No. 16-1653

In the United States Court of Appeals for the First Circuit

IN RE: DAVID A. MARTEL; CHERYL A. MARTEL,
Debtors.

DAVID A. MARTEL; CHERYL A. MARTEL,
Plaintiffs-Appellants,

v.

LVNV FUNDING; RESURGENT CAPITAL SERVICES,
Defendants-Appellees.

On Appeal from the United States Bankruptcy Court for the District of Maine, Portland

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OPENING BRIEF FOR PLAINTIFFS-APPELLANTS DAVID A. MARTEL AND CHERYL A. MARTEL

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

In accordance with Fed. R. App. P. 34(a) and 1st Cir. R. 34(a), Plaintiffs respectfully submit that this appeal warrants oral argument. According to the bankruptcy court, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, does not prohibit debt collectors from filing knowingly time-barred proofs of claim in a Chapter 13 bankruptcy. The decision implicates a direct, acknowledged circuit split, is incompatible with the controlling logic of multiple Supreme Court decisions, and affects thousands of debtors (in cases implicating potentially billions of dollars) in bankruptcies nationwide.

In light of the importance and complexity of these issues, Plaintiffs believe that oral argument will assist the Court in its review.

INTRODUCTION

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. Defendants are professional debt collectors. They acquire time-barred debts for pennies on the dollar, and then flood bankruptcy courts with proofs of claim seeking to recover on these knowingly time-barred debts. Defendants are acutely aware that their claims are wholly unenforceable under the Bankruptcy Code, and will *always* be disallowed once anyone objects. But Defendants also know that, due to predictable shortcomings in the bankruptcy process, parties will often mistakenly *fail* to object. Because the Code automatically allows any claim—even invalid claims—absent an objection, this permits Defendants to collect on meritless claims when the system malfunctions, diverting funds from vulnerable debtors and innocent creditors.

This appeal challenges this misuse of the claims-process. As explained below, Defendants' misconduct squarely violates the FDCPA and the Bankruptcy Code. This issue is both important and recurring, and it has sharply divided the 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 bankruptcy court's ruling suggests that Congress, without any discernible reason, *permitted* debt collec-

tors to file frivolous claims in bankruptcy—even though such claims would be categorically *sanctioned* in any other legal context. Reversal is warranted.

JURISDICTIONAL STATEMENT

David A. Martel and Cheryl A. Martel filed a complaint asserting claims under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*, its counterpart under Maine law, and the Bankruptcy Code. JA43-JA54.[1] The bankruptcy court had jurisdiction under 15 U.S.C. 1692k(d), 28 U.S.C. 157(b), and 28 U.S.C. 1334. On October 13, 2015, the bankruptcy court dismissed Plaintiffs' claims in an adversary proceeding. A1-A10. Plaintiffs timely filed a notice of appeal on October 26, 2015. JA27-JA28.

On November 6, 2015, all parties filed a joint certification in bankruptcy court seeking a direct appeal to this Court under 28 U.S.C. 158(d)(2)(A). JA41-JA42. Under Fed. R. Bankr. P. 8006(g), the parties timely filed a petition for direct appeal in this Court on December 4, 2015. This Court granted that petition on May 23, 2016.

[1] "JA" refers to the appendix filed separately with the Court; "A" refers to the addendum filed together with this brief; "Doc." refers to a docket entry in the adversary proceeding.

STATEMENT OF THE ISSUES

In this Chapter 13 bankruptcy, Defendants filed proofs of claim on knowingly time-barred debts. There is no legitimate basis for these claims: the claims-process is limited to legally enforceable rights, and time-barred debts are not legally enforceable. It is undisputed that these claims will be rejected 100% of the time if the system functions as Congress intended. But Defendants often collect anyway when the system (predictably) breaks down and fails, which is precisely why Defendants continue filing knowingly invalid claims. According to Defendants, the Code grants an absolute right to file even baseless claims, and the FDCPA cannot interfere with that "right."

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA or the Maine FDCPA.[2]

2. Whether any viable FDCPA claim is nevertheless impliedly repealed by the Bankruptcy Code.

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[2] For all relevant purposes, the provisions of the Maine FDCPA are identical to its federal counterpart. Compare Me. Rev. Stat. Ann. tit. 32, § 11013(2), with 15 U.S.C. 1692e; compare Me. Rev. Stat. Ann. tit. 32, § 11013(3), with 15 U.S.C. 1692f. To avoid redundancy, this brief will reference only the FDCPA in the text, but Plaintiffs assert both federal and state FDCPA claims, and seek reversal on both sets of claims on this appeal.

3. Whether any viable Maine FDCPA claim is nevertheless preempted by the Bankruptcy Code.

4. Whether the bankruptcy court abused its discretion in refusing to sanction Defendants' misuse of the bankruptcy process under 11 U.S.C. 105.

STATEMENT OF THE CASE

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).

"The Act regulates interactions between consumer debtors and 'debt collector[s],' defined to include any person who 'regularly collects * * * debts owed or due or asserted to be owed or due another." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 577 (2010) (quoting 15 U.S.C. 1692a(5), (6)). 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) (internal quotation marks omitted); see also, *e.g.*, *Stratton* v. *Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 448 (6th Cir. 2014) ("'The Fair Debt Collection Practices Act is an extraordinarily broad statute' and must be construed accordingly.").

Congress authorized a private right of action to enforce the FDCPA's prohibitions. 15 U.S.C. 1692k.

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); see also 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* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1256 (11th Cir. 2014). "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 only 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 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old"); *Buchanan* v. *Northland Group, Inc.*, 776 F.3d 393, 395 (6th Cir. 2015) ("LVNV buys 'uncollectable' debts at a discount—the older the debts, the greater the discount"). 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." *Ibid.*

3. Defendants are a substantial part of this trend, representing some of the nation's biggest buyers of unpaid debt. See, *e.g.*, *In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009) (describing LVNV). In 2014, after Plaintiffs sought protection in Chapter 13 bankruptcy, Defendants filed three separate proofs of claim,

seeking a total of $2,460.61. JA45-JA47.[3] Each claim on its face was barred by Maine's six-year statute of limitations: the latest relevant transaction was in 2006, the earliest was in 2001 (well over a *decade* earlier), and the original creditors charged off the debts between 2001 and 2007, again well outside the limitations period. JA46. Plaintiffs contacted Defendants to contest the debts and request written documentation and details about the alleged debts. JA46-JA47. In response, Defendants simply withdrew all three claims. A3.

Plaintiffs responded by seeking relief under the FDCPA, alleging that Defendants' attempt to collect a knowingly time-barred debt violated 15 U.S.C. 1692e and 1692f as an "unfair," "unconscionable," "deceptive," and "misleading" practice. JA50-JA51; see also JA51-JA52 (asserting identical claims under the Maine FDCPA). Plaintiffs also sought relief under the Bankruptcy Code, asserting that Defendants' abuse of the bankruptcy process was appropriately subject to sanctions under 11 U.S.C. 105. JA48-JA50.

Defendants moved to dismiss the proceeding (Doc. 6), and the bankruptcy court granted the motion (A1-A10). The bankruptcy court rejected Defendants' theory that the Code "preempts" or "implicitly repeals" the FDCPA. A9-A10. But

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[3] Plaintiffs' confirmed Plan allowed all unsecured creditors to be repaid 100% of their claims. JA47. Had Plaintiffs not objected, they accordingly would have owed Defendants the full amount of these unenforceable debts.

the court also refused to allow an FDCPA claim for filing a knowingly time-barred proof of claim. A7-A8. According to the court, "[f]iling in a bankruptcy case an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice." A8 (quoting *Gatewood* v. *CP Med., LLC*, 533 B.R. 905, 910 (B.A.P. 8th Cir. 2015)). The court reasoned that the limitations period "do[es] not extinguish debts, but bar[s] actions to collect once raised." *Ibid.* It accordingly found nothing "'false, misleading, deceptive, unfair, or unconscionable'" about Defendants' practice. *Ibid.* (quoting *Gatewood*, 533 B.R. at 910).

For the "same reasons," the court also found that "filing a proof of claim in accordance with Fed. R. Bankr. P. 3001 is not an abuse of the bankruptcy process" under 11 U.S.C. 105. A10.

The court accordingly dismissed the adversary proceeding. A1.

4. The parties subsequently filed a joint certification for a direct appeal (JA41-JA42), which this Court granted.

SUMMARY OF ARGUMENT

I. The FDCPA prohibits filing proofs of claim on knowingly time-barred debt, and the bankruptcy court's contrary view was mistaken.

A. Defendants represent that their time-barred claims are valid and enforceable when they know exactly the opposite is true. A "claim" is a legally "enforcea-

ble" right, and time-barred claims are not *legally enforceable*. *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998). By falsely asserting a "right to payment" when *no* "right to payment" exists, Defendants misrepresent the "legal status" and "character" of the debt. This deceptive conduct fits comfortably within the FDCPA.

B. Defendants also exploit the claims-allowance process to collect when the system *malfunctions*. Defendants engage in a systemic effort to "flood" bankruptcy proceedings with thousands of time-barred claims. Defendants file these claims without any legitimate basis or useful purpose. There is *no* scenario in which these claims survive under proper review: Defendants' claims are invalid and will be universally rejected if the process functions as Congress intended. Defendants' entire scheme is premised on the hope that the system will break down and fail—as it predictably does when debtors fail to object and trustees fail to weed out invalid claims. This flagrant abuse imposes needless costs on courts and innocent parties; it is exactly the kind of false, deceptive, and unfair practice that the FDCPA was designed to avoid.

