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Consumer Bankruptcy Panel: Recent Developments in Bankruptcy Regulation: Mortgage Servicing Rules, the FDCPA, and the CFPB

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CONSUMER BANKRUPTCY PANEL
**RECENT DEVELOPMENTS IN BANKRUPTCY REGULATION:
MORTGAGE SERVICING RULES, THE FDCPA, AND
THE CFPB**

*Frederick Tung (Moderator)**

*Alane A. Becket***

*Sarah Bolling Mancini****

*Nick Wooten*****

MS. DEPERT: Welcome back. Before we begin, I'd like to take this opportunity to introduce you to our second panel of the day, our Consumer Panel, which will discuss Recent Developments in Bankruptcy Regulation, including mortgage servicing rules, the Fair Debt Collection Practices Act (the "FDCPA"), and the Consumer Financial Protection Bureau (the "CFPB"). This afternoon we are privileged to have the following distinguished panelists join us. First we have Alane Becket, Managing Partner at Becket & Lee LLP, in Malvern, Pennsylvania, a law firm representing primarily consumer lenders in bankruptcy proceedings. Ms. Becket was elected to the Board of Directors of the ABI in 2009, where she served as the co-chair of the Consumer Bankruptcy Committee from 2009 through 2011. Ms. Becket currently serves on the Board of Directors of the ABI where she is a member of the Executive Committee and Vice President of Publication.

Next, we have Nick Wooten. Mr. Wooten is a solo practitioner living in Little Rock, Arkansas, whose practice primarily involves consumer litigation in the Northern District of Illinois, and selected consumer cases in various bankruptcy courts. Nick is nationally recognized for handling consumer claims including claims under the FDCPA and mortgage servicing abuse cases in bankruptcy courts, federal courts and state courts around the country.

Third, we have Ms. Sarah Mancini, Of Counsel for the National Consumer Law Center and also an attorney in the Home Defense Program at Atlanta

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Legal Aid. Ms. Mancini is a co-author of *Georgia Real Estate Finance and Foreclosure Law*, *Collier on Bankruptcy*, and National Consumer Law Center's treatises on the Truth in Lending Act ("TILA") and foreclosures in mortgage servicing.

Finally, moderating our panel today we have Professor Frederick Tung, Professor of Law and Associate Dean for Academic Affairs at Boston University School of Law. Professor Tung is a former law professor at Emory University, and has been a visiting professor at Harvard Law School. Professor Tung researches, teaches, and consults in the areas of corporate and securities law, bankruptcy, and the governance of financial institutions. So with that, I'll turn it over to Professor Tung to begin the discussion.

PROFESSOR TUNG: Thanks very much, Chelsea, and let me echo our thanks to all the folks that were involved in organizing this wonderful event. It's really nice for me to be back here, having spent some time wandering this building a few years back. It's really great to see several of my former students here who have now grown up and they're now earning an honest living as bankruptcy lawyers, so that's gratifying. And, also great to see professional colleagues in Judge Hagenau and Judge Diehl in the audience.

We've got a great panel on consumer bankruptcy this morning. We're going to have first a little brawl between Alane Becket and Nick Wooten. They take opposite sides on the question whether it is a violation of the Fair Debt Collection Practices Act to file a proof of claim in a consumer bankruptcy where the claim is time barred. And then following that, we have Sarah Mancini who is going to talk to us about the activities of the Consumer Financial Protection Bureau and the U.S. Trustee's Offices in policing mortgage foreclosures and related consumer issues. With that, I'm going to turn it over to Alane for her presentation.

MS. BECKET: Thank you. I'm very happy to be here. Thank you for inviting me. The last panel was really impressive. It was professor, professor, professor, Judge. And now we've got Professor and Sarah Mancini (Brilliant), and then me and Nick, so I hope that we live up to that last panel.

PROFESSOR TUNG: Excuse me. I'm sorry I have to interrupt. I just want to let you know the ground rules. If anybody has a question during a presentation, all the speakers have graciously agreed to field them. So, if you just want to walk up to a microphone, I'll try to pay attention and make sure we get you in. Okay, thanks.

MS. BECKET: I'm also standing up here so I can be taller than Nick who's about 6'5" and I'm five feet tall, and I won't be hitting him from here. We're going to have sort of two parts here. Let me just ask, how many people out in the audience are familiar with the *Crawford*¹ case from the Eleventh Circuit from 2014? Okay, so I'm going to say a little more than half maybe. We're going to talk about that case. We're going to talk about what's next in the Eleventh Circuit and sort of how the rest of the country is looking at this issue, and Sarah is going to talk about a separate piece on the mortgage issues.

MS. BECKET: For those of you who don't know what *Crawford* is, this is basically the hottest topic in consumer bankruptcy litigation that doesn't have to do with mortgages. This was Nick's case, a miraculous win for him, because the ruling is wrong, sorry, Eleventh Circuit, in my humble opinion. But anyway, here's what *Crawford* said. *Crawford* said that the FDCPA is designed to protect the least sophisticated consumer from unfair and deceptive acts or practices, and if you were to file a proof of claim that you knew was out of statute, a lot of people call it time barred or the statute of limitations has run, a party who does that violates the Fair Debt Collection Practices Act, even though you're operating in a bankruptcy context because it's unfair and unconscionable, deceptive practice under the FDCPA.

What you have to remember about this part of it is that the FDCPA is a statute that only applies to certain parties, so not all bankruptcy claimants are subject to the FDCPA, just what are defined as debt collectors, and that's a defined term under the FDCPA that does not include original creditors. So, to put that in simple terms, American Express is not a debt collector, but when I file a claim for American Express, I am a debt collector. So, you're talking about collection agencies and servicers and attorney law firms. It also applies only to consumer debts. So, we're not talking about commercial debts, construction loans, that kind of thing. We're just talking about basically your basic credit card or maybe installment sales loan, something like that. When we talk about the *Crawford* decision, you need to understand that it only applies to certain claimants filing certain types of proofs of claim in bankruptcy cases. So we're not all subject to this ruling, but certainly a lot of us are because a lot of us are considered debt collectors, and a lot of these credit card companies and debt purchasers use debt collectors to file their claims so there's a lot of liability for a lot of us there, but not everybody.

¹ See 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015).

Here's what happened in *Crawford*. The debtors filed a chapter 13 case and the creditors filed proofs of claim for debts on which the statute of limitations had run before the claims were filed. Nick, on their behalf filed adversary proceedings for filing stale claims arguing that, among other things, that they were a violation of the FDCPA, and the creditors moved to dismiss basically saying that, all we did was file our proof of claim; it's not an FDCPA violation. At the time, no court in the country had said that filing an out-of-statute proof of claim was an FDCPA violation, and some courts specifically said it was not. So there was either no ruling from a court or they ruled that it was not an FDCPA violation, but nobody had ruled that it was. So, the Bankruptcy Court in *Crawford* was more or less following established precedent.

So, we get to the District Court and appellant, Nick, candidly admitted that he could not win his appeal without a change in the law, and the elephantine body of persuasive authority, that was all my people, my side of the argument, had ruled against him, but not yet in the Eleventh Circuit, but the District Court again upheld the Bankruptcy Court's ruling. Nick lost again, and as tenacious as he was, he appealed again. But what the District Court did say was, nothing that the claimants did violated the FDCPA. The creditor never talked to them, the creditor filed a proof of claim that was true on its face, there was nothing deceptive about it, we never lied to the creditor, we never spoke to the creditor, we never did anything affirmatively other than what the Bankruptcy Code allowed you to do, which is file a proof of claim. And then there's that whole thing about whether a proof of claim in a bankruptcy court is an act to collect a debt covered by the FDCPA because the FDCPA covers people in the act of collecting a debt. And there's this argument that when you're filing a proof of claim, you're sort of communicating with the Bankruptcy Court, it's a separate federal proceeding, and it's not an act to collect a debt against the consumer. It's like filing a claim against the bankrupt estate. But the Court said even if it was an act to collect a debt under the FDCPA, it still didn't violate the FDCPA which prohibits false, abusive, deceptive, misleading conduct, and that filing this proof of claim even though it was out of statute was not that kind of conduct.

So, Nick goes up to the Eleventh Circuit and wins.

MR. WOOTEN: To the shock of Alane and everyone else in the industry.

MS. BECKET: Yeah, I couldn't believe my eyes when I read it. And I didn't even know Nick back then, so that really came out of nowhere. So the Court starts off with this first line in red: "A deluge has swept the United States

Bankruptcy Courts of late.”² Consumer debt-buyers armed with all of these accounts are inundating the courts with these unenforceable claims and wreaking havoc on the system, and overturned the decision of the lower courts.

