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## PRIVATE REMEDIES AND ACCESS TO JUSTICE IN A POST-MIDLAND WORLD

Kara J. Bruce\*  
Alexandra P.E. Sickler\*\*

### INTRODUCTION

Consumer bankruptcy has long been described as a social safety net of last resort, bridging the gaps when other front-line social programs fail.<sup>1</sup> It fills this role by providing consumers with an avenue to reduce the financial impact of setbacks including illness, injury, job loss, or divorce.<sup>2</sup> Consumer bankruptcy has been separately recognized as a forum for consumers to vindicate substantive rights through private lawsuits.<sup>3</sup> Although many scholars have highlighted challenges that consumers face in bringing private suits to address wrongdoing outside of bankruptcy, a variety of factors change the relationship between a debtor and her creditors when a debtor is in bankruptcy.<sup>4</sup> The dynamics of consumer bankruptcy might make it a particularly effective instrument for the vindication of consumer-protection ends.<sup>5</sup>

In past writings, we have highlighted how systematic creditor non-compliance has undermined foundational bankruptcy policies, affecting debtors' ability to obtain relief from financial distress in bankruptcy.<sup>6</sup> We have suggested that debtors' unique capacity to vindicate their rights through private lawsuits is key to bridging this enforcement gap and ensuring access to the benefits of the

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<sup>1</sup> See *infra* Part II(A).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Kara Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, 69 BAYLOR L. REV. 479, 502–05 (2017).

<sup>5</sup> See *id.*

<sup>6</sup> See Kara J. Bruce and Alexandra P.E. Sickler, *Policing Bankruptcy Claims: The Chapter 13 Trustee Interview Project*, (forthcoming work, draft on file with authors); Bruce, *supra* note 4; Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 25–30 (2013).

bankruptcy forum.<sup>7</sup> In this Essay, we profile the rise and fall of one such private-litigation device: the use of Fair Debt Collection Practices Act (FDCPA) lawsuits to challenge the practice of filing time-barred debt claims in bankruptcy.<sup>8</sup>

Over the past several years, chapter 13 debtors have used the FDCPA as a tool to challenge debt buyers who file massive numbers of proofs of claim for debt for which the statute of limitations has run.<sup>9</sup> Spurred by initial success in the Eleventh Circuit, these cases have proliferated across the nation.<sup>10</sup> Yet in *Midland Funding v. Johnson*, the Supreme Court held that filing a proof of claim for time-barred debt does not violate the FDCPA. This decision put an end to the spate of FDCPA litigation and, in doing so, placed the burden of policing stale debt claims squarely on the shoulders of chapter 13 trustees.<sup>11</sup>

In this Essay, we question whether this state of affairs is in line with the balance of powers contemplated by the Bankruptcy Code (the Code) or feasible in light of the realities of bankruptcy practice.<sup>12</sup> We also explore alternatives to FDCPA litigation that might provide a more viable response to this problem.<sup>13</sup> Finally, we consider what stale-claim litigation can tell us about the role of private remedies in improving access to justice.<sup>14</sup> Although the proliferation of stale debt cases was ultimately not successful on the merits, the legal precedents that developed have dramatically increased awareness of debt buyers' stale-claim practices. In so doing, these cases have primed the bankruptcy system to respond. Thus, despite the limited success of FDCPA cases challenging time-barred debt claims, we conclude this wave of litigation likely has improved access to justice in the bankruptcy forum.

This Essay proceeds as follows. In Part I, we describe how creditor under-compliance and overreaching can impair access to justice in consumer bankruptcy cases. We consider generally the role that private litigation might play in addressing this problem. In Part II, we trace the arc of FDCPA litigation described above from its origins in the Eleventh Circuit in *Crawford v. LVNV*

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<sup>7</sup> See Bruce, *supra* note 4; see also Alexandra P.E. Sickler, *The (Un)fair Credit Reporting Act*, 28 LOY. CONS. L. REV. 238 (2016) (describing private litigation's benefits in the context of FCRA claims).

<sup>8</sup> See *infra* Part III.

<sup>9</sup> Although this practice can occur in chapter 7 cases, we focus in this essay on chapter 13 cases, where the practice is more likely to be profitable. See *infra* Part III(A).

<sup>10</sup> See *infra* Part III.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *infra* Part IV.

*Funding, LLC* to its end, with the Supreme Court’s decision in *Midland Funding v. Johnson*. We also outline how the bankruptcy system has struggled to address stale debt claims after *Midland Funding*. In Part III we consider the lessons of this short-lived legal theory on the utility of private litigation as a tool to achieve access to justice in consumer bankruptcy cases.

## I. ACCESS TO JUSTICE IN CONSUMER BANKRUPTCY

Bankruptcy plays a fundamental role in our social safety net.<sup>15</sup> When other forms of social protection (such as health insurance, unemployment, and social security) fail, consumer bankruptcy can provide consumers with an avenue to overcome the financial impact of their misfortune.<sup>16</sup> To that end, many scholars have described consumer bankruptcy as a form of social insurance.<sup>17</sup> A consumer’s ability to receive a discharge is a dominant feature of consumer bankruptcy’s role in the social safety net.<sup>18</sup> At the conclusion of a bankruptcy case, debtors emerge free of both the direct financial effects of misfortune (such as medical bills) as well as other obligations incurred during the period of financial turmoil.<sup>19</sup> Other bankruptcy features, such as the breathing space provided by the automatic stay, the ability to assume or reject executory contracts, and the right to hold some assets exempt from one’s creditors, likewise support these ends.<sup>20</sup>

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<sup>15</sup> The term “social safety net” refers to “a panoply of programs and policies in the United States that provide mechanisms to catch individuals when they are financially unable to provide basic and vital living expenses for themselves.” Robert J. Landry III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. ST. J. INT’L L. 343, 346 (2007). Examples of programs typically thought to comprise the social safety net include social security, Medicaid, the Family Medical Leave Act, welfare, SNAP, workers’ compensation, unemployment insurance, and Temporary Assistance to Needy Families. *Id.*

<sup>16</sup> See, e.g., Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. (forthcoming 2018) (manuscript at 7–8) (describing why, and how, debtors access bankruptcy); Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001) (exploring “the extent to which middle-class families have used bankruptcy as a safety net, or as insurance of last resort, in the financial aftermath of medical problems”); Landry & Yarbrough, *supra* note 15, at 347 (Where there are gaps in other social insurance or social assistance programs, “an individual’s level of debt naturally increases, and ultimately the need for consumer bankruptcy, the final layer in the social safety net, increases.”).

<sup>17</sup> Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 130 (2005) (describing consumer bankruptcy as an “insurer of last resort” and describing competing explanations for this social-insurance function).

