1-1-2018

Midland Funding v. Johnson and the Pernicious Problem of Stale-Debt Claims

Kara J. Bruce
University of Toledo College of Law

MIDLAND FUNDING V. JOHNSON AND THE PERNICIOUS PROBLEM OF STALE-DEBT CLAIMS

Kara J. Bruce∗

I. INTRODUCTION

Midland Funding, LLC v. Johnson[1] represents the culmination of a nationwide litigation blitz to combat the filing of "stale-debt claims" in consumer bankruptcy cases. Debt buyers, who purchase portfolios of old debt for pennies on the dollar, have filed massive numbers of proofs of claim in consumer bankruptcy cases to collect debts for which the statute of limitations has run. This practice is predicated on the expectation that the bankruptcy system will fail to screen out all time-barred debts, and as a result, that some of these stale-debt claims will receive payment in a debtor's bankruptcy case. Because the Bankruptcy Code and Rules provide no clear remedy for deterring this practice, debtors' attorneys recently turned to the private remedies available under the Fair Debt Collection Practices Act ("FDCPA" or the "Act").[2] They argued that filing a stale-debt claim is false, deceptive, or misleading because it misrepresents the enforceability of the debt, or that the practice is an unfair or unconscionable use of the bankruptcy process.[3]

In *Midland Funding*, the Supreme Court held in a 5-3 decision that filing a proof of claim for time-barred debt, without more, does not violate the FDCPA. This holding leaves bankruptcy professionals to reckon with the gaps in bankruptcy's existing remedial structure as

---

∗ Professor of Law and Associate Dean for Faculty Research and Development, University of Toledo College of Law. My thanks to Alexandra Sickler, Chris Bradley, Melissa Jacoby, Bob Lawless, and the participants at the Young Bankruptcy Scholars' Workshop at Brooklyn Law School for refining my thinking on this topic. Breanne Hitchen provided helpful research assistance.

1. 137 S. Ct. 1407 (2017).

2. *See* Kara J. Bruce, *Debt Buyers Beware: Filing Proofs of Claim for Time-Barred Debt in the Eleventh Circuit and Beyond*, BANKR. L. LTR., June 2016, at 5.

3. *See id.*

they seek to address the massive numbers of time-barred debt claims that pass through the bankruptcy process. While *Midland Funding* does not foreclose the FDCPA's application to bankruptcy altogether, the Court's sweeping language, together with its decision in a related FDCPA case,[4] might sharply limit the FDCPA's utility in the future.

This Comment considers *Midland Funding's* effect on the bankruptcy system's ability to police stale-debt claims. It begins by explaining how the practice of filing time-barred debt claims takes advantage of gaps in bankruptcy's enforcement structure. It then describes the rash of FDCPA lawsuits leading up to *Midland Funding*, as well as the majority and dissenting opinions in *Midland Funding*. Finally, this Comment considers some analytical deficiencies in the majority's opinion and briefly outlines several actual or anticipated effects of the ruling.

II. THE PROBLEM OF TIME-BARRED DEBT CLAIMS

Over the last decade or more, debt buyers have used the bankruptcy system to seek payment of old, often time-barred debt from consumers.[5] Although the expiration of a statute of limitations provides a complete defense to the collectability of stale debts, debt collectors apparently rely on the expectation that a percentage of these claims will pass through the bankruptcy process without notice, and will therefore receive some amount of distribution or plan payments from a debtor's bankruptcy case.[6] This section explains the structural realities of the bankruptcy process that make this practice a profitable one. It then describes how debtors have brought suit under the FDCPA to combat the practice, generating the case law leading up to *Midland Funding*.

A. Collecting Debt in Bankruptcy: The Proof-of-Claim Process

A creditor of a debtor in bankruptcy has a "claim" against the bankruptcy estate for the amount the debtor owes.[7] If a creditor wishes

4. *See infra* Part IV (discussing Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017)).

5. See Bruce, *supra* note 2, at 1 for a discussion of this phenomenon.

6. *See id.* at 3.

7. *See* 11 U.S.C. § 101(5)(A) (2012) (defining "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment").

to receive a share of any distributions from a debtor's bankruptcy case, the creditor typically files a "proof of claim"[8] as evidence of the character and amount of the claim.[9] To the extent that a claim is "allowed" in the bankruptcy case, it will receive a distribution of any available assets or plan payments.[10]

Section 502(b)(1) of the Bankruptcy Code governs the allowance of claims. It provides that a claim shall be allowed "except to the extent that . . . such claim is unenforceable . . . under any agreement or applicable law."[11] Claims that are subject to a statute-of-limitations defense are unenforceable under applicable law and are thus subject to disallowance. Yet proofs of claim are entitled to *prima facie* validity.[12] As such, if no party files an objection, claims are "deemed allowed" and eventually receive a pro-rata share of any distribution from the debtor's estate.[13]

In addition to the *prima facie* validity of claims, economic realities facilitate the collection of time-barred debts in consumer bankruptcy cases. Debt buyers, who are primarily responsible for filing stale-debt claims, typically buy massive amounts of old debt for pennies on the dollar. According to the Federal Trade Commission, debt buyers can pay as little as two cents on the dollar for debts older than six years, and "effectively nothing" for debts greater than fifteen years old.[14] Likewise, filing a proof of claim in bankruptcy is a relatively inexpensive undertaking; no filing fee is required, and creditors can complete and electronically submit a simple PDF form.[15]

---

8. A proof of claim is a simple legal document, signed under penalty of perjury, which sets forth a creditor's claim. It typically includes copies of supporting documentation to establish the basis of the claim. *See* OFFICIAL FORM 410, PROOF OF CLAIM, http://www.uscourts.gov/sites/default/files/form_b410.pdf; FED. R. BANKR. P. 3001.

9. 4 COLLIER ON BANKRUPTCY ¶ 501.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2017).

10. *Id.* at ¶ 502.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2017). In a chapter 7 case, creditors are satisfied primarily through the liquidation of a debtor's property. The chapter 7 trustee seizes and sells certain property of the debtor and distributes the proceeds to claims according to the bankruptcy's priority structure. In a chapter 13 case, debtors form a plan to pay creditors a portion of their income over time. The chapter 13 trustee distributes these "plan payments" on behalf of creditors.

