No. 15-11240-E

In the United States Court of Appeals for the Eleventh Circuit

ALEIDA JOHNSON,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama in No. 1:14-cv-00322-WS-C, Hon. William H. Steele

REPLY BRIEF FOR PLAINTIFF-APPELLANT ALEIDA JOHNSON

Earl P. Underwood, Jr.
Kenneth J. Riemer
UNDERWOOD & RIEMER, P.C.
21 S Section Street
Fairhope, AL 36532
Tel.: (251) 990-5558
epunderwood@alalaw.com
kjr@alaconsumerlaw.com

Peter K. Stris
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
peter.stris@strismaher.com
daniel.geyser@strismaher.com

Counsel for Plaintiff-Appellant

No. 15-11240-E

In the United States Court of Appeals for the Eleventh Circuit

ALEIDA JOHNSON,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama in No. 1:14-cv-00322-WS-C, Hon. William H. Steele

AMENDED CERTIFICATE OF INTERESTED PERSONS

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 and 26.1-2, the undersigned hereby certifies that the certificate contained in Plaintiff-Appellant's opening brief, as updated by Defendant-Appellee's answering brief, is complete except as noted below:

1. McKool Smith, P.C. earlier participated as counsel for Plaintiff-Appellant but is no longer participating in the appeal.
2. Stris & Maher LLP is now participating in the appeal as counsel for Plaintiff-Appellant.
3. Peter K. Stris is now participating in the appeal as counsel for Plaintiff-Appellant.

Respectfully submitted.

/s/ *Daniel L. Geyser*

Earl P. Underwood, Jr.
Kenneth J. Riemer
UNDERWOOD & RIEMER, P.C.
21 S Section Street
Fairhope, AL 36532
Tel.: (251) 990-5558
epunderwood@alalaw.com
kjr@alaconsumerlaw.com

Peter K. Stris
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
peter.stris@strismaher.com
daniel.geyser@strismaher.com

Counsel for Plaintiff-Appellant Aleida Johnson

October 30, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

INTRODUCTION

Midland's answering brief is most telling for what it does *not* say. Midland does not contest that it knowingly floods bankruptcy courts with frivolous proofs of claim in the hope of collecting unenforceable debts. It does not contend that it has *any* good-faith basis for these filings or *any* legitimate response once a debtor or trustee objects. Make no mistake: Midland is well aware that it will only collect on its frivolous claims if the bankruptcy process breaks down completely and fails—*i.e.*, no one notices or properly challenges its misconduct.

Nonetheless, Midland convinced the district court to dismiss actionable FDCPA claims on the sole ground that those FDCPA claims were impliedly repealed one year later by Congress in passing bankruptcy legislation. With no apparent irony, Midland contends that its flagrant misuse of the bankruptcy process was not only sanctioned by Congress but also intended to repeal *by implication* the express prohibition of such conduct by Congress (one year earlier) in the FDCPA.

In accepting Midland's argument, the district court unquestionably erred. The Supreme Court has long made clear that a party (like Midland) bears an extremely heavy burden in attempting to establish implied repeal of one federal law by a subsequent one. Indeed, courts may not find an implied repeal "unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d

Cir. 2013) (quoting *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007)). In the absence of an "irreconcilable conflict," both statutes must be enforced. *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004).

Here, there is no conflict between the Bankruptcy Code and the FDCPA, because (unsurprisingly) neither scheme permits Midland's abusive tactics. Under the Code's plain command, debt collectors are prohibited from filing proofs of claim without a good-faith basis, and there is no such basis for filing a claim that one knows is time-barred: the Supreme Court has defined a "claim" as a legally "enforceable" right (*Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998)), and time-barred claims are not "legally enforceable" (*McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014)).

But even if the Code somehow tolerated Midland's conduct, there is still no "irreconcilable conflict": Midland can always comply with the FDCPA by not filing frivolous claims under the Code. The claims-process is wholly permissive; no one is compelled to file a claim. Put another way: even if the Code permits Midland's abusive conduct, it certainly does not *require* it. Thus, it cannot effect a repeal of the FDCPA by implication. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM*

Wonderful LLV v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014). Midland's contrary view reflects a fundamental misunderstanding of well-settled doctrine.

