Fall 2014

The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Stephanie C. Lieb, Trenam Kemker

PRESIDENT'S MESSAGE

by Edward Peterson
Stichter Riedel Blain & Prosser, P.A.

I am thrilled and honored to be the president of the Tampa Bay Bankruptcy Bar Association. Having practiced in another state, I can tell you that it is rare to find such a wonderful local bar organization. The collegiality of our members is unparalleled. Indeed, we are an association whose members routinely settle matters over lunch or drinks. Such collegiality makes the practice of law even more enjoyable.

This past July, we had our annual reception with all of the past presidents of the board. It is my goal to try to continue the high standards that the past presidents have set and to look to them for advice and guidance to make sure we stay on that path.

We have a great board this year. Members of the board are true professionals committed to make this association even better. I have truly enjoyed working with them and look forward to a great year with the board members. I want to thank Stephenie Anthony for her hard work as president last year.

We have a great slate of CLE presentations for our monthly luncheons this year. Patrick Mosley and Lori Vaughan have been working hard as CLE Chairs to put together a wide variety of interesting topics for your enjoyment. Additionally, Kathleen DiSanto is working hard as Chair of the consumer luncheons this year. We will continue to have interesting topics each month for the consumer luncheons.

Please mark your calendars for the View From the Bench seminar which is scheduled for November 6, 2014. This is always an extremely interesting seminar to attend, with the judges giving us their thoughts on various issues, both substantive and procedural. Please make every effort to attend the View from the Bench.

Please be on the lookout for your membership application and please turn it in as quickly as you can. The backbone of our association is the excellent membership and we look forward to having you as a member this year. This year's membership directory was organized and produced by Scott Stichter. By now I hope you have received your directory.

Finally, please also be on the lookout for emails from Jake Blanchard, the Chair of our Pro Bono Committee. It is imperative that we have lawyers fill in staffing the attorney resource room to meet with consumer debtors and advance our pro bono efforts.

I look forward to seeing each of you at the luncheons and happy hours. Thank you again and I anticipate another great year for this wonderful organization.

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Point & Counterpoint

#1
Insolvency: What Have You Got to Lose?

by Michael V. Leeman, Esq.

"We took risks, we knew we took them; things have come out against us, and therefore we have no cause for complaint…." – Robert Falcon Scott, who led the famously second-place expedition to the South Pole and then died on his way home.

Your Delaware corporate client is in trouble, real trouble. Bills are stacked to the ceiling. Revenue is down massively. Key people are leaving.

The company is insolvent, no matter how you look at it, and most of the board is panicked.

But the chairman, cool as a clam, gives you a call and says not to worry. He just received an e-mail from a Nigerian prince (who, oddly, has a Yahoo! e-mail account) offering a three million dollar loan that can be wired directly to the company's bank account overnight, after certain information is provided, of course. The chairman knows it's a risk to take on more debt, but what other choice does the company have? He wants to take the prince up on his generous offer and asks for advice.

Being a bankruptcy lawyer, you do what bankruptcy lawyers do best – give advice about bankruptcy. But the chairman doesn't want to hear it. He is not "giving up" and believes there is a real shot to turn things around without resorting to the complicated "sections, subsections, paragraphs, subparagraphs, snippets and sub-snippets" of the Bankruptcy Code. He's going to take the Nigerian prince's loan if he can be assured the company doesn't have to file for bankruptcy. (He's willing to help, but he's not willing to get sued over it.)

The company is in luck, at least for the moment. It is not per se required to file for bankruptcy. Strictly speaking, there is no duty to bankrupt an insolvent company with dim prospects.[1] That much might seem obvious from the various bankruptcy alternatives available to companies, like receiverships and dissolutions under state corporate codes.[2] The lack of a duty also makes sense given how hard it is to determine whether a company is actually insolvent.[3]

But a company need not limit its options to those that look and act a lot like a bankruptcy. The company remains free to try to get out of its hole the old-fashioned way, by taking on risk and hoping for returns. Taking on more debt may anger creditors (shareholders will probably cheer with delight, as it is their only chance of recovery), but the board is free to pursue "risky restructuring plans in good-faith attempts to regain solvency."[4] Any other rule would undermine the risk-reliant capitalist system and "stand in the way of the development of any new enterprise."[5]

Litigators who were practicing in the late 90's or 00's might shiver a little, the words "deepening insolvency" racing back to mind. But, fear not, the tort of deepening insolvency (the idea that a creditor has a cause of action when the death of a hapless company is delayed because the company negligently took out more loans) and the mess of case law it inspired have been thoroughly discredited almost everywhere, especially in Delaware.[6]

It is the familiar, though pliable, duties of care and loyalty that govern the board's decision. Loyalty is not implicated here (though a prudent lawyer would probe more), and courts will not second guess the care given to the board's decision if made on an informed, good-faith basis.[7] While the company's current troubles should inform the board's decision, they do not govern it.[8]

So, fire up the browser and start working the phones – it's time to figure out who this wealthy prince is.