11. 11 U.S.C. § 502(b)(1) (2012).

12. 11 U.S.C. § 502 (2012); FED. R. BANKR. P. 3001(f).

13. 11 U.S.C. § 502 (2012).

14. FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 23–24 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

15. *See* OFFICIAL FORM 410, PROOF OF CLAIM, http://www.uscourts.gov/sites/default/files/form_b410.pdf; *Bankruptcy Court Miscellaneous Fees Schedule*, U.S. CTS.,

Given the low cost of purchasing and filing stale-debt claims, it is easy to see how debt buyers might profit if only a very small portion of time-barred debts are deemed allowed.[16]

Conversely, the parties who are best positioned to review and object to claims—the chapter 7 or 13 trustee, the debtor, or another creditor—face a number of impediments to actually completing the task. First, a trustee is appointed in every consumer bankruptcy case and is charged with the duty to "examine proofs of claims and object to the allowance of any claim that is improper" if a purpose would be served by doing so.[17] Yet chapter 7 and 13 trustees often carry massive caseloads and have a variety of statutory duties in addition to the monitoring of claims.[18] What is more, determining whether a debt is time-barred often requires the trustee to investigate choice of law, tolling, and revival—information to which the trustee might not have ready access.[19] Thus, it is unrealistic to expect that trustees will catch all of the problematic claims that debt buyers file.[20] Moreover, expecting trustees' offices to undertake a more robust and time-intensive claim review might increase the costs of administrating bankruptcy cases, and such costs ultimately would be passed along to creditors who have complied with bankruptcy law and procedure.

Debtors have better information about the origin and status of the debt, but often lack a financial incentive to object to claims because the allowance or disallowance of a stale-debt claim will not alter their personal outcomes in bankruptcy.[21] Indeed, debtors might have strong

https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (last visited Mar. 15, 2019).

16. Brief for United States as Amicus Curiae Supporting Respondent, Midland Funding, LLC v. Johnson, 2016 WL 7422733 (U.S. 2016) (No. 16-348).

17. 11 U.S.C. § 704(a)(5) (2012); *see also* 11 U.S.C. § 1302(b)(1) (2012).

18. *See* Kara Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, 69 BAYLOR L. REV. 479, 491–92 (2017).

19. *See* Brief for Nat'l Assoc. of Chapter Thirteen Trs. as Amici Curiae Supporting Respondent, Midland Funding, LLC v. Johnson, 2016 WL 7449176 (U.S. 2016) (No. 16-348); *see also* Brief for United States as Amicus Curiae Supporting Respondent, Midland Funding, LLC v. Johnson, 2016 WL 7422733 (U.S. 2016) (No. 16-348).

20. The Federal Rules of Bankruptcy Procedure were amended in 2012 in order to make stale-debt claims easier to detect. Rule 3001(c)(3) requires the holder of a claim based on an "open-end or revolving consumer credit agreement" to disclose certain information relevant to determining timeliness. FED. R. BANKR. P. 3001(c)(3). Yet even after these amendments, claims do not include all of the information needed to conclusively determine whether the statute of limitations has expired. *See* Brief for Nat'l Assoc. of Chapter Thirteen Trs. as Amici Curiae Supporting Respondent, Midland Funding, LLC v. Johnson at 14, 137 S. Ct. 1407 (No. 16-348).

21. W. HOMER DRAKE, JR., ET AL., CHAPTER 13 PRACTICE AND PROCEDURE § 17:3 (2d ed. 2017) (noting that in a chapter 13 bankruptcy case, "unless the debtor's plan provides for the

disincentives to object to stale-debt claims, insofar as the cost of filing an objection might not be included in the debtor's fee agreement with his or her attorney.[22]

Finally, although competing creditors might stand to gain a greater share of a debtor's assets or plan payments if the stale-debt claim is disallowed, the amounts at issue in a single bankruptcy case are typically too small to justify building routine claim review into the scope of their creditors'-rights work. Moreover, some courts have questioned whether creditors have standing to object to proofs of claim.[23]

Some debtors' attorneys responded to this imbalance by challenging the filing of stale-debt claims using the FDCPA.[24] Debtors argued that debt buyers engage in false, deceptive, misleading, unfair, or unconscionable conduct when they seek to collect stale debt through bankruptcy's proof-of-claim process.[25] These cases sought to increase the cost to debt collectors of filing time-barred claims in order to provide a more meaningful deterrent than the Bankruptcy Code otherwise provides.[26] The following sub-parts introduce the FDCPA and discuss its application to the pernicious problem of stale-debt claims.

B. The Fair Debt Collection Practices Act and its Application to Stale-Debt Claims

Congress enacted the FDCPA in 1978 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[27] The Act

---

payment of all unsecured claims in full, disallowance of reduction of an unsecured claim may not affect how much she pays to complete her plan").

22. *Id.*; *see also* Bruce, *supra* note 18, at 504 (explaining that fee agreements in bankruptcy often carve out adversary matters to ensure a low cost of access to bankruptcy).

23. *Compare, e.g.*, *In re* Bozman, 403 B.R. 494, 496 (Bankr. S.D. Ohio 2006) (holding that a creditor may object), *with In re* Micro-Precision Techs., Inc., 303 B.R. 238, 243 (Bankr. D. N.H. 2003) (citations omitted) (holding that creditors lack "full and unfettered" standing to object), *and* Eastgate Enters., Inc. v. Funk (*In re* Meade Land & Dev. Co.), 1 B.R. 279, 279–82 (Bankr. E.D. Pa. 1979) (holding that creditors generally should channel their objections through the appointed trustee to further orderly administration of the estate).

24. Bruce, *supra* note 2, at 1.

25. *Id.*

26. *Id.* at 3.