C. As the Eleventh Circuit held in *Crawford*, the same acts that violate the FDCPA outside bankruptcy also violate the FDCPA within it. Courts routinely hold that debt collectors violate the FDCPA by filing state-court litigation over time-barred debts. See, *e.g.*, *Phillips* v. *Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). The same rationale applies in this context: 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 Plaintiffs not declared bankruptcy, Defendants indisputably would have no right to demand payment from anyone. Bankruptcy promises a fresh start by forgiving debt. Defendants' attempt to use bankruptcy to *add* debt flips the system on its head.

II. In the alternative, Defendants argue that the Bankruptcy Code repealed the FDCPA *by implication*. Yet such repeals must be established through "clear text" or "irreconcilable conflict" (*J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), and Defendants fail that heavy burden.

A. Defendants concede that there is no *textual* preclusion. Put simply, nothing in the Code or the FDCPA possibly qualifies as a "clear statement" that one scheme precludes the other.

B. 1. Nor is there any irreconcilable conflict. Defendants assert that the two schemes conflict because the Code grants professional debt collectors an absolute "right" to file knowingly time-barred claims. But the Code (unremarkably) does not tolerate *frivolous* claims. Congress instructed trustees to *reject* the very claims that Defendants insist are allowed, and courts routinely sanction parties for deliberately filing stale claims. There is no "right" to engage in *sanctionable* conduct.

The FDCPA thus prohibits what the Code does not even allow, and its application would not undermine the Code, but *promote* it. Because nothing compels (or even permits) an act under one scheme that violates the other, there is no conceivable "conflict."

2. The FDCPA survives the Code even if parties had a "right" to file knowingly baseless claims. There is no conflict where a party can easily comply with each scheme by voluntarily refraining from targeted behavior. The Code creates a *permissive* right to file a claim; no one is compelled to take any act under the Code that is forbidden by the FDCPA. The fact that professional debt collectors are singled out for additional regulation does not create a conflict; it merely reflects Congress's considered judgment that this particular group imposes heightened risks of public harm, and its behavior must be restricted in ways that do not affect ordinary creditors.

III. Nor does the Bankruptcy Code preempt the Maine FDCPA. As above, Defendants can easily comply with both laws by refusing to file frivolous claims. The Maine FDCPA simply punishes debt collectors for violating the Code, which is hardly inconsistent with the Code's requirements. And the claims-process is not frustrated by limiting the ability of debt collectors to file baseless claims: Defendants cannot explain why Plaintiffs' bankruptcy would have functioned more effi-

ciently had Defendants not wasted everyone's time by filing meritless claims that they were immediately forced to withdraw.

IV. The bankruptcy court erred in declining to sanction Defendants under 11 U.S.C. 105. That section authorizes bankruptcy courts to issue orders (including sanctions) that prevent abuse of the bankruptcy process. The court refused to issue sanctions here, but its decision was premised on a mistaken view of the Code and its requirements; it is settled law that courts abuse their discretion by misapplying the law, and this Court should remand for the bankruptcy court to reconsider its decision under an appropriate legal framework.

* * *

Congress intended the FDCPA to fill the gaps of other laws, and it does that here. Professional debt collectors are purchasing huge portfolios of knowingly stale claims, and flooding bankruptcy courts with claims that are undeniably unenforceable. While individual claims may impose little harm, the aggregate effect of this practice is staggering. Congress had every reason to impose additional restrictions on groups that tend to abuse the system to collect debts. It was aware that existing remedies were not always adequate to deter wrongful collection practices, and it intended the FDCPA to overlap with those schemes to provide added protection. The remedies available under the Code for *ordinary* creditors are not calibrated to handle the business methods of debt collectors. The FDCPA performs that role,

and the bankruptcy court erred in refusing to enforce the FDCPA as Congress intended. Its judgment should be reversed.

STANDARD OF REVIEW

1. This Court "review[s] *de novo* the legal determinations of the bankruptcy court, and its findings of fact for clear error." *Marrama* v. *Citizens Bank of Mass. (In re Marrama)*, 430 F.3d 474, 477 (1st Cir. 2005). "Discretionary rulings made pursuant to the Bankruptcy Code are reviewable only for abuse of discretion." *In re Gonic Realty Trust*, 909 F.2d 624, 626 (1st Cir. 1990).

2. This Court should use the "hypothetical unsophisticated consumer" standard in assessing these claims. *Pollard* v. *Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014); see also, *e.g.*, *Wallace* v. *Wash. Mut. Bank, F.A.*, 683 F.3d 323, 326 (6th Cir. 2012) (asking whether a "statement would tend to mislead or confuse the reasonable unsophisticated consumer"). Defendants' representations are designed to deceive unrepresented debtors or mislead busy attorneys and trustees who have neither the time nor the resources to review invalid proofs of claim. Because the process often relies on consumer debtors as the ultimate backstop, Defendants' representations should be reviewed on the assumption that the debtor herself (*not* her attorney) will review these claims. See *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007).

Nor does it matter that lawyers will *sometimes* review claims; the same is true in state-court litigation over stale debt, where it is certainly plausible that *some* debtors would hire attorneys to defend against time-barred debts. See *Phillips*, 736 F.3d at 1079; see also *Crawford*, 758 F.3d at 1258 ("[t]he inquiry is not whether the *particular* plaintiff-consumer was deceived or misled") (emphasis added); *Stratton*, 770 F.3d at 449. Defendants cannot invoke a higher standard simply because some lawyers or trustees will review claims that Defendants hope will be reviewed by consumers alone. See *Evory*, 505 F.3d at 776 (calibrating the FDCPA standard to the "intended recipient[]").

ARGUMENT

I. THE FDCPA PROHIBITS KNOWINGLY FILING A PROOF OF CLAIM ON TIME-BARRED DEBT IN A CHAPTER 13 BANKRUPTCY

Contrary to Defendants' contentions, knowingly filing a proof of claim on time-barred debt violates the FDCPA. It is "false, deceptive, [and] misleading" under 15 U.S.C. 1692e, and it is "unfair [and] unconscionable" under 15 U.S.C. 1692f. The bankruptcy court erred in holding otherwise, and its judgment should be reversed.

A. Defendants Violate The FDCPA By Falsely Representing That Their Time-Barred Claims Are Valid And Enforceable When They Know Exactly The Opposite Is True

The FDCPA "specifically prohibits the false representation of the character or legal status of any debt" (*McMahon*, 744 F.3d at 1020), which precisely de-

scribes Defendants' conduct. Their claims are indisputably time-barred and unenforceable. Yet "[i]n 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." *Feggins* v. *LVNV Funding LLC (In re Feggins)*, 535 B.R. 862, 869 (Bankr. M.D. Ala. 2015). Defendants have asserted a "right to payment" that does not exist, and they have taken advantage of default rules declaring their claims "prima facie" valid when they know precisely the opposite is true. Their conduct squarely violates the FDCPA.

1. a. Defendants misrepresent the "character" and "legal status" of time-barred debts. 15 U.S.C. 1692e, 1692e(2)(A), 1692e(10).

The Bankruptcy Code defines a "claim" as a "right to payment" (11 U.S.C. 101(5)(A)), and a "right to payment" (according to the Supreme Court) is "nothing more nor less than an *enforceable* obligation." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991) (emphasis added); see also, *e.g.*, *FCC* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003); *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990). Parties voluntarily participating in the claims-process act against the backdrop of these settled rules. When a creditor files a "proof of claim," it is necessarily asserting "proof" of a "right to payment" on legally "enforceable" debt.

Here, however, Defendants assert "proofs" of claim without any conceivable "right to payment." It is axiomatic that time-barred debts are not "legally enforceable" (*Buchanan*, 776 F.3d at 396-399; *McMahon*, 744 F.3d at 1020), and Defendants are fully aware that they lack any "corresponding 'right to payment'" (*Cohen*, 523 U.S. at 218). 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) (time-barred debts are "unenforceable in a court of law"). Yet Defendants act anyway despite knowing that no such "right" exists. *E.g.*, *Avalos* v. *LVNV Funding, LLC (In re Avalos)*, 531 B.R. 748, 754 (Bankr. N.D. Ill. 2015).

Defendants' misrepresentations are unlawful. "Whether a debt is legally enforceable is a central fact about the character and legal status of that debt." *McMahon*, 744 F.3d at 1020. "[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." *Feggins*, 535 B.R. at 869. By asserting a "right to payment" when there is *no* "right to payment," Defendants violate the FDCPA. *McMahon*, 744 F.3d at 1020.

b. In addition to prohibiting direct misrepresentations, the FDCPA also prohibits inappropriate "means" of collecting debts. 15 U.S.C. 1692e, 1692e(10). Defendants' scheme *defines* unlawful means.

Under the Code's background rules, every claim is automatically deemed "prima facie" valid. *Gardner* v. *New Jersey*, 329 U.S. 565, 573 (1947); 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."). Defendants exploit that background rule. They are fully aware that their claims are not entitled to a presumption of validity. Yet Defendants never disclose that their claims are "prima facie" *invalid* or make any corrective statement to avoid deceiving the court and other parties. Cf. *McMahon*, 744 F.3d at 1021 ("Neither LVNV nor CMS gave a hint that the debts that they were trying to collect were vulnerable to an ironclad limitations defense."). Defendants simply leverage "the misleading impression * * * that the debt collector can legally enforce [a] debt" that indisputably cannot be enforced. *Crawford*, 758 F.3d at 1261; see also *Buchanan*, 776 F.3d at 396.

Nor does it matter that Defendants never explicitly stated that their claims were timely or enforceable. That representation inheres in every claim. Cf. *McMahon*, 744 F.3d at 1022. The Code's claims-process is reserved for *enforceable* claims. When a party knowingly participates in that process, it necessarily represents that its claims are enforceable.

