Emory Bankruptcy Developments Journal

Volume 33
Issue 1 *A Tribute to Professor Grant W. Newton*

2016

Another Arrow in the Quiver: Preserving the Fresh Start in Debt Collection by Creating a National Registry for Discharge Orders

Joseph W. Sherman

ANOTHER ARROW IN THE QUIVER: PRESERVING THE FRESH START IN DEBT COLLECTION BY CREATING A NATIONAL REGISTRY FOR DISCHARGE ORDERS

ABSTRACT

The debtor's fresh start is violated when a creditor attempts to collect on a discharged debt as a personal liability of the debtor. Even if that attempt is unintentional—i.e., not willful—the fresh start has been hampered. Under the Fair Debt Collection Practices Act, debt collectors are not expected to have the same knowledge about a debt as the original creditor. Thus, a debt collector may unintentionally violate a discharge injunction by sending a collection letter or making a collection phone call. The Bankruptcy Code cannot remedy this scenario because violations of the injunction require a contempt analysis, which requires a willful violation to award damages. Likewise, the FDCPA recognizes the knowledge disparity between creditors and debt collectors, and allows debt collectors to make an initial contact without violating its prohibition on unfair, deceptive, or abusive practices.

Debtors have a number of tools at their disposal to remedy abusive practices, none of which touches on this exact scenario. This Comment argues that debtors are unable to fully remedy the violation of their discharge injunctions through existing law, and that amending the Code is not the solution. Rather, the problem of discharge injunction violations should be viewed primarily as a product of the debt collection industry. Thus, this Comment suggests creating a national registry to house discharge orders, requiring debt collectors to search the registry prior to making a first collection attempt, and proposes that the Consumer Financial Protection Bureau is better suited to implementing the registry than bankruptcy courts.

INTRODUCTION

In the gray area that is the intersection of the American bankruptcy scheme and the debt collection system, debt collection practices may violate the debtor's fresh start. Under the Bankruptcy Code (the "Code"), people who file for bankruptcy and fulfill the relevant requirements are granted a discharge order. This order does not "wipe out" the debtor's debts, but simply cuts off the debtor's personal liability for those debts that are discharged in the bankruptcy case. This distinction is important because it means that discharged debts still exist outside of bankruptcy: they can be sold to debt buyers,[1] and debtors may voluntarily repay them.[2]

With over 77 million Americans having a debt in collection,[3] the potential for abuses by debt collectors exists. Consumers now fear "zombie debts": debts they thought they no longer owed but which are given new life by collection efforts.[4] Zombie debt affects many consumers, not just those who have gone through bankruptcy.[5] For example, in July 2015, JPMorgan Chase was found to have sold zombie debts to third-party debt buyers in the form of "accounts that were inaccurate, settled, discharged in bankruptcy, not owed, or otherwise not collectible."[6] For the debts discharged in bankruptcy, any attempts to collect by the third-party debt buyers would have violated those debtors' discharge injunctions and, thus, their fresh start.

This Comment suggests that one way to prevent this type of discharge injunction violation is to create a national registry to house discharge injunctions and require debt collectors, including third-party debt buyers, to confirm the status of a debt prior to attempting to collect on it. The registry should be implemented by the Consumer Financial Protection Bureau

---

1 Finnie v. First Union Nat'l Bank, 275 B.R. 743, 746 (E.D. Va. 2002) (finding that § 524(a)(2) does not prohibit creditors from selling discharged debt); *see* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 18 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf (discussing the practice of buying and selling "debts of consumers who have filed for bankruptcy").

2 11 U.S.C. § 524(f) (2012).

3 Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 42 (2015).

4 Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 330 (2014).

5 *Id.* (describing zombie debt as "a debt that is dead or non-existent, but has now come to life, and is wreaking havoc on consumers and their credit histories").

6 CONSUMER FIN. PROT. BUREAU, *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, CONSUMER FINANCIAL PROTECTION BUREAU (July 8, 2015), http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/.

("Bureau") under the Fair Debt Collection Practices Act ("FDCPA"), rather than under the Code. The Bureau's mission and rulemaking authority put it in an excellent position to combat this type of zombie debt collection.

I. BACKGROUND: PRESERVING THE DISCHARGE INJUNCTION IS KEY TO ADVANCING THE FRESH START

The fresh start is the sine qua non of the American system of bankruptcy,[7] and its development underscores its important place. Bankruptcy law has historically been a creditor's remedy.[8] The fresh start, a relatively recent concept, had its birth in the American system in 1867.[9] When the Bankruptcy Act of 1867 was passed, it reflected "a compromise between debtor and creditor interests."[10] This compromise was largely propelled "by a desire to 'relieve the plight of debtors.'"[11] This first attempt at legislating a fresh start policy goal in bankruptcy did not last long, however—the 1867 Act was repealed in 1878.[12] The next time that Congress created a federal bankruptcy system was in 1898, when it created a system very similar to the one currently in place.[13] The 1898 Act created a more debtor-friendly system which gave debtors a discharge.[14] Much like in the 1867 Act, the discharge created by the 1898 Act was justified by the social welfare, or social utility, argument.[15]

The social utility argument has two parts. First, the public interest is benefited when a debtor is liberated from oppressive levels of debt and permitted to return to being a productive member of society.[16] Second, society's forgiveness of debts of the honest but unfortunate debtor is an act of

---

[7] Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 71 (2006) ("The long-standing and much-touted theory of consumer debt relief is that it provides a fresh start for debt-laden individuals.").

[8] Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 326 (1991).

[9] *Id.* at 355 ("Bankruptcy has been around for almost half a millennium in Anglo-American jurisprudence, yet the discharge as we know it in the United States did not exist until the turn of this century.").

[10] *Id.*

[11] *Id.*

[12] *Id.* at 361–62.

[13] *Id.* at 363.

[14] *Id.* at 364.

[15] *Id.* at 364–65 n.321. This approach has also been termed "social insurance." *See* Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 129 (2005) ("Bankruptcy scholars generally agree that consumer bankruptcy functions, at least in part, as a form of social insurance.").

[16] Tabb, *supra* note 8, at 364–65.

humanity to those in need.[17] It is within this first line of reasoning that the concept of the honest but unfortunate debtor arises.[18] The legislative history related to the passage of the 1898 Act shows that this view had the support of some members of Congress. One House Report sympathetically characterized the honest but unfortunate debtors as persons who have tried to make it but, through no fault of their own, have met with misfortune:

> [t]his vast number constitutes an army of men crippled financially-most of them active, aggressive, honest men who have met with misfortune in the struggle of life, and who, if relieved from the burden of debt, would reenter the struggle with fresh hope and vigor and become active and useful members of society.[19]

The fresh start remains a "principal goal" of our bankruptcy system.[20] In fact, Congress proclaimed "its intent to preserve the 'fresh start for the honest debtor'" when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act.[21] In contrast to the longevity of the fresh start principle, the humanitarian justification does not seem to have done as well. Shortly after its enactment, the 1898 Act was criticized for being a "poor-debtor law."[22] Today, we might consider that the humanitarian argument has been supplanted by scientific studies of the physical, emotional, and psychological effects of bankruptcy on a debtor. Such studies examine these effects of bankruptcy as a way of measuring the success of bankruptcy in rehabilitating debtors.[23]

Rehabilitation is the notion that bankruptcy law can help put the debtor back on his or her feet and is an important part of helping a debtor make the

---

17 *Id.* at 365. In an earlier article, Professor Tabb treated the humanitarian and social utility arguments as separate justifications for the bankruptcy discharge. *See* Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56 (1990). For the purposes of this Comment, neither treatment (as separate justifications or as two parts of the same justification) is particularly more beneficial than the other. Thus, this Comment arbitrarily treats them as being two parts of the same argument.

18 Tabb, *supra* note 8, at 364.

19 *Id.* at 365 n.321.

20 Porter & Thorne, *supra* note 7, at 72.

21 *Id.* ("This rhetoric is especially notable because the general nature of the reforms was unfriendly to most consumer debtors. Nevertheless, congressional representatives affirmed or at least gave the appearance of affirming bankruptcy's importance as an opportunity for a fresh start.").

22 Tabb, *supra* note 8, at 366. It was also pejoratively compared to the "nature of a 'Hebrew Jubilee.'" *See id.* The "Hebrew Jubilee" was the biblically mandated cancellation of all debts every seven years. *See id.* at 366 n.332.

23 *Compare id.* at 365 (tracing the historical arguments for the rehabilitative justification for the discharge), *with* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1059–60, 1061 (1987) (discussing the psychological aspect of the rehabilitative justification for the discharge).

most of the fresh start.[24] The goals of rehabilitation include "consumer financial education of the debtor, emotional and psychological relief from financial failure, and renewed debtor participation in the open-credit economy."[25]

Today, the fresh start, with all of its notions of social utility and rehabilitation, is protected by the discharge order, and is offended when a creditor or a debt collector attempts to collect on a debt that has been discharged in bankruptcy. The power of the discharge order to protect the debtor's fresh start is found in § 524(a), which voids any judgment attempting to determine the personal liability of the debtor[26] and enjoins any attempt to collect on a discharged debt as a personal liability of the debtor.[27] Technically speaking, the discharge order does not wipe out debt; it only creates a permanent injunction against debt collection.[28] Thus, § 524(a)(2) is more of a defensive weapon than an offensive weapon; it is more reactive than proactive.

The limits of the discharge injunction can be seen with a comparison of the FDCPA and the Code. Under the FDCPA, the debt collector[29] may send a letter to the debtor alleging that the debt is owed and notifying the debtor of the debtor's right to request verification.[30] When the debtor, or the debtor's attorney, informs the debt collector that the debt has been discharged, the collection attempts are required to cease.[31] Although the debt collector's initial contact letter is permitted under the FDCPA, the letter violates the debtor's fresh start because it is an act "to collect" a discharged debt from the debtor

---

24 Porter & Thorne, *supra* note 7, at 74.

25 *Id.* at 73 (citing Howard, *supra* note 23, at 1047, 1059).

26 11 U.S.C. § 524(a)(1) (2012).

27 11 U.S.C. § 524(a)(2).

28 3 WILLIAM L. NORTON JR. & WILLIAM L. NORTON III, NORTON BANKR. L. & PRAC. § 58:2 (3d ed. 2008) ("Thus, the effect of a discharge is to interpose a permanent prohibition against debt collection rather than to absolve the underlying debt retroactively.").

29 The FDCPA distinguishes between creditors and debt collectors. Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004) ("A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all."); *see* 15 U.S.C. § 1692a(3), (6) (2012). By contrast, the Code does not distinguish between the two, and a discharge injunction may be enforced against "both creditors and debt collectors." *Randolph*, 368 F.3d at 728. This Comment addresses primarily the actions of debt collectors that violate the discharge injunction and thus uses the terms "debt collector" and "creditor" to distinguish the differences between the two under the FDCPA.

30 *What If I Believe I Do Not Owe The Debt Or I Want Proof Of The Debt?*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/askcfpb/1403/what-if-i-believe-i-do-not-owe-debt-or-i-want-proof-debt.html (last visited Sept. 13, 2016).

31 *See* Eastman v. Baker Recovery Servs. (*In re* Eastman), 419 B.R. 711, 730 (Bankr. W.D. Tex. 2009).

personally.[32] The bankruptcy court will provide little relief because the discharge injunction, although violated by the collection letter, has not been violated willfully. Requisite knowledge is necessary for the court to award damages for a willful violation,[33] but here the debt collector had no knowledge that the debt had been discharged.

Although a technical violation of the discharge injunction has occurred, proof of money damages is missing. The debtor's fresh start has been violated, however, by the collection attempt. This Comment seeks to reduce or eliminate discharge violations by debt collectors, while also dealing fairly with debt collectors who commonly lack knowledge about the debtor's discharged status.

Debt collectors may violate the injunction intentionally or unintentionally. Many of the violations are likely unintentional, a result brought about by creditors who sell debt portfolios with incomplete information on accounts. A debt collector may have many accounts that have been discharged in bankruptcy, but the account portfolio only mentions that the debt is delinquent, not that the debtor has filed for bankruptcy relief. It would not be fair to punish the debt collector for having no knowledge of the debt's discharged status. Debt collectors need a reliable source of information regarding discharged debts. One way to establish a reliable source of information is to create a national registry for housing discharge orders ("Registry System").