27. 15 U.S.C. § 1692(e) (2012).

prohibits, among other things, debt-collection actions that are "false, deceptive, or misleading" and "unfair or unconscionable."[28] It provides consumers a private right of action to recover actual damages, statutory damages, and reasonable attorney's fees and costs.[29]

The FDCPA has long been applied to punish the collection of stale debts outside of bankruptcy. Indeed, every federal court of appeals to hear the issue has held or suggested that filing or threatening suit to collect debts for which the statute of limitations has run violates the Act.[30] In so holding, courts have highlighted the information asymmetry between consumers and debt collectors: consumers may not realize their rights have been violated, or may not have the fortitude or financial resources to challenge the behavior when it has occurred.[31] As such, debt collectors engage in false, deceptive, or misleading conduct when they threaten or pursue enforcement of stale debts.[32]

Whether this precedent applies with equal force to the collection of debts in bankruptcy is a question that, before *Midland Funding*, divided lower courts.[33] Some courts, most notably the Eleventh Circuit in *Crawford v. LVNV Funding, LLC*,[34] held that debtors in bankruptcy are just as vulnerable to creditor overreaching as debtors who are sued in state court, and as such, the FDCPA should likewise bar the collection of stale debts through bankruptcy's proof-of-claim process.[35] Other courts disagreed, pointing to a variety of procedural

28. *Id.* at 1692(e), 1692(f).

29. *Id.* at 1692(k).

30. *See, e.g.*, Phillips v. Asset Acceptance, LLC*,* 736 F.3d 1076, 1079 (7th Cir. 2013); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 32–33 (3d Cir. 2011); *see also* Castro v. Collecto, Inc., 634 F.3d 779, 783 (5th Cir. 2011) (noting in dicta that "threatening to sue on time-barred debt may well constitute a violation of the FDCPA"); Freyermuth v. Credit Bureau Servs.*,* 248 F.3d 767, 771 (8th Cir. 2001) (suggesting that filing or threatening suit to collect time-barred debt violates the FDCPA, but finding no FDCPA violation in the case at hand because the debt collector never took such actions).

31. Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

32. *Id.* at 1488–89.

33. *See* Bruce, *supra* note 2, at 2.

34. 758 F.3d 1254 (11th Cir. 2014).

35. *Id*. at 1262; *see also* Taylor v. Midland Funding, LLC, 94 F. Supp. 3d 941, 948–49 (N.D. Ill. 2015); Brimmage v. Quantum3 Grp., LLC (*In re* Brimmage), 523 B.R. 134, 141 (Bankr. N.D. Ill. 2015); Grandidier v. Quantum3 Grp., LLC, No. 1:14-CV-00138-RLY-TAB, 2014 WL 6908482, at *3 (S.D. Ind. Dec. 8, 2014); Reed v. LVNV Funding, LLC, 181 F. Supp. 3d 523, 530 (N.D. Ill. 2015); Avalos v. LVNV Funding, LLC (*In re* Avalos), 531 B.R. 748, 757 (Bankr. N.D. Ill. 2015); Edwards v. LVNV Funding, LLC (*In re* Edwards), 539 B.R. 360, 367 (Bankr. N.D. Ill. 2015).

distinctions that place debtors in a fundamentally different position than their state-court counterparts, and therefore holding that the filing of a time-barred proof of claim is not false, deceptive, misleading, unfair, or unconscionable under the Act.[36]

Courts were likewise divided on whether the FDCPA should have any application in bankruptcy. Some courts held that the FDCPA cannot apply in bankruptcy, as its provisions stand in "irreconcilable conflict" with certain provisions of the Bankruptcy Code.[37] This issue, which is typically characterized as whether the later-enacted Bankruptcy Code impliedly repeals the FDCPA, has generated a three-way circuit split. The Ninth Circuit completely precludes the application of the FDCPA to bankruptcy matters, while the Second Circuit holds that matters arising before the debtor's discharge cannot support an FDCPA claim.[38] Other circuits, including the Third, Seventh, and most recently, the Eleventh, have held that FDCPA liability can arise in active bankruptcy cases, including in the proof-of-claim context.[39] The following section outlines the facts and procedural history of the Eleventh Circuit case, *Johnson v. Midland Funding, LLC*,[40] and its continuation to the Supreme Court in *Midland Funding v. Johnson.*

C. Midland Funding v. Johnson

In March 2014, Aleida Johnson filed a petition for relief under chapter 13 of the Bankruptcy Code in the Southern District of

---

36. *See, e.g.*, Gatewood v. CP Med., LLC (*In re* Gatewood), 533 B.R. 905, 909 (B.A.P. 8th Cir. 2015); Broadrick v. LVNV Funding, LLC (*In re* Broadrick), 532 B.R. 60, 75 (Bankr. M.D. Tenn. 2015); Donaldson v. LVNV Funding, LLC, 97 F. Supp. 3d 1033, 1040 (S.D. Ind. 2015); LaGrone v. LVNV Funding, LLC (*In re* LaGrone), 525 B.R. 419, 427 (Bankr. N.D. Ill. 2015); Torres v. Cavalry SPV I, LLC, 530 B.R. 268, 276 (E.D. Pa. 2015); Jenkins v. Genesis Fin. Sols. (*In re* Jenkins), 456 B.R. 236, 240 (Bankr. E.D.N.C. 2011); B-Real, LLC v. Rogers, 405 B.R. 428, 434 (Bankr. M.D. La. 2009).

37. *See, e.g.*, Johnson v. Midland Funding, LLC, 528 B.R. 462, 470 (S.D. Ala. 2015), *rev'd*, 823 F.3d 1334 (11th Cir. 2016), *cert. granted*, 137 S. Ct. 326 (2016), *rev'd*, 137 S. Ct. 1407 (2017), *vacated*, 868 F.3d 1241 (11th Cir. 2017). ("[T]he Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct. There is thus an obvious tension between the Act and the Code.").

38. *See* Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002); Simmons v. Roundup Funding, LLC, 622 F.3d 93, 96 (2d Cir. 2010).

39. *See* Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004); Simon v. FIA Card Servs., N.A., 732 F.3d 259, 279 (3d Cir. 2013); Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1335 (11th Cir. 2016).

40. 823 F.3d 1334 (11th Cir. 2016).