Finally, it is worth pausing to consider what Midland asks this Court to do. Midland asks this Court to ignore the very FDCPA claim that it just recognized in *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014). And its sole justification is the assertion that Congress, in passing the Bankruptcy Code, intended to create an absolute right to file knowingly frivolous claims.

Midland insists that the Code endorsed such a scheme (one with no discernible societal value or public benefit).[1] As explained below, Midland's interpretation of the Code is indefensible. But even if it were *reasonable*, it could not support affirmance because it falls far short of "the overwhelming evidence needed to establish repeal by implication." *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). Reversal is warranted.

[1] Midland concedes that has no legitimate purpose for filing the claims at issue; it did (and does) so in the hope that debtors and trustees fail to detect or properly object to its misconduct. Thus, in the best-case scenario, the debtor or trustee is burdened with the hassle and expense of filing a needless objection, and the court is forced to waste its time rejecting the claim; in the worst-case scenario, the process breaks down and allows the invalid claim, diverting limited funds from vulnerable debtors and innocent creditors.

ARGUMENT

MIDLAND CANNOT MEET ITS HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE IMPLIEDLY REPEALED THE FDCPA CLAIMS ASSERTED IN THIS CASE

"'[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M.*, 534 U.S. at 143-144; *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). Midland concedes that there is not a single line of text in the Code or the FDCPA that expressly precludes the claims at issue. Answering Br. 39. Midland thus can prevail only by showing this is one of the "rare" occasions where one independent federal enactment precludes the other. *Randolph*, 368 F.3d at 730. It most certainly is not. *J.E.M.*, 534 U.S. at 142 ("'The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.'").

A. There Is No Preclusion Because There Is No "Right" To File A Time-Barred Proof Of Claim, And Midland's Contrary Contention Is Meritless

As previously established, Midland's conduct is plainly forbidden under *both* schemes. In *Crawford*, this Court held that filing a knowingly time-barred proof of claim violates the FDCPA. 758 F.3d at 1256-1257. That describes Midland's conduct exactly: it filed a proof of claim involving a debt from a transaction over a *decade* ago. Dkt. 1-1 at 3. It was well aware that the debt was "time-barred

and unenforceable in court," but it filed anyway, hoping to take advantage of another's mistake. This renders Midland's conduct "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford*, 758 F.3d at 1260.

Midland's conduct is also forbidden under the Code. The Code values fairness and efficiency. See, *e.g.*, Fed. R. Bankr. P. 1001 (aiming to advance the "just, speedy, and inexpensive determination of every case and proceeding"). Unsurprisingly, the Code grants no "right" to knowingly file a time-barred proof of claim. Midland resists this conclusion, but its efforts are unavailing.

1. As matter of law and logic, there is no "right to payment" for unenforceable claims

Midland's assertion of a "right" to file baseless claims is incompatible with the Code's plain text. A claim is defined as a "right to payment" (11 U.S.C. 101(5)(A)), and "[t]he plain meaning of a 'right to payment' is nothing more nor less than an *enforceable obligation*'" (*Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990) (emphasis added); see also, *e.g.*, *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Johnson* v. *Home State Bank*, 501 U.S. 78, 83-84 (1991)).[2] Because stale claims are *not* legally "enforceable" (*Crawford*,

[2] Midland says that *Davenport* rejected an argument (supposedly "[m]uch like Johnson['s]") that "restitution obligations should not count as 'claims' in part be-

[Footnote continued on next page]

758 F.3d at 1261), Midland has no corresponding "right to payment"—and thus no basis for filing a proof of claim.[3]

a. Midland says that it indeed has a "right to payment," because the debt is not extinguished under Alabama law—only the "remedies" are extinguished. Br. 6. This has it exactly backwards. The lack of any "remedy" *is* the lack of "a right to payment." Put bluntly: once the limitations period runs, there is no right to *payment*. "[S]ome people might consider full debt re-payment a moral obligation even though the legal remedy for the debt has been extinguished," but the claim itself is

---

[Footnote continued from previous page]

cause neither the state nor the victim may enforce restitution obligations in civil proceedings." Br. 9. This is perplexing: Johnson's point is not that all debts must be legally enforceable everywhere; her point is that all debts must be legally enforceable *somewhere*. *Davenport* identified a legal "enforcement mechanism" that guaranteed a "right to payment," thus satisfying *Davenport*'s own standard. 495 U.S. at 559-560. Midland's problem is not simply that it cannot "enforce its claim in state court civil proceedings" (Br. 10), though it plainly cannot (see, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (recognizing FDCPA violation for filing a time-barred suit in state court)); Midland's problem is that it cannot properly enforce its claim *anywhere*.