<sup>18</sup> See *id.* at 140.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy’s Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 274 n.24 (2009). Some scholars have

The Code and accompanying Bankruptcy Rules provide a sophisticated structure for adjusting a debtor's financial obligations, ensuring the fair and ratable treatment of creditors, and awarding the debtor a fresh financial start. Yet despite its sophistication, the consumer bankruptcy process functions without a great deal of individualized oversight and attention.<sup>21</sup> Many dimensions of the Code and Rules are designed to function in an automated manner, reflexively moving a debtor toward discharge unless and until a party in interest objects.<sup>22</sup> This state of affairs is essential to maintaining a low cost of access to the bankruptcy forum, yet it is premised on the idea that all parties are participating in good faith.

In earlier writings, we have observed that this level of automation provides opportunities for under-compliance and abuse.<sup>23</sup> In particular, some creditors have shirked consumer bankruptcy's procedural requirements in an apparent effort to economize on administrative costs.<sup>24</sup> Other creditors have taken advantage of bankruptcy's regulatory gaps to draw more than they are entitled to receive from debtors' estates.<sup>25</sup> These actions can undermine foundational bankruptcy principles by, among other things, reducing the recoveries of creditors that have complied with bankruptcy law, causing some debtors to pay more out of pocket than they otherwise would have, or impairing debtors' fresh start after receiving a discharge in bankruptcy.<sup>26</sup> More broadly, creditors' lack of compliance can destabilize the bankruptcy system, increasing the relative costs of compliance and perhaps encouraging others to break the rules.

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observed that the specter of bankruptcy might provide indirect benefits to distressed individuals, as it might encourage creditors to adjust a debtor's financial obligations outside of the bankruptcy forum. Feibelman, *supra* note 17, at 141.

<sup>21</sup> See Bruce, *Debtor Class*, *supra* note 4.

<sup>22</sup> The Code's procedure for objecting to a debtor's claimed exemptions illustrates this aspect of the bankruptcy process. A trustee or a creditor has the right to challenge a debtor's claimed exemption, but absent any such objection, a debtor is entitled to it. See 11 U.S.C. § 522(l) (2012) ("Unless a party in interest objects, the property claimed as exempt on such list is exempt.")

<sup>23</sup> See Bruce, *Debtor Class*, *supra* note 4.

<sup>24</sup> See *id.* at 26–27. For example, creditors have robo-signed bankruptcy filings, sought relief from the automatic stay without standing to do so, and failed to invest in technology that could responsibly handle loan details when a debtor enters bankruptcy. *Id.*

<sup>25</sup> See *id.*; *infra* Part II(A). The proliferation of the debt buying industry might have exacerbated these problems in recent years. In *Life in the Sweatbox*, researchers from the Consumer Bankruptcy project highlight that the growth of the debt-buying industry has fundamentally changed the relationships between "creditors, debt collectors, and American families." See Foohey, et al., *supra* note 16, at 35. While the researchers posit that this shift might have altered the types of debtors who seek bankruptcy protection, it is plausible that this shift increased the incidence of aggressive or overreaching collection activity that occurs within bankruptcy cases.

<sup>26</sup> See Bruce, *Debtor Class*, *supra* note 4, at 31.

We have argued elsewhere that debtors in bankruptcy are well suited to address creditor under-compliance and abuse by bringing private lawsuits for damages.<sup>27</sup> Private lawsuits can augment bankruptcy's limited enforcement resources, removing burdens from overtaxed case trustees and the U.S. Trustee Program.<sup>28</sup> Private suits also permit debtors, who have the best access to information about certain bankruptcy-related wrongdoing, to play a key role in its correction.<sup>29</sup> Moreover, private lawsuits are more agile than time-consuming law and rule reform processes, and can more quickly keep pace with lender overreaching.<sup>30</sup>

Although scholars have recognized that consumers are not always effective proponents of private litigation, a variety of factors suggest that debtors in bankruptcy might be more effective than their non-bankrupt counterparts.<sup>31</sup> In light of these benefits, we have urged debtors to embrace their abilities to serve as their own advocates and play a more dominant role in policing the bankruptcy process for misconduct.<sup>32</sup> The following section explores the use of one such private litigation device.

## II. FDCPA LITIGATION IN BANKRUPTCY FROM *CRAWFORD* TO *MIDLAND FUNDING*

### A. *The Problem of Time-Barred Debt Claims*

In recent years, bulk debt purchasers have attempted to use the bankruptcy process to collect debts for which the statute of limitations has run.<sup>33</sup> Debt buyers, who buy large portfolios of old debts for mere pennies on the dollar,

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<sup>27</sup> See, e.g., Bruce, *Debtor Class*, *supra* note 4. Other scholars have observed that consumer bankruptcy can provide a particularly effective forum to vindicate consumer protection claims. For example, William Whitford argued that, in light of the low value of many consumer causes of action and resultant difficulty in litigating them in civil court, bankruptcy should be considered as a vehicle for consumers to resolve disputed transactions. William Whitford, *The Ideal of Individualized Justice*, 68 AM. BANKR. L. J. 397, 401 (1994) (likening a discharge in bankruptcy to successfully asserting a defense to a claim). Decades later, Katie Porter observed that most of the litigation surrounding the rampant mortgage servicer misconduct in the wake of the great recession occurred in bankruptcy cases. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 133 (2008).

<sup>28</sup> Bruce, *Debtor Class*, *supra* note 4, at 499.

<sup>29</sup> See *id.* at 500.

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 501–05.

<sup>32</sup> See generally *id.*

<sup>33</sup> See Kara Bruce, *Debt Buyers Beware: Filing Proofs of Claim for Time-Barred Debt in the Eleventh Circuit and Beyond*, 36 BANKR. L. LTR. No. 6 (June 2016) (describing this phenomenon).

have filed massive numbers of proofs of claim in bankruptcy cases throughout the nation.<sup>34</sup> Although this practice does not technically violate the Code or procedural rules, it exploits a weakness in bankruptcy's regulatory structure. Proofs of claim are entitled to *prima facie* validity.<sup>35</sup> As such, unless some party files an objection, claims will be allowed and will receive a portion of any distributions made from a debtor's estate.<sup>36</sup>

The parties who are most likely to discover a statute of limitations defense—debtors, their attorneys, or case trustees—do not always have the capacity or financial incentive to address time-barred debt claims.<sup>37</sup> As discussed in more detail below, trustees often carry very large caseloads and lack information necessary to determining whether the claim is valid.<sup>38</sup> Moreover, trustees may lack the financial incentive to object where the costs of objecting outweigh any pecuniary benefit to the estate. Debtors might have better information about the status of a debt, but also may lack the financial incentive to object to claims because the allowance or disallowance of a stale-debt claim will typically not alter their personal outcomes in bankruptcy.<sup>39</sup> Indeed, debtors might have strong disincentives to object to stale-debt claims when their attorney's fee agreements do not include that service.<sup>40</sup> Those debtors who seek bankruptcy relief without the assistance of an attorney rarely (if ever) object to claims filed in their bankruptcy cases.<sup>41</sup> Conversely, debt buyers typically face no penalty for the filing proofs of claim that are later disallowed.