So right out of the gate we know that the Eleventh Circuit judge, who, by the way, was a judge who serves on the International Court of Trades sitting by designation in the Eleventh Circuit, and I had to look up what that judge did, and they adjudicate customs disputes. I guess they were busy at the Eleventh Circuit so they called in this fellow who wrote this opinion. Very brave. A lot of appellate judges don’t like to dabble in bankruptcy matters, and if the decision sounds good from the lower court, they’re going to uphold it.

So anyway, this guy comes in and he overturns the lower court and really establishes new precedent that says that this was an FDCPA violation and remanded it back down to the lower courts where I think, Nick, whatever happened down there?

MR. WOOTEN: Oh, that’s a fun story. We got back down to Judge Williams in the Bankruptcy Court, who just to be clear so people understand how one-sided this was, when I went before Judge Williams in 2012 when the original filing, I literally stood up in front of him and said, you have to rule against me. There is no case that supports my position. I’m taking this case to the Eleventh Circuit. That was the sum of my argument. Okay, then we walked out. We went to the District Court and I said to Judge Watkins in my brief, as Alane said, there’s no way I can win under current law; I have to go to the Eleventh Circuit. Please rule against me. And he did. So we went to the Eleventh Circuit, and Judge Frank Hull, who some of you may know at the Eleventh Circuit, was the Eleventh Circuit panel judge. She was sitting with Judge Goldberg from the Court of International Trade and Judge Walter from the Western District of Louisiana, who was a District Judge sitting by designation because at that time some of you may have been aware, the Eleventh Circuit was short-handed because the Senate was not acting on appointments. And the three of them were the panel. But it was pretty obvious that Judge Hull who started out as a court of limited jurisdiction, state court judge in Georgia, had quite a history with debt buyers and debt collectors in her court coming in and taking defaults against consumers. She was very familiar with how the system worked and she was very pointed. If you go back and pull the oral arguments and listen to her questions, she was on LVNV’s lawyer like a duck on a June bug pretty much right out of the chutes.

² *Id.* at 1256.

And so when we got back down to Judge Williams after the ruling, initially he just said he was going to enter judgment in our favor and let me apply for fees, but LVNV persuaded him that there were unanswered questions that they had not waived in the previous round of briefing, and they came back with the argument that Crawford's claim was actually time-barred as an FDCPA action because it was filed more than one year after they filed their proof of claim. There was a whole other round of technical legal arguments headed back to the Eleventh Circuit about the nature of recoupment and set-off rights in Bankruptcy Court, and whether or not statute of limitations applies to a counterclaim, that we will eventually make our way back to the Eleventh Circuit on, and by the time *Crawford* is finally over, I'll either be retired or have \$20 million in fee time in by the time we get through going to the Eleventh Circuit. So that's where we are right now. We're back into the appeal mode headed back up to Atlanta.

MR. BECKET: So that's where we are now. Obviously, I have my very strong opinion on this, and I'm going to explain why and why I think *Crawford* was wrongly decided. And it has to do with the nature of the statute of limitations and what it is and what it isn't, and what it does and what it does not do. So forgive me if I insult your intelligence a little bit, but a statute of limitations is generally an affirmative defense that needs to be raised by the defendant in a lawsuit, and what it would do is the statute of limitations has run on the claim, the defendant asserts that, the judge decides whether it has or has not, and if the statute of limitations has run the case will be dismissed. So, I like to think about it in terms of closing the courthouse doors only. It only closes the courthouse doors to the suit. If it's a collection suit and the statute has run, the doors to the courthouse might be closed but that doesn't necessarily mean that you can't attempt to collect the debt in another way. It's kind of hard to do that, but that's the essence of what it means.

If the statute of limitations is not raised as a defense, it's waived. So again, that's because it's the debtor's burden to raise and to prove. And when a creditor files a lawsuit on a debt for which the statute has run, it's not a violation of state law, again, because it's an affirmative defense.³ So what is the problem with the statute of limitations running and filing a lawsuit? It becomes an FDCPA problem. So again this is just case law from this circuit that shows that it is not the plaintiffs, it's not the plaintiff, and when you think about this in the terms of a proof of claim, it's not the plaintiff's job to say,

³ See, e.g., *Special Assets, LLC v. Chase Home Fin., LLC*, 991 So. 2d 668, 675 (Ala. 2007) (showing that in Alabama the statute of limitations is an affirmative defense, not an element of the plaintiff's claim).

well, the statute of limitations has run; I'm not going to file this suit. It's the affirmative defense that's raised by the debtor.

[Inaudible question from audience]

MS. BECKET: That brings in why we don't do that, why don't we file them anyway and just wait and see if the debtor figures out that the statute has run? Because it's an FDCPA violation. So it's not a violation, as I said, of state law, but you do have an FDCPA problem if you file this suit. But when I consider the statute of limitations as an affirmative defense and the defendant's burden to plead and prove, now we're looking at that in the terms of the *Crawford* case, and me being the person that's filing a proof of claim. You're asking the claimant in order to avoid the FDCPA violation that *Crawford* said exists, me as the claimant, I have to determine for the debtor that the statute of limitations has run, and then go ahead and not file my client's claim. I'll have more on that later, but I find that to be really problematic.

MR. WOOTEN: And let me say, and this is something Alane and I have talked about a number of times. This is at least the second time we've spoken together on a panel on these issues. It's incredibly important when you think about this, to think about it in the context of how the FDCPA overlaps everything that a debt collector does. The biggest problem with *Crawford* logically that I had the case as it existed beforehand, was the notion that the FDCPA did not apply to debt collectors in bankruptcy court. That had been the lynchpin of why the case law had developed the way that it had. There were two points. One, is filing a proof of claim is not debt collection, as you see in the District Court opinion. And, two, was the idea that debtors have all these protections in Bankruptcy Court. They have trustees and judges and their own lawyers, and so the FDCPA simply shouldn't apply. And I thought that was intellectually dishonest and basically was a prejudice to consumers who found themselves in bankruptcy court versus being sued out in state court and collections.

So, creditors can still file on time-barred debt, original creditors. Debt collectors cannot, and they have not been able to for a very long time. The case in the Eleventh Circuit that's in effect the law of the land is called *Kimber* which was written by Myron Thompson who was the judge in the Middle District of Alabama in 1987.⁴ So, this was not a new concept to debt collectors, but it had become an area where there was a windfall because bankruptcy court

⁴ See 668 F. Supp. 1480, 1481 (M.D. Ala. 1987).

literally could do this with impunity. And I just thought that what had happened with that logic was that there was just a blow hole in the coverage of the FDCPA where debt collectors were free to roam in bankruptcy court, and they were in effect doing something that they could not do in any other court in America. And my argument was simply if the debt collector is covered by the Act, then they are covered by the Act in any court in which they operate. bankruptcy courts are not inferior and they are not—there are some special rules about bankruptcy court, but they are still covered by the FDCPA. So, we found a case out of the Supreme Court, *Gardner v. New Jersey*,⁵ that said filing a proof of claim is a traditional form of debt collection, and so that resolved the issue of whether filing a proof of claim is debt collection. And then we made the argument simply that debt collectors don't get a free pass in bankruptcy court which was accepted by the panel.

But as Alane has said, and I freely admit, it was a sea change in the law, and one that is not being swallowed very easily by a lot of judges around the country. There are still a lot of bankruptcy judges who are hostile to this notion.

MS. BECKET: So actually I agree with Nick in one little, tiny part, and we'll talk about this a little further on, but I don't disagree that the FDCPA should not apply to debt collectors' actions, whether they're in bankruptcy or not. So if they do something deceitful and misleading and all of that in bankruptcy, I don't really have too much of a problem with them having an FDCPA suit filed against them, but don't tell anybody I said that. But I still agree that *Crawford* was decided wrongly.

The other thing that I have to say about what Nick just said that I don't agree with is you say, okay, filing a lawsuit is a violation of the FDCPA if you know the claim is out of statute. Well, if you file an out of statute proof of claim in bankruptcy, then the same result should apply, and I really disagree with that strongly because a proof of claim is not a lawsuit. It's not the same thing as a lawsuit. It's very easy to say it is like it, and it sounds like very analogous concepts, but they're not. Just to give you one example without going into this too deeply, what do you get when you win your lawsuit if the debtor doesn't raise the defense and you win your lawsuit on an out of statute claim? You get a judgment, and that judgment is good for a good, long time, and there's a lot of things you can do with that judgment. What happens when your out of statute proof of claim gets paid in bankruptcy? Well, you just get

⁵ See 329 U.S. 565 (1947).

the same two cents on the dollar that everybody else gets, and then the debt is discharged. That's just one example of how these two things are very, very different, in my opinion, and I could go on. If I have time, I will.