Defendants took advantage of the false impression that they deliberately helped foster. That deception violates the FDCPA.

2. The bankruptcy court accepted Defendants' position that it was not false or misleading to assert a "right" to recover time-barred debt. The court was mistaken.

a. Defendants insist they have a "right to payment" because time-barred debts are not extinguished under Maine law—only corresponding remedies are extinguished. See, *e.g.*, A8 ("Statutes of limitation do not extinguish debts, but bar actions to collect once raised."); *Gatewood*, 533 B.R. at 910. That is exactly backwards: without a "remedy," *there is no right to payment*. Under the Code, the question is not whether a debt still exists, but whether that debt can be *legally enforced*—and there is no "right to payment" unless a debt is "legally enforceable." *NextWave*, 537 U.S. at 303; *Johnson*, 501 U.S. at 83-84; *Davenport*, 495 U.S. at 559. Debt collectors have no "right" to enforce time-barred debts in *any tribunal*. The underlying obligation may still exist, but it is at most a "moral obligation," not a "legal" one. *McMahon*, 744 F.3d at 1020; see also *Buchanan*, 776 F.3d at 396-397; *Crawford*, 758 F.3d at 1261; *Huertas*, 641 F.3d at 32. Defendants can ask nicely to be repaid, but a debtor may simply refuse. That is not a "right" under any ordinary understanding of the term. See *Feggins*, 535 B.R. at 873 ("a creditor

barred by limitation has no more right to be paid than one barred by repose, and it has no more right to be paid in bankruptcy than it does in state court").[4]

Under the Code, debt collectors cannot share in an estate's limited assets—diverting funds from *legitimate* creditors—based on "moral" obligations alone. Defendants have no basis for claiming a "right to payment."

b. Defendants also resist liability because their time-barred claims are literally true: "a proof of claim submitted on a court-approved form, fully compliant with Rule 3001(c)(3), is a neutral statement that a debt existed at a certain time and is now owned by the claimant." *Robinson* v. *eCast Settlement Corp.*, No. 14-CV-8277, 2015 WL 494626, at *3 (N.D. Ill. Feb. 3, 2015); see also A7-A8. Defendants are factually and legally wrong.

As a factual matter, Defendants' claims were *not* literally true. To be clear: these claims were not "neutral statement[s] that a debt existed at a certain time." These were knowingly false assertions of "*proof*" that Defendants had a "*right to payment*" designed to exploit the Code's presumption of validity (and collect at the expense of everyone else). Indeed, even Defendants' own authority acknowledges that a claim reflects "an implicit representation of legal enforceability." *Ibid.* The

[4] Nor is there any genuine dispute that filing a proof of claim is akin to initiating civil litigation. See *Gardner*, 329 U.S. at 573.

fact that Defendants managed not to distort *other* aspects of a frivolous claim is entirely beside the point.

As a legal matter, the FDCPA is not limited to *literal* misstatements. It prohibits statements that are *deceptive or misleading* and targets improper *means* of collecting debts. See, *e.g.*, *Buchanan*, 776 F.3d at 396 ("the statute outlaws more than just falsehoods"; "even a true statement may be banned for creating a misleading impression"); *Gammon* v. *GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1258 (7th Cir. 1994) (Easterbrook, J., concurring) ("literal truth may convey a misleading impression"). Even were Defendants' filings literally true, they still used deceptive *means* to foster the misleading impression that time-barred debts were enforceable. A professional debt collector cannot excuse itself by including half-truths about a debt's amount or age—Defendants still wrongly included stale debts in a process reserved for *enforceable* claims. See, *e.g.*, *Owens* v. *LVNV Funding, LLC*, No. 15-2044, __ F.3d __, 2016 WL 4207965, at *10 (7th Cir. Aug. 10, 2016) (Wood, C.J., dissenting) (such claims are not "'accurate and complete'" in "the only respect pertinent here," because "they are mum about the unenforceability of the debt"). Their abusive scheme fits comfortably within the FDCPA.

B. Defendants Violate The FDCPA By Exploiting The Claims-Allowance Process To Collect When The System *Malfunctions*, Not When It Operates As Congress Intended

Defendants also violate the FDCPA by using "unfair or unconscionable means to collect or attempt to collect" time-barred debts. 15 U.S.C. 1692f. Defendants succeed only when the bankruptcy process breaks down and fails—as it routinely does. Their claims have no legitimate purpose: there are *zero* circumstances where Congress intended time-barred claims to divert funds from the estate. Defendants simply exploit unintended flaws in the process, at the expense of vulnerable debtors and innocent creditors. Their scheme is "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford*, 758 F.3d at 1260.

1. Defendants engage in a flagrant misuse of the bankruptcy process. As described above, proofs of claim are automatically "allowed" unless someone objects. 11 U.S.C. 502(a). Under this automatic-allowance procedure, all unchallenged claims—even patently *invalid* claims—are included by default in distributions. This permits the system to function efficiently. But it also creates opportunities for abuse: creditors with defective claims can "unfairly game[] the system by taking advantage of the automatic claims allowance process," "camouflaging [their claims] among the inundation of other claims filed," and hoping to "slip past the bankruptcy court's supervision unnoticed." *Feggins*, 535 B.R. at 869. These bad-

faith actors know that if the process breaks down, they will illegitimately collect on unenforceable claims, flouting Congress's intent.

Most legitimate collection efforts work within the system's intended operation; Defendants' business model is predicated entirely on system failure.[5] Defendants knowingly flood bankruptcy courts with time-barred claims in the hope of collecting unenforceable debts. These claims have no legal justification. *Avalos*, 531 B.R. at 757. Defendants do not (and *cannot*) contend that they have any good-faith basis for these filings. Defendants' only hope is that the system *malfunctions*: the debtor may unwittingly "fail to object" and the trustee may "fail[] to fulfill its statutory duty to object to improper claims." *Crawford*, 758 F.3d at 1259 n.5, 1261. When that happens, Defendants can force debtors to "pay the debt from [their] future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court." *Id.* at 1259.

This scheme is "an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court." *Feggins*, 535 B.R. at 868. Defendants impose pointless costs on courts and innocent parties without any offsetting societal

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[5] System failure is also all too predictable. Consumer debtors may review claims without an attorney, and many unrepresented debtors are unaware of limitations defenses. While trustees are likely aware of limitations defenses, they may not devote their limited time and resources to inspecting claims. Defendants, by design, take improper advantage of these predictable deficiencies. See Part I.C.2, *infra*.

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. Defendants' attempt to profit from system-error is unfair and unconscionable, and it violates the FDCPA. See *Dubois* v. *Atlas Acquisitions LLC (In re Dubois*), No. 15-1945, __ F.3d __, slip op. 29 (4th Cir. Aug. 25, 2016) (Diaz, J., dissenting) ("Atlas knew exactly what it was doing—exploiting a weakness in the bankruptcy system and preying on potential error to collect on debts where it should not").

2. Defendants insist that their scheme is a fair and legitimate use of the bankruptcy process, but they are mistaken.

a. According to Defendants, Congress *invited* parties to file knowingly time-barred claims: "The Bankruptcy Code implicitly recognizes that proofs of claim regarding time-barred debts may be filed *by providing debtors with an affirmative defense to such claims*." *Birtchman* v. *LVNV Funding, LLC*, No. 1:14-CV-00713, 2015 WL 1825970, at *6 (S.D. Ind. Apr. 22, 2015) (emphasis added); A8.

This logic is mystifying. The claims-process permits *genuinely disputed* claims; it does not tolerate (much less permit) frivolous claims *indisputably* subject

to an iron-clad defense. Defendants' claims are not "disputed" at all; indeed, it is *undisputed* that they are invalid and unenforceable (*e.g.*, *McMahon*, 744 F.3d at 1020). The Code authorizes a defense to time-barred claims because *there otherwise would be no mechanism for discarding untimely claims mistakenly filed in good faith*. That hardly suggests Congress intended parties to file *knowingly* defective claims—any more than Rule 11 invites parties to file frivolous lawsuits or Title 18 of the U.S. Code invites parties to commit felonies. See, *e.g.*, *Trevino* v. *HSBC Mortgage Servs., Inc. (In re Trevino)*, No. 10-70594, 2015 WL 3883180, at *15 (S.D. Tex. June 19, 2015).

b. Nor is Defendants' practice somehow "fair" because their claims "clearly state[] information that can be used to determine if the debt is time barred." *Birtchman*, 2015 WL 1825970, at *6; A8. This same information is available to *Defendants*, who thus knew their claims were time-barred but filed anyway. It is hardly an excuse that others—absent system failure—might figure out what Defendants already knew before "burden[ing]" the system with frivolous claims. *In re Sekema*, 523 B.R. 651, 655 (Bankr. N.D. Ind. 2015) (sanctioning debt collectors with a fine "reflect[ing] an appreciation of the system-wide burdens created by this type of misconduct"); see also Fed. R. Bankr. P. 9011 (barring claims filed without a good-faith basis).

The bankruptcy process relies on parties acting in good faith; it cannot function when parties abuse the system hoping that the process breaks down and no one notices. *Young* v. *Young (In re Young)*, 789 F.3d 872, 879 (8th Cir. 2015). Defendants' practice is an inexcusable attempt to subvert the Code. It plainly violates the FDCPA.