1 *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 204 (Del. Ch. 2006) *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007) ("Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate.")
2 *See, e.g.*, Del. Code Ann. tit. 8, § 291 (West) (permitting appointment of receiver over insolvent Delaware corporation); Del. Code Ann. tit. 8, § 280 (West) (setting forth method for notice and payment of claims against dissolved corporation).
3 *In re RSL COM PRIMECALL, Inc.*, 2003 WL 22989669 at *8 (Bankr. S.D.N.Y. Dec. 11, 2003) (raising concerns about directors' practical ability to determine if a company is insolvent at any particular moment in time).
4 *In re Sec. Asset Capital Corp.*, 396 B.R. 35, 40 (Bankr. D. Minn. 2008); *cf. Trenwick Am. Litig.*, 906 A.2d at 193 ("The business judgment rule exists precisely to ensure that directors and managers acting in good faith may pursue risky strategies that seem to promise great profit.").
5 *In re RSL COM PRIMECALL, Inc.*, 2003 WL 22989669 at *8 ("It has never been the law in the United States that directors are not afforded significant discretion as to whether an insolvent company can "work out" its problems or should file a bankruptcy petition.").
6 *See, e.g,, Trenwick Am. Litig. Trust* 906 A.2d at 204 (rejecting adoption of tort of deepening insolvency, calling it a concept of "ultimate emptiness"); *Mukamal v. Bakes*, 378 Fed. Appx. 890, 901 (11th Cir. 2010) (recognizing Delaware's rejection of the tort); *In re Amcast Indus. Corp.*, 365 B.R. 91, 119 (Bankr. S.D. Ohio 2007) (rejecting tort of deepening insolvency applying Ohio law); *cf. Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 811 (Minn. Ct. App. 2007) (rejecting deepening insolvency as a form of corporate damages, because unable to "discern what recoverable harms the concept captures that the ordinary measure of damages" do not).
7 *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (noting that business decision protected from scrutiny under business judgment rule if decision was one made on an "informed" and "good faith" basis).
8 *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d at 205 ("[T]he proper role of insolvency [is] to act as an important contextual fact in the fiduciary duty metric," not to establish a duty per se.).

#2
From Solvency to Bankruptcy: Can a Solvent Entity File a Chapter 11 Case in Anticipation of Future Financial Catastrophe?

by Kelly V. Robinson, Esq.
Carlton Fields Jorden Burt, P.A.

Your bank client calls with a unique concern. A significant and otherwise performing loan is set to mature in a matter of months, and the borrower, though current, is requesting forbearance. The loan is fully secured by a mortgage on a commercial building that is long occupied by a large, reputable retail tenant. The loan matures prior to expiration of the lease, but word is out that the tenant is considering relocation. With this uncertainty, the borrower has been unsuccessful in its attempts to refinance. The borrower threatens that if the bank is unwilling to forbear, the borrower will soon file bankruptcy.

Your client asks if the borrower's threat is legitimate. You consider that, presently, the value of the borrower's assets exceeds that of its liabilities. The borrower has sufficient cash flow and is current on all payments to the bank and its other creditors. For all intents and purposes, the borrower is solvent. There is no doubt the borrower's solvency will be compromised if it is unable to secure refinancing. But, is that enough to justify a bankruptcy filing? Can a solvent entity seek protection under the Bankruptcy Code in anticipation of future financial trouble?

It can. The Bankruptcy Code does not require that a debtor be insolvent, either in the "balance sheet sense" (having liabilities that exceed the value of all assets) or in the "liquidity sense" (being unable to pay debts as they come due), to file a Chapter 11 or confirm a plan of reorganization.[1] Specifically, 11 U.S.C. §109(d), which sets forth the eligibility requirements for Chapter 11 relief, makes no mention of insolvency.

A solvent Chapter 11 debtor will likely be afforded relief if it shows a good-faith purpose for reorganization, together with a reasonably imminent, serious financial difficulty that can be remedied in the Chapter 11 case.[2] Future catastrophic events, such as a threatened foreclosure of real property vital to a successful reorganization[3] or the forthcoming maturity of substantial debt,[4] can provide an otherwise solvent debtor with sufficient justification for filing. However, the filing must still be in good faith and in furtherance of the Chapter 11 goals—preservation of the business as a going concern and maximization of assets available to satisfy unsecured claims.[5]

And so, you advise, there may be more to the borrower's threat than mere posturing.

1 *In re Marshall*, 300 B.R. 507, 510 (Bankr. C.D. Cal. 2003); *See In re Liptak*, 304 B.R. 820, 832 (Bankr. N.D. Ill. 2004) ("[I]nsolvency is not a requirement for filing a bankruptcy case under any Chapter."); *In re Dickerson*, 193 B.R. 67, 71 (M.D. Fla. 1996) ("[N]owhere in the Code is there a requirement that a debtor be insolvent in order to file for bankruptcy."); *In re The Bible Speaks*, 65 B.R. 415, 426 (Bankr. D. Mass. 1986) (finding that debtors are not required to be insolvent before filing a case under the bankruptcy code).
2 *In re Capital Foods Corp. of Fields Corner*, 490 F. 3d 21 (1st Cir. 2007) (denying a motion to dismiss where the debtor, though admittedly solvent, filed bankruptcy to avoid losing a lease vital to its reorganization).
3 *Id.*
4 *In re General Growth Properties, Inc.*, 409 B.R 43 (Bankr. S.D. N.Y. 2009) (bankruptcy filing not premature when profitable debtor had sizeable debt set to mature in the next few years and had not yet secured refinancing) .
5 *See Liptak*, 304 B.R. at 832 ("[S]olvency is a factor to consider in determining whether a debtor has filed in good faith because of his genuine need to preserve the going-concern value of a business."); *Marshall*, 300 B.R. at 513 ("If a debtor must wait until it becomes insolvent to invoke the reorganization provisions under the bankruptcy law, substantial economic values will often be irretrievably lost.").

5 Things Your Mother Taught You That Apply to Mediation

by Michael P. Horan, Esq.
Trenam Kemker

Remember those wise things Mom taught you? They just may apply to the mediations you get involved in.