The national registry will protect the fresh start by giving debtors a way to put the world on notice; by punishing bad actors; and by giving debt collectors a reliable source of information when their debt portfolios paint an incomplete picture. There will always be bad actors, but the proposed Registry System will punish bad actors while protecting debt collectors acting in good faith by requiring debt collectors to search the registry prior to taking any act to collect on a debt.

II. THE EXISTING MARKET

Debt collection is a part of life for many Americans because of the high levels of consumer debt in America. The level of American consumer debt

---

32 11 U.S.C. § 524(a)(2).

33 *In re* Eastman, 419 B.R. at 730 (alteration in original) (quoting Torres v. Chase Bank USA, N.A. (*In re* Torres), 367 B.R. 478, 490 (Bankr. S.D.N.Y. 2007)) ("To succeed [in a claim for willful violation of § 524(a)(2)] the debtor must 'show by [clear and convincing evidence] that the offending . . . entity had knowledge [actual or constructive] of the discharge and willfully violated it by continuing with the activity complained of.'"); 11 U.S.C. § 524(a)(2).

exceeds $2.7 trillion.[34] While nearly three in four "American families own at least one credit card," the average per household credit card debt is about $7,400.[35] With the large amounts of credit card debt, delinquent debt[36] is commonplace in America, with more than 77 million people having a debt in collection.[37] The proliferation of debt since the 1970s has been accompanied by growth in the debt-collection industry, with over four times as many collection jobs today as in the 1970s.[38] This industry generates between one and four billion collection calls annually.[39]

The phenomenon of seeking payment of debts from people who are no longer legally obligated to pay those debts has been described as "zombie debt."[40] As Neil Sobol notes, the phrase "zombie debt" encourages analogy to zombie movies:

> Just as the zombies in movies come back from the dead to terrorize individuals, dead debts may resurface to wreak havoc on consumers. Even if a consumer successfully defeats one zombie-debt collector, the process may restart if the debt is resold.[41]

When a debt persists in a delinquent status, creditors generally rely on three principal collection methods—creditors choose to (1) collect delinquent debts themselves; (2) hire a third-party debt collector; or (3) sell debts to debt buyers.[42] A 2009 Government Accountability Office Report on Credit Cards found that credit card issuers usually collect debts delinquent for less than six months themselves.[43] Older accounts, however, often get outsourced to third-party debt collectors.[44]

---

34 Sobol, *supra* note 4, at 333. This amount does not "include debt secured by real estate." *Id.* at 334.

35 *Id.* at 334.

36 Debts are marked delinquent when consumers do not pay on time. FED. TRADE COMM'N, *supra* note 1, at 13 n.57.

37 Jiménez, *supra* note 3, at 42.

38 Sobol, *supra* note 4, at 334.

39 *Id.*

40 *Id.* at 327 n.1 (citing media articles utilizing the term "zombie debt").

41 *Id.* at 327–28 (2014).

42 FED. TRADE COMM'N, *supra* note 1, at 11.

43 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY (2009), http://www.gao.gov/assets/300/295588.pdf (stating that credit card companies typically use "internal collection departments or 'first-party' agencies that collect under the issuer's name"). First-party agencies function as a supplement to internal departments; are paid on "a fee-for-service rather than contingency basis"; and focus on "preserving the relationship with the consumer and mitigating the negative perception that consumers can have about" collection efforts. *Id.* at 21.

44 *Id.*

Third-party debt collectors may be used because the creditor lacks sufficient expertise in applicable collection law or infrastructure to pursue collection efforts.[45] An important benefit to employing a debt collector is that the creditor retains a degree of control over the type of collection efforts utilized, allowing creditors some ability to avoid harm to its reputation which can occur through collection agencies.[46] Third-party debt collectors are a popular choice, with $6.56 billion generated in 2014 by third-party debt collectors.[47] This figure represents more than half of the debt collection industry's revenue in 2014.[48] Debt collection can be a difficult and time-consuming task, however, so creditors often sell the unsatisfied debts to debt collection firms or debt buyers.[49]

The option of selling a debt to a debt buyer is a more recent option for creditors and is made popular for three reasons: (1) federal banking regulations; (2) the closure that accompanies selling; and (3) the presence of willing debt buyers. First, federal banking regulations require that credit card debts be charged off after a specified period of time and permit the proceeds from a debt sale to be "counted as assets for capital requirements."[50] By contrast, charging off a debt does not permit banks to treat the charged-off amounts toward capital requirements.[51] Thus, the ability to sell the debt allows creditors to offset some of their losses.

Second, a sale to a debt buyer brings some closure to the delinquent account in the form of a guaranteed amount, rather than waiting to see if a third party can collect any amounts.[52] Although debts are sold for pennies on the dollar,[53] by selling debts to debt buyers, creditors reduce the losses associated

---

45 FED. TRADE COMM'N, *supra* note 1, at 11.

46 *Id.*

47 *Fair Debt Collection Practices Act*, 2015 CONSUMER FIN. PROT. BUREAU ANN. REP. 7 (2015), http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf (Third-party debt collectors earn money by "charging fees for services, often a percentage of the amount collected.").

48 *Id.*

49 Jiménez, *supra* note 3, at 42.

50 FED. TRADE COMM'N, *supra* note 1, at 13.

51 *Id.*

52 *Id.* at 12 (citing Rozanne M. Andersen & Andrew M. Beato, ACA Int'l, Comment of ACA International Regarding the Debt Collection Workshop 7 n.6 (June 6, 2007)) ("[C]reditors may choose to receive an immediate and guaranteed amount from debt sales rather than receiving a delayed and uncertain amount as a result of the efforts of third-party debt collectors.").

53 *Id.* at 22–23.

with extending credit, which in turn "is likely to lead to an increase in the amount of credit extended and a decrease in the price of that credit."[54]

Third, creditors find willing debt buyers in the market. More than 75% of debts sold are credit card debts.[55] For example, in 2008, the nine largest debt buyers purchased over $72 billion of consumer debt.[56] About 76.8% of that, or $55.5 billion, was credit card debt.[57] At least one author has suggested that the option of a debt sale is becoming more popular with credit card issuers.[58] One reason for this popularity could be that debt buyers are often in a better position than creditors to adopt more aggressive collection practices.[59] On the other hand, the FTC Report found that some large creditors sell charged off debts discriminately, choosing buyers whose collection practices are less likely to cause harm to the creditors' reputations.[60] The reality of annual debt sales in the billions of dollars, however, suggests that a market exists, although the low purchasing costs highlight how risky the investment can be.[61]

The characteristics of the debt-buying industry make violations of the discharge injunction more likely to occur for two reasons: the low costs of debts; and the lack of information in debt purchase agreements. First, the low costs that debt buyers are willing to pay, and that sellers are willing to accept, for debts indicates the risks of debt buying. The low cost of purchasing defaulted debt impugns the market for purchasing defaulted debts: "The less the seller is willing to 'stand by' the accounts it sells—for example, if the seller disclaims all warranties of title or accuracy of the information provided—the cheaper the debt."[62] The FTC Report found an average purchase price of "4.0

---

[54] *Id.* at 11 (citing studies); *see also* Julie D. Hoffmeister & David N. Anthony, *Is Dodd-Frank Doing More Harm Than Good?*, TROUTMAN SANDERS: CONSUMER FIN. SERVS. L. MONITOR (Feb. 8, 2016), http://www.consumerfinancialserviceslawmonitor.com/2016/02/is-dodd-frank-doing-more-harm-than-good/ (citing study by American Action Forum which found "a 14.5 percent cut in consumer revolving credit since" Dodd-Frank's enactment and blamed Dodd-Frank's regulatory costs in time and money).

[55] FED. TRADE COMM'N, *supra* note 1, at 13.

[56] *Id.* at 7.

[57] *Id.*

[58] Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 390–91 (2007) ("Although my thoughts on this topic are relatively impressionistic, discussions with industry sources suggest that major credit card issuers are increasingly moving towards selling defaulted credit card debt.").

[59] *Id.* at 391.

[60] FED. TRADE COMM'N, *supra* note 1, at 20.

[61] *See id.* at 23 ("[A]lthough the price paid by debt buyers for debts is low relative to their face value, it does not necessarily follow that the profit from collecting on those debts will be high.").

[62] Jiménez, *supra* note 3, at 43.

cents for each dollar of debt."[63] Older debts are worth less than newer ones, with an average price of "2.2 cents per dollar of debt for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than three years old."[64] Relatedly, debt buyers still have to incur costs for collection attempts, and collection efforts do not always produce recoveries.[65] Nor do debt buyers attempt collection efforts on all the accounts they purchased, which further limits their recoveries.[66] The debt-buying industry is a gamble, albeit one that many find worth the risk.

For example, in 2015, the Bureau settled an enforcement action against the "nation's two largest debt buyers and collectors for using deceptive tactics to collect bad debt."[67] The two companies purchased debts that were "potentially inaccurate, lacking documentation, or unenforceable," and then successfully collected on many of those unverified debts through unfair practices, including making false statements to debtors and filing lawsuits "using robo-signed court documents."[68] Many of these lawsuits resulted in default judgments against the consumers.[69] Default judgments are powerful tools that can make debts enforceable that are not otherwise enforceable.[70] Thus, a debt barred by a statute of limitations gets a new lease on (zombie) life.

Second, debt buyers are likely to try to collect a debt which has been discharged in bankruptcy because debt buyers receive limited information about the debts they purchase. Many debt buyers receive incomplete information when making purchases from the original creditor for a few reasons. The first is that purchase and sale agreements used in the sale of debt are usually drafted by the sellers.[71] Further, sellers often sell the debts "as is," disclaiming "all warranties and representations regarding the accuracy of the information" they include about the debts.[72] The debt buyer is permitted to

---

[63] FED. TRADE COMM'N, *supra* note 1, at 23.
[64] *Id.* at 23–24.
[65] *Id.* at 23.
[66] *Id.*
[67] *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CONSUMER FIN. PROT. BUREAU (Sept. 9, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/.
[68] *Id.*
[69] *Id.*
[70] Sobol, *supra* note 4, at 330.
[71] FED. TRADE COMM'N, *supra* note 1, at 24.
[72] *Id.* at 25. The FTC Report also noted that it "did not test the accuracy of the information conveyed by debt sellers to debt buyers. Accordingly, the study does not permit any conclusions to be drawn as to the prevalence of errors or inaccuracies in debts generally sold 'as is.'" *Id.*

"put back" accounts that did not fit the profile of the purchased portfolio, however.[73] Nonetheless, most agreements "provided very limited, if any," put-back remedy on the basis of "missing or inaccurate" information.[74] Finally, agreements conferred limited rights upon debt buyers to request and obtain "documents associated with creating and servicing" the purchased debts through limiting the time in which to request documents at no charge, the frequency of requesting documents, the amount of documents that could be requested, and the time after which the debt buyer can no longer request documents, even at cost.[75]

These risks can be exacerbated when debts are resold. The purchase and sale agreements used frequently permit resale.[76] Most of the agreements that permit resale require that the resale be subject to the same terms and conditions as the original agreement.[77] The limits on obtaining copies of the creating and servicing documents are increased as the original creditors have no contractual obligation to provide any documents to the resold debt buyers.[78] As a consequence, the resold debt buyers' only chance of getting the relevant documents is to request them from the original debt buyer, who then requests them from the original seller.[79]

Recently, however, the debt buying industry has undergone some changes, with more expected soon.[80] One major change began with a 2014 guidance document issued by the Office of the Comptroller of Currency ("OCC").[81] The OCC's guidance document applies to "all outright legal sales of charged-off debt by banks"[82] and suggests "best practices" to reduce the risks associated with the debt buying industry.[83] In response to this added layer of regulations,

---

73 *Id.*

74 *Id.*

75 *Id.* at 26.

76 Jiménez, *supra* note 3, at 66; FED. TRADE COMM'N, *supra* note 1, at 27.

77 FED. TRADE COMM'N, *supra* note 1, at 27.

78 *Id.*

79 *Id.* at 28.

80 Terry Carter, *Debt-buying Industry and Lax Court Review Are Burying Defendants in Defaults*, A.B.A. J. (Nov. 1, 2015, 4:20 AM), http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default (noting that the CFPB is expected to issue "comprehensive rules regulating debt collection and debt buying" in 2016).

81 *Fair Debt Collection Practices Act*, *supra* note 47, at 9.