C. The Same Baseless Filings That Would Violate The FDCPA In State Court Also Violate The FDCPA In Bankruptcy

As even Defendants admit, they could not file time-barred claims in state court without violating the FDCPA. *Phillips*, 736 F.3d at 1079 (invoking 15 U.S.C. 1692e, 1692f); see also *Freyermuth* v. *Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). Defendants, however, insist that they can sidestep the FDCPA by pursuing the same stale debt in bankruptcy, because bankruptcy is "different" and Chapter 13's "safeguards" protect debtors. See also Doc. 6-1 at 8-12; *Gatewood*, 533 B.R. at 909. Defendants are wrong.

1. As the Eleventh Circuit held in *Crawford*, in every relevant respect, the reasons "for outlawing stale suits to collect consumer debts" (*Phillips*, 736 F.3d at 1079) are "[t]he same * * * in the bankruptcy context." *Crawford*, 758 F.3d at 1260. Here, as in ordinary litigation, knowingly time-barred claims take unfair advantage of debtors, deliberately "creat[ing] the misleading impression" that debts can be enforced. *Id.* at 1261. Indeed, the entire point of Defendants' scheme is to deceive debtors into "unwittingly" accepting stale debt. *Phillips*, 736 F.3d at 1079.

Likewise, debtors will often give up rather than fight a frivolous claim: "filing 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. Here, as in state court, frivolous claims may survive simply because no one has sufficient incentive to oppose them.

"In bankruptcy," as in ordinary litigation, "the limitations period provides a bright line for debt collectors and consumer debtors, signifying a time when the debtor's right to be free of stale claims comes to prevail over a creditor's right to legally enforce the debt." *Crawford*, 758 F.3d at 1260-1261. The FDCPA "outlaw[s]" time-barred claims in state court (*Phillips*, 736 F.3d at 1079); there is no reason that Congress intended to provide *less* protection once debtors enter bankruptcy.

2. Defendants reject *Crawford* on the ground that Chapter 13 debtors are protected by attorneys and trustees. But these "safeguards" are ineffective—which is precisely why Defendants continue flooding bankruptcies with frivolous claims. Put bluntly: if these safeguards worked, Defendants' business model would collapse.

Defendants may believe it is fine to waste the court's time and burden trustees, debtors, and innocent creditors with the pointless task of objecting to frivo-

lous claims. But Defendants' conduct is just as improper in this context as any other. *Crawford* was correct, and Defendants' contrary contention is meritless.

a. According to Defendants, Chapter 13 debtors are typically represented by lawyers aware of limitations defenses. But not all consumer debtors have lawyers, and not all lawyers are retained to review claims or file objections. It is wrong to presume that attorneys retained for the overall bankruptcy have also been paid to review proofs of claim. And every time debtors are unrepresented (or a representation's scope is limited[6]), debtors alone are forced to review claims and identify defenses. Those debtors are materially indistinguishable from debtors in state-court litigation.

Nor is it fair to ask debtors to hire attorneys to object to Defendants' frivolous filings. See *Birtchman*, 2015 WL 1825970, at *9 (suggesting debtors would incur only "minimal" expense for "the additional legal work required" to challenge time-barred claims). The cost of even a few hundred dollars is a meaningful expense to Chapter 13 debtors—it can mean the difference in a debtor's ability to meet basic needs for herself and her family. And even if frivolous claims prompt only "straightforward" objections (*ibid.*), someone must still review the claim, con-

[6] While the local rules of certain courts require attorneys to participate in all proceedings, that is not universally true. Even where it is true, attorneys will predictably charge higher fees for the representation on the expectation that it will entail additional work—a predictable, harmful result of Defendants' misconduct.

firm the limitations period, prepare the 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. See, *e.g.*, *Jenkins* v. *Genesis Fin. Solutions, LLC (In re Jenkins)*, 456 B.R. 236, 241 (Bankr. E.D.N.C. 2011) ("The issue is a real one, the problem is widespread, and it burdens both debtors and the courts."). Given the lack of any redeeming value in Defendants' practice, this significant expense is especially unwarranted.[7]

b. Defendants further insist that debtors are adequately protected by trustees: even with "unrepresented" debtors, trustees have an independent "statutory obligation to object to improper claims," including "those barred by the statute of limitations." *Birtchman*, 2015 WL 1825970, at *9 (citing 11 U.S.C. 704(a)(5)). Because trustees must object to stale claims, debtors are "protected" from time-barred debts. *Ibid.*; see also Doc. 6-1 at 9; *LaGrone* v. *LVNV Funding LLC (In re LaGrone)*, 525 B.R. 419, 426 (Bankr. N.D. Ill. 2015).

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[7] In many situations, the cost of objecting to the time-barred debt quickly approaches the amount of the debt itself. See *Suesz* v. *Med-1 Solutions, LLC*, 757 F.3d 636, 639 (7th Cir. 2014) (en banc). Debt collectors are very aware of this dynamic, and it explains why many parties simply acquiesce in baseless filings rather than invest time and resources filing an objection.

This logic makes nonsense of the statutory scheme. The FDCPA bans "abusive, deceptive, and unfair" practices. 15 U.S.C. 1692(a). Debt collectors cannot possibly avoid the FDCPA by suggesting that 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" only underscores precisely why this conduct violates the FDCPA; it hardly excuses it.[8]

In any event, as a practical matter, trustees do *not* adequately protect debtors. Defendants know 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. In light of 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*, 540 B.R. 895, 901 n.5 (Bankr. M.D. 2015) (*Feggins II*) (trustee "testified that his office processes between 6,000 and 7,000 claims each month, and that there are between 18,000 and

[8] See, *e.g.*, *Dubois*, slip op. 27-28 (Diaz, J., dissenting) ("At best, a debt collector who files such a claim wastes the trustee's time. At worst, the debt collector catches the trustee asleep at the switch and collects on an invalid claim to the detriment of other creditors and, in many cases, the debtor. In either case, the debt collector misleadingly represents to the debtor that it is entitled to collect through bankruptcy when it is not.").

19,000 pending Chapter 13 cases in this district"). Defendants deliberately exploit this dynamic.

c. Defendants' theory, if accepted, invites this Court to stand in direct conflict with the Eleventh Circuit. On indistinguishable facts, *Johnson* recently reaffirmed *Crawford*: "a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding." 823 F.3d at 1339. This "misbehavior" "'creates the misleading impression to the debtor that the debt collector can legally enforce the debt.'" *Id.* at 1341-1342. "[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 1338-1339.

The panel found "no blanket prohibition" on filing time-barred claims (823 F.3d at 1341), but did so in the narrowest sense. It found those 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." *Ibid.* 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 1341-1342.[9]

d. Three circuits—two by sharply divided panels—have recently reached the opposite conclusion, but their reasoning is indefensible. See *Nelson* v. *Midland Credit Mgmt., Inc.*, No. 15-2984, __ F.3d __, 2016 WL 3672073 (8th Cir. July 11, 2016); *Owens* v. *LVNV Funding, LLC*, No. 15-2044, __ F.3d __, 2016 WL 4207965 (7th Cir. Aug. 10, 2016) (Bauer and Flaum, JJ.; Wood, C.J., dissenting); *Dubois* v. *Atlas Acquisitions LLC (In re Dubois)*, No. 15-1945, __ F.3d __, slip op. (4th Cir. Aug. 25, 2016) (Floyd and Thacker, JJ.; Diaz, J., dissenting).

Like Defendants, these courts never identified any legitimate purpose in filing knowingly frivolous claims. They did not identify a single instance where Defendants' claims succeed absent system malfunction, or explain why Defendants' deliberate abuse of the claims-process is fair or appropriate under the FDCPA. They did not explain why the FDCPA (or the Code) tolerates meritless claims sub-

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[9] The better view is that time-barred claims are not permitted under the Code: As *Johnson* itself recognized, "[a] 'right to payment' under the Bankruptcy Code 'is nothing more nor less than an enforceable obligation,'" and time-barred claims are not "enforce[able]." 823 F.3d at 1338. In suggesting defendants somehow still had a "claim," *Johnson* made no attempt to square its view with those settled propositions. The panel was apparently bound by circuit precedent, which held (also without confronting those propositions) that "'creditors may file unenforceable claims in the bankruptcy court.'" *Ibid.* (citing *In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015)).

ject to a clear, ironclad defense (notwithstanding Rule 9011's unremarkable requirement of a good-faith basis for *all* claims). And they 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" for *invalid* claims.

These courts declared that debtors have substantial "protections" in bankruptcy (*Dubois*, slip op. 18 n.6, 21-22; *Owens*, 2016 WL 4207965, at *6; *Nelson*, 2016 WL 3672073, at *2), but in quantifying that protection, the courts said—nothing. If those protections actually worked, Defendants' claims would be rejected 100% of the time. The courts did not address the obvious pattern of system failure, or explain why Defendants continue to flood bankruptcy proceedings with baseless filings—at great cost to innocent parties and busy courts—if those "protections" functioned as Congress intended.[10] Defendants' 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 profes-

[10] See, *e.g.*, *Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting) ("The reason this case is important is because the protections the majority believes exist in the bankruptcy courts are only as good as the human actors working in those courts."); *Dubois*, slip op. 28 (Diaz, J., dissenting) ("if trustees performed their duties flawlessly, Atlas would have little incentive to engage in its scheme").

sional debt collectors. 15 U.S.C. 1692(b). Some circuits may view the Code's protections as sufficient, but Congress disagreed; the courts had no basis for overriding Congress's considered judgment. *POM Wonderful LLV* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); *Johnson*, 823 F.3d at 1338.