1. Do your homework. Just like a court hearing requires advanced preparation, so does a mediation. It is amazing to sit down with a client and its attorney at mediation and come to realize they never discussed the settlement value of their case.

2. Go to bed on time and eat your breakfast. Although some mediations end quickly, most do not. Be prepared for a process that may take time and patience.

3. Mind your manners. A mediation is an informal proceeding structured to allow frank negotiations which allow parties to "let their guard down." Terminology or tone of voice appropriate in an adversarial setting may not be appropriate in a mediation.

4. If you can't say anything nice about a person, don't say anything at all. This relates to number 3. If necessary, remind your client that name calling or rudeness are counterproductive.

5. Be thankful for what you have. Litigation is usually stressful for the parties involved. Mediation offers a chance for resolution. More fundamentally, be thankful that we have a judicial branch for resolution of civil disputes, instead of armed conflict, bribery or graft.

People on the Go

As of September 30, 2014, **Terry E. Smith** retired as Chapter 13 Standing Trustee in the Tampa Division. Effective October 1, 2014, **Kelly Remick** has been selected as the new Chapter 13 Standing Trustee to handle all cases assigned to Terry E. Smith.

Birth Announcement:

Congratulations!
Steven Wirth & his wife welcome Penelope Ruby Wirth, born 7/8/14. 6lbs, 8oz., 20 inches.

New hire? Promotion? Birth announcement? Share with your colleagues in the next edition by emailing these personal and career updates to Stephanie Lieb at slieb@trenam.com

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FDCPA Limits Debt Buyers' Windfall In Bankruptcy

by Megan W. Murray, Esq.
Trenam Kemker

There is no doubt credit greases the wheels of commerce. But to what extent are we willing to allow consumer debt to haunt our sacred pocketbooks indefinitely? When is a debt finally extinguished? The Eleventh Circuit Court of Appeals recently answered this question in an opinion that logically extends state law into insolvency, finding the filing of a bankruptcy proof of claim on an expired debt, like state law, deceitfully attempts to extend a debt beyond its natural life and violates the FDCPA.

The History of the FDCPA

Prior to the passage of the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., Section 5 of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45(a)(1), protected consumers from deceitful debt collection practices. Despite FTC enforcement in the area, Congress noted there was still abundant evidence of abusive, deceptive and unfair debt collection practices that contributed to personal bankruptcies, marital instability, job loss, and invasion of individual privacy. 15 U.S.C. § 1692(a). Existing laws and procedures for redressing these injuries were, according to Congress, woefully inadequate to protect consumers. Thus the FDCPA was born. It now provides consumer debtors with a private right of action against a creditor, in addition to the government's administrative authority to take action against violating creditors. It also is a means to ensure that creditors who cease the use of illegal debt collection practices are not competitively disadvantaged. Debt collectors who violate the Act are liable for actual damages, statutory damages up to $1,000, and reasonable attorney's fees and costs. § 1692(k).

FDCPA in the Eleventh Circuit

Crawford v. LVNV Funding, LLC, a recently decided 11th Circuit opinion, addresses 15 U.S.C. § 1692(e) and (f), two related provisions of the FDCPA. *Crawford v. LVNV Funding, LLC*, 2014 U.S. App. LEXIS 13221 at *6 (11th Cir. July 10, 2014). Section § 1692(e) of the FDCPA provides "[a] debt collector may not use any false, deceptive, or misleading representations or means in connection with the collection of any debt." Section 1692(f) similarly prohibits a debt collector from using "unfair or unconscionable means to collect or attempt to collect any debt." These statutes sound nearly identical, and seem interchangeable. Indeed, "an act or practice is deceptive or unfair if it has the tendency or capacity to deceive." *Crawford* at 6 (citing *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1200 (11th Cir. 2010)). "The plain meaning of 'unfair' is 'marked by injustice, partiality, or deception.'" *Id*. (In substance, "the phrase 'unfair or unconscionable' is as vague as they come." (quoting *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474 (7th Cir. 2007)).

In *Jeter v. Credit Bureau*, the Eleventh Circuit cut a swath through the ambiguity with its sharp pen, rejecting the "reasonable consumer" test for a more consumer-friendly "least-sophisticated consumer" standard in evaluating whether a debt collector's conduct is "deceptive," "misleading," "unconscionable," or "unfair" under § 1692(e) or (f). 760 F.2d 1168-72 (11th Cir. 1985). The inquiry is not whether a particular consumer, or even a reasonable consumer, was actually deceived or misled; instead, the question is whether the "least sophisticated consumer" would have been deceived by the debt collector's conduct. *Jeter*, 760 F.2d at 1177 n.11. The "least-sophisticated consumer" standard takes into account that consumer protection laws are not enacted to protect the experts, but are created and enforced to protect the public—including "the ignorant, the unthinking, and the credulous." *Id*. at 1172-73. Unlike a "reasonable person," the "least sophisticated consumer" can be presumed to possess only a rudimentary amount of information about the world, and generally lacks a willingness

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or capacity to read a collection notice with due care. *LeBlanc* 601 F.3d at 1194.[1]

Crawford v. LVNV, LLC

This brings us to the facts of *Crawford*, which involved two separate debtors' claims that a consumer claims buyer, LVNV Funding, LLC ("LVNV")[2] violated the FDCPA by filing time-barred proofs of claim in their bankruptcy estates. Both debtors filed what is known as "pot plans" at the outset of their Chapter 13 cases. These pot plans provided that timely filed allowed unsecured claims would receive a pro rata portion of the "pot" each month over the plan period. The debtors' pots were determined from the amount of income each anticipated being available for unsecured creditors after payment of their necessary living expenses. If the total of the pot exceeded the total amount of unsecured claims, the unsecured claims would be paid in full.

