In the decade that has passed since the widely held start of the housing crisis, home loan servicing practices, and the risks associated with those practices, have continued to evolve at rapid pace. In the past, the risks associated with the filing of a proof of claim did not typically include concern for the statute of limitations. With current delays in enforcement, often precipitated by the myriad of required state and federal programs heaped upon new and changing state and federal regulations, statute of limitation concerns now move to the front and center.

The growing split of authority on the impact of filing a proof of claim based on a seemingly time barred debt suggests that, when it comes to the statute of limitation, a servicer must not only look at state law but also individual court interpretation of the United States Code.

This article will address the potential consequences of filing a claim for a debt that is time barred as well as discuss potential options available to home loan servicers.

As an initial matter it is important to note that the statute of limitations is an affirmative defense. As such, the defense must be raised or potentially waived by any borrower facing enforcement of the debt. Further, the statute of limitations, unlike a statute of repose, can be tolled under a variety of circumstances, thus making enforceable a debt that may on its face appear time barred. However, it is also true that some courts have found the mere prosecution of a suit to enforce a time barred debt to be a potential violation of the Fair Debt Collection Practices Act. In these cases, the theory is that the filing of the lawsuit in and of itself is unfair because the least sophisticated consumer would be unaware that the statute of limitations could be used to defend against the lawsuit and/or may be prejudiced to defend against the lawsuit by the passage of time. Of less certainty is how the courts would react to in rem actions to enforce security agreements pledged as security for debts that have become time barred. That is an emerging topic that will be left for a later article and discussion.

For the purposes of this article, we assume that a claim filed does describe a debt that is, at least on its face, time barred. The question then becomes what remedy is available to the Debtor? Under 11 U.S.C. § 502(b)(1), the Debtor may object to the claim and have the same disallowed. But can the Debtor also seek damages under applicable state or federal laws? Traditionally, the answer has been no. In many past cases the courts have held that the Bankruptcy Code preempts substantive state and federal claims and remedies for alleged misconduct that occurs in connection with the claims process in bankruptcy court.[1] Some of these courts have found the application of protections such as provided by the Fair Debt Collection Practices Act to be misplaced in bankruptcy court where the borrower enjoys the protections of a well regulated and supervised debt collection process.

More recently, the Eleventh Circuit[2] has rejected any deference to the rules and code of Bankruptcy in allowing a Debtor to pursue claims based only on the filing of allegedly defective proofs of claim. In *Crawford v. LVNV Funding LLC*, 758 F.3d 1254 (11th Cir. 2014), the Court began with the assertion that "a deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers –

[1] See *In re Chaussee,* 399 B.R. 225 (9th Cir. BAP 2008); *Simmons v. Roundup Funding, LLC.* 622 F.3d 93 (2nd Cir. 2010); *Walls v. Wells Fargo* 276 F.3d 502 (9th Cir. 2002).

[2] And the Third Circuit before it in *Simon v. FIA Card Services. N.A.*, 732 F. 3d 259 (3rd Cir. 2013).

armed with hundreds of delinquent accounts purchased from creditors – are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." It isn't clear from the court's commentary whether the deluge is as to debts that have actually been judicially determined as unenforceable, or are just apparently past the date for enforcement absent some act of tolling. It also isn't clear whether the court would hold a different opinion if the debt in question were secured by real property that the debtor continued to occupy or control, and that was obtained through use of the funds described in the time barred debt. However, what is clear from this opinion, is the court doesn't recognize a difference between a filing a proof of claim and filing a lawsuit or letter of collection when it comes to analysis under the Fair Debt Collection Practices Act.

Just last month, the United States Bankruptcy Court for the Middle District of Alabama joined the list of courts allowing expanded theories of liability.[3] In a decision published August 24, 2015, the court examined the question of whether the Bankruptcy Code precludes the Fair Debt Collection Practices Act by asking whether the code *repeals* the Fair Debt Collection Practices Act by implication. In holding that it does not, the court noted that repeal by implication is not favored under the law and that although the code grants the ability of any creditor to file a claim, it does not shelter that creditor from liability if it is later determined that a claim violates another provision of law.

Even in those jurisdictions that allow liability for the filing of a time barred claim, it appears presumed that the debt in those cases is or was time barred. Perhaps when the debt in question is an unsecured obligation, definite in expiration and past due in full, the result is clearer than the case of secured installment debt subject to state and federal directives that tolled enforcement?

In any event, what option does the holder of a secured claim that is only potentially time barred have to limit exposure? At present, under 11 U.S.C. § 501(a), a creditor *may* file a proof of claim, but nothing in that section requires the filing. While a secured creditor is bound by a plan's provisions regarding a debtor's personal liability, in rem rights may survive. In short, a creditor may choose to ride through a Chapter 13 plan, retain its secured lien, and look to enforce the obligation after the stay has terminated or the plan completes. In that event, the creditor would at least be seemingly protected from liability under the FDCPA, but the creditor would also sacrifice any right to payment under the terms of the plan. Conversely, the debtor could file a claim for the creditor, thus eliminating the creditor's FDCPA concern while also allowing the creditor to get paid and the Debtor to cure the default.

If the debt that forms the basis of a creditor's secured claim requires installment payments, another option could be available. By waiving installments that are time barred or making advances as necessary to bring a portion of the debt to within the statute of limitations, the creditor could file a claim that would not, at least on its face, be time barred and thus not necessarily indicate potential violation of the Fair Debt Collection Practices Act. Whether this option is available may be a function of state law and whether acceleration is required to invoke the statute of limitations as to the debt in its entirety as opposed to only as to installments due. Once again, the debtor's plan treatment and intent as to the debt and property may guide the creditor as to whether a contest should be expected.

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[3] Feggins v. LVNV Funding 2015 Bankr. LEXIS 2822

Until such time as the Supreme Court may choose to resolve the growing conflict between the circuits, creditors must rely on their local counsel to properly evaluate the risks and options when filing potentially time barred claims. As long as the case law continues to preserve the lien of the creditor even when claims are not filed, and as long as defenses exist to potential statute of limitation arguments, negotiation with the Debtor may ultimately be the best resolution as it is in the best interests of both creditor and debtor to insure cure of all defaults through the chapter 13 process.