No. 15-2984

In the United States Court of Appeals for the Eighth Circuit

DOMICK NELSON,
Plaintiff-Appellant,

v.

MIDLAND CREDIT MANAGEMENT, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Missouri in No. 4:15-cv-00816-ERW, Hon. E. Richard Webber

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

RULE 35(b)(1) STATEMENT

This case presents fundamental questions concerning the interaction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Bankruptcy Code. According to the panel, the FDCPA does not prohibit debt collectors from filing knowingly time-barred proofs of claim in a Chapter 13 bankruptcy. The panel's decision creates a direct, acknowledged split with the Eleventh Circuit, is incompatible with the controlling logic of multiple Supreme Court decisions, and adopts the minority view in suggesting the Code somehow limits the FDCPA, leaving this Court directly at odds with the Third, Seventh, and Eleventh Circuits (while embracing a Second Circuit decision that has since been called into doubt *by the Second Circuit itself*). The panel did this without confronting or addressing scores of dispositive arguments presented in briefing and oral argument.

The case for rehearing is compelling. Midland is a professional debt collector. It acquires time-barred debts for pennies on the dollar, and then floods bankruptcy courts with proofs of claim to recover on such time-barred debts. There is no legitimate basis for these claims: the claims-process is limited to "enforceable" rights, and time-barred debts are *not* enforceable. Midland does not even pretend it has any good-faith basis for its filings. If the system functioned as Congress intended, these claims would be rejected 100% of the time. But these claims are regularly *not* rejected: the system *predictably* breaks down and fails, and Midland collects whenever it does. This is why Midland burdens the system with frivolous claims. If the process never malfunctioned, its abusive scheme would not exist.

The panel approved this flagrant misuse of the claims-process. Contrary to the panel's view, "a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim." *Johnson* v. *Midland Funding, LLC*, No. 15-11240, 2016 WL 2996372, at *3 (11th Cir. May 24, 2016). This "misbehavior" "'creates the misleading impression to the debtor that the debt collector can legally enforce the debt.'" *Id.* at *6. "[W]here the bankruptcy process is working as intended," time-barred claims are always rejected; it is only when defendants *exploit* the system that they collect, "'necessarily reduc[ing] the payments to other legitimate creditors with enforceable claims.'" *Id.* at *7, *10. Midland's scheme is "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1260 (11th Cir. 2014).

This issue is both important and recurring, and it has hopelessly divided the lower courts. It directly affects thousands of debtors, consumes countless hours of judicial and party time in bankruptcies nationwide, and imposes serious costs on creditors with legitimate claims (unlike those at issue here). The panel's disposition suggests that Congress, without any discernible reason, *permitted* debt collectors to file frivolous claims in bankruptcy—even though such claims would be categorically *sanctioned* in any other legal context. Rehearing is plainly warranted.

STATEMENT

1. a. Congress enacted the FDCPA in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure 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." 15 U.S.C. 1692(e). Congress specifically determined that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. 1692(b).

Among a broad range of prohibitions, the FDCPA forbids the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. That section further enumerates a non-exhaustive list of prohibited practices, including making false representations of "the character, amount, or legal status of any debt," and "using any false or deceptive means to collect or attempt to collect any debt." 15 U.S.C. 1692e(2)(A), 1692e(10). The Act separately prohibits the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. "[A]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes." *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 172 (3d Cir. 2015).

b. Once a debtor files for bankruptcy, a bankruptcy estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). Creditors who wish to recover from the estate "may file a proof of claim" (11 U.S.C. 501(a))—"a written statement setting forth a creditor's claim." Fed. R. Bankr. P. 3001. The Code defines a "claim" as a "right to payment, whether or not such right is * * * fixed, contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. 101(5)(A). The filing of a proof of claim is "prima facie" evidence of its validity. Fed. R. Bankr. P. 3001(f).

A proof of claim is automatically "allowed" unless a party in interest objects and shows that "such claim is unenforceable against the debtor * * * under any agreement or applicable law." 11 U.S.C. 502(a), (b)(1). Congress specifically included "statutes of limitation" as one means of proving unenforceability (11 U.S.C. 558), and tasked bankruptcy trustees with "examin[ing] proofs of claims and object[ing] to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1) (imposing the same duty on Chapter 13 trustees). While debtors are often represented by lawyers, not all debtors are represented, and the representation does not always extend to examining proofs of claim or filing objections.

