

2017

# THE FAIR DEBT COLLECTION PRACTICES ACT AND BANKRUPTCY—FDCPA CLAIMS SHOULD NOT BE BARRED BY THE BANKRUPTCY CODE

Katey M. Garrett

*Western New England University School of Law*

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Katey M. Garrett, *THE FAIR DEBT COLLECTION PRACTICES ACT AND BANKRUPTCY—FDCPA CLAIMS SHOULD NOT BE BARRED BY THE BANKRUPTCY CODE*, 39 W. New Eng. L. Rev. 41 (2017), <http://digitalcommons.law.wne.edu/lawreview/vol39/iss1/2>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

THE FAIR DEBT COLLECTION PRACTICES ACT AND  
BANKRUPTCY—FDCPA CLAIMS SHOULD NOT BE BARRED BY THE  
BANKRUPTCY CODE

*Katey M. Garrett\**

*Bankruptcy is among the oldest of consumer protections. It is a safeguard vital to both the economy and the individuals who seek to file bankruptcy. During bankruptcy, a debtor often suffers from shame, depression, and anxiety, and seeks a fresh start as a last resort. With the advancement of technology, ruthless debt collectors have grown increasingly aggressive. The Fair Debt Collection Practices Act was enacted in 1977 in response to debt collection conduct to protect consumers from unfair, deceptive, or misleading acts or practices in connection with attempts to collect debts. One year later, bankruptcy laws were reformed when the Bankruptcy Code was enacted in 1978. Debtors in bankruptcy are much more vulnerable than the average debtor, and therefore should be afforded additional protection where the FDCPA allows. This Note proposes that during bankruptcy, debtors should not be limited to relief under the Bankruptcy Code.*

INTRODUCTION

For decades, Congress has employed creative mechanisms to achieve its longstanding goals to protect consumers.<sup>1</sup> But long before the proposal and enactment of consumer-friendly statutes such as the Fair Debt Collection Practices Act (hereinafter FDCPA) and the Consumer Credit Protection Act (hereinafter CCPA), the framers of the United States Constitution “virtually copied” the English approach to bankruptcies.<sup>2</sup> As

---

\* B.A., Legal Studies, Bay Path University, 2013; J.D. Candidate, Western New England University, 2017. I would like to thank Professor Justin H. Dion for being an invaluable mentor throughout these crazy eight years—I couldn’t have done it without you. Mom—Thank you for being an inspiration and always encouraging me to make my dreams a reality. I wouldn’t have done it without you. Lastly, thank you to the 2016 WNEU Law Review Staff for helping me transform my Note into something I am proud of.

1. See Michael D. Sousa, *A Circuits Split Does the Bankruptcy Code Implicitly Repeal the FDCPA*, AM. BANKR. INST. J. (Oct. 2006), <http://www.abi.org/abi-journal/a-circuits-split-does-the-bankruptcy-code-implicitly-repeal-the-fdcpa>.

2. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995).

originally enacted, English bankruptcy laws were meant to “aid creditors in the collection of debts,” but have adapted and changed over time to shift some of the protection to debtors.<sup>3</sup> Over the years, bankruptcy laws have been challenged based on provisions that conflict with many other laws and policies.<sup>4</sup>

While bankruptcy laws were shifting protection to the debtor, Congress also sought to reform laws protecting consumer rights.<sup>5</sup> In 1968, Congress enacted the CCPA to protect consumers by requiring fair and honest credit practices.<sup>6</sup> Eleven years later, the FDCPA was enacted as an extension of the CCPA in 1977.<sup>7</sup>

For decades, courts faced the tremendous task of determining how the FDCPA interacts with federal bankruptcy laws.<sup>8</sup> More recently, courts have struggled to decide whether FDCPA claims are allowed during stages of bankruptcy where a debtor is already protected by the Bankruptcy Code.<sup>9</sup>

This Note will argue FDCPA claims should not be banned merely because a debtor has entered bankruptcy. Parts I.A and I.B will first discuss the history and connections between the FDCPA and the Bankruptcy Code before providing a brief history of the circuit split that has developed over the years in Part I.C. Part I.D will discuss the snowball effect that has emerged since a notable Eleventh Circuit decision in 2014. Part I.E will outline one of many hypothetical situations that illustrates how an alternative approach may put creditors at an unfair advantage if shielded from FDCPA liability while a debtor is in bankruptcy. Part I will conclude with a proposed solution to the problem, which will be expanded upon in the following section.

Part II of this Note will first identify the problems involved in a

---

3. *Id.* at 8. “As commerce expanded, the need for a collective procedure to collect debts became evident. Individual collection remedies . . . did not address the distinct problems presented by a debtor’s multiple defaults. Creditors needed protection from defaulting debtors and from each other.” *Id.* at 7.

4. *Id.* at 43. Bankruptcy laws in the United States have had a long history of constitutional challenges, including problems with interstate commerce, uniformity, and preemption. *Id.*

5. In 1968, Congress enacted the Consumer Credit Protection Act (CCPA), which requires meaningful disclosures of credit and personal property lease terms. 15 U.S.C. §§ 1601–1693r (2015).

6. *Id.*

7. See S. Rep. No. 95-382, at 1 (1977). The FDCPA is codified at 15 U.S.C. §§ 1692–1692p (2015).

8. 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, 1071 (2015).

9. *Id.* at 1074–75.

preemption analysis in Part II.A before discussing an alternative approach for analyzing the issue. Part II.B will argue that a preclusion analysis is more appropriate than a preemption analysis. Part II.C will then apply the proposed approach to the two most frequently cited issues among courts, arguing the two statutes were intended to coexist and complement one another where appropriate. Lastly, Part II.D will apply the proposed approach to the hypothetical illustrated in Part I.D. This will reiterate the notion that the FDCPA should not be banned during bankruptcy by analyzing the outcome of a specific set of facts. Part II of this Note will conclude with a brief recap of the problem, solution, and the reasoning behind the argument.

## I. BACKGROUND INFORMATION AND A HISTORY OF THE CIRCUIT SPLIT

### A. *New Protections: The Fair Debt Collection Practices Act*

In 1977, Congress enacted the FDCPA,<sup>10</sup> which prohibits the use of abusive, deceptive, and unfair acts or practices in connection with an attempt to collect a debt.<sup>11</sup> The FDCPA covers only consumer debts and does not extend protection to commercial debts of any kind.<sup>12</sup> The FDCPA governs communications between debt collectors and consumer debtors, third parties, and the consumer debtor's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.<sup>13</sup> FDCPA claims are only enforceable against debt collectors<sup>14</sup> and do not apply to creditors.<sup>15</sup>

Under the FDCPA, a debt collector must send the debtor a written validation notice within five days of the initial communication with a consumer.<sup>16</sup> The validation notice informs the debtor of the amount of the

---

10. 15 U.S.C. §§ 1692–1692p (2015).

11. *Id.*

12. A “consumer” is defined as “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3) (2015). “Debt” is defined as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services . . . are primarily for personal, family, or household purposes . . . .” 15 U.S.C. § 1692a(5) (2015).

13. 15 U.S.C. § 1692c (2015).

14. A “debt collector” is defined by the FDCPA as “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, direct or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6) (2015).

15. A “creditor” is defined by the FDCPA as “any person who offers or extends credit creating a debt or to whom a debt is owed . . . .” 15 U.S.C. § 1692a(4) (2015).

16. 15 U.S.C. § 1692g (2015).

debt, the name of the creditor to whom the debt is owed, and includes a statement of the consumer's opportunity to object to the debt within thirty days.<sup>17</sup> After the validation notice is sent, the consumer may notify the debt collector in writing within thirty days to dispute the debt.<sup>18</sup>

In addition to the specific requirement that debt collectors send a written validation notice, the FDCPA also sets forth rules governing general communications between a debt collector and a consumer debtor.<sup>19</sup> Unless the consumer gives express permission, a debt collector may not contact the debtor (or third parties) at unreasonable hours or<sup>20</sup> at their place of employment,<sup>21</sup> and may not contact a debtor directly when the debt collector knows the consumer debtor is represented by an attorney with respect to the debt.<sup>22</sup>

The FDCPA is commonly referred to as a "strict liability statute" since it does not require the consumer to have suffered actual harm.<sup>23</sup> To establish a claim under the FDCPA, a plaintiff must make two showings: (1) the defendant is a debt collector,<sup>24</sup> and (2) the collector engaged in an act or omission prohibited or required by the FDCPA in attempting to collect a debt.<sup>25</sup> A debt collector in violation of the FDCPA is only protected from civil liability where the debt collector shows "that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."<sup>26</sup> A plaintiff prevailing on an FDCPA claim may be entitled to statutory damages up to \$1,000 with attorneys' fees and

---

17. 15 U.S.C. § 1692g(a) (2015).