[3] Midland suggests (Br. 11 n.15) that the Supreme Court did not mean what it plainly said in (repeatedly) limiting Section 101(5)(A)'s "right to payment" to an "enforceable obligation." While Midland hopes to distinguish these cases on their facts, it overlooks that each case shares a critical common feature: all the claims at issue, unlike those here, were *legally enforceable*. See, *e.g.*, *NextWave*, 537 U.S. at 303 (discussing an *enforceable* regulatory condition); *Johnson*, 501 U.S. at 83-84 (discussing an *enforceable* mortgage interest). This commonality underscores precisely what Midland's claim lacks—and why its theory is indefensible under the Supreme Court's authoritative construction of the Code.

not "legally enforceable." *McMahon*, 744 F.3d at 1020; see also *Crawford*, 758 F.3d at 1261 (time-barred claims are "unenforceable"); *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011) ("Huerta's debt obligation is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law").

Midland repeatedly insists (mostly by citing the district court) that it has a "right to payment," but it cannot identify that right by *ipse dixit*; it failed to identify a single, non-voluntary, legal means of enforcing the time-barred debt. Midland can ask nicely to be repaid, but a debtor has every right to simply refuse. The lack of remedy eliminates the right to payment, and Midland invites a square (and lopsided) circuit conflict in suggesting otherwise.

Nor is Midland correct that this settled law somehow "'contradict[s] [the Supreme Court's] pronouncement that the parameters of a right to payment are defined by state law, not federal law.'" Br. 11. Federal law defines "right to payment" as a legally "enforceable" right; state law determines whether a right is legally enforceable. That leaves the federal statute with its (unitary) federal meaning, while still letting "state law govern[] the substance of claims." *Travelers Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (internal quotation marks omitted); see also *ibid.* ("Accordingly, when the Bankruptcy Code uses the word 'claim'—which the Code itself defines as a 'right to payment'—it is

usually referring to a right to payment recognized under state law.") (internal citation omitted). As with virtually all other States, Alabama says that debts are *not* legally enforceable after the limitations period expires, even if the underlying obligation remains. See, *e.g.*, *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So.2d 758, 765 (Ala. 2007). Midland simply misunderstands the import of this common distinction. See, *e.g.*, *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 396-397 (6th Cir. 2015) (recognizing the difference between the debt itself and its enforceability); *McMahon*, 744 F.3d at 1020 (same); *Huertas*, 641 F.3d at 32 (same).

Further, Midland repeatedly cites this Court's decision in *In re Charter Co.*, 876 F.2d 866 (11th Cir. 1989), as standing for the proposition that "creditors who may be barred from enforcing their claims in state courts 'are no less creditors under the Code.'" Br. 11; see also Br. 24 (citing *In re Charter* for the proposition that "creditors with out-of-statute claims 'are no less creditors under the Code'"). This is highly misleading: *In re Charter* had nothing to do with time-barred or unenforceable claims; it addressed claims that were legally enforceable but *small*—so small that creditors, "absent class procedures[,] might not prosecute them," despite being "no less creditors under the Code than someone with a large, easily filed claim." 876 F.2d at 871. The case thus asked whether "proofs of claim in bankruptcy may be filed on behalf of a class of claimants, rather than being required individually of each claimant." *Id.* at 867. In holding that "class proofs" are appro-

priate, the Court nowhere suggested that parties could assert a "right to payment" *without* an "enforceable" obligation.[4]

b. Midland also asserts that "Congress intended for a 'claim' to be defined in the 'broadest possible manner,'" so any definition that excludes stale claims is necessarily wrong. Br. 7-8. Yet "broadest possible" does not mean limitless or incoherent. Congress expanded the definition of "claim" in important respects, but those respects were *enumerated*: things like "liquidated," "unliquidated," "fixed," "contingent," "unmatured," and "disputed." See *In re Charter*, 876 F.2d at 869 (explaining how Congress expanded the definition by "using the following broad language [in Section 101(5)(A)]"). Congress did not leave "claim" bounded only by the imagination of future litigants. While the new definition captures "all legal obligations of the debtor, no matter how remote or contingent" (*ibid.*), Congress did not capture solely "moral" obligations, which is all Midland now pursues. See also Opening Br. 26-27.