3. In short, the best proof that bankruptcy's "safeguards" are inadequate is Defendants' own existence. If Defendants failed to deceive or exploit debtors, their entire scheme would disappear. *Avalos*, 531 B.R. at 756-757. Defendants have no good-faith basis for their filings, which is precisely why they throw in the towel when anyone objects. Defendants are playing the odds: they know the process will break down, and attorneys and trustees will not catch every invalid claim.[11] Defendants cannot avoid the FDCPA merely because their bad-faith scheme does not always work.

II. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE IMPLIEDLY REPEALS THESE FDCPA CLAIMS

Defendants alternatively argue that the Bankruptcy Code precludes any viable claim under the FDCPA. According to Defendants, the Code grants creditors an absolute "right" to file proofs of claim, and the FDCPA (by prohibiting frivo-

[11] See, *e.g.*, *Dubois*, slip op. 24 (Diaz, J., dissenting) ("If someone notices the claims and objects, as happened here, Atlas grins sheepishly—'You caught me!'—and admits that the claim is meritless. But if the claim slips through, Atlas uses the bankruptcy court to garner a payoff on unenforceable debts.").

lous claims) is irreconcilable with that "right." Doc. 15 at 3. This theory is meritless.[12]

"When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other * * * ." *Randolph*, 368 F.3d at 730. This standard is demanding, and Congress's intent to displace one of its own laws must be "clear and manifest" (*Morton*, 417 U.S. at 551): "Courts should 'not infer a statutory repeal unless the later statute *expressly contradicts* the original act or unless such a construction is *absolutely necessary* in order that the

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[12] Contrary to Defendants' contention, multiple courts have already rejected the sweeping theory that the FDCPA is precluded in its entirety in the bankruptcy setting (including, of course, the bankruptcy court here, see A9-A10). Compare *Johnson* v. *Midland Funding, LLC*, 823 F.3d 1334, 1338 (11th Cir. 2016) ("The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred."), *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730-733 (7th Cir. 2004) ("[t]he Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA"), and *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 273-274 (3d Cir. 2013) ("follow[ing] the Seventh Circuit's approach"), with *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-511 (9th Cir. 2002) (holding the FDCPA categorically "precluded"), and *Simmons* v. *Roundup Funding LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (holding that the Code precluded an FDCPA claim over an "inflated" proof of claim). *Walls* is an outlier, and the Second Circuit recently cut back *Simmons*, refusing to find the FDCPA precluded where a debt collector alleged a violation of 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"). To prevail notwithstanding *Johnson*, *Randolph*, *Simon*, and *Garfield*, Defendants must show a true "irreconcilable conflict" between the FDCPA and Defendants' asserted right to file time-barred claims. Defendants flunk that showing.

words of the later statute shall have any meaning at all." *Simon*, 732 F.3d at 274 (quoting *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007)) (emphases added).

There is no preclusion under this controlling standard. Congress did not textually foreclose the FDCPA in bankruptcy, and there is no serious (much less "irreconcilable") conflict between the Code and the FDCPA. These statutory schemes can readily co-exist, and it is "easy to enforce each one." *Randolph*, 368 F.3d at 730. Defendants' preclusion theory is mistaken.

A. There Is No Textual Support For Preclusion Because There Is No Clearly Expressed Statement Of Preclusion In Either Scheme

There is no "clearly expressed legislative decision" that the Code supplant the FDCPA in this context. *Randolph*, 368 F.3d at 730. No court examining this question—in *any* setting—has suggested that Congress textually displaced the FDCPA. Congress addressed proofs of claim and provided general contempt remedies in the Code. But Congress did not include any special or exclusive mechanism for handling patently invalid claims, and it never declared the Code's remedies the *exclusive* means for redressing unfair, misleading, or unlawful conduct. See *Wagner* v. *Ocwen Fed. Bank*, No. 99-C-5404, 2000 U.S. Dist. LEXIS 12463, at *3-*4 (N.D. Ill. Aug. 28, 2000).

Nor is there any preclusive language in the FDCPA: Congress framed its open-ended prohibitions with broad language (*e.g.*, forbidding "any" improper rep-

resentations or means, 15 U.S.C. 1692e), and Congress underscored the "inade-qua[cy]" of "[e]xisting" remedies for curbing abusive practices (15 U.S.C. 1692(b)). That suggests the *opposite* intent of deferring to other schemes to regulate "debt collectors."

Congress was well aware of the obvious connection between abusive debt-collection and "personal bankruptcies." 15 U.S.C. 1692(a). If it wished to set aside the FDCPA in this context, it would have said so.

B. There Is No Conflict ("Irreconcilable" Or Otherwise) Between The FDCPA And The Code

Following certain lower courts, Defendants assert that the Code and the FDCPA "irreconcilabl[y] conflict": the Code "authorizes" debt collectors to pursue time-barred debts, while the FDCPA "prohibits" the same practice. *Johnson* v. *Midland Funding, LLC*, 528 B.R. 462, 473 (S.D. Ala. 2015), rev'd, 823 F.3d 1334, 1338 (11th Cir. 2016); see also *B-Real, LLC* v. *Chaussee (In re Chaussee)*, 399 B.R. 225, 236-237, 240 (B.A.P. 9th Cir. 2008). According to Defendants, the FDCPA and the Code thus cannot coexist. Defendants are wrong.

1. There is no preclusion because there is no "right" to file a time-barred proof of claim

There is simply no "right" (under the Code *or* the FDCPA) to file a proof of claim knowing that a debt is unenforceable. This eliminates any conceivable conflict: It is easy to comply with both statutes because the conduct *violates* both stat-

utes. Nothing compels (or even *permits*) an act under one scheme that violates the other. This is simply a matter of refusing to pursue claims that lack any conceivable good-faith basis. Because Defendants cannot establish a "right" under the Code to file baseless claims, their preclusion defense fails.

a. First, Defendants' asserted "right" is incompatible with the Code's plain text. Again, a claim is a "right to payment" (11 U.S.C. 101(5)(A)), and "a 'right to payment' is nothing more nor less than an *enforceable obligation*" (*Davenport*, 495 U.S. at 559 (emphasis added)). Only "enforceable" claims are authorized under 11 U.S.C. 101(5)(A) (*NextWave*, 537 U.S. at 303), and stale claims are *not* "enforceable" (*Crawford*, 758 F.3d at 1261; *McMahon*, 744 F.3d at 1020; *Huertas*, 641 F.3d at 32). Because Defendants have no "right to payment," they have no "right" to file a proof of claim.[13]

Second, any such "right" is directly at odds with the trustee's duty to "object" to stale claims. See 11 U.S.C. 704(a)(5), 1302(b)(1). No rational legislative body simultaneously grants an absolute "right" for one party to file a claim that another party has an absolute duty to reject. Bankruptcies are sufficiently busy

[13] It is true that Congress expanded the term "claim" with the "broadest possible definition." H.R. Rep. No. 95-595, at 180 (1977). But Congress only expanded the term in certain respects, and those respects were *enumerated*: things like "contingent," "unmatured," and "disputed." That satisfied the purpose of bringing all *enforceable* obligations before the court to provide comprehensive relief. *Ibid.* But nowhere did Congress hint that this definition sweeps in knowingly *invalid* claims.

without make-work. Defendants' time-barred claims will fail, by design, unless trustees fail to discharge their legal obligations. That statutory design is incompatible with a purported "right" to file unenforceable claims.

Third, Defendants' understanding is inconsistent with the routine award of sanctions for filing knowingly time-barred claims: "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); see, *e.g.*, *FDIC* v. *Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994); *White* v. *GM Corp.*, 908 F.2d 675, 682 (10th Cir. 1990); see also *Young*, 789 F.3d at 879 ("case law interpreting Rule 11 applies to Rule 9011 cases").[14]

That describes Defendants' conduct exactly. Defendants purchased time-barred debts at pennies on the dollar precisely because those debts are unenforceable. The affirmative defense is "blindingly obvious": "coming to the conclusion that the claims might be time-barred did not require either claimant to look beyond the information it already possessed." *Sekema*, 523 B.R. at 654. Nor does it matter that "the statute of limitations is an affirmative defense which must be pled or

[14] To the extent the bankruptcy court found nothing wrong with deliberately filing suit on knowingly stale claims (A8), it is inviting this Court to create a lopsided circuit split.

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; *Leeds Bldg. Prods.* v. *Moore-Handley, Inc. (In re Leeds Bldg. Prods.)*, 181 B.R. 1006, 1010 (Bankr. N.D. Ga. 1995); see also *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-1113 (7th Cir. 1992).

Sanctions, in short, are "appropriate if any attorney knowingly file[s] suit on an undisputedly time-barred claim." *Goins* v. *JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005). That proposition is impossible to square with Defendants' alleged "right" to file time-barred claims. The entire point of a sanction is that conduct is not merely prohibited, but so egregious to warrant *punishment*. There is no such thing as a "right" to engage in sanctionable conduct. See *Feggins*, 535 B.R. at 869-870; *Smith* v. *Asset Acceptance, LLC*, 510 B.R. 225, 226 (S.D. Ind. 2013).

Congress legislates against the backdrop of established principles like Rule 11 authority and inherent judicial power to sanction frivolous behavior. See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994). It follows that whatever "right" Congress conferred in the Code presumptively does not extend to frivolous filings. If Congress intended to create a "right" for debt collectors to file time-barred claims

(without any discernible justification), Congress surely would have done so with clearer language than this.

b. Defendants' practice is not even *tolerated* under the Code, but *forbidden*. This eliminates any plausible "conflict" between the Code and the FDCPA: a debt collector "can easily satisfy both mandates" (*Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 767 (2004)), because the challenged conduct is forbidden under both schemes. If Defendants simply refuse to file baseless claims, they will automatically comply with the FDCPA. *Johnson*, 823 F.3d at 1341. Defendants' assertion of a "'positive repugnancy'" is incorrect, and it should be rejected. *Simon*, 732 F.3d at 274; see also *Randolph*, 368 F.3d at 730; *Brimmage* v. *Quantum3 Group LLC (In re Brimmage)*, 523 B.R. 134, 140 (Bankr. N.D. Ill. 2015).