In both cases, LVNV's claims for the debtors' debts were barred by the Alabama statute of limitations and were no longer enforceable against the debtors under state law. The delinquent debts were written off and sold to LVNV, whose practice was to pursue charged off and overdue debt. After Crawford and Sims filed their Chapter 13 pot plans, their creditors were afforded an opportunity to file claims before the claims bar date. Regardless of the stale debts, LVNV filed a proof of claim in both Sim's and Crawford's bankruptcy cases.

Neither Crawford nor Sims initially objected to LVNV's time-barred claims, and as such, they were deemed allowed under § 502(a)-(b) and Fed. R. Bankr. P. 3001(f). These debtors, whose concerns were likely limited to making a monthly payment from their pots, presumably were not concerned with the details of the underlying claims. Crawford actually made four years of payments to LVNV under his plan before he noticed he was paying LVNV on its expired debt. Both Sims and Crawford filed adversary proceedings alleging that LVNV violated the FDCPA because the act of filing proofs of claim on time-barred debts was an unfair, unconscionable and a means of collection.

In two short, identical opinions, bankruptcy Judge Dwight H. Williams, Jr. dismissed both adversary proceedings in their entirety, relying on the case of *In re Simpson*, 2008 WL 4216317, *2 (Bankr. N.D. Ala. 2008). *Simpson* similarly involved a debtor who owed a small debt to a consumer claims buyer. The creditor of the purchased debt similarly filed a proof of claim well beyond the passage of statute of limitations. The *Simpson* debtor timely objected to the creditor's proof of claim, and he also filed an adversary proceeding alleging the proof of claim was fraudulent and violated the FDCPA.

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1 However, the test does have an objective component to prevent liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *LeBlanc*, 601 F.3d at 1194

2 The other defendants in this case are Resurgent Capital Services, L.P., and PRA Receivables Management, LLC. According to Crawford's complaint, LVNV filed the time-barred proof of claim "by and through" Resurgent in May 2008, and then LVNV transferred the claim to PRA Receivables in September 2010. The defendants are collectively referred to in the opinion as "LVNV."

FDCPA Limits

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Judge Williams held the proof of claim was not fraudulent and did not violate the FDCAP. He looked to the definition of a "claim" under 11 U.S.C. § 101(5), which claim should be construed as broadly as possible to include even time-barred claims. A claim, he said, is enforceable even though it is matured "because the creditor has the right to receive payment."[3] Judge Williams found the claims allowance process under § 502 contemplates the filing of time-barred claims, and expressly preserves the statute of limitations as a defense and a ground for their disallowance. This finding was consistent with other courts addressing the same issue. *See e.g. Simpson*, at 8-9, (citing *Middleebrooks v. Interstate Credit Control, Inc.*, 391 B.R. 434, 2008 WL 2705496 (D. Minn. 2008) ("[T]) he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt and the Bankruptcy Court disallowing such claim after objection from the debtor. It is difficult for this Court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis of a violation under the FDCPA."). *See also Keeler v. PRA Receivables Mgmt., LLC* (*In re Keeler*), 440 B.R. 354, 365, (Bankr. E.D. Pa. 2009) (noting Pennsylvania law is consistent with the law of other jurisdictions in that a time barred debt is not extinguished, but rather subject to an affirmative defense that can be waived).

Judge Williams ultimately held "an FDCPA claim . . . cannot be based on the filing of a proof of claim, regardless of the ultimate validity of the underlying claim." *Simpson*, at 8-9. According to *Simpson* and an abundance of other case law, a debtor's remedy in dealing with an objectionable claim is set forth in the claims allowance process, and only the claims allowance process.

Crawford and Sims appealed the bankruptcy court's dismissal of their FDCPA adversary proceedings to the District Court for the Middle District of Alabama. Chief Judge W. Keith Watkins affirmed the bankruptcy court decisions. *Crawford v. LVNV Funding, LLC*, Nos. 2:12-CV-701-WKW, 2:12-CV-729-WKW, 2013 WL 1947616 (M.D. Ala. May 9, 2013). Judge Watkins looked to the 2nd Circuit decision of *Simmons v. Roundup Funding, LLC*, and noted that, while there is no binding authority on point, the "elephantine body of persuasive authority" weighs against these debtors. *Simmons*, 622 F.3d 93, 96 (2d Cir. 2010). The plaintiffs in Simmons argued an inflated proof of claim constitutes a violation of the FDCPA. The Second Circuit Court of Appeals rejected the plaintiffs' claims, finding that "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."). The Court in *Simmons* held as it did because it found that the bankruptcy code itself contemplates a creditor filing a proof of claim on a time-barred debt, which a bankruptcy court may disallow after objection from the debtor.

Thus, the *Crawford* debtors are fighting an uphill battle, said Judge Watkins; and, in the face of various precedent, "consistency is strongly persuasive." *Crawford*, 2013 WL 1947616 at *5. *Crawford* alone then appealed this decision to the Eleventh Circuit Court of Appeals on May 24, 2013. The opinion issued by the Court over a year later reversed the bankruptcy court and the district court decisions, and is a shot across the bow to creditors who wish to venture into the Machiavellian territory of filing time-barred or otherwise knowingly improper claims in a debtor's bankruptcy.