Alabama.[41] Midland Funding, LLC ("Midland Funding"), a commercial debt purchaser, filed a proof of claim in Johnson's bankruptcy case asserting a debt of $1,879.71.[42] Johnson had originally incurred this debt to Fingerhut Credit Advantage, which at some point before the bankruptcy case had sold the debt to Midland Funding.[43] Midland Funding disclosed on the face of the proof of claim that the last payment on the debt had been made, and the account had been charged off, more than ten years before the bankruptcy filing.[44] The applicable statute of limitations for the debt was six years.[45]

Johnson, through counsel, objected to Midland Funding's proof of claim because it was sought to collect time-barred debt.[46] Midland Funding did not respond, and the court disallowed the claim.[47] The debtor then sued Midland Funding in federal district court, arguing that filing a proof of claim for time-barred debt was false, deceptive, misleading, unfair, and unconscionable under the FDCPA.[48] Johnson asserted that Midland Funding, like many commercial debt purchasers, engaged in a pattern and practice of filing time-barred debt claims in bankruptcy cases.[49] It alleged that this practice overloaded the bankruptcy courts and was an unconscionable use of the bankruptcy process.[50]

The district court held the FDCPA did not apply to the creditor's filing of a time-barred debt claim because the FDCPA and Bankruptcy Code stood in "irreconcilable conflict."[51] The Eleventh Circuit reversed, aligning with the Third and Seventh Circuits to hold that the FDCPA could apply in bankruptcy.[52] The Eleventh Circuit underscored that the FDCPA and the Bankruptcy Code "provid[e]

41. *Midland Funding*, 137 S. Ct. at 1411.
42. *Id.* (internal quotation marks omitted).
43. *Johnson*, 823 F.3d at 1336.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *See id.*
49. *See id.*
50. *Id.*
51. Johnson v. Midland Funding, LLC, 528 B.R. 462, 473 (S.D. Ala. 2015), *rev'd*, 823 F.3d 1334 (11th Cir. 2016), *cert. granted*, 137 S. Ct. 326 (2016), *rev'd*, 137 S. Ct. 1407 (2017), *vacated*, 868 F.3d 1241 (11th Cir. 2017).
52. *Id.*

different tiers of sanctions for creditor misbehavior in bankruptcy."[53] While the Bankruptcy Code provides for disallowance and perhaps sanctions for the filing of improper claims, the FDCPA supplies "an additional layer of protection" to consumers when a creditor, which qualifies as a "debt collector," engages in behavior that violates the Act.[54] The court then applied existing circuit precedent laid out in *Crawford v. LVNV Funding LLC*, and held that the FDCPA could be violated if a creditor knowingly filed a proof of claim on a time-barred debt.[55]

Midland Funding filed a petition for *certiorari*, seeking review of two questions: (1) whether filing a proof of claim that accurately asserts a time-barred debt violates the FDCPA; and (2) whether the Bankruptcy Code precludes the application of the FDCPA to this issue.[56] The Supreme Court granted the petition and, in May 2017, decided *Midland Funding v. Johnson*.[57]

III. THE COURT'S DECISION

The Supreme Court held, in a 5-3 decision, that filing a facially accurate proof of claim asserting a time-barred debt does not violate the FDCPA.[58] The majority opinion portrayed consumer bankruptcy as containing robust structural protections that easily protect against debt-collector misconduct, and depicted debtors in bankruptcy as less vulnerable to creditor misconduct than the average consumer.[59] Accordingly, the Court viewed application of the FDCPA in this context as unnecessary and procedurally burdensome.[60] The dissent appeared to describe an entirely different legal system, focusing on overworked bankruptcy professionals and a business model that exploited structural gaps for profit.[61] From this vantage point, the

53. Johnson v. Midland Funding, LLC, 823 F.3d 1334, 1341 (11th Cir. 2016), *cert. granted*, 137 S. Ct. 326 (2016), *rev'd*, 137 S. Ct. 1407 (2017), *vacated*, 868 F.3d 1241 (11th Cir. 2017)

54. *Id.*

55. *Id.* at 1342.

56. Petition for Writ of Certoriari, Midland Funding, LLC v. Johnson, 2016 WL 4983173 at *I (Sept. 14, 2016) (No. 16-348), *cert. granted*, 137 S. Ct. 326 (2016).

57. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1416 (2017).

58. *Id.* at 1411. Justice Gorsuch took no part in the opinion. *Id.* at 1407.

59. *See id.* at 1414.

60. *Id.* at 1415.

61. *See id.* at 1421 (Sotomayor, J., dissenting).

dissent viewed the FDCPA to be central to rebalancing bankruptcy's playing field and deterring abusive claims practices.

A. "False, Deceptive, or Misleading"

The majority opinion, written by Justice Breyer, found it "reasonably clear" that a facially accurate, but time-barred proof of claim is not "false, deceptive or misleading" under section 1692e of the FDCPA.[62] That the statute of limitations had run, the Court explained, did not change the fact that the creditor has the right to payment and a "claim" against the debtor's estate.[63] The Court underscored that the expiration of the statute of limitations amounts to an affirmative defense, and found "nothing misleading or deceptive" in the act of filing a proof of claim that is subject to an affirmative defense.[64]

The Court explained that "to determine whether a statement is misleading normally 'requires consideration of the legal sophistication of its audience.'"[65] Chapter 13 cases feature a knowledgeable trustee, who is charged with the duty to examine proofs of claim. The Court concluded that "that trustee is likely to understand that . . . a proof of claim is a statement by the creditor that he or she has a right to payment subject to disallowance," and would therefore not be misled by a stale claim.[66]

B. "Unfair or Unconscionable"

Whether filing a proof of claim for time-barred debt is "unfair or unconscionable" under section 1692f "present[ed] a closer question."[67] The Court noted that several circuit courts have held that filing a civil suit to recover a time-barred debt violates the FDCPA, because unsophisticated consumers might not realize that the statute of limitations could present a defense, the passage of time dulls a consumer's memory and makes it more difficult to defend against a collection, and "a consumer might pay a stale debt simply to avoid the cost and embarrassment of suit."[68] The Court held, however, that