18. 15 U.S.C. § 1692g(b) (2015). If a consumer disputes the debt within thirty days as required by the FDCPA, the debt collector must cease collection activity until the debt collector obtains verification of the debt. *Id.*

19. 15 U.S.C. § 1692c (2015).

20. The FDCPA prohibits contact with a consumer "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer." 15 U.S.C. § 1692c(a)(1) (2015). Unless the debt collector has knowledge of circumstances to the contrary, it is assumed that the convenient time for communications are after nine o'clock a.m. and before eight o'clock p.m. *Id.*

21. 15 U.S.C. § 1692c(a)(3) (2015).

22. 15 U.S.C. § 1692c(a)-(b) (2015).

23. "The FDCPA does not ordinarily require proof of intentional violation and . . . is described by some as a strict liability statute." *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010). *See also* 15 U.S.C. § 1692k (2015).

24. A "debt collector" is defined by the FDCPA as "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, direct or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (2015).

25. 15 U.S.C. § 1692 (2015).

26. 15 U.S.C. § 1692k(c) (2015).

court costs, as well as actual damages suffered due to illegal collection practices.<sup>27</sup>

While the FDCPA explicitly acknowledges an inadequacy of existing laws governing abusive debt collection practices, Congress made no mention of the FDCPA's relation to protections already afforded under the existing bankruptcy laws.<sup>28</sup> In 1978, Congress reformed the bankruptcy laws and enacted the Bankruptcy Code, but again neglected to address how this would interfere with the FDCPA already in place.<sup>29</sup>

### B. *The Birth of the Bankruptcy Code*

In 1898, Congress enacted the Bankruptcy Act of 1898,<sup>30</sup> exercising the authority granted in Article I, Section 8 of the United States Constitution.<sup>31</sup> Congress amended the Act numerous times over the course of eighty years before its repeal in 1978.<sup>32</sup> In 1978, Congress enacted the Bankruptcy Code (codified as Title 11 of the United States Code) as a replacement to the Bankruptcy Act of 1898.<sup>33</sup>

Both Chapter 7 and Chapter 13 of the Bankruptcy Code<sup>34</sup> aim to provide consumer debtors with a financial fresh start from burdensome debts.<sup>35</sup> In a Chapter 7 bankruptcy proceeding, a trustee takes control of the debtor's nonexempt assets,<sup>36</sup> liquidates them, and distributes payments to creditors from the bankruptcy estate.<sup>37</sup> In a Chapter 13 bankruptcy proceeding, consumer debtors with a "regular income"<sup>38</sup> develop and

---

27. 15 U.S.C. § 1692k (2015).

28. Congress explicitly outlined congressional findings and declaration of purpose, noting that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a) (2015).

29. 11 U.S.C. §§ 101–1532 (2015).

30. The Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (1898) (repealed 1978).

31. U.S. CONST. art. I § 8.

32. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

33. 11 U.S.C. §§ 701–784, §§ 1301–1330 (2015).

34. 11 U.S.C. §§ 101–1532 (2015).

35. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

36. Under the Bankruptcy Code, debtors may exempt, or exclude, from the bankruptcy estate certain assets. *See* 11 U.S.C. § 522(d) (2015). For example, debtors may exempt an aggregate interest in real property used as a residence up to \$23,675, up to \$3,775 in interest in one motor vehicle, up to \$600 in interest in household furnishings, and up to \$1,600 in interest in jewelry held for personal use. *Id.*

37. "The term 'liquidation' is not defined in the Bankruptcy Code but refers to a Chapter 7 bankruptcy that provides for the administration, collection, and sale of a debtor's assets by a bankruptcy trustee and the distribution of the proceeds, after administrative expenses, to pay creditors." *Liquidation Definition*, NORTON BANK. L. & PRAC. DICT. OF BANKR. TERMS (3d. ed. 2017). Very few Chapter 7 cases contain assets, since the assets involved are usually exempt. *Id.* 11 U.S.C. §§ 704–726 (2015).

38. "The term 'individual with regular income' means [an] individual whose income is

propose a repayment plan over a maximum of five years,<sup>39</sup> retaining possession of assets while completing the repayment plan.<sup>40</sup>

In both Chapter 7 and Chapter 13 cases, creditors<sup>41</sup> are notified of the pending bankruptcy proceeding and are given the opportunity to take part in the distribution of the bankruptcy estate funds.<sup>42</sup> In non-asset cases, there is no need for creditors to take part in the proceeding, as there are no funds to distribute.<sup>43</sup> In asset cases, creditors may file a proof of claim or interest<sup>44</sup> with the bankruptcy court, which gives the creditor the right to receive a share of the liquidated assets in a Chapter 7 bankruptcy or the right to receive payments under a Chapter 13 bankruptcy.<sup>45</sup> After proofs of claim are filed, debtors have the opportunity to object to proofs of claim that are unenforceable.<sup>46</sup> A proof of claim or interest “is deemed allowed, unless a party in interest . . . objects.”<sup>47</sup> The only creditors that share in the distribution of assets are those “whose claims have been allowed.”<sup>48</sup>

In both types of cases, debtors are also given the protection of the automatic-stay provision, which prevents creditors from contacting

sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or commodity broker.” 11 U.S.C. § 101(30) (2015).

39. The Bankruptcy Code provides the repayment plan in a Chapter 13 Bankruptcy “may not provide for payments over a period that is longer than 5 years.” 11 U.S.C. §1322(d)(1)(C) (2015).

40. 11 U.S.C. § 1306(b) (2015).

41. A “creditor” is defined as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.” 11 U.S.C. § 101(10) (2015). Creditors in a bankruptcy proceeding are divided into two categories. A “secured creditor” is one that holds a secured claim, such as a lien on a property in which the estate has an interest. 11 U.S.C. § 506 (2015). An “unsecured creditor” is one that holds an unsecured claim, meaning that the value of the claim is subject to setoff. *Id.*

42. 11 U.S.C. § 501 (2015).

43. Not all bankruptcy petitions include assets to distribute. An “asset case” is a bankruptcy where there is non-exempt property in the bankruptcy estate to distribute to creditors. *Liquidation Definition*, NORTON BANK. L. & PRAC. DICT. OF BANKR. TERMS (3d ed. 2017). Alternatively, a “non-asset” case involves debtors who have no property at all or have used the exemptions outlined in 11 U.S.C. § 522(d) (2015). *Id.* See 11 U.S.C. § 704–726 (2015).

44. A “proof of claim” is defined as “a written statement setting forth a creditor’s claim.” FED. R. BANKR. P. 3001(a).

45. 11 U.S.C. § 501 (2015).

46. Proofs of claim are allowed unless a party in interest objects. 11 U.S.C. § 502(a) (2015). Parties may object where claims are unenforceable, are for unmatured interest, or are not timely filed. 11 U.S.C. § 502(b) (2015). The Bankruptcy Code does not define “unmatured interest,” but courts have defined it as interest that is “not yet due and payable.” *Thrifty Oil Co. v. Bank of Am. Nat’l Tr. & Sav. Ass’n*, 322 F.3d 1039, 1046 (9th Cir. 2002), *as amended* (March 6, 2003) (citing *Joyce v. Fid. Consumer Dis. Co. (In re Joyce)*, 41 B.R. 249, 254 (Bankr. E.D. Pa. 1984)).

47. 11 U.S.C. § 502 (2015).

48. Fed. R. Bankr. P. 3021.

debtors directly throughout the proceeding.<sup>49</sup> Debtor individuals “injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.”<sup>50</sup> The automatic stay protects a debtor from the moment a petition is filed until the time the case is closed, dismissed, or a discharge is granted or denied.<sup>51</sup>

At the closing of a bankruptcy proceeding, a debtor is granted a discharge.<sup>52</sup> In a Chapter 7 bankruptcy, a debtor is discharged from “all debts that arose before the date of the order for relief.”<sup>53</sup> In Chapter 13 cases, discharge occurs after the debtor completes all payments required by the repayment plan.<sup>54</sup> After payments are completed, debtors are granted a discharge of “all debts provided for by the plan.”<sup>55</sup>

At first glance, the Bankruptcy Code appears to provide debtors with adequate protection against creditor misconduct. Where proofs of claim are invalid, debtors may object to prevent the allowance of the claim.<sup>56</sup> Under the automatic-stay provision, debtors are automatically protected from being contacted or pursued by creditors while the bankruptcy is pending.<sup>57</sup> However, recent case law involving the Bankruptcy Code, as it relates to the FDCPA, provides clear indication debtors are in need of additional protections not provided for under the Bankruptcy Code. Congress’s failure to address the role of the FDCPA and its relation to the Bankruptcy Code has left courts in charge of connecting the dots, resulting in inconsistencies among jurisdictions.<sup>58</sup> The next section of this Note will explore the history of the circuit split that evidences a need for

---

49. The automatic stay “operates as a stay, applicable to all entities” against the enforcement of the debt, commencement of a judicial, administrative, or other action, acts to obtain possession of the property of the estate, or any act to collect assess, or recover a claim against the debtor. 11 U.S.C. § 362(a) (2015).