---

[4] Midland asserts that a "proof of claim" under 11 U.S.C. 501(a) must include *knowingly unenforceable claims* because 11 U.S.C. 502(b)(1) says that a "claim" can be rejected as "unenforceable." Br. 15-16. This is mere semantics: Congress did not have to write "purported" claim in Section 502(b)(1) to convey its obvious intent. Further, Section 501(a) is restricted (for the reasons discussed here and in the opening brief) to claims supported by a good-faith belief in their enforceability. Even if a "claim" did not mean what the Supreme Court has said it means, the Code's structure—including Section 502(b)(1)'s procedure for striking time-barred claims—underscores that Congress did not permit parties to abuse the claims-process by filing knowingly frivolous claims.

In any event, the Supreme Court has construed the "claim" definition after the amendment, and it has held that the "right to payment" must still be an *enforceable* right. See, *e.g.*, *NextWave*, 537 U.S. at 303. Midland's contrary view—insisting that proofs of claim include "unenforceable" obligations (Br. 13)—is irreconcilable with the Supreme Court's definitive construction.[5]

2. A purported "right" to file time-barred claims is directly at odds with the Code's structure and purpose

a. Contrary to Midland's contention, the Code's structure and purpose confirm that debt collectors have no "right" to knowingly file time-barred claims. The entire point of the claims-process—as reflected by multiple Code provisions—is to efficiently and fairly process claims. See, *e.g.*, Answer Br. 18 n.19 (so conceding). That process is directly frustrated by attempts to bog down bankruptcy proceedings with knowingly stale claims. Congress would not have tasked the trustee with a statutory duty to object to stale claims (11 U.S.C. 704(a)(5), 1302(b)(1)), only so debt collectors could prompt the pointless exercise of filing a claim that the trustee

[5] Midland suggests that its time-barred claims must be permitted because other presently unenforceable claims are also permitted. Br. 11-12. This argument rests on a clear logical error: the fact that some unenforceable claims are included does not mean that all unenforceable claims are included. As Johnson previously explained (Br. 27), Congress deliberately captured known claims that would soon be enforceable to avoid the situation where claims ripening after bankruptcy (i) disrupt the debtor's fresh start or (ii) fail to receive a fair share of the estate (since the estate was already distributed). Neither of those concerns apply to Midland's time-barred debt, which will *never* ripen into an enforceable obligation.

immediately rejects. Nor would Congress have declared time-barred claims unenforceable (11 U.S.C. 502(b)(1)) if it wished parties to *knowingly* file unenforceable claims: there is sufficient work in every bankruptcy without inviting claims that are unequivocally doomed for failure. And Congress would not have deemed claims "prima facie valid"—and presumptively enforceable—if it intended parties to file knowingly *invalid and unenforceable* claims. Compare *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947) ("A proof of claim is, of course, *prima facie* evidence of its validity."); see also Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

The process is designed to function when all parties act in good faith; it is not designed to tolerate parties who abuse the system by filing meritless claims, all in the hope that the system breaks down and no one notices. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015). "[F]iling objections to time-barred claims consumes energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Crawford*, 758 F.3d at 1261. Midland's business practice wastes limited judicial and party resources, interferes with the efficient processing of claims, and (when successful) diverts funds from parties with legitimate claims. Midland cannot explain how its understanding of a "right" to file frivolous claims is consistent with the clear structure and purpose of the Code. See,

e.g., *King* v. *Burwell*, 135 S. Ct. 2480, 2496 (2015) (construing language in light of Congress's "plan" in enacting the statute); contra Answering Br. 17 (suggesting that absurd or puzzling constructions are acceptable).[6]

b. Midland says that the Code's structure supports its position, but Midland is wrong. As its lead argument, Midland says that Congress would not have created a process for objecting to stale claims if it wished to exclude those claims at the outset: "the fact that the Code contemplates that such claims will be filed is evidence that they are not prohibited." Br. 13. Indeed, according to Midland, "the only way to make sense of a scheme which provides that claims may be filed, yet later disallowed (only upon objection), is to conclude that the Code does not *prohibit* the filing of claims simply because they may later be deemed unenforceable." Br. 14.