The business practice underlying the collection of time-barred debt capitalizes on these asymmetries, allowing debt buyers to profit in the likely case that some of the thousands of stale claims filed will pass through the bankruptcy

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<sup>34</sup> See generally Kara Bruce, *Midland Funding v. Johnson and the Pernicious Problem of Stale-Debt Claims*, 50 LOY. L.A. L. REV. (forthcoming 2018) (on file with author).

<sup>35</sup> 11 U.S.C. § 502(b)(1) (2012) (providing that a claim shall be allowed "except to the extent that . . . such claim is unenforceable . . . under any agreement or applicable law").

<sup>36</sup> See Bruce, *Debt Buyers Beware*, *supra* note 33, at 2.

<sup>37</sup> See *id.* at 3–4 (discussing the various impediments to trustees, debtors' attorneys, and other parties robustly reviewing claims).

<sup>38</sup> See *infra* text accompanying note 80.

<sup>39</sup> Hon. W. Homer Drake, Jr., et. al., § 17:3 *Duties of trustee*, in CHAPTER 13: PRACTICE AND PROCEDURE (2d ed. 2017) (noting that in a chapter 13 bankruptcy case, "unless the debtor's plan provides for the payment of all unsecured claims in full, disallowance of reduction of an unsecured claim may not affect how much she pays to complete her plan").

<sup>40</sup> *Id.*; see also Bruce, *Debtor Class*, *supra* note 4, at 504 (explaining that fee agreements in bankruptcy often carve out adversary matters to ensure a low cost of access to bankruptcy).

<sup>41</sup> See, e.g., *In re Edwards*, 539 B.R. 360, 366 (Bankr. N.D. Ill. 2015) (noting that the judge "Cannot recall a single *pro se* debtor who has [filed a claim objection] in 16 years").

process.<sup>42</sup> Although this practice can be employed in both chapter 7 and 13 cases, it is more likely to be profitable in chapter 13 cases, many of which contemplate at least some payments to unsecured creditors.

Debtors' attorneys have attempted to fashion a solution to the mass filing of time-barred debt claims by, among other things,<sup>43</sup> bringing suit under the FDCPA. The FDCPA prohibits debt collectors from engaging in false, deceptive, misleading, unfair, or unconscionable debt-collection practices.<sup>44</sup> It provides debtors with a private right of action and the ability to recover statutory damages and attorneys' fees for debt-collection activities that violate the Act.<sup>45</sup> FDCPA claims that challenge the practice of filing proofs of claims filed for time-barred debt have gained particular traction in the Eleventh Circuit.

In *Crawford v. LVNV Funding LLC*, the Eleventh Circuit reversed the bankruptcy and district courts to hold that filing a proof of claim for time-barred debt violates the FDCPA.<sup>46</sup> In so holding, the court analogized the filing of a time-barred debt claim to filing a lawsuit to collect a time-barred debt, which courts have uniformly held violates the FDCPA.<sup>47</sup> Almost two years later, in *Johnson v. Midland Funding, LLC*, the Eleventh Circuit confronted a question the *Crawford* court "dodged"—the extent to which the FDCPA can apply in bankruptcy's proof-of-claim context.<sup>48</sup> There, the court held that the FDCPA could apply to address proof-of-claim matters in bankruptcy.<sup>49</sup>

The legal theory in *Crawford* has gained little support outside of the Eleventh Circuit. Although many courts have held, like *Johnson*, that the FDCPA can apply to bankruptcy's proof of claim process,<sup>50</sup> far fewer have

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<sup>42</sup> *Id.*

<sup>43</sup> We discuss alternative legal theories for challenging this conduct in Part III(C), below.

<sup>44</sup> 15 U.S.C. §§ 1692(e), (f) (2012).

<sup>45</sup> *Id.* § 1692(k).

<sup>46</sup> *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

<sup>47</sup> *Id.* at 1259, 1262 ("Just as LVNV would have violated the FDCPA by filing a lawsuit on stale claims in state court, LVNV violated the FDCPA by filing a stale claim in bankruptcy court.")

<sup>48</sup> *Johnson v. Midland Funding, LLC*, 823 F.3d 1334, 1338 (11th Cir.), *cert. granted*, 137 S. Ct. 326 (2016), and *rev'd*, 137 S. Ct. 1407, (2017), and *vacated*, 868 F.3d 1241 (11th Cir. 2017).

<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.*, *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004); *Simon v. FIA Card Servs. N.A.*, 732 F.3d 259, 271 (3d Cir. 2013). *But see* *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002); *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2nd Cir. 2010).



followed *Crawford*'s invitation to hold that filing a time-barred claim violates the FDCPA.<sup>51</sup>

The Supreme Court granted *certiorari* in *Midland Funding* to resolve two issues: (1) whether filing a proof of claim that accurately asserts a time-barred debt violates the FDCPA; and (2) whether the Code precludes the application of the FDCPA to this issue.<sup>52</sup> In a 5-3 decision,<sup>53</sup> the Court resolved only the first issue. It held that filing a time-barred debt claim, without more, does not violate the FDCPA.<sup>54</sup> The following section provides a very brief overview of the Court's opinion in *Midland Funding*.

### B. *Midland Funding v. Johnson*

The majority opinion in *Midland Funding*, authored by Justice Breyer and joined by four justices, quickly concluded that filing a proof of claim for time-barred debt was not false, deceptive, or misleading under the terms of the FDCPA.<sup>55</sup> The Court noted that the running of the statute of limitations did not change the fact that creditors had a "claim" against the debtor's bankruptcy estate and were therefore entitled to file a proof of claim.<sup>56</sup> It underscored that the statute of limitations was an affirmative defense, which the debtor or trustee had the burden to raise.<sup>57</sup> Taken together, there was nothing false, deceptive, or misleading in filing an accurate claim for a debt that was subject to a statute-of-limitations defense.

The bulk of the Court's opinion focused on whether the practice of filing stale debt claims was "unfair and unconscionable" under the FDCPA.<sup>58</sup> The majority rejected the analogy, drawn in *Crawford*, that filing a proof of claim to

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<sup>51</sup> See, e.g., *In re Gatewood*, 533 B.R. 905, 909 (B.A.P. 8th Cir. 2015) (disagreeing with *Crawford*); *Broadrick v. LVNV Funding, LLC (In re Broadrick)*, 532 B.R. 60 (Bankr. M.D. Tenn. 2015) (same); *Donaldson v. LVNV Funding, LLC*, 97 F. Supp. 3d 1033 (S.D. Ind. 2015) (same); *LaGrone v. LVNV Funding LLC (In re LaGrone)*, 525 B.R. 419, 427 (Bankr. N.D. Ill. 2015) (same); *Torres v. Cavalry SPV I, LLC*, 530 B.R. 268 (E.D. Pa. 2015) (same); *Jenkins v. Genesis Fin. Solutions (In re Jenkins)*, 456 B.R. 236 (Bankr. E.D. N.C. 2011) (same); *B-Real, LLC v. Rogers*, 405 B.R. 428 (M.D. La. 2009) (same).