The Eleventh Circuit noted *Crawford* is an affirmative and principled attack on the "deluge" of consumer debt buyers sweeping through bankruptcy courts armed with delinquent accounts, unenforceable under state statutes of limitations, purchased from creditors too tired or weary to enforce the debts themselves. The Court began by noting that, of course, LVNV's conduct, like that of other creditors, likely would violate the FDCPA had the lawsuits to collect time-barred debts been filed in state court. Federal circuit and district courts have uniformly

3 Under 11 U.S.C. § 101(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 . . ."

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held that a debt collector's threat to sue, or actual lawsuit, in state court on a time-barred debt violates §§ 1692(e) and 1692(f). *Crawford*, at 11-12. The Court cited no less than 15 cases from various states to such effect, noting the FDCPA outlaws "stale suits to collect consumer debts" as unfair for three reasons:

> (1) few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts and would therefore unwittingly acquiesce to such lawsuits;
> (2) the passage of time . . . dulls the consumer's memory of the circumstances and validity of the debt; and
> (3) the delay in suing after the limitations period 'heightens the probability that [the debtor] will no longer have personal records' about the debt.

Crawford, at 12-13 (quoting *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987)).

The purpose behind limitations periods in general reflects the sensible legislative stance that it would be manifestly unjust to require a debtor to anticipate the prosecution of debts into eternity. Over time, the right to be free from stale claims overrides the right to prosecute them. *Crawford*, at 13-14 (citing *United States v. Kubrick*, 100 S. Ct. 352, 357 (1979). So why are statutes of limitation not afforded the same weight in bankruptcy? The lower courts found that the filing of a proof of claim throws the ball back into a debtor's court to object to the claim, and that a time-barred claim is miraculously "revived" under § 502 if a debtor fails to object. The Eleventh Circuit wholly disagreed with proposition. In bankruptcy, as in most other non-bankruptcy settings, 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 prevails over a creditor's right to legally enforce the debt. The filing of a stale proof of claim is deceptive, deceitful, unfair, and unconscionable under § 1692(e) and (f) because it places the burden on the least sophisticated consumer to realize the debt is matured and to know how that affects the bankruptcy estate.

Similar to the filing of a stale lawsuit in state-court, filing a time-barred proof of claim in a debtor's bankruptcy creates the misleading impression that the creditor can legally enforce the debt. The least sophisticated Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and may fail to object to such a claim, giving rise to the inclusion of that debt in a plan under the automatic allowance provision of § 502. That an otherwise unenforceable time-barred debt must be paid from the debtor's future wages as part of a Chapter 13 plan is untenable indeed, and outright rejected in *Crawford*. "Under the "least-sophisticated consumer standard" in our binding precedent, LVNV's filing of a time-barred proof of claim against Crawford in bankruptcy was "unfair," "unconscionable," "deceptive," and "misleading" within the broad scope of §1692(e) and §1692(f).

The Court also disagreed with LVNV's contention that its proof of claim was not a "collection activity" aimed at Crawford and, therefore, not "the sort of debt-collection activity that the FDCPA regulates." The broad prohibitions of § 1692(e) and (f) apply to a debt collector's "false, deceptive, or misleading unfair, or unconscionable "means used to collect, or in connection with the collection of any debt." LVNV's filing of the proof of claim falls squarely within the ambit of "means used" or "efforts made" to collect a debt. What makes it deceptive is that the time for enforceability has passed.

The Court also took issue with LVNV's argument that considering the proof of claim a "means" used "in connection with the collection of debt" for purposes §§ 1692(e) and 1692(f) of the FDCPA would be at odds with the automatic stay provision of 11 U.S.C. § 362(a)(6). The automatic stay prohibits debt-collection activities outside bankruptcy, such as lawsuits in state court, but it does not prohibit the filing of a proof of claim to collect a debt within the bankruptcy process. As is an adversary proceeding

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Clerk's Appreciation Luncheon
5th Floor of Sam M. Gibbons Courthouse
July 23, 2014













TBBBA September Luncheon
University Club of Tampa
September 9, 2014





FDCPA Limits

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to determine the extent, priority, and validity of a lien, a proof of claim is merely the first step in collecting a debt in bankruptcy and is, at the very least, an "indirect" means of collecting a debt. *See* 15 U.S.C. §§ 1692a(6), 1692(e), and 1692(f). The difference for LVNV is that there is nothing deceitful about participating in a bankruptcy to attempt to collect on a valid, enforceable, non-time-barred debt.

A review of the case posits a few additional questions. First, why was it Crawford, and not the trustee, who filed the adversary proceeding objecting to LVNV's claims and asserting an FDCPA claim. After all, a trustee has a duty to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(5). Moreover, aside from statutory damages, any "relief" Crawford could obtain by eliminating payments to LVNV would likely go to enhance the distribution to the estate and its legitimate creditors, not to Crawford individually. Whatever the reason, the answer is now moot.

Second, does the reasoning of *Simmons* and its progeny still stand in cases not involving consumers protected by consumer protection statutes like the FDCPA and similar state law? In other words, can creditors of non-consumer debts file stale proofs of claim in the hopes a debtor does not object and the claim is deemed allowed?

Crawford seems to have righted a perverse injustice caused by the interplay between two federal statutes, at least as to individual consumers. The decision eliminates the burden on trustees to exert needless effort playing whack-a-mole with unscrupulous creditors looking to beat the system, and redirects the responsibility to creditors to pay attention to statutes of limitation and other bars to enforceability. Of course, this benefit to consumers does not come without a cost. The reduction in liquidity provided by consumer debt buyers to those who originate credit may cause the cost of consumer credit to rise. Only time, and the market, will tell. The moral of the story, at least in the 11th Circuit, is that creditors with stale consumer debts must now "let bygones be bygones."

