(k) does provide such a remedy. *Id.* at 92-3.

Various other courts have issued nuanced decisions that contradict in whole or in part the *Garfield* decision. *See id.* at 90-93 (discussing some of those decisions). For example, the Ninth Circuit Court of Appeals ruled that a bankruptcy debtor may not pursue claims under the FDCPA for violation of the discharge injunction. *See generally Walls v. Wells Fargo Bank N.A.*, 276 F.3d 502 (9<sup>th</sup> Cir. 2002). The *Walls* court found that Congress had created a comprehensive system to protect debtors and creditors in enacting the Code and that remedial scheme was exclusive for bankruptcy debtors. *See id.* at 512-13.

On the other hand, the Seventh Circuit Court of Appeals concluded that a debtor can in fact bring claims against a creditor for violations under both the Code and the FDCPA at the same time. *See Randolph v. IMBS Inc.*, 368 F.3d 726 (7<sup>th</sup> Cir. 2004) (also discussed *supra*). The Seventh Circuit Court of Appeals reasoned that although the FDCPA and the Code overlap in some ways, one does not repeal the other, and both can be brought against a violating creditor at the same time. *Id.* at 731. The court emphasized that the FDCPA does not regulate creditors' activities, rather only debt-collectors, while the automatic stay can be violated by any creditor. *Id.* The court concluded that "[i]t is easy to enforce both statutes, and any debt collector can comply with both [statutes] simultaneously." *Randolph*, 368 F.3d at 730. However, as stated above in section IV(a), it is not always possible for debt collectors to comply with both statutes and it remains to be seen how courts that side with the *Randolph* decision will respond when faced with a *Maloy* fact scenario.

### c. Stale Claims

For years, courts generally held that the FDCPA did not apply to the filing of proofs of claims in consumer bankruptcy cases.<sup>8</sup> *Martel*, 539 B.R. at 194. However, in *Crawford v. LVNV Funding LLC*, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit questioned that prior standard. In *Crawford*, a controversial case on the issue, a debtor initiated an adversary proceeding in which it accused creditor LVNV Funding, LLC, of violating the FDCPA by filing a time-barred proof of claim. *Id.* at 1257. Both the bankruptcy court and, on appeal, the district court, found that the act of filing a time-barred claim does not constitute a violation of the FDCPA. *Id.* at 1256. On further appeal, the Eleventh Circuit held that by filing a time-barred claim, the creditor engaged in conduct that was “deceptive, misleading, unconscionable, or unfair” under the FDCPA to the “least sophisticated consumer.” *Id.* at 1256, 1259-62. The *Crawford* court concluded that the debt collector violated the FDCPA when it filed a proof of claim on the time-barred debt. *Id.*

However, the majority of federal courts addressing the issue have held otherwise. *In re Martel*, 539 B.R. 194. For example, in *In re Martel*, a case decided by the United States Bankruptcy Court for the District of Maine, the court considered this issue as a matter of first impression. *Id.* at 195. In that case, the court disagreed with the *Crawford* decision and reviewed the more nuanced approach of courts since *Crawford*, but still held that the filing of a time barred or “stale” proof of claim cannot serve as the basis for an FDCPA action. *Id.* at 195-7 (discussing decisions by various courts and holding that the filing of a time-barred proof of claim in accordance with the Code is not a violation of the FDCPA and specifically stating that “statutes of limitation do not extinguish debts, but bar actions to collect once raised”). The

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<sup>8</sup> By contrast, “[f]ederal circuit and district courts have uniformly held that a debt collector’s threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§ 1692e and 1692f’ of the FDCPA. *Crawford*, 758 F.3d at 1259.

diametrically opposed decisions illustrate a persistent question. The issue continues to be controversial, and practitioners are strongly advised to review and consider relevant, current case law when filing any proof of claim that may be barred by statutes of limitation.

## **V. Conclusion**

The FDCPA and the Code present extensive and at times contradictory federal statutory schemes. There is widespread controversy over the applicability of the FDCPA where bankruptcy debtors are concerned. The cases addressing this issue are diverse and extremely nuanced. It is beyond the scope of this limited presentation to discuss and explain all of the facets of the various cases that have addressed the Code vs. FDCPA controversy, but the central message is obvious: Debt collectors pursuing consumer claims against bankruptcy debtors will be well-served to review and consider any relevant case law in the applicable jurisdiction to avoid potential exposure.