<sup>52</sup> Petition for Writ of Certiorari, *Midland Funding, LLC*, 137 S. Ct. 326 (No. 16-348).

<sup>53</sup> Justice Gorsuch took no part in the decision.

<sup>54</sup> *Midland Funding, LLC v. Johnson*, 136 S. Ct. 1407 (2017). The Court did not determine the extent to which the FDCPA can punish bankruptcy-related misconduct.

<sup>55</sup> *Id.* at 1411–12.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 1413.

collect a time-barred debt is equivalent to filing suit in civil court.<sup>59</sup> It held that the analysis supporting those holdings “ha[s] significantly diminished force in a chapter 13 bankruptcy.”<sup>60</sup> The Court relied on several procedural points to support this distinction. First, because consumers voluntarily initiate their chapter 13 bankruptcy cases, they are unlikely to be bullied into paying a stale debt to avoid the cost and embarrassment of a lawsuit.<sup>61</sup> Second, a “knowledgeable trustee” is appointed in each consumer’s bankruptcy case.<sup>62</sup> Finally, “procedural bankruptcy rules more directly guide the evaluation of claims.”<sup>63</sup> As such, the Court held that bankruptcy’s claims resolution process is “a more streamlined and less unnerving prospect” than a civil suit to collect time-barred debt.”<sup>64</sup>

Conversely, the majority repeatedly expressed its concern that allowing FDCPA lawsuits to augment the claims-resolution process would harm the bankruptcy system. The Court highlighted, among other things, that to apply the FDCPA in bankruptcy would “authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it”;<sup>65</sup> “permit postbankruptcy litigation in an ordinary civil court concerning a creditor’s state of mind”;<sup>66</sup> “require creditors . . . to investigate the merits of an affirmative defense (typically the debtor’s job to assert and prove);<sup>67</sup> result in “added complexity [and] changes in settlement incentives”;<sup>68</sup> and upset the “delicate balance” of debtor and creditor protections that the Code seeks to achieve.<sup>69</sup> Certain of these statements echo Justice Breyer’s concern, expressed during oral argument, that permitting the FDCPA to augment the Code would authorize duplicative remedies for debtors or others affected by this practice.<sup>70</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (quoting *Gatewood*, 533 B.R. at 909).

<sup>64</sup> *Id.* at 1409–10 (quoting *Gatewood*, 533 B.R. at 909).

<sup>65</sup> *Id.* at 1414.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See* Transcript of Oral Argument at 44, *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017) (No. 16-348), available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/16-348\\_2cp3.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-348_2cp3.pdf) (“We then have the FTC that could [address debt buyers’ business practice]. We have the sanctions in the Bankruptcy Code, and now you want this, too?”).

The dissent, authored by Justice Sotomayor and joined by Justices Ginsburg and Kagan, highlighted the lack of evidentiary support for the majority’s reliance on the structural protections of bankruptcy.<sup>71</sup> The dissent pointedly referred to the expressed positions of the government and chapter 13 trustees that belie such reliance.<sup>72</sup> The dissent also underscored that bankruptcy’s procedural rules facilitate the allowance of time-barred debt claims and asserted that debtors under bankruptcy protection are “arguably more vulnerable in bankruptcy—not less—to the oversights that the debt buyers know will occur.”<sup>73</sup>

The dissent prefaced this discussion with an extensive description of debt-buying industry, highlighting its scope, the low prices debt buyers pay for most consumer claims, and the industry’s historical practice of filing lawsuits to collect stale debt claims.<sup>74</sup> The dissent took pains to explain how the FDCPA has successfully “beaten back” debt buyers’ efforts to collect stale debt in state court. It found “no sound reason” that the Act should not be similarly employed in bankruptcy.<sup>75</sup>

Yet a case decided by the Supreme Court less than a month after *Midland Funding* risks removing the entire debt-buying industry from the scope of the FDCPA. In *Henson v. Santander Consumer USA*, the Court unanimously held that third-party debt buyers, like *Midland Funding* in the case at hand, do not necessarily qualify as “debt collectors” under the FDCPA.<sup>76</sup> While the unique facts of *Santander* might justify a narrow interpretation of this precedent,<sup>77</sup> this case has the potential to further undermine the applicability of the FDCPA in bankruptcy and other contexts.

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<sup>71</sup> *Midland Funding, LLC*, 136 S. Ct. at 1420 (Sotomayor, J., dissenting).

<sup>72</sup> *Id.* at 1420–21 (Sotomayor, J., dissenting) (“Everyone with actual experience in the matter insists [the majority’s *ipse dixit*] is false.”). For example, the Government asserted in its briefing that trustees “cannot realistically be expected to identify every time-barred . . . claim filed in every bankruptcy.” Brief for United States as Amicus Curiae Supporting Respondents at 25–26, *Midland Funding, LLC v. Johnson*, 137 S. Ct. 326 (2016) (No. 16-348). The National Association of Chapter 13 Trustees (NACTT)’s amicus brief explained that trustees’ fiduciary duties, which extend primarily to the estate, do not require them to object time-barred claims “in every instance” and to impose such a requirement would be “wasteful” and impose unnecessary costs on both debtors and other creditors with claims against a debtor’s estate. Brief for National Association of Chapter Thirteen Trustees as Amici Curiae Supporting Respondent at 16, *Midland Funding, LLC v. Johnson*, 137 S. Ct. 326 (2016) (No. 16-348) [hereinafter NACTT Brief].

<sup>73</sup> *Id.* at 1421 (Sotomayor, J., dissenting).

<sup>74</sup> *Id.* at 1416–18 (Sotomayor, J., dissenting).

<sup>75</sup> *Id.* at 1417 (Sotomayor, J., dissenting).

<sup>76</sup> See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017).

<sup>77</sup> See Kara Bruce, *The Supreme Court’s 2017 FDCPA Rundown*, 37 BANKRUPTCY LAW LETTER No. 9 (Sept. 2017).

### C. In Search of a Path to Justice After Midland Funding

Despite the *Midland Funding* Court's confidence in consumer bankruptcy's structural protections, the bankruptcy system continues to struggle to address the problem of time-barred debt claims. The Court's restriction of the FDCPA in this context has the effect of making stale debts more valuable in bankruptcy than outside of it.<sup>78</sup> It also creates a dynamic where claims filers can impose the costs of their business strategy on trustees, debtors, and the bankruptcy system as a whole. This section briefly outlines how various bankruptcy participants, including chapter 13 trustees, debtors, and the U.S. Trustee Program, have attempted to address the problem of time-barred debt claims, and the challenges that they have encountered in doing so.