---

[6] According to Midland, the "'burden' of objecting" to frivolous claims is not "as weighty as Johnson makes it out to be." Br. 17 n.17. Yet the cost of even a few hundred dollars is a meaningful expense to many Chapter 13 debtors. While that cost may not seem significant to everyone, it can mean the difference in a debtor's ability to meet basic needs for herself and her family. And even if each frivolous claim prompts only a "simple" objection, someone must still review the claim, confirm the limitations period, prepare that objection, and file that objection with the court, which must then review and adjudicate the issue. Even if that entire process consumes only an hour of everyone's time—an exceedingly low estimate—the aggregate cost of filing hundreds of thousands of claims quickly reaches staggering proportions. Given the lack of any obvious "redeeming value" in Midland's practice, this significant global expense is hardly "'undue.'" Br. 17 n.17.

Johnson has already refuted this line of argument (Opening Br. 24-25), and Midland simply refuses to engage Johnson's position. Again, there is a far easier way to "make sense of" this process: Congress realized that it was necessary to create a procedure for resolving *genuinely disputed claims that were filed in good faith*. That has nothing to do with tolerating or permitting parties to file knowingly frivolous claims, simply because the Code has a way to strike those claims from the proceeding. Indeed, Midland's contrary position is exactly tantamount to saying that parties have a "right" to engage in frivolous litigation, because Fed. R. Civ. P. 11 contemplates sanctions for frivolous litigation. Rule 11 would not exist, according to Midland, unless parties had a "right" to pursue frivolous claims.[7]

Contrary to Midland's contention, what is truly difficult to "make sense of" is a scheme that permits parties to file frivolous claims. Bankruptcy courts operate under difficult circumstances, and the system is sound but imperfect. Midland effectively concedes that the only earthly scenario in which it collects is where the process affirmatively breaks down. It has no lawful grounds for collecting or good-faith belief that it has a "right"—as that term is traditionally understood—to collect

[7] Nor is Midland correct that Congress would not have required parties to include information about a claim's timeliness unless it contemplated time-barred claims. Br. 13-14. Midland overlooks that this information is useful in assessing both genuinely disputed claims and ferreting out frivolous claims that never should have been filed in the first place. It is not "permission" to file a claim that everyone agrees is time-barred.

on its stale claims. Midland's entire business practice turns on the predictability of system failure—and its ability to collect unenforceable debts (at the expense of debtors and innocent creditors) whenever that happens. Midland tellingly could not offer a single reason that Congress would authorize baseless claims to divert limited funds from rightful claimants. Br. 17 n.17. In short, Midland cannot explain why Congress would grant a "right" to undermine its own system. See, *e.g.*, *Feggins* v. *LVNV Funding LLC (In re Feggins)*, No. 13-11319-WRS, 2015 Bankr. LEXIS 2822, at *12 (Bankr. M.D. Ala. Aug. 24, 2015) ("A facially time-barred proof of claim is not well-founded. It follows that a creditor's only possible purpose in filing a facially time-barred proof of claim is to take advantage of the automatic claims allowance process of § 502(a) and hope that the debtor and the bankruptcy court do not notice the defect. Such conduct is an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court.").

Congress legislates against the backdrop of established principles like Rule 11 authority and the inherent power of courts to sanction frivolous behavior. See, *e.g.*, *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994). That means that whatever "right" Congress conferred in the Code presumptively did not extend to filing frivolous claims. If Congress, in enacting the Code, intended to create a "right" for

debt collectors to file frivolous claims (which has no discernible policy justification), Congress surely would have done so with clearer language than this.[8]

c. Midland also maintains that its conduct benefits debtors (Br. 22-23), but that argument is wholly insubstantial. No one believes that Midland is acting charitably in filing these claims. It is not trying to "reduc[e] the balance [on stale debts] * * * owed after bankruptcy" (Br. 22), because debtors already owe *nothing* on time-barred debts. It is not trying to ensure that a stale debt is discharged, because debtors can always list those debts on its schedules.

