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## Making Money with "Consumer Rights" Claims in Chapter 13

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- The opinions expressed by the participants of this seminar are their **personal opinions**. They do not necessarily reflect the opinions of the NACTT, the NACTT Academy, or any members of such organizations. They also do not necessarily reflect the views of Trustee Russell C. Simon.
- Any **examples** presented herein are for **illustrative purposes only**. None of the parties herein intend to be bound in any future matter by the examples given.
- The information contained in these slides, or presented by the participants, is not intended as **legal advice** as to how any particular case now existing or arising in the future should be handled.

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## INTRODUCTION – TYPES OF CLAIMS

- **Prepetition:**
  - Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692-1692p
  - Telephone Consumer Protection Act (TCPA) 47 U.S.C. § 227
  - State Consumer Protection Statutes
- **Post-Petition:**
  - All prepetition claim-types
  - Violations of the automatic stay
  - Privacy rights claims
  - Discharge Injunction violations



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## THE FDCPA 15 U.S.C. § 1692-1692p



### Four Pre-requisites for Bringing an FDCPA Claim:

- Consumer
- Consumer Debt
- Debt Collector
- Violation of the FDCPA

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

### ▪ Definitions:

- **Consumer:** A natural person obligated or allegedly obligated to pay a debt. 15 U.S.C. § 1692a(3). For some purposes of the Act, a "consumer" includes the debtor's spouse, parent (if the debtor is a minor), guardian, executor, or administrator. 15 U.S.C. § 1692c(d).
- **Debt:** An obligation arising out of a transaction entered into primarily for personal, family, or household purposes (thus, the requirement of a "consumer debt"). 15 U.S.C. § 1692a(5).

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

### ▪ Definitions (continued):

- **Debt Collector:** With certain exceptions, "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).
- A "debt collector" **does not include** a person collecting a **debt** which was **not in default** at the time it was obtained by the collector. 15 U.S.C. § 1692a(6)(F)(iii).

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

### Examples of Violations:

- Disclosing the existence of the debt to third parties. 15 U.S.C. § 1692b.
- Communicating with a consumer a debt collector knows to be represented by an attorney. 15 U.S.C. § 1692c(2).
- Communicating with a consumer at a time or place the debt collector knows to be inconvenient. 15 U.S.C. § 1692c.
- Threatening violence if the debt is not paid, or using obscene or profane language. 15 U.S.C. § 1692d.
- Calling excessively. 15 U.S.C. § 1692d(5).

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

### Examples of Violations (continued):

- Making false representations, including representations:
  - about the character, amount, or legal status of the debt. 15 U.S.C. § 1692e(2)(A);
  - that the debt collector is an attorney, if he/she is not. 15 U.S.C. § 1692e(3);
  - that the non-payment of the debt will result in the arrest or imprisonment of the debtor, or that the wages or property of the consumer will be seized, garnished, attached, or sold unless such action would be legal and the debt collector actually intends to take such action. 15 U.S.C. § 1692e(4);

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

### Examples of Violations (continued):

- Making the false representation or falsely implying that:
  - the collector may take action that cannot legally be taken, or that the collector does not intend to take. 15 U.S.C. § 1692e(5);
  - the consumer has committed a crime, or has engaged in other wrongful conduct, in order to disgrace the consumer. 15 U.S.C. § 1692e(7);
- Communicating or threatening to communicate credit information the collector knows to be false, including failing to communicate that a debt is disputed. 15 U.S.C. § 1692e(8);

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## THE FDCPA (CONTINUED) 15 U.S.C. § 1692-1692p

- **Examples of Violations (continued):**
  - Using any false representation or deceptive means to collect or attempt to collect on a debt, or to obtain information regarding a consumer. 15 U.S.C. § 1692e(10);
  - The false representation or implication that documents are legal process. 15 U.S.C. § 1692e(13);
  - Conversely, the false representation that documents which are legal process are not, or falsely representing or implying that such documents do not require any action by the consumer. 15 U.S.C. § 1692e(15);
  - Collection of improper fees, and the collection or solicitation of certain post-dated checks. 15 U.S.C. § 1692f.