#### 1. Chapter 13 Trustees

The Court's opinion in *Midland Funding* expressed confidence in chapter 13 trustees' abilities to address time-barred debt claims through a case-by-case review and objection. And at least in theory, a trustee is well suited to root out this type of behavior. Yet, trustees face both legal and practical challenges in carrying this burden.<sup>79</sup>

First, both volume and information challenges impair trustees' abilities to police stale-debt claims. Many chapter 13 trustees have thousands of active cases at any given time, and each case can feature dozens of proofs of claim. The sheer number of filed claims makes the case-by-case review daunting for statute of limitations defenses and other deficiencies. Evaluating claims for statutes-of-limitation defenses can be particularly challenging because it can require investigation of choice of law, tolling, and revival, information to which the trustee might not have ready access.<sup>80</sup> Trustees have sound arguments that other bankruptcy participants, including debtors (and their counsel) and the creditor filing the proof of claim, have superior information to assess a claim's staleness. Moreover, in light of these challenges, trustees have argued that they (and other

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<sup>78</sup> Courts have uniformly held that filing a lawsuit to collect stale debt violates the FDCPA. *See, e.g.*, *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987); *Huertas v. Galaxy Asset Management*, 641 F.3d 28, 32–33 (3d Cir. 2011); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001).

<sup>79</sup> The Supreme Court's recent decision in *Midland Funding, LLC v. Johnson* brought into sharp focus an information gap regarding the role and capacity of chapter 13 trustees. We are currently in the midst of a survey project that reviews how trustees are responding to this new burden in light of these challenges.

<sup>80</sup> NACTT Brief, *supra* note 72, at 14.

creditors) should be able to assume that a creditor seeking an estate distribution is “knowledgeable about statutes of limitation” and has “a good-faith belief that its claim is enforceable.”<sup>81</sup>

Second, trustees who undertake a more robust review of claims for statute-of-limitations defenses might do so at the expense of their fiduciary duties to the estate. The Code charges trustees with the duty to “examine proofs of claims and object to the allowance of any claim that is improper,” but only “if a purpose would be served” by doing so.<sup>82</sup> The Code does not explain “when a purpose would be served” by objecting, but this language is generally understood to require trustees to object when “other creditors would receive a greater distribution if the claims objections were pursued.”<sup>83</sup> In many bankruptcy cases, the distributions expected by creditors are minimal, and the costs of extensive review and claims objections might quickly overshadow any benefit to the estate.<sup>84</sup> Thus, an economic purpose might *not* be served by objecting to a claim in an individual case, notwithstanding the fact that allowing improper claims on an aggregate basis might have widespread effects on the bankruptcy system. To be sure, this calculus is difficult to make conclusively in chapter 13 cases because most plans contemplate some distribution to unsecured creditors, and because the administrative costs of objecting are dispersed across the chapter 13 system.<sup>85</sup> Yet it is clear that the expectation outlined in *Midland Funding* is to some extent in tension with this statutory obligation.

It is certainly possible that these strains on case trustees will increase, now that *Midland Funding* has neutralized a significant threat of liability for the practice of mass filing of time-barred debt claims. Indeed, as the following

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<sup>81</sup> *Id.* at 15.

<sup>82</sup> 11 U.S.C. §§ 704(a)(5), 1302(b)(1) (2012).

<sup>83</sup> Hon. Steven Rhodes, *The Fiduciary and Institutional Obligations of A Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 176 (2006) (discussing the duty to object in the chapter 7 context); Hon. W. Homer Drake, Jr., et al., *Chapter 13 Trustee's Rights, Powers, and Duties*, in CHAPTER 13: PRACTICE AND PROCEDURE (2d ed. 2017) (noting “A Chapter 13 trustee is likely to object to a proof of claim when, *inter alia*, she becomes aware that the claim is objectionable and its allowance will dilute the recovery to the unsecured claimants”); 8 COLLIER ON BANKRUPTCY ¶ 1302.03[d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (suggesting a purpose will frequently be served in chapter 13 cases, “since substantial distributions are likely to be made to holders of allowed claims”); *Thompson v. Bronitsky*, No. 13-04793, 2014 WL 2452043, at \*6 (N.D. Cal. May 30, 2014) (collecting case law supporting the contention that the trustee has the discretion not to object to the claim if she finds no purpose would be served).

<sup>84</sup> NACTT Brief, *supra* note 72, at 16 (“If a debtor’s plan guarantees full payment of unsecured claims, the debtor is the only party affected in any significant way by the allowance of a particular claim. In that situation, the trustee does not have the clear duty to object to a stale claim because no purpose under the trustee’s purview would be served.”).

<sup>85</sup> Henry E. Hildebrand III, *A Chapter 13 Trustee's Duty to Object to Claims an Obligation to Bring Fairness to the System*, 31 AM. BANKR. INST. J. 40 (2012).

sections discuss in more detail, creditors have few incentives not to file a stale claim and hope it escapes detection.

## 2. *Private Suits by Debtors*

Debtors have asserted a variety of alternative legal theories to challenge the filing of stale-debt claims, both in an individual capacity and on behalf of a putative class. In particular, debtors have alleged that the business practice of flooding courts with time-barred debt claims is sanctionable under Bankruptcy Rule 9011, an abuse of process punished by the court's inherent or statutory contempt powers, or a fraud on the court. As described in this section, these claims have largely failed to survive motions to dismiss.

At first blush, the practice of filing time-barred debt claims might seem to violate either Rule 9011(b)(1), as it arguably takes advantage of the prima-facie validity of claims under § 502, or 9011(b)(2), on the theory that creditors who file time-barred debt claims fail to conduct a reasonable inquiry into the merits of the claims before filing.<sup>86</sup> With limited exceptions,<sup>87</sup> courts have rejected both of these arguments. Courts cite to the Code's broad definition of "claim," and the procedural reality that the debtor or trustee bears the burden of raising a statute-of-limitations defense.<sup>88</sup> Moreover, in light of the unsettled application of the law to the practice of filing stale-debt claims, most courts have held that their filing cannot be considered frivolous.<sup>89</sup>

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<sup>86</sup> Federal Rule of Bankruptcy Procedure 9011 provides that parties who file documents in a bankruptcy case certify, among other things, that "after an inquiry reasonable under the circumstances," they have determined that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Rule 9011 also prohibits the submission of proofs of claim "for any improper purpose, such as to harass or to cause delay or needless increase in the cost of litigation." FED. R. BANKR. P. 9011(b)(1), (b)(2).

<sup>87</sup> See *Matter of Sekema*, 523 B.R. 651 (Bankr. N.D. Ind. 2015) (awarding sanctions, *sua sponte*, against creditor that failed to take account of "blindingly obvious" statute-of-limitations defense); *In re Feggins*, 535 B.R. 862, 867–69 (Bankr. M.D. Ala. 2015) (suggesting in dictum that the only purpose of filing time-barred debt claim is to take advantage of the claims-allowance process).

<sup>88</sup> See, e.g., *In re Freeman-Clay*, 578 B.R. 423, 441 (Bankr. W.D. Mo. 2017) ("[T]he mere filing of a claim barred by the applicable statute of limitations, even by an entity with knowledge of the bar and without a good faith basis for contravening the defense, is not itself sanctionable if the expiration of the statute of limitations does not extinguish the claim under the applicable law.").