In short, Midland's view of the claims process blinks reality. No one truly believes that Midland is acting in the debtor's best interest (or other creditors' best interest) by filing defective proofs of claim. If Midland were truly concerned about debts omitted from a debtor's schedules—even though such claims no longer pose any threat to a debtor, who can simply ignore them—Midland could always remind the debtor or the court to list the debt without wasting limited time and resources

---

[8] As described above, Midland is incorrect that Johnson failed to cite any provision of the Code that forbids the filing of a knowingly stale claim. Br. 3. First, the plain language of the key provision is dispositive: there is no "right to payment" for time-barred debt, which is legally unenforceable. Second, the trustee's mandatory duty to reject stale claims is directly at odds with Midland's presumption that such claims can be filed. Third, the language suggesting that *disputed* claims can be filed hardly suggests that *indisputably invalid* claims may be filed; indeed, it suggests the very opposite. Fourth, the provisions disallowing stale claims shows that *knowingly* stale claims are not tolerated or permitted; Congress does not allow a filing only to immediately reject that filing.

by filing a baseless proof of claim. At a minimum, Midland could admit on the claim itself that the debt is time-barred and unenforceable. But Midland instead attempts to sneak its claims through the process with all the other legitimate claims, in the hope that no one will notice. That practice is unlawful under the FDCPA, and Midland has no right to revive it under the Code.

3. If parties had a "right" to file time-barred claims, courts would not routinely award sanctions for time-barred claims

As previously explained, Midland's position is inconsistent with the routine award of sanctions against parties filing knowingly time-barred claims. Opening Br. 22-24; see also *Feggins*, 2015 Bankr. LEXIS 2822, at *18 ("If Bankruptcy Rule 9011 authorizes sanctions for the filing of stale proofs of claim, it follows that § 501(a) does not provide creditors an absolute right to file a proof of claim with impunity if it violates another rule or statute.").

In response, Midland offers three reasons that its business practice is not sanctionable, but each is baseless.

First, Midland says that its practice is permitted under the Code even if it is punished under Fed. R. Bankr. P. 9011, because "'Rule 9011 is not part of the Code but a non-statutory adjunct to it.'" Br. 19. This misses the point entirely. Courts are not typically in the practice of *sanctioning* parties for conduct permitted by statute. The very reason that courts invoke Rule 9011 is that a party has violated

operative law. If parties had a right to file frivolous claims under the Code, then courts would have no power to sanction the practice under Rule 9011.

Second, Midland asserts that knowingly time-barred claims are not necessarily "baseless" or "frivolous." Br. 19. Yet it is difficult to imagine a better characterization for a claim that is indefensible in court: once anyone lodges an objection, Midland immediately throws in the towel. It simply withdraws or abandons the stale claim, because it has no colorable basis for defending why it previously asserted a "right to payment." When a party asserts that it has a "right to payment"—when it knows it has *no* "right to payment"—it has filed (in common parlance) a *frivolous* claim. See, *e.g.*, *Feggins*, 2015 Bankr. LEXIS 2822, at *15-*16 ("In the context of the Bankruptcy Code's automatic claims allowance process, the filing of a proof of claim amounts to an assertion that the underlying claim is enforceable and that the claimant is entitled to be paid out of the bankruptcy estate—at the expense of other creditors. * * * [A] time-barred claim is unenforceable within the meaning of the Bankruptcy Code, so a debt collector who knowingly files such a claim in bankruptcy is falsely asserting that it is entitled to be paid.").[9]

---

[9] The fact that courts are not always eager to invoke Rule 9011 does not suggest that Midland's practice is acceptable. Contra Br. 19 n.20. It is notable, in fact, that Midland makes no effort to square its position with the uniform legal principles articulated in Johnson's brief: parties are not permitted to knowingly file claims subject to unavoidable dispositive defenses. That principle squarely applies in this set-

[Footnote continued on next page]

Nor can Midland sidestep this conclusion by suggesting that some claims "might actually prove to be timely." Br. 19. True enough for *some* claims, but not *these* claims. The pertinent question is whether a knowingly time-barred claim is permitted under the Code, not whether a (deceptively) *timely* claim is permitted under the Code. If Midland had not in fact filed a frivolous claim, it would have nothing to worry about under the Code or the FDCPA.