2. "A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors—are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." *Crawford*, 758 F.3d at 1256. "Absent an objection from either the Chapter 13 debtor or the trustee, the time-barred claim is automatically allowed

against the debtor"; "[a]s a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259. "Such a distribution of funds to debt collectors with time-barred claims then necessarily reduces the payments to other legitimate creditors with enforceable claims." *Id.* at 1261. And even when a proper objection is lodged, those objections "consume[] energy and resources in a debtor's bankruptcy case, just as filing a limitations defense does in state court." *Ibid.*

Debt buyers obtain debts at a fraction of their face value. *McMahon* v. *LVNV Funding, LLC*, 744 F.3d 1010, 1022 (7th Cir. 2014) (FTC study showing debt buyers paid on average "2.2 cents per dollar for debts that were 6 to 15 years old"). Due to this significant margin, debt collectors can generate a profit even if the majority of their time-barred claims are properly rejected as baseless. "[T]he phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system." *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009).

3. Midland is a substantial part of this trend. After Domick Nelson sought protection in Chapter 13 bankruptcy, Midland filed a proof of claim seeking $751.87. Slip op. (Op.) 2. The claim on its face was barred by Missouri's statute of

limitations: it had been obtained from Retail Lane Bryant, which recorded the last transaction on November 12, 2006, nearly a *decade* earlier. Addendum (Add.) 15.

Nelson objected to this claim, and it was disallowed. Op. 2; Add. 20. Nelson then sought relief under the FDCPA, alleging that Midland's attempt to collect knowingly time-barred debts violated 15 U.S.C. 1692e and 1692f as an "unfair," "unconscionable," "false," "deceptive," and "misleading" practice. Add. 5-6.

The district court dismissed Nelson's complaint (Add. 7-12), and the panel affirmed (Op. 2-5). According to the panel, Midland filed an "accurate and complete" proof of claim, despite seeking relief on patently time-barred debt. Op. 5. It reasoned that the Bankruptcy Code's "protections against harassment and deception satisfy the relevant concerns of the FDCPA": "Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by 'trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims.'" *Id.* at 4. The panel thus found "'no need to protect debtors who are already under the protection of the bankruptcy court,'" and "'no need to supplement the remedies afforded by bankruptcy itself.'" *Ibid.* (quoting *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010)).

The panel acknowledged that Midland's practice "burden[s]" debtors, but insisted the Code's claims-process was *less* "burdensome" than ordinary litigation. Op. 4. The panel likewise recognized that Midland's scheme inflicts harm, but still *less* harm than collection lawsuits: "Because a proof of claim does not expand the pool of available funds in bankruptcy, debtors have less at stake than a collection defendant." *Id.* at 4-5. The panel thus refused to "follow the Eleventh Circuit," and "reject[ed] extending the FDCPA to time-barred proofs of claim." *Ibid.*

REASONS FOR GRANTING THE PETITION

The panel's decision creates a direct conflict with the Eleventh Circuit, is irreconcilable with Supreme Court precedent, sharply departs from cases in other circuits, and embraces an abusive practice that burdens busy courts and innocent parties without any redeeming value or useful purpose. Midland's practice is actionable under the FDCPA, and the panel erred in holding otherwise.

In reaching its mistaken conclusion, the panel failed to grapple with scores of dispositive arguments. For example: Like Midland itself, the panel never identified any legitimate purpose in filing knowingly frivolous claims. It did not identify a single instance where Midland's claims succeed absent system malfunction, or explain why Midland's deliberate abuse of the claims-process is fair or appropriate under the FDCPA. It did not explain why the FDCPA (or the Code) tolerates meritless claims subject to a clear, ironclad defense, notwithstanding Fed. R. Bankr. P. 9011 (requiring a good-faith basis for *all* claims). And it did not say why baseless claims are "accurate and complete" despite (i) asserting a "right to payment" that does not exist; and (ii) invoking the Code's presumption of "validity" despite having plainly *invalid* claims.

The panel declared that debtors have substantial "protections" in bankruptcy (Op. 4-5), but in quantifying that protection, the panel said—nothing. If those protections actually worked, Midland's claims would be rejected 100% of the time. The panel did not address the obvious pattern of system failure, or explain why Midland continues to flood bankruptcy proceedings with baseless filings—at great cost to innocent parties and busy courts—if those "protections" functioned as Congress intended. Midland's business model is designed to exploit predictable failures in the process; the model would collapse if bankruptcy's "protections" were sufficient. Congress enacted the FDCPA to fill in gaps where "existing laws" were "inadequate to protect consumers" from professional debt collectors. Some may view the Code's protections as sufficient, but Congress disagreed; the panel had no basis for overriding Congress's considered judgment. *POM Wonderful LLV* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); *Johnson*, 2016 WL 2996372, at *5. Rehearing en banc is warranted.