Here's the problem when I was talking about why it's a challenge to tell a proof of claim or even a plaintiff to refrain from filing a proof of claim if the statute of limitations has run. It's the defendant or the debtor's burden to plead and prove it. Therefore, the defendant selects the statute that the defendant believes applies to the claim and makes a case to the Court that the statute has run. However, the statute of limitations that applies to a revolving credit account which most of these cases are about, it's not set in stone. It's different from state to state. The debtor can choose which state statute the debtor thinks applies, maybe based on where the debtor lived when the debtor opened the account, or where the debtor lived when the debtor defaulted, or where the debtor is living now. Which contract? So you look in your state statute and you go, oh, here's all the different statute of limitations. Am I going to look for the one that's an open account, which is like two years? Am I going to go for the one that's account stated, which is three years? Am I going to go for a written contract which is five years, but I know there's a written contract but I don't have one because the creditor doesn't have it anymore, so then which one do I use? It's not so easy to determine what the statute of limitations is that's going to apply to any given account.

Now, if it's 20 years old, okay. But how about if there's a judgment on it? That judgment might still be alive. So, there's a lot that goes into the defendant or the debtor's job of choosing which statute to allege applies to disallow this proof of claim.

MR. WOOTEN: Let me say something about that, Alane. I know Alane's on one side of it, and I'm on the other. So let me just say what I have seen in my career doing consumer work on this very issue that she mentions. I think it's salient, given the discussion. I have defended people facing these collection suits in state courts in Alabama where I have seen every argument of statute of limitations on a credit card account from three years, which is the open account law in Alabama, to ten years which is the bonded contract account statute of limitations in Alabama.

So, what Alane is saying is true from the creditor's perspective or the debt collector's perspective. Most of them are going to find an argument to make, and they always try to win on the paper because the economics of the collection won't typically allow a trial. Most of the time if you push it all the

way to a trial, then you'd get a dismissal of the claim by the debt collector because they can't get their documents or their witnesses for reasons that we don't nearly have enough time to discuss. But that issue comes up also. It was a shock to me when we got into the *Crawford* litigation that there wasn't a decision in the Middle District of Alabama bankruptcy courts about what statute of limitations applied to a credit card debt in the State of Alabama. And when we began to look at that issue, there were cases all over the place. And one of the things that Alabama is famous for is the argument that you can find a case that says what you want on any given subject, even if it's directly opposite of what the other party is citing if you just look long enough, and that's true within this context as well. None of these issues are settled in Alabama, and this is 2015, and I don't know that Alabama is alone in that problem. So, what Alane is talking about is a major issue and it's one of the reasons that I think a lot of debt collectors have taken the tacks that they have, besides the 90% default rate on these claims, and the judgment is a powerful weapon. Judgments in Alabama are good for up to 20 years. So, once you convert it to a judgment, you're getting treated entirely differently than just an unsecured claim on an account when you go to bankruptcy court as well. So there are advantages to having a judgment that you don't have when you're just making a claim on an open account or a credit card contract.

MS. BECKET: So you agree with me. There you go.

MR. WOOTEN: I would agree that there are definitely advantages.

MS. BECKET: Okay, so we're talking about it's difficult to do that and so here's another piece of that. Let's say the statute of limitations is five years. Well, then you've got to figure out five years from when? The date the debtor made the last payment, the date the last payment was due? Again, case law all over the place. The date the debtor last acknowledged the debt is the law in some areas, and that could be up to as late as the day the debtor put it on their Schedule F in their petition. I owe Citibank \$5,000. So again it's difficult to do this on the front end and make the decision on the front end that the statute has run. And it's especially difficult when you're not the defendant or the debtor with all the facts that you would need to make and prove your defense.

So that's why the statute of limitations is a legal determination that the court will make after it's raised and it's argued. This case at the bottom here from Florida, the non-lawyer employees of the law firm wrote letters to the client telling them whether the statute of limitations had run and they were

cited for unauthorized practice of law.⁶ So this leads me to think that this again determining that the statute of limitations on a claim has run is a legal determination which makes it really hard for me as an attorney, number one, if I want to protect myself I'm going to consider what's the shortest statute that could apply to this account. Because if I pick one that's too long, which would benefit my client, I could be wrong and then I'm going to get sued by Nick.

MS. BECKET: So you get the attorney's fees with FDCPA violations, so it puts me as an attorney in the awkward position of taking my opponent's position in the light most favorable to them and acting against my client's interest in protecting myself. So, does everybody see how that puts me in a conundrum and it deprives my client of what may be a valid proof of claim, but in the self-protective mode that we're all in, we're not going to take any chances.

And then you also have clients or debt buyers or whoever that have non-lawyers working for them filing these proofs of claim, and now you've got these people arguably engaging in the unauthorized practice of law because they're making a legal determination that a statute has run, and then they're either acting on it or not acting on it as the case may be if you're not going to file a claim.

So, let's get back to what I said about these lawsuits and why they are FDCPA violations if the debt is out of statute. It's not because the FDCPA itself says don't file out-of-statute lawsuits. That's nowhere in the FDCPA. It's case law under these two provisions that prohibit misrepresenting the legal status of a debt or taking any act that would be an unfair or unconscionable means or attempt to collect a debt.

As you know, the unsophisticated consumer is the standard that you look at under the FDCPA in most cases when you're determining whether an act that you take is unfair or unconscionable or deceptive, and the case law has almost unanimously said that a debt collector who knowingly files an out-of-statute lawsuit against a consumer violates the FDCPA because that's just wrong. I mean, you know it's wrong and you know they have a defense, and it's unfair because you're going to end up with a judgment at the end of it, and so that's why it's a violation of the FDCPA. Not because it says so in the FDCPA, but because it's like an unfair deceptive act or practice. And this is why these pieces in red here, few unsophisticated consumers would know that they had

⁶ Fla. Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996).

this as a defense and might just default or not raise it as a defense.⁷ This case says that you're falsely implying that you have legal recourse to collect the debt and when you know that the statute of limitations had run and you know if the debtor knew it the debtor would have a defense, it's kind of falsely what that first section said, misrepresenting the legal character or legal status of a debt.

Finally, this is the *Kimber* case,⁸ filing a lawsuit when you knowingly file a lawsuit again it's unfair and an unconscionable means so it's this kind of language where you get that it violates the FDCPA, those two sections that talk about unfair things. So, when I analyze what it means to have a claim disallowed under the Bankruptcy Code, we're talking about § 502.⁹ And § 502 says a claim that's filed is allowed unless it's disallowed by one of the following reasons. And one of them is that the claim is unenforceable under state law. So, the argument here is, an out-of-statute proof of claim is unenforceable under state law and therefore it should be disallowed in the bankruptcy case under § 502(b).¹⁰ I can't say I necessarily agree with that because unenforceable under state law does not to me say unenforceable in a court of law, because if you look here in the red, the defendant has a right to payment of its time-barred debt, and starting at the top in Alabama as in almost every state, a creditor's right to payment is not eliminated by the statute of limitations.¹¹ It eliminates the remedy of going to court and getting a judgment but not your right, not your right, the property right that the guy still owes you money. So, what we go back to, is it unenforceable under state law and subject to disallowance in bankruptcy, I feel like I have a somewhat colorable argument that my out-of-statute claim is still enforceable. I can still ask for the money. I can still dun the debtor. I can still call the debtor. It's just not enforceable in a court of law. Nobody agrees with me, but see I still think—because I don't think they've thought through as much as I have.

MR. WOOTEN: And, Alane, this is a case you mentioned *Johnson v. Midland Funding*.¹² You and I have talked about this case a good bit, and I'll tell everyone here that that is one of the cases that I was mentioning earlier

⁷ Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079, 1083 (7th Cir. 2013) (finding that there was a FDPCA violation because the statute of limitations had run to sue on a debt).

⁸ 668 F. Supp. 1480.

⁹ 11 U.S.C. § 502 (2012).

¹⁰ See *Johnson v. Midland Funding, LLC*, 528 B.R. 462 (S.D. Ala. 2015), *appeal docketed*, No. 15-11240 (11th Cir. Mar. 24, 2015).

¹¹ *Id.* at 466.