---

62. *Id.*
63. *Id.*
64. *Id.* at 1412.
65. *Id.* at 1413.
66. *Id.*
67. *Id.*
68. *Id.*

"[t]hese considerations have significantly diminished force in a Chapter 13 bankruptcy."[69]

The Court relied on several features of bankruptcy law and procedure to support this distinction. First, because consumers voluntarily initiate chapter 13 cases, it is less likely that they might pay a debt to avoid the cost and embarrassment of suit.[70] Second, a "knowledgeable trustee is available."[71] Third, "[p]rocedural bankruptcy rules more directly guide the evaluation of claims."[72] The Court concluded that bankruptcy's claims resolution process is "'a more streamlined and less unnerving prospect'" than a civil suit to collect time-barred debt.[73]

The Court was not moved by the evidence of this practice's impact on debtors or the bankruptcy process as a whole.[74] It noted that stale claims frequently do not affect the debtor's financial contribution to a bankruptcy case, and stated that some debtors might even realize benefits when a stale debt discharged in bankruptcy no longer mars their credit reports.[75] The Court did not comment on the strain the mass filing of time-barred debt claims has placed on the bankruptcy system.[76] It repeatedly expressed concern, however, that FDCPA litigation could place additional strains on the court system.[77] The Court noted that FDCPA claims could result in "added complexity, changes in settlement incentives, and a shift from the debtor to the creditor the obligation to investigate the staleness of a claim."[78] It closed by noting that to apply the FDCPA in the bankruptcy context

---

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (quoting Gatewood v. CP Med., LLC (*In re* Gatewood), 533 B.R. 905, 909 (B.A.P. 8th Cir. 2015)).
74. *Id.* at 1414.
75. *Id.*
76. *See id.*
77. *See id.* at 1410, 1415 ("[A] change in the simple affirmative-defense approach, carving out an exception, itself would require defining the boundaries of the exception . . . . To find the Fair Debt Collection Practices Act applicable here would . . . authorize a new significant bankruptcy-related remedy in the absence of language in the Code providing for it . . . . [I]t would permit postbankruptcy litigation in an ordinary civil court concerning a creditor's state of mind . . . [and] it would require creditors . . . to investigate the merits of an affirmative defense (typically the debtor's job to assert and prove).").
78. *Id.* at 1415.

would upset the "delicate balance" of debtor and creditor protections created by the Bankruptcy Code and procedural rules.[79]

C. "Everyone with Experience in the Matter"

The dissent, authored by Justice Sotomayor and joined by Justices Ginsburg and Kagan, began by explaining how debt buyers have built a profitable business model on the collection of stale debts, winning "billions of dollars in default judgments simply by filing suit and betting that consumers will lack the resources to respond."[80] The dissent noted that FDCPA claims have "largely beaten back" this practice in state courts.[81] Now that debt buyers have continued this practice in the bankruptcy courts, the dissenting justices found "no sound reason" to depart from the precedent that finds that collection of time-barred debts violates the FDPCA.[82]

The dissent took aim at the majority's comfort with bankruptcy's structural protections, highlighting how they fail to adequately protect against the inadvertent collection of stale debts in bankruptcy.[83] The dissent took particular issue with the majority's reliance on the chapter 13 trustee to police the bankruptcy claims process, noting that "everyone with actual experience in the matter insists [the majority's understanding] is false."[84] Trustees carry large caseloads and have statutory duties far beyond objecting to stale-debt claims. The dissent underscored that they "cannot realistically be expected to identify every time-barred . . . claim filed in every bankruptcy."[85]

The dissent also questioned the assertion that a chapter 13 debtor is better positioned to respond to misconduct than her non-bankruptcy counterpart.[86] Someone who has just sought court protection from overwhelming debt "is arguably more vulnerable in bankruptcy—not less—to the oversights that the debt buyers know will occur."[87] In addition, the dissent noted that bankruptcy's procedural rules do not

---

79. *Id.*
80. *Id.* at 1416–17 (Sotomayor, J., dissenting).
81. *Id.* at 1417.
82. *Id.* at 1414–18.
83. *Id.* at 1420.
84. *Id.*
85. *Id.* (quoting Brief for United States as Amicus Curiae Supporting Respondent, Midland Funding, LLC v. Johnson, 2016 WL 7422733 (U.S. 2016) (No. 16-348)).
86. *Id.* at 1420–21.
87. *Id.* at 1421.

protect against the inadvertent payment of stale-debt claims.[88] As to the majority's suggestion that debtors might be better off if these claims were disposed of in bankruptcy, the dissent cited several counterfactuals to show that this practice might render debtors worse off "than had they never entered bankruptcy at all."[89]

Finally, the dissent took pains to underscore that the majority's opinion was reached on narrow grounds and did not need to "be the last word on the matter."[90] It looked to Congress to clarify that these practices violate the FDCPA.[91]

IV. *MIDLAND FUNDING*'S TROUBLING LEGACY

The Court's opinion in *Midland Funding* comes from a perspective of procedural idealism, and at times seems divorced from the day-to-day reality of bankruptcy cases.[92] This dissonance exacerbates an enforcement gap in bankruptcy's proof of claim process, straining the court's existing machinery to address stale-debt claims. More broadly, the Court's decision features several sweeping statements about the purpose and scope of the FDCPA that, especially in conjunction with other recent Court opinions, threaten to drive the FDCPA into obsolescence.[93] The following subsections address these issues.

88. *Id.*

89. *Id.* Although not addressed in the dissent, another point worth noting here is that class actions are winding their way through the appellate courts based on creditors' failure to remove discharged debts from credit reports. *See In re* Anderson, 553 B.R. 221, 225 (Bankr. S.D.N.Y. 2016), *appeal docketed*, No. 16-2496 (2d Cir. July 13, 2016). This case law provides another example of the majority's structural protections failing to match the realities of bankruptcy practice.

90. *Id.* at 1419, 1421.

91. *Id.* at 1421.