82 OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, OCC BULL. NO. 2014–37, CONSUMER DEBT SALES: RISK MANAGEMENT GUIDANCE 2 (2014), http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

83 *Id.* at 8 n.2.

some smaller collection firms have stopped buying credit card debt or have been bought up by larger firms.[84]

Another change has come with the Bureau's enforcement activities. For example, in July 2015, the Bureau entered into a consent agreement with JPMorgan Chase arising out of an administrative action alleging, inter alia, that Chase sold bad credit card debts.[85] The "zombie debts" that Chase sold included "accounts that were inaccurate, settled, discharged in bankruptcy, not owed, or otherwise not collectible."[86] The consent agreement requires Chase to: verify debts before attempting collections; cease collection activities (including sales to debt buyers) on the known bad debts; refund approximately $50 million to consumers; and pay $166 million in penalties to various government agencies involved in the administrative action.[87]

Combining Bureau enforcement actions with new regulations of the debt buying industry is necessary if the Bureau wants to keep pace with changes in the debt collection industry.[88] Debt collection remains a constant source of consumer complaints. December 2015 marked the twenty-eighth consecutive month in which "debt collection" was the highest category of consumer complaints to the Bureau.[89] In 2014, the first full year of data on debt collection complaints, 37% of consumers complained about attempts to collect on debts no longer owed.[90] Among these consumer complaints, 4% specifically reported that the "debt was discharged in bankruptcy."[91]

Consumer complaints also address collection efforts on debts no longer owed, with debtors reporting frustration with the level of documentation provided by debt collectors, confusion about their rights to dispute a debt, and

---

[84] *Fair Debt Collection Practices Act*, *supra* note 47, at 9.

[85] *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, *supra* note 6; Chase Bank, USA N.A. & Chase Bankcard Servs., Inc., CFPB No. 2015-CFPB-0013, 2015 WL 5209143 (July 8, 2015).

[86] *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, *supra* note 6.

[87] *Id.* ("Chase will pay . . . $136 million in penalties and payments to the CFPB and states, and a $30 million penalty to the Office of the Comptroller of the Currency (OCC) in a related action.").

[88] *See Fair Debt Collection Practices Act*, *supra* note 47, at 10 ("Since the FDCPA has not been substantially updated since 1977, there can be some uncertainty as to what the law requires in some circumstances. The bureau expects that its rulemaking activities will address many of the primary uncertainties in the market, promote compliant debt collection practices, lessen unfair competition from bad actors, and most importantly, assist in protecting consumers from illegitimate collection practices.").

[89] 7 CONSUMER FIN. PROT. BUREAU MONTHLY COMPLAINT REP. 6 (2016).

[90] *See Fair Debt Collection Practices Act*, *supra* note 47, at 13.

[91] *See id.*

threats to take illegal action.[92] First, consumers have difficulty obtaining debt validation from collectors.[93] When asking debt collectors for supporting documentation, they report frustration at the amount of documentation provided.[94] Second, a trend in complaints in 2014 is that companies purchased "second mortgages that were discharged in bankruptcy and then pursu[ed] foreclosure on the mortgages."[95] Third, consumers continue to report attempts to collect debts no longer owed.[96]

The poor flow of information between creditors and debt collectors creates a strong possibility that debt collectors will try to collect on debts that are no longer legally owed. This possibility is supported by consumer complaint data collected by the Bureau, which receives consumer complaints and publishes data on these complaints in accordance with Congress's mandate.[97] Debt collection is one of the leading sources of consumer complaints. For example, the Bureau received more than 30,000 complaints about debt collection from July 2013 through the end of the 2013 calendar year; 34% of those complaints were about collection efforts on debts not owed.[98] Similarly, during 2014, 35% of the total number of consumer complaints received were related to debt collection[99] and included original creditors and third-party debt collectors.[100] Of the more than 88,000 debt collection complaints received, 37% related to attempts to collect on a debt no longer owed.[101]

III. The Existing Framework for Remedying a Violation of the Discharge Injunction Does Not Adequately Protect the Debtor's Fresh Start

The discharge injunction protects the debtor's fresh start by, inter alia, enjoining attempts to collect on the debt as a personal liability of the debtor.[102] The discharge does not wipe out any debts, however; it simply cuts off

---

92 *See id.* at 14.
93 *See id.*
94 *Consumer Response Annual Report (January 1–December 31, 2014)*, 2015 Consumer Fin. Prot. Bureau Ann. Rep. 19, http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.
95 *Id.* at 17.
96 *Id.* at 16.
97 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1021, 12 U.S.C. § 5511 (2012).
98 *Fair Debt Collection Practices Act*, *supra* note 47, at 11–12.
99 *Consumer Response Annual Report (January 1–December 31, 2014)*, *supra* note 94, at 14 fig.4.
100 *Fair Debt Collection Practices Act*, *supra* note 47, at 11–12.
101 *Id.*
102 11 U.S.C. § 524(a) (2012).

personal liability. In practice, this nuance can be seen by the fact that secured creditors may pursue in rem liability, and both secured and unsecured creditors may sell discharged debts. At least the secured creditor has a remedy in rem. The unsecured creditor, however, has to forgive its debtors. Sometimes, the only way for an unsecured creditor to make up some of the losses caused by a discharge is to sell off the debt, but, as shown, debt sales are fraught with danger and potential abuses.

Debt sales can be lucrative for buyers and sellers, and they serve an important role in the consumer credit economy. Outlawing debt sales could have serious consequences to consumer access to revolving credit. For that reason, an outright ban on debt sales should not be the first solution. Rather, empowering debtors with a weapon to fight violations—both intentional and unintentional—of the discharge will bring some order to the tumultuous landscape of debt sales.

Currently, the Bureau seeks to bring order to this landscape by combatting unfair, deceptive, and abusive debt collection practices on behalf of consumers, including bankruptcy debtors. For example, in 2015, the Bureau put an end to the abusive practices of a debt collection lawsuit mill.[103] In *Consumer Financial Protective Bureau v. Frederick J. Hanna & Associates*, the Bureau alleged that a Georgia law firm ("Firm") habitually filed collection lawsuits with "faulty or unsubstantiated evidence" regarding the debts owed.[104] The Firm brought more than 350,000 collection suits between 2009 and 2013.[105] Given the small number of attorneys and the large number of non-attorney staff employed by the firm, the suits were likely brought without "meaningful attorney involvement."[106] The Bureau sued the Firm to stop what it perceived as an intimidation technique: using deceptive court filings when other collection efforts have failed.[107]

Another deceptive practice in lawsuits concerns affidavits that are falsified or robo-signed. In 2016, the Bureau settled a case against Citibank and the debt

---

103 *CFPB Takes Action to Stop Illegal Debt Collection Lawsuit Mill*, CONSUMER FIN. PROT. BUREAU (Dec. 28, 2015), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-stop-illegal-debt-collection-lawsuit-mill/.

104 *Id.*

105 Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1349 (N.D. Ga. 2015).

106 *See id.* at 1349. In the court's Order denying the Firm's Motion to Dismiss, the court found that the Bureau's allegation of no meaningful attorney involvement "makes sense, given the alleged ratio of the volume of lawsuits filed to the number of attorneys at the Firm." *See id.* at 1350.

107 *CFPB Takes Action to Stop Illegal Debt Collection Lawsuit Mill*, *supra* note 103.

collection law firms it employed, accusing the law firms of altering the "dates of the affidavits, the amount of the debt allegedly owed, or both, after the affidavits were executed."[108]

Similarly, multiple higher profile suits have been brought against JPMorgan Chase for its tactics in credit card collection efforts, including filing lawsuits with robo-signed affidavits, furnishing the courts with improper supporting documentation, and selling zombie credit card debts to third-party collectors. Although Chase ceased such illegal practices in 2011 after an investigation by the U.S. Office of the Comptroller of the Currency, its illegal practices spawned lawsuits by most of the states.[109] The Bureau and the attorneys general of 47 states and the District of Columbia settled their enforcement action in July 2015, forcing Chase to pay $136 million in penalties and payments to the Bureau, plus $50 million in consumer refunds.[110]

Consumers must constantly be on guard for these kinds of unfair, deceptive, and abusive practices by debt collectors. Likewise, debtors must vigilantly watch out for such practices concerning debts that have been discharged in bankruptcy because many years may sometimes pass between a bankruptcy discharge and a collection lawsuit.

IV. REMEDYING VIOLATIONS

The broad language of § 524 exemplifies the intent of Congress "to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."[111] *Any* act to collect on a discharged debt from the debtor as a personal liability is a violation of the injunction.[112] Whether a party has violated the injunction is not always difficult to determine. The difficulty arises in assessing damages

[108] *CFPB Orders Citibank to Provide Relief to Consumers for Illegal Debt Sales and Collection Practices*, CONSUMER FIN. PROT. BUREAU (Feb. 23, 2016), http://www.consumerfinance.gov/newsroom/cfpb-orders-citibank-to-provide-relief-toconsumers-for-illegal-debt-sales-and-collection-practices/.

[109] Chris Cumming, *Mississippi AG Sues JPMorgan Chase Over Debt Collections*, AM. BANKER (Dec. 17, 2013), http://www.americanbanker.com/issues/178_241/mississippi-ag-sues-jpmorgan-chase-over-debt-collections-1064406-1.html.

[110] *CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents*, *supra* note 6.

[111] Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 105 (2003) (quoting H.R. REP. NO. 95-595, at 365 (1977)).

[112] 11 U.S.C. § 524(a)(2) (2012).

because § 524 is silent on the topic.[113] Courts have accordingly relied on their contempt powers to remedy violations and, in some cases, to award damages.[114] Contempt powers, however, offer limited relief to debtors. Thus, debtors also have advanced different legal arguments to enhance the relief afforded to them. Below is a discussion of the different arguments debtors have advanced in attempts to enhance their relief.

A. Two Sources of Contempt

Bankruptcy courts possess two types of contempt powers with which to remedy violations of the § 524 injunction: statutory and inherent. Statutory contempt powers in the bankruptcy context originate in § 105, which gives courts the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[115] Statutory contempt is fundamental to enforcing the discharge order. As one court noted, without the statutory power to enforce their own orders, bankruptcy courts would issue orders in vain:

> It would be ironic indeed and nothing more than an exercise in futility to grant a Debtor a discharge, together with a permanent injunction prohibiting the pursuit of the Debtor after discharge in an attempt to enforce discharged pre-petition debts, if the very court which granted the discharge would be powerless to enforce an obedience of the order and permit violation of the permanent injunction with impunity.[116]

Compensatory damages may be awarded under the § 105 contempt authority upon a showing that a party "*willfully* violated the permanent injunction of § 524."[117] If a party was unaware of the discharge when it attempted to collect a debt from the debtor, then it cannot be held in contempt.

The Eleventh Circuit has applied a two-part test to determine the willful nature of a violation.[118] The debtor carries the burden of proving these two

---

[113] *In re* Eastman, 419 B.R. 711, 724 (Bankr. W.D. Tex. 2009) (finding that § 524 "does not prescribe the debtor a specific remedy if a creditor violates the discharge injunction").

[114] *E.g.*, Bigham v. Equip. Leasing Specialists, Inc., No. 2:99-CV-119, 1999 WL 1005709, at *2 (W.D. Mich. Oct. 12, 1999) (relying on contempt powers to sanction a violation of the discharge injunction).

[115] 11 U.S.C. § 105.

[116] Braun v. Champion Credit Union (*In re* Braun), 141 B.R. 133 (Bankr. N.D. Ohio 1992) (quoting *In re* Miller, 81 B.R. 669, 678–79 (Bankr. M.D. Fla. 1988)), *aff'd*, 152 B.R. 466 (N.D. Ohio 1993).

[117] Hardy v. United States (*In re* Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996).

[118] *See id.*

parts by "clear and convincing evidence."[119] First, the party must have known that the injunction was in place.[120] This knowledge may be either "actual or constructive."[121] Second, the party must have "intended the actions which violated" the injunction.[122] Thus, in *Bigham v. Equipment Leasing Specialists, Inc.*, the debtor's motion for damages relating to a violation of the injunction was denied because there was adequate evidence that the creditor did not have notice of the bankruptcy.[123] In cases where the violation was willful, however, courts may award compensatory damages and impose sanctions.[124] Furthermore, in cases where a party acts willfully *and* "in bad faith, vexatiously, wantonly or for oppressive reasons," courts may also award attorney's fees.[125]

Inherent contempt powers, by comparison, originate in "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[126] Such control empowers courts "to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[127] In the bankruptcy context, courts wield their inherent contempt power "to award actual damages for violation of § 524," even though the text of § 524 does not actually provide the remedy for violations of the injunction.[128] Courts should invoke inherent contempt powers with "caution,"[129] however, reserving them for particularly egregious behavior.[130] Courts use inherent contempt powers to punish parties for acting in bad faith.[131]

---

119 *In re* Torres, 367 B.R. 478, 490 (Bankr. S.D.N.Y. 2007).