¹² *Id.*

where some of the judges just do not want to follow *Crawford*.¹³ This case arose out of a class action in the Southern District of Alabama that was predicated on a *Crawford* theory, and Judge Steele down there basically adopted *Midland Funding, LVNV*, same law firm defended, their argument that this really isn't a problem. And the opinion recites almost whole sections of the defendant's brief in that case.

MR. WOOTEN: And that case is at the Eleventh Circuit now. But this will get into the preclusion argument we'll talk about in a minute, but there is a case from the Middle District from Judge Sawyer called *In re Feggins*.¹⁴ Judge Sawyer does a pretty good of taking apart what is wrong with *Johnson*¹⁵ and what's wrong with the argument, and the proof of claim analogy that we've talked about before is procedurally you look at it and there's a whole string cite of cases from every circuit in the country that a proof of claim is analogous to a lawsuit and any objections are treated as affirmative defenses to the claim, and if there are any adversary proceedings, those are treated as like a setoff or recoupment or counterclaim against the claim itself. So this whole issue kind of overlaps and it would take the rest of the day to explain all the overlap, but the *Johnson* case is good to understand where the creditor's side is coming from. You can look at the *Feggins* case and sort of see what the consumer interpretation is at least by one court.

MS. BECKET: If you go to court and your claim is out of statute, you're going to lose and your claim is going to be disallowed. As I said, I don't necessarily agree with that. But it's going to take a brave client to let me argue that because it could go really, really bad. So, generally speaking it's sort of accepted that if an out-of-statute proof of claim is objected to in bankruptcy, it's going to be disallowed.

So, let me juxtapose what I just said about statute extinguishing the remedy and not the right to these three statutes, which are the three states wherein when the statute of limitations runs your right evaporates; the debt is gone more or less. It extinguishes the right. And I try to talk to some people in these states to figure out how this ever got passed, because talk about taking someone's property rights without due process but I couldn't really get an answer about how this came to be. I know North Carolina was very, very active constructing rules against debt purchasing, the industry and how they

¹³ 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015).

¹⁴ 540 B.R. 895, 899 (Bankr. M.D. Ala. 2015).

¹⁵ 528 B.R. 462.

conducted their business so I'm not surprised about that one, but these other ones have actually been around longer than those most recent versions.

You take that where the debt is gone in, those three states and you look at the rest of the states, they say your debt is not gone it's still there so of course you could file a proof of claim for that debt. Nobody, no court, disputes that you can file a proof of claim for that debt. The question still is, does it violate the FDCPA, so are you engaging in risky behavior, as they say, if you file that proof of claim if your debt is out of statute if you're a debt collector? And here was one case that really came out of nowhere.¹⁶ This was a sua sponte sanction under Federal Rule 9011 against a creditor for filing an out-of-statute proof of claim saying your reasonable inquiry under Rule 9011, which is similar to Federal Rule 9011, means that you have to take into consideration obvious defenses.

This case scared me a lot when it came out because it wasn't based on finding that the FDCPA was violated. It was based on saying, well, you're just making the debtor come into court and object to your claim which is going to cost the debtor time and money so I'm going to sanction you because you shouldn't do that anyway. This idea didn't really take off, so it is limited to that area. And I will tell you in that area the trustee sends us letters and asks us to withdraw out-of-statute proofs of claim because the judge has made this ruling and that's what he wants her to do so that's a little bit of an outlier.

So that's kind of where we are. The materials contain cases from throughout the country. The Eighth Circuit BAP has ruled opposite *Crawford*. Recently since *Crawford*, the Ninth Circuit and the Second Circuit have previously ruled that proofs of claim do not violate the FDCPA. Then we've got one going up in the Seventh right now, and some are still undecided. So, kind of all over the place. Initially after *Crawford* came out, everybody was with *Crawford*—bam, bam, bam, people were settling, the lawsuits are flying, Nick was like the champion of the debtor bar, and so the industry was changing. The industry stopped filing their proofs of claim. They started settling these claims. They started really examining what they wanted to do even in those jurisdictions where it was okay to file these out-of-statute proofs of claim. And then it kind of slowed down. And then these other decisions kind of came out saying, you know, hey, filing a proof of claim is nothing more than putting information on a piece of paper and giving it to the Court, which is what the Court told you to do when you got the first notice of the bankruptcy

¹⁶ *In re Sekema*, 523 B.R. 651 (Bankr. N.D. Ind. 2015).

filing when it said, file a proof of claim. And the proof of claim doesn't ask for anything. It fills out the form, and since 2012, the rules have required disclosure of the information that was previously not required and is also not required in a lawsuit. Again, another difference with a lawsuit. In a proof of claim, you now have to state if it's one of these open or revolving accounts, who you bought it from if you're a debt collector, the date of the last payment, the date of the last transaction, the date of charge-off. That's all on the proof of claim form now. That's not on a lawsuit. When you're talking about something being deceptive or misleading, what's deceptive or misleading about putting all the information right there on the claim that's required by the Bankruptcy Rules? And I will say the advisory committee on bankruptcy rules considered this issue and decided not to make any rules regarding out-of-statute proofs of claim. And if you look at the advisory committee notes to Rule 3001, it says the addition of all of this information among other things will help the debtor in assessing the timeliness of the claim.

So, the courts that are not following *Crawford* are saying there's nothing false or fraudulent or misleading about filing this truthful proof of claim. So the reason the FDCPA case law has interpreted filing a lawsuit that's out of statute as a violation does not apply here because we're talking apples and oranges. All the information is there, where in a lawsuit it is not. And so there's a lot of sub-issues here. Is it a collection of a debt? Are you really collecting against a consumer? There's a lot of kind of noisy issues, but when it boils down to it, in my opinion, the reason the FDCPA has a violation is if something is false, fraudulent, deceptive or misleading. And most recently Judge Wedoff, Judge Dow, these folks wrote opinions that said no. It's all on there right in front of the debtor, and most of the time the debtor doesn't really care whether the out-of-statute claim is paid. Let's not forget there's nothing wrong with paying an out-of-statute proof of claim. In most cases it doesn't affect the debtor's bottom line. If it's not 100% plan or like a surplus in a chapter 7, it doesn't matter to the debtor anyway. So that's where that's going.

So, I think the tide is turning a little bit, but we're not done yet. As I said, there's a case going up right now for briefing in the Seventh on this issue. One issue that was not decided, and Nick is going to take over here, but I'll say one issue that was not decided by *Crawford*, it was intentionally left out of the case, was the whole argument of whether application of the FDCPA is precluded by the Bankruptcy Code. Preemption is not the right word, but basically which would say, well, the Bankruptcy Code occupies the field of this, so anything that happens under the Bankruptcy Code, you deal within the

Bankruptcy Code and you can't overlay these FDCPA provisions onto the Bankruptcy Code, and that is the *Johnson* case that's going to be argued in April here in the Eleventh, and that was the one issue that could have turned *Crawford* the other way. So, Nick, do you want to talk about that?

MR. WOOTEN: Well, let's say this about *Crawford*. I gave LVNV every opportunity to argue that there was this issue. They abandoned the issue in the Eleventh Circuit in *Crawford*. They said that I was right, that they weren't arguing that there was preemption or preclusion, that filing a proof of claim simply wasn't debt collection. So in my opinion, LVNV, Midland Funding and those folks waived those arguments in the Eleventh Circuit and that issue should've been decided, but the panel did not choose to decide the issue. They did not choose to say that it was conceded.

Preclusion versus preemption, let me begin with this. Preemption deals with federal law preempting state law. There is no issue of preemption when you're discussing one federal statute and another. *Walls v. Wells Fargo* in the Ninth Circuit that was the FDCPA case saying that it didn't apply in bankruptcy court, actually analyzed whether the FDCPA was applying in the bankruptcy court under a preemption analysis, which is 100% wrong and has been since it was decided and will always be, but it has never been corrected by the Ninth Circuit, at least to date.¹⁷ But once other circuits began to look at the issue, and we're not looking at it in a sense of preemption but of preclusion, the case law is very clear that one federal statute never precludes the other unless there is an express preclusion or there is implicit repeal of the statute.

There is no express preclusion of the application of the FDCPA to debt collectors who are operating in bankruptcy court. So, the argument that the industry is making is one of implicit repeal, and the argument is best summarized in the *Johnson* case¹⁸ where they say the Code gives us a right to file a claim; therefore, the FDCPA cannot apply because the Code gives us permission to do so. And the Code does give creditors permission to file proofs of claim even on out-of-statute debt. The issue is whether the FDCPA allows a debt collector to pursue out-of-statute debt. But in the case out of the Seventh Circuit that was sort of the foundation, my argument is *Randolph v. IMBS*,¹⁹ which talks about this issue and I think discusses it very clearly. The *Johnson*

¹⁷ See 276 F.3d 502, 510–11 (9th Cir. 2002).