50. 11 U.S.C. § 362(k)(1) (2015).

51. 11 U.S.C. § 362(a)–(c) (2015).

52. A “discharge in bankruptcy” is “[t]he release of a debtor from personal liability for prebankruptcy debts . . . .” *Discharge in Bankruptcy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

53. 11 U.S.C. § 727(a)–(b) (2015).

54. 11 U.S.C. § 1328(a) (2015).

55. *Id.*

56. 11 U.S.C. § 502(a)–(b) (2015).

57. 11 U.S.C. § 362(a)–(c) (2015).

58. The Second and Ninth Circuits hold FDCPA violations are precluded by the Bankruptcy Code. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 511 (9th Cir. 2002). Alternatively, the Third, Seventh, and Eleventh Circuits allow for recovery under both federal statutes. *Crawford v. LVNV Funding LLC*, 758 F.3d 1254, 126162 (11th Cir. 2014); *Simon v. FIA Card Servs. N.A.*, 732 F.3d 259, 271–74 (3rd Cir. 2013); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730–33 (7th Cir. 2004).



change.

### C. *A History of the Circuit Split*

The circuits are split on the issue of whether FDCPA claims are allowed as a private cause of action during a bankruptcy proceeding.<sup>59</sup> Today, the Second and Ninth Circuits hold that the FDCPA does not apply in a bankruptcy context at all, as the debtor is already entitled to adequate relief and protection through the bankruptcy court.<sup>60</sup> Alternatively, the Third, Seventh, and Eleventh Circuits allow debtors to seek relief under both the Bankruptcy Code and the FDCPA.<sup>61</sup> Last year, the Fourth Circuit jumped on the majority bandwagon, holding that bankruptcy does not bar FDCPA claims.<sup>62</sup>

The split as to whether the Bankruptcy Code generally precludes<sup>63</sup> claims brought under the FDCPA developed in the early 2000s.<sup>64</sup> In 2002, the Ninth Circuit considered whether Wells Fargo Bank's attempted debt collection during bankruptcy was actionable under the FDCPA and held that it was "not, as to do so would circumvent the Bankruptcy Code's remedial scheme."<sup>65</sup> In *Walls v. Wells Fargo Bank, N.A.*, Donna Marie Walls brought a class action lawsuit against Wells Fargo Bank after continuous solicitations to collect monthly payments "before [her] discharge but after the automatic stay" was issued.<sup>66</sup> Walls argued a private cause of action under the FDCPA was consistent with the purposes of the Bankruptcy Code,<sup>67</sup> and urged the Ninth Circuit to "read the two competing statutes jointly."<sup>68</sup> Ultimately, the Ninth Circuit held that because Congress did not articulate the intent to allow debtors relief under both federal statutes, a separate private cause of action was not allowed

---

59. See generally *Simmons*, 622 F.3d at 93; *Walls*, 276 F.3d at 259; *Simon*, 732 F.3d at 259; *Randolph*, 368 F.3d at 1254.

60. *Walls*, 276 F.3d at 510. See also *Simmons*, 622 F.3d at 95.

61. See *Simon*, 732 F.3d at 271–74; *Randolph*, 368 F.3d at 730–33; *Crawford*, 758 F.3d at 1254, 1256–57.

62. *In re Dubois*, 834 F.3d 522, 525 (4th Cir. 2016).

63. "Preclude" is defined as "[t]o prevent or make impossible; to rule out beforehand by necessary consequence." *Preclude*, BLACK'S LAW DICTIONARY (10th ed. 2014). To "preclude" is "to make impossible by necessary consequence." *Preclude*, MERRIAM WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003).

64. *Walls*, 276 F.3d at 510; cf. *Randolph* 368 F.3d at 730–33.

65. *Walls*, 276 F.3d at 504.

66. *Id.* at 505.

67. "[T]he purpose of the Bankruptcy Code is to provide debtors with a 'fresh start' and to protect them from subsequent collection efforts." *Walls*, 276 F.3d at 509.

68. *Id.* at 510. [A]bsent . . . clearly expressed congressional intention to the contrary," the Supreme Court instructs courts to give effect to both laws where competing statutes are capable of coexisting. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

under the FDCPA.<sup>69</sup>

Two years later, the Seventh Circuit considered the same issue, but under slightly different circumstances.<sup>70</sup> In *Randolph v. IMBS, Inc.*, three debtors filed suit under the FDCPA for false representation of a debt<sup>71</sup> after discharge had occurred.<sup>72</sup> The Seventh Circuit began with an analysis of “the compatibility of overlapping systems[,]”<sup>73</sup> and determined “[i]t would be better to recognize that the statutes overlap, each with coverage that the other lacks . . . .”<sup>74</sup> The court ultimately held that FDCPA claims were not precluded by the Bankruptcy Code.<sup>75</sup> However, because all three cases involved debt collectors who desisted all collection attempts immediately upon learning of the bankruptcy proceedings, the judgment was remanded for further review.<sup>76</sup>

In 2010, the split grew when the Second Circuit considered whether a creditor’s filing of inflated proofs of claim during bankruptcy constituted a violation of the FDCPA.<sup>77</sup> Without seeking remedies under the Bankruptcy Code, the debtors in *Simmons v. Roundup Funding, LLC* filed suit under the FDCPA.<sup>78</sup> The Second Circuit failed to find language in either the Bankruptcy Code or the FDCPA that authorizes a debtor “to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA”<sup>79</sup> and held that the debtor was not entitled to relief under the FDCPA.<sup>80</sup>

The Third Circuit wrote the next notable opinion on the issue in

---

69. “Nothing in either Act persuades us that Congress intended to allow debtors to bypass the [Bankruptcy] Code’s remedial scheme when it enacted the FDCPA. While the FDCPA’s purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor’s protection and remedy remain under the Bankruptcy Code.” *Walls*, 276 F.3d at 510 (citing *Kokoszka v. Belford*, 417 U.S. 642 (1974)).

70. See *Randolph*, 368 F.3d 726.

71. 15 U.S.C. § 1692(a) (2015).

72. The court in *Randolph v. IMBS, Inc.* consolidates the facts of three cases by using one set of facts as illustration. *Randolph*, 368 F.3d at 728. The court considered a Chapter 13 debtor who has discharged a debt to her dentist. *Id.* Approximately two years after the debtor’s Chapter 13 plan was confirmed, her dentist died and his office hired a third party to collect on old accounts. *Id.* The third-party collection agency sent two collection letters, which the debtor relayed to her attorney. *Id.* at 728–29.

73. *Id.* at 732.

74. *Id.* at 731.

75. *Id.* at 733.

76. *Id.*

77. See *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010). The proof of claim at issue in this case was considered “inflated” in that it misrepresented the amount of debt owed, claiming an amount of \$2,039.21 when Simmons actually only owed \$1,100. *Id.* at 94–95.

78. *Id.* at 96.

79. *Id.*

80. *Id.*

2013.<sup>81</sup> In *Simon v. FIA Card Services, N.A.*, the court considered whether a notice sent to a Chapter 7 debtor's bankruptcy counsel gave rise to a claim under the FDCPA.<sup>82</sup> The court first applied the FDCPA to the facts of the case and then addressed the relationship between the FDCPA and the Bankruptcy Code.<sup>83</sup> In doing so, the Third Circuit followed the approach of the Seventh Circuit, holding when FDCPA claims arise during bankruptcy, "there is no categorical preclusion of the FDCPA claims."<sup>84</sup>

One year later, the Eleventh Circuit considered whether a consumer debt buyer, who had filed an invalid proof of claim in a Chapter 13 bankruptcy proceeding, was in violation of the FDCPA.<sup>85</sup> In *Crawford v. LVNV Funding, LLC*, the court completely neglected to address the preemption or preclusion issue and instead analogized the filing of an invalid proof of claim in a bankruptcy proceeding to the filing of a stale lawsuit.<sup>86</sup> Ultimately, the Eleventh Circuit held that both actions rise to the level of an FDCPA violation.<sup>87</sup>

Other circuit courts have taken the *Crawford* decision and ran in two opposite directions with it.<sup>88</sup> Recently, many courts have considered the issue, citing the Eleventh Circuit as persuasive authority and have adopted, deviated from, or rejected it.<sup>89</sup>

#### D. 2016 Decisions

In 2016, three circuit courts considered the narrower issue of whether debtors can bring an FDCPA claim against debt collectors for filing stale proofs of claim in bankruptcy.<sup>90</sup> The first decision came from the

---

81. See generally *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259 (3d Cir. 2013).

82. *Id.* The communications at issue in this case were "a debt collector's letter and notice requesting an examination" of the debt and offering to settle the debt. *Id.* at 262.