120 *In re* Hardy, 97 F.3d at 1390.

121 *In re* Torres, 367 B.R. at 490.

122 *In re* Hardy, 97 F.3d at 1390.

123 Bigham v. Equip. Leasing Specialists, Inc., No. 2:99-CV-119, 1999 WL 1005709, at *3 (W.D. Mich. Oct. 12, 1999).

124 *In re* Ramos, 2013 WL 5461859, at *1 (Bankr. S.D.N.Y. 2013).

125 *In re* Ramos, 2013 WL 5461859, at *1 (Bankr. S.D.N.Y. 2013).

126 Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962)).

127 *Id.* (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

128 *In re* Hardy, 97 F.3d at 1389.

129 *Id.* (quoting *Chambers*, 501 U.S. at 44–45).

130 *See id.* at 1389 n.3 (11th Cir. 1996) ("Bad faith conduct includes conduct that is vexatious, wanton or oppressive.").

131 *Chambers*, 501 U.S. at 48–49 (permitting a court to award attorney's fees under the court's "inherent power would require a finding of bad faith"); Glatter v. Mroz (*In re* Mroz), 65 F.3d 1567, 1575 (11th Cir. 1995) ("Invocation of a court's inherent power requires a finding of bad faith.").

The nature of the sanctions imposed through the statutory and inherent contempt powers of the bankruptcy court may be either coercive or punitive, although circuits are not in agreement about whether bankruptcy courts even have authority to mete out punitive contempt.[132] It is, however, generally accepted that the bankruptcy court has the power "to coerce compliance with a court order or to compensate another party for the contemnor's violation (coercive sanctions),"[133] but only some jurisdictions recognize the court's power "to punish the contemnor and vindicate the authority of the court (punitive sanctions)."[134] One author has summarized the problem with punitive damages jurisprudence as being "so subjective that its availability is uncertain."[135] Among the circuits holding that bankruptcy courts do have authority to issue punitive sanctions, the availability of punitive sanctions depends on the context.[136] The justification for punitive damages is reserved for cases of egregious conduct, malicious conduct, or bad faith.[137] Thus, in jurisdictions that recognize both coercive and punitive contempt powers, categorizing the court's contempt powers as either "coercive" or "punitive" is important for measuring the appropriate amount of sanctions.

Addressing violations of the discharge injunction with a contempt analysis has some drawbacks. One drawback is that possible damages might be too low to pursue, or a pro se debtor may not be aware that something like an improper fee attached to a proof of claim is invalid. The debtor's attorney might not

---

[132] *See* 3 NORTON JR. & NORTON III, *supra* note 28, § 58:2 ("A majority of courts also allow punitive damages in appropriate cases for a violation of the discharge injunction.").

[133] Placid Ref. Co. v. Terrebone Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 612 (5th Cir. 1997).

[134] 1 NORTON JR. & NORTON III, *supra* note 28, § 13:5 (citing *In re Terrebonne Fuel & Lube*, 108 F.3d at 612). The Fifth Circuit, expressing concern about finding the Article III power of criminal contempt in a non-Article III bankruptcy court, held that "bankruptcy courts do not have inherent *criminal* contempt powers, at least with respect to the criminal contempts not committed in (or near) their presence." *In re* Hipp, Inc., 895 F.2d 1503, 1511 (5th Cir. 1990). The Eighth Circuit has ruled that finding the authority to grant criminal contempt "attributes to bankruptcy judges no more of 'the judicial power of the United States,' than does giving them jurisdiction over core proceedings in the first place." Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174, 1180 (8th Cir. 1993) (citation omitted).

[135] Wasson, Jr., *supra* note 111, at 133.

[136] *In re* Hardy, 97 F.3d 1384, 1389 (11th Cir. 1996) (quoting Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1554 (11th Cir. 1996)) ("The language of § 105 encompasses 'any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions of' the Bankruptcy Code.'"). An example of the importance of context is noted by the Eleventh Circuit, where the court stated that in contrast to § 105, the language of § 106 "unequivocally waives sovereign immunity for court-ordered monetary damages under § 105, although such damages may not be punitive." ***Id.*** at 1390 (quoting *Jove Eng'g*, 92 F.3d at 1554).

[137] *See In re* Sielaff, 164 B.R. 560, 573 (Bankr. W.D. Mich. 1994).

contest an improper fee if the costs of objecting to the fee are greater than "the distribution the claim will receive under the plan."[138] Similarly, even though a technical violation of the discharge may have occurred, a debtor or the debtor's attorney will not achieve any practical benefit to pursuing relief under the contempt analysis. One of the ways that debtors have learned to deal with this scenario is advancing different legal arguments to broaden the scope of the injury. Specifically, debtors have argued for class certification in cases of widespread creditor abuses, which could allow a class of debtors to bring an action that might be too difficult to bring individually, which is discussed below.

B. *Contempt in a Class Action*

A class action can provide a useful tool for debtors to push back against the better organized, better positioned creditors. With unsecured debt, there are likely many debtors affected by the practices of a single creditor. If those practices are violating the discharge injunction on a widespread basis, the impact on the debtor's fresh start will also be widespread. One way to remedy this would be through a class action, but litigants seeking class action certification encounter difficulties with the Code.

These difficulties stem from the Code's silence on the topic of class actions, as well as from the jurisdictional limits that accompany a contempt analysis. The Federal Rules of Bankruptcy Procedure permit class actions in adversary bankruptcy proceedings through incorporation of Rule 23 of the Federal Rules of Civil Procedure.[139] Even among courts that have found statutory support for the class action, however, the class action remedy has been curtailed by jurisdictional restraints.

The two-part argument against allowing a class action is straightforward, focusing on (1) the limits of a court's jurisdiction to hear class actions; and (2) the lack of statutory support in the Code. While courts generally agree on the first part, that only the court that issued the injunction has the jurisdictional power to enforce it,[140] they are split on whether the Code permits a class action. The source of the circuit division is whether a class action is

[138] Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 37 (2013).

[139] *Id.* at 42.

[140] Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 970 (11th Cir. 2012) ("[T]he court that enters an injunctive order retains jurisdiction to enforce its order. In this respect, a bankruptcy court is no different than any other federal court, which possesses the inherent power to sanction contempt of its orders.").

"demonstrably necessary" and "consistent with the Code."[141] Courts holding that the Code does not permit the class action turn to § 524, finding that the statute neither expresses nor implies a private right of action.[142] For example, the Ninth Circuit in *Walls v. Wells Fargo Bank* concluded that § 524 did not create a right for a private right for a class action.[143] The analysis in *Walls* is instructive when considering how other courts have found a legal theory in support of a class action for discharge injunction violations.

In *Walls*, the debtor attempted to bring a class action lawsuit against Wells Fargo pursuant to § 524, arguing the statute created "substantive rights in favor of the debtor," and that the bankruptcy court could enforce these rights through its statutory contempt powers (i.e., § 105).[144] If the court had accepted this argument, it would have potentially empowered debtors to bring class actions to remedy widespread discharge injunction violations. The court, however, determined that neither the plain language of the statute nor the legislative history of the Code provided the relief the debtor sought.[145] The Ninth Circuit held that there was no indication "that Congress intended to create a private right of action under § 524, and we shall not imply one."[146]

In contrast, courts that have found statutory support for a class action lawsuit rely on § 105. In *Bessette v. Avco Financial Services*, the First Circuit held that the bankruptcy court's § 105 power could properly be invoked to support a class action suit "if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code."[147] The court cautioned, however, that a bankruptcy court should permit this remedy "so long as the court acts consistent with the Code and does not alter the Code's distribution of other substantive rights."[148]

Bessette's reach is limited, however. The First Circuit expressly declined to rule on the "suitability of class certification in these circumstances."[149] With the First Circuit's identification of a legal argument in support of a class action

---

[141] *Id.*

[142] Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002).

[143] *Id.* at 511.

[144] *Id.* at 506.

[145] *Id.* at 508–10.

[146] *Id.* at 510 ("Congress evidently saw no reason to change things as they were (and are): there is no private right of action under § 524.").

[147] Bessette v. Avco Fin. Servs., 230 F.3d 439, 445 (1st Cir. 2000) (quoting Noonan v. Sec'y of Health & Human Servs. (*In re* Ludlow Hosp. Soc'y, Inc.), 124 F.3d 22, 28 (1st Cir. 1997)).

[148] *Id.* (citing *In re Ludlow Hosp. Soc'y*, 124 F.3d 22, 28 (1st Cir. 1997)).

[149] *Id.* at 446.

to remedy violations of the discharge injunction, the Rhode Island District Court certified a class on remand, but limited the class to debtors within the court's jurisdiction.[150] The bankruptcy court's jurisdiction is limited to estates located within the physical jurisdiction of the bankruptcy court.[151] Thus, the district court held that "[i]f the petition for bankruptcy is not filed in Rhode Island, the estate is not located here, and the Court has no jurisdiction."[152] The district court concluded its opinion with precise and careful language. "What remains of this lawsuit is very basic: It is an action for contempt on behalf of plaintiff and, *potentially*, a class of similarly situated debtors whose bankruptcy was filed or discharged in Rhode Island."[153]

The debtor in *Bessette* could not overcome the jurisdictional component for an appropriate class action. Although a class action seems like "the perfect procedural device to remedy systematic, widespread violations of law by a single defendant,"[154] the bankruptcy court's jurisdiction must be established over all members of the putative class.[155]

The bankruptcy court in *Bessette* adopted the approach of the so-called "home court cases." The home court cases permit classes but restrict those classes "to debtors within the district in which the class action is commenced."[156] The district where the class action originates holds exclusive jurisdiction of "all of the property of the debtor's estate" pursuant to 28 U.S.C. § 1334(e).[157] Exclusive jurisdiction, however, is geographically limited and, therefore, home court cases refuse to expand a class beyond the geographic limits of its own jurisdiction.[158] According to these cases, causes of action are treated as property of the debtor's estate.[159] Thus, the class action as a remedy for widespread violations of the discharge injunction may be "demonstrably

---

150 Bessette v. Avco Fin. Servs., 279 B.R. 442, 449 (D.R.I. 2002) (finding "the Court only has jurisdiction over claims that are related to bankruptcy estates in the District of Rhode Island").

151 *Id.* at 447 (finding its subject matter jurisdiction limited because "[i]f one has not been subject to an order, one cannot violate an order, and cannot be sanctioned or punished for contempt.").

152 *Id.* at 449.

153 *Id.* at 454–55 (emphasis added).

154 Williams v. Sears, Roebuck & Co. (*In re* Williams), 244 B.R. 858, 862 (S.D. Ga. 2000).

155 *See* Bessette v. Avco Fin. Servs., 230 F.3d 439, 448 (1st Cir. 2000) (finding the location of the estate is the key factor in determining bankruptcy jurisdiction).

156 Bruce, *supra* note 138, at 56.

157 *Id.* at 57.

158 *Id.* at 56.

159 *Id.* at 58.

necessary" to afford relief, but it has not been found to be "consistent with the Code."[160]

Even in *Conley v. Sears, Roebuck & Co.*, which sprang from Sears's widespread and systematic practice of entering into reaffirmation agreements without court approval,[161] the debtors' claims were settled without resolving the jurisdictional question.[162] The *Conley* court conditionally certified a nationwide class of debtors, with Sears's consent, for settlement purposes.[163] Shortly after the conditional certification of a nationwide class, Sears settled.[164] The settlement was made under an agreement between Sears and the FTC, which had threatened "an enforcement action against Sears pursuant to Section 19 of the Federal Trade Commission Act."[165] The court in *Conley* did uphold an "award of attorneys' fees as a settlement of the class action,"[166] but this, too, arguably failed to establish jurisdiction because the settlement was "entered into pursuant to a consent order between the FTC and Sears."[167]

While the circuit courts in both *Walls* and *Bessette* diverged on the existence of a legal theory supporting a class action to remedy widespread violations of the discharge injunction, the availability of a class action has, in practice, been greatly limited because of jurisdiction.

C. Can the Sale of Discharged Debt Violate the Injunction?

The Bankruptcy Court for the Northern District of Ohio in *In re Lafferty* consolidated two injunction violation cases involving a bank as the original creditor and a debt collection agency, which purchased the debts after they had

160 *Bessette*, 230 F.3d at 445.