Upcoming Events

- Monthly CLE Luncheon: October 14, 2014 from 12:00-1:30 at the University Club.
  Topic: Trial and Error, How to Get Your Documents Admitted into Evidence

- October Happy Hour: October 23, 2014 at 5:30pm at the Tampa Museum of Art Terrace

- Monthly Consumer Lunch: November 4, 2014 at the Sam M. Gibbons Courthouse

- View from the Bench Reception and Seminar November 5-6, 2014, see details on following page

- Monthly CLE Luncheon: November 11, 2014 from 12:00-1:30pm at the University Club.
  Topic: TBA

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Business Law Section present

BANKRUPTCY LAW & PRACTICE: VIEW FROM THE BENCH 2014

• Live
• Audio CD
• Video DVD

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

TWO LIVE PRESENTATIONS:

Thursday, November 6, 2014 – Tampa • Stetson University College of Law
1700 N. Tampa St. • (813) 228-6625

Friday, November 7, 2014 – Miami • Hyatt Regency • 400 SE Second Ave. • (305) 358-1234

Course No. 1801R

8:00 a.m. – 8:25 a.m.
Registration

8:25 a.m. – 8:30 a.m.
Opening Remarks
Hon. Michael G. Williamson

8:30 a.m. – 9:15 a.m.
Key Developments

9:15 a.m. – 10:30 a.m.
Consumer Issues

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:45 a.m.
Chapter 11 Issues

11:45 a.m. – 12:30 p.m.
Practice Pointers: A Judicial Perspective

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Chief Bankruptcy Judge
U.S. Bankruptcy Court, Orlando

Honorable Paul G. Hyman
Chief Bankruptcy Judge
U.S. Bankruptcy Court, West Palm Beach

Honorable Karen K. Specie
Chief Bankruptcy Judge
U.S. Bankruptcy Court, Tallahassee

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RECEPTION

Registrants of this seminar are invited to attend a reception with the judges participating in this program.

TAMPA: The Tampa Bay Bankruptcy Bar Association will host a reception with the participating judges on Wednesday, November 5, at 5:30 p.m., at Le Meridien Hotel, 601 N. Florida Avenue, Tampa. The TBBBA will send registration information to its membership. Non-members of the TBBBA can request registration information from Stephanie Lieb, via email to slieb@trenam.com.

MIAMI: The Bankruptcy Bar Association of the Southern District of Florida will host a reception with the participating judges on Thursday, November 6, at 5:30 p.m., at Joe's Stone Crab Restaurant, 11 Washington Avenue, Miami Beach. Seminar attendees do not need to register separately for the Miami reception. Dinner will follow at 6:30 p.m. at Joe's, and registration for dinner is required. The BBASDFL will provide registration information for the dinner. Please visit www.bbasdfl.org or email laura@bbasdfl.org for information.

CLE CREDITS

CLER PROGRAM
(Max. Credit: 4.5 hours)
General: 4.5 hours Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 3.5 hours)
Business Litigation: 3.5 hours

TO REGISTER

ON-LINE: www.floridabar.org/CLE

MAIL: Completed form with check

FAX: Completed form to 850/561-9413

The Tampa Bay Bankruptcy Bar Association
and
The Business Law Section of The Florida Bar

cordially invite you to a Reception honoring the Bankruptcy Judges
held in conjunction with the View from the Bench Seminar

When:
November 5, 2014, at 5:30 p.m.

Where:
Le Meridien Tampa
601 N. Florida Avenue
Tampa, FL 33602

Admission Price:
Reception: $50.00 per person

Please RSVP by October 24, 2014
by sending your checks with the attached reservation form.

Reservation Form

Enclosed is a check in the amount of $_____ for attendees for the November 5, 2014 Reception.

Name(s): _____

_____

_____

Reservations must be received by October 24, 2014. Please mail this form and your check payable to the **Tampa Bay Bankruptcy Bar Association** to:

Stephanie C. Lieb
Trenam Kemker
P.O. Box 1102
Tampa, Florida 33601

Cancellation Policy: *Please note that only cancellations received by the reservation deadline will qualify for a refund. After that date, the Tampa Bay Bankruptcy Bar Association regrets that it cannot offer refunds to non-attendees because we guarantee attendance to the venue and are obligated to pay for those attendees.*

Additional inquiries please send emails to slieb@trenam.com

Delaware Bankruptcy Court Faces Split Among the Courts Concerning Scope of a Landlord's Claim Against a Tenant in Bankruptcy

by Linda Zhou, Esq.
Buchanan Ingersoll & Rooney, PC

The Delaware bankruptcy court will soon be forced to rule on the scope of a landlord's claim in bankruptcy, an issue on which courts around the country have been split for many years. In the case of *In re Masonite Corp.* (Case No. 09-10844-PJW), currently pending before the Delaware bankruptcy court, a tenant in bankruptcy rejected the lease of real property on which it conducted its business operations. The landlord filed a proof of claim for lease rejection damages, which included amounts owed for HVAC repairs and general repairs and maintenance. The debtor-tenant objected to the landlord's claim. The landlord filed a response in opposition to the debtor's objection. The landlord and tenant disagree on whether the landlord's claim for damages necessary to repair the leased property should fall within the statutory cap for damages owed to a landlord stemming from the rejection of a lease of non-residential real property.