83. *Id.* at 278–80.

84. *Id.* at 274.

85. See generally *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1257 (11th Cir. 2014). In this case, the defendant attempted to collect a debt that was unenforceable in both state and federal court under a three-year Alabama statute of limitations that governed the debt. *Id.*

86. *Id.* at 1261.

87. *Id.* The court adopted the Seventh Circuit's reasoning that the FDCPA prohibits the filing of stale lawsuits to collect consumer debts because: (1) "unsophisticated consumers" would not know about the statute of limitations defense; (2) would not remember "the circumstances and validity of the debt" after time has passed; and (3) would be highly unlikely to have maintained personal records. *Id.* at 1260 (citing *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013)).

88. The recent decisions surrounding the issue are discussed in the next section of this Note.

89. *Id.*

90. See *In re Dubois*, 834 F.3d 522 (4th Cir. 2016); *Owens v. LVNV Funding, LLC*, 832

*Crawford* court, which considered whether Chapter 13 debtors had a claim under the FDCPA against a debt collector for filing a proof of claim for a debt that they knew to be time-barred.<sup>91</sup> While the Bankruptcy Code “certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability.”<sup>92</sup>

In revisiting the FDCPA and Bankruptcy Code issue, the Eleventh Circuit expanded upon the “preemption”<sup>93</sup> issue “the district court artfully dodged” and the *Crawford* decision “decline[d] to weigh in on.”<sup>94</sup> The Eleventh Circuit answered “the question left open in *Crawford*” and held that “[t]he 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.”<sup>95</sup> Rather, “[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.”<sup>96</sup>

The Seventh Circuit revisited the issue months later under similar circumstances.<sup>97</sup> In three consolidated cases, the court considered whether “filing a proof of claim on a stale debt violates §§ 1692e and 1692f of the [FDCPA].”<sup>98</sup> Since the court previously held in *Randolph* that “the Bankruptcy Code d[oes] not implicitly repeal the FDCPA,” the court was now charged with determining “whether defendants’ attempts to collect on plaintiffs’ time-barred debts in bankruptcy were false, deceptive, or misleading under the FDCPA.”<sup>99</sup> The court first referred to the *Crawford* decision, but declined to take the same approach.<sup>100</sup> Noting that because “the concerns . . . regarding the misleading or deceptive nature of the conduct are less acute when a proof of claim is filed in bankruptcy, especially in a counseled case, as opposed to when a lawsuit is filed in state or federal court,” debtors—especially those with attorneys—don’t need any additional protection.<sup>101</sup>

---

F.3d 726 (7th Cir. 2016); *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016), *cert. granted*, 137 S. Ct. 326 (2016).

91. *Johnson*, 823 F.3d at 1338.

92. *Id.* at 1336.

93. This Note will argue that the issue some courts label as “preemption” does not apply in this context. *See infra* Part II.A.

94. *Johnson*, 823 F.3d at 1338 (quoting *Crawford*, 758 F.3d at 1262 n.7).

95. *Id.*

96. *Id.* at 1341.

97. *Owens*, 832 F.3d at 734.

98. *Id.* at 729.

99. *Id.* at 734.

100. *Id.* at 735.

101. *Id.*

Proofs of claim are “required to inform the debtor about the age and origin of the debt,” which provides the debtor with an “affirmative defense . . . evident on the face of the claim.”<sup>102</sup> The court explained that because most debtors hire attorneys, the correct standard is the “competent attorney” standard, which is “whether the communications would be likely to mislead a competent lawyer.”<sup>103</sup> Ultimately, the court concluded that although FDCPA claims are not barred by the Bankruptcy Code, filing a stale proof of claim in bankruptcy is not deceptive or misleading and thus cannot form the basis for an FDCPA claim.<sup>104</sup> That’s not to say a proof of claim could never form the basis for an FDCPA claim in the Seventh Circuit—just not in cases where the proof of claim is a “factual, true statement about the existence of a debt and the amount.”<sup>105</sup>

Under a strikingly similar fact pattern to both 2016 cases above, *In re Dubois* considered whether proofs of claim filed on debts that were barred under Maryland’s statute of limitations entitled debtors to recover “damages, attorney’s fees, and costs under the FDCPA.”<sup>106</sup> In the Fourth Circuit’s case of first impression, the court began with a broad overview of bankruptcy, the FDCPA, and each statute’s respective purpose.<sup>107</sup> Because “[f]ederal courts have consistently held that a debt collector violates the FDCPA by filing a lawsuit or threatening to file a lawsuit to collect a time-barred debt,” the court then looked to whether filing a proof of claim constitutes debt collection activity regulated by the FDCPA.<sup>108</sup> Although the debt collector argued that a proof of claim is only a “request to participate” in the bankruptcy proceeding, the court held that “does not alter [the] conclusion” that “a proof of claim is an attempt to collect a debt.”<sup>109</sup>

The court then looked at the narrower issue of whether the proofs of claim for time-barred debts violated the FDCPA.<sup>110</sup> When the word “claim” is used in bankruptcy, “it is usually referring to a right to payment recognized under state law.”<sup>111</sup> Maryland does not interpret the expiration of a statute of limitations to extinguish a debt, but rather, interprets it as

---

102. *Id.* at 735–36.

103. *Id.* at 736 (citing *Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 603 (7th Cir. 2016)).

104. *Id.*

105. *Id.*

106. *In re Dubois*, 834 F.3d 522, 525 (4th Cir. 2016).

107. *Id.* at 526.

108. *Id.* at 527.

109. *Id.* at 529.

110. *Id.* at 528.

111. *Id.* at 529 (quoting *Traveler’s Cas. & Sur. Co. of Am. V. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007)).

simply barring recovery under the law.<sup>112</sup> The debt collector can still contact a debtor to try to collect a debt and in many states, if a debt collector secures payment on a stale debt, the debt is revived and the statute of limitations is no longer a valid defense.<sup>113</sup> Citing to *Crawford*, the court analogized the filing of a stale proof of claim to filing a stale lawsuit, but ultimately held that filing a proof of claim on a stale debt is not an FDCPA violation.<sup>114</sup> The Eleventh Circuit distinguished claims for stale debts in court from claims for stale debts in bankruptcy, determining that a debtor pays the same amount into the estate regardless of whether the proof of claim has been allowed, so relief is not necessary.<sup>115</sup>

With more and more circuits citing to *Crawford* as persuasive authority, the United States Supreme Court has decided to weigh in.<sup>116</sup> In October of 2016, certiorari was granted to *Johnson v. Midland Funding*, the missing piece of the *Crawford* puzzle.<sup>117</sup> The timing indicates the Supreme Court is eager to do one of two things: (1) jump on the *Crawford* bandwagon and eradicate the circuit split; or (2) extinguish the *Crawford* wildfire and ban FDCPA claims from bankruptcy altogether. While *Crawford* comes to the correct conclusion, it discusses only a fraction of the reasoning that leads to that conclusion. This gap in reasoning leads to inconsistencies in application among circuits and unpredictability within the courts. The next section will discuss how inconsistencies among jurisdictions preclude relief where a debtor is in need of additional protection.

#### E. *A Practical Application: A Hypothetical to Illustrate the Need for Change*

Betty<sup>118</sup> is overwhelmed with anxiety and debt after some unexpected health complications forced her to “max out” her credit cards and spend the last bit of her savings. After months of struggling to keep up with the minimum payments, Betty is laid off from work. For months, she is unable to pay her creditors anything at all and is harassed by debt collectors around the clock. She borrows against her retirement plan to barely keep a roof over her head and food on the table.

Betty searches desperately for a job, but finds very few openings in

---

112. *Id.*

113. *Id.*

114. *Id.* at 533.

115. *Id.* at 531–32.

116. Petition for Certiorari, *Midland Funding, LLC v. Johnson*, No. 16-348 (2016).

117. *Id.*

118. Betty is a hypothetical character developed for the purpose of demonstrating the harmful effects of disallowing FDCPA claims while in bankruptcy. She is completely fictional and not based on any real person.

her field of employment. After not working for nine months, she finds a job with decent pay and great benefits. She comes home from her second day of work to find the usual pile of bills in her mailbox, but in addition, she finds a notice of the foreclosure proceeding against her. Betty is devastated she may lose the childhood home her mother devised to her, so she immediately seeks the advice of a family friend who is also an attorney. She decides to file Chapter 13 bankruptcy in order to keep her home, as she now has a steady source of income to repay her debts on a payment plan.