¹⁸ 528 B.R. 462, 470 (S.D. Ala. 2015), *appeal docketed*, No. 15-11240 (11th Cir. Mar. 24, 2015).

¹⁹ 368 F.3d 726 (7th Cir. 2004).

case, which is I think the next slide but it discussed it in Judge Steele's view, and again adopted the debt collector industry's argument that there was some sort of irreconcilable conflict between the Bankruptcy Code which permits the filing of a proof of claim and the FDCPA. I simply don't buy it. I think it's poorly analyzed. There are other judges who've looked at it who agree, because again, Judge Sawyer took that argument apart in great detail in the *Feggins* case. I think if I was a bankruptcy judge I would be very scared of the decision in *Johnson* because it's in effect carving out special rules that say that you don't have the authority to manage your own caseload and docketing more, somehow you operate as a red-headed stepchild because you're in bankruptcy court. And that's a part of the problem with these type decisions. They have far-reaching impact beyond simply the FDCPA, and it will spill over into other issues that people will start to care about including major chapter 11 cases and that sort of thing.

Basically *Johnson*, the argument goes that because there was an express permission, there is an implied repeal. That same analysis to state law court cases, federal court lawsuits, there is no prohibition against the debt collector filing a time-barred lawsuit in any court. The only prohibition is the FDCPA. So, it's the same analysis, state law permits it, the FDCPA does not. In those issues it's very similar. And where I think we're headed, I don't know if it will be the *Johnson* case or some other case or maybe a Seventh Circuit case. At some point the Supreme Court is going to have to expressly decide this. I do think it's going there. I honestly wish it had gone there with *Crawford*. I had rather just had that whole fight at one time and been done with it but I think the Supreme Court is very hostile to this notion of implied repeal, and I don't think it has any chance of success, regardless of who the ninth member of the Supreme Court becomes. I think it's an argument that will fail miserably. The Supreme Court has made it very clear every time the industry has taken up these very narrow issues, I can't recall where they've won one recently, from the arguments that lawyers are exempt from the FDCPA to the argument that what they do in litigation is exempt from the FDCPA. The industry just does not fare well on this type of argument and I don't suspect they will here either.

And quite honestly, it works very simply. The debt collector files a time-barred proof of claim, they're on the hook for up to \$1,000 in statutory damages in attorney's fees. As I said to the Eleventh Circuit, if you make the correct ruling here and this law goes into effect, what you will see is this problem will eliminate itself very quickly. And in practice, that's what happened. Within 90 days of the *Crawford* decision, I could not find a new

proof of claim being filed that was out of statute. The *Crawford* proof of claim was 13 years old and had not had a payment made on it in more than 10 years. So there was no arguable statute of limitations that they could assert. All that went away, literally overnight. And in the Eleventh Circuit, especially in Alabama, you don't see these anymore. I kind of expected I'd make a little windfall off *Crawford*. I thought I'd have hundreds of cases. I think I had about 50 before these were all gone. And, like I said, I've got a retirement's worth of income in time in *Crawford* that I may never see.

MR. WOOTEN: See that's what you get when you're stubborn and crazy. You just do things like that because you think it's the right thing to do, and so that's kind of how—

MS. BECKET: But I can't believe you're surprised. Because who in their right mind would file an out-of-statute proof of claim in the Eleventh if they're a debt collector?

MR. WOOTEN: And my point is that this entire issue, which is one of the debt buying industry more so than any individual defendant, would clear up very quickly if *Crawford* was adopted by the Supreme Court, or a like analysis, this issue would disappear. It still won't disappear in state courts where I still see defendants and debt collectors doing this a lot because they know that their success rate by default is about 90%, so they're willing to take the risk. What has had more impact on that conduct than any one crazy consumer lawyer from nowhere, Alabama, is the CFPB has taken a great interest in this, and they have forced many of these folks to clean up their act in a way that no consumer lawsuit ever could.

MS. BECKET: We're going to turn it over now to Sarah.

MS. MANCINI: Actually, Alane, I want to ask you one question before I start on my part if that's okay. The point you mentioned about the conflict that might be created for an attorney to want to take the most conservative statute of limitations, would that concern, if your client is a creditor and not a debt collector, would that concern be taken away if the creditor files a proof of claim themselves?

MS. BECKET: Of course, because they're not liable, an original creditor and we're not talking about debt buyers. They're not creditors under the FDCPA, but American Express, I'll just use an example, they can file their claims themselves, their out-of-statute claims and not worry about FDCPA liability; however, they've chosen to hire an expert firm that specializes in this to file

them for them, and now those claims are not being filed because the law firm that files it for them are debt collectors, and so a client is giving up its right to an attorney to do the work for them. So, yes, it's a difficult issue.

PROFESSOR TUNG: Could I just ask one follow up on that, just very briefly? Why don't the creditors then file proofs of claim and then assign them?

MS. BECKET: To the law firm?

PROFESSOR TUNG: Or, to the debt collectors, to the buyers.

MS. BECKET: They do, but first of all, the creditors, these big banks, they don't have the expertise to get their claims filed correctly, a lot of them, and that's why they outsource them to companies like mine. There is a process whereby they do file their own claims or I file them for them or whatever and then they group them up and they sell them. The CFPB has really changed the dynamic between creditors and the people to whom they sell their debt. I think if the CFPB had it their way, there would be no debt sales because, as much as they don't like banks, they like debt buyers even less. And the restrictions that they're putting on debt sales when they enter into these consent orders—one just came out with Citi Bank a few days ago, make it such that it's really not worth it for the bank to sell these debts. So I don't know how much longer this industry is really going to be alive and well, the debt-buying industry.

MR. WOOTEN: Can I comment on that because I have a sort of a pet theory about this. Part of the problem I have with debt buyers and the debt collection industry is what you have happening is a lot of times people have a very unfortunate event, a sickness, a job loss, whatever. They're in a car accident and can't work for a while so their financial situation becomes dire, and they get behind on everything and stuff goes into default, and that's their trauma moment. And a lot of times what should happen is right there at that point maybe it would be best if the debtor went and declared bankruptcy and discharged all these debts and started over fresh. But a lot of times that doesn't happen because what you see is people get a letter that says, well, we've written off your debt and then nothing else happens. So they think, well, I can recover, I can get back on my feet. But then this debt goes out in the world and gets recycled six, seven, eight, nine, ten times. And then six, seven years later that debt from that moment of crisis comes back and bites them on the rear end through some debt collection lawsuit or something of that nature. And so what you have is economic misery becomes extended. So, instead of it being a very

narrow, compact point in time in the timeline of your life where you have this crisis and you get through it, it ends up dragging out for ten years, or longer in some instances. And that is what I think is my fundamental moral problem with why this goes down the way it does currently, and why I cheer every time I see the CFPB slap somebody for this. I really think what should be happening if I were in the industry and it was my choice, is that you would accelerate these collection timelines, you would move forward with your lawsuit if that's what you want to do, and you make this stuff wash in that very narrow window and you give people the opportunity to have their fresh start and move on with their life, or settle their car wreck case and pay off their defaulted debt or whatever the circumstance is, or get a new job and make money and pay that default. But you don't make it take up a decade of someone's adult life which is currently what's happening. And growing up, like I said, in "nothing, Alabama," poor and watching people that I knew and my own family go through things, I'm very sensitive to the long-term policy ramifications of this entire scheme. So the hope in *Crawford* was that these types of decisions in these CFPB actions will cause the industry to reevaluate the way they're doing this, and rather than focus on this huge debt buying market, the focus will be on cycling this debt when it occurs as fast as possible, bring it to a conclusion, getting it over, and then the consumer can go on with their life. That's kind of where I think it ought to go.

PROFESSOR TUNG: Fitting last words from Nick on this subject. Let's move on to Sarah Mancini.

MS. MANCINI: Great. I'm very pleased to be with you today. I'm going to talk now about two other federal statutes with specific applications to mortgage servicing. The Real Estate Settlement Procedures Act ("RESPA") and TILA. And, in particular the mortgage servicing provisions that were enacted under the Dodd Frank Act and the rules promulgated by the Consumer Financial Protection Bureau, the CFPB, that took effect in January, 2014, and the application of those statutes in bankruptcy.