Typically, when a debtor-tenant rejects a lease of non-residential real property, the landlord files a claim for damages as a result of such rejection. 11 USC § 502(b)(6) provides a formula for the claim of a lessor for damages resulting from the termination of a lease of real property that consists of, generally speaking, the unpaid pre-petition rent due under the lease and the forward-looking "rent reserved" under the lease for a specified period of time. The landlord, however, often discovers that in the course of its business operations, the tenant has damaged the leased premises. To the landlord's dismay, the cost to repair such damage is significant. As a result, the landlord, in its claim for lease rejection damages, may attempt to include the amounts necessary to repair the leased property.

Courts around the country are split as to whether such damages should be limited by 11 USC § 502(b)(6) or whether the statutory cap only restricts the "rent" component of a landlord's claim and not any other amounts that comprise the debt under applicable non-bankruptcy law. Courts that hold that the landlord is allowed a single claim for all of its damages, including damages relating to repair of the leased premises, include bankruptcy courts in Texas[1], Delaware[2], Pennsylvania[3], New Jersey[4] and Colorado[5]. Courts that hold to the contrary include bankruptcy courts in Illinois[6], North Dakota[7], Virginia[8], Michigan[9] and Florida[10], as well as the Ninth Circuit Court of Appeals[11].

The first set of courts read the statute expansively and advance many arguments for their position, including the following:

> 1) When a debtor "rejects" a lease, the debtor is rejecting its future performance of all of the covenants contained within the lease. Rejection effectuates a breach of all of the lease provisions, including covenants, and that breach is what authorizes a landlord to file a proof of claim for damages.
>
> 2) The language in Section 502(b)(6) does not qualify or in any way limit the type

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1 *In re Mr. Gatti's, Inc.*, 162 B.R. 1004 (Bankr. W.D. Tex. 1994).
2 *In re Foamex Intern., Inc.*, 368 B.R. 383 (Bankr. D. Del. 2007); In re PPI Enters., 228 B.R. 339 (Bankr. D. Del. 1998).
3 *In re Flanigan*, 374 B.R. 568 (Bankr. W.D. Penn. 2007); In re Peters, 2004 Bankr. Lexis 787 (Bankr. E.D. Penn. 2004); In re Blatstein, 1997 U.S. Dist. Lexis 13376 (E.D. Penn. 1997).
4 *In re New Valley Corp.*, 2000 U.S. Dist. Lexis 12663 (D.N.J. 2000).
5 *In re Storage Technology*, 77 Bankr. 824 (Bankr. D. Colo. 1987).
6 *In re Atlantic Container Corp.*, 133 B.R. 980 (Bankr. N.D. Ill. 1991).
7 *In re Bob's Sea Ray Boats, Inc.*, 143 B.R. 229 (Bankr. D.N.D. 1992).
8 *In re Best Products Co., Inc.*, 229 B.R. 673 (Bankr. E.D. Va. 1998).
9 *In re Energy Conversion Devices, Inc.*, 483 B.R. 119 (Bankr. E.D. Mich. 2012).
10 *In re Q-Masters, Inc.*, 135 B.R. 157, 161 (Bankr. S.D. Fla. 1991).
11 *In re El Toro Materials Co.*, Inc., 504 F.3d 978 (9th Cir. 2007).

Delaware Bankruptcy Court

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of damages involved. The damage cap applies to all damages, which are then arbitrarily capped and measured by rent reserved.

3) Section 502(b)(6) was enacted to curtail exorbitant future damage claims by landlords on long-term leases that threaten to consume a debtor's bankruptcy estate to the detriment of other creditors.

Courts that read the statute narrowly likewise present several arguments in support of their position, including the following:

1) The statutory cap applies solely to those damages that arise as a consequence of the lease being terminated. It does not apply to damages the landlord would have suffered

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regardless of the premature termination of the lease. Therefore, if instead of rejecting the lease, the debtor had assumed it, a claim that would be part of the cure amount should be allowed in its entirety.

2) Damages for lost rental income based on the amount of expected rent should be capped, as landlords may have the ability to mitigate their damages by re-leasing or selling the premises, but will suffer injury in proportion to the value of their lost rent in the meantime. In contrast, it does not make sense to cap collateral damages, since a tenant may cause significant damage to a premises leased cheaply.

3) An expansive application of the cap would create a perverse incentive for lessees to reject otherwise desirable leases in order to gain the benefit of capping unrelated damages. Rejecting the lease would allow the tenant to cap its liability for any collateral damage to the premises and thus reduce its overall liability, even if staying on the property would otherwise be desirable and preserve the operating value of the business.

The Delaware bankruptcy court currently faces this issue in *In re Masonite Corp.*[12] Given the ruling in *In re El Toro Materials Co., Inc.* by the Ninth Circuit, the only circuit court of appeals to have ruled directly on this issue, it will be interesting to see which way the Delaware bankruptcy court swings and how narrowly or expansively it interprets the Section 502(b)(6) limitation.

12 Assuming the matter is not continued, the Delaware bankruptcy court is scheduled to hear the matter on July 23, 2014.

JUDICIAL MUSINGS

Submissions by U.S. Bankruptcy Judges, Middle District of Florida

Required reading for debtors' counsel: Judge Specie's decision on a §727 objection in the *Mitchell* case from last year: *Suntrust Bank v. Merlin Merton Mitchell, Jr. and Candice Kruse Mitchell*, Adv. Pro. No. 12-04014 KKS dated 7/15/13.

Judge McEwen profusely thanks Randy Hiepe for supplying candy to her vestibule candy jar (especially before chapter 13 "rocket dockets") over the past several years when she has obviously been lax in getting to the grocery store!!