Because of her income, Betty's Chapter 13 payment plan will repay her secured debts in full over a span of five years.<sup>119</sup> Eager to use all of her money to pay off her debts as soon as possible, she does not hire an attorney. After her 341 Hearing,<sup>120</sup> Betty notices in her paperwork that two of her secured creditors<sup>121</sup> list a claim for exactly the same amount. Further investigation reveals the claims are duplicative; her creditor had sold the debt to a third-party debt collector and then proceeded to file a proof of claim<sup>122</sup> to collect on that same debt. She finds an old bill and discovers the debt was incurred over eight years ago, rendering the debt unenforceable under a three-year state statute of limitations. Betty is unsure of her rights and does not know how to dispute the debt because, under the Bankruptcy Rules, she no longer has the right to object to an invalid proof of claim.<sup>123</sup> As Betty's case is under the jurisdiction of the Ninth Circuit, she is also unable to seek recovery under the FDCPA.<sup>124</sup>

#### F. *FDCPA Claims are Not Barred by the Bankruptcy Code*

Barring FDCPA claims while a debtor is in bankruptcy shields debt collectors from liability for "abusive, deceptive, and unfair" acts and

---

119. The Bankruptcy Code provides that the repayment plan in a Chapter 13 Bankruptcy "may not provide for payments over a period that is longer than 5 years." 11 U.S.C. § 1322(d) (2015).

120. 11 U.S.C. § 341 (2015). Under the Bankruptcy Code, the United States trustee has the authority to convene a meeting of any equity security holders. At this meeting (typically referred to as a "341 Meeting"), a debtor is required to appear and submit to an examination under oath. Creditors, indenture trustees, or any trustee or examiner in the case may examine the debtor. 11 U.S.C. §§ 341–43 (2012). *See also* An Act of Nov. 6, 1978, Pub. L. No. 95–598, 92 Stat. 2549 (establishing a uniform Law on the Subject of Bankruptcies).

121. A "secured claim" is "a claim held by a creditor who has a lien or a right of setoff against the debtor's property." *Secured Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

122. A "proof of claim" or interest is defined as "a written statement setting forth a creditor's claim." FED. R. BANKR. R. 3001.

123. Under the Bankruptcy Rules, objections to claims must be "in writing and filed" and "[a] copy of the objection with notice of the hearing thereon [must] be mailed or . . . delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing." FED. R. BANKR. P. 3007(a).

124. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 504 (9th Cir. 2002).

practices in connection with an attempt to collect a debt.<sup>125</sup> To adopt this approach is not only inconsistent with the strict liability mechanism Congress imposed in the FDCPA,<sup>126</sup> but also inconsistent with the Bankruptcy Code, which operates to bring all of the rights and duties of debtors and creditors together and distribute assets equally in one proceeding.<sup>127</sup>

Rather than finding claim preclusion where FDCPA claims arise in bankruptcy proceedings, courts should allow for relief under both federal statutes, when both apply, since the FDCPA and the Bankruptcy Code are not in conflict and fully capable of coexisting.<sup>128</sup> Further, the FDCPA provides a debtor with additional relief where the Bankruptcy Code does not, which if prohibited, would deprive a debtor of relief and put a bankrupt debtor at an unfair disadvantage.<sup>129</sup>

## II. APPLICATION AND ANALYSIS UNDER THE CORRECT STANDARD

### A. *Preemption Argument is Inapplicable*

Many courts, including circuit courts, have phrased the issue of whether FDCPA claims are barred by the Bankruptcy Code in the context of preemption.<sup>130</sup> “Preemption” is defined as “[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.”<sup>131</sup> While the preemption doctrine governs when federal law may override state law, it fails to provide any guidance when the allegedly conflicting statutes are both federal.<sup>132</sup> Since both the Bankruptcy Code and the FDCPA are federal statutes, as the court in *Randolph v. IMBS Inc.* acknowledged, the preemption analysis is inappropriate.<sup>133</sup> Instead, just as the Seventh

---

125. 15 U.S.C. § 1692(a) (2015).

126. 15 U.S.C. § 1692k (2015).

127. *See Straton v. New*, 283 U.S. 318, 320–21 (1931).

128. *See infra* Part II.A.

129. 15 U.S.C. § 1692k (2015).

130. *See generally* *Simmons v. Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010); *Walls, v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002); *cf. Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (holding the correct question to consider in this circumstance is whether implicit repeal has occurred, rather than whether one statute preempts another); *see Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (neglecting the preemption issue altogether since counsel did not raise the issue).

131. *Preemption*, BLACK’S LAW DICTIONARY (10th ed. 2014).

132. 11 U.S.C. §§ 101–112 (2015); 15 U.S.C. §§ 1692–1692p (2015).

133. In *Randolph*, the Seventh Circuit reversed the lower court’s holding that section 362(h) of the Bankruptcy Code “preempts” section 1692e(2)(a) of the FDCPA, noting “this cannot be right. One federal statute does not preempt another.” *Randolph*, 368 F.3d at 729



Circuit did, courts should consider whether one federal statute precludes relief under the other.<sup>134</sup>

### B. *Preclusion Analysis*

The Supreme Court of the United States has held that as a “cardinal principle” of statutory construction, when there are two federal laws on the same subject, “the rule is to give effect to both if possible.”<sup>135</sup> Therefore, the Seventh Circuit was correct in considering “whether one [statute] implicitly repeals the other” rather than phrasing the issue in terms of preemption.<sup>136</sup>

Implicit repeal may occur in one of two ways.<sup>137</sup> The “two well-settled categories of repeals by implication” are: “(1) [w]here provisions in the two acts are in irreconcilable conflict. . . ; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute . . . .”<sup>138</sup> There is an important distinction to note between these two categories: the first type allows for repeal of *only* the conflicting provisions, but the second type constitutes an implied repeal of the *entire* original act, causing the new act to replace or substitute the original.<sup>139</sup> In both circumstances, in order for repeal by implication to occur, “[t]he intention of the legislature to repeal ‘must be clear and manifest[.]’”<sup>140</sup>

With regard to the second type of repeal by implication, the later act must cover the “the whole subject of the earlier one and [be] clearly intended as a substitute” before the later act will be construed as a substitute that implicitly repeals the earlier act.<sup>141</sup> The FDCPA (the earlier act) and the Bankruptcy Code (the later act) arguably cover entirely different subjects.<sup>142</sup> Even if both statutes fall within the broader subject of consumer protection, it cannot be argued the Bankruptcy Code covers the whole subject matter of the FDCPA.<sup>143</sup> Further, before implicit repeal

(citing *Baker v. IBP Inc.*, 357 F.3d 685 (7th Cir. 2004)).

134. To “preclude” is “to make impossible by necessary consequence.” *Preclude*, MERRIAM WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003). See *infra* Part II.A and II.B.

135. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

136. *Randolph*, 368 F.3d at 729 (citing *Brand v. Smith*, 538 U.S. 254, 273 (2003)).

137. See *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

138. *Id.*

139. *Id.* Since the Bankruptcy Code (the later act) does not cover the entire subject of the FDCPA (the earlier act), this Note will address the first type only.

140. *Borden Co.*, 308 U.S. at 198 (quoting *Red Rock v. Henry*, 106 U.S. 596, 601–02 (1883)).

141. *Posadas*, 296 U.S. at 503.

142. The Bankruptcy Code governs bankruptcies, while the FDCPA governs “abusive, deceptive, and unfair debt collection practices.” See 11 U.S.C. §§ 101–112 (2015); 15 U.S.C. §§ 1692a (2015).

143. The Bankruptcy Code contains provisions that govern debt collection during

may occur, the intention of the legislature to repeal the later statute must be clear and manifest.<sup>144</sup> In fact, it contains express language indicating Congress intended for the Bankruptcy Code to repeal and replace *itself*.<sup>145</sup> Thus, “[t]he Bankruptcy Code of 1968 does not work an implied repeal of the FDCPA, any more than the latter Act implicitly repeals itself.”<sup>146</sup> Lastly, the Bankruptcy Code fails to address the consumer protection concerns the FDCPA seeks to remedy and cannot be said to be “clearly intended as a substitute” to the FDCPA.<sup>147</sup> Therefore, under the second theory of implied repeal, the Bankruptcy Code cannot repeal the FDCPA in its entirety; thus, the FDCPA should remain applicable during bankruptcy proceedings.

The only other “well-settled” method of repeal by implication occurs when the provisions within the two acts are in irreconcilable conflict.<sup>148</sup> Repeals by implication are not favored.<sup>149</sup> As a general rule, an irreconcilable conflict exists where the two acts are “repugnant in any of their provisions[.]”<sup>150</sup> “Repugnance” is defined as “the quality or fact of being contradictory or inconsistent[.]”<sup>151</sup> Therefore, in order to find a repeal by implication, provisions of the later statute must contradict or be inconsistent with provisions in the earlier statute.<sup>152</sup> Even if this were applicable, the FDCPA would be repealed only to the extent that its provisions are in irreconcilable conflict with provision in the Bankruptcy Code.<sup>153</sup> This means the *entire* Bankruptcy Code is not invalidated by conflicting provisions in the FDCPA. Rather, the specific provisions in the Bankruptcy Code that conflict with the FDCPA are inoperable only to the extent they are unable to be enforced together.<sup>154</sup>

The next section of this Note will explore the specific provisions of

---

bankruptcies, but does not provide any guidance or authority over consumers who are not in bankruptcy. See 11 U.S.C. §§ 101–112 (2015).