THE PANEL'S DECISION IS WRONG, CREATES A CIRCUIT SPLIT, AND IS IRRECONCILABLE WITH SUPREME COURT PRECEDENT

1. a. Defendants misrepresent the "character" and "legal status" of time-barred debts (15 U.S.C. 1692e, 1692e(2)(A), 1692e(10)), and the panel's contrary holding is at odds with binding Supreme Court precedent.

The Bankruptcy Code defines a "claim" as a "right to payment" (11 U.S.C. 101(5)(A)), and a "right to payment" (as the Supreme Court has said *four times*) is "nothing more nor less than an *enforceable* obligation." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991) (emphasis added); see also *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998); *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). It is axiomatic that time-barred debts are not "legally enforceable" (*Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 396-399 (6th Cir. 2015); *Crawford*, 758 F.3d at 1261; *McMahon*, 744 F.3d at 1020; *Huertas* v. *Galaxy Asset Mgmt.*, 641 F.3d 28, 32 (3d Cir. 2011)), and Midland thus has no "corresponding 'right to payment'" (*Cohen*, 523 U.S. at 218). By falsely claiming a "right to payment" when *no* "right to payment" exists, Midland violates the FDCPA. 15 U.S.C. 1692e.

b. The panel suggests Midland *does* have a "right to payment" because time-barred debts are not "extinguished" under Missouri law—only the corresponding "remedies" are gone. Op. 2. This is exactly backwards: The lack of any "remedy" *is* the lack of a "right to payment." Once the limitations period expires, Midland cannot *enforce* the debt against anyone. The underlying debt may still exist, but it is at most a "moral obligation," not a "legal" one. *McMahon*, 744 F.3d at 1020; see *Buchanan*, 776 F.3d at 396-397; *Crawford*, 758 F.3d at 1261; *Huertas*, 641 F.3d at 32. Midland can ask nicely to be repaid, but a debtor may simply refuse. The lack of remedy eliminates the "right to payment" (*NextWave*, 537 U.S. at 303), and the panel invites a square (and lopsided) circuit conflict in suggesting otherwise.[1]

2. The panel said that Midland's claims are "accurate and complete" (Op. 5), but that is wrong. It makes no difference that Midland's claims disclosed half-truths about the debt (*e.g.*, the debt's amount, the last-transaction date), because Nelson is not challenging those half-truths; Nelson is challenging the core assertion that Midland has a "right to payment" when no such "right" exists. Midland falsely asserts "*proof*" of a "*right to payment*" to exploit the Code's presumption of validity. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); Fed. R. Bankr. P. 3001(f). When the process (predictably) breaks down and fails, Midland gladly participates in the estate's distribution, despite having *unenforceable* claims that should be rejected.

Midland knows its claims are not "prima facie" valid. But it never discloses that to anyone or makes any corrective statements. It simply lodges baseless claims in a formal process reserved for *enforceable* obligations. The fact that some will detect its claims as frivolous does not wipe away the "misleading impression" that

[1] *Johnson* found "no blanket prohibition" on filing time-barred claims (2016 WL 2996372, at *5), but only in the narrowest sense. It found such claims allowed in the way "frivolous lawsuit[s]" are allowed, but subject to *punishment*: "[t]here is nothing to stop the filing, but afterwards the filer may face sanctions." *Id.* at *6. One might quibble whether *sanctionable* claims are truly *allowed* claims, but the import is clear: the FDCPA properly punishes filing time-barred claims. *Id.* at *10.

it "can legally enforce [a] debt" that cannot be enforced. *Crawford*, 758 F.3d at 1261. Midland's half-truths hardly render these claims "accurate" or "complete."[2]

3. Midland exploits the claims-allowance process to collect when the system *malfunctions*. Midland's claims have no legitimate basis or useful purpose. There is *no* scenario in which these claims survive under proper review: the claims are invalid and will be rejected every time if the process functions as Congress intended. Yet Midland deliberately "floods" bankruptcy proceedings with hundreds of thousands of time-barred claims, all to collect when the process fails. Midland's business practice wastes limited judicial and party resources, interferes with the efficient processing of claims, and (when successful) diverts funds from legitimate creditors. This flagrant abuse is "unfair" and "unconscionable" under the FDCPA.[3]