2. There is no preclusion even if there somehow *is* a "right" to file a time-barred proof of claim

Even if there were a "right" to file knowingly time-barred claims, the Code and the FDCPA would still easily co-exist. Defendants' contrary assertion fundamentally misunderstands the implied-repeal analysis.

a. There is no "irreconcilable conflict" when one scheme allows what the other forbids; one must *compel* what the other forbids. The standard is one of impossibility. *J.E.M.*, 534 U.S. at 142; *Johnson*, 823 F.3d at 1340-1341; *Randolph*, 368 F.3d at 730. Defendants cannot find a single controlling case suggesting that a true "conflict" exists where one statute merely permits what another disallows.

Mere tension may be relevant in a *preemption* analysis, but not a *preclusion* analysis. See *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014); *Simon*, 732 F.3d at 275-276; *Randolph*, 368 F.3d at 730-732; *Feggins*, 535 B.R. at 874-875. Each law operates within its proper sphere to regulate its targeted behavior. See *POM Wonderful*, 134 S. Ct. at 2239-2240; *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992); *Johnson*, 823 F.3d at 1340. If Congress bans conduct under one law, a court cannot excuse it under another. *J.E.M.*, 534 U.S. at 141-142.

Here, the FDCPA works against the Code's backdrop to regulate professional debt collectors. *Randolph*, 368 F.3d at 730-731; *Feggins*, 535 B.R. at 866. Even if Defendants are somehow permitted to file time-barred claims, no one suggests Defendants are *compelled* to file such claims.[15] 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 Defendants elect not to file baseless claims, they will comply with both

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[15] Indeed, by its own terms, the Code's allowance is wholly *permissive*: "A creditor * * * *may* file a proof of claim." 11 U.S.C. 501(a) (emphasis added). "Thus, it is within the creditor's discretion whether or not to file the claim * * * ." *Grandidier* v. *Quantum3 Group LLC*, No. 1:14-cv-00138, 2014 U.S. Dist. LEXIS 169279, at *4 (S.D. Ind. Dec. 8, 2014) (concluding that courts consequently can "apply both the Bankruptcy Code and the FDCPA"); see also *Trevino*, 2015 WL 3883180, at *14 ("If the Code *required* holders of a debt on which the statute of limitations had run to file proofs of claim, this might conflict with the FDCPA. * * * However, there is no such requirement.").

laws. See *Conn. Nat'l Bank*, 503 U.S. at 253. The fact that professional debt collectors must forgo certain claims in Title 11 is a direct consequence of Congress's political judgment—it is a reason to *enforce* the FDCPA, not preclude it.

* * *

Defendants hint that authorizing these FDCPA claims will flood courts with unnecessary litigation. Yet exactly the opposite is true: it is *Defendants*, not debtors, who are creating needless work for innocent parties and busy courts. Once it is clear that courts will enforce the FDCPA as Congress intended, Defendants will have no choice but to respect the process and end their abusive tactics. The entire point of the FDCPA is to stop unfair practices before they begin. Without the FDCPA's deterrent, Defendants have no reason to stop a practice that exacts significant costs without any redeeming benefit. These suits will deter that future misconduct, eliminating the need to expend *any* further effort grappling with baseless claims.

III. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN OF ESTABLISHING THAT THE BANKRUPTCY CODE PREEMPTS THE MAINE FDCPA

The Code does not preempt the Maine FDCPA for essentially the same reasons that it does not preclude the FDCPA itself. The preemption standard is more forgiving than the preclusion standard, but courts still demand a stringent showing before presuming Congress intended to displace state laws, especially ones protect-

ing public safety and welfare. See, *e.g.*, *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (describing the "presumption against preemption"). Defendants have not remotely mustered their burden of satisfying that standard. See *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1594–1595 (2015) (describing "express," "field," and "conflict" preemption).

The only conceivably relevant form of preemption is conflict preemption, and it fails. As explained above, it is easy to "'compl[y] with both state and federal law'" (*Oneok*, 135 S. Ct. at 1595)—Defendants must simply forgo filing frivolous proofs of claim. See *Randolph*, 368 F.3d at 730. Nor does the Maine FDCPA impose any "'obstacle'" to achieving the Code's "'purposes and objectives.'" *Ibid.* On the contrary, state law merely regulates creditors who are abusing the system in offensive ways. It has no effect on the equitable distribution of the estate, because the equitable distribution of time-barred debt is *always* zero. It does not interfere with the bankruptcy discharge, because debtors seek Chapter 13 relief to discharge *enforceable* debts, not time-barred claims: there is no need to discharge stale debt, because "[t]he statute of limitations itself is full protection against a lawsuit on a stale claim; it does not need to be supplemented by a bankruptcy discharge." *Owens*, 2016 WL 4207965, at *9 (Wood, C.J., dissenting).

The Maine FDCPA *advances* the Code's purposes by deterring and prohibiting Defendants from attempting to take unfair advantage of system error. That is fully consistent with the Code, and Defendants err in suggesting otherwise.[16]

IV. DEFENDANTS' DELIBERATE ABUSE OF THE CLAIMS-PROCESS FALLS SQUARELY WITHIN THE BANKRUPTCY COURT'S SANCTIONS AUTHORITY UNDER 11 U.S.C. 105(a)

Defendants' bad-faith misuse of the claims-process also warrants sanctions under 11 U.S.C. 105(a). Under Section 105(a), Congress specifically granted bankruptcy courts the authority to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," including those necessary to "prevent an abuse of process." 11 U.S.C. 105(a); see also, *e.g.*, *In re Hann*,

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[16] It is possible that certain debt-collection practices in Maine are exempt from the FDCPA under federal regulation, leaving in place Maine's "substantially similar" prohibitions under state law. See 15 U.S.C. 1692o ("Exemption for State regulation"); see also Notice of Maine Exemption From The Fair Debt Collection Practices Act, 60 Fed. Reg. 66,972 (Dec. 27, 1995); 12 C.F.R. 1006.6. To the extent this exemption applies, Defendants failed to raise the issue below and thus waived it. In any event, this exemption (whatever its reach) has no effect on the substantive outcome. Federal regulation makes clear that any exemption preserves the FDCPA's private right of action, see 12 C.F.R. 1006.6(d), and any suit under the FDCPA would incorporate Maine's substantive standards, which are materially identical in all relevant respects. A5 n.4 (stating that "[t]he Maine FDCPA mirrors the federal Act"); cf. *Shapiro* v. *Haenn*, 176 F. Supp. 2d 42, 45 (D. Me. 2002) ("The language of the exemption itself thus makes clear that it was never intended to preclude a plaintiff from taking advantage of the private right of action created by the FDCPA."); *Shapiro* v. *Haenn*, 222 F. Supp. 2d 29, 39-44 (D. Me. 2002) (employing identical analysis for claims under the federal and Maine FDCPA). Plaintiffs nevertheless call the issue to the Court's attention in the interest of full disclosure.

711 F.3d 235, 242-243 (1st Cir. 2013) (affirming a bankruptcy court's sanctions award targeting a creditor's abuse of process); *In re Talisman Marina, Inc.*, 393 B.R. 774, 777 (Bankr. M.D. Fla. 2008) (explaining that Section 105 authorizes sanctions "in addition" to a bankruptcy court's authority "under Rule 9011").

As explained above, Defendants have engaged in a plain abuse of the claims-process. They filed a series of frivolous claims designed to collect in the event of system malfunction. Whenever Defendants are caught—as they were here—they simply abandon the claim and walk away, seeking to avoid any responsibility for their misconduct. Yet walking away is not enough: Defendants' scheme, if tolerated, would permit a pointless practice that imposes real costs without any legitimate basis. Defendants either waste everyone's time or collect when they indisputably should not—"banking on * * * no one spot[ting] the stale claim." *Owens*, 2016 WL 4207965, at *9 (Wood, C.J., dissenting). That flagrant abuse violates the Code (and the FDCPA), and Defendants' contrary view is mistaken.

The bankruptcy court declined to impose sanctions based on its mistaken interpretation of the Code's requirements. That was an abuse of discretion: its ruling was based entirely on its legal view of the claims-process, and a lower court "by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U.S. 81, 100 (1996). According to the bankruptcy court, "filing a proof

of claim in accordance with Fed. R. Bankr. P. 3001 is not an abuse of the bankruptcy process." A10. But Defendants' filings were *not* "in accordance with" Rule 3001 because an undeniably time-barred debt is not an enforceable obligation. Moreover, Rule 3001(c) operates together with Rule 9011, which requires a good-faith basis for all claims. *Young*, 789 F.3d at 879; *Sekema*, 523 B.R. at 653. Filing claims that Defendants *knew* were obviously time-barred constitutes a clear abuse of the bankruptcy process.

The Court should accordingly reverse and remand to give the bankruptcy court an opportunity to exercise its discretion under a proper understanding of the law.

CONCLUSION

The judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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August 29, 2016

ADDENDUM

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ORDER

For the reasons set in the Opinion dated October 13, 2015, the motion to dismiss filed by defendants LVNV Funding, LLC and Resurgent Capital Services is **GRANTED**. Adversary proceeding 15-02001 is hereby dismissed.