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## JURISDICTION & STATUTORY AUTHORITY

- **Jurisdiction:** 28 U.S.C. §§ 151, 157, and 1334.
- **Statutory Authority:**
  - 11 U.S.C. § 1303 gives a debtor the powers of a trustee under 11 U.S.C. § 363(b), (d), (e), (f), and (l).
  - 11 U.S.C. § 363(b) and (d) give a trustee the right to use property of the bankruptcy estate; 11 U.S.C. § 363(l) says that a plan may provide for the use of property of the estate.
  - A debtor "uses" a consumer rights claim by pursuing it.
  - **Pre-Petition claims** a debtor may have against other entities are property of the estate pursuant to 11 U.S.C. § 541(a)(1).

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## Post-Petition Claims Property of the Estate?

- 11 U.S.C. § 1306(a)(1): Property of the estate includes "all property of the kind specified [in section 541] that the debtor acquires after commencement of the case but before the case is closed, dismissed, or converted[.]"
- 11 U.S.C. § 1327(b): "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all property of the estate in the debtor."
- **Cause of Action Accrues Post-Petition, but Pre-confirmation:** The property will come into the estate by virtue of § 1306(a)(1), but will vest according to the election under 11 U.S.C. § 1327(b).

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### Cause of Action Accrues Post-Petition and Post Confirmation – Property of the Estate?

- The cause of action is NOT related to property that re-vested in the debtor at confirmation = Property of the Estate
  - The majority of cases say that § 1306(a)(1) even captures, for the bankruptcy estate, inheritances a debtor becomes entitled to acquire more than 180 days of the filing of the petition, which would not be property of the estate in a chapter 7. See 11 U.S.C. § 541(a)(5) and *Carroll v. Logan*, 735 F.3d 147, 151 (4<sup>th</sup> Cir. 2013).
  - Not affected by re-vesting because only property in which the debtor has an interest at confirmation re-vests. See *in re Waldron*, 536 F.3d 1239, 1243 (11th Cir. 2008).
- The cause of action IS related to property that re-vested in the debtor at confirmation = ?
  - "In the current case, Debtor argues because the Truck re-vested in him at confirmation, the insurance proceeds are a substitution for the Truck and belong to him. Given these facts and circumstances, I agree. Unlike the proceeds in *Waldron*, these proceeds are not a new asset but rather serve as a substitute for the collateral." *In re Castleberry*, 10-11991, 2013 WL 1397705, at \*2 (Bankr. S.D. Ga. Mar. 15, 2013).

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### Identifying Possible Pre-Petition Claims



Thom Hooper



Craig Shapiro

- How to identify:
  - Intake Questionnaire
  - Collection letters
- Estoppel:
  - "In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).
  - List claim(s) on Schedules A/B and C.

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### Exempting Pre-Petition Claims

- Known claims:
  - Describe with as much specificity as possible/prudent on Schedule A/B.
  - Claim as exempt under appropriate section(s) of Schedule C.
    - Personal injury:
      - Federal exemption is limited to personal bodily injury. 11 U.S.C. § 522(d)(11)(D).
      - Some state law personal injury exemptions are not limited to "bodily" injury.
  - A "wildcard" exemption.



Jody Bledsoe

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### Exempting Pre-Petition Claims (continued)

#### Unknown Claims: List Generally

- **Schedule B, paragraph 33:** "Possible Consumer Rights Claim(s). Subject to approval of settlement/award by Bankruptcy Court. Unless otherwise specified, no specific claims are known at present."
- **Schedule C:** "The Debtor claims an exemption in any possible consumer rights claim only to the extent that the settlement/award is found by the Bankruptcy Court, upon the filing of a Motion for Approval of Settlement/Award and for Allowance of Exemptions and an Amendment to this Schedule C, to be in the nature of a personal injury claim, if allowed as exempt under applicable law, or to the extent that it is found to be other than a personal injury claim only to the extent of the dollar amount available to the Debtor under another exemption, such as the wildcard exemption, under applicable exemptions law. The time within which the trustee may object to the claiming of any exemption in this asset, shall be deemed tolled until such time as the Motion and Amendment are filed and served upon the trustee."