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[2] Midland says its claims disclose all details required by Fed. R. Bankr. P. 3001(c). But that Rule operates together with Rule 9011, which requires a *good-faith basis* for all claims. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015). "Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions." *Brubaker* v. *City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991). Nor does it matter that "the statute of limitations is an affirmative defense which must be pled or waived" (*Steinle* v. *Warren*, 765 F.2d 95, 101 (7th Cir. 1985)): "Rule 11 does not permit a plaintiff to avoid sanctions merely because the opposing party or the judge might not immediately recognize that the assertion is groundless." *Brubaker*, 943 F.2d at 1385. Midland cannot avoid liability because its claims are so *clearly* baseless that some parties can ferret them out.

[3] The panel discounts the "burden[]" imposed by Midland's conduct. Op. 4. But for each frivolous filing, someone must still review the claim, confirm the limitations

[Footnote continued on next page]

The panel offers no true response. It says the Code has "protections against harassment and deception" (Op. 4-5), but never explains why Midland's abuse is conceivably tolerated under the FDCPA *or* the Code. Midland imposes pointless costs on courts and innocent parties without any offsetting societal value or public benefit. In the best-case scenario, the debtor or trustee is burdened with the hassle and expense of filing needless objections, and the court is forced to waste its time and resources rejecting baseless claims; in the worst-case scenario, the process breaks down and allows invalid claims, diverting limited funds from vulnerable debtors and honest creditors. The process is sufficiently taxed without the deliberate filing of baseless claims. *Young*, 789 F.3d at 879. Midland's attempt to profit from system-error is unfair and unconscionable, and it violates the FDCPA.[4]

4. As the Eleventh Circuit held in *Crawford*, the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. It is settled that debt

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[Footnote continued from previous page]

period, prepare the objection, and file it 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 redeeming value in the practice, this significant expense is especially unwarranted.

[4] Nor are stale claims necessary for an equitable distribution of estate assets. The "equitable distribution" on time-barred debt is *always* zero. Those debts are unnecessary to any functioning Chapter 13 plan. They are submitted only to take unfair advantage of the process in the hope of collecting when the system malfunctions.

collectors violate the FDCPA by filing litigation over time-barred debts. *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). The same rationale applies here: there is no reason that debt collectors suddenly have more freedom to pursue stale claims once debtors enter bankruptcy. This is the same blatant attempt to collect debts that a creditor has no right to collect. Ironically, had Nelson not declared bankruptcy, Midland indisputably would have no right to compel payment from anyone. Bankruptcy promises a fresh start by forgiving debt. Midland's attempt to use bankruptcy to *add* debt flips the system on its head.

The panel stated that debtors are adequately protected by trustees, who have a "statutory obligation to object to unenforceable claims." Op. 4. This makes nonsense of the statutory scheme. The FDCPA bans "abusive, deceptive, and unfair" practices. Debt collectors cannot avoid the FDCPA by suggesting their practice is so egregious that Congress *compelled* trustees to ferret out and attack it. If these claims had any legitimate purpose, Congress would not have charged trustees with automatically objecting the moment the claims are filed. The trustees' "statutory obligation" underscores why this conduct violates the FDCPA; it hardly excuses it.

In any event, as a practical matter, trustees do *not* adequately protect debtors. Midland knows that trustees cannot feasibly object to every baseless claim. Trustees are charged with multiple duties and obligations, and they operate under difficult circumstances with limited time and resources. With these practical constraints, trustees simply cannot wade through each and every proof of claim filed in all Chapter 13 proceedings. See *Feggins* v. *LVNV Funding, LLC*, No. 13-11319, 2015 WL 7424339, at *3 n.5 (Bankr. M.D. Ala. Nov. 20, 2015) (trustee "testified that his office processes between 6,000 and 7,000 claims each month, and that there are between 18,000 and 19,000 pending Chapter 13 cases in this district").[5]

The best proof that bankruptcy's "safeguards" are inadequate is Midland's own existence. If Midland failed to deceive or exploit debtors, its entire scheme would collapse. Midland has no good-faith basis for its filings, which is why it gives up once anyone objects. Midland is playing the odds: it knows the process will break down, and debtors and trustees will not catch every invalid claim. Midland cannot avoid the FDCPA because its bad-faith scheme does not always work.