<sup>89</sup> See, e.g., *In re Edwards*, 539 B.R. 360, 367 (Bankr. N.D. Ill. 2015) ("[G]iven the split of authority in this circuit and elsewhere . . . there is no basis for sanctioning the defendants for filing their proofs of claim in this case in any event."); *In re Freeman*, 540 B.R. 129, 144 (Bankr. E.D. Pa. 2015) ("[G]iven the split in the case law, it is difficult to see how sanctions under Rule 9011(b)(2) can be imposed on claimants filing stale proofs of claim."); *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008) (acknowledging "a substantial body of existing case law upon which Roundup and B-Real reasonably relied" and finding sanctions were not justified).

Courts have, for similar reasons, declined to exercise their statutory contempt powers or inherent authority punish the filing of time-barred debt claims as an “abuse of process.”<sup>90</sup> Even assuming the courts have the authority to sanction improper claim practices, a question that has divided courts,<sup>91</sup> the filing of a time-barred claim does not strike many courts as conduct deserving of sanction.<sup>92</sup> Courts again point to the fact that the Code’s definition of claim is broad enough to include most claims subject to a statute-of-limitations defense.<sup>93</sup> Because the practice of filing time-barred debt claims does not violate the Code or Rules, and because the Code and Rules place the burden for asserting statute of limitations defenses on the trustee or debtor, these courts hold that § 105 cannot be invoked to redress stale debt claims.<sup>94</sup>

Federal and state non-bankruptcy claims for vexatious litigation and unfair, deceptive, or abusive acts and practices (UDAAPs) have also failed to gain traction as a means to address stale debt claims.<sup>95</sup> Most courts have held that the Code preempts state-law UDAAP claims.<sup>96</sup> Courts that have considered whether filing a proof of claim for time-barred debt violates other federal statutes have held that it does not.<sup>97</sup>

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<sup>90</sup> Section 105 provides courts with the authority to “tak[e] any action or mak[e] any determination necessary or appropriate to . . . prevent an abuse of process.”

<sup>91</sup> Compare *Yancey v. Citifinancial, Inc. (In re Yancey)*, 301 B.R. 861, 868–69 (Bankr. W.D. Tenn. 2003) (§ 105 cannot justify a private right of action for improper claim practices); *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 699–700 (Bankr. N.D. Ill. 1999) (same); *Lenior v. GE Capital Corp. (In re Lenior)*, 231 B.R. 662, 673 (Bankr. N.D. Ill. 1999) (same); *Simmons v. Ford Motor Credit Co. (In re Simmons)*, 237 B.R. 672, 674 (Bankr. N.D. Ill. 1999) (same); *with Kerney v. Capital One Fin. Corp. (In re Sims)*, 278 B.R. 457, 480–81 (Bankr. E.D. Tenn. 2002) (§ 105 permits the issuance of contempt sanctions for improper proofs of claim); *In re Dansereau*, 274 B.R. 686, 689–90 (Bankr. W.D. Tex. 2002) (same); *Tate v. NationsBanc Mortgage Corp. (In re Tate)*, 253 B.R. 653, 667–69 (Bankr. W.D.N.C. 2000) (same).

<sup>92</sup> See *In re Varona*, 388 B.R. at 723 (“The claims facially indicate the circumstances under which they were incurred; there is no attempt to obfuscate the timing of their incurrence . . . . As such, asserting the claims in the bankruptcy . . . does not render the claims either “false” or “fraudulent” and the imposition of sanctions is not appropriate.”).

<sup>93</sup> In most jurisdictions, the running of the statute of limitations does not extinguish the underlying debt.

<sup>94</sup> See *In re Keeler*, 440 B.R. 354, 366–67 (Bankr. E.D. Pa. 2009) (“Given that section 501(a) authorizes every creditor holding a claim to file a proof of claim, even if that claim is later disallowed under section 502(b), section 105(a) does not state a cause of action to sanction such a filing.”); see also *In re Freeman-Clay*, 578 B.R. at 443 (collecting authority).

<sup>95</sup> See, e.g., *In re Keeler*, 440 B.R. at 367 (holding claims for violation of state consumer protection laws are preempted by bankruptcy law); *In re Chaussee*, 399 B.R. 225, 229–34 (9th Cir. BAP 2008) (same); *In re Pariseau*, 395 B.R. 492, 494–95 (Bankr. M.D. Fla. 2008) (same).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *In re Edwards*, 539 B.R. at 367 (dismissing claims for “fraud on the court” under 18 U.S.C. §§ 152, 3571 because these provisions do not provide a private right of action); *In re Keeler*, 440 B.R. at 367 (“No action was taken that has been unreasonable or vexatious [under 28 U.S.C. § 1927].”).

Taken together, this growing body of case law suggests that, absent an amendment to the Code or Rules, debtor-driven private remedies are unlikely to provide a solution to the business practice of filing time-barred debt claims.

### 3. *Action by the United States Trustee Program*

The U.S. Trustee Program has also pursued litigation to challenge the practice of filing stale-debt claims as an abuse of process in violation of Rule 9011. While *Midland Funding* was on appeal, the U.S. Trustee Program sought a nationwide injunction, appointment of a monitor, monetary damages, and the imposition of sanctions against several debt purchasers for their “systematic abuse of the bankruptcy process.”<sup>98</sup> The Bankruptcy Court for the Western District of Missouri held that the debt buyers’ practices of filing robo-signed, stale claims, while “unsavory or worse,” did not merit an award of sanctions.<sup>99</sup>

The court first noted that to impose sanctions under its inherent authority, or § 105, required a finding of bad faith or willful misconduct.<sup>100</sup> It held that the U.S. Trustee failed to allege that the robo-signing of claims was committed in bad faith, and that the U.S. Trustee sought relief beyond the compensatory or coercive sanctions bankruptcy courts are authorized to impose.<sup>101</sup> The court further held that knowingly filing a stale debt claim is not sanctionable conduct under Rule 9011 because existing law both permits such conduct and contemplates that the trustee or the debtor will assert the statute of limitations as an affirmative defense.<sup>102</sup> It is only if a creditor continues to press the stale-debt claim after the statute of limitations has been raised as a defense that Rule 9011 sanctions come into play.<sup>103</sup> Finally, the bankruptcy court declined to use § 105 to sanction the systemic filing of stale-debt claims where Rule 9011 already provides a framework for sanctions if the circumstances warrant it.<sup>104</sup> Like many courts before it, this court held that it would require “changes made either by Congress or the Rules Committee” to make this behavior sanctionable.<sup>105</sup>

In the absence of a litigation-based solution or an amendment to the Code or Rules, the U.S. Trustee Program also appears to be relying on case trustees to

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<sup>98</sup> *In re Freeman-Clay*, 578 B.R. at 444.

<sup>99</sup> *Id.* at 427.

<sup>100</sup> *Id.* at 436.