144. *Posadas*, 296 U.S. at 503.

145. If Congress intended to repeal the Bankruptcy Code in enacting the FDCPA, then it would have likely done so expressly, as it did in 1978. See Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (establishing a uniform law on the subject of bankruptcies).

146. *Randolph*, 368 F.3d at 732.

147. *Kline v. Mortg. Elec. Sec. Sys.*, 659 F. Supp. 2d 940, 950 (S.D. Ohio, 2009). The Bankruptcy Code does not govern abusive, deceptive, and unfair acts and practices in connection with attempting to collect a debt where the consumer is not in bankruptcy, whereas the FDCPA does. *Id.* See also 11 U.S.C. §§ 101–112 (2015); cf. 15 U.S.C. §§ 1692–1692p. (2015).

148. *Posadas*, 296 U.S. at 504.

149. *Id.* at 503.

150. *Id.* at 504.

151. *Repugnance*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

152. *Posadas*, 296 U.S. at 503.

153. *Id.* See *infra* Part II.C.

154. *Posadas*, 296 U.S. at 503.

the Bankruptcy Code and the FDCPA that are most frequently relied upon when making an implicit repeal argument. The following section will argue that statutory provisions are not in conflict.<sup>155</sup> Lastly, even if statutory provisions are contradictory, they are not in irreconcilable conflict and should complement, rather than contradict, each other.

### C. *Conflicting Provisions*

Because the Bankruptcy Code and the FDCPA cover different subjects,<sup>156</sup> repeal by implication may occur only where provisions in the two acts are in irreconcilable conflict.<sup>157</sup> “Irreconcilable” means the provisions are “impossible to reconcile[,]”<sup>158</sup> or in other words, impossible to “make consistent or congruent.”<sup>159</sup> The Supreme Court of the United States has expanded on this notion, holding it is not enough to show “affirmative, or cumulative, or auxiliary” provisions.<sup>160</sup> Further, it is not enough that each statute’s provision produces a different result in its application.<sup>161</sup> Therefore, in order for implied repeal to occur, a provision in the Bankruptcy Code (the later act) must first conflict with a provision in the FDCPA (the earlier act) *and* second, the conflict must be irreconcilable.<sup>162</sup> This Note will first argue that the FDCPA complements, rather than conflicts with, the Bankruptcy Code. Second, this Note will argue that even if courts *were* to accept the argument that a conflict exists, any alleged conflicts between the statutory provisions are certainly not irreconcilable and the two may be enforced together, at least to some extent, as the United States Supreme Court encourages.<sup>163</sup>

The most convincing arguments that provisions in the FDCPA irreconcilably conflict with provisions in the Bankruptcy Code cite to conflicts between the FDCPA and the Bankruptcy Code’s automatic-stay provision and proof of claim provisions.<sup>164</sup> Several courts have held that because provisions in the FDCPA require contact with the consumer, where the Bankruptcy Code’s automatic-stay provision forbids contact

---

155. *See infra* Part II.C.

156. The Bankruptcy Code governs bankruptcies, while the FDCPA addresses abusive debt-collection practices. *See* 11 U.S.C. §§ 101–112 (2015); 15 U.S.C. §§ 1692e (2015).

157. *Posadas*, 296 U.S. at 503.

158. *Irreconcilable*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

159. *Reconcilable*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

160. *Wood v. U.S.*, 41 U.S. 342, 363 (1842).

161. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

162. *Posadas*, 296 U.S. at 503.

163. *See infra* Part II.A.

164. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1260–61 (11th Cir. 2014); *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013).

with the consumer, the two statutes are in irreconcilable conflict.<sup>165</sup> Other courts have found irreconcilable conflict where the Bankruptcy Code allows creditors to file invalid or stale proofs of claim, shifting the burden to the consumer debtor to object,<sup>166</sup> whereas the “FDCPA governs debt collection in or out of court; it does not allow debt collectors to use litigation as a vehicle for abusive and unfair practices that the Act forbids.”<sup>167</sup>

#### 1. The Automatic-Stay Provision Is Not in Conflict with the Validation-Notice Requirement

The automatic-stay provision of the Bankruptcy Code is hardly in conflict with the validation notice requirement of the FDCPA.<sup>168</sup> From the moment a bankruptcy petition is filed, a debtor is protected by the automatic-stay injunction, which prohibits a broad range of debt-collection activity, including, but not limited to, “any act to create, perfect, or enforce any lien against property of the estate”<sup>169</sup> and “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case.”<sup>170</sup> The validation notice requirement of the FDCPA mandates that debt collectors must send a consumer a written validation notice “[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt.”<sup>171</sup> The validation notice must contain the amount of the debt, the name of the creditor to whom the debt is owed, and a statement advising the debtor how to proceed in the event the validity of the debt is disputed.<sup>172</sup>

The argument that these two provisions conflict is flawed because in order to accept this argument, one must assume the two provisions would be in effect concurrently.<sup>173</sup> Under the Bankruptcy Code’s automatic-stay provision, both creditors and debt collectors are strictly prohibited from contacting consumer debtors altogether once a bankruptcy petition is

---

165. *Simon*, 732 F.3d at 280.

166. 11 U.S.C. § 502(a)–(b) (2012).

167. *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443, 451 (6th Cir. 2004), *as amended* (Dec. 11, 2014).

168. 11 U.S.C. § 362(h) (2015); 15 U.S.C. § 1692g (2015).

169. 11 U.S.C. § 362(a)(4) (2015).

170. 11 U.S.C. § 362(a)(6) (2015).

171. 15 U.S.C. § 1692g (2015).

172. *Id.*

173. The Ninth Circuit made this incorrect assumption, and failed “to understand how [a debt collector] could comply with FDCPA § 1692g and its various notice and informational requirements because those provisions conflict with the [Bankruptcy] Code and Rules.” *In re Chaussee*, 399 B.R. 225, 239 (9th Cir. 2008), *overruled in part by In re Sia*, 2015 U.S. Dist. LEXIS 172126 (D.N.J. 2015).

filed.<sup>174</sup> Courts that find this argument persuasive fail to consider that the FDCPA's validation notice requirement attaches only where the debt collector has already sent an initial communication to the debtor in an attempt to collect the debt within the preceding five days.<sup>175</sup> When a debtor files bankruptcy, the initial communication described in the FDCPA is already barred by the Bankruptcy Code's automatic-stay injunction, thus negating the requirement that a validation notice be sent.<sup>176</sup> Therefore, this apparent inconsistency *only* becomes an issue where the initial communication to collect a debt is sent within the preceding four days of the filing of the bankruptcy petition.<sup>177</sup>

In most cases, debt collectors would not need to send a validation notice under the FDCPA because they are unable to initiate communication in the first place under the Bankruptcy Code's automatic-stay provision.<sup>178</sup> However, a conflict exists during a small four-day time period before the petition is filed, where debt collectors may legally communicate with the debtor under both statutes, but are barred from sending an FDCPA validation once the Bankruptcy Code's automatic-stay injunction is enforced.<sup>179</sup> However, evidence of contradictions between statutory provisions does not indicate total categorical preclusion, as the Ninth Circuit concluded in *In re Chaussee*.<sup>180</sup> At best, it indicates a window of time during which conflict between the two *might* arise, which may only lead to repeal by implication in provisions where conflict is irreconcilable.<sup>181</sup>

This small conflict does not justify a finding that the provisions are so different that agreement is not possible.<sup>182</sup> Under the FDCPA, when a debt collector knows the debtor is represented by an attorney with respect to the debt, the debt collector is prohibited from contacting the debtor

---

174. 11 U.S.C. § 362(h) (2015).

175. 15 U.S.C. § 1692g (2015).

176. 11 U.S.C. § 362(h) (2015); 15 U.S.C. § 1692g (2015).

177. Since the initial communication is only prohibited by the Bankruptcy Code's automatic-stay provision *after* filing bankruptcy, debtors who have not yet filed may potentially receive initial communication before filing. 11 U.S.C. § 362(h) (2015). This may admittedly cause a conflict where the debtor is initially contacted immediately before the filing of their bankruptcy petition. In this case, the FDCPA would require the validation notice be sent within the next five days, where the automatic-stay injunction would forbid it. 15 U.S.C. § 1692g (2015); 11 U.S.C. § 362(h) (2015).

178. 11 U.S.C. § 362(h) (2015).

179. 15 U.S.C. § 1692g (2015); 11 U.S.C. § 362(h) (2015).