Dated: October 13, 2015

/s/ Peter G. Cary
Hon. Peter G. Cary
Chief Judge, U.S. Bankruptcy Court
District of Maine

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: David A. Martel and Cheryl A. Martel, Debtors	)	Chapter 13 Case No. 14-20198
David A. Martel and Cheryl A. Martel, Plaintiffs v. LVNV Funding, LLC and Resurgent Capital Services, Defendants.	)	Adv. No. 15-02001

OPINION

This case raises the question of whether filing of a proof of claim based upon a time-barred debt violates the Federal and Maine Fair Debt Collection Practices Acts and the Bankruptcy Code.[1] The issue is before me on defendants LVNV Funding, LLC and Resurgent Capital Services' motion to dismiss the complaint of plaintiffs David A. Martel and Cheryl A. Martel. For the reasons set forth below, I conclude that filing a proof of claim in accordance with the Federal Rules of Bankruptcy Procedure for a time-barred debt does not violate the consumer protection Acts or the Code, and I therefore **GRANT** the motion to dismiss for failure to state a claim upon which relief may be granted.

[1] Unless otherwise noted, all citations to statutory sections are to the Bankruptcy Reform Act of 1978, as amended, (the "Code"), 11 U.S.C. §101 et seq.

I. FACTS

David and Cheryl Martel filed for bankruptcy protection under Chapter 13 of Title 11 on March 25, 2014. They filed schedules and statements listing their debts and income but did not initially include either LVNV or Resurgent as creditors. On June 5, 2014, the defendants, which qualify as debt collectors under Maine and federal law, filed three separate proofs of claim. Each proof of claim included, as required by F. R. Bankr. P. 3001(c), the amount of the debt, the last transaction date, the last payment date, the chain of ownership of the debt, and the date the original creditor "charged off" the debt. The documents showed that the last transaction dates were in 2006, 2001, and 2003, and that the defendants had written off the debts in 2007, 2001, and 2003, respectively.

In response to the defendants' proofs of claim, the Martels amended Schedule F of their petition on December 15, 2015, listing the amounts claimed by the defendants as "disputed". Soon after, the Martels contacted Resurgent to discuss the validity of the claims. They asserted that the underlying debts were time-barred under state law, and that the defendants had no right to payment through the bankruptcy process. The defendants withdrew all three proofs of claim on January 9, 2015.

The Martels filed this adversary proceeding, seeking actual, compensatory and punitive damages under the U.S. Fair Debt Collection Practices Act (the "FDCPA"), the Maine Fair Debt Collection Practices Act (the "Maine FDCPA"), and §§ 105 and 502 of the Code.[2] Subsequently, the defendants filed this motion to dismiss the complaint pursuant to F. R. Bankr. P. 12(b)(6).

[2] Initially, the plaintiffs alleged that the defendants' actions also violated the automatic stay but their amended complaint eliminated that claim.

II. JURISDICTION AND VENUE

This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334, and the general order of reference entered in this district pursuant to 28 U.S.C. § 157(a). D. Me. Local R. 83.6(a). Venue here is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A).

III. DISCUSSION

In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the 11th Circuit became the first circuit to hold that filing a proof of claim for a time-barred debt constituted a violation of the FDCPA. Prior to, and since, the *Crawford* decision, the majority of federal courts addressing the issue have held otherwise.[3] *See* Brittany M. Dant, *Down the Rabbit Hole: Crawford v. LVNV Funding, LLC Upends the Role of the Fair Debt Collection Practices Act in Consumer Bankruptcy*, 66 Mercer L. Rev. 1067, 1074 (2015). The First Circuit has not decided the issue, though at least one other bankruptcy court in the circuit has held that filing a time-barred proof of claim is not a violation of the FDCPA. *See In re Claudio*, 463 B.R. 190 (Bankr. D.Mass. 2012). For the reasons discussed below, I reach the same conclusion.

A. Motion to Dismiss Standard

In order for the Martels to survive a motion to dismiss under F. R. Bankr. P. 7012(b)(6), their complaint must state a claim upon which relief can be granted. Specifically, the Supreme Court has explained that the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). Furthermore, the complaint must present facts that plausibly suggest

[3] It does not appear that this split in authority will be resolved soon given the United States Supreme Court's denial of certiorari in *Crawford*. 758 F.3d 1254, *cert. denied*, *LVNV Funding LLC v. Crawford*, 135 S. Ct. 1844 (April 20, 2015). *See, also*, K. Grant, K. Yonover and S. Zimmerman, *Cracking the Crawford Code: Treatment of time – barred claims in bankruptcy proceedings*, XXXIV ABI Journal 9, September 2015.

the Martels' right to the relief requested. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The burden of demonstrating that the complaint does not state a claim for which relief can be granted is on the defendants. *See* 5B Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 1357 (3d ed. 2015).

B. The FDCPA and the Code[4]

The FDCPA was enacted 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 collection abuses." 15 U.S.C. § 1692e. In Count II of their complaint, the Martels claim the defendants violated the FDCPA by filing proofs of claim for time-barred debts. They argue that such a practice is abusive and misleading to consumers, violating 15 U.S.C. §§ 1692e, d, and f.[5]

This is a matter of first impression for the bankruptcy court in this district. However, the United States District Court has stated that "in order to prevail on a [] FDCPA claim, a plaintiff must prove that (1) he was the object of collection activity arising from consumer debt, (2) the defendant is a debt collector within the meaning of the statute, and (3) the defendant engaged in a

[4] In Count III of their amended complaint, the Martels allege analogous violations of the Maine FDCPA. The Maine FDCPA mirrors the federal Act, and therefore, my analysis applies equally to each. For brevity, the analogous citations will be footnoted throughout.

[5] The Martels allege that the defendants violated the following sections of the FDCPA in the following ways:

> §1692e by using "false, deceptive or misleading representations or means in connection with the collection of the alleged debts and falsely representing the character, amount or legal status of the debt";
>
> §1692d "by engaging in harassing and abusive conduct in attempting to collect the debts"; and
>
> §1692f "by using unfair or unconscionable means to collect or attempt to collect on the debts".

Adv. Pro. #15-02001 First Amended Complaint, ¶53. The Martels make similar allegations in Count III under the Maine FDCPA. 32 M.R.S.A. § 11013. *Id.* at ¶61.

prohibited act or omission under the FDCPA." *Poulin v. The Thomas Agency*, 760 F.Supp.2d 151, 158 (D.Me.2011)(*citing Kransnor v. Spaulding Law Office*, 675 F.Supp.2d 208, 211 (D.Mass.2009)). Therefore, in order for the Martels' FDCPA count to survive a motion to dismiss, the facts contained in the complaint must meet each of the elements of this three-prong test.

Under the FDCPA, a debt collector is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another…" 15 U.S.C. § 1692a(6).[6] The Martels allege, and the defendants admit, that both LVNV and Resurgent are in the business of collecting debts from consumers. Therefore, both defendants are debt collectors under the statute.

However, for their complaint to remain viable, the Martels must also allege facts that the defendants engaged in acts prohibited under the FDCPA. In this case, those alleged acts are the filing of proofs of claim for time-barred debts. Section 1692e[7] of the FDCPA prohibits creditors from employing "false, deceptive or misleading representations or means in connection with the collection of [] alleged debts and falsely representing the character, amount or legal status of the debt". The defendants argue that those acts cannot be the basis for relief under the FDCPA or the Code, asserting two basic arguments: first, that the FDCPA is preempted by the bankruptcy code, and therefore, a creditor can never violate the FDCPA as long as it is acting appropriately under Title 11; and second, that filing a proof of claim in a bankruptcy case, even a proof of

[6] 32 M.R.S.A. § 11002(6).

[7] 32 M.R.S.A. § 11013(2).

claim for a time-barred debt, does not violate the Code. Though I disagree with the former, I am persuaded by the latter.

This issue has been widely considered in other circuits and in other courts within the First Circuit. Prior to *Crawford*, the consensus was clear: "Federal Courts have consistently ruled that filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA, and that such a filing therefore cannot serve as the basis for an FDCPA action." *Claudio v. LVNV*, 463 B.R. at 193 (Bankr.D.Mass. 2012)(collecting authorities). Following *Crawford*, the result is more nuanced. As the Martels point out, several courts, even some outside of the 11th Circuit, have held that filing stale proofs of claims may violate the FDCPA.[8] Others steadfastly hold that creditors who file proofs of claim in accordance with the rules and applicable Code sections do not mislead or harass debtors, nor do they abuse the bankruptcy process.[9] As a recent 8th Circuit Bankruptcy

[8] *See Taylor v. Galaxy Asset Purchasing, LLC*, 2015 WL 3645668 (N.D. Ill. June 11, 2015); *Patrick v. Quantum3 Group, LLC*, No. 1:14-cv-00545-TWP-TAB, 2015 WL 627216, at *1 (S.D.Ind. Feb. 13) *adopted*, 2015 WL 1166055 (S.D.Ind. Mar. 12, 2015); *Grandidier v. Quantum3 Group, LLC*, No. 1:14-CV-00138-RLY-TAB, 2014 WL 6908482, at *3 (S.D.Ind. Dec. 8, 2014); *In re Feggins*, 535 B.R. 862, 870-871 nn. 10–14 (Bankr. M.D.Ala. 2015)(collecting cases); *In re Holloway*, Adv. Pro. 15-8038-WRS, 2015 WL 5299457 (Bankr. M.D.Ala. Sept. 9, 2015); *In re Avalos*, 531 B.R. 748, 754 (Bankr.N.D.Ill. 2015); *In re Brimmage*, 523 B.R. 134 (Bankr.N.D.Ill. 2015); Order Denying Defendants' Motion to Dismiss Adversary Proceeding, *Douglass v. LVNV Funding, LLC*, (Bankr.S.D.Ohio Adv. Pro. 15-2148 September 21, 2015).