<sup>101</sup> *Id.* at 436–37.

<sup>102</sup> *Id.* at 444.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 443–44.

<sup>105</sup> *Id.* at 444.



absorb the burden of claim review and objection. Indeed, the Executive Director of the U.S. Trustee Program has at several times mentioned his expectation that trustees will do more to address problems with proofs of claim.<sup>106</sup> In addition, the U.S. Trustee Program may consider formal guidance to trustees on this topic. While such guidance has potential to promote uniformity in the process of claim review and objection for chapter 13 trustees across districts, it raises several issues.

First, requiring trustees to review and object to all claims would impose new costs on the bankruptcy system. Chapter 13 trustees might need to hire additional staff and legal counsel to handle the increased burden of claims review and objection, which increases their aggregate administrative costs. While the U.S. Trustee Program could raise chapter 13 trustees' percentage fee to accommodate the increased workload, the result of such an increase would be to reduce the dividends paid to complying creditors.<sup>107</sup> Second, as we discussed earlier, this state of affairs might run afoul of the trustee's statutory burden to object to claims "where a purpose would be served."<sup>108</sup> The Code provides trustees with a degree of discretion over selecting claims appropriate for objection.<sup>109</sup> A policy meant to address how trustees carry out their statutory duty has potential to intrude upon that discretion, for instance, by requiring a trustee to object to a claim in an individual case because of the claim's staleness, even where the economics of the case do not justify it.

Additionally, the nuts and bolts of chapter 13 trustee practice vary from district to district such that a one-size-fits-all guidance model may tax the resources of some trustee offices more than others. Trustees' existing claim review and objection procedures and practices are tailored to the unique characteristics of their districts, judges, and dockets. For instance, the volume of claims in some districts may be so large that individual claim scrutiny is extremely challenging, in light of existing staffing and other resources. Also, the

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<sup>106</sup> See, e.g., Director Addresses the 52<sup>nd</sup> Annual Seminar of the National Association of Chapter 13 Trustees, July 13, 2007, available at <https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees> ("Even though it increases the cost of administration, and those costs ultimately are borne by legitimate creditors, I am calling upon all chapter 13 trustees to identify stale debt claims and to object to stale debt claims that they uncover.").

<sup>107</sup> Remarks of Clifford J. White III at the 2016 Annual Convention of the National Association of Bankruptcy Trustees, available at [https://www.justice.gov/ust/file/nabt\\_annual\\_conference\\_09092016.pdf/download](https://www.justice.gov/ust/file/nabt_annual_conference_09092016.pdf/download) (considering the financial impact of a formal policy of objecting to stale debt claims).

<sup>108</sup> See *supra* text accompanying notes 82–85.

<sup>109</sup> See *In re Thompson*, 2014 WL 2452043, at \*6 ("Congress gave [chapter 13] trustees discretion not to examine and object to proofs of claim if no purpose would be served."); *In re Day*, No. 07-13016-RGM, 2009 WL 3233160, at \*4 (Bankr. E.D. Va. Sept. 30, 2009) ("A trustee has some discretion not to object to a proof of claim . . . where no purpose would be served by objecting to the claim.").

role of custom cannot be ignored. While one trustee might contact a creditor's attorney upon identifying an improper claim, another trustee may not need to do so because the debtor's attorney typically objects. Thus, any guidance would need to be flexible enough to account for these varied characteristics of the districts, such as whether a district has multiple trustees or a single trustee, the range in claim volume across districts, any local rules or general orders that regulate trustee practice, to name a few.

#### *D. Looking Forward*

The preceding sections have explained how the bankruptcy system lacks a clear alternative to FDCPA litigation to address the mass filing of time-barred-debt claims. The efforts of case trustees, the U.S. Trustee Program, and individual debtors acting as private litigants underscore this enforcement gap. Absent the threat of a penalty to deter this conduct, debt buyers can continue to exploit the remedial gaps in the bankruptcy system. While the case-by-case review and objection can neutralize any stale debt claim filed in any individual case, the massive numbers of claims filed strain the utility of this solution. Moreover, bankruptcy law and procedural rules that contemplate a case-by-case resolution shelter this practice from a global remedy.

In light of these realities, many have concluded that amendments to the Code or Bankruptcy Rules are the next logical step. Courts and commenters have suggested a range of changes, including amending § 501 to require creditors who file claims to do so with a good faith belief that they are allowable, or amending the Rules to require creditors to make a similar certification when they submit proofs of claim.<sup>110</sup> Such efforts are likely to be resisted by industry participants, who would bear the cost of increased pre-filing scrutiny. They will also face the political challenges typical of any reform effort. Moreover, the Bankruptcy Rules Advisory Committee's authority to address this problem without complementary Congressional action is constrained by the Rules Enabling Act.<sup>111</sup>

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<sup>110</sup> See *In re Keeler*, 440 B.R. 354, 366–67 (Bankr. E.D. Pa. 2009).

<sup>111</sup> The Rules Enabling Act provides the Supreme Court the power “the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11.” 28 U.S.C. § 2075. Unlike other provisions of the Rules Enabling Act, which govern general rules of practice and procedure and rules of evidence, the rule applicable to bankruptcy lacks language that allows the newly enacted rule to supersede laws in conflict (as long as the new rule does not affect substantive rights). Compare 28 U.S.C. § 2072(b) (providing that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect”); with 28 U.S.C. § 2075 (lacking this language). Accordingly, “bankruptcy

Our ongoing research examines whether the beleaguered Consumer Financial Protection Bureau (CFPB), or other federal agencies with overlapping jurisdiction, might also play a role in addressing this problem. The CFPB has used its authority to regulate some aspects of mortgage creditor conduct in bankruptcy, after reaching a considered conclusion that such regulation would not interfere with bankruptcy law.<sup>112</sup> Moreover, it appears that the Bureau's authority under Dodd-Frank may be broad enough to fashion a solution that targets the business practice of filing stale-debt claims as an unfair and deceptive practice. As noted above, the Supreme Court's recent decision in *Henson v. Santander Consumer USA* calls into question whether third-party debt buyers still qualify as "debt collectors" for FDCPA purposes,<sup>113</sup> but Dodd-Frank gives the CFPB broader authority to regulate debt collectors, including debt buyers,<sup>114</sup> and makes it unlawful for them to commit or engage in unfair, deceptive, or abusive acts or practices, commonly referred to as UDAAPs.<sup>115</sup> The CFPB has authority to prescribe rules banning UDAAPs and to pursue enforcement actions to combat them.<sup>116</sup> It theoretically could leverage this authority to address the stale debt claims in bankruptcy.<sup>117</sup> In a forthcoming work, we will consider in more detail how the Bureau might provide an alternative global solution to the problem of stale-debt filers.

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rules are the only federal rules that may not conflict with a procedural statutory provision." Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245, 262 (1996).