In re Tobkin, --- Fed.Appx. ----, 2014 WL 4233368 (11th Circ. 2014). A Florida Bar disciplinary costs and fees judgment is a "fine" by a "governmental entity" and non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(7).

Frequent Chapter 7 Filings Can Affect Attorney Compensation Rates in Tampa

by Chase Fifner
Summer 2014 Intern for U.S. Bankruptcy Court for the Middle District of Florida and
J.D. Candidate 2016, Florida A&M University College of Law

The United States Court for the Middle District of Florida contains more than half of Florida's sixty-seven counties, including several of Florida's largest metropolitan areas. Of the ninety federal districts nationwide, the United States Bankruptcy Court for the Middle District of Florida is the third busiest bankruptcy court based on number of filings (and the second busiest based on weighted filings per judge).

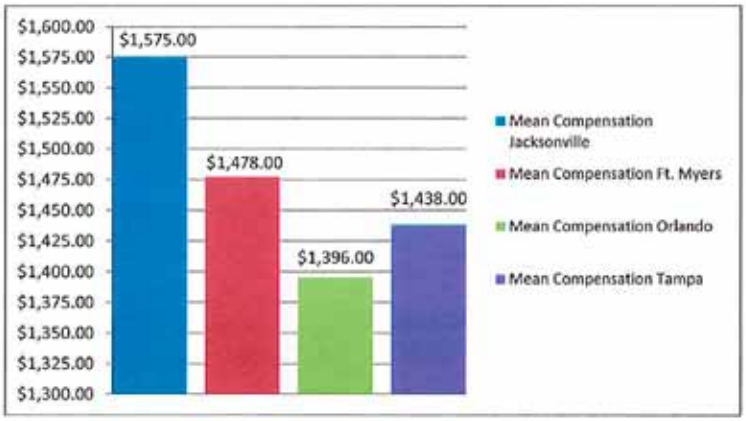
While interning with Judge Catherine Peek McEwen this summer, I comprised an array of Chapter 7 statements of compensation paid or promised to the attorney for debtor(s) for each division: Tampa, Orlando, Ft. Myers, and Jacksonville.

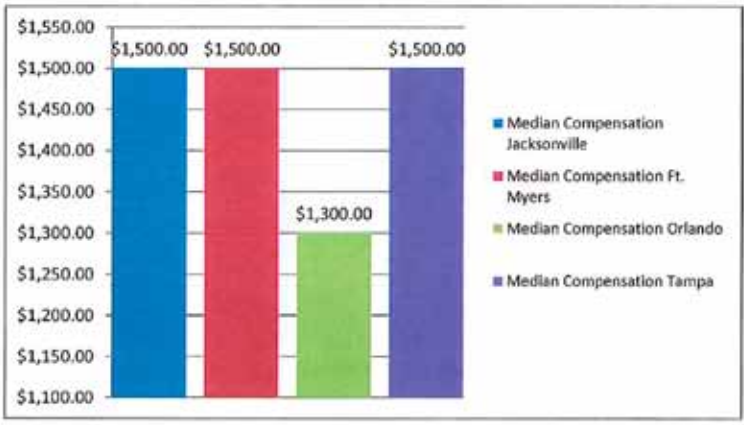
Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b), any attorney representing a debtor must file with the court a statement of compensation for the services rendered. These disclosure statements are readily available on the CM/ECF system. After surveying the disclosure statements, I input the attorney compensation amount for 100 of the most recent Chapter 7 filings into a spreadsheet for each division. Omitting the highest and lowest figures and the pro se cases eliminated the outliers. This narrowed the discrepancy of the mean, median, and mode compensation for each division.

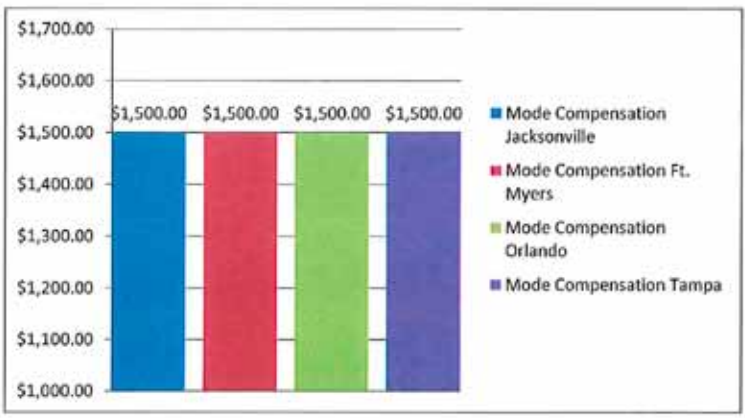
Interestingly, the frequency of Chapter 7 filing in Tampa and Orlando is substantially higher than the frequency of filings in Ft. Myers and Jacksonville. In Tampa and Orlando, I was able to obtain 100 Chapter 7 filings from the docket within a one month period. In Ft. Myers and Jacksonville, where Chapter 7 filings are less frequent, I had to go back over a two month period to obtain 100 compensation statements.

Average compensation for the period varied from division to division. Jacksonville maintained the highest average compensation, with attorneys receiving $1,575.00 for a Chapter 7 filing. The second highest average compensation was Ft. Myers with $1,478.00, followed by Tampa at $1,438.00, and Orlando at $1,396.00.

Based on the statistics, divisions within the Middle District of Florida with a higher frequency of Chapter 7 filings also maintain a lower average compensation for attorneys than divisions with less frequent filings. Therefore, it is possible that a higher frequency of Chapter 7 filings affects attorney compensation in the Tampa division.







The Cramdown
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