Third, Midland asserts that sanctions are inappropriate because Midland has a "right to payment." Br. 20. Yet Midland still cannot explain why this "right" is always refused except when the process malfunctions. "Rights" are not typically contingent on system failure or parties waiving iron-clad defenses. Midland takes advantage of the Code's background rules to create the false impression that its claims are enforceable when the opposite is true. *Crawford*, 758 F.3d at 1261. There is nothing in the Code that supports any "right" to engage in that misleading conduct.

[Footnote continued from previous page]

ting. If Midland felt that sanctions were unwarranted, it could at least explain why the universal principles applied in multiple circuits are somehow inapplicable in this setting. See, *e.g.*, Opening Br. 22-24 (citing circuit authority in the Fourth, Fifth, Seventh, and Tenth Circuits, together with lower-court authority in this Circuit).

* * *

As established above, a debt collector "can easily satisfy both mandates" (*Dep't of Trans.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. Any debt collector who refuses to file baseless claims will automatically comply with every FDCPA requirement. There is no "positive[] repugnan[cy]" between these laws, and the district court's contrary finding should be rejected. Dkt. 28 at 15.

B. There Is No Preclusion Even If There Somehow *Is* A "Right" To File A Time-Barred Proof Of Claim

Even if Midland had a "right" to file knowingly time-barred claims, the Code and the FDCPA would still easily co-exist, and Midland's contrary contention fundamentally misunderstands the implied-repeal analysis.

1. There is no "irreconcilable conflict" where one scheme allows what the other forbids; one must *compel* what the other forbids. The standard is one of impossibility: if Congress bans conduct under one law, a court cannot excuse it under another. *J.E.M.*, 534 U.S. at 141-142. Each law operates within its proper sphere to regulate its targeted behavior. See, *e.g.*, *POM Wonderful*, 134 S. Ct. at 2239-2240; *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

Here, the FDCPA works against the backdrop of the Code to regulate professional debt collectors. See Opening Br. 39-40, 44-46; *Feggins*, 2015 Bankr. LEXIS at *18-*19. This is a particularly easy case if the Court concludes that the

Code forbids attempts to abuse the process and collect unenforceable debts; but even if Midland somehow is permitted to file such claims, no one suggests Midland is *compelled* to file such claims. That ends the matter: the judiciary is not entitled to "pick and choose" between competing enactments when it is possible to enforce both. *Morton*, 417 U.S. at 551. It is easily possible to enforce both here: Once Midland elects not to file a claim doomed for failure—which is not only its right (no one is compelled to file a proof of claim), but its legal and ethical responsibility—then it will comply with the Code and the FDCPA. There is no "positive repugnancy" at all. *Conn. Nat'l Bank*, 503 U.S. at 253.

2. Contrary to Midland's contention, there is no "irreconcilable conflict" because the Code allegedly permits what the FDCPA forbids. Br. 25 ("conduct expressly *permitted* by the Bankruptcy Code is also *proscribed* by the FDCPA"). That tension may be relevant in a *preemption* analysis, but not a *preclusion* analysis. See, *e.g.*, *POM Wonderful*, 134 S. Ct. at 2236; *Simon*, 732 F.3d at 275-276; *Randolph*, 368 F.3d at 730-732; *Feggins*, 2015 Bankr. LEXIS 2822, at *27-*29. The "rarity" of preclusion is a direct result of its "stringent" standard: there must be an "irreconcilable conflict" between the two provisions. *J.E.M.*, 534 U.S. at 142. Midland cannot find a single controlling case suggesting that a true "conflict" exists where one statute merely permits what another disallows. The actual test

asks whether one statute *compels* what the other disallows, a standard Midland cannot meet.