92. In this respect, *Midland Funding* hardly stands alone. The bankruptcy literature contains many examples of Supreme Court cases that fail to appreciate the realities of bankruptcy practice. *See* Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMPLE L. REV. 875, 880–81 (2015) (describing the Court's decision in United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010), which imposed a dramatic burden on judges to independently review Chapter 13 plans for compliance with bankruptcy law, and noting several other Supreme Court cases that impose similar expectations on professionals in the bankruptcy process).

93. *Midland Funding*, 137 S. Ct. at 1410 (holding "[t]he Act seeks to help consumers by preventing consumer bankruptcies in the first place, while the Code creates and maintains the 'delicate balance of a debtor's protections and obligations'") (quoting Kokoszka v. Belford, 417 U.S. 642, 651 (1974)).

A. Procedural Ideals and Practical Realities

One of the most salient aspects of the majority's opinion is its confidence in the structural protections of consumer bankruptcy, and particularly in chapter 13 trustees' capacity to address the problem of stale-debt claims. Yet as the briefing made clear and the dissent highlights, trustees are inadequately positioned to address time-barred debt claims on a widespread basis.[94] First, as noted above, many trustees manage thousands of cases at a time, and each case can include any number of individual proofs of claim. Second, trustees typically do not have ready access to information on the applicable statute of limitations and whether the statute of limitations has been tolled or revived. For these reasons, it is logistically infeasible for trustees to subject every filed claim to detailed scrutiny. Moreover, the Bankruptcy Code requires the trustee to object to proofs of claim "if a purpose would be served" by doing so.[95] Although the Code does not explain when "a purpose would be served," this language is generally understood to require trustees to object when "other creditors would receive a greater distribution if the claims objections were pursued."[96] Accordingly, trustees could arguably violate their statutory obligations if they undertake a review of claims that is more robust than the economics of the individual case might justify. To be sure, it is difficult to make this calculus in chapter 13 bankruptcy cases, where most plans contemplate some distribution to unsecured creditors, and where the administrative costs are spread across the chapter 13 system.[97] Yet to some extent, the pressure to more fully police claims is in tension with the trustee's fiduciary duties to the estate.

94. *See id.* at 1419 (Sotomayor, J., dissenting); Brief for Petitioner at 23, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017) (No. 16-348).

95. 11 U.S.C. § 704(a)(5) (2012); § 1302(b)(1) (2012).

96. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 176 (2006) (discussing the duty to object in the chapter 7 context); W. HOMER DRAKE, JR., ET AL., CHAPTER 13: PRACTICE AND PROCEDURE § 13 (2d ed. 2017) (noting "[a] Chapter 13 trustee is likely to object to a proof of [a] claim when, *inter alia*, she becomes aware that the claim is objectionable and its allowance will dilute the recovery to the unsecured claimants"); 8 COLLIER ON BANKRUPTCY ¶ 1302.03(d) (Richard Levin & Henry J. Sommer eds., 16th ed. 2017) (suggesting a purpose will frequently be served in chapter 13 cases, "since substantial distributions are likely to be made to holders of allowed claims"); Thompson v. Bronitsky, No. 13-cv-04793-WHO, 2014 WL 2452043, at *6 (N.D. Cal. May 30, 2014) (collecting case law supporting the contention that the trustee has the discretion not to object to the claim if she finds no purpose would be served).

97. *See* Henry E. Hildebrand III, *A Chapter 13 Trustee's Duty to Object to Claims: An Obligation to Bring Fairness to the System*, 31 AM. BANKR. INST. J., 40, 40 (2012); *Director Addresses the 35th Annual Convention of the National Association of Bankruptcy Trustees*, U.S.

Other aspects of the Court's opinion are likewise out of touch with bankruptcy's procedural realities. For example, the Court expressed concern that FDCPA litigation would cause more bankruptcy-related matters to be resolved in ordinary civil courts.[98] This statement does not account for two important factors. First, FDCPA claims can be asserted as adversary proceedings, which typically are resolved by a bankruptcy judge and within the context of the bankruptcy case.[99] Second, federal district courts routinely handle matters relating to pending and completed bankruptcy cases.[100] As the dissent notes, "there is nothing new about the inquiry that courts would be required to undertake; it is no different than the analyses they conduct every day."[101]

The Court also states that a debtor could *benefit* if a stale claim is filed and thereafter discharged.[102] Yet payment of a stale-debt claim in bankruptcy can revive the statute of limitations, placing a debtor whose chapter 13 case does not end with a discharge in a *worse* position.[103] More to the point, this statement fails to appreciate that the debtor can herself obtain the benefits of a discharge of time-barred debt, whether or not the creditor files a claim. The debtor must simply list the time-barred debt on her schedules, and if her case is successful and no objection is filed, that debt will be permanently discharged.[104]

DEP'T OF JUST.: JUST. NEWS (Sept. 14, 2017), https://www.justice.gov/ust/speeches-testimony/director-addresses-35th-annual-convention-national-association-bankruptcy-trustees (suggesting the duty to object to claims is "more clear cut" in chapter 13 cases because "the costs of administration are more broadly spread out among perhaps millions of creditors across many thousands of cases").

98. *See Midland Funding*, 137 S. Ct. at 1414, 1415 (expressing concern that applying the FDCPA in this context would "permit postbankrutpcy litigation in an ordinary civil court" and noting that neither the FDCPA nor the Bankruptcy Code provides a "good reason to believe that Congress intended an ordinary civil court applying the Act to determine answers to these bankruptcy-related questions").

99. For example, the debtor in *Crawford* brought her claim as an adversary proceeding. *See* Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1257 (11th Cir. 2014).

100. Kara Bruce, *The Debtor Class*, 88 TUL. L. REV. 21, 53 (2013) (discussing the frequency with which non-bankruptcy courts resolve bankruptcy-related claims and the statutory provisions that facilitate such resolution).

101. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1419 n.5 (2017) (Sotomayor, J., dissenting).

102. *Id.* at 1410.

103. *See id.* at 1421 (Sotomayor, J., dissenting) (noting that if a chapter 13 case does not proceed to a discharge, any payments made on stale debts during bankruptcy will revive the statute of limitations).