180. *In re Chaussee*, 399 B.R. 225 (9th Cir. 2008).

181. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

182. *See Preclude*, MIRRIAM WEBSTER, *supra* note 134; *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

directly.<sup>183</sup> Therefore, one simple solution would be to send the validation notice to the debtor's attorney once the filing of a bankruptcy petition bars him from communicating directly with the debtor.<sup>184</sup> This conflict could also be easily addressed in the same manner conflicting provisions within the Bankruptcy Code are dealt with. For example, under the Bankruptcy Code, debtors have the ability to reaffirm the debts owed to secured creditors.<sup>185</sup> In cases of reaffirmation, creditors are still able to communicate with debtors under some circumstances, when necessary.<sup>186</sup>

If courts are ultimately not persuaded that either of these solutions allow for coexistence of the two provisions, irreconcilable conflict triggers an implied repeal.<sup>187</sup> Even if an irreconcilable conflict exists, implied repeal operates to repeal the FDCPA only to the extent that the provision is in irreconcilable conflict with the provision in the Bankruptcy Code.<sup>188</sup> Therefore, in the small four-day window where the Bankruptcy Code's automatic-stay injunction cannot operate simultaneously with the FDCPA's validation notice requirement, the provision of the earlier statute (the FDCPA) is repealed, meaning that in this circumstance, validation would no longer be required.<sup>189</sup>

## 2. Proofs of Claim Provision is Not in Conflict with FDCPA Provisions

Another commonly cited "discrepancy"<sup>190</sup> between the Bankruptcy Code and the FDCPA involves the handling of proofs of claim.<sup>191</sup> Many courts find an unexplainable overlap in provisions where the Bankruptcy

---

183. 15 U.S.C. § 1692c (2015).

184. This solution would be compliant with both Bankruptcy Code and FDCPA requirements. 15 U.S.C. § 1692g (2015); 11 U.S.C. § 362(h) (2015). Further, where the validation notice is sent during this time period, a debt collector who is genuinely unaware that the debtor is represented by counsel with respect to the debt may still escape liability by invoking the bona fide error defense. 15 U.S.C. § 1692k(c) (2015). The bona fide error defense states that

[a] debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of [the] evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

*Id.*

185. "Reaffirmation" is an agreement to continue repayment of debt and has the opposite effect of discharging it in the bankruptcy proceeding. 11 U.S.C. §§ 701, 1322 (2015).

186. *See generally In re Jamo*, 283 F.3d 392 (1st Cir. 2002).

187. *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

188. *Id.*

189. *See id.*

190. This Section argues that this commonly cited "discrepancy" is not actually a discrepancy and explains how the allegedly conflicting provisions are able to coexist.

191. *See Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010).

Code “contemplates a creditor filing a proof of claim on a time-barred debt . . . .”<sup>192</sup> Section 502(a) of the Bankruptcy Code states a proof of claim is “allowed, *unless* a party in interest . . . objects.”<sup>193</sup> Section 502(b) then goes on to state that courts “*shall* allow such claim in such amount, *except* to the extent that such claim is unenforceable against the debtor . . . .”<sup>194</sup> The Bankruptcy Code also provides remedies, which include “revocation of fraudulent proofs of claim and the court’s contempt power.”<sup>195</sup> Some courts are still not persuaded Congress intended for debtors to “be permitted to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA.”<sup>196</sup> But courts taking this view fail to consider that allowing an FDCPA claim during bankruptcy does not necessarily require the debtor to “bypass” the remedial scheme of the bankruptcy code, since both statutes provide a disincentive to filing an invalid or unenforceable proof of claim.<sup>197</sup> This notion that debtors are allowed to object, therefore disallowing the creditor from taking part in the bankruptcy estate liquidation or repayment plan, seems consistent with, rather than contradictory to, the FDCPA.<sup>198</sup>

Under the repeal by implication analysis, repeal by implication may occur where provisions in the two acts are in irreconcilable conflict.<sup>199</sup> In this provision, the Bankruptcy Code allows debtors to object to any invalid or unenforceable proof of claim to have it eliminated from the bankruptcy proceeding.<sup>200</sup> In some circumstances, this same behavior may also rise to the level of abusive, deceptive, and unfair acts or practices in connection with an attempt to collect a debt under the FDCPA.<sup>201</sup> This does not evidence a conflict. Simply put, a debtor in bankruptcy may stop creditors from taking part in their bankruptcy by objecting under the Bankruptcy Code, and if the proof of claim was also abusive, the debtor may sue for

---

192. *Id.* at 95 (quoting *B-Real, LLC v. Rogers*, 405 B.R. 428, 431–32 (M.D. La. 2009); 11 U.S.C. §§ 502(a)–(b) (2015).

193. 11 U.S.C. §§ 502(a)–(b) (2015) (emphasis added).

194. 11 U.S.C. § 502(b) (2015) (emphasis added).

195. *Simmons*, 622 F.3d at 96.

196. *Id.* (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999); *see generally Baldwin v. McCalla, Raymer, Padrick, Cobb, Nicols & Clark, LLC*, No. 98-C-4280, 1999 WL 284788, at \*7 (7th Cir. 1999) (citing *In re Clark*, 172 B.R. 701, 705 (S.D. Ga. 1994).

197. *See generally Baldwin*, 1999 WL 284788, at \*2–5 (adopting a preclusion analysis, but failing to address whether the FDCPA and the Bankruptcy Code are in irreconcilable conflict); *See also Simmons*, 622 F.3d at 96.

198. 11 U.S.C. §§ 502(a)–(b) (2015); 15 U.S.C. § 1692 (2015).

199. *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

200. 11 U.S.C. §§ 502(a)–(b) (2015).

201. *See* 15 U.S.C. § 1692a (2015).

damages under the FDCPA.<sup>202</sup> To hold otherwise is to fall into the exact trap Justice Story cautioned against when he stated, “it is not sufficient [to find an implied repeal by establishing] that subsequent law covers some or even all of the cases provided for by it (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.”<sup>203</sup>

Some courts still are reluctant to allow for recovery under both statutes simultaneously for fear that it authorizes the debtor to “double dip,” and thus they hold that “[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.”<sup>204</sup> This interpretation is inconsistent with the United States Supreme Court’s approach which encourages courts to give effect to both federal statutes when possible<sup>205</sup> even when they are “merely affirmative, or cumulative, or auxiliary.”<sup>206</sup>

Lastly, even in courts that interpret remedies under both statutes to be a conflict, the later act only repeals the earlier act to the extent the provisions are in irreconcilable conflict.<sup>207</sup> This indicates the Bankruptcy Code’s proof of claim provision shields debt collectors from FDCPA claims *only* while the debtor remains under the protection of the Bankruptcy Code.<sup>208</sup> Adopting this approach is problematic because it is more time-consuming, difficult to administer,<sup>209</sup> and would be inconsistent with the Bankruptcy Code’s goal “to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike”<sup>210</sup> by failing to address FDCPA claims simply because a person is in bankruptcy. This cannot be the intended effect. Courts that allow for FDCPA claims to be brought for invalid proofs of claim have also reasoned that this practice is analogous to filing a stale lawsuit and should be treated the same.<sup>211</sup>

---

202. 11 U.S.C. §§ 502(a)–(b) (2015); 15 U.S.C. § 1692e (2015).

203. *Wood v. U.S.*, 41 U.S. 342, 362–63 (1842).

204. *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010).

205. *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

206. *Wood*, 41 U.S. at 362–63.

207. *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

208. The two statutes may only conflict when they are both in effect at the same time.

*Id.*

209. The Second Circuit attempted to adopt this approach, in denying FDCPA protection to a debtor during bankruptcy, but allowing recovery to a different debtor after discharge. *See Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010); This does not create a bright-line rule that provides any guidance, as it is unclear when remedies under the Bankruptcy Code end and remedies under the FDCPA begin. *Id.*

210. *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996).