As its lead authority, Midland relies heavily on *United States* v. *Devall*, 704 F.2d 1513 (11th Cir. 1983), but it misreads that decision. See Answering Br. 35-38. *Devall* involved a different statute (Section 207 of the Social Security Act, 42 U.S.C. 407), a different provision in the Code (11 U.S.C. 1325(b)), and entirely different considerations—whether the Act's "anti-assignment" provision precludes the Social Security Administration from complying with an order to pay "all or some portion of the debtor's social security benefits to a trustee in bankruptcy." 704 F.3d at 1514. While the Code provision was framed in permissive terms (*id.* at 1515), *Devall* found that the Code would be wholly defeated by applying the Social Security Act, including rendering certain Code provisions "meaningless" (*id.* at 1516); *Devall* conversely found that Congress's intent in the Social Security Act would not be impaired in the slightest by refusing to apply the Act in that setting (*id.* at 1517). It accordingly found clear congressional intent to enforce one law over the other, and also found it effectively impossible to apply both at the same time: "the conflict between the Bankruptcy Code and the Social Security Act is apparent and cannot be reconciled without limiting one to accommodate the other." 704 F.2d at 1518.

Here, by contrast, Congress passed the FDCPA precisely because other laws were "inadequate" to regulate debt-collector misconduct (15 U.S.C. 1692(b)), and the Code is not frustrated, but advanced, by deterring knowingly time-barred claims. *Devall* does not support Midland's request for the Court to "pick and choose" among congressional enactments. *Morton*, 417 U.S. at 551.

* * *

Midland says that the district court adopted the "*narrowest* formulation" of the preclusion standard (Br. i), but that is mistaken. The correct formulation recognizes that preclusion is forbidden unless it is impossible to comply with both statutes. That means that a conflict does not exist unless one statute compels what the other forbids; the standard is plainly unsatisfied where one statute forbids what the other merely allows. Contra Answering Br. 32-34. Midland is not faced with an impossible position: no provision of any law demands that it file a frivolous proof of claim. If it elects not to flood the bankruptcy court with frivolous filings, it faces no risk under either the Code or the FDCPA. That is exactly the opposite of a true "conflict"—one where a party finds it impossible to escape liability because its conduct will be punished under some provision no matter what it does.

Midland's contrary view sets up the judiciary on a collision course with the political branches. It is not the courts' proper role to decide which laws to enforce and which to ignore. See, *e.g.*, *Astoria Fed. Sav. Loan Ass'n* v. *Solimino*, 501 U.S.

104, 109 (1991); *Miccosukee Tribe of Indians of Fla.* v. *U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1299 (11th Cir. 2010). Congress is well aware of the controlling standard, and it legislates against that backdrop: it presumptively intends each law to be enforced according to its terms unless it explicitly says otherwise or mutual compliance is impossible. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. That standard is unsatisfied here, and the district court erred in concluding otherwise.[10]

CONCLUSION

The district court's judgment should be reversed, and the case should be remanded for further proceedings.

[10] Midland has apparently conceded that *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-511 (9th Cir. 2002), and *Simmons* v. *Roundup Funding LLC*, 622 F.3d 93, 96 (2d Cir. 2010), were incorrectly decided. See Answering Br. 26. Midland has accordingly waived any claim that the FDCPA is precluded in its entirety in this setting. *Id.* at 39-40 (conceding that this "broader" theory "is not an issue in this case"). While Johnson briefed the issue in the interest of providing the Court with a comprehensive analysis, the Court need not resolve that broader question in light of Midland's concession. Unless Midland can show a true "irreconcilable conflict" between *Crawford*'s FDCPA claim and Midland's asserted right to file time-barred claims, the judgment should be reversed.

Respectfully submitted.

/s/ *Daniel L. Geyser*

Earl P. Underwood, Jr.
Kenneth J. Riemer
UNDERWOOD & RIEMER, P.C.
21 S Section Street
Fairhope, AL 36532
Tel.: (251) 990-5558
epunderwood@alalaw.com
kjr@alaconsumerlaw.com

Peter K. Stris
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
peter.stris@strismaher.com
daniel.geyser@strismaher.com

Counsel for Plaintiff-Appellant Aleida Johnson

October 30, 2015

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 32-4 because it contains 5,893 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ *Daniel L. Geyser*
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com

Counsel for Plaintiff-Appellant

October 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2015, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Daniel L. Geyser*
Daniel L. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Tel.: (213) 995-6811
Fax: (213) 261-0299
daniel.geyser@strismaher.com

October 30, 2015