104. Some creditors have argued that listing the debt on the debtor's schedules revived the debt in question. *See, e.g.*, *In re* Vaughn, 536 B.R. 670, 677 (Bankr. D.S.C. 2015). The author is unaware

B. Policing Bankruptcy Claims

At oral argument, members of the Court appeared concerned that FDCPA claims would duplicate remedies already provided by the bankruptcy code and applicable law.[105] Yet, the outcome of *Midland Funding* in fact creates a remedial gap.[106] Courts have considered and rejected several alternative remedies to the problem of stale-debt claims. For example, most courts have held that filing a stale-debt claim is not sanctionable conduct under Rule 9011 of the Bankruptcy Code.[107] For similar reasons, courts have rejected arguments that this behavior can be sanctioned under the court's inherent authority or section 105 powers.[108] Federal and state non-bankruptcy claims for vexatious litigation and unfair and deceptive practices have likewise failed.[109] Without the use of FDCPA liability or an amendment to the

---

of any cases in which this argument has been successful. *See, e.g.*, *id.*; Biggs v. Mays, 125 F.2d 693, 697 (8th Cir. 1942) (citations omitted).

105. *See, e.g.*, Transcript of Oral Argument at 44, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017) (No. 16-348), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-348_2cp3.pdf ("We then have the FTC which could do such a thing. We have the sanctions in the Bankruptcy Code, and now you want this, too?" (quoting Breyer, J.)).

106. Kara J. Bruce and Alex P.E. Sickler, *Private Remedies and Access to Justice in a Post-*Midland *World,* 34 EMORY BANKR. DEV. J. 365, 369–382 (describing how various efforts to address the problem of stale-debt claims in the absence of FDCPA liability have failed).

107. Edwards v. LVNV Funding, LLC (*In re* Edwards), 539 B.R. 360, 367 (Bankr. N.D. Ill. 2015) ("[G]iven the split of authority in this circuit and elsewhere . . . there is no basis for sanctioning the defendants for filing their proofs of claim in this case in any event."); *In re* Freeman, 540 B.R. 129, 144 (Bankr. E.D. Pa. 2015) ("[G]iven the split in the case law, it is difficult to see how sanctions under Rule 9011(b)(2) can be imposed on claimants filing stale proofs of claim . . . ."); Casmatta v. Resurgent Capital Servs., L.P. (*In re* Freeman-Clay), No. 14-20400-drd13, 2017 WL 3841739, at *12 (Bankr. W.D. Mo. Sept. 1, 2017) ("[T]he mere filing of a claim barred by the applicable statute of limitations, even by an entity with knowledge of the bar and without a good faith basis for contravening the defense, is not itself sanctionable if the expiration of the statute of limitations does not extinguish the claim under the applicable law."). *But see In re* Sekema, 523 B.R. 651, 654 (Bankr. N.D. Ind. 2015) (holding that filing a stale-debt claim is sanctionable under Rule 9011).

108. *See, e.g.*, *Casmatta*, 2017 WL 3841739, at *9 (holding that it is inappropriate to impose sanctions under the court's inherent or section 105 powers because the creditor's conduct is not "entirely without color and motivated by improper purposes").

109. *See, e.g.*, Keeler v. PRA Receivables Mgmt., LLC (*In re* Keeler), 440 B.R. 354, 367 (Bankr. E.D. Pa. 2009) (holding claims for violation of Pennsylvania consumer protection laws are preempted by bankruptcy law); *In re* Chaussee, 399 B.R. 225, 229–34 (B.A.P. 9th Cir. 2008) (holding that claims under the Washington Consumer Protection Act for filing time-barred proofs of claim were preempted by the Bankruptcy Code and Rules); Pariseau v. Asset Acceptance, LLC (*In re* Pariseau), 395 B.R. 492, 494–95 (Bankr. M.D. Fla. 2008) (holding that similar claims under the Florida Consumer Collection Practices Act, and the Florida Deceptive and Unfair Trade Practices Act are preempted by the Bankruptcy Code).

Bankruptcy Code or Rules, the only clear recourse for time-barred debt claims is case-by-case review and objection.[110]

In most jurisdictions, the onus of this task falls squarely on chapter 13 trustees. Indeed, the Executive Director of the United States Trustee Program, which supervises chapter 13 trustees in most states, has made several statements underscoring his expectations that trustees will enhance their review of claims for statute-of-limitations defenses.[111] Putting aside the logistical challenges this presents, it also may increase the costs of administering bankruptcy cases, which ultimately are borne by creditors who comply with bankruptcy law and procedure. Moreover, it is unclear that this result will curb the practice of filing time-barred debt claims, as debt buyers stand to profit if even a small percentage of the filed claims slip through the cracks.

C. Midland Funding*'s Potential Impact on FDCPA Jurisprudence*

The Court's ruling in *Midland Funding* might also drive the development of FDCPA jurisprudence in several distinct respects. First, while the Court did not decide the question before the Eleventh Circuit in *Johnson v. Midland Funding*—whether the Bankruptcy Code impliedly repeals the FDCPA—the Court nevertheless expressed concern about applying the FDCPA to bankruptcy matters. It emphasized that the Bankruptcy Code and the FDCPA have "different purposes and structural features," and stated that permitting FDCPA claims in bankruptcy cases could upset the "'delicate balance' of debtor protections and obligations underlying the Bankruptcy Code."[112]

Lower courts might interpret the Court's language as a soft rejection of the FDCPA's application in bankruptcy. Yet, to do so

110. *See, e.g.*, *Keeler*, 440 B.R. at 368–69 ("Absent some creditor impropriety in completing the proof of claim form constituting misconduct falling within the scope of section 105(a), or Fed. R. Bankr. P. 9011, or within the scope of a non-bankruptcy law provision that is in harmony with the Bankruptcy Code, a debtor or trustee's only redress for stale proofs of claim is the disallowance of the claim under section 502(b).").