5. According to the panel, the Code's existing "protections" and "remedies" render the FDCPA unnecessary in this context. Op. 5 (following *Simmons*). This logic directly conflicts with Supreme Court authority. It is not up to courts to "pick

[5] The panel stated that bankruptcy debtors have "less at stake" than "collection defendant[s]." Op. 4-5. This is wrong for debtors with 100% plans, who end up paying dollar-for-dollar a debt that is unenforceable outside bankruptcy. It is even wrong for debtors not repaying 100% of unsecured debt: If the bankruptcy case is dismissed or converted to Chapter 7, debtors would owe more on outstanding debts due to amounts wrongly diverted to stale claims. *In re Freeman*, 540 B.R. 129, 135 (Bankr. E.D. Pa. 2015). Chapter 13 debtors are vulnerable; they have much at stake with *every* payment, as they struggle to meet basic needs for themselves and their families. Midland cannot excuse the real harm it inflicts by citing the *additional* harm it could inflict outside bankruptcy.

and choose among congressional enactments." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "'[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. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001). The panel may feel that the Code's remedies are sufficient, but Congress made a contrary determination in the FDCPA. It decided that heightened remedies were necessary to counteract the abusive practices of professional debt collectors. The Code and the FDCPA can readily co-exist, and it is "easy to enforce each one." *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004); accord *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013). It "show[s] disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful*, 134 S. Ct. at 2238; *Johnson*, 2016 WL 2996372, at *5.[6]

CONCLUSION

The petition for rehearing en banc should be granted.

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[6] The panel followed *Simmons*, which itself relied upon *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-511 (9th Cir. 2002). But *Walls* is an outlier, and the Second Circuit recently cut back on *Simmons*, refusing to find the FDCPA precluded where a debt collector allegedly violated the Code's discharge injunction. See *Garfield* v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91-92 (2d Cir. 2016) (adopting *Randolph*, rejecting *Walls*, and acknowledging that *Randolph*'s logic "lead[s]" to "a result that differs from our *Simmons* decision"). The panel's analysis is incompatible with *Johnson*, *Simon*, *Randolph*, and *Garfield*.

Respectfully submitted.

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August 8, 2016

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 15-2984

Domick Nelson

Plaintiff - Appellant

v.

Midland Credit Management, Inc.

Defendant - Appellee

National Association of Consumer Bankruptcy Attorneys

Amicus on Behalf of Appellant(s)

ACA International

Amicus on Behalf of Appellee(s)

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: March 15, 2016
Filed: July 11, 2016

Before WOLLMAN, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

In November 2006, Domick R. Nelson defaulted on a consumer debt of \$751.87. On February 25, 2015, she filed a Chapter 13 petition in bankruptcy court. Midland Credit Management, Inc., as agent for the creditor, filed a proof of claim in bankruptcy court for the amount of the debt. According to the proof of claim, Nelson made no payment on the debt after November 2006. Nelson objected to the proof of claim, arguing it was time-barred. *See* **§ 516.120(1) RSMo 2000**; ***Discovery Grp. LLC v. Chapel Dev., LLC***, 574 F.3d 986, 990 (8th Cir. 2009) (recognizing that Missouri statutes of limitations are procedural, not substantive, and merely suspend the remedy without extinguishing the right). The bankruptcy court agreed, disallowing Midland's claim. *See* **11 U.S.C. § 558** (recognizing statutes of limitation as a "defense available to the debtor").

Nelson then sued Midland, alleging that, by filing the proof of claim on the time-barred debt, Midland violated the Fair Debt Collection Practices Act (FDCPA). The district court[1] dismissed for failure to state a claim, holding that the FDCPA is not implicated by a debt collector filing an accurate and complete claim on a time-barred debt. Nelson appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

This court reviews de novo the Rule 12(b)(6) dismissal of Nelson's claims. ***Cox v. Mortgage Elec. Registration Sys., Inc.***, 685 F.3d 663, 668 (8th Cir. 2012). This court assumes as true all factual allegations in the pleadings, interpreting them most favorably to Nelson, the nonmoving party. ***Bell v. Pfizer, Inc.***, 716 F.3d 1087, 1091 (8th Cir. 2013). "[A] complaint must contain sufficient factual matter, accepted

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[1] The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri.

as true, to state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009).