<sup>112</sup> 81 Fed Reg. 72160, 72320–22 (Oct. 19, 2016) (2016 Mortgage Servicing Rule) (considering whether regulating the provision of periodic statements for mortgages in bankruptcy would be consistent with, rather than conflict with bankruptcy law).

<sup>113</sup> See *Henson v. Santander Consumer USA*, 137 S. Ct. 1718, 1722 (2017).

<sup>114</sup> See 12 U.S.C. §§ 5481(5), (6), (15)(A)(x). The CFPB has authority to regulate "covered persons," defined to include persons who offer or provide a "consumer financial product or service," which in turn is defined to include "collecting debt related to any consumer financial product or service."

<sup>115</sup> Dodd-Frank makes it unlawful for any person who offers or provides consumer financial products or services (or their service providers) to engage in any unfair, deceptive, or abusive act or practice, commonly referred to as UDAAPs. See Dodd-Frank Act §1036, *codified at* 12 U.S.C. §5536.

<sup>116</sup> See Dodd-Frank Act §1031, *codified at* 12 U.S.C. §5531.

<sup>117</sup> The Federal Trade Commission (FTC) may have some overlapping authority here. The FTC Act authorizes the agency to pursue enforcement actions against nonbank debt buyers for unfair or deceptive acts and practices. See 15 U.S.C. §45(a). As required by Dodd-Frank, the agencies have entered into a Memorandum of Understanding to coordinate enforcement and rulemaking activities and promote information sharing between the agencies. See 12 U.S.C. §5495; Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade Commission, <https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf> (last visited Apr. 11, 2017).

### III. *MIDLAND FUNDING* AND PRIVATE LITIGATION'S ROLE IN ACCESS TO JUSTICE

The arc of stale-claim litigation, beginning with *Crawford* and ending with *Midland Funding*, provides a unique lens to examine the effectiveness of private lawsuits in consumer bankruptcy cases. In this section, we draw some initial conclusions on how the stale-claim litigation blitz attempted to provide some degree of access to justice, and where it might have fallen short.

From a structural perspective, the surge of FDCPA cases challenging the practice of filing stale-debt claims represents a classic application of private litigation to solve a new regulatory problem. In response to a gap in enforcement that permitted these stale claims to pass through the bankruptcy system unchecked, debtors and their attorneys leveraged the FDCPA's litigation incentives to address the conduct.<sup>118</sup> The FDCPA acted nimbly and quickly to address an emerging problem through private suits for damages, requiring no investment of public resources or complicated law reform efforts to do so.<sup>119</sup> Moreover, these cases redirected the investigation and prosecution of claims-related issues onto individual debtors, who have better access to information about the relevant statutes-of-limitation defenses than the trustees who are statutorily directed to address this conduct. Conversely, now that FDCPA litigation and other private remedies have largely failed, the bankruptcy system has strained to address the problem of stale-debt claims.<sup>120</sup>

Yet the swell of FDCPA claims undoubtedly placed new pressures the dockets of bankruptcy and district courts across the nation, while potentially failing to provide the benefits that litigants anticipated. Importantly, the cases that preceded *Midland Funding* were not particularly successful on the merits. As noted above, most courts outside of the Eleventh Circuit rejected *Crawford*, holding either that the FDCPA does not apply in bankruptcy cases, or that the filing of a time-barred debt claim did not run afoul of its provisions.<sup>121</sup> While debt buyers no doubt incurred significant costs litigating and appealing hundreds of FDCPA decisions, they largely avoided the massive damages awards that

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<sup>118</sup> See Sickler, *supra* note 7, at 284–85 (explaining that private rights of action “aim[ ] to deter and remedy harm that *ex ante* regulation does not prevent, whether as a result of gaps in the public enforcement mechanism or to ensure regulation of harmful practices that a public regulator may not be able to anticipate”).

<sup>119</sup> See Bruce, *supra* note 4, at 99 (explaining that private suits can adapt more quickly than legislative actors).

<sup>120</sup> See *supra* Part III(C).

<sup>121</sup> See *supra* text accompanying note 51.

could conceivably have arisen in these cases.<sup>122</sup> If we assume that the purpose of bringing these FDCPA suits was to generate damage awards to deter debt buyers' conduct—an assumption that has some basis in the *Midland Funding* briefing<sup>123</sup>—it is not clear whether these cases achieved those ends. As such, this litigation arc might feed prominent criticisms of private litigation as a remedial device—that litigation-based regulatory systems are messy and inefficient, and that they can push the development of the law in untenable directions.<sup>124</sup> Further empirical study of claims practices surrounding the *Crawford* and *Midland Funding* decisions might shed additional light on whether this spate of litigation had any effect on creditor behavior involving stale debt claims.

Nevertheless, these cases have generated one inescapable benefit: increasing the awareness of a pernicious problem in the claims-allowance process. The filing of time-barred debt claims is now a well-known problem among bankruptcy professionals, and this knowledge has primed the bankruptcy system to enhance its response. For example, debtors' attorneys and private trustees appear to be paying greater attention to stale claims and objecting where appropriate. The U.S. Trustee Program has attempted to address the practice through litigation, and may do more in the future. To the extent that increased awareness produces greater numbers of claims objections or leads to structural solutions, these cases can be construed as providing some benefits to the procedural integrity of the bankruptcy system, and, in an indirect manner, improving access to justice.

## CONCLUSION

Less than a year has passed since the Supreme Court decided *Midland Funding*, and efforts to address the problem of stale debt claims continue. In this essay, we have explored the role that private lawsuits have played in responding to this regulatory challenge. Even taking into account the rate of failure of these legal claims, private lawsuits have played a key role bringing this conduct to light. Moreover, private lawsuits might have a continuing role to play in this

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<sup>122</sup> In a turn of procedural irony, the *Crawford* case itself failed to result in a damages award for the plaintiff. Although the Eleventh Circuit reversed the dismissal of the *Crawford* case and remanded for further proceeding, a second motion to dismiss—based on the fact that Mr. Crawford's FDCPA claim was itself time-barred—prevailed at the bankruptcy court and on appeal to the district court. See *In re Crawford*, No. 08-30192-DHW, 2015 WL 5735187 (Bankr. M.D. Ala. Sept. 29, 2015), *aff'd sub nom.* *Crawford v. LVNV Funding, LLC*, No. 2:15-CV-00750-JAR, 2016 WL 4249498 (M.D. Ala. Aug. 9, 2016).

<sup>123</sup> See, e.g., Opening Brief of Plaintiffs-Appellants at 30, *Brock v. Resurgent Capital Services, Inc.*, 2015 WL 7831244 (11th Cir. 2015) (“These suits deter future misconduct, eliminating the need to expend any effort objecting to baseless claims.”).

<sup>124</sup> See Bruce, *supra* note 4, at 500–01 (collecting criticism).

arena. First, to the extent that lawmakers and rule makers address the problem of stale-debt claims, they will rely on the case law that has developed to understand the contours of this issue. Moreover, law and rule reform might expressly carve out a method for debtors and their attorneys to police creditor behavior with private claims.