211. *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (adopting



a. *Invalid proofs of claim analogous to filing a stale lawsuit in court*

The *Crawford* court has been both praised and criticized for taking a different path to reach the proposed result.<sup>212</sup> Rather than look to the statutes themselves, *Crawford* adopted the approach of analogizing the filing of an invalid proof of claim to the filing of a lawsuit on a time-barred debt in state court, an act consistently held to violate the FDCPA.<sup>213</sup> The Eleventh Circuit based its decision on the notion that filing a lawsuit in state court on a time-barred debt would likely subject a debt collector to FDCPA liability, and therefore a stale proof of claim should as well.<sup>214</sup> Federal “courts have uniformly held that a debt collector’s threatening to sue on a time-barred debt and/or filing a time-barred suit in state court to recover that debt violates §§1692e and 1692f.”<sup>215</sup>

Stale lawsuits to collect consumer debts are unfair under the FDCPA for three reasons: (1) few unsophisticated consumers would know about the statute of limitations and would therefore fail to raise a statute of limitations defense; (2) the passage of time makes it harder for a consumer to remember the circumstances surrounding the debt and its validity; and (3) the delay in suing after the statute of limitations period has run makes it more likely that the debtor will have disposed of or misplaced personal records regarding the debt.<sup>216</sup> The filing of a stale lawsuit in state court may not be as wholly analogous to filing a stale proof of claim in bankruptcy court as *Crawford* suggests,<sup>217</sup> but it is still unfair under the FDCPA for the same reasons. Like the filing of a stale lawsuit, the filing of a stale “proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt.”<sup>218</sup> The least-sophisticated consumer probably will not know a claim is time-barred, both in state court and in bankruptcy court, and will likely fail to object to such a claim.<sup>219</sup> The passage of time makes it less likely for a debtor to remember the circumstances surrounding the debt and more likely that personal documentation is no longer accessible.<sup>220</sup> This makes it difficult for a consumer debtor to defend against a time-barred claim, whether the

---

the approach outlined in *Phillips v. Asset Acceptance, LLC*, 736 F.3d 287 (7th Cir. 2013)).

212. See *Dant*, *supra* note 8.

213. *Crawford*, 758 F.3d at 1261 (adopting the approach outlined in *Phillips v. Asset Acceptance, LLC*, 736 F.3d 287 (7th Cir. 2013)).

214. *Id.* at 1259.

215. *Id.*

216. *Id.* (citing *Phillips*, 736 F.3d at 1079).

217. *Dant*, *supra* note 8, at 1078.

218. *Crawford*, 758 F.3d at 1261.

219. *Id.*

220. *Id.*

claim is in state court or in bankruptcy court.<sup>221</sup> To find otherwise would be contrary to the purpose of the FDCPA.<sup>222</sup>

Allowing recovery for an FDCPA violation while a debtor is in bankruptcy is also necessary to achieve the underlying purpose behind statutes of limitation.<sup>223</sup> Statutes of limitation are meant to “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”<sup>224</sup> As *Crawford* points out, the same is true in the bankruptcy context.<sup>225</sup> To place the burden on the debtor to prove the invalidity of the claim would be contrary to the objective of statutes of limitation.<sup>226</sup> This same notion of unfairness may even be more apparent in a bankruptcy context, where debtors often are *pro se*, filing without the guidance or assistance of legal counsel.<sup>227</sup>

Further, state courts generally allow claims to be brought even if time-barred, just like the Bankruptcy Code’s automatic allowance provision allows a time-barred proof of claim to be filed unless the debtor objects.<sup>228</sup> Allowing an FDCPA claim for time-barred proofs of claim would also eliminate the risk of unnecessary consumption of energy and resources in a bankruptcy proceeding, just as it does in state court.<sup>229</sup>

In sum, neither of the two most frequently referenced provisions preclude debtors from making an FDCPA claim while in bankruptcy.<sup>230</sup> Even where minor conflicts exist, the conflicts are not irreconcilable and thus the statutes can coexist.<sup>231</sup> In situations where provisions do conflict, courts are authorized to imply a repeal of only the conflicting provision in the earlier statute, which still allows for recovery, but would merely negate procedural requirements under the FDCPA.<sup>232</sup> Lastly, setting aside the preclusion argument to adopt a different approach still produces the

---

221. *Id.*

222. The purpose of the FDCPA is “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(a) (2015).

223. *Crawford*, 758 F.3d at 1260.

224. *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

225. *Id.*

226. See Dant, *supra* note 8, at 1078; see also *Crawford*, 758 F.3d at 1261.

227. “Pro Se” is defined as “[f]or oneself; on one’s own behalf; without a lawyer.” *Pro Se*, BLACK’S LAW DICTIONARY (10th ed. 2014).

228. *Crawford*, 758 F.3d at 1260.

229. *Id.*

230. See *supra* Part II.C.2.

231. See *supra* Part II.C.2.

232. See *supra* Part II.C.1.

same result: FDCPA claims are not precluded during bankruptcy.<sup>233</sup> The last subsection of this Part will demonstrate how the new approach will work in a practical scenario.<sup>234</sup>

#### D. *Betty, Bankruptcy, and the Proposed Approach*

Remember Betty, the Chapter 13 debtor who was previously unable to proceed with an FDCPA claim after a debt collector attempted to collect a duplicative debt by filing an invalid proof of claim?<sup>235</sup> Now imagine her in a jurisdiction that has adopted the new approach, allowing her to assert a private right of action against the collector under the FDCPA. Rather than having to reopen the bankruptcy to initiate an adversary proceeding,<sup>236</sup> Betty now carries a sword that will allow her to recover something the Bankruptcy Code does not provide: the monetary damages that Congress intended the FDCPA to award.<sup>237</sup> Best of all, under the low standard of the “least sophisticated consumer,”<sup>238</sup> Betty does not have to worry about incurring additional expenses, because she is more likely to prevail, and will be awarded attorney’s fees under the FDCPA.<sup>239</sup> This result seems more consistent with congressional intent and the United States Supreme Court’s instruction where two federal statutes conflict.

Many courts believe Betty is not in need of any additional protections because the FDCPA violations usually do not result in monetary damages.<sup>240</sup> However, those courts fail to consider that money isn’t everything—the harassment, embarrassment, and anxiety that comes with filing a bankruptcy may be exponentially multiplied by FDCPA violations. This protection is necessary to give the FDCPA its full effect.

---

233. See *supra* Part II.C.2.a.

234. See *infra* Part II.D.

235. See *supra* Part I.D.

236. An “adversary proceeding” is “[a] lawsuit that is brought within a bankruptcy proceeding, governed by special procedural rules, and based on conflicting claims usu[ally] between the debtor (or the trustee) and a creditor or other interested party . . . .” *Adversary Proceeding*, BLACK’S LAW DICTIONARY (10th ed. 2014). In practice, adversary proceedings are generally not covered by the flat fee debtors pay to file bankruptcy and are often billed additionally by hourly rates. The Bankruptcy Code does not allow a debtor to recover attorney’s fees. See 11 U.S.C. §§ 301–362k(1) (2015).

237. See 11 U.S.C. §§ 301–362k(1) (2015); see also 15 U.S.C. § 1692k (2015).

238. To determine “whether a debt collector’s practice is deceptive within the meaning of the [FDCPA], courts apply an objective test based on the understanding of the ‘least sophisticated consumer.’” *Lewis v. ACB Bus. Servs.*, 135 F.3d 389 (6th Cir. 1998) (citing *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (2d. Cir. 1993).

239. 15 U.S.C. § 1692k (2015).

240. *Owens*, 832 F.3d at 734.

## CONCLUSION

The Third, Fourth, Seventh, and Eleventh Circuits correctly concluded that the Bankruptcy Code does not preempt the FDCPA in situations where both may apply.<sup>241</sup> Where courts are able to comply with the provisions of two federal statutes simultaneously, they are required to do so.<sup>242</sup> An analysis of the FDCPA against the backdrop of the Bankruptcy Code shows no express contradiction or “irreconcilable conflict” necessary to give rise to the inference of statutory repeal.<sup>243</sup> Further, where irreconcilable conflict exists among provisions, courts should only interpret an implied repeal of the conflicting provisions and still enforce the FDCPA when they can.<sup>244</sup> Not only is this consistent with the purpose of both statutes, but when analogized with other holdings, it is clear the two should coexist.<sup>245</sup>

In order to achieve the desired effect of the FDCPA, the United States Supreme Court should adopt the usual standard of FDCPA violations regardless of bankruptcy status. The circuit split will be eradicated in the foreseeable future.<sup>246</sup> Only time will tell which end of the spectrum the Supreme Court wants all courts to be on. Betty is one small fish in a big sea of debtors whose protections under the Bankruptcy Code fall short of the full redress the FDCPA intended to allow.<sup>247</sup>

Both the Bankruptcy Code and the FDCPA strive to provide the utmost protection to consumers who find themselves in financial binds.<sup>248</sup> Limiting debtors to relief under the Bankruptcy Code where both statutes apply results in the same confusion circuits that have adopted this approach sought to eliminate by choosing only one statute.<sup>249</sup>

---

241. *Simon v. FIA Card Servs. N.A.*, 732 F.3d 259, 271–74 (3d Cir. 2013); *In re Dubois*, 834 F.3d 522, 525 (4th Cir. 2016); *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730–33 (7th Cir. 2004); *see Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1257–58 (11th Cir. 2014).

242. *Simon*, 732 F.3d at 273.

243. *Id.* at 274.

244. *Id.*

245. *See supra* Parts II.A–C.

246. *Id.*

247. *See* 15 U.S.C. §1692(a) (2015).

248. *See supra* Part I.

249. *See supra* Parts II.C.1–3.