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### Identifying Possible Post-Petition Violations

#### Violation:

- Stay Violation
- "Privacy Rights" Violation
- Discharge Injunction Violation

#### Example:

- Contacting the debtor to demand payment after notice of filing.
- Filing a Proof of Claim which shows the debtor's full social security number.
- Attempting to collect on a discharged debt, or overstating the amount due.




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### Non-Bankruptcy Post-Petition Claims May Be Precluded or Preempted

- **Any claim not based in the Bankruptcy Code may be subject to preclusion or preemption.** These include claims under the FDCPA, TCPA, and state Consumer Protection Statutes.
- **The argument:** if the only act by a creditor which might give rise to a cause of action by the debtor for violation of these types of statutes is a violation of a provision of the Bankruptcy Code itself, the exclusive remedy should be one allowed under the Bankruptcy Code.
- **Example:** *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002).
- **But see** *Simon v. FIA Card Servs., N.A.*, 732 F.3d 259, 274 (3d Cir. 2013) ("When . . . FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims.")

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### Example of When A Consumer Rights Claim is Independent of a Bankruptcy-Related Claim

Assume a state consumer protection statute which, similar to the FDCPA, provides that it is an unfair collection practice to cause a debtor's telephone to ring with such frequency as to be unreasonable under the circumstances:

- After receiving written notification of the bankruptcy filing, a creditor calls the debtor 3 times.
- A stay violation, but may not give rise to a cause of action under the state statute.
- After receiving written notification of the bankruptcy filing, a creditor calls the debtor 300 times.
- A stay violation, but the frequency is such as to be unreasonable under any circumstances.

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### Are Precluded Claims of Any Value?

- 11 U.S.C. § 362(k): "[A]n individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."
- North Carolina General Statute § 75-56: "Any debt collector who fails to comply with any provision of this Article with respect to any person is liable to such person in a private action in an amount equal to the sum of (i) any actual damage sustained by such person as a result of such failure and (ii) civil penalties the court may allow, but not less than five hundred dollars (\$500.00) nor greater than four thousand dollars (\$4,000) for each violation."

Even if the court determines that the only relief available is relief provided under the Bankruptcy Code, to the extent that the Bankruptcy Code does not address how to calculate the appropriate amount of actual or punitive damages, you can argue that state or federal non-bankruptcy law may provide some guidance.

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### Identify Possible Defendants

- The Original Creditor:
  - No claim against the original creditor under the FDCPA.
  - Would have a claim under 11 U.S.C. §§ 105 (discharge violation) and 362(k).
  - May have a claim under state and/or non-bankruptcy federal law.
- Debt Collectors
- National Banks




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### Preemption by the National Bank Act - The Argument

- An attempt to sue a national bank under state law will often be met with a motion to dismiss alleging that all state law actions are preempted by the National Bank Act of 1864, 12 U.S.C. § 21 et seq. ("NBA"). The argument:
  - The NBA was enacted to protect national banks against intrusive state regulation, and to facilitate uniform banking operations throughout the nation.
  - The Constitution provides that federal law is the "supreme law of the land." U.S. Cont. Art. VI, cl. 2.
  - Accordingly, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 8 (2007)(quoting *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)).

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### Preemption by the National Bank Act – The Response

- With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in 2010, courts are increasingly finding that the NBA does not preempt state law actions based on a bank's debt collection efforts. The relevant section of Dodd-Frank is found at 12 U.S.C. § 25(b)(1):
  - IN GENERAL. State consumer financial laws are preempted, only if --
    - application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
    - in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et. al.*, 577 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
    - the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

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### Preemption by the National Bank Act – The Response (Continued)

- After the enactment of Dodd-Frank, the Office of the Comptroller of the Currency ("OCC"), which is vested with the authority to regulate national banking institutions, amended Title 12 of the Code of Federal Regulations. 12 C.F.R. § 34.4(b) now provides:
 

State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 577 U.S. 25 (1996):

  - Rights to collect debts[.]