[9] *See Neal v. Atlas Acquisitions, LLC*, No. 3:14-cv-1113-J-34PDB, 2015 WL 5687785, at *7 (M.D.Fla. Sept. 25, 2015); *Murphy v. Resurgent Capital Services, L.P.*, No. 4:15CV506 JCH, 2015 WL 5124171, at *2 (E.D.Mo. Sept. 1, 2015); *Brock v. Resurgent Capital Services, LP*, 14-0324-WD-M, 2015 WL 4985700, at *3 (S.D.Ala. Aug. 20, 2015); *Nelson v. Midland Credit Mgmt., Inc.*, No. 4:15-CV-00816-ERW, 2015 WL 5093437, at *3 (E.D. Mo. Aug. 28, 2015) *appealed sub nom Domick Nelson v. Midland Credit Mgmt., Inc.*, No. 15-20984 (8th Cir.); *Townsend v. Quantum3 Group, LLC*, 535 B.R. 415 (M.D.Fla. 2015); *Johnson v. Midland Funding, LLC*, 528 B.R. 462 (S.D.Ala. 2015); *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268 (E.D.Pa. 2015) *appealed by* No. 15-2131 (3rd Cir.); *Robinson v. eCast Settlement Corp.*, No. 14 CV 8277, 2015 WL 494626, at *3 (N.D.Ill. Feb. 3, 2015); *In re Jenkins*, No. 14-40226-JJR13, 2015 WL 5472513, at *3 (Bankr.N.D.Ala. Sept. 17, 2015); *In re Howard*, No. 13 B 44200, 2015 WL 4574847, at *1 (Bankr.N.D.Ill. July 29, 2015); *Murff v. LVNV Funding, LLC, (In re Murff)*, No. 14 A 790, 2015 WL 3690994, at *5 (Bankr.N.D.Ill. June 15, 2015); *Broadrick v. LVNV Funding, LLC*, 532 B.R. 60 (Bankr.M.D.Tenn. 2015); *In re Perkins*, 533 B.R. 242, 246 (Bankr.W.D.Mich. 2015). Also, on facts similar to those in the instant case, a bankruptcy court in the Northern District of Alabama recently granted the creditor's motion to dismiss the debtor's adversary proceeding under the FDCPA based upon the filing of a claim on a stale debt when the claim was withdrawn before the debtor filed any objection or adversary proceeding regarding the claim. *Brown v. Midland Credit Mgmt., Inc., (In re Brown)*, AP Np. 15-40021-JJR, 2015 WL 5735190 (Bankr.N.D.Ala. Sept. 29, 2015).

Appellate Panel observed: "The FDCPA does not prohibit all debt collection practices. Instead, it simply prohibits false, misleading, deceptive, unfair, or unconscionable debt collection practices. Filing in a bankruptcy case an accurate proof of claim containing all the required information, including the timing of the debt, standing alone, is not a prohibited debt collection practice." *In re Gatewood*, 533 B.R. 905, 910 (B.A.P. 8th Cir. 2015). Nor is such a claim harassing or abusive or unfair within the meaning of §§1692d[10] or f[11] of the FDCPA. *See, e.g., LaGrone v. LVNV Funding, LLC (In re LaGrone)*, 525 B.R. 419, 426 (Bankr.N.D.Ill. 2015)(analyzing the subsections of the FDCPA in relation to the requirements for proofs of claim under the Code).

In the case before me now, the parties agree that the proofs of claim filed by the defendants clearly stated all relevant dates of activity on the underlying accounts, including the debt amounts and the last transaction date. From a review of the proofs, the Martels (or, more specifically, their attorney) identified that the debts would be time-barred in state court proceedings.[12] Exercising their rights under the Code and the Rules, the Martels contacted the defendants to raise their dispute and the claims, which would have been subject to disallowance in the normal course of the bankruptcy proceedings, were withdrawn. The fact that the debts were subject to the affirmative defense of the statute of limitation does not make filing the proofs of claim violative of the FDCPA, the Maine FDCPA or the Code. Statutes of limitation do not extinguish debts, but bar actions to collect once raised. *See* 5B Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 1278 (3d ed. 2015).

[10] 32 M.R.S.A. §11013(1).

[11] 32 M.R.S.A. §11013(1).

[12] The issue of whether Maine law is determinative of the statute of limitations for the defendants' claims is not before me.

Finally, the defendants urge me to conclude that the FDCPA and the Code cannot co-exist—that the Code completely preempts the FDCPA, as some courts have decided.[13] I disagree. First, the concept of statutory preemption applies when a state law attempts to address the same subject matter as a federal statute. U.S.C.A. Const. Art. VI, cl. 2; *see POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). When two federal statutes apply to the same subject, the appropriate question is whether one implicitly repeals the other. The Supreme Court has made it clear that repeals by implication are not favored and such a finding requires that two federal statutes are irreconcilable. *See Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945). As the Seventh Circuit observed:

> One federal statute does not preempt another. *See Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir.2004). When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed. [. . .] It takes either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other. Preemption is more readily inferred, so decisions such as *Cox v. Zale*—which held that bankruptcy principles come from federal rather than state law—are not informative about which federal laws apply to what transactions. The district court did not find any clearly expressed decision that the Bankruptcy Code displaces the FDCPA, and the debt collectors do not contend that Congress made such a decision. The argument, rather, is

[13] "[C]ircuits have split on the question of whether the Bankruptcy Code precludes the FDCPA. The Second and the Ninth Circuits have broadly ruled that it does. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2nd Cir.2010) (holding that the Bankruptcy Code provides exclusive remedies for inflated proofs of claim, dismissing an FDCPA claim); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir.2002) (holding that § 524(a) of the Bankruptcy Code provided the exclusive remedy for violation of the discharge injunction, dismissing an FDCPA claim). The Third and the Seventh Circuits have ruled to the contrary, finding that the FDCPA and the Bankruptcy Code may peacefully co-exist, allowing FDCPA claims in cases involving debtors that were in bankruptcy. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 271 (3d Cir.2013) (holding that debt collectors' communication with debtors in bankruptcy violated the FDCPA and that an FDCPA remedy was not precluded by the Bankruptcy Code); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir.2004) (holding that the Bankruptcy Code does not work an implied repeal of the FDCPA in action involving demand letters sent in violation of the automatic stay)." *In re Feggins*, 535 B.R. at 866.

> one based on the operational differences between the statutes. These do not, however, add up to irreconcilable conflict; instead the two statutes overlap . . . It is easy to enforce both statutes, and any debt collector can comply with both simultaneously.
>
> *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004).

The Code and the FDCPA are not irreconcilable and creditors are under the obligation to follow both. *See, e.g., Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13 (1st Cir. 2002) (discussing how bankruptcy reaffirmation agreements might violate the FDCPA).

C. Sanctions under §105 and §502 of the Code

The first count of the Martels' amended complaint seeks sanctions against the defendants for abusing the bankruptcy process. For the same reasons discussed above, I find that filing a proof of claim in accordance with Fed. R. Bankr. P 3001 is not an abuse of the bankruptcy process.

IV. CONCLUSION

I find that the defendants have met their burden of showing that the Martels have not stated a claim upon which relief can be granted. Therefore, this case shall be dismissed.

A separate order shall enter.

Dated: October 13, 2015

/s/ Peter G. Cary
Hon. Peter G. Cary
United States Bankruptcy Court

RELEVANT STATUTORY PROVISIONS AND RULES

1. 11 U.S.C. 101(5) provides in pertinent part:

Definitions

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured * * *.

2. 11 U.S.C. 501(a) provides:

Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

3. 11 U.S.C. 502 provides in pertinent part:

Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured * * * .

* * * * *

4. 11 U.S.C. 541(a) provides in pertinent part:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

5. 11 U.S.C. 558 provides:

Defenses of the estate

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

6. 11 U.S.C. 704(a) provides in pertinent part:

Duties of trustee

(a) The trustee shall—

* * *

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper * * * .

7. 11 U.S.C. 1302(b) provides in pertinent part:

Trustee

(b) The trustee shall—

(1) perform the duties specified in sections 704(a)(2), 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and 704(a)(9) of this title * * * .

8. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter 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.

9. 15 U.S.C. 1692e provides in pertinent part:

False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt * * * .

* * * * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

* * * * *

10. 15 U.S.C. 1692f provides in pertinent part:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section * * * .

* * * * *

11. Fed. R. Bankr. P. 3001 provides in pertinent part:

Proof of Claim

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

* * * * *

(c) Supporting information

(1) Claim based on a writing

Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional requirements in an individual debtor case: sanctions for failure to comply

In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in the debtor's property, a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

* * * * *

(f) Evidentiary effect

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.

* * * * *

12. Fed. R. Bankr. P. 9011(b) provides:

Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, an electronic copy of the foregoing Opening Brief and Addendum was filed with the Clerk of Court for the U.S. Court of Appeals for the First 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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August 29, 2016

United States Court of Appeals
For the First Circuit

No. 16-1653

IN RE: DAVID A. MARTEL; CHERYL A. MARTEL

Debtors

DAVID A. MARTEL; CHERYL A. MARTEL

Plaintiffs - Appellants

v.

LVNV FUNDING; RESURGENT CAPITAL SERVICES

Defendants - Appellees

APPELLEE'S BRIEFING NOTICE

Issued: August 30, 2016

Appellee's brief must be filed by **October 3, 2016**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **December, 2016** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Margaret Carter, Clerk

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