So, as Nick and Alane pointed out, when you're looking at the way one of these statutes interacts with the Bankruptcy Code, the correct analysis is one of implied repeal and not preemption. That's a really important point because the question that's going to come up in some of these cases is, how do these RESPA and TILA rules dovetail with the Bankruptcy Code? So, I just wanted to reiterate again the *Walls* case out of the Ninth Circuit²⁰ incorrectly applied a

²⁰ See 276 F.3d 502.

preemption analysis, and instead the right standard is the one articulated by the *Randolph* case²¹ out of the Seventh Circuit which points out that implied repeal is a “rare bird indeed” and that it requires an irreconcilable conflict, that basically the creditor or debt collector cannot comply with both laws.²² Those are the circumstances under which you might find an implied repeal situation or preclusion of a statute by the Bankruptcy Code.

So, the vast majority of courts looking at RESPA claims have found correctly that there is no conflict with the Bankruptcy Code and that these two statutes can be applied consistently. And I just want to note that with implied repeal, the question is whether the later enacted statute in some way is repealing the prior statute. And so of course for a lot of these provisions that I’m going to be talking about, they were enacted in 2010 in the Dodd Frank Act. So they would be the later enactment, and of course it seems a little bit obvious that they were not intending to repeal parts of the Bankruptcy Code. But I just wanted to point that out. We cannot say that the Bankruptcy Code would implicitly repeal parts of these RESPA and TILA requirements if they were, in fact, enacted later.

But more to the point, it’s important to recognize that some of these provisions have explicit bankruptcy exemptions and others of them do not. So that indicates Congressional intent that the ones where there is no bankruptcy exemption can be applied in bankruptcy.

It’s also important to note that, as I’m going to explain with some case examples, it is possible to comply with both, which means there’s no conflict, which means no implied preemption. And I just want to point out by way of background that both the Bankruptcy Rules that were meant to deal with abuse by mortgage servicers and these TILA and RESPA mortgage servicing rules grew out of the same bad conduct during the foreclosure crisis. We had robo signing in foreclosure cases, and also misbehavior and mistake in bankruptcy cases as Katie Porter called it. All of that conduct led to the National Mortgage Settlement between the Department of Justice, the U.S. Trustee, and 49 state attorneys general with the five largest mortgage servicers, and those servicing standards in the National Mortgage Settlement were largely imported into the RESPA and TILA mortgage servicing rules. And at the same time, that same misbehavior or mistake also led to the 2011 changes in the Bankruptcy Rules

²¹ See 368 F.3d 726.

²² *Id.* at 730.

that deal with proof of claim filings and the ability to effectively cure in a chapter 13 plan.

So, I think that is important to remember because it shows the common purpose of these two systems that are walking hand in hand. And clearly they're not in conflict because they're serving this common purpose of addressing those types of problems.

I do want to walk through the highlights briefly of what these rules that we're talking about provide for, these rules under RESPA and TILA as they are still somewhat new. So first of all, what we have now for mortgage servicers is something that, this part has been in law for a while but there were some updates to it in Dodd Frank and in the 2014 rules from the CFPB, is the duty to respond to a request, a qualified written request from the borrower. So that has been part of RESPA for a long time but it's been updated, and now what we have in the rules is two different flavors of qualified written requests. A borrower can send a request for information or a notice of error pointing out to the servicer where there has been an error in the servicing of the loan. And the servicer has a duty to respond to that by correcting the error or doing a reasonable bit of research and saying there is no error if that's their conclusion. But again, they have to respond to that by doing that inquiry and correcting an error when there is an error.²³

These rules also have early intervention requirements.²⁴ This is a loss mitigation rule which is basically making the servicers reach out to homeowners when they're first falling into default, to actually establish contact with them and say there might be options available to help you save your home. This rule, the early intervention is one that does have a bankruptcy exemption.

Then there are rules about procedures that servicers have to comply with for loss mitigation.²⁵ Timelines and procedures that are meant to allow the borrower to file a complete application and have that be something that's attainable, because previously there was a lot of what we call rope-a-dope where servicers would ask for one thing but not ask for everything, and this could go on forever and ever. So the loss mitigation procedures are in the RESPA rules.

²³ 12 U.S.C. § 2605 (2012); 12 C.F.R. §§ 1024.35–36 (2013).

²⁴ 12 C.F.R. § 1024.39.

²⁵ 12 C.F.R. § 1024.41.

There's also a duty to make timely payments out of the escrow for taxes and insurance.²⁶ There's a duty to provide annual escrow statements.²⁷ The Truth in Lending Act has a duty to send payment change notices.²⁸ That's one of the recent changes, and also a duty to promptly credit payments on the account when a complete payment is received.²⁹

There is a ban on pyramiding of late fees.³⁰ That was something that was already in a Federal Reserve Bank rule and now it's been adopted by the CFPB rules under TILA. There's also this duty to provide a timely payoff statement within seven business days when the borrower requests it.³¹ That's also under TILA. And then there's a duty to send periodic mortgage statements to the borrower.³² And so I want to point out only three of these that I just listed have an explicit bankruptcy exemption.

First of all, the periodic statements rule does have a bankruptcy exemption right now.³³ This was kind of a surprise. The CFPB put this in during an interim final rule that was done after the initial final rule without notice and comment and so basically right now the state of the law is that while the debtor is in an active bankruptcy, or for any debt that was discharged in the bankruptcy, so for a chapter 7 debtor who did not reaffirm the debt, that requirement to send periodic statements does not apply. However, it's important to note that the CFPB is looking at rolling back that exemption. And there's a proposed rule that was issued in November, 2014, the final rule is expected sometime this spring. And in that proposed rule, the CFPB said, we're going to walk back that exemption, and we're going to say, you don't have to send periodic statements while the borrower is in a bankruptcy, only if certain other criteria are met. And those are things like the borrower has sent you a cease communication letter under the FDCPA or the borrower has stated that they intend to surrender the home in the bankruptcy or they're not treating it or curing it in their chapter 13 plan. So, it's basically really circumscribing that bankruptcy exemption if the CFPB continues with that in the final rule that again is coming sometime this spring.

²⁶ 12 U.S.C. § 2605(g); 12 C.F.R. §§ 1024.17, 34.

²⁷ 12 U.S.C. § 2609(c)(2); 12 C.F.R. § 1024.17.

²⁸ 15 U.S.C. § 1638a (2015); 12 C.F.R. § 1026.20(c).

²⁹ 15 U.S.C. § 1639f.

³⁰ 12 C.F.R. § 1026.36(c)(2).

³¹ 15 U.S.C. § 1639g; 12 C.F.R. § 1026.36(c)(3).

³² 15 U.S.C. § 1638(f); 12 C.F.R. § 1026.41.

³³ 15 U.S.C. § 1638(f); 12 C.F.R. § 1026.41.

And so the other two that have bankruptcy exemptions are again, as I said, the early intervention requirement and the duty to provide annual escrow statements.³⁴ It's important to note that there is still the obligation to make timely payments out of the escrow. And again, all of the other rules I just mentioned do not have a bankruptcy exemption.

So, I wanted to talk briefly about a few examples of issues that come up in bankruptcy cases, particularly in chapter 13, and how the Bankruptcy Code and Rules address those problems and how these servicing rules under TILA and RESPA apply to the problems so that you can see that there is not a conflict and that they can go hand in hand and be complimentary to each other.

The first scenario I want to talk about is proof of claim problems. So this is a mortgage servicer who files an inflated proof of claim that includes improper fees that are not authorized under the contract, an incorrect arrearage or an incorrect escrow analysis, and I'm sure this never happens or never should happen, but in the rare event that it does, let's talk about what do the Bankruptcy Rules provide and what do RESPA and TILA provide?

So of course § 502 of the Code and Bankruptcy Rule 3007 govern the claims process. And under § 502, a claim is deemed allowed unless a party in interest objects. And then of course if there is an objection, the Court after notice and hearing will determine the amount of the claim. And Rule 3007 points out that an objection to a proof of claim has to be made in writing and filed and has to be mailed to the claimant at least 30 days prior to the hearing. So that's what you have from the Bankruptcy Code side. And of course Bankruptcy Rule 3001 governs what needs to be attached to a proof of claim. And I do want to point out, generally you've got the rule that if a claim is supported by a writing or based on a writing, you've got to attach a copy of the writing. And then you also have the special rules that apply to mortgage claims secured by the principal residence.