161 222 B.R. 181, 182 (Bankr. D. Mass. 1998); *see also In re* Latanowich, 207 B.R. 326, 337 (Bankr. D. Mass. 1997) (concluding that "Sears's disregard for the law and for the rights of the Debtor in this case was also systematic, a matter of company policy"). For background information on the Sears reaffirmation agreement scandal, see generally Mark J. Balthazard, *The Criminal Side of Sears*, U.S. ATT'YS' BULL. (Exec. Office for U.S. Att'ys, Washington, D.C.), Aug. 1999, at 71. This discussion cites to different opinions because the scandal spanned several states and involved various plaintiffs suing Sears on nearly identical facts.

162 *Conley*, 222 B.R. 181. In discussing the jurisdictional question, the *In re Williams* court noted that, although the defendant consented, jurisdiction was never conclusively established because "parties cannot confer subject matter jurisdiction on a federal court by virtue of their consent." 244 B.R. 858, 863 (S.D. Ga. 2000).

163 *Id.* at 184.

164 *Id.* at 185.

165 *In re* Williams, 244 B.R. at 864.

166 *Id.* at 863.

167 *Id.* at 863–64.

been discharged.[168] Both debtors carried unsecured debts in favor of Ohio Savings Bank when they filed for bankruptcy in the late 1980s.[169] Both debtors listed the Ohio Savings debts in their schedules, and Ohio Savings filed proofs of claim in both cases.[170] Both debts were discharged in the bankruptcies.[171] More than eight years after the discharges, National Check Bureau ("National") brought state court actions to collect the discharged debts.[172] In response to the state court actions, both debtors successfully reopened their bankruptcy cases, and the court found Ohio Savings to be guilty of violating the injunction and jointly and severally liable for actual damages caused to the debtors.[173]

The bankruptcy court found that both Ohio Savings and National had violated the discharge injunction. Ohio Savings violated the injunction when it sold the discharged debts to National because it knew that National would try to collect those debts.[174] Although National was the entity that actually attempted to collect, Ohio Savings could have prevented those collection attempts by properly identifying "those accounts that had been discharged in bankruptcy."[175] Ohio Savings could not easily identify the accounts that were uncollectable because of bankruptcy discharges, however, because its coding system coded all uncollectable accounts the same way "and did not delineate the reason the account was uncollectible."[176] Although Ohio Savings had since upgraded its coding system to one which coded bankruptcy separately, those upgrades failed to "insulate it from liability for damage caused by its historically inadequate memorialization of notices received from bankruptcy courts."[177]

Even though National abandoned the suits, the court still found that National violated the injunction when it filed suit to collect on the debts in state court.[178] National argued it did not know the debts were discharged

---

168 229 B.R. 707 (Bankr. N.D. Ohio 1998).

169 *Id.* at 709.

170 *Id.*

171 *Id.*

172 In the first case, the debt was discharged in October 1988; in the second case, the debt was discharged in June 1989. *Id.* National brought suit on both discharged debts in August 1997. *Id.* at 710.

173 *Id.* at 715.

174 "The selling of accounts is a deliberate act to collect on a discharged debt . . . [because] Ohio Savings knew that National would take action to collect against the debtors on those accounts." *Id.* at 714.

175 *Id.*

176 *Id.* at 711.

177 *Id.* at 714.

178 *Id.* at 715.

because it had relied upon Ohio Savings' representations in the sale agreement. The court, however, found multiple instances that put National on notice that debts it bought from Ohio Savings were not legally collectible.[179] In one of those instances, National admitted to receiving "an 'alarming' response to its 30-day demand letters claiming that the debts had been discharged in bankruptcy.[180]

Not every bankruptcy court would reach the result of *In re Lafferty*. In *Finnie v. First Union Bank*, the District Court for the Eastern District of Virginia found that the language of § 524(a)(2) did not extend to prevent the sale of discharged debt when the seller does not retain any control over any postsale collection efforts.[181] Only the purchaser of the debt who attempts to collect the discharged debt may be found to violate the injunction.[182] Collection by proxy is also impermissible; a creditor may not simply employ "a collection agency to recover a discharged debt on its behalf."[183] But an outright sale of debt to a third party is not a violation of the injunction.

The opposite results from the courts in Ohio and Virginia are not anomalous from a statutory construction point of view. Section 524 does not expressly classify the sale of discharged debts as a violation of the injunction.[184] Reasonable judges can and do disagree over the extent of the injunction's reach in these cases.

D. Failure to Report the Discharge of a Debt to a Credit Reporting Agency

The failure of a creditor to update a debtor's credit report information following a discharge is another contested area relating to the discharge injunction. A failure to update a prepetition credit report following the discharge is not usually a violation of the injunction for two reasons. First, a discharge order does not technically wipe out the debt—it only eliminates the

179 *Id.*
180 *Id.*
181 275 B.R. 743, 746 (E.D. Va. 2002).
182 *Id.* at 745.
183 *Id.* at 746.
184 *Id.*

debtor's "personal obligation to pay the debt."[185] Second, under the Code, creditors are not required to update credit information following a discharge.[186]

Notwithstanding the usual rule, one court found a report to a credit reporting agency to violate the injunction. In *In re Sommersdorf*, the Bankruptcy Court for the Southern District of Ohio found that a creditor had violated the automatic stay by reporting to a credit reporting agency that a debt was charged off, even though the debtor's chapter 13 plan provided for full payment of the debt.[187] Generally, courts have held that the "failure to update pre-petition credit information" following the discharge does not, by itself, violate the discharge injunction.[188] The facts of *In re Sommersdorf* were, however, particularly egregious.[189] There, the debtor notified the creditor of the full payment in the chapter 13 plan, and "requested the creditor to remove the charge-off notation" prior to bringing an action for violation of the automatic stay.[190]

Additionally, a court may find that a false report is an attempt to coerce payment from the debtor if combined with other acts "such as substantial contacts by telephone or mail."[191] In the absence of more egregious acts or circumstances like in *In re Sommersdorf*, though, reporting the debt as charged off is accurate, and courts will not punish creditors for reporting the truth.[192]

The Code does not provide a specific remedy, either.[193] Attempts to compare the Code and the Fair Credit Reporting Act ("FCRA"), similar to the comparison of the Code and the FDCPA, have been frustrated because of the

---

185 *E.g.*, Debra Lee Hovatter, *Sommersdorf's Progeny: Can Wrong Credit Report Trigger A Debtor Claim Under the Code?*, AM. BANKR. INST. J., June 2007, at 14 (quoting Vogt v. Dynamic Recovery Servs. (*In re* Vogt), 257 B.R. 65, 70 (D. Col. 2000)).

186 *In re* Zine, 521 B.R. 31, 40 (Bankr. D. Mass. 2014) (quoting *In re* Vogt, 257 B.R. at 71) ("Admittedly, '[f]alse reporting, if not done to extract payment of the debt, is simply not an act proscribed by the Code.'").

187 139 B.R. 700, 701–02 (Bankr. S.D. Ohio 1992).

188 *See* Hovatter, *supra* note 185, at 14 n.4 (collecting cases).

189 *In re* Sommersdorf, 139 B.R. at 701–02 (concluding that the report was a "flagrant" violation of the stay and "just the type of creditor shenanigans intended to be prohibited by the automatic stay").

190 Hovatter, *supra* note 185, at 14; *see In re* Sommersdorf, 139 B.R. at 701.

191 *In re* Zine, 521 B.R. at 40.

192 *See* Hovatter, *supra* note 185, at 14, 74 (quoting Irby v. Fashion Bug (*In re* Irby), 337 B.R. 293, 296 (N.D. Ohio 2005)) ("As the *Irby* court pointed out, if 'all that is being reported is the truth,' it cannot be the basis for violating the discharge injunction.").

193 *Id.* at 14, 75 (noting the Code does not contain a "rights or remedies" provision governing credit reporting).

lack of significant overlap between the Code and the FCRA.[194] The Bankruptcy Court for the Western District of New York has held that a debtor's remedy for a credit report that has not been updated postdischarge is "to obtain a copy of their credit report or reports and follow the established process under those *other* Acts for updating the record, if they wish to do so."[195] The court reached its conclusion even though the debtor offered to prove that the inaccurate credit report hampered his fresh start.[196]

E. The FDCPA vs. The Code

A bankruptcy court's jurisdiction has also been questioned with regard to other statutes that overlap with the Code. Specifically, portions of the FDCPA and the FCRA have been challenged because of a perceived conflict with the Code.[197] A circuit split exists over whether the FDCPA may be utilized to punish violations of the injunction as unfair debt collection practices. While the Ninth Circuit has held that the Code precludes use of the FDCPA to remedy a violation of the discharge injunction, some circuits, like the Seventh Circuit, have held that "as long as people can comply with both, then courts can enforce both," and the statutes do not implicitly repeal one another.[198] Accordingly, courts that follow the Seventh Circuit's approach hold that the two statutes may coexist peacefully and a debtor may seek relief under both.[199] In *Randolph v. IMBS*, for example, the Seventh Circuit held that the Code's protections from certain debt-collecting activities, both during the life of the bankruptcy and after, could coexist with provisions of the FDCPA that dealt with those same activities.[200]

---

[194] *Id.* at 14, 76 ("This is not a case of reconciling two related federal statutes, for example, where courts have tried to reconcile the Code and the Fair Debt Collection Practices Act . . . . Rather, credit reporting disputes have no place in the Code; the Code simply does not address them.").

[195] Bruno v. First USA Bank, N.A. (*In re* Bruno), 356 B.R. 89, 92 (Bankr. W.D.N.Y. 2006) (emphasis added).

[196] *Id.* at 90–91.

[197] 4 COLLIER ON BANKRUPTCY ¶ 524.02[c][ii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

[198] Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004). The court in *Randolph* also found that the conflict between federal statutes is not a question of preemption. Instead, "the right question is whether one implicitly repeals the other—and repeal by implication is a rare bird indeed." *Id.* at 730.

[199] Michael D. Sousa, *Circuits Split: Does the Bankruptcy Code Implicitly Repeal the FDCPA?*, AM. BANKR. INST. J., Oct. 2006, at 20, 20; *see, e.g.*, Johnson v. Midland Funding, LLC, 823 F.3d 1334 (11th Cir. 2016), *appeal docketed*, No. 16-348 (Sept. 16, 2016).

[200] *Randolph*, 368 F.3d at 732. Although the Seventh Circuit's conclusion directly involved § 362(h), the court's analysis grouped §§ 524(a)(2) and 362(h) together. *Id.* at 728 ("A demand for immediate payment while a debtor is in bankruptcy (or after the debt's discharge) is 'false' in the sense that it asserts that money is due, although, because of the automatic stay (11 U.S.C. § 362) or the discharge injunction (11 U.S.C. § 524), it is not."). Note also that the *Randolph* court cites a previous version of the Code that codified the relevant

The FDCPA provision at issue was § 1692e(2)(A), a strict liability statute that flatly prohibits the "false representation of the character, amount, or legal status of any debt."[201] Under this section, however, a debt collector may escape liability by availing itself of the bona fide error defense.[202]

The bona fide error, or due care, defense of § 1692k(c),[203] shields from liability a debt collector who "exercises care to avoid making false statements."[204] For this defense to apply, the debt collector must show that the violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[205] This important limitation to liability flows from a critical component of the statutory scheme: the FDCPA only regulates debt collectors, not creditors.[206] A major reason for this distinction between debt collectors and creditors is that a debt collector's knowledge of the debt is not necessarily the same as the creditor's.[207] As the court stated: "The due-care defense of § 1692k(c) also would be pointless if creditors' knowledge were imputed to debt collectors."[208]

In contrast to the strict liability approach of § 1692e(2)(A), the Code sanctions willful violations of the automatic stay or the discharge injunction.[209] The different standards for liability prompted the lower court to conclude that § 1692e(2)(A) would "interfere with the administration of bankruptcy law."[210] The possibility of violating both created an apparent conflict between the statutes that the lower court resolved in favor of the Code.[211] On appeal,

automatic stay provision at § 362(h). 11 U.S.C. § 362(h) (2000) (current version at 11 U.S.C. § 362(k) (Westlaw through Pub. L. No. 114-112 (excluding Pub. L. No. 114-92, 114-94, and 114-95))). The provision at issue is currently located at 11 U.S.C. § 362(k) (2012).