111. *See Director Addresses the 52nd Annual Seminar of the National Association of Chapter 13 Trustees*, U.S. DEP'T OF JUST.: JUST. NEWS (July 13, 2017), https://www.justice.gov/ust/speeches-testimony/director-addresses-52nd-annual-seminar-national-association-chapter-13-trustees ("Even though it increases the cost of administration, and those costs ultimately are borne by legitimate creditors, I am calling upon all chapter 13 trustees to identify stale debt claims and to object to stale debt claims that they uncover.").

112. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1414–15 (2017).

would depart significantly from the Court's existing jurisprudence on the intersection of federal statutes.

The Supreme Court has long held that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[113] The Court will find that one statute impliedly repeals the other only "where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"[114] Most circuit courts that have considered the intersection of the FDCPA and the Bankruptcy Code have found that the two statutes can peacefully coexist. And, as I discuss elsewhere, the case law to the contrary has significant analytical flaws.[115]

Moreover, the Supreme Court has recently explained that overlapping enforcement structures might represent a thoughtful component of legislative design, rather than an improper duplication of remedies. In *Pom Wonderful, LLC v. Coca-Cola, Inc.*,[116] the Court held that competitor companies were entitled to bring private lawsuits asserting violations of the Lanham Act, even though the Food, Drug, and Cosmetics Act purported to comprehensively regulate the subject of the dispute.[117] The Court noted that it "is quite consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection of competitors and consumers."[118]

The lessons of *Pom Wonderful* have direct application to the intersection of the FDCPA and the Bankruptcy Code. While the Bankruptcy Code provides a comprehensive process for the allowance and disallowance of claims, the FDCPA augments bankruptcy's framework by providing additional consumer-debtor protections.[119] These protections operate to require creditors who qualify as "debt collectors" under the FDCPA to refrain from behavior that violates the

---

113. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 674 (2007) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); *see also* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001) (same).

114. Branch v. Smith, 538 U.S. 254, 273 (2003), *amended by*, 852 F. Supp. 2d 757 (S.D. Miss. 2011).

115. *See* Bruce, *supra* note 2, at 5–7.

116. 134 S. Ct. 2228 (2014).

117. *Id.* at 2238.

118. *Id.* at 2239.

119. *See* Bruce, *supra* note 2, at 10.

FDCPA. This clear and well-reasoned precedent should overshadow the Court's more casual statements of concern in *Midland Funding*. And relatedly, litigants should not hesitate to invoke the FDCPA to challenge bankruptcy-related activities that violate the Act.[120]

In *Midland Funding*, the Court also suggested that courts should apply a heightened standard to determine whether communications in bankruptcy are false, deceptive, or misleading under the FDCPA.[121] The Court stated that "to determine whether a statement is misleading normally 'requires consideration of the legal sophistication of its audience.'"[122] It characterized the audience in bankruptcy as including the chapter 13 trustee, "who must examine proofs of claim and, where appropriate, pose an objection."[123] This language appears to embrace a "competent trustee" standard, rather than the least sophisticated or unsophisticated consumer standard typically applied in FDCPA actions.[124] At least one circuit court has applied a "competent attorney" standard to address whether proofs of claim filed in a bankruptcy case violate the FDCPA.[125] But there, the debtor had been represented by counsel at all stages in the proceedings.[126] The Court's opinion in *Midland Funding* appears to take this one step further, applying a heightened standard in all bankruptcy cases, based on the fact that a trustee is always present.[127] To the extent that lower courts interpret this ruling as such, it risks further reduction in the applicability of the FDCPA to bankruptcy matters.

The potential effect of these statements pales in comparison to the likely impact of another recent Supreme Court case on the future of FDCPA litigation. In *Henson v. Santander Consumer, USA, Inc.*,[128] the Court held that Santander Bank was not a "debt collector" under the FDCPA because it had purchased the debt at issue as part of a portfolio and therefore was not engaged in the collection of "debts

120. *Id.*
121. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1409 (2017).
122. *Id.* at 1413.
123. *Id.*
124. *See* Brief for Petitioner at 30, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017) (No. 16-348) (arguing for a competent trustee standard).
125. *See* Owens v. LVNV Funding, LLC, 832 F.3d 726, 736 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017).
126. *Id.* at 736.
127. *Midland Funding*, 137 S. Ct. at 1420.
128. 137 S. Ct. 1718 (2017).

owed . . . another."[129] This decision calls into serious question the FDCPA's applicability to third-party purchasers of debt, like *Midland Funding*. It also may provide a roadmap for creditors to strategically avoid application of the FDCPA to their businesses.[130] Yet, as I discuss elsewhere, *Henson* was decided on extremely narrow grounds and leaves open several alternative arguments for applying the Act to third-party debt buyers.[131]

V. CONCLUSION

While *Midland Funding* has halted the flurry of FDCPA litigation proceeding through bankruptcy, district, and appellate courts throughout the nation, it may well encourage the continued filing of proofs of claim for time-barred debt. Despite the Court's high praise of the competence of chapter 13 trustees, this decision places significant—and perhaps unattainable—regulatory burdens on their shoulders.

The bankruptcy system has already begun the work of responding to these regulatory challenges through law and rule reform,[132] targeted enforcement action, and non-FDCPA litigation strategies.[133] With time and sustained attention to the problem, the bankruptcy system will adapt. Yet, the impact of the Court's rulings in *Midland Funding* and *Henson* could significantly affect the future viability of FDCPA actions, both in consumer bankruptcy cases and beyond.

129. *Id.* at 1721–22, 1724.

130. *See* Kara Bruce, *The Supreme Court's 2017 FDCPA Rundown*, BANKR. L. LTR., Sept. 2017, at 1, 9–10.

131. *Id.* at 9.

132. *See ABI Announces Commission on Consumer Bankruptcy*, AM. BANKR. INST. (Mar. 13, 2017), https://www.abi.org/newsroom/press-releases/abi-announces-commission-on-consumer-bankruptcy (discussing the American Bankruptcy Institute's recent announcement of the formation of a Commission on Consumer Bankruptcy Issues).

133. *See, e.g.*, Order Denying Atlas Acquisition LLC and Avischild's Motion to Dismiss Plaintiffs' Class Certification Claims, No 16-03235 (Bankr S.D. Tex. May 19, 2017).