And there was a recent change effective December 1, 2015. So I just wanted to mention this. That Form 410A, the mortgage proof of claim attachment, is different now and there are some important changes there that I just wanted to highlight that I think will make it easier for consumer debtors to find out if the claim that's being filed is being treated correctly.

³⁴ 12 C.F.R. § 1024.39 (early intervention requirements); 12 U.S.C. § 2609(c)(2) (duty to provide annual escrow statements); 12 C.F.R. § 1024.17 (duty to provide annual escrow statements).

What was done in this new form is that whereas before the creditor had to itemize the charges on the account, now they actually have to file a payment history. And that payment history has to include information such as the payments that were received, how they were applied, when any fees and charges were incurred, and whether any funds have been held in an unapplied funds or a suspense account. So, all of that has to be apparent in this payment history that now has to be attached to the new Form 410A.

And that payment history is supposed to date back to the date of the most recent default that has not been cured. So, if this debtor has been in default for a while, the payment history that's attached to the proof of claim has to go back to that date of first default that has not yet been cured.

The Rule 3000(c) has recently required the escrow statement to be attached and the new attachment 410A clarifies the way the escrow is supposed to be treated. And so as part of the cure of the arrearage it is now very clear from the form that any escrow deficiency or shortage needs to be included in the arrearage that is going to be cured through the chapter 13 plan. And the servicer is now required to do an escrow analysis, assuming that the plan is going to cure that arrearage and treating the escrow as if it has enough funds in it now for there to be no shortage going forward.

And that's clear in the instructions on this new Form 410A. If it's been less than a year since the last escrow analysis, the servicer will do a short year escrow statement and basically start a new year and reanalyze the escrow. So I wanted to point that out.

I think that these new rules will go a long way towards making the RESPA protections less important for borrowers in bankruptcy because the rule and the forms are getting you the information that you otherwise might have had to get through a qualified written request under RESPA. But RESPA can still play an important role in cases where the proof of claim does not comply with those rules or the information that's attached to the proof of claim shows that there is a problem, a servicing error.

So under RESPA, of course the borrower has the right to send this request for information about the servicing or a notice of error telling the servicer that there has been a mistake in the application of payments or payments out of escrow, or whatever set of issues. And as I said, I really think that these provisions can go hand in hand without a conflict. Sometimes sending a request for information might obviate the need to file an objection to a proof of

claim. Or, sometimes it will provide the information that forms the basis for an objection to a proof of claim. I do want to mention that the *In re Nosek* case³⁵ out of Massachusetts which was vacated on other grounds by the First Circuit, but *Nosek* is a 2006 case that improperly applies the preemption analysis, and basically that case was following the *Walls* case³⁶ out of the Ninth Circuit.

In the *Nosek* case, the borrower had filed a motion to determine the extent of the lien, and had also sent a qualified written request, and the *Nosek* court said these are in conflict, we're not going to apply both. But it was doing it under a preemption analysis which is now very clear is not the right analysis to follow. So, that case, I think has been left behind by the vast weight of majority since then. I also just wanted to point out that in the *Nosek* case, the court got the timelines wrong for responding to a qualified written request, and that was why the court found a conflict because the court said, oh, under a qualified written request you only have 20 days to respond, and under the RESPA law that existed at that time, it was 20 days to acknowledge receipt and 60 days to actually fully investigate and respond to a claim. Those timelines have been changed by these recent rules, but it's just important to point out that the *Nosek* case was wrongly decided on a few grounds.

But again the vast weight of authority since then has been clear on this point and the *Conley v. Central Mortgage Company* decision out of the Eastern District of Michigan points out that there is no conflict, and correctly points out that the preemption analysis is not the correct one to use here, and points out that the Bankruptcy Code is not a substitute for RESPA.³⁷ And the *Conley* court said the fact that there might be timing and operational differences between the RESPA rule and Rule 9014 that applies to contested matters is not the same as a conflict. The fact that there might be some operational differences doesn't mean that you can't comply with both.

And there are these other cases on point that are helpful as well, *Figard* and *Miller*, which have a string cite of other helpful RESPA cases.³⁸ And in the *Figard* case, I just wanted to point out some of the helpful language there.³⁹

³⁵ 354 B.R. 331 (D. Mass. 2006), *vacated on other grounds*, 544 F.3d 34 (1st Cir. 2008) (improperly applying preemption analysis).

³⁶ See 276 F.3d 502, 510–11 (9th Cir. 2002).

³⁷ 414 B.R. 157 (E.D. Mich. 2009) (Bankruptcy Code and RESPA's provision for borrowers to send a qualified written request do not conflict—a creditor may comply with both).

³⁸ 382 B.R. 695 (Bankr. W.D. Pa. 2008); *Laskowski v. Ameriquest Mortg. Co.* (*In re Laskowski*), 384 B.R. 518 (Bankr. N.D. Ind. 2008).

³⁹ 382 B.R. at 711 (“The RESPA statute does not address objections to claims and is therefore not in conflict with the 11 U.S.C. § 502, let alone irreconcilable conflict which is a higher standard of conflict.”).

The Court pointed out that basically it was clear that the statute was not intended as a substitute, that Congress in § 502 was not intending to subsume RESPA, that they have different purposes, different but complementary purposes, that RESPA is there for information gathering purposes, and on the other hand § 502 relates to actually establishing a claim for purposes of the bankruptcy. And that Court goes on to discuss the way that these can be complimentary because a debtor might not know that they should object to a proof of claim unless they are able to seek information under a qualified written request through RESPA. And on the other hand, as well, once they file an objection to a proof of claim, the debtor then has the burden of overcoming the prima facie case that a proof of claim would be valid. So they have to have enough information to say in fact this proof of claim is improper. So again, pointing out the complementarity there.

The next example I want to talk about just very briefly is payment change notices. So the problem you might see here is a mortgage servicer who fails to notify the borrower of an impending interest rate change and consequent change in their payment amount. And of course Bankruptcy Rule 3002.1(b) requires the servicer to file a payment change notice at least 21 days before that different payment is due. And I do want to mention that the U.S. Trustee has had some recent settlements with Chase and Wells Fargo for substantial amounts of money for those creditor servicers not complying with the rule and filing payment change notices without actual knowledge and that had incorrect information, and in some cases reflected a much larger increase in the payment than was actually happening. So there are some problems around compliance with this rule.

So what TILA does require is that the creditor also has to send a payment change notice, and the deadlines are slightly more protective under TILA. In general, the creditor has to send a payment change notice at least 60 days before the first different payment but no more than 120 days before because obviously if you send it too early it would be less meaningful. So there's a window in which the creditor has to send that payment change notice under TILA that gives the consumer potentially a little bit more time than what's required by the Bankruptcy Rule but obviously you can easily comply with both if the servicer simply complies with the TILA requirement.

So finally, the last example I want to address in the remaining minutes here is this problem that I think is still coming up quite a bit, which is payment application problems and curing a mortgage arrearage. This is a scenario where

a mortgage servicer perhaps fails to apply chapter 13 Trustee payments to the arrearage and debtor payments to postpetition payments. Maybe these get scrambled, or put some payments into a suspense account, or fails to credit them properly to the contractual payments that are due, or maybe imposes some fees. And for whatever reason the debtor exits bankruptcy, gets the discharge, and a month or so later gets a notice that the mortgage is in default. And of course, this is still happening to a surprising degree. This is still coming up a lot, even though the rule changes in 2011 with Bankruptcy Rule 3002.1 were specifically designed to address this problem. We're still seeing it a lot. I can tell you we have at least three or four cases right now in my office at Atlanta Legal Aid where homeowners are coming in with this exact problem. And so it's important to note that you have of course you have protections under the Bankruptcy Code in § 524(i) which says that the willful failure of a creditor to credit payments received under a confirmed plan shall constitute a violation of the discharge injunction if it cause material injury to the debtor.⁴⁰ And of course, those violations of the discharge injunction can be punished like contempt. So you have § 524(i) and § 105 as a remedy for this type of conduct. And you also have Bankruptcy Rule 3002.1 that is meant to prevent this from happening by requiring payment change notices to be filed, notices of any fees that are incurred during the bankruptcy, and then of course the process for a notice of final cure that is filed by the trustee and where the creditor has a duty to respond to the notice of final cure. And there's an opportunity for the Court to determine whether in fact the mortgage has been cured. So you have all of those bankruptcy rules in effect.