▪ *In re Pryor*, 479 B.R. 694 (Bankr. E.D.N.C. 2012)




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## Getting Paid

- **Fee Agreement:** Whether as part of your basic contract, or under a separate contract, you need to enter into a written fee agreement with the debtor.
  - Your basic contract should explain that the pursuit of a "Consumer Rights" claim is not included as part of your basic bankruptcy representation, with an explanation of what kinds of claims will be considered as "Consumer Rights."
  - The fee arrangement for pursuit of a "Consumer Rights" claim should be clearly set forth. Typical arrangements are for a contingency fee, with the debtors' attorney seeking the higher of an hourly rate or a percentage.
- **Fee Application:** The court has the right to review the debtor's transactions with counsel under 11 U.S.C. § 328(b), and will consider as part of its review the factors set forth in 11 U.S.C. § 330. **Apply early!**

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## Adversary Proceeding v. Motion?

- Use an **Adversary Proceeding** when joining a bankruptcy-related claim (stay violation) with a non-bankruptcy related cause of action (state law, non-bankruptcy federal law).
  - More stringent procedural requirements for an AP which are on par with the procedural requirements had the non-bankruptcy related matter been brought by itself, outside of bankruptcy.
  - Immediately applicable discovery requirements which may benefit the debtor.
  - The debtor is not required to pay an AP filing fee.
- Otherwise, relief may be sought by a **Motion**. A benefit of seeking relief by motion is that the matter will may be resolved faster.

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## Special Rules for Discharge Violations

- If you are seeking damages in the bankruptcy court for violation of the permanent discharge injunction: (1) always seek relief via a motion, and (2) never try to incorporate any other claims (state or federal).
  - There is no private right of action available to a debtor seeking a remedy for the discharge injunction. Any relief available will be by virtue of the court's contempt powers under 11 U.S.C. § 105.
  - Once the case has concluded, the outcome of the action will have no effect on the debtor's bankruptcy estate, and as a result, the court has no authority to act other than by virtue of its contempt powers.
  - When the case has been closed, you will need to file a Motion to Reopen, but there is no charge to the debtor when you are seeking enforcement of the discharge injunction. Also, there will be no trustee acting in the case when it is reopened.

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## Approval of Settlements

- File a Motion to Approve any Settlement, in accordance with Bankruptcy Rule 9019.
- Confidential versus non-confidential.
- Trustee Approval:
  - What effect, if any, will the settlement have on the estate? In particular, will the liquidation test be implicated?
  - "Let's Make A Deal" on the distribution of damages between the debtor and the estate?




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## "Let's Make A Deal"?

**Facts:** Assume a debtor with a consumer rights claim, that is estimated to settle for \$50,000 if the debtor vigorously pursues it. Assume, also, that the debtor has available a "wildcard" exemption of \$5,000, but no other exemptions under which to claim any portion of any settlement proceeds. The trustee in **Scenario 1** insists that the debtor turn over all settlement proceeds above his available exemptions to the estate. The trustee in **Scenario 2** agrees to a 60/40 split of all proceeds above the exemption, with the estate getting 40%.

Scenario 1:	
Settlement:	\$5,000
Wildcard:	\$5,000
Estate:	\$0

Scenario 2:	
Settlement:	\$50,000
Wildcard:	\$5,000
Remainder:	\$45,000
Debtor:	\$27,000
Estate:	\$18,000

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## "Let's Make A Deal" (Continued)

- The debtor in **Scenario 1** has absolutely no incentive to cooperate in the pursuit of the consumer rights claim beyond the extent that he will be able to retain the proceeds. Without the debtor's assistance, the trustee will likely lack the knowledge to pursue the claim, and knowing this, creditor's counsel will act accordingly and offer to settle for \$5,000 plus fees and costs.
- The debtor in **Scenario 2** has considerable incentive to cooperate in the pursuit of the consumer rights claim and obtain the maximum amount possible. By encouraging the debtor to do this, the trustee may also hope to increase the estate and the payout to unsecured creditors.




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THANK YOU TO OUR PARTICPANTS



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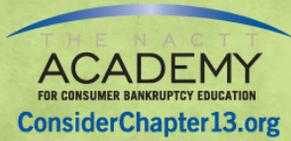
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