"Enacted to eliminate abusive debt collection practices, the FDCPA imposes civil liability on debt collector[s] for certain prohibited debt collection practices." ***Hemmingsen v. Messerli & Kramer, P.A.***, 674 F.3d 814, 817 (8th Cir. 2012) (alteration in original). Nelson alleges that Midland's claim violated three prohibitions in the FDCPA: "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," **15 U.S.C. § 1692d**; "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," **§ 1692e**; and "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," **§ 1692f**. Because each of these allegations stem from the same conduct—the filing of the proof of claim—this court may consider the provisions together. *See* ***Hemmingsen***, 674 F.3d at 817.

More specifically, under the FDCPA, a debt collector may neither falsely represent "the character, amount, or legal status of any debt," **15 U.S.C. § 1692e(2)(A)**, nor threaten "to take any action that cannot legally be taken or that is not intended to be taken," ***id.*** **§ 1692e(5)**. Nelson argues that Midland, by submitting its claim, represented that the claim was valid and enforceable. *See* **11 U.S.C. § 502(a)** ("A claim or interest . . . is deemed allowed, unless a party in interest . . . objects."). Even if—as here—the debt collector does not make express misrepresentations, the FDCPA bars a debt collector from filing or threatening a lawsuit to collect a time-barred debt. *See* ***Freyermuth v. Credit Bureau Servs., Inc.***, 248 F.3d 767, 771 (8th Cir. 2001) ("[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.").

Nelson urges this court to follow the Eleventh Circuit and extend to bankruptcy claims the rule against actual or threatened litigation on time-barred debts. *See* ***Crawford v. LVNV Funding, LLC***, 758 F.3d 1254 (11th Cir. 2014); *see also* ***Johnson v. Midland Funding, LLC***, 2016 WL 2996372, at *3 (11th Cir. May 24, 2016) (clarifying *Crawford* by holding that the Bankruptcy Code does not preempt the FDCPA). In *Crawford*, the Eleventh Circuit held that knowingly filing a time-barred proof of claim violated the FDCPA's prohibitions against unfair, unconscionable, deceptive, or misleading conduct. 758 F.3d at 1261. The *Crawford* court reasoned that the same concerns underlying the rule against litigating or threatening to litigate time-barred debts—the debtor's faded memory and lost records, possible ignorance of the statute of limitations, and expense to contest the stale debt—apply equally to a debt collector filing a claim on a stale debt. ***Id.***

Crawford, however, ignores the differences between a bankruptcy claim and actual or threatened litigation. In *Freyermuth*, this court held that a defendant's FDCPA liability turns on "whether an unsophisticated consumer would be harassed, misled or deceived by" the debt collector's acts. ***Freyermuth***, 248 F.3d at 771. The bankruptcy process protects against such harassment and deception. Unlike defendants facing a collection lawsuit, a bankruptcy debtor is aided by "trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims." ***In re Gatewood***, 533 B.R. 905, 909 (8th Cir. B.A.P. 2015); *see* **11 U.S.C. §§ 704(a)(5)**, **1302 (b)(1)** (outlining trustees' duties, including objecting "to the allowance of any claim that is improper").

Defending a lawsuit to recover a time-barred debt is more burdensome than objecting to a time-barred proof of claim. "[T]he Bankruptcy Code provides for a claims resolution process involving an objection and a hearing to assess the amount and validity of the claim . . . [that] is generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit." ***In re Gatewood***, 533 B.R. at 909. Because a proof of claim does not expand the pool of available funds in bankruptcy, debtors have less at stake than a collection defendant. Rather, an unsecured creditor likely shares only "pro rata in the distribution of the pool of available funds and see[s] the unpaid portion of its claim discharged." ***Id.***

These protections against harassment and deception satisfy the relevant concerns of the FDCPA. "There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." ***Simmons v. Roundup Funding, LLC***, 622 F.3d 93, 96 (2d Cir. 2010) (so stating while rejecting an FDCPA suit even where the proof of claim was inaccurate and inflated).

This court rejects extending the FDCPA to time-barred proofs of claim. An accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA. The district court properly dismissed for failure to state a claim.

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The judgment is affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2016, an electronic copy of the foregoing Petition For Rehearing En Banc was filed with the Clerk of Court for the U.S. Court of Appeals for the Eighth Circuit, using the appellate CM/ECF system. I further certify that all parties in these consolidated cases are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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