You also have rules that apply under TILA. So TILA has a requirement that the creditor promptly credit payments to the account, that when the creditor has received a full payment, they cannot keep it in a suspense account or return it to the debtor; they have to apply it to the next contractual payment. And of course, the way they apply it would be determined by the confirmed bankruptcy plan, but there is still an obligation to promptly credit that payment that still applies in bankruptcy. It's important to note that the rule and the interpretations of the rule from the CFPB say a complete payment is principal, interest, taxes and insurance. You cannot take money and apply it to a late fee or some other fees on the account and say, well, now we don't have a complete payment anymore. If you have enough money to cover a PITI payment, it has to be credited to the account.

⁴⁰ 11 U.S.C. § 524(i) (2012).

So that's the rule under TILA. You then also have rules under RESPA that allow the borrower to send a notice of error to the servicer and say, the way you've applied these payments is incorrect. And then if the servicer fails to correct those mistakes, you now have a cause of action under RESPA that could be raised simultaneously with a violation of the discharge injunction under contempt theory.

So I just want to point out that really if you're seeing these problems come up, it's a good idea to consider potential claims under TILA and RESPA, and keep in mind that those claims do provide for attorney's fees as well as actual damages and statutory damages. And so as business market changes in the bankruptcy world with filings down in some circumstances, this is a fruitful avenue for consumer bankruptcy attorneys to look at to think about helping chapter 13 debtors really exit a bankruptcy current and make sure that that's being handled correctly.

PROFESSOR TUNG: Let me ask you a sort of a general question. All these developments and sort of tightening up the forms, are consumers winning?

MS. MANCINI: From the rule changes? From the forms? I think that this is a huge step forward for consumers. And of course this most recent one with Form 410A is too new to really see whether the creditors are going to comply with it properly. But absolutely. Because you're giving consumers more information, and they need that information to actually make sure that the claim is proper, that the disclosed claim is right, and that they can actually cure.

MR. WOOTEN: And just to weigh in on that, I've been doing these cases, mortgage servicing cases since 2007 when we had this very issue, you just addressed with the discharge injunction for a client with Wells Fargo, personally I think it's impossible for the servicers to comply, knowing that their technology is basically 1970s circuitry. The spinal column of their system dates back to old DOS platforms from the '60s and '70s. There's nothing—

PROFESSOR TUNG: That's probably too far back for many of you to understand.

MR. WOOTEN: There are no iPad apps for servicers. They can't fix these problems that seem very common sense. I'm going to watch with morbid curiosity the new Form 410A because my friends who are doing this all over the country are all expecting this to be just a train wreck. I don't know how it's going to get fixed from the servicing side unless they abandon their

architecture and come up with something new. And from the discharge injunction perspective, I would say that it is a problem that probably affects forty percent of bankruptcy chapter 13 cases. And what I have seen in my experience is that the notice of final cure is completely ignored. It's just business as usual. They've decided that it's a cost of doing business and they'll just pay the price when they get caught.

MS. MANCINI: It's important to point out that when it is ignored, there's a remedy for that in the rule which is that if a servicer doesn't respond to that notice of final cure, they can be precluded from raising evidence later that contradicts the notice of final cure. I agree that they are ignoring it quite a bit.

MR. WOOTEN: That is correct, and it should be that way. I mean, that's the whole purpose of the chapter 13, what we mentioned earlier is you want this traumatic event and this economic trouble to be fully and finally behind someone. You don't want it to linger on for years. But it is very, very common between the work I've done in Alabama, Chicago, and Arkansas, it's just an everyday thing.

AUDIENCE MEMBER: I personally found that Judge Steele's opinion was quite convincing. Judge Steele actually cites another Supreme Court case that states that when provisions in two acts are in irreconcilable conflict, the earlier one must give way to the later one to the extent that there is a reconcilable conflict.

MR. WOOTEN: Right. And I think that's where you have to look at what is an irreconcilable conflict. I don't see where debt collectors being subject to the FDCPA in bankruptcy court and having to comply with the body of FDCPA law is in any way in conflict with performing their obligations under the Bankruptcy Code. No different than when you talk about the analysis again of filing a lawsuit on stale debt, leading into *Crawford*, the only court in America that a debt collector could walk into and make a claim to be paid for out-of-statute debt without being sued under the FDCPA was the bankruptcy court, and it had become because of the debt buying industry, there were a number of corollary problems that are not discussed in *Crawford* with proof and documents and issues and how old is this debt and where did it originate and who did it come from. So there were some rule changes to address those problems, but there was not any check on the volume of these claims. And I mean in a typical chapter 13 bankruptcy in the Middle District of Alabama which is a very busy district, it was not uncommon to see seven or eight of these types of claims. And there are two problems with it.

Every penny that goes to a debt buyer on a stale claim does not go to other creditors who have claims that are not stale. So if I'm a creditor, I'd be objecting like crazy to those claims if I expect to get a dollar, because I want to get two dollars instead of one. But they really just literally were taking advantage of the system by just overwhelming trustees and judges and courts with the volume of these filings. So it would be no different than if they chose to file 20,000 debt collection lawsuits in a district court. When I say district court, Alabama District Court, which is a court of limited jurisdiction, and just overwhelm the court with the sheer number of cases, and all of them out of statute. A lot of times what happens is there's no remedy and the courts just throw their hands up and essentially become a rubber stamp because no one is there to stop them. But I don't see that it's irreconcilable conflict in any way to say that debt collectors don't get a free pass in bankruptcy court, which is the core issue. It's not whether filing a proof of claim is allowed or not. You can file lawsuits. That's allowed, too. But only a debt collector is subject to the FDCPA for that liability. And that's a voluntary mantle that they chose when they became debt collectors. That's the price you pay to be in that place.

And I think that's what you said is where the rubber meets the road on *Johnson*, and I have no idea who the panel is. Maybe Alane knows. But I think who the panel of judges is in that case is going to have a huge impact on what actually comes out of the Eleventh Circuit on *Johnson*.

AUDIENCE MEMBER: In regards to the changes in TILA and RESPA, the CFPB is relatively new so changes are bound to happen. And in my personal research, since January, 2013, they have met with consumer advocates and things of that nature to see what changes could be made. What changes do you see being made in the future that could affect the bankruptcy practice?

MS. MANCINI: That's a great question. So the big thing is this pending rulemaking that's been open since November, 2014. Then, again, the final rule is expected in the spring of 2016, so we're in the spring, so we'll see. Sometimes the CFPB says one thing and it gets to be a little bit later. I think some of these changes, as I mentioned, would relate to the bankruptcy exemption for periodic statements. But there's another really big part of it which is the problem of successors in interest. These are homeowners who become the owner of a home through a death or a divorce or other transfer that's protected by the Garn-St. Germain Act from enforcement of a due-on-sale clause. And this person is now the owner of the home trying to deal with the mortgage and running into major problems in that process. So the CFPB

proposed a fix to help successors in interest get information about the mortgage and apply for loan modifications. So, I think people are eagerly watching to see how that issue is going to come out. I'm not sure whether there are other things the CFPB is considering in the mortgage servicing arena, but I think they've been taking up a lot of issues.

And to answer your other question, the CFPB has been talking with consumer advocates and also with lending industry advocates to make sure that they're aware of the issues that need to be addressed.

MR. WOOTEN: And just on that point, I would say that the thing that I'm watching the most out of the CFPB is how long will it take for there to be regulatory capture of the CFPB. Currently, the CFPB is the only agency of government who's actively seeking out problems and trying to resolve them in this area. Prior to the CFPB no one was doing it, and if you want to see how fast law can change when you're on the consumer side, you just should've been hanging around here in the foreclosure crisis because we had laws passed overnight. We had rules coming out of places you'd never heard of. regulatory guidance, all kinds of things happening with the speed and power that just was simply stunning. And I was operating at that time between New York, Washington, D.C., across the South, out to the West. And in the way the industry moved when threatened, particularly with a company called MERS, if any of you remember those folks, it was amazing. And there was literally no resistance. So, when the CFPB came on the scene it was the first time that I saw activity that you could say was definitely generated for the benefit of consumers. And as I said, what I'm watching for is how long until that becomes a softball. And I think depending on the outcome of the elections, it could be very soon, based on some of the threats that are being made by at least one of the major political parties.

PROFESSOR TUNG: I'm sure you all agree that we owe a debt of gratitude to our panelists. I know I learned a lot this morning, and if you'll join me in thanking them, then we can all go pursue our lunches like a duck on a June bug.

MS. DEPERT: I'd like to thank all of our panelists for attending today and for their insightful discussions, and thank each of you for participating in the *Emory Bankruptcy Developments Journal's* Thirteenth Annual Symposium. This concludes today's program.