What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer

Eleventh Circuit Expands Crawford Ruling

June 22, 2016 | by

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

The Eleventh Circuit, however, is sticking to its guns and in a recent decision expanded its position in *Crawford* but expanded it by addressing the issue left unanswered by *Crawford:* whether the Bankruptcy Code preempts the FDCPA where the debt collector files a proof of claim on a debt it knows to be time-barred. *Johnson v. Midland Funding, LLC*, C.A. No. 15-11240, 2016 U.S. App. LEXIS 9478 (11th Cir. May 24, 2016).

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

The Court's decision expands the Eleventh Circuit's view that the filing of time barred

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

proofs of claim by debt collectors is a FDCPA violation even if the Bankruptcy Code allows the debt collectors to do so. If there is good news to be had from the Eleventh Circuit's opinion, it is that the court recognized that FDCPA's bona fide error defense may protect debt collectors who unintentionally or in good faith file time-barred proofs of claim. Those playing in the debt buyer space should continue to watch for developments on this issue as there is a growing divide in the circuits. *See, e.g., Simmons v. Roundup Funding, LLC,* 622 F.3d 93 (2d Cir. 2010); *Garfield v. Ocwen Loan Servicing,* 811 F.3d 86 (3d Cir. 2016); *Simon v. FIA Card Servs.,* 732 F.3d 259 (3d Cir. 2013); *Covert v. LVNV Funding,* 779 F.3d 248 (4th Cir. 2015); *Gatewood v. CP Medical, LLC,* Case No. 15-6008 (8th Cir. Jul. 10, 2015); *Walls v. Wells Fargo Bank, N.A.,* 276 F. 3d 502 (2002*)*. While the Supreme Court denied certiorari in *Crawford,* the broader holding in *Johnson* and the split in the circuits make it more likely that the Supreme Court will address this issue on the next appeal.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541