201 15 U.S.C. § 1692e(2)(A) (2012); *see Randolph*, 368 F.3d at 730 (citing 15 U.S.C. § 1692e(2)(A)) ("A debt collector's false statement is presumptively wrongful under the Fair Debt Collection Practices Act.").

202 *Randolph*, 368 F.3d at 728.

203 The Seventh Circuit's opinion used the phrase, "due care defense," although the statute refers to a "bona fide error" defense. *Compare id.* at 729, *with* 15 U.S.C. § 1692k(c).

204 *Randolph*, 368 F.3d at 728.

205 15 U.S.C. § 1692k(c).

206 *Randolph*, 368 F.3d at 729 ("A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all.").

207 *Id.* ("Courts do not impute to debt collectors other information that may be in creditors' files—for example, that debt had been paid or was bogus to start with.").

208 *Id.*

209 *Id.* at 730.

210 *Id.* at 729.

211 *Id.* (citation omitted) ("The parties consented to decision by a magistrate judge . . . who concluded that the Bankruptcy Code 'preempts' the FDCPA when the act alleged to transgress the FDCPA also violates the Code.").

however, the Seventh Circuit ruled that it was possible to address these provisions independently.[212]

Randolph presented a consolidation of three similar cases,[213] in each of which the debt collector directly contacted the debtors after they filed their chapter 13 petitions, and even though they were represented by counsel.[214] The act of communicating with the debtor could violate both § 1692c(a) and the automatic stay, depending on the debt collector's knowledge.[215]

While acknowledging the close overlap of the statutory provisions at issue,[216] the Seventh Circuit relied on the Supreme Court's caution against finding repeal by implication in the absence of "either irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other."[217] The court noted how the relevant provisions of the Code and the FDCPA did not overlap enough to justify finding an implicit repeal.[218] The court enumerated some of the differences[219] and pointed out how the FDCPA is much more comprehensive than the Code.[220] The differences between the statutes were important to the *Randolph* court's analysis because "overlapping and not entirely congruent remedial systems can coexist."[221]

The court applied its implicit repeal analysis first between different provisions of the FDCPA and then between provisions of the FDCPA and the Code. The court held that §§ 1692c(a) and 1692e could be addressed independently, without undercutting "the scienter requirement [of] § 1692c(a) to permit no-fault liability under § 1692e(2)(A)."[222] In the same way, prohibition on false statements in § 1692e(2)(A) was not in conflict with the automatic stay because those provisions are not similar enough to find an

212 *Id.* at 732.
213 *Id.* at 728 ("These suits are similar in material respects, so we use one as an illustration.").
214 *Id.* at 728–729.
215 *Id.* at 729 (noting how "[i]n the other two suits the district judge held that the Code supplies the exclusive remedy for any debtor in bankruptcy and applied this understanding to knock out claims under § 1692c(a)(2) . . . [and] § 1692e(2)(A)").
216 *Id.* at 731 ("Whether overlapping and not entirely congruent remedial systems can coexist is a question with a long history at the Supreme Court, and an established answer: yes. . . . This is so even if the application of one system is jarring against the background of another.").
217 *Id.* at 730.
218 *Id.* at 731 ("Overlapping statutes do not repeal one another by implication.").
219 The court created a table that delineated the differences. *See id.* at 730.
220 *Id.* at 731.
221 *Id.*
222 *Id.* at 732.

implicit repeal.[223] Applying the Code to the exclusion of § 1692e(2)(A) would "eliminate all control of negligent falsehoods."[224] Likewise, the § 1692c(a) rule on communicating about a debt with a debtor's attorney is independent of the automatic stay's prohibition on acts to collect on a debt.[225] The FDCPA's separate remedial scheme, which distinguishes between debt collectors and creditors, required an evaluation separate from any inquiry of a violation of an automatic stay.[226]

The Ninth Circuit reached the opposite conclusion in *Walls*.[227] There, § 1692f was at issue,[228] which prohibits any "unfair or unconscionable means to collect or attempt to collect any debt."[229] The debtor argued that Wells Fargo had violated the FDCPA because it "engaged in unfair and unconscionable collection practices" when it collected mortgage payments from her after the discharge was granted and without a valid reaffirmation agreement.[230] The facts of the case, however, indicated that the debtor was actually trying to remedy a violation of the discharge injunction.[231]

Throughout her chapter 7 bankruptcy, Walls kept her house pursuant to a "ride-through" option.[232] The question, according to the Ninth Circuit, was not whether the bank had violated the discharge injunction but whether the mortgage was subject to the ride through.[233] The appropriate analysis, therefore, would involve only the relevant provisions of § 524: whether Walls made voluntary payments under § 524(f); and whether a § 524(c) reaffirmation

---

223 *Id.* ("They are simply different rules, with different requirements of proof and different remedies.").

224 *Id.*

225 *See id.* at 732–33.

226 *Id.* at 733 ("To the extent that plaintiffs Cross and Randolph seek relief under § 1692c(a)(2) on the theory that the debt collectors (and not just the creditors) knew that they had counsel, again the FDCPA may be enforced, and further proceedings are required to explore the question whether the debt collectors themselves (as opposed to the creditors) knew that the debtors were represented by attorneys.").

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

228 *Id.* ("This appeal also raises the issue whether a discharged debtor may pursue a simultaneous claim under . . . 15 U.S.C. § 1692f. We think not, as to do so would circumvent the Bankruptcy Code's remedial scheme."). *See generally* Sousa, *supra* note 199, at 61–63 (comparing the outcomes in *Randolph* and *Walls*).

229 15 U.S.C. § 1692f (2012), *recognized as repealed by implication by* Townsend v. Quantum3 Grp., LLC, 535 B.R. 415 (Bankr. M.D. Fla. 2015).

230 *Walls*, 276 F.3d at 505, 510 (citing 15 U.S.C. § 1692f).

231 *Id.* at 510 ("There is no escaping that Walls's FDCPA claim is based on an alleged violation of § 524.").

232 *Id.* at 505. Ninth Circuit precedent permits "debtors who are current on their loan payments on secured property and who continue to make payments" to "avoid making a statutory election whether to redeem the property or reaffirm the debt pursuant to § 524(c)." *Id.* (citing McClellan Fed. Credit Union v. Parker (*In re* Parker), 139 F.3d 668, 672–73 (9th Cir. 1998)).

233 *Id.* at 510.

agreement was required.[234] Permitting a simultaneous FDCPA claim would therefore "circumvent the remedial scheme of the Code."[235]

The split between the *Randolph* and *Walls* decisions has grown,[236] and the overlap between the FDCPA and the Code remains a source of litigation.[237] In fact, the Seventh Circuit recently declined to extend its rationale in *Randolph* to another area where courts are split: time-barred proofs of claim.[238] In that case, *Owens v. LVNV Funding*, the court found that the bankruptcy process provides sufficient protections against time-barred claims, with no need to invoke the FDCPA.[239] Now, the Eleventh Circuit leads the side arguing for statutory coexistence. In two cases the Eleventh Circuit examined how the Code and the FDCPA coexist with regard to time-barred, or stale, proofs of claim: *Crawford v. LVNV Funding*,[240] and *Johnson v. Midland Funding, LLC*.[241]

In *Crawford*, a debt-collection agency filed a proof of claim on a stale debt.[242] The debtor filed a chapter 13 bankruptcy petition in 2008, and, under applicable state and federal law, the debt had been unenforceable for nearly four years prior to the filing of the petition.[243] Although the debt was unenforceable, "neither the bankruptcy trustee nor Crawford objected to the claim during the bankruptcy proceeding."[244] As a result, the proof of claim was deemed allowed under § 502(a) and (b) for the amount included in the proof of claim.[245] Having failed to timely object to the stale debt, Crawford's only

---

[234] *Id.*

[235] *Id.*

[236] *See* Donald S. Maurice & Alan D. Leeth, *Continued Circuit Conflicts Create Uncertainty Under the FDCPA*, 70 BUS. LAW. 637, 643–644 (2015) (listing the different approaches taken by the Third, Seventh, Ninth, Tenth, and Eleventh Circuits).

[237] *See, e.g.*, Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1338 (11th Cir. 2016) ("[The] Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred."); *see also* Maurice & Leeth, *supra* note 236, at 643–644 (listing the different approaches taken by the Third, Seventh, Ninth, Tenth, and Eleventh Circuits).

[238] Owens v. LVNV Funding, LLC, 832 F.3d 726 (7th Cir. 2016), *aff'g* No. 1:14-CV-02083-JMS, 2015 WL 1826005 (S.D. Ind. Apr. 21, 2015), *appeal docketed*, No. 16-315 (Sept. 12, 2016).

[239] *Id.* at 735–36; *see* Owens v. LVNV Funding, LLC, 2015 WL 1826005, at *7 n.4, *aff'd*, 832 F.3d 726 (quoting B–Real, LLC v. Rogers, 405 B.R. 428, 431–32 (M.D. La. 2009)) (limiting *Randolph* to a question of "whether the FDCPA and the Bankruptcy Code can co-exist in a vacuum"), *aff'd*, 832 F.3d 726.

[240] 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015).

[241] 823 F.3d 1334.

[242] *Crawford*, 758 F.3d at 1257.

[243] *Id.*

[244] *Id.* at 1259.

[245] *See* FED. R. BANKR. P. 3001 ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

remedy was to sue the debt collector for attempting to collect a time-barred debt in violation of §§ 1692e and 1692f of the FDCPA.[246]

The debt collector's strongest defense to this suit would be that an FDCPA suit is improper because the Code controls this scenario.[247] The Eleventh Circuit did not address the implicit repeal question, however, because the debt collector "argue[d] only that its conduct does not fall under the FDCPA or, alternatively, did not offend the FDCPA's prohibitions. LVNV does not contend that the Code displaces or 'preempts' §§ 1692e and 1692f of the FDCPA."[248] This unanswered question was subsequently addressed by the Eleventh Circuit in *Johnson*.[249]

In *Johnson*, the court "faced a question nearly identical to the one" in *Crawford*.[250] This time, however, the implicit repeal issue *was* raised on appeal.[251] The court held that the "Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a *debt collector* files a proof of claim it knows to be time-barred."[252] Although the Code permits creditors to file stale proofs of claim,[253] when one particular subset of creditors—i.e., debt collectors—files them, the FDCPA's prohibitions on unfair debt collection practices still operate.[254] This includes the bona fide error defense, which protects debt collectors filing stale proofs of claim in good faith.[255]

Although *Johnson* directly addressed the implicit repeal issue, the Eleventh Circuit's analysis of the FDCPA in *Crawford* is still informative for three reasons.

246 *Crawford*, 758 F.3d at 1259.

247 *See id.* at 1261. This is the argument that won out in *Walls*. 276 F.3d 502, 510 (9th Cir. 2002).

248 *Crawford*, 758 F.3d at 1262 n.7.

249 823 F.3d 1334, 1338 (11th Cir. 2016) ("We now answer the question left open in *Crawford*."), *appeal docketed*, No. 16-348 (Sept. 16, 2016). This issue has been appealed to the Supreme Court and the Court is expected to hear arguments and rule on the case by the end of June. Lawrence Hurley, *Supreme Court Agrees to Hear Debt Collection Dispute*, REUTERS, Oct. 11, 2016, http://www.reuters.com/article/us-usa-court-debtcollection-idUSKCN12B2EQ.

250 *Johnson*, 823 F.3d at 1337.

251 *Id.*

252 *Id.* (emphasis added).

253 *Id.* at 1339 ("[W]e recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations . . . .").

254 *Id.* (noting that debt collectors "are not free from all consequences of filing these [stale] claims").

255 *Id.* The bona fide error defense appears at 15 U.S.C. § 1692k(c) (2012) ("A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.").

First, the court explained the framework for addressing an FDCPA claim. This framework has two parts. The first part is that the FDCPA gives debtors "a private right of action" to remedy violations of its provisions.[256] The second part is identifying what types of behavior are banned by §§ 1692e and 1692f. Section 1692e bans the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."[257] The related § 1692f prohibits any "unfair or unconscionable means to collect or attempt to collect any debt."[258] Given the ambiguity in defining what is included in "unfair or unconscionable,"[259] the Eleventh Circuit has "adopted a 'least-sophisticated consumer' standard to evaluate whether a debt collector's conduct is 'deceptive,' 'misleading,' 'unconscionable,' or 'unfair' under the statute."[260] This standard focuses the inquiry on whether the debt collector's actions would have deceived the "least-sophisticated consumer," instead of whether a particular consumer was deceived.[261]

Second, the court compared the filing of a stale proof of claim to the filing of a stale lawsuit.[262] The court found that LVNV's actions "would likely subject it to FDCPA liability had it filed a lawsuit to collect this time-barred debt in state court."[263] Similarly, the court noted how other courts, utilizing the "least sophisticated consumer" standard, have "reasoned that the FDCPA outlaws 'stale suits to collect consumer debts' as unfair."[264] Much of what makes a stale suit unfair is underscored by the purpose of statutes of limitations.

---

[256] Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1258 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015).

[257] 15 U.S.C. § 1692e (2012), *recognized as repealed by implication by* Townsend v. Quantum3 Group, LLC, 535 B.R. 415 (Bankr. M.D. Fla. 2015).

[258] *Id.* § 1692f, *recognized as repealed by implication by Townsend*, 535 B.R. 415.

[259] *Crawford*, 758 F.3d at 1258 (noting that "Congress did not provide a definition for the terms 'unfair' or 'unconscionable'" and then recounting the Eleventh Circuit's previous attempt to come up with a definition).

[260] *Id.*

[261] *Id.*

[262] *Id.* at 1260.

[263] *Id.* at 1259.

[264] *Id.* at 1260. The Seventh Circuit declined to follow *Crawford*, suggesting that the bankruptcy process affords sufficient protection. Owens v. LVNV Funding, LLC, 832 F.3d 726, 735–36 (7th Cir. 2016) (noting, inter alia, that "the concerns . . . regarding the misleading or deceptive nature of the conduct are less acute when a proof of claim is filed in bankruptcy, especially in a counseled case, as opposed to when a lawsuit is filed in state or federal court").

Statutes of limitations recognize that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[265] In the bankruptcy context, statutes of limitations provide a "bright line for debt collectors and consumer debtors."[266] Faded memories and vanishing documents accompany the passage of time.[267] Just as filing a time-barred lawsuit in state court would be an unfair and deceptive means of collecting a stale debt, so, too, filing a proof of claim in bankruptcy would be "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f."[268]

Third, the conclusion that filing a time-barred proof of claim is a type of activity the FDCPA bars is not inconsistent with the automatic stay because the automatic stay does not cover this type of activity.[269] The Eleventh Circuit's approach to this third point is reminiscent of the *Randolph* court's "overlapping but not entirely congruent" approach.[270] The automatic stay provision suspends actions to collect a debt "outside the procedural mechanisms of the Code."[271] It says nothing about filing a stale proof of claim in a bankruptcy proceeding. Filing a stale proof of claim, though, is at least "an 'indirect' means of collecting a debt," and thus subject to the FDCPA.[272]

The Eleventh Circuit's opinions are at odds with the Ninth Circuit. More recently, the Eight Circuit has disagreed with the Eleventh Circuit's approach.[273] In *Nelson v. Midland Credit Management, Inc.*, the Eighth Circuit refused to extend the FDCPA's protections to a time-barred proof of claim in a chapter 13 bankruptcy case because the FDCPA's consumer protection concerns are adequately addressed by the bankruptcy process.[274] The Eighth Circuit's standard for determining liability under the FDCPA "turns on 'whether an unsophisticated consumer would be harassed, misled or deceived by' the debt collector's acts."[275] The bankruptcy process satisfies the FDCPA's

---

265 *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979)).
266 *Id.*
267 *Id.* at 1261.
268 *Id.*
269 *Id.*
270 Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004).
271 *Crawford*, 758 F.3d at 1262 (quoting Campbell v. Countrywide Home Loans, Inc., 545 F.3d 348, 354 (5th Cir. 2008)).
272 *Id.*
273 828 F.3d 749, 751–52 (8th Cir. 2016).
274 *Id.* at 752.
275 *Id.* (citing Freyermuth v. Credit Bureau Servs., 248 F.3d 767, 771 (8th Cir. 2001)).

concerns, however, by providing "trustees who owe fiduciary duties to all parties and have a statutory obligation to object to unenforceable claims."[276]

The circuit split is at a tipping point.[277] The *Johnson*[278] and *Owens*[279] opinions have been appealed, and the Supreme Court is expected to "hear arguments and rule on the [*Johnson*] case by the end of June."[280] The current divide speaks volumes about the state of the law. Debtors, on the one hand, are searching out "nuances that distinguish their situations from" previous cases, a la *Johnson*.[281] Debtors exploit the gaps in the overlapping but not entirely congruent statutes because the FDCPA provides a more favorable remedy to debtors.[282] Courts, on the other hand, are resorting to their "equitable powers to stop what they view as unfair practices."[283] The Eleventh Circuit has noted the recent "deluge" of "[c]onsumer debt buyers—armed with hundreds of delinquent accounts purchased from creditors . . . filing proofs of claim on debts deemed unenforceable under state statutes of limitations."[284] As debtors struggle to make the most of their fresh start, violations of the discharge injunction should not burden their efforts, whether intentional or unintentional.

V. PROPOSED SOLUTION—A DEBT COLLECTION REGISTRY SYSTEM

Although debtors have many tools to enforce their discharge injunction under the Code, these tools, coupled with the FDCPA's bona fide error defense, leave debtors without a remedy for unintentional violations by debt collectors. This Comment recommends a remedy for this gap—the Registry System—a national registry to house consumer discharge orders that requires debt collectors to search the registry prior to a first collection attempt. Based

276 *Id.* (quoting Gatewood v. CP Med., LLC, (*In re* Gatewood), 533 B.R. 905, 909 (B.A.P. 8th Cir. 2015)).

277 *See generally*, Adam Gilbert, *Damned if You Do, Damned if You Don't*, EMORY L. SCH. SUP. CT. ADVOC. PROGRAM: SUNDAY SPLITS (Oct. 16, 2016), http://sundaysplits.com/2016/10/16/damned-if-you-do-damned-if-you-dont/ (providing a brief overview of the circuit split).

278 Johnson v. Midland Funding, LLC, 823 F.3d 1334 (11th Cir. 2016), *appeal docketed*, No. 16-348 (Sept. 16, 2016).

279 Owens v. LVNV Funding, LLC, 832 F.3d 726 (7th Cir. 2016), *aff'g* 2015 WL 1826005, *appeal docketed*, No. 16-315 (Sept. 12, 2016).

280 Hurley, *supra* note 249.

281 Alane A. Becket, *An Uneasy Harmony*, AM. BANKR. INST. J., Mar. 2002, at 10, 55.

282 *Id.* ("[T]he damages available pursuant to the FDCPA would appear to be more desirable than the relief provided by the contempt powers of the courts.").

283 Brittany M. Dant, Comment, *Down the Rabbit Hole: Crawford v. LVNV Funding, LLC Upends the Role of the Fair Debt Collection Practices Act in Consumer Bankruptcy*, 66 MERCER L. REV. 1067, 1083 (2014).

284 Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1256 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015).

on the prevalence of consumer debt in America and the lack of adequate information associated with debt sales and debt collection efforts, a national registry would provide a safeguard mechanism through which unfair, deceptive, or abusive debt collection practices will be easier to punish and will be more costly for the abuser. The Registry System's requirements should, in turn, reach upstream to reduce or stop the abuse in the first instance.

Specifically, the safeguard mechanism will function as follows. First, a national registry should be established to house discharge orders. Debtors will bear the burden of uploading a copy of the discharge order into the registry. The Registry System will automatically time-stamp each uploaded discharge order.[285]

Second, the debt collector will be required to search the database prior to attempting to collect on a debt to verify that no order in the registry indicates that the debt has been discharged. The debt collector must include a verification statement with any initial debt collection effort. The required verification statement must provide the date and time that the debt collector checked the registry, and that no discharge order was found for the debtor. The verification statement must be included as part of the required debt validation materials of 15 U.S.C. § 1692g.

Third, penalties should be governed by the FDCPA and assessed against a debt collector who fails to search the database or fails to either include a copy of the verification in the initial collection letter or disclose that the registry was searched in the initial phone call. A debtor should also be permitted to sue any debt collector for failure to comply with the registry requirements.

A. The Registry Database

The idea of a registry is not new. In 2013, the Bureau included in its Advance Notice of Proposed Rulemaking a question soliciting the anticipated costs and benefits of a repository for documents and information related to unsecured debts.[286] The benefits of such a repository are tantalizing: a way for documentation for, and ownership of, unsecured consumer debts to be

---

[285] The Registry System should have a log-in requirement for debt collectors and debtors. By requiring a log-in to upload discharge orders and to search, the Registry System can record all of the searches performed by a user.

[286] Debt Collection (Regulation F), 78 Fed. Reg. 67,848, 67,856 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

tracked.[287] The repository would be for unsecured debts what the county recorder's offices throughout the country are for secured debts: a way to put the world on notice about the chain of title.[288] The Bureau may no longer be seriously pursuing the repository idea, as judged from its most recent update on the status of its debt collection regulation efforts, which did not mention it.[289]

The registry will only house discharge orders. Debtors who have received a discharge order may choose to upload a copy of the order into the registry database.[290] To ensure that debt collectors can accurately match up the debtors listed in their accounts with discharge orders in the database, any debtor who uploads a discharge order must provide identifying information, including their name, the last four digits of their social security number, the chapter of bankruptcy, and their date of birth. With the exception of the chapter of bankruptcy, these pieces of information are so commonly used to identify individuals today that they will be necessary to make the database a useful resource for debt collectors.[291]

---

[287] *See* Jiménez, *supra* note 3, at 103 ("This 'chain of title' record-keeping and account document storage could be the most helpful features in a repository.").

[288] *Id.* at 102. Professor Jiménez has noted the industry support for this idea from two companies. One of those companies even touted the chain of title benefits of a registry in a whitepaper:

> Businesses and individuals would not dream of buying real property, automobiles, or anything else of value without first having its ownership status verified by a third party. If one would not buy a car or house without title confirmation, why would one spend thousands or millions buying debt without the same protection?

Id. (quoting Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, GLOBAL DEBT REGISTRY (Jan. 5, 2011), https://perma.cc/9YPA-7J6V).

[289] *See* Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered, CONSUMER FIN. PROT. BUREAU (July 28, 2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf. This may be the product of insufficient support for the repository. For example, Professors McCoy and Jiménez expressed concern about the potential of having a negative experience similar to what happened with the Mortgage Electronic Registration Systems, Inc. ("MERS"). Patricia A. McCoy & Dalié Jiménez, Comment to Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), 14–17, https://perma.cc/3T7J-ZDED. In addition, they urged that any implementation of a repository must first seriously consider how the FCRA might be interpreted to cover the repository. *Id.* at 17–18. The proposed Registry System can avoid these concerns altogether because of its limited scope. Furthermore, the Registry System may also be useful as a test-run repository, informing future attempts to create a system of record for unsecured debt.

[290] The attorney or legal representative for the debtor should also be permitted to upload the order. This can be noted by including a check-the-box option (e.g., "□ I am the debtor's attorney or legal representative") when uploading to the database. It will be easy enough for a debtor's attorney to upload the order as part of the package of legal services provided.

[291] These pieces of information will also help to weed out false positives triggered by a similar name.

B. Operation

Once the debtor has uploaded a copy of the discharge to the registry, all initial debt collection actions must include a verification stating that the debt collector has checked the registry and that the debt at issue has not been discharged in bankruptcy; or if it has, that the discharge has been revoked. This verification must be sent out as part of the validation-of-debts requirement of § 1692g.[292] Although the discharge order does not list out all the discharged debts item-by-item, or account-by-account, it does give a case number and indicates the bankruptcy court where the case was filed. That information provides debt collectors with sufficient notice that the debt they seek to collect has already been discharged. Thus, debt collectors that comply with the registry requirements will reduce the likelihood of violating the discharge injunction.

C. Creation and Implementation of the Registry System

The first, and best, way to create the Registry System is by Congressional amendment for two reasons. From the perspective of establishing an overarching policy, Congress can emphasize the FDCPA's continued relevance and the importance of treating the fresh start policy seriously by lending its imprimatur to the Registry System. From a litigation-avoiding perspective, Congress should implement the Registry System because it can directly address the FDCPA's bona fide error defense for debt collectors.

The bona fide error defense is a crucial component of the debt collection regulatory scheme, as Congress has recognized that debt collectors do not have the same access to information as creditors. The Registry System changes the disparity of access to information as it relates to bankruptcy discharges and, in effect, forces debt collectors to rely on a source of information *independent of* the creditor's own knowledge. Any rules promulgated by the Bureau to implement the Registry System would have to face the question of whether the bona fide error defense could be legitimately obviated by an administrative agency's rule. Congressional amendment, which makes clear that the Registry System functionally obviates application of the bona fide error defense in specific circumstances, will go a long way to avoiding litigation over the issue of whether the defense still applies to the Registry System.

---

[292] 15 U.S.C. § 1692g provides that debt collectors must provide certain validation-of-debt information either with the initial communication or within five days of the initial communication. 15 U.S.C. § 1692g (2012).

The second possible way to create the Registry System is by agency rule-making authority. The Bureau is well-suited to implement the Registry System, given its mission "to protect consumers and level the playing field in the financial marketplace" and its rulemaking authority.[293] In fact, the Bureau is already working to issue rules that will govern the debt collection industry. In November 2013, the Bureau issued an Advance Notice of Proposed Rule Making for debt collection.[294] As of this writing, however, the Bureau remains in the information-gathering stage, most recently publishing an Outline of Proposals Under Consideration and Alternatives Considered.[295]

When Congress passed the Dodd–Frank Wall Street Reform Act of 2010, its broad purpose was a response to the nation's financial crisis: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices."[296] With Dodd–Frank, Congress amended the FDCPA by authorizing the Bureau to "prescribe rules with respect to the collection of debts by debt collectors."[297]

As the "first federal agency solely focused on consumer financial protection,"[298] the Bureau is better positioned than the bankruptcy courts to administer the Registry System, and the creation of such a registry falls within

---

[293] Richard Cordray, *Foreword: Consumer Protection in the Financial Marketplace*, 9 HARV. L. & POL'Y REV. 307, 307 (2015).

[294] Debt Collection (Regulation F), 78 Fed. Reg. 67,848 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

[295] Consumer Fin. Prot. Bureau, Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking (2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf.

[296] Dodd–Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[297] 15 U.S.C. § 1692*l*(d). Prior to Dodd–Frank, the FDCPA fell primarily within the province of the Federal Trade Commission. The FTC, however, was limited to enforcing the provisions of the FDCPA and proposing suggested changes to Congress. It lacked the authority to promulgate rules. *Id.* § 1692*l* ("Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter."). Instead, the FTC was required to include a summary of any "necessary or appropriate" changes to the FDCPA in its annual report to Congress. *Id.* § 1692m. In fact, the FTC recommended that Congress empower the FTC "to issue rules to implement the FDCPA." FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 70 (2009), http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. In 2010, Congress took the FTC's recommendation, but vested rulemaking authority in a brand new agency—the Bureau—rather than granting that authority to the FTC. *Fair Debt Collection Practices Act*, *supra* note 47, at 3. There remains some overlap between the FTC and the CFPB, however, such that the two agencies continue to work together to "enforce the laws applicable to debt collectors." *Id.*

[298] *Consumer Response Annual Report (January 1–December 31, 2014)*, *supra* note 94, at 6.

the ambit of the Bureau's mission. Bankruptcy courts lack the legal authority to create and implement this kind of solution. As "one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts,"[299] the courts lack the flexibility of rulemaking authority.[300] The Code does have two federal agencies that support it—the United States Trustee Program ("USTP") and the Bankruptcy Administrators Program—but they have critical shortcomings.

The USTP is not designed to handle this type of solution. It is a part of the Department of Justice, consisting of twenty-one regional offices, each run by just one U.S. Trustee.[301] Its mission is to serve as a bankruptcy watchdog[302] "to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public."[303] The USTP polices bankruptcy practices of creditors such as banks. They use their investigatory powers to "protect[] the integrity of the bankruptcy system by overseeing case administration and litigating to enforce bankruptcy laws."[304] Investigations may end in settlements in which the offending institution agrees to pay restitution to consumers they have harmed.

The Bankruptcy Administrators Program is the equivalent of the USTP in Alabama and North Carolina.[305] Together, the Bankruptcy Administrators and the U.S. Trustees function as watchdogs, ensuring enforcement of bankruptcy laws.[306] The mandates of these two programs, however, are not keyed to implementing the Registry System.[307]

---

299 Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 386 (2012).

300 *Id.* at 384 ("Unlike policy set by regulatory agencies through notice-and-comment rulemaking, courts set policy through case-by-case adjudication and decide only the matters presented in a particular case.").

301 *Id.* at 394–95.

302 *U.S. Trustee Program: About the Program*, U.S. DEP'T OF JUST., http://www.justice.gov/ust/about-program#FTI (last updated May 12, 2016).

303 *U.S. Trustee Program: Strategic Plan & Mission*, U.S. DEP'T OF JUST., http://www.justice.gov/ust/strategic-plan-mission (last updated May 8, 2015).

304 *U.S. Trustee Program: About the Program*, *supra* note 302.

305 Pardo & Watts, *supra* note 299, at 397 ("Despite covering different geographic territory, the duties of the UST and BA Programs largely mirror each other."). For an excellent description of the two systems—and an interesting bit of political and historical trivia—see *id.* at 395–97.

306 *Id.* at 398.

307 *See id.* at 394 ("[The USTP and Bankruptcy Administration Program] do not possess the power to set policy relating to the restructuring of debtor-creditor relationships under the Code."). In Fiscal Year 2016, the Bureau had 1,623 employees, and, for Fiscal Year 2017, it projected a total of 1,757 employees. CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 12 tbl.2 (2016), http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf.

D. Penalties under the Registry System

The penalty scheme for failing to comply with the Registry System can be established in one of two ways. First, if Congress chooses to create the Registry System by amending the FDCPA, it could also choose to change the penalty scheme. The FDCPA currently provides that "any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of" actual damages; statutory damages as the court allows up to $1000; and costs of the action plus reasonable attorney's fees.[308] Within the context of the Registry System, the damages most likely to be awarded will be statutory damages and reasonable attorney's fees.[309] Congress could choose to beef up the penalty scheme for violations of the Registry System, for example, by placing a higher ceiling on statutory damages, or by providing a range, with a minimum damages amount required to be awarded upon a showing of a violation, and capped by a ceiling amount.[310] The fee shifting provision should also remain, as an incentive for lawyers to take up these claims. Amending the penalty scheme is an additional way for Congress to affirm its commitment to furthering the goals of the FDCPA and the Code.

Alternatively, regardless of whether Congress or the Bureau creates the Registry System, the consequences of debt collectors failing to comply will fit into the existing penalty scheme of the FDCPA; there is no need for a separate penalty scheme.

These penalties should be available to debtors in actions against a debt collector that fails to comply with the Registry System. The bona fide error defense should not offer the offending debt collector much protection because the debt collector is required to take affirmative steps to ensure that a debt has not been discharged *prior* to attempting to collect it.

---

308 15 U.S.C. § 1692k(a) (2012).

309 Because the Registry System targets initial collection attempts, an award of actual damages seems unlikely.

310 A more robust discussion of possible iterations of a new statutory damages scheme is beyond the scope of this Comment. For background material on statutory damages, see generally *Emerging Issues in Statutory Damages*, JONES DAY, July 2011, http://www.jonesday.com/emerging_issues_in_statutory_damages/#_ftnref56.

E. Benefits of the Solution

The Registry System furthers policy goals, provides legal advantages in the current Code–FDCPA dispute, and encourages positive practical results in debt collection practices.

1. Policy Goals

The Registry System furthers two policy goals. The first goal is to provide debt collectors with a reliable source of information. The second is to protect the fresh start by reducing the chances of an unintentional violation.

First, the registry database will provide a reliable, easily accessible source of information to debt collectors. The discharge order, as an official court order signed by a bankruptcy judge, will give debt collectors a reliable piece of information about the debtor. Although debt collectors often do not have complete information regarding accounts, they will at least have knowledge of the original creditor, which they can match up to the discharge order. This puts debt collectors on notice that the debt has likely been discharged. Searching the registry should be an easy process, because debt collectors will be able to search with the debtor's name, the last four numbers of the debtor's social security number, or date of birth, pieces of information very often provided by the original creditor.[311]

Second, the Registry System will complement the Code by giving debtors a better chance at a fresh start. The fresh start, fundamental to bankruptcy law,[312] is threatened by unfair, abusive, or deceptive collection efforts. Attempting to collect on a discharged debt is deceptive because it can lead the debtor to believe that the debt is still owed. It is also unfair to the debtor because liability for the debt has been discharged already. With a reliable, easily accessible source of information, the burden on debt collectors to search the registry should diminish collection attempts on discharged debts, thus strengthening the debtor's fresh start free from past debts.

---

[311] Debtor portfolios provided to debt collectors by original creditors typically have plenty of identifying information about debtors, including "credit applications, agreements, contracts, personal guarantees, purchase orders and/or emails or orders for services or products." Gerri Detweiler, *Why You Can't Hide from Debt Collectors*, ABC NEWS (Mar. 23, 2014), http://abcnews.go.com/Business/hide-debt-collectors/story?id=23011597.

[312] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

2. *Legal Advantages*

The Registry System also provides two legal advantages in resolving the Code–FDCPA conflict. It avoids the conflict altogether, in a way that complements the Code.

On the one hand, the Registry System avoids the Code–FDCPA conflict discussed above.[313] The Registry System does not invoke the Code, but rather relies only on the FDCPA. It is wholly a debt collection system, designed to prevent abuses of debt collection. Even though the Registry System is related to the discharge injunction, failure to comply with it will not be a violation of the discharge injunction. It will be a violation of the FDCPA.

On the other hand, a debtor can use the Registry System to help prove allegations of a discharge injunction violation. In the case of a bad actor that tries to collect knowingly on a discharged debt, the requirements of the Registry System will provide prima facie evidence of the debt collector's actual or constructive knowledge that the debt was formally discharged.

3. *Practical Results*

Implementation of the Registry System should produce at least two positive, practical results. First, the penalty scheme and the burden on debt collectors should encourage lawyers to take on these injunction violation cases. The cases are low risk and do not present complicated proof issues. An attorney can determine whether a creditor received proper notice that a debt was discharged through a simple search of the national registry. So long as the debtor uploaded the discharge order prior to the challenged debt collection efforts, there would be little upfront work by the attorney to verify the debtor's claim and to evaluate the odds of success.

Second, the search requirements on debt collectors will likely reduce the sale of debts that have been discharged or that are currently in bankruptcy. The costs of failing to comply with the Registry System will place debt buyers in a better position to demand more accurate information on the debts they purchase.

---

[313] *See* discussion *supra* Section IV.E

CONCLUSION

Bankruptcy should not be viewed in isolation. Many "families . . . struggle for months before filing bankruptcy."[314] Income interruptions are a common precursor to a bankruptcy petition.[315] Bankruptcy law in America offers the "honest but unfortunate debtor" a chance at a fresh start from many of these past debts.[316] Violations of the discharge injunction undermine that chance. The creation and utilization of a national registry is one way to empower the fresh start by giving debtors a tool to directly combat injunction violations.

Teddy Roosevelt famously admonished, "Speak softly and carry a big stick."[317] Currently, debtors carry different legal weapons to preserve their fresh start. In addition to the legal arguments available to preserve the fresh start, the Bureau and other regulatory agencies are slowly reforming how business is done in the debt collection industry by holding banks and debt collectors accountable for unfair, deceptive, or abusive practices. The Registry System will complement current efforts to curb abusive debt collection practices by empowering consumer debtors to fight alongside the Bureau. The Bureau, as "a 21st century agency that helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives," is ideally situated to implement the solution.[318]

JOSEPH W. SHERMAN*

---

314 Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 129 (2008).

315 Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 126–27 (2003).

316 *See, e.g.*, Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'").

317 "Speak Softly. . ." (Memory): American Treasures of the Library of Congress, https://www.loc.gov/exhibits/treasures/trm139.html.

318 *About us*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/about-us/ (last visited Sept. 13, 2016).

* Executive Managing Editor, *Emory Bankruptcy Developments Journal* (2016-17); J.D. Candidate, Emory University School of Law (2017); B.S., *summa cum laude*, University of Central Florida (2013). First, I would like to thank Professors Charles Shanor and Rafael Pardo for their perceptive and thoughtful feedback throughout the writing process. I also would like to thank the staff members and editors of the *Emory Bankruptcy Developments Journal*—particularly Jake Jumbeck, Nicole Griffin, and Sophie Macon—for their diligence in editing this Comment. Finally, I would like to thank my family, for their abiding love and support, and my friends at the Palm Bay City Attorney's Office, for their encouragement and mentorship.