



LAW LETTER NO. 16 AUGUST 1 2016

CONTENTS

[PRODUCTS & EVENTS](#)

[EXCERPTS](#)

[LAW & CASE HOTWIRE](#)

[OTHER NEWS](#)

[ROOKER FELDMAN - DESPERATE BANKRUPTCY ATTORNEY](#)

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[RETURN TO TOP](#)



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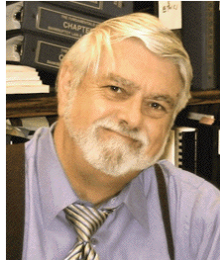
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[RETURN TO TOP](#)

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NACBA BANKRUPTCY JOURNAL
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[RETURN TO TOP](#)



EXCERPT FROM King's ABUSIVE DEBT COLLECTION Law & Practice

Book Release 2016 # 1
KingLawPublishing.com

**Note: remarks below offered courtesy of Robbin Miller's Consumer Bankruptcy Abstracts & Research
([CBAR.pro](#))**

KING'S ABUSIVE DEBT COLLECTION

PART 8 - REMEDIES

8.3(c) File Bankruptcy

8.3(c)(i) Proof of claim

The Eighth Circuit Court of Appeals held that a debt collector's filing an "accurate and complete" proof of claim for a time-barred debt does not constitute a practice forbidden under the Fair Debt Collection Practices Act.

See *Nelson v. Midland Credit Management, Inc.*, --- F.3d ----, 2015 WL 5093437 (8th Cir., July 11, 2016) (text of opinion). The court concluded that such a proof of claim "is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA."

To date only the Eleventh Circuit Court of Appeals has allowed a claim under the FDCPA for a debt collector's filing a proof of claim for a time-barred debt. See *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (by filing a proof of claim for a time-barred debt, the debt collector engaged in conduct that was "deceptive," "misleading," "unconscionable," or "unfair" under the FDCPA) (text of opinion) and *Johnson v. Midland Funding, LLC*, --- F.3d ----, 2016 WL 2996372 (11th Cir., May 24, 2016) (the Bankruptcy Code does not preempt the FDCPA in the context of a Chapter 13 bankruptcy case in which a debt collector files a proof of claim for a debt the collector knows to be time-barred).

Conversely, decisions in two other circuits disallow such a claim under the FDCPA. In *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2nd Cir., Oct. 5, 2010) (text of opinion), which involved a debt collector's filing an allegedly inflated proof of claim, the Second Circuit Court of Appeals held that a creditor's filing an invalid proof of claim in a bankruptcy case does not constitute the sort of abusive debt collection practice proscribed by the Fair Debt Collection Practices Act.

Previously, in *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), which involved a claim under the FDCPA for a debt collector's attempting to collect a debt previously discharged in bankruptcy, the Ninth Circuit Court of Appeals held that a debtor's sole remedy is under the Bankruptcy Code for creditor misconduct for which the Code provides a remedy; this decision has been interpreted as generally disallowing a claim under the FDCPA for creditor conduct during or related to a bankruptcy case. See also *Rhodes v. Diamond*, 433 Fed. Appx. 78 (3rd Cir., April 28, 2011) (text of opinion), an unreported case that is similar to *Simmons*, above.

This issue is currently before five Courts of Appeals. See *Martel v. LVNV Funding, LLC*, Case No. 16-1653 (1st Cir., filed May 25, 2016); *Torres v. Cavalry SPV I*, Case No. 15-2132 (3rd Cir., filed May 13, 2015); *Dubois v. Atlas Acquisitions LLC*, Case No. 15-1945 (4th Cir., filed August 21, 2015); *In re Broadrick*, Case No. 16-5042 (6th Cir., filed Jan. 14, 2016); and *Owens v. LVNV Funding, LLC*, Case No. 15-2044 (7th Cir., filed May 13, 2015). Oral argument has been held in the *Dubois* (4th Circuit) and *Owens* (7th Circuit) cases (on May 10 and June 1, respectively); briefing is ongoing in the others.

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[RETURN TO TOP](#)



**THE LAW & CASE
HOTWIRE**

HELD: Filing a proof of claim for a time-barred debt is a violation of the Bankruptcy stay.

[In re Freeman 540 B.R. 129 \(Bankr E.D.Pa. 2015\).](#)

The Bankruptcy Code and Rules provide remedy for such conduct.... Bankruptcy Rule 9011 authorizes the bankruptcy court to impose sanctions on creditors who file proofs of claim for any improper purpose or who make claims or legal contentions that are not warranted by existing law.

There also are reported decisions that have stated, in dicta, in the course of denying claims brought under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA"), that the filing of proof of claim for an obviously time-barred claim violates Rule 9011

HELD: Objection to time-barred claim is accepted and motion for attorney fees and sanctions against creditor, denied.

[Feggins v. LVNV \(Bankr. M.D.Ala 2015\).](#)

"Feggins alleges that this claim is barred by the statute of limitations.⁴ In addition, Feggins claims that the filing of a time-barred proof of claim in bankruptcy court is a violation of the Fair Debt Collection Practices Act ("FDCPA").

"It is well established that a claim that is barred by statute of limitations under applicable law will be disallowed under § 502(b)(1).⁸ Thus, while a creditor has a right to file a proof of claim under § 501, such a claim is not well-founded when its allowance is obviously and solely dependent on the oversight of the debtor and bankruptcy court. A facially time-barred proof of claim is not well-founded. It follows that a creditor's only possible purpose in filing a facially time-barred proof of claim is to take advantage of the automatic claims allowance process of § 502(a) and hope that the debtor and the bankruptcy court do not notice the defect. Such conduct is an abuse of the claims allowance process and an affront to the integrity of the bankruptcy court."

HELD: Ninth Circuit holds that FDCPA Notice Requirement Applies to Subsequent Collectors of Same Debt

[Hernandez v. Williams, Zinman & Parham PC](#)

HELD: A creditor's filing of a proof of claim for a debt that is time-barred (statute of limitations expired) in Chapter 13 is not a violation of the stay.

[Nelson v. Midland Credit \(8th Cir. 2016\)](#)

Creditor filed a proof of claim in debtor's chapter 13 for a time-barred debt (i.e., statute of limitations had expired). Debtor filed an objection and the bankruptcy court disallowed the claim. Debtor then sought sanctions against the creditor for violating the Fair Debt Collection Practices Act

The court, dismissing the suit for failure to state a cause of action, said:

"These protections [inter alia objection to claim"] against harassment and deception satisfy the relevant concerns of the FDCPA. ... An accurate and complete proof of claim on a time-barred debt is not a false, deceptive, misleading, unfair, or unconscionable under the FDCPA."

RETURN TO TOP



IN OTHER NEWS

Bankruptcy - Taxes - Consumer Protection

STATUS OF NATIONAL UNIFORM CHAPTER 13 FORM

The Advisory Committee on Bankruptcy Rules has been pressing forward with its project to develop a national Chapter 13 form plan and implementing Bankruptcy Rule amendments. The committee has now published, for public comment through October 3, a revised version of amended Rule 3015, and a new Rule 3015.1, which together allow for a court to opt out from the national plan in favor of a local plan. More information is available at:

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CFPB Holds Hearing to Present Proposals for Debt Collection Regulation

8/1/2016
Ballard Spahr LLP

July 28th, the CFPB held a field hearing in Sacramento, California on debt collection that coincided with its release of an outline of the proposals it is considering in connection with its debt collection rulemaking. In his opening remarks, Director Cordray discussed the key elements of the proposals under consideration which would only cover businesses that would be "debt collectors" under the Fair Debt Collection Practices Act, such as third-party debt collectors, debt buyers, and collection law firms. His remarks mirrored those set forth in his prepared remarks issued in advance of the field hearing.

Following Director Cordray's remarks, John McNamara, CFPB Debt Collections Program Manager, moderated a panel discussion during which participants from consumer advocacy groups and debt collection firms had the opportunity to provide remarks and answer questions. The panelists included:

[CLICK FOR MORE STORY](#)

U.S. Credit Card Debt Is Surging

According to new reports, the amount of U.S. credit card (and other types of revolving debt) has exploded to \$18 billion in just the last three months - triggering concerns among experts that Americans are getting a little too debt-happy when the U.S. could be staring down the barrel of a recession.

Debt levels via credit cards and overdrafts have started growing at their fastest rate since the pre-crisis days of 2007 - which economists think is somewhat problematic, since the U.S. election is likely to slow down economic growth nationwide for a year, given the level of uncertainty in play

(Trump).

[CLICK FOR MORE STORY](#)

[RETURN TO TOP](#)



[RETURN TO TOP](#)

ROOKER FELDMAN - DESPERATE CONSUMER BANKRUPTCY ATTORNEY

When Rocky arrived at his office he couldn't help but notice, as he whooshed past the hot front-desk girl Bling's desk, that Bling seemed to be totally absorbed in her cell phone.

He didn't stop there to suggest she get back to work, but a moment later as he slipped through the doorway to his office he suddenly realized he was annoyed. He stepped back into the open office and stared at Bling.

"Hgmnpf."

Bling did not look up.

"Hrumpf grh=umpfho!"

Bling still focused entirely on her cell phone.

"Eh, Bling? Should we all get back to work now? Put our phones away?"

Bling didn't look up, but replied:

"Just a moment! I've got one in my sights!"

"Got what, exactly, in your sights?"

"The pokemon!"

Rocky quickly scanned the office.

"The pokey what? I don't see him in the office."

Bling finally looked up and, rolling her eyes, said -

"Mr. Feldman, the pokemon! You know, a pokemon! I've hunted him down to this office."

Rooker realized he had no idea what she was talking about.

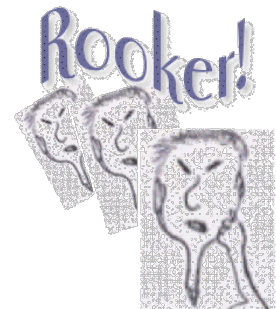
"Well, I don't want him poking, or whatever, in the waiting room! Kick him out and let's get back to work!"

Suddenly, a small crowd of people, strangers, poured in the front door, each holding a cell phone aimed somewhere into the air space of the waiting room.

"What the ...?"

"Sorry folks, this is a law office. Unless you're here for an appointment, you are welcome to leave."

The group ignored him and paced around the office, aiming their phones here and there.



**DESPERATE
CONSUMER
BANKRUPTCY
ATTORNEY!**

"You're all welcome to get out of here, NOW."

Still no reaction.

"Bling, what the hell is going on here? Please clue me in!"

"We've all spotted the pokemons in our office."

"How did they get in here?"

"No, Mr. Feldman, they aren't really here. They're in the virtual space of the office. They can only be seen if you have the app on your cell phone. Where have you been?"

Being over 50 years old, Rooker Feldman had no clue, and would never have a clue, about what Bling, the crowd, and the pokemons were about. He just knew he wanted them all out of the office.

"Bling! Let me put it straight. If you don't collect your pokemons and get them out of the office, you will soon be in virtual employment and you will be free to hunt these pokey whatever's with your phone, while you wait in the unemployment office."

At that point, Lew, the faithful old paralegal, stuck his head out of his office. With a wide grin he announced -

"Hey! There's one in my office!"

"Oh, criminy!" Rocky muttered.

He reached for a phone and called the police. Presently a cop showed up and came into the office.

"I'm so happy to see you, officer! Can you please help me get rid of all these people?"

The officer came back with "Ok. Oh! Hold on here."

He was studying his own cell phone with great interest.

"Wow!" blurted the cop. "I've found one right here!"

With a great sigh, Rooker gave up, turned around and went back into his office. As he went in he couldn't help but scan the office out of the corners of his eyes for signs of one of these pokemons. To be safe, he also stepped over to the open window, which as we know is a portal to Rocky's virtual spirit world. He looked out the window, again searching for signs of anything strange.

Suddenly, his heart began to race. There ... over there ... it's a "OMG!"

No, only a little squirrel.

Now, feeling a little embarrassed, he grumbled . . .

"Hmmp!" he murmured, "all just hocus pokus!" and lit up a cigar.

World without end.

Amen.

[RETURN